[ORAL ARGUMENT NOT YET SCHEDULED]

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.

BILLY NOLEN, Acting Administrator of the Federal Aviation Administration, and the FEDERAL AVIATION ADMINISTRATION,

Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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INTRODUCTION

Congress mandated that the Federal Aviation Administration (FAA) conduct notice-and-comment rulemaking to establish minimum dimensions for seat size and spacing on passenger airlines, and to complete the rulemaking by October 5, 2019. The FAA does not dispute that—three and a half years past the statutory deadline—it has not even begun the notice-and-comment process. Nevertheless, it asserts that mandamus relief is unwarranted. Its reasons, however, do not bear up under scrutiny.

The FAA primarily argues that the statute's directive that the agency "shall issue regulations that establish minimum dimensions for passenger seats on aircraft … that are necessary for the safety of passengers" does not require the issuance of seat-dimension regulations if the FAA concludes, following the notice-and-comment process, that there are no minimum dimensions necessary to protect passenger safety. The FAA's reading of the statute is strained to say the least, and its speculation that passenger safety might not be affected no matter how small the seat dimensions is illogical. In any event, the FAA's explanation for why it has ignored the statutory mandate demonstrates why this

Court's intervention is needed: Without mandamus relief, the FAA will continue to treat the statutory requirement as a low priority that it can ignore indefinitely, despite Congress's express direction to the contrary.

Indeed, the FAA concedes that, at a minimum, the statute required that it issue notice, review the comments received, and make a final determination regarding a potential seat-dimension rule by October 2019, regardless of the ultimate outcome of the process. The FAA admits that it did not comply with the statute, and it provides only a vague statement of plans to come into compliance at some unstated future time.

Finally, the FAA argues that petitioners should be denied relief because, after passage of the 2018 Act requiring that rulemaking, they did not continue their litigation in support of an earlier effort to persuade the agency to initiate a seat-dimension rulemaking. The FAA's argument is illogical, has no legal support, and further demonstrates that the agency's intransigence is unlikely to abate without this Court's intervention.

The Court should grant the petition for a writ of mandamus and order the FAA to commence and complete a rulemaking to establish minimum seat size dimensions by the end of the year.

ARGUMENT

I. Mandamus relief is warranted because the FAA's inaction is egregious and its excuses unavailing.

Mandamus relief is available "to correct transparent violations of a clear duty to act." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citation and internal quotation marks omitted). The FAA has indisputably committed such a violation. Section 577 of the FAA Reauthorization Act of 2018, *codified at* 49 U.S.C. § 42301 note (2018 Act), provides that by October 5, 2019 (one year after enactment):

> [A]fter 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 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.

More than 30 months have passed since the statutory deadline, and the FAA admits that it has yet to provide notice and an opportunity for comment, much less issue the required regulations. *See* FAA Resp. 11. Mandamus relief is needed to address the statutory violation, and none of the FAA's excuses for its inaction indicate otherwise.

A. The 2018 Act requires the FAA to conduct notice-and-comment rulemaking to establish minimum seat-dimension standards.

The FAA argues that mandamus relief is not available because it "does not understand Section 577 of the Reauthorization Act to require issuance of seat-dimension standards if the agency concludes after notice and comment that such standards are not required to protect passenger safety." FAA Resp. 10. The FAA's argument is flawed for several reasons.

First, the FAA's assertion that it need not issue regulations is contrary to the plain language of the statute. Section 577 states that the FAA "shall issue regulations" establishing minimum seat dimensions. The term "shall" is mandatory and means that the subject "has a duty" or "is required" to take the specified action. Black's Law Dictionary (11th ed. 2019). Where Congress uses such mandatory language, agencies do not have discretion to ignore the directive. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (stating that "Congress used 'shall' to impose discretionless obligations"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (holding that use of "the mandatory 'shall' … normally creates an obligation impervious to judicial discretion"); *see In re United Mine Workers Int'l Union*, 190 F.3d 545, 550 (D.C. Cir. 1999) (considering

statute stating that agency "*shall* by rule promulgate, modify, or revoke" standards and holding that "[n]othing about the language of those deadlines suggests they are anything other than mandatory"). This Court has "frequently stated that Congress says what it means and means what it says." *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021). Here, the statute states that the FAA "shall issue" seat-size regulations.

The FAA's argument that the general language of its organic statute vesting it with authority to promote airline safety, 49 U.S.C. § 44701(a), somehow relieves it of any obligation to comply with the specific requirement of § 577 is similarly misplaced. It is well within Congress's authority to both enact a comprehensive scheme and deliberately target specific problems with specific solutions. *See Patten v. Dist. of Col.*, 9 F.4th 921, 926 (D.C. Cir. 2021) ("We are guided by the 'old and familiar rule' that 'the specific governs the general,' which is 'particularly true' where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–46 (2012)). Indeed, if the broad language of an agency's organic

statute could divest Congress of its ability to direct specific agency action, it would turn administrative law (and separation of powers) on its head.

The FAA argues that the phrase "necessary for the safety of passengers" in § 577 releases it from any statutory obligation to issue regulations because, it speculates, minimum seat dimensions may not be necessary to protect passenger safety. The FAA's own study contradicts its litigation position that passenger safety may not be affected by the size and spacing of seats, no matter how small. *See* FAA Resp. Ex. B at 44 (FAA study concluding that reducing seat pitch past those used in the study "begins to have a detrimental impact on a larger percentage of the population, since more average-sized Americans are unable to fit in narrower seat pitches, which in turn may impede egress"). As the FAA study shows, there must be some minimum size necessary for passenger safety—and the rulemaking process mandated by the statute is designed to identify it. Speculation as to the outcome of the rulemaking cannot excuse the FAA's failure to even begin the process by providing the notice and opportunity for comment required by § 577. The FAA concedes that it has not done so. FAA Resp. 11.

B. The *TRAC* factors support mandamus.

The petition (at 16–22) demonstrated that each factor set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*), strongly supports relief requiring the FAA to conduct notice-and-comment rulemaking to establish minimum seat dimensions on passenger airlines. The FAA's response fails to refute that showing.

"The first and most important" of the *TRAC* factors examines whether the agency's delay fits within the "rule of reason," *In re People's Mojahedin Organization of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012), and the second *TRAC* factor provides that a statutory deadline establishes what is reasonable, *TRAC*, 750 F.2d at 80. Here, § 577 expressly requires the FAA to complete notice-and-comment rulemaking within a year of the statute's enactment, thus setting a deadline of October 5, 2019. The FAA concedes that it has not complied with this statutory mandate. FAA Resp. 11. Indeed, it admits that it has not even started the rulemaking process. *Id.*

Nonetheless, the FAA argues that its inaction should be excused and "does not present the 'extraordinary circumstances' necessary to

'interfere with an ongoing agency process,'" *id.* at 12 (quoting *In re United Mine Workers*, 190 F.3d at 549), because in a letter sent to Congress two business days before it filed its response in this case, the agency expressed skepticism that seat dimensions affect passenger safety and stated that it "plans to seek public comment" as required by the statute, *id.* Ex. A (letter of Mar. 31, 2022). Where, as here, an agency has ignored a statutory deadline, resisted the premise of the statutory mandate, and made only a vague pledge of action during the pendency of litigation and without any specific timetable, this Court's intervention is warranted and, indeed, necessary. *See In re Pub. Emps. for Env't Responsibility*, 957 F.3d 267, 273 (D.C. Cir. 2020) ("At some point, promises are not enough; judicial intervention is needed."); *In re Am. Rivers*, 372 F.3d at 418 (holding that courts "will interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act because it is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action" (cleaned up)).

The third and fifth *TRAC* 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. "Delays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake. This is particularly true when the very purpose of the governing Act is to protect those lives." *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (citations omitted). All parties agree that passenger safety during air travel is of the "highest priority." FAA Resp. at 13.

The FAA focuses its defense on the fourth *TRAC* factor: the effect of requiring compliance with the statutory mandate of § 577 on agency activities of a higher or competing priority. *TRAC*, 750 F.2d at 80. The FAA argues that "[t]he agency's rulemaking priorities in the last two years have included rulemaking that directly protects the safety of the public," FAA Resp. 13, albeit not the rulemaking mandated by § 577 of the 2018 Act. Although any efforts to improve airline safety are laudable, an agency's discretion to set priorities does not include the power to disregard statutory obligations. "Once 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." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *see Am. Hosp. Ass'n v.*

Burwell, 812 F.3d 183, 193 (D.C. Cir. 2016) ("[A]lthough courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities, our ultimate obligation is to enforce the law as Congress has written it."); *see also In re People's Mojahedin Org.*, 680 F.3d at 837 ("Congress undoubtedly knew the enormous demands placed upon the Secretary and nonetheless limited her time to act."). Here, by setting a firm deadline, Congress directed the agency to prioritize rulemaking to establish minimum seat dimensions.

II. Petitioners' decision not to pursue a particular litigation strategy in 2018 in light of intervening congressional action has no bearing on whether the Court should grant mandamus.

Without citing any authority, the FAA argues that petitioners should be barred from seeking mandamus relief to compel compliance with a statutory mandate because they did not pursue a petition for review of the agency's denial of an earlier petition for a rulemaking on the same subject. FAA Resp. 15–16. No authority, however, supports the proposition that a party who petitions an agency for a rulemaking and does not pursue judicial review of the agency's denial cannot later seek mandamus to compel agency compliance with a statutory mandate.

Equally important, the FAA's argument is factually nonsensical. Petitioners have long sought regulations establishing minimum seat dimensions to protect passenger safety. In 2015, they petitioned the FAA for such rulemaking. The FAA denied the petition, but this Court granted in part a petition for review and remanded the matter to the agency. *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 749 (D.C. Cir. 2017). In July 2018, the FAA again denied the petitioners' petition. In August 2018, petitioners sought reconsideration by the FAA. *See* Request to the FAA to Withdraw Decision, FAA-2015-4011-0181 (Aug. 23, 2018). At the same time, they filed a petition for review in this Court, *see* Petition, *Flyers Rights Educ. Fund, Inc. v. FAA*, No. 18-1227 (D.C. Cir. Aug. 24, 2018), which the Court dismissed as premature because the FAA had not yet acted on the request for reconsideration. *See* Order, *Flyers Rights Educ. Fund, Inc. v. FAA*, No. 18-1227 (D.C. Cir. Dec. 28, 2018). By the time of the Court's order, the 2018 Act had become law, imposing on the FAA a statutory mandate requiring it to complete notice-and-comment rulemaking to establish minimum seat dimensions by October 5, 2019—that is, requiring that the agency do exactly what the petition requested. Accordingly, at that point, it would have been nonsensical for petitioners

to pursue their 2015 rulemaking petition following resolution of their request for agency reconsideration, because Congress had stepped in and provided the very relief sought by the 2015 rulemaking petition.

III. The Court should order the FAA to complete the rulemaking by the end of 2022.

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 complete the rulemaking by the end of calendar year 2022. At that point, the statutory deadline will have passed by more than three years. "There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough,' … [and] that point has been reached." *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (quoting *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987)).

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

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April 28, 2022

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 2,413 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 April 28, 2022, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all registered filers in this case.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick