

No.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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

Petitioners.

PETITIONERS' ADDENDUM

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Public Law 99-435
99th Congress

An Act

Oct. 2, 1986
[S. 2703]

To amend the Federal Aviation Act of 1958 to provide that prohibitions of discrimination against handicapped individuals shall apply to air carriers.

Air Carrier
Access Act of
1986.
49 USC app.
1301 note.
49 USC app.
1374.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Air Carrier Access Act of 1986".

SEC. 2. (a) Section 404 of the Federal Aviation Act of 1958 (49 U.S.C. 1374) is amended by adding at the end thereof the following new subsection:

"PROHIBITION ON DISCRIMINATION AGAINST HANDICAPPED INDIVIDUALS

"(c)(1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.

"(2) For the purposes of paragraph (1) of this subsection the term 'handicapped individual' means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment."

(b) That portion of the table of contents of the Federal Aviation Act of 1958 which appears under the side heading

"Sec. 404. Rates for carriage of persons and property."

is amended by adding at the end thereof:

"(c) Prohibition on discrimination against handicapped individuals."

Regulations.
49 USC app.
1374 note.

SEC. 3. Within one hundred and twenty days after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers.

Approved October 2, 1986.

LEGISLATIVE HISTORY—S. 2703:

SENATE REPORTS: No. 99-400 (Comm. on Commerce, Science, and Transportation).
CONGRESSIONAL RECORD, Vol. 132 (1986):

Aug. 15, considered and passed Senate.
Sept. 18, considered and passed House.

Deadline.
Notice.
Regulations.

SEC. 2108. AIR TRAVEL ACCESSIBILITY.

Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue the supplemental notice of proposed rulemaking referenced in the Secretary's Report on Significant Rulemakings, dated June 15, 2015, and assigned Regulation Identification Number 2105-AE12.

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

**DECLARATION OF DAVID L. ZURFLUH, PRESIDENT OF
PARALYZED VETERANS OF AMERICA**

I, David L. Zurfluh, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am the President of Paralyzed Veterans of America (“PVA”).
2. PVA is a congressionally chartered veterans service organization founded in 1946 and based in Washington, D.C. A core tenet of PVA’s mission is to advocate for civil rights and opportunities

that maximize the independence of veterans of the armed forces who have experienced spinal cord injury or dysfunction.

3. As President of PVA, I am the chief executive officer of the corporation, responsible for managing the property, business, and affairs of the corporation and representing the corporation in all instances in which the corporation has an interest.

4. PVA currently has approximately 17,000 members nationwide, all of whom are veterans of the armed forces who have experienced spinal cord injury or dysfunction. Almost all PVA's members use wheelchairs for mobility.

5. PVA's members elect the leadership of their local chapters and vote on various chapter policies and initiatives, or serve as at large members of the national organization. PVA's national directors are drawn from the local chapters and determine PVA's overall direction.

6. PVA's leadership at all levels, including both its national board and its chapters, is entirely drawn from its membership. For example, I am a U.S. Air Force veteran who served his country in Operation Desert Shield/Storm before being injured in a motor vehicle accident in 1995 while on active duty in Hachinohe, Japan. Following

one year of inpatient rehabilitation and two years of outpatient care, I resumed life as an incomplete quadriplegic.

7. Facilitating our members' access to air travel is a core part of PVA's mission.

8. PVA spends substantial resources to carry out this mission in a variety of ways, including education and advocacy efforts. For example, PVA works closely with air carriers and the Department of Transportation to identify problems in accessibility or service for travelers with mobility impairments. As part of these efforts, PVA has provided training to airline personnel and their contractors and collaborated with airlines to develop procedures for serving travelers with mobility disabilities. PVA provides these services free of charge.

9. PVA also works with individual members who have experienced issues during air travel. Among other things, PVA advises members in submitting complaints with the Aviation Consumer Protection Division of the Department and the specific airline.

10. PVA has devoted substantial resources advocating for a rule that requires lavatories on single-aisle aircraft to be accessible.

- a. In 1991, PVA commissioned a study on the necessity and feasibility of having accessible lavatories for single-aisle aircraft. PVA used the findings of that study in a comment it submitted to the Department advocating for accessible lavatories on single-aisle aircraft.
- b. In 1992 through 1996, PVA participated as a member of the Aircraft Accessibility Federal Advisory Committee. That committee addressed, among other things, the issue of lavatory accessibility on aircraft.
- c. In 2008, PVA submitted a comment in response to the Department's rulemaking on extending the Air Carrier Access Act to include foreign carriers. In that comment, PVA again asked the Department to issue a rule requiring accessible lavatories on single-aisle aircraft.
- d. In 2016, PVA was appointed to serve on the Accessible Air Transportation Advisory Committee ("ACCESS Committee"). The ACCESS Committee, which included representatives from the airline and airline manufacturing industries, reached consensus on a rule requiring accessible lavatories

on single-aisle aircraft. The Department had promised to propose any such consensus for public comment.

- e. PVA has continued to inquire on a periodic basis whether the Department is still planning to propose the ACCESS Committee's consensus rule for public comment, or whether the Department intends to propose any other rule on lavatory accessibility for public comment. The Department's responses suggest it is, at best, moving at a glacial pace, with nearly no discernable movement towards the issuance of a proposed rule.

11. PVA believes that lavatory accessibility on all aircraft is vital to ensuring the health and safety of travelers with mobility disabilities. PVA further believes that any rule requiring accessible lavatories on single-aisle aircraft will significantly improve the lives of its members.

12. Should the Department publish such a final rule, PVA could redirect the resources it is currently expending on the accessible lavatory issue to aid in its other wide-ranging efforts to improve travel accessibility for veterans with mobility disabilities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 27th day of November, 2018.

A handwritten signature in black ink, appearing to read "David L. Zurfluh". The signature is written in a cursive style with a large initial "D".

David L. Zurfluh, National President
Paralyzed Veterans of America

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STATES SECRETARY OF TRANSPORTATION

DECLARATION OF JAMES THOMAS WHEATON, JR.

I, James Thomas Wheaton, Jr., hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am the National Treasurer for Paralyzed Veterans of America ("PVA") and a member of the PVA Executive Committee, the committee charged with making policy, governance, and other major decisions on behalf of PVA. I currently reside in Golden, Colorado.

2. I served in the U.S. Navy from 1986 through 1989 as a deck seaman on the U.S.S. Fort McHenry.

3. While docked in Australia, I was hit by a drunk driver while walking down the street. I broke my spine at C-6 and C-7, leaving me with paraplegia.

4. As a result of my paraplegia, I use an Invacare A4 manual wheelchair.

5. As a member of the PVA Executive Committee, I fly for work events approximately once a month. Because these are domestic flights, usually between Denver, Colorado and Washington, D.C., the flights are on single-aisle aircraft. Because the lavatories on these single-aisle aircraft are not configured to accommodate my paraplegia, I cannot access the lavatories on these flights.

6. Most of my flights are approximately 2-4 hours in duration. However, because I am in a wheelchair, I am the first to board (approximately half an hour before take-off) and the last to deplane (approximately half an hour after landing).

7. This means that when I fly, I do not have access to a lavatory for at least 3-5 hours at a time. That period is often extended due to ancillary issues, including that the airline does not immediately have available an aisle chair—a special chair designed to fit on airplanes that is

required to transport me from my seat on the plane to my wheelchair in the terminal.

8. Because I do not have access to a lavatory, flying causes me significant anxiety. I am always apprehensive about whether I will have a bladder or bowel accident during the flight—an occurrence which would cause me significant embarrassment and humiliation.

9. In addition, I run the risk of contracting infections, such as a urinary tract infection, that sometimes result from having to hold one's bowel and bladder for an extended period of time.

10. As a result, I take a variety of precautions in advance of, and during, any flight. Starting the day before the flight, I limit my intake of food and fluids. I have to balance the need for sufficient food and water to allow me the energy needed to travel long distances, while also ensuring I will not have to relieve myself during the 3-5 hours that I am unable to access a lavatory. This takes careful planning for at least 24 hours in advance of any flight.

11. In addition, I also often wear a protective undergarment when flying. I take this precaution so that if I do have a bowel or bladder issue during a flight, my body, clothes, and the airline seat will be protected.

Although necessary, having to wear this undergarment causes me embarrassment.

12. Because flying causes stress and anxiety, in addition to the time and energy needed to take the necessary precautions, I prefer to drive when it is feasible. For example, in May 2018, PVA held its annual conference in Minneapolis, MN. I chose to drive to that event, even though that took, each way, 16 hours and 2 days.

13. It is psychologically disheartening to be denied access to something so basic as the ability to relieve oneself as needed. Indeed, I feel the most hindered by my disability when flying, in large part because I am unable to access a lavatory.

14. If I had access to a lavatory on single-aisle aircraft, my flight experiences would be significantly improved. I would, like any able-bodied individual, be able to eat and drink freely before a flight without concern about the potential for a bowel or bladder accident in-flight. I would not have to wear protective undergarments. I would never have to opt for slower, less efficient means of transportation because of a concern about lavatory accessibility. And I would be spared the psychologically distress and anxiety that accompanies the justifiable apprehension I experience every time I fly.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of November, 2018.


James Thomas Wheaton, Jr.

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DECLARATION OF HACK D. ALBERTSON

I, Hack D. Albertson, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am the National Vice President for Paralyzed Veterans of America (“PVA”) and a member of the PVA Executive Committee, the committee charged with making policy, governance, and other major decisions on behalf of PVA. I currently reside in Campbellsburg, Indiana.

2. I served in the U.S. Marine Corps from 1981 through 1985. I was paralyzed as the result of a snow accident. I broke my spine at T-6 and am a complete paraplegic.

3. I have flown approximately 50 times in the last 2 years, mostly for work as the National Vice President of PVA. I also frequently fly for work related to my participation in Lifewaters.org—a group of recreational therapists and clinicians that train paralyzed and disabled veterans to scuba dive. Because these are mostly domestic flights, the flights are on single-aisle aircraft. And because single-aisle aircraft are not configured to accommodate my paraplegia, I cannot access the lavatories on these flights.

4. Most of my flights are over 3 hours in duration. However, because I am in a wheelchair, I am the first to board (approximately half an hour before take-off) and the last to deplane (approximately half an hour after landing).

5. This means that when I fly, I do not have access to a lavatory for at least 4 hours at a time. That period is often extended due to ancillary issues, including that the airline does not immediately have available an aisle chair—a special chair designed to fit on airplanes

that is required to transport me from my seat on the plane to my wheelchair in the terminal.

6. Because I do not have access to a lavatory, flying causes me significant anxiety. I am always apprehensive about whether I will have a bladder or bowel accident during the flight—an occurrence which would cause me significant embarrassment and humiliation.

7. As a result, I take a variety of precautions in advance of, and during, any flight. First, I try to buy flights that include layovers to avoid having to remain too long on an airplane without access to a lavatory. This of course means my overall travel time is extended. But it also often results in me spending more money on travel. Because I need approximately 2 hours between flights (due to the extra time it takes for me to board and deplane), purchasing a flight with a layover often requires me to stay overnight at a hotel between legs of travel, thereby increasing my travel costs significantly.

8. In addition to purchasing tickets with shorter travel legs, I also limit my intake of food and fluids starting the day before a flight.

9. I also bring a catheter to drain my bladder during long flights. When I use the catheter, I try to shield myself with either a blanket or the body of a travel companion.

10. I always request permission from a flight attendant before using the catheter. Sometimes, however, the flight attendant refuses to allow me to use the catheter. In such instances, my bladder will drain onto myself and the airline seat. For this reason, I tend to wear dark clothing when traveling to minimize the likelihood that people will notice when I have had to drain my bladder or bowels onto myself during long flights. This is particularly important because I often have to go straight to meetings after deplaning, without an opportunity to change my clothes.

11. For example, in 2002 I was on a flight from Alaska to Indiana. The flight had a layover in Salt Lake City. The flight attendant did not allow me to get off the plane to use a restroom in the airport terminal. She also refused to allow me to use my catheter to drain my bladder. As a result, my bladder drained on myself and the seat shortly after take-off, requiring me to sit uncomfortably in my soiled clothes and seat for the remainder of the flight home.

12. I cannot fully express how embarrassing it is to be dressed in a suit and have to conceal the fact that I may be wet or about to have a bowel movement on an airplane.

13. I have on several occasions contracted a urinary tract infection because of having to hold my bladder for an extended period of time or from having to use a catheter in an unsanitary location, e.g., the airline seat.

14. Because of the stress and anxiety that accompanies flying, plus the extra time and energy that it takes to engage in the many precautionary measures I take, I try to drive whenever possible—even when that means longer travel time and spending additional travel money on overnight stays. For example, I have driven from my home in Indiana to PVA events in Miami, Tampa, Richmond, and Washington, D.C.

15. I also recently turned down an offer to become the Deputy Director of PVA. Because that position would require even more travel, I ultimately determined that taking on the position was not feasible, in large part because of the expense and anxiety that results from my inability to access a lavatory during flights.

16. It is psychologically disturbing to be denied access to something so basic as the ability to relieve oneself as needed. Indeed, I feel the most hindered by my disability when flying, in large part because I am unable to access a lavatory.

17. If I had access to a lavatory on single-aisle aircraft, my flight experiences would be significantly improved. I would, like any able-bodied individual, be able to eat and drink freely before a flight without concern about the potential for a bowel or bladder accident in-flight. I would never have to opt for slower, less efficient means of transportation because of a concern about lavatory accessibility. And I would be spared the psychological distress and anxiety that accompanies the justifiable apprehension I experience every time I fly.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of November, 2018.



Hack D. Albertson

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2018, 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: November 29, 2018

/s/ Karianne M. Jones
Karianne M. Jones