No. 18-1465

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE PARALYZED VETERANS OF AMERICA AND
JAMES THOMAS WHEATON, JR.,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO ELAINE L. CHAO,
UNITED STATES SECRETARY OF TRANSPORTATION

PETITIONERS' REPLY IN SUPPORT OF ITS MOTION TO LIFT THE STAY

In passing the FAA Act of 2016, Congress was clear: the Department was to issue a proposed rule addressing whether to make lavatories on single-aisle aircraft accessible. Respondents' proposed rule fails that standard.[1]

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[1] Notably, Respondents make no attempt to argue that the Advanced Notice of Proposed Rulemaking described in Respondents' first Status Report satisfies the Department's duty under the FAA Act of 2016. *See generally* Resp'ts Opp. This Court should therefore consider that argument waived. *See Iliev v. Holder*, 613 F.3d 1019, 1026 n.4 (10th Cir. 2010) (failure to sufficiently develop an argument constitutes a waiver).

As explained in Petitioners' Motion, the proposed rule ignores the fundamental issue of lavatory size, and instead addresses only accessibility features *within* lavatories that do nothing to enable persons with mobility disabilities to actually enter, maneuver within, and leave the lavatory. Thus, even if the Department were to adopt the promised rule *in toto*, lavatories on single-aisle aircraft would remain inaccessible for travelers with mobility disabilities. Respondents' arguments to the contrary do not change this simple reality.

First, Respondents suggest, misreading a footnote in Petitioners' Motion, that because the Department could propose a rule that completely declines to require accessible lavatories on single-aisle aircraft, it can therefore propose a rule that addresses only certain aspects of lavatory accessibility and excludes others. Resp'ts Opp. at 4-5 (quoting Mot. at 9 n.3). But whatever the proposed rule's content, the Department's path to getting there matters too. Congress required the Department to issue a proposed rule subject to the APA's requirements of public notice, public participation, and reasoned decisionmaking. The Department therefore cannot simply conclude *sub silentio* that fully accessible lavatories will not be required on single-aisle aircraft. *See*

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (agency cannot fail to "consider an important aspect of the problem"). Instead, the Department must publish for public review and comment a proposed rule that explains the reasoning for its preferred course.

Second, Respondents insist that the December proposed rule will suffice because the FAA Act of 2016 did not define "accessible lavatories" or require the Department to adopt the same definition as for lavatories on twin-aisle aircraft. Resp'ts Opp. at 5-6. But although Congress did not define "accessible lavatories" in the 2016 Act, it did require the Department propose a rule addressing the issues listed in the Secretary's Significant Rulemaking Report of June 2015. That Report describes a proposed rule on accessible lavatories for single-aisle aircraft as discussed in the 2008 Air Carrier Access Act final rule, which undoubtedly contemplated that a future rulemaking would address increasing lavatory size. *See* 73 Fed. Reg. 27,614, 27,625 (May 13, 2008) (deciding to delay decision on whether to make accessible lavatories a requirement on single-aisle aircraft because of cost concerns related to seat loss from larger lavatories).

Moreover, Congress's directive in the 2016 Act must be viewed against the backdrop of the Department's long-standing regulatory definition governing lavatory accessibility on twin-aisle aircraft. *See Alexander v. Sandoval*, 532 U.S. 275, 313 (2001) ("Congress does not legislate in a vacuum."); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). That definition requires that lavatories be large enough to allow a person to "enter, maneuver within as necessary to use all lavatory facilities, and leave, by means of the aircraft's on-board wheelchair," 14 C.F.R. § 382.63(a)(1). Although the Department may be correct that Congress does not require it to adopt the same definition for single-aisle aircraft, that definition should at the least guide whether the Department's proposed rule will fully address lavatory accessibility, as the 2016 Act requires.

Third, Respondents assert that neither the standard governing accessible lavatories on twin-aisle aircraft nor the standard agreed to by the ACCESS Committee for single-aisle aircraft specifically prescribes lavatories of a particular size. Resp'ts Opp. at 6-7. But the Department

prefers to publish performance-based standards with the expectation that industry will provide designs to meet those performance-based standards. For example, the Department is considering setting "performance standards" for the on-board wheelchair, requiring new designs to meet "functional criteria" but without "specify[ing] technical requirements such as dimensions for specific features." 84 Fed. Reg. 43,037, 43,101 (Aug. 20, 2019); *see also* 14 C.F.R. § 386.65(c)(1)-(2). So too here. The main performance standard for an accessible lavatory is as basic as it is obvious: it must be of sufficient size to enable a traveler with a mobility disability to enter, use, and exit it.

Fourth, Respondents suggest that the forthcoming proposed rule will make changes to the performance-standards for on-board wheelchairs, thereby making lavatories on single-aisle aircraft accessible. Resp'ts Opp. at 7. As an initial matter, there is no on-board wheelchair currently available on the commercial market that would meet these new proposed standards. 84 Fed. Reg. at 43,102 (noting that the only chair which would meet the proposed standards is in prototype form, not currently commercially available). But even if such a chair were to become commercially available, the new standards (if adopted

in a final rule) will leave "many people" still unable to use the toilet in the lavatories. *See id.* (describing a chair that would be "designed such that it can fully enter the aircraft lavatory in a backward orientation, where the seat of the onboard wheelchair slides over the *closed* toilet" but that will not enable one to use the toilet unless he or she is able "to transfer from the onboard wheelchair to the toilet" through a "stand-and-pivot" movement—a movement that the Committee recognizes "many people are unable to perform"). Thus, these new standards would fall short of making lavatories fully accessible because travelers with mobility disabilities would remain unable to "maneuver within [the lavatory] *as necessary to use all lavatory facilities*," 14 C.F.R. § 382.63(a)(1) (emphasis added).

Fifth, Respondents seek to defer Petitioners' concerns as "premature," noting that they "will have every opportunity to suggest changes and make specific objections to the proposed rule during the notice-and-comment rulemaking period." Resp'ts Opp. at 7. But Petitioners are entitled to comment on the action that Congress required of the Department—a proposed rule that fully addresses the issue of lavatory accessibility. That issue necessarily includes the

question of whether the Department will require that single-aisle aircraft, like twin-aisle aircraft, have at least one lavatory on board designed such that persons with disabilities can enter, maneuver within to use all facilities, and leave the lavatory by means of the on-board wheelchair. Until such time as the Department proposes a rule addressing that issue in full, it has not complied with the 2016 Act.

To the extent Respondents suggest that Petitioners seek to end run the rule making process, the short answer is that Petitioners have engaged with the Department through the regulatory process on precisely this issue for thirty years, including submitting numerous comment letters, commissioning studies, and participating on multiple advisory committees. *See* Pet'rs Add., Zurfluh Decl. at Add.5 ¶10. Indeed, PVA agreed as part of its participation on the ACCESS Committee in 2016 to waive its right to comment against a proposed rule on lavatory accessibility so long as the Department adopted the Committee's consensus, compromise recommendations on that score. *See* Pet. for Writ of Mandamus at 36 n.6. In sum, Petitioners have given the Department ample time to propose a rule on lavatory accessibility for single-aisle aircraft before seeking this Court's intervention. In light

of its statutory duty, the Department's delay should no longer be tolerated.

Lastly, Respondents contend that it would be disruptive at this late stage to require the Department to issue a different proposed rule than the one it has currently drafted and which is "close to completion." Resp'ts Opp. at 8-9. But any disruption would be of Respondents' own making. Petitioners sought relief from this Court shortly after receiving the first Status Report describing the particulars of the December proposed rule, rather than waiting until publication of that proposal in December. Moreover, an order lifting the stay and proceeding to the merits of this case does not preclude the Department from issuing its planned proposed rule in December. But the Department would be on notice that the December 2019 proposed rule will not end the matter and will not satisfy its legal obligation to propose a rule addressing the *entire* issue of lavatory accessibility, including the fundamental issue of lavatory size.

CONCLUSION

Respondents' opposition makes clear that the Department has no current plan to propose a rule which fully addresses lavatory

accessibility, including a proposal on whether to require that lavatories on single-aisle aircraft be capable of being entered, used, and exited by means of the on-board wheelchair. Until such time as the Department proposes such a rule, it has not satisfied its statutory duty under the FAA Act of 2016. Accordingly, Petitioners respectfully request the Court lift its stay and proceed to decide the case on the merits.

Dated: August 29, 2019 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g), the undersigned counsel for Petitioners certifies that this motion:

(i) complies with the type-volume limitation of FRAP 27(d)(2)(A) because it contains 1499 words, including footnotes and excluding the parts of the brief exempted by FRAP 32(f) and Tenth Circuit Rule 32(B); and

(ii) complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14-point or larger.

Dated: August 29, 2019

/s/ *Karianne M. Jones*
Karianne M. Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2019, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

Dated: August 29, 2019

/s/ *Karianne M. Jones*
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