

No. 22- 1004

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In Re FLYERS RIGHTS EDUCATION FUND, INC.,
doing business as FLYERSRIGHTS.ORG, and PAUL HUDSON,

Petitioners,

v.

STEPHEN DICKSON, Administrator of the Federal Aviation
Administration; and the FEDERAL AVIATION ADMINISTRATION,

Respondents.

**PETITION FOR A WRIT OF MANDAMUS TO STEPHEN
DICKSON, ADMINISTRATOR OF THE FEDERAL AVIATION
ADMINISTRATION, and THE FEDERAL AVIATION
ADMINISTRATION**

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January 12, 2022

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GLOSSARY

DOT Department of Transportation

FAA Federal Aviation Administration

INTRODUCTION

The Federal Aviation Administration Reauthorization Act of 2018 required the Federal Aviation Administration (FAA), a component of the Department of Transportation (DOT), to conduct notice-and-comment rulemaking to issue regulations establishing the minimum dimensions for seat size and spacing necessary for the safety of passengers on commercial aircraft. The Act mandated that the FAA complete the rulemaking by October 5, 2019. More than two years after that deadline, the FAA has not begun, much less completed, the rulemaking.

“At some point, [the Court] must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.” *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). That point has come. Because the FAA has violated the Act by failing to issue the required regulations, the Court should grant this petition, declare the agency’s inaction unlawful, and order the agency to commence and finalize the rulemaking by a date certain.

STATEMENT OF THE ISSUE

Whether the FAA’s failure to promulgate minimum seat size and spacing standards by the statutory deadline set by Congress—which

passed more than twenty-six months ago—constitutes agency action “unlawfully withheld” and “not in accordance with law,” 5 U.S.C. § 706, and entitles petitioners to an order compelling the FAA to promulgate a minimum seat size and spacing rule by a date certain.

JURISDICTION

This Court has jurisdiction over this mandamus petition under the All Writs Act, 28 U.S.C. § 1651, because under 49 U.S.C. § 46110(a), this Court would have jurisdiction to review the rule that the FAA has failed to issue. *See In re Public Employees for Environmental Responsibility*, 957 F.3d 267, 271 (D.C. Cir. 2020) (“Our court has exclusive jurisdiction over mandamus petitions alleging unreasonable agency delay whenever a statute commits review of the relevant action to the courts of appeals.”). A statute that provides a court of appeals with jurisdiction over petitions by persons adversely affected by an agency order also supplies jurisdiction over petitions by parties adversely affected by the agency’s failure to act. *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 76 (D.C. Cir. 1984).

PARTIES

Petitioner Flyers Rights Education Fund, Inc., doing business as FlyersRights.org, is a District of Columbia nonprofit corporation and the largest nonprofit airline passenger advocacy organization in the United States. On behalf of its more than 60,000 members, FlyersRights represents airline passengers on the FAA Aviation Rulemaking Advisory Committee, and on the FAA Emergency Evacuation Standards Advisory Rulemaking Committee. Hudson Decl. ¶ 2 (attached in Addenda). FlyersRights promotes the adoption of laws and regulations to benefit airline travelers, and it operates a toll-free hotline for airline passengers experiencing travel difficulties. *Id.*

In 2015, FlyersRights petitioned the FAA to promulgate rules governing the minimum requirements for seat sizes and spacing on commercial passenger airlines. After the FAA denied the petition, FlyersRights petitioned this Court for review. *See Flyers Rights Education Fund, Inc. v. FAA*, 864 F.3d 738, 741–42 (D.C. Cir. 2017). The Court granted the petition in part and remanded the matter to the FAA “for a properly reasoned disposition of the petition’s safety concerns about the adverse impact of decreased seat dimensions and increased

passenger size on aircraft emergency egress.” *Id.* at 749. In July 2018, the FAA again denied the petition. Three months later, however, Congress enacted the FAA Reauthorization Act of 2018 which mandated that, by October 2019, the FAA promulgate a rule establishing the minimum dimensions for passenger seats on commercial aircraft that are necessary for the safety of passengers. *See* FAA Reauthorization Act of 2018 § 577, Pub. L. No. 15-254, 132 Stat. 3186 (2018), *codified at* 49 U.S.C. § 42301 note.

FlyersRights and its members have been, and continue to be, injured by the FAA’s failure to promulgate the seat dimension rule mandated by statute. FlyersRights brings this petition on its own behalf because the FAA’s failure to initiate rulemaking has required FlyersRights to expend resources to encourage agency action that should already be complete. Hudson Decl. ¶ 4. FlyersRights also brings this petition to redress injury to its members, who are harmed by the agency’s failure to undertake the statutorily required rulemaking intended by Congress to advance passenger safety. *Id.* ¶¶ 5–10; *see Flyers Rights Education Fund, Inc. v. DOT*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) (holding that FlyersRights is the functional equivalent of a traditional

membership organization and has associational standing on behalf of its members).

Petitioner Paul Hudson is the president and a member of FlyersRights. Hudson Decl. ¶ 1. Mr. Hudson is a frequent flyer and suffers increased risk to his health and safety because of decreased seat size and spacing, which increases his risk of being unable to timely evacuate an aircraft in the event of an emergency and increases his risk of developing health problems such as deep vein thrombosis. *Id.* ¶¶ 11–14. As a result, Mr. Hudson sometimes pays a premium to sit in rows with greater passenger space. *Id.* ¶ 15. If FAA complied with the statutory mandate and promulgated a rule requiring seat dimensions and spacing adequate to protect passenger safety, there is a substantial likelihood that Mr. Hudson would no longer have to incur additional fees to sit in rows with greater passenger space. *Id.*; see *Flyers Rights Education Fund, Inc. v. DOT*, 810 Fed. App'x 1, 2 (D.C. Cir. 2020) (holding that Paul Hudson had standing to sue over agency's denial of petition for rulemaking where requested regulation would have made it less expensive for Hudson to fly).

Respondents are the FAA and its Administrator, Stephen Dickson. The FAA oversees the safety of civil aviation in the United States, including by issuing and enforcing regulations and standards related to the manufacture, operation, certification, and maintenance of aircraft. See DOT, U.S. Department of Transportation Administrations: FAA, <https://www.transportation.gov/administrations#FAA>. Mr. Dickson is responsible for carrying out the FAA's legal responsibilities, including the rulemaking at issue in this petition.

FACTUAL BACKGROUND

In 2018, following years of organizing and advocacy from consumer and safety advocates, including petitioners, Congress passed a law requiring the FAA to promulgate rules for minimum seat size and spacing on commercial airlines. See FAA Reauthorization Act of 2018 § 577, *codified at* 49 U.S.C. § 42301 note (2018 Act). The 2018 Act required the FAA to complete the rulemaking by October 5, 2019. *Id.* More than three years after passage of the law and more than two years after the statutory deadline, the FAA has not even begun the statutorily required rulemaking.

A. FAA Standards Concerning Seats

In 1967, following an accident in Salt Lake City in 1965 that resulted in forty-three fatalities, the FAA adopted a rule requiring aircraft manufacturers to demonstrate that each airplane model with more than forty-four passenger seats could be fully evacuated in 90 seconds or less, under specified test conditions. *See* DOT, Office of Inspector General, *FAA's Process for Updating Its Aircraft Evacuation Standards Lacks Data Collection and Analysis on Current Evacuation Risks* 4 (2020), <https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Aircraft%20Evacuations%20Final%20Report%20-%202009-16-20.pdf> (*Inspector General Report*); *see* 14 C.F.R. § 25.803. The test conditions include some realistic features, such as luggage strewn throughout the cabin, three infant-sized dolls carried by evacuees, blocked exits, and reduced lighting. *See* 14 C.F.R. Appendix D to Part 121. However, the required test conditions do not mention the distance between seats, known as seat pitch (the distance between a point on one seat and the same point on the seat directly in front of it). Although the *average* seat pitch for the major airlines appears to be 30 inches, manufacturers have performed evacuation demonstrations using seat

pitches up to 38 inches. *Inspector General Report* at 12. In addition, although the FAA testing requirements address the gender and age makeup of the test evacuation passengers, the FAA does not require that the test passengers reflect the average size, age, or abilities of the flying public. See 14 C.F.R. Appendix D to Part 121 (test evacuation requirements).

The FAA has promulgated a variety of additional rules relating to seating on commercial aircraft: rules addressing the maximum number of seats abreast in airplanes, 14 C.F.R. § 25.817; headrests, 14 C.F.R. § 27.785; fire retardation, 14 C.F.R. Part 25, Appendix F; the weight an airline seat is required to support, 14 C.F.R. § 27.785; and limits on the number of seats in an aircraft based on the number and size of emergency exits, 14 C.F.R. § 25.807. The FAA has never established minimum seat size or spacing requirements, and it does not require manufacturers to report data on seat dimensions.

B. FlyersRights' 2015 Petition

In August 2015, FlyersRights submitted a petition to the FAA requesting promulgation of minimum seat and passenger space size standards. See *Petition for Rulemaking: Limitations of Seat Size Reduc-*

tions, FAA-2015-4011-00001 (Aug. 26, 2015), <https://www.regulations.gov/document/FAA-2015-4011-0001>. The petition explained that the “decrease in seat size, coupled with the safety, health, and comfort of passengers” called for rulemaking to establish minimum passenger space requirements. *Id.* at 3. In support of the petition, FlyersRights pointed to the decline in average seat pitch from 35 inches to 31 inches, with some airlines going as low as 28 inches. *Id.* at 4. It also noted that seat width had decreased to approximately the same width as the average male—meaning that more than half of male passengers are larger than the width of a coach seat. *Id.*

The FAA denied the petition. *See* U.S. DOT/FAA – Decision, FAA-2015-4011-0140 (Feb. 29, 2016), <https://www.regulations.gov/document/FAA-2015-4011-0140>. FlyersRights then appealed to this Court, challenging two aspects of the FAA’s denial of its petition: (1) FAA’s conclusion that current seat pitch and width, as well as passenger size, do not negatively impact emergency egress, and (2) its denial of authority to consider matters related to passenger health and comfort. *See Flyers Rights Education Fund, Inc. v. FAA*, 864 F.3d 738, 744 (D.C. Cir. 2017). Although the court “disagreed with Flyers Rights’ challenge to the

[FAA’s] declination to regulate matters of physical comfort and routine health,” it “agree[d] with Flyers Rights that the [FAA] failed to provide a plausible evidentiary basis for concluding that decreased seat sizes combined with increased passenger sizes have no effect on emergency egress.” *Id.* Referring to the appeal as “the Case of the Incredible Shrinking Airline Seat,” *id.* at 740, the Court rejected the FAA’s assertion “that seat spacing did not affect the safety or speed of passenger evacuations,” *id.* Accordingly, the Court remanded the matter to the FAA “to adequately address the petition and the emergency egress concerns it raises.” *Id.* at 747.

On remand, the FAA again denied the petition. *See* U.S. DOT/FAA – Decision, FAA-2015-4011-0160 (July 2, 2018), <https://www.regulations.gov/document/FAA-2015-4011-0160>.

C. FAA Reauthorization Act of 2018

Less than four months after the FAA denied FlyersRights’ petition, on October 5, 2018, Congress enacted the FAA Reauthorization Act of 2018, which directed the FAA to take two actions with respect to seat size and spacing. First, the Act required the FAA to review airline cabin evacuation procedures and report back to Congress within one year. 2018

Act § 337, *codified at* 49 U.S.C. § 44903 note. Specifically, the Act required the FAA to evaluate: (1) the impact of emergency conditions, including impacts of water on evacuations; (2) crew procedures for evacuations; (3) “any relevant changes to passenger demographics and legal requirements, including the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq), that affect emergency evacuations”; and (4) “any relevant changes to passenger seating configurations, including changes to seat width, padding, reclining, size, pitch, leg room, and aisle width.” *Id.* Second, the Act required the FAA to promulgate “regulations that establish minimum dimensions for passenger seats on aircraft operated by air carriers in interstate air transportation or intrastate air transportation, including minimums for seat pitch, width, and length, and that are necessary for the safety of passengers” within one year of the bill’s enactment—a deadline of October 5, 2019. *Id.* § 577, *codified at* 49 U.S.C. § 42301 note.

More than two years later, the FAA has missed both deadlines. Of particular relevance here, the FAA has yet to begin the rulemaking regarding minimum seat size and spacing required by section 577.

D. Post-2018 Developments

Two developments since the passage of the 2018 Act are relevant here. First, in 2020, at the request of the ranking member of the House of Representatives Committee on Transportation and the Ranking Member of the Subcommittee on Aviation, DOT's Office of the Inspector General conducted an audit of the FAA's evacuation standards.¹ The audit's "objective was to assess FAA's process for developing and updating aircraft emergency evacuation standards, including how changes in passenger behavior, passenger demographics, and seating capacity affect the standards." *Inspector General Report* at 2.

The Inspector General Report raised substantial questions about the efficacy of the FAA's process for developing evacuation standards, including its consideration of passenger seating:

Lack of comprehensive information on the pitches of seats used in evacuation demonstrations hinders FAA's ability to respond to public concerns about seat pitch. It also affected the accuracy of the Agency's response to the 2015 passenger petition [by FlyersRights]. Furthermore, the lack of data on

¹ DOT, Office of Inspector General, *FAA's Process for Updating Its Aircraft Evacuation Standards Lacks Data Collection and Analysis on Current Evacuation Risks* (2020), <https://www.oig.dot.gov/sites/default/files/FAA%20Oversight%20of%20Aircraft%20Evacuations%20Final%20Report%20-%202009-16-20.pdf> (*Inspector General Report*).

the effects of seat pitch and width on evacuation inhibits FAA's ability to adequately assess risk due to seat dimensions and ensure passenger and crew safety to the extent possible in emergency evacuations.

Id. at 12–13. In addition, the report concluded that passenger evacuation tests alone are insufficient to ensure passenger safety. While noting that only thirty of forty-three manufacturers specified the seat pitch used for evacuation demonstrations, the Inspector General Report observed that, of those thirty manufacturers, twenty-nine conducted the test using pitches between 29 and 38 inches. *Id.* at 12. Further, although the FAA's regulations require that evacuation tests include passengers of various ages and genders, they do not require that the participants reflect the size of typical passengers. *Id.* (citing 14 C.F.R. Part 25, Appendix J). The Inspector General pointed to Centers for Disease Control and Prevention data showing that, since 1960, the mean weight of Americans has increased by more than thirty pounds and average height for both men and women has also increased. *Id.* at 11. "Due to FAA's lack of up-do-date study on passenger demographics," the Inspector General concluded, "it is unclear whether the mix of passengers involved in demonstrations reflects the current flying public." *Id.*

Second, from November 2019 through January 2020, the FAA conducted seat testing at its Civil Aerospace Medical Institution in Oklahoma City. *See id.* at 11 n.19. The FAA testing focused only on seat width and the space between rows; it “did not include a review of seat padding, reclining, or aisle width”—features that the Act expressly requires the FAA to consider. *See* 2018 Act § 337, 49 U.S.C. § 44903 note; *Id.* § 577, 49 U.S.C. § 42301 note. To evaluate the results of the tests, the FAA convened an Emergency Evacuation Standards Aviation Rulemaking Committee, which submitted its report to the FAA in May 2020. *Inspector General Report* at 12. That report has not been made public.

REASONS FOR ISSUANCE OF THE WRIT

I. The FAA’s failure to issue the minimum seat size and spacing regulations mandated by Congress is unlawful.

In 2018, Congress ordered the FAA to promulgate regulations establishing “minimum dimensions for passenger seats on aircraft operated by air carriers in interstate air transportation or intrastate air transportation, including minimums for seat pitch, width, and length, and that are necessary for the safety of passengers” by October 5, 2019. 2018 Act § 577, 49 U.S.C. § 44903 note. More than two years later, the

FAA has failed to do so. The FAA's failure to promulgate the regulations by the statutory deadline violates the unambiguous statutory language and constitutes agency action "unlawfully withheld" and "not in accordance with law" under the Administrative Procedure Act. 5 U.S.C. § 706.

II. The Court should issue an order compelling the FAA to promulgate the statutorily required regulations by a date certain.

Because the FAA violated a clear statutory mandate and unlawfully withheld agency action required by law, this Court should order the agency to promulgate the minimum seat and passenger space rules by a date certain. The APA specifies that a "reviewing court *shall* ... compel agency action unlawfully withheld." 5 U.S.C. § 706 (emphasis added). And this Court issues writs of mandamus "to correct transparent violations of a clear duty to act." *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (cleaned up); *see, e.g., In re Aiken County*, 725 F.3d 255, 257 (D.C. Cir. 2013) (noting that the court's "task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress" and granting petition for a writ of mandamus where Nuclear Regulatory Commission failed to act within

the statutorily-mandated deadlines). “At some point, promises are not enough; judicial intervention is needed.” *In re Public Employees for Environmental Responsibility*, 957 F.3d at 273. We are at that point.

The multi-factor test originally set forth in *TRAC* to evaluate claims of unreasonable delay, 750 F.2d at 80, supports the strong need for an order requiring the FAA to issue the minimum seat and passenger space size rule by a date certain. *See, e.g., In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (citing *TRAC* factors in case in which statute commanded agency to act by a set date); *In re Public Employees for Environmental Responsibility*, 957 F.3d at 273 (same). The *TRAC* test states that:

(1) [T]he time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any

impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 80 (cleaned up). “No one factor is determinative, and each case must be analyzed according to its own unique circumstances.” *In re Public Employees for Environmental Responsibility*, 957 F.3d at 273 (citation omitted).

“The first and most important” of the *TRAC* factors looks to whether the length of the delay is governed by a “rule of reason.” See *In re People’s Mojahedin Organization of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012); *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (same). Although there is no *per se* rule as to how long a delay is “too long,” a “reasonable time for agency action is typically counted in weeks or months, not years.” *In re American Rivers & Idaho Rivers United*, 372 F.3d at 419. Where Congress provides a timetable in a statute, that timetable, under the second *TRAC* factor, supplies the “rule of reason,” setting forth what is reasonable under the statute. *TRAC*, 750 F.2d at 80.

Here, Congress in the 2018 Act expressly instructed the FAA to issue a final rule within a year of the statute’s enactment. 2018 Act § 577 (“Not later than 1 year after the date of enactment of this Act ... the Administrator ... shall issue regulations that establish minimum

dimensions for passenger seats”). The Act was enacted on October 5, 2018, and the statutory deadline was October 5, 2019. More than two years later, the FAA has failed to act.

Just last year, this Court ordered the FAA to act where Congress had instructed the agency to “make every effort” to comply within two years. *In re Public Employees for Environmental Responsibility*, 957 F.3d at 274. This Court wrote that “[a]lthough the Act does not impose a rigid schedule, it provides a ruler against which the agencies’ progress must be measured” and that “even the lack of a hard deadline ‘does not give government officials carte blanche to ignore their legal obligations.’” *Id.* (quoting *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001)). Here, Congress *did* impose a rigid schedule. Thus, as much or more than in *In re Public Employees for Environmental Responsibility*, the FAA’s failure to promulgate a final rule (or even issue a proposed rule) more than two years after the statutory deadline has passed is unreasonable.

The third and fifth *TRAC* factors likewise weigh in favor of setting a firm deadline for the minimum seat size and passenger space regulations. These factors consider, respectively, whether “human health and welfare are at stake,” and “the nature and extent of the interests

prejudiced by delay.” *TRAC*, 750 F.2d at 80. Here, the interests at stake are the safety of more than a billion passengers and aircraft crew who fly in our nation’s sky annually.

Safe and efficient emergency evacuations are an essential component of air safety. While air travel has grown safer over the years, accidents and emergency evacuations “occur more frequently than you might think.” Bill Read, *Emergency Evacuations – time for a rethink* (June 15, 2018), <https://www.aerosociety.com/news/emergency-evacuation-time-for-a-rethink/>. A 2000 report from the FAA—the most recent publicly available report on emergency evacuations in the United States—found that precautionary emergency evacuations occurred every 6 days between 1988 and 1996. Michael K. Hynes, DOT, FAA, Office of Aviation Medicine, *Evacuee Injuries and Demographics in Transportation Airplane Precautionary Emergency Evacuations*, 1 (2000), www.faa.gov/data_research/research/med_humanfacs/oamtechreports/2000s/media/00_11.pdf; see also FAA, *Report to Congress: Federal Aviation Administration and National Transportation Safety Board Review of General Aviation Safety*, 4 (Jan. 2021), https://www.faa.gov/sites/faa.gov/files/2021-11/PL_115-

[254_Sec308_NTSB_Review_General_Aviation_Safety.pdf](#) (stating that 18,481 aviation accidents resulting in 3,647 fatalities occurred between 2000 and 2018).

As this Court stated in previous litigation challenging the FAA's inaction on a petition for rulemaking concerning seat size and spacing, "[e]nsuring that all passengers can rapidly evacuate an airplane is of central importance to [the FAA's] safety mission." *Flyers Rights Education Fund*, 864 F.3d at 744. "As a matter of basic physics, at some point seat and passenger dimensions would become so squeezed as to impede the ability of passengers to extricate themselves from their seats and get over to an aisle. The question is not whether seat dimensions matter, but when." *Id.* at 745. Factors three and five thus strongly support requiring the FAA to promulgate these important safety regulations by a date certain.

Finally, the fourth *TRAC* factor—whether an order requiring agency action would interfere with other agency priorities, *TRAC*, 750 F.2d at 80—also supports relief. The FAA itself has identified minimum seat size and spacing requirements as a priority since as early as 2015. *Inspector General Report* at 11. Perhaps more importantly, by

establishing a one-year deadline for the agency to act, Congress made clear that the agency should prioritize the minimum seat and space size regulations. “Congress undoubtedly knew the ... demands placed upon the [agency] and nonetheless limited [its] time to act[.]” *In re People’s Mojahedin Organization of Iran*, 680 F.3d at 837. By setting a deadline, Congress directed the agency to prioritize this rulemaking. And “[o]nce Congress ... has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). An agency’s prerogative to set its priorities “does not encompass the discretion not to follow a law imposing a mandate” on it. *In re Aiken County*, 725 F.3d at 267.

The FAA’s actions since the 2018 Act underscore the importance of this Court’s setting a deadline. Despite this Court’s recognition in 2017 that the agency’s studies on seat size and passenger demographics were “outdated” and its caution that “agency reasoning ... must adapt as the critical facts change,” *Flyers Rights Education Fund*, 864 F.3d at 745, the FAA has yet to gather the data necessary to promulgate the rule required by law, *Inspector General Report* at 6. The FAA conducted 12 days of

testing on evacuation procedures two years ago, yet its “research did not include a review of seat padding, reclining, or aisle width,” as required by the 2018 Act. *Id.* at 11 n.19. Additionally, the Inspector General’s 2020 Report raised significant concerns about the FAA’s plans to address these issues. *Id.* at 22. These failures on the FAA’s part, in combination with the statutory mandate, show an urgent need for this Court’s intervention.

* * *

In sum, the *TRAC* factors highlight the need for this Court to order respondents to issue regulations establishing minimum seat and space size requirements for commercial aircraft by a date certain. Petitioners have no other judicial or administrative remedy, and the FAA’s actions show that it does not feel compelled to comply with the statutory mandate. Absent imposition of a deadline from the Court, the agency will be able to continue its delay indefinitely, depriving petitioners and millions of travelers of a rule that Congress determined is needed to keep travelers safe.

In light of the length of the delay, the FAA’s inaction, and the safety concerns underlying the statutory mandate, the Court should order the FAA promptly to commence rulemaking and to issue a final rule by a date

certain. See *In re Public Employees for Environmental Responsibility*, 957 F.3d at 275 (ordering action within 120 days); *In re People's Mojahedin Organization of Iran*, 680 F.3d at 838 (ordering the agency to take action within four months); *In re American Rivers & Idaho Rivers United*, 372 F.3d at 420 (ordering the agency to take action within 45 days).

RELIEF SOUGHT

The Court should issue a writ of mandamus to the FAA and its Administrator directing the agency promptly to commence rulemaking to establish minimum seat size and spacing requirements for commercial aircraft and to issue a final rule by a date certain. The Court should also retain jurisdiction to monitor respondents' compliance with the Court's order, and award petitioners their reasonable costs and attorneys' fees.

January 12, 2022

Respectfully submitted,

s/ Michael T. Kirkpatrick

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ADDENDA

Statutory Provisions Involved

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

1. compel agency action unlawfully withheld or unreasonably delayed;

...

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. § 46110

§ 46110. Judicial review

(a) **Filing and venue.**—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District

of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

FAA Reauthorization Act of 2018 § 577

49 U.S.C. § 42031 note

§ 42031 note. Minimum Dimensions for Passenger Seats

(a) IN GENERAL – Not later than 1 year after the date of enactment of this Act, and after providing notice and an opportunity for comment, the Administrator for the Federal Aviation Administration shall issue regulations that establish minimum dimensions for passenger seats on aircraft operated by air carries in interstate air transportation or intrastate air transportation, including minimums for seat pitch, width, and length, and that are necessary for the safety of passengers.

FAA Reauthorization Act of 2018 § 337

49 U.S.C. § 44903 note

§ 44903 note. Aircraft Cabin Evacuation Procedures

(a) REVIEW. –The Administrator of the Federal Aviation Administration shall review—

1. evacuation certification of transportation-category aircraft used in air transportation, with regard to—
 - A. emergency conditions, including impacts into water;
 - B. crew procedures used for evacuations under actual emergency conditions;

- C. any relevant changes to passenger demographics and legal requirements, including the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) that affect emergency evacuations; and
 - D. any relevant changes to passenger seating configurations, including changes to seat width, padding, reclining, size, pitch, leg room, and aisle width; and
2. recent accidents and incidents in which passengers evacuated such aircraft.
- (b) **CONSULTATION; REVIEW OF DATA.**—In conducting the review under subsection (a), the Administrator shall—
- 1) Consult with the National Transportation Safety Board, transport-category aircraft manufactures, air carriers, and other relevant experts and Federal agencies, including groups representing passengers, airline crew members, maintenance employees, and emergency responders; and
 - 2) Review relevant data with respect to evacuation certification of transport-category aircraft.
- (c) **REPORT TO CONGRESS.**—Not later than 1 year after the date of enactment of this Act, the Administrator shall submit to the appropriate committees of Congress a report on the results of the review under subsection (a) and related recommendations, if any, including recommendations for revisions to the assumptions and methods used for assessing evacuation certification of transportation-category aircraft.

Declaration of Paul Hudson

Declaration of Paul Hudson

I, Paul Hudson, declare:

1. I am the President and a member of Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org. I have been President of FlyersRights since 2013.
2. FlyersRights is a District of Columbia nonprofit corporation and the largest nonprofit airline passenger advocacy organization in the United States. On behalf of more than 60,000 member/supporters, FlyersRights represents airline passengers on the FAA Aviation Rulemaking Advisory Committee and on the FAA Emergency Evacuation Advisory Rulemaking Committee, promotes the adoption of laws and regulations to benefit airline travelers, and operates a toll-free hotline for airline passengers experiencing travel difficulties.
3. FlyersRights has a long history of advocacy on the issue of minimum seat size and spacing requirements. For example, it filed a rulemaking petition in 2015 calling for the FAA to appoint an advisory committee of experts and stakeholders to study and recommend minimum seat sizes and spacing and to place a moratorium on further

seat size reductions while rulemaking was pending (See FAA-2015-4011-0001 at <http://Regulations.gov>), appealed the denial of that petition in 2016 to the DC Circuit, filed additional papers in response to the Court's remand in 2017 and the FAA second denial in 2018 (See FAA-2015-4011-0140, 0145, 0155, 0156, 0181, 0182, 0201), and filed a second appeal to the DC Circuit Court. FlyersRights.org also made formal presentations in 2014 to the DOT Advisory Committee for Aviation Consumer Protection DOT-OST-2012-0087-0253 2/28/2014 and directly to the DOT Secretary on July 23, 2021.

4. Because the FAA has failed to promulgate the seat dimension rule required by the FAA Reauthorization Act of 2018, FlyersRights continues to expend resources to encourage agency action that should have already been completed. For example, FlyersRights.org participated at its expense in approximately eight multiday meetings of the Emergency Evacuation Advisory Rulemaking Committee from November 2019 to May 2020 including a trip to the FAA Civil Aeronautics Medical Institute in Oklahoma City, prepared briefing and policy papers, and had numerous communications with FAA and DOT

personnel urging seat and emergency evacuation standards be updated as required by the 2018 FAA Reauthorization Act.

5. FlyersRights has members who are harmed by the FAA's failure to undertake the rulemaking intended by Congress to advance passenger safety.

6. FlyersRights is the functional equivalent of a traditional membership organization because individuals associated with the organization play a role in guiding and financing the organization's activities.

7. FlyersRights' toll-free hotline is operated by the Board of Directors and staffed by volunteers from the membership.

8. FlyersRights frequently polls members on their positions on issues of interest to commercial airline passengers. The results of the polls are distributed to the members and are used to guide the organization's activities. The issues that are most important to members, including issues of seat size and spacing, are the issues FlyersRights pursues.

9. FlyersRights leadership examines petitions signed by members to determine which issues and policies to pursue.

10. Many FlyersRights members have contributed money to support FlyersRights' advocacy efforts. A majority of FlyersRights' funding comes directly from its members.

11. I frequently fly on commercial airlines and average about 15-20 flights per year.

12. I am concerned that in the case of an emergency on a flight, I will not be able to evacuate the plane in a timely manner because realistic evacuation tests have not been run on aircraft with seat pitches under 31 inches. This makes me hesitate to fly on commercial airlines; however, my job requires that I continue to engage in such travel.

13. I am also concerned that any further delay or reduction in the size and pitch of airline seats may cause significant increases Deep Vein Thrombosis DVT, pulmonary embolisms, joint and back pain and greater number and severity of head and neck injury in emergency or crash landings that occur several hundred times annually. Members of Congress, European air safety agencies, medical and ergonomic experts, and the UN World Health Organization WHO have all expressed similar concerns. See Anthropetry and Ergonomics in Airline Seating by R. Michael et al Ergoweb.com 11/6/2001; The Ergonomics of Airplane

Seats: The problem with economy class, Jord.Porte et al, International Journal of Industrial Ergonomics, vol. 69, Jan 2019, 90-95; who.int Air Travel Advice 27 April 2020 (2-3 fold increase in DVT for flights over 4 hours); <http://perma.cc/KL7J-GE62>.

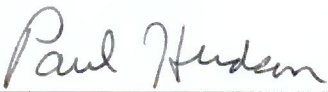
14. I believe that without regulations establishing minimum size and spacing requirements for passenger seats, airlines will continue to reduce seat sizes and any further reduction in seat size and pitch may make flying commercial even more difficult or impossible, which may impede my ability to do my job.

15. In an effort to avoid sitting in cramped and unsafe conditions as I am six feet tall and 74 years old with health conditions that increase risks, I sometimes pay a premium to sit in rows with extra room. If the FAA issued regulations requiring seat dimensions and spacing adequate to protect passenger safety, it is likely that I would no longer have to incur additional fees to sit in rows with greater passenger space.

16. Over 160 persons, FlyersRights members and supporters, and other organizations have expressed publicly filed health and safety concerns regarding inadequate seat size and spacing. For example,

Geoffrey Barrance (pulmonary embolisms FAA-2015-0030), Jim Mindling (lack of evacuation testing FAA-2015-4011-0192), Association of Flight Attendants-CWA (numerous concerns and objections re emergency evacuation FAA-2015-4011-0202). Thousands have signed a Flyersrights.org online petition at www.flyersrights.org requesting reasonable minimum seat standards and in support of the Flyersrights.org FAA rulemaking petition.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on December 28, 2021 in Washington, D.C.



Paul Hudson

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 21(d) and 28(a)(1)(a), counsel for petitioners certifies as follows:

A. Parties and Amici

Petitioners are Flyers Rights Education Fund, Inc., doing business as FlyersRights.org, and Paul Hudson, President and member of FlyersRights.

Respondents are the Federal Aviation Administration and Stephen Dickson, Administrator of the Federal Aviation Administration.

B. Rulings Under Review

There are no rulings under review. Petitioners seek a writ of mandamus ordering respondents to promulgate rules for minimum seat size and spacing on commercial airlines as required by the Federal Aviation Administration Reauthorization Act of 2018 § 577, Pub. L. No. 15-254, 132 Stat. 3186 (2018) (codified at 49 U.S.C. § 42301 note).

C. Related Cases

Petitioners previously filed in this Court a petition for review of an order of the FAA denying their petition to promulgate rules governing the minimum requirements for seat sizes and spacing on commercial

passenger airlines. *Flyers Rights Education Fund, Inc. v. Federal Aviation Administration*, No. 16-1101 (D.C. Cir.). The Court granted the petition for review in part and denied it in part, holding that the FAA had failed to provide a plausible evidentiary basis for concluding that decreased seat size combined with increased passenger size had no effect on emergency egress, but that the FAA's decision not to undertake immediate rulemaking on passenger-health concerns related to seat size and spacing was within the agency's province. The decision is reported at 864 F.3d 738.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

Rule 26.1 Disclosure Statement

Petitioner Flyers Rights Education Fund Inc., doing business as FlyersRights.org, is a District of Columbia nonprofit corporation that represents airline passengers on the FAA Aviation Rulemaking Advisory Committee, promotes the adoption of laws and regulations to benefit airline travelers, and operates a toll-free hotline for airline passengers experiencing travel difficulties. FlyersRights has no parent companies and has issued no shares or debt securities to the public, and no publicly held company has any ownership interest in it.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,402 words. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 Century Schoolbook 14-point font.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on January 12, 2022, I caused this petition to be served by first-class U.S. mail on respondents, as follows:

Stephen Dickson, Administrator
Federal Aviation Administration
800 Independence Avenue, SW
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Mark W. Bury, Acting Chief Counsel
Federal Aviation Administration
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Federal Aviation Administration
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s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick