

**STATEMENT OF
DAVID ZURFLUH
NATIONAL PRESIDENT
PARALYZED VETERANS OF AMERICA
BEFORE THE
HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON AVIATION
CONCERNING
IMPLEMENTATION OF THE FAA REAUTHORIZATION ACT OF 2018**

SEPTEMBER 26, 2019

Chairman Larsen, Ranking Member Graves, and members of the Subcommittee, Paralyzed Veterans of America (PVA) thanks you for the opportunity to testify for this oversight hearing regarding implementation of the FAA Reauthorization Act of 2018 (Public Law 115-254). This legislation included many provisions that if properly implemented by the U.S. Department of Transportation (DOT) would improve the air travel experience of catastrophically disabled veterans and all people with disabilities.

Protections in air travel for people with disabilities began in earnest when President Ronald Reagan signed into law the Air Carrier Access Act (ACAA). The ACAA, which prohibits disability-based discrimination in air travel, was the result of a U.S. Supreme Court decision in *Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). In this case, the Court held that air carriers were not subject to Section 504 of the Rehabilitation Act of 1973, as amended, unless they received direct federal financial assistance. As a result of this decision, PVA led the charge in advocating for Congress to pass protections that would finally end discrimination against people with disabilities in air travel.

The ACAA is a civil rights law that protects not only PVA members, who are all honorably discharged veterans with catastrophic disabilities, but also the rights of all individuals living with disabilities to access air travel. Before the ACAA, people with

disabilities were routinely forced to travel with an attendant at their own expense, even if they did not need assistance to fly safely; required to sit on a blanket for fears that they might soil the passenger seat; or simply refused passage. The ACAA has provided passengers with disabilities improved consistency in air travel. Through this law, air carriers must provide passengers with disabilities the opportunity to preboard, if additional time or assistance is needed in boarding the aircraft; timely assistance in boarding and deplaning; proper stowage of assistive devices; and appropriate seating accommodations.

Despite improvements in air travel over the last three decades for passengers with disabilities, too many still encounter regular problems in air travel due to their disabilities. PVA members routinely report incurring bodily harm in boarding and deplaning aircraft, and their wheelchairs, particularly power wheelchairs, are often damaged while stowed. In addition, members have expressed difficulty in receiving appropriate seating accommodations on aircraft and often encounter air carrier personnel and contractors who are not appropriately trained in assisting passengers with catastrophic disabilities. Consequently, some of our members and other individuals with disabilities choose to drive long distances rather than risk personal injury or damage to their mobility devices.

In order for a person with a permanent disability such as a spinal cord injury to board or deplane an aircraft, he or she has to be transferred from his or her customized wheelchair to an aisle chair, a small, narrow device, prior to entering the aircraft. The passenger is then maneuvered backwards onto the aircraft and pulled down the aisle to his or her seat. Within the confines of the cabin, the individual is then transferred to an aircraft passenger seat, where he or she will most likely remain until the process is repeated when the individual departs the aircraft.

Today's aircraft present a rather hostile environment for many passengers with disabilities, particularly for those who are unable to ambulate. This environment often results in profound consequences for passengers with disabilities. For example, PVA's Senior Vice President, Charles Brown, in attendance at today's hearing, was severely injured earlier this year when he was dropped while attempting to board an aircraft. Mr. Brown fractured his tail bone as a result of this incident and subsequently developed skin breakdown and a bone infection. As a result of his injuries, he spent three months as an in-patient at the Spinal Cord Injury unit at the VA's Medical Center in Miami. Because of his injuries, he is very apprehensive about flying and drove to Washington, D.C. from south Florida to attend recent PVA meetings and events.

Unfortunately, Mr. Brown's situation is not unique among PVA members. From our former national treasurer's broken wheelchair; our deputy executive director's need to pull himself down the aisle to reach his own wheelchair because assistance never arrived; to a wheelchair athlete who developed stage three pressure ulcers on his backside after being asked to wait on an aisle chair for 30 minutes with the assurance that his own wheelchair would be delivered shortly, the barriers to safely access air

travel are numerous. In fact, problems with air travel are one of the most common complaints that we receive from our members.

Although I am currently using a cane to assist with mobility, I used a wheelchair for the first four years following my injury. As I age, I know that I will again be fully dependent on my wheelchair for mobility. Each year, I fly 25-40 round trips. I, too, have experienced disability-related problems in air travel.

A couple of years ago, I severely injured my hip, and as a result, I needed to use my wheelchair instead of my cane for mobility. During this time, I needed to fly for PVA business but was apprehensive because of past problems that I had experienced and the problems relayed by many fellow PVA members. I transferred without assistance onto the aisle chair to avoid putting myself at too much risk. As I was pulled down the aisle, my knee hit nearly every armrest on the way back. Each time, the jolt sent pain radiating to my injured hip. Once I arrived at my seat, I was determined to transfer myself because I could not further risk my health and safety at the hands of the air carrier's assistant.

To address disability-related complaints under the ACAA, passengers with disabilities may file complaints with the specific air carrier and DOT. In 2017, passengers filed 34,701 disability-related complaints as reported by 190 domestic and foreign air carriers, which represents a 6.5 percent increase over 2016. Top complaints with U.S. carriers for passengers with paraplegia or quadriplegia include failure to provide passenger assistance and appropriate seating accommodations. During 2018, passengers filed 828 disability-related complaints directly with DOT.

It is because of the experiences of our members and those of people with disabilities more broadly that PVA has once again been leading the charge to improve air travel for all people with disabilities. PVA was pleased to work with members of the House Transportation and Infrastructure Committee and other House disability champions on the inclusion of several disability-related provisions in the FAA Reauthorization Act of 2018. Congress's recognition of the issues encountered by PVA members and millions of people with disabilities was a tremendous victory for all passengers with disabilities.

Title IV, Subtitle B, Aviation Consumers with Disabilities, included 11 provisions focused solely on air travel for passengers with disabilities. These provisions include those that will inform air travel passengers about their rights under the ACAA, improve the assistance they receive from air carriers, and establish formal lines of communication between the air travel industry, the disability community, and DOT to address barriers to air travel. The law also requires a forward-looking study designed to determine the feasibility of passengers who depend on wheelchairs for their mobility to remain in them while on the aircraft.

In December 2018, DOT complied with Section 441, Transparency for Disabled Passengers. This section required large domestic air carriers to report on a monthly basis the number of wheelchairs and scooters enplaned and subsequently damaged.

Although DOT had finalized the regulation implementing this requirement in November 2016, DOT subsequently delayed implementation in March 2017 until January 1, 2019.

As a result of Congress's action, DOT implemented the requirement on December 4, 2018. For the first six months of 2019, 10 carriers reported enplaning 294,216 wheelchairs and scooters and mishandling 4,777 of them.¹ We are pleased that PVA members and all people with disabilities now have publicly available information about the treatment of assistive devices on U.S. air carriers and are able to make informed choices when they purchase their tickets. We are also working with several U.S. carriers and wheelchair manufacturers to improve handling of wheelchairs during transport.

Nearly a year after enactment of the FAA Reauthorization Act, however, we are still waiting for information from DOT regarding the Secretary's review and needed revision of regulations ensuring timely, dignified, and effective assistance for passengers with disabilities. Section 440, Regulations Ensuring Assistance for Passengers with Disabilities in Air Travel, required the Secretary to perform a review, and as necessary, to make revisions to the regulations governing assistance under the ACAA within 180 days of enactment. The Secretary was also required to determine whether the regulations governing training programs for assisting passengers, like paralyzed veterans, are sufficient and whether hands on training should be part of the required regular training regimen.

It is unconscionable to think that someone with a spinal cord injury or disorder should be assisted in multiple transfers to board and subsequently deplane an aircraft without having been properly educated about how to assist them. It is dangerous for not only those passengers, but also for those who are assisting them. The experience of many of our members who have been injured during this process is evidence enough for PVA that the current regulations are not sufficient to guarantee safe passage for these passengers. We look forward to the Secretary's review.

In the meantime, we are also waiting on DOT to publicly announce the members of the Advisory Committee on the Air Travel Needs of Passengers with Disabilities. Section 439 lays out the requirements for the Secretary to establish a committee that would identify disability-related access barriers, recommend improvements, and anticipate future problems that may result from industry trends. The advisory committee is to include people with disabilities, disability organizations, air carriers, service providers, aircraft and wheelchair manufacturers, and organizations representing veterans with disabilities.

PVA looks forward to the establishment of this advisory committee because we believe that it will provide a formal, ongoing opportunity for stakeholders to work toward

¹ U.S. Department of Transportation, Aviation Consumer Protection Division, Office of Aviation Enforcement and Proceedings, Air Travel Consumer Report, Mishandled Wheelchairs and Scooters: Ranking of U.S. Reporting Marketing Carriers* (YTD) 42 (Aug. 2019), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/346301/august-2019-atcrr1.pdf>.

solutions that will improve access to air travel for passengers with disabilities. We urge DOT to move forward as expeditiously as possible to officially establish the committee and schedule its inaugural meeting.

Another key provision in the law that we believe will improve air travel for passengers with disabilities is the requirement for an Airline Passengers with Disabilities Bill of Rights. Section 434 requires the Secretary to partner with disability community and air carrier stakeholders to develop a plain language bill of rights that governs the treatment that passengers with disabilities can expect to receive under the ACAA. A protection inherent in the ACAA that must be included is the right to be treated with dignity and respect.

Although there is no deadline in the law for DOT to comply with this requirement, we hope that collaborative efforts to draft the bill of rights will begin this year. We believe that the bill of rights presents an important opportunity to increase awareness of the ACAA's protections for people with disabilities. In addition, the requirement for air carriers to train their personnel and their contractors on these rights has the potential to improve the assistance services that passengers with disabilities receive during travel.

PVA also strongly supported the requirement in Section 432 for the U.S. Access Board to work with DOT on a study to determine the feasibility of in-cabin wheelchair restraint systems to allow passengers who are dependent on their wheelchairs to avoid transferring into an aircraft seat. Instead, passengers would be able to fly while seated in their wheelchair. A determination of the feasibility of flying while seated in a wheelchair is one of the first steps in the effort to bring air access in line with access in other modes of transportation such as buses, subways, and passenger trains that do not require people who use wheelchairs to stow them.

If deemed compliant with cabin safety requirements, allowing passengers to fly while remaining in their wheelchairs would reduce risks to their health and safety and to those who currently must assist them in transferring to and from aisle chairs, passenger seats, and their own wheelchairs. We look forward to the study's findings. We also request that carriers and aircraft manufacturers take seriously these efforts to improve air travel for passengers who depend on wheelchairs.

Although not included in the disability-specific provisions, I want to highlight our support for the requirement in Title IV, Subtitle A, Section 426 for the U.S. Government Accountability Office (GAO) to study lavatory access on aircraft. The law explicitly required GAO to assess lavatory accessibility for passengers with disabilities. Despite recent focus on the accessibility of aircraft lavatories for all passengers, PVA members have been involved for decades in efforts to provide access to lavatories on single-aisle aircraft for passengers with disabilities.

When I fly, I purposefully dehydrate myself to limit the possibility that I might need to use a lavatory while on the aircraft. This is the typical protocol for many members of PVA's Executive Committee who are in the audience today. When I fly to Washington,

D.C. from my home in Ruston, Washington, I intentionally book flights that require layovers in the middle of the country so that I will not have to deprive myself of using a lavatory on a cross country flight. Even then, I only allow myself to begin rehydrating once the flight is approximately 30 minutes from landing.

GAO has been in contact with PVA regarding our efforts to improve access to lavatories for people with disabilities. We are pleased that the unique needs of passengers with limited mobility have been included in the broader discussion about the accessibility of lavatories for all passengers. The dignity of being able to access a lavatory cannot be underestimated and should not be measured against the cost of doing so. If lavatories are going to be made available on commercial aircraft, then they should be accessible to all passengers.

We also hope that Congress will hold DOT accountable for meeting requirements in Section 2108 of the FAA Extension, Safety, and Security Act of 2016 (Public Law 114-190) to promulgate a rule regarding the accessibility of lavatories on single-aisle aircraft. To date, DOT has failed to publish a rule despite being given a deadline of July 2017 to do so. Access to lavatories was also the subject of a DOT negotiated rulemaking in 2016. In December 2016, DOT formally announced that the committee charged with the negotiation, comprised of disability advocates, air carriers, and aircraft manufacturers, had come to an agreement that would ultimately lead to accessible lavatories on single-aisle aircraft.

Despite promises from DOT to move forward with an agreement, and a congressional requirement to publish a supplemental notice of proposed rulemaking, DOT has yet to publish the rule.² Although DOT is planning to publish two rules by the end of the year regarding lavatory accessibility, the one regarding full access to lavatories will be an advance notice of proposed rulemaking regarding the cost benefit of requiring fully accessible lavatories.³ PVA believes that when industry and consumers agree on a proposed course of action, as they did with the negotiated rulemaking, that DOT should remove bureaucratic hurdles and move forward with those agreements.

The disability-related provisions in the FAA Reauthorization Act and the study on lavatory access represent an important step forward in efforts to improve the air travel experience of passengers with disabilities. However, more work remains to be done. Thus, we are proud to strongly support the Air Carrier Access Amendments Act, H.R. 1549, which was introduced in March by Rep. Jim Langevin (D-RI). This legislation would greatly improve accessibility within aircraft and strengthen enforcement of the ACAA.

² PVA filed a lawsuit in the U.S. Court of Appeals for the Tenth Circuit in July 2018 to compel DOT to publish the rule as agreed to during the negotiated rulemaking.

³ PVA's litigation is stayed pending DOT's promise to publish a notice of proposed rulemaking on short-term accessibility improvements and an advance notice of proposed rulemaking on long-term accessibility requirements.

The Americans with Disabilities Act ensures access to mass transportation in the United States. Aircraft, however, are only covered by the ACAA and have very limited accessibility features for people with disabilities. Neither passenger seats nor the path to reach them meet any accessibility standards, other than a requirement for lowering of armrests on some seats. PVA believes that standards for new aircraft are necessary to ensure a future with aircraft that will meet the needs of passengers with disabilities and our aging population. Only when they are able to independently access aircraft without depending on unsafe, inefficient assistance will air travel truly be a viable option for all Americans.

One of the most important changes needed to the ACAA statute concerns enforcement of its civil rights protections. The statute must be amended to require DOT to refer alleged violations that are matters of general importance to the Department of Justice. Furthermore, the statute must be amended to restore a private right of action for passengers with disabilities under the ACAA.

Unlike laws governing access for people with disabilities in other forms of transportation, the ACAA does not explicitly allow people with disabilities to enforce their civil rights, if needed, in a court of law. Prior to 2001, some courts⁴ had held that the ACAA allowed for a private right of action. Following the U.S. Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001),⁵ however, the Second,⁶ Fifth,⁷ Ninth,⁸ Tenth,⁹ and Eleventh¹⁰ U.S. Courts of Appeals have ruled that there is no private right of action under the ACAA. We believe that Congress must act to restore this right to paralyzed veterans and all passengers with disabilities.

We believe that pilots, flight attendants, gate agents and other carrier personnel want to do their best to assist all passengers, including those who have disabilities. However, as an industry, air carriers' policies, procedures, and business decisions often prevent passengers with disabilities from having a safe, satisfying air travel experience. We want air carriers to do the right thing. Many times, that means we need Congress and DOT to guide them.

PVA thanks you for this opportunity to express our views. We would be happy to answer any questions you may have.

⁴ The U.S. Courts of Appeals for the Fifth and Eighth Circuits had previously ruled that there is a private right of action under the ACAA. *Shinault v. American Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991) and *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989).

⁵ In *Sandoval*, the Court held that a private right of action should not be implied absent obvious congressional intent.

⁶ *Lopez v. Jet Blue Airways*, 662 F.3d 593 (2d Cir. 2011).

⁷ *Stokes v. Southwest Airlines*, 887 F.3d 199 (5th Cir. 2018).

⁸ *Segalman v. Southwest Airlines Company*, 895 F.3d 1219 (9th Cir. 2018).

⁹ *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004).

¹⁰ *Love v. Delta Airlines*, 310 F.3d 1347 (11th Cir. 2002).

Information Required by Rule XI 2(g) of the House of Representatives

Pursuant to Rule XI 2(g) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2019

Department of Veterans Affairs, Office of National Veterans Sports Programs & Special Events — Grant to support rehabilitation sports activities — \$193,247.

Fiscal Year 2018

Department of Veterans Affairs, Office of National Veterans Sports Programs & Special Events — Grant to support rehabilitation sports activities — \$181,000.

Fiscal Year 2017

Department of Veterans Affairs, Office of National Veterans Sports Programs & Special Events — Grant to support rehabilitation sports activities — \$275,000.

Disclosure of Foreign Payments

Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies.

DAVID ZURFLUH, NATIONAL PRESIDENT

David Zurfluh was re-elected national president of Paralyzed Veterans of America (Paralyzed Veterans) during its 72nd Annual Convention in May 2018, and took office on July 1, 2018.

Prior to becoming president in 2017, Zurfluh had served as national senior vice president since May 2015. A member of the Air Force from 1987 to 1995, Zurfluh served as a jet engine mechanic and a crew chief in Operation Desert Shield and Operation Desert Storm. He was injured in 1995 in a motor vehicle accident while on active duty in Hachinohe, Japan, suffering a shattered left arm, broken left wrist and a broken neck. He was diagnosed with incomplete quadriplegia spending one year as an inpatient, and two years as an outpatient in Seattle VA spinal cord injury unit.

Zurfluh joined Paralyzed Veterans in 1995. He has been active since 2003, with the Northwest Chapter. He has held chapter-level positions as legislative director, vice president, president, and member of the sports committee. Zurfluh currently serves on the National Board of Advisors of the Museum of Aviation Foundation. A native of Washington, he served on the Veterans Legislative Coalition in Olympia, WA, and served as co-chair of the West Slope Neighborhood Coalition in Tacoma, WA.

In addition to his work on behalf of Paralyzed Veterans, Zurfluh is a lector at Holy Rosary Church and volunteers at local food banks. His hobbies include handcycling, shooting sports (trap, handgun, and archery), golf and snow sports. President Zurfluh divides his time between Tacoma, Washington and Washington, DC.