ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1071

FLYERS RIGHTS EDUCATION FUND, INC, *et. al.,*
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al*.,
Respondents.

Petition for Review of Final Agency Action by the United States Department of Transportation

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REPLY BRIEF FOR PETITIONERS

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* Petitioners chiefly rely on these authorities in this brief.

GLOSSARY

APA	Administrative Procedure Act
CFR	Code of Federal Regulations
DOT	United States Department of Transportation
FlyersRights	Flyers Rights Education Fund d/b/a FlyersRights.org
JA	Joint Appendix
Rulemaking Petition	Petition for Rulemaking: Notice of Montreal Convention for Passenger Delay Rights to Airline Passengers Submitted by FlyersRights (October 5, 2015), JA 397-428
DOT Decision	Letter from Steven G. Bradbury, General Counsel, DOT to Paul Hudson, FlyersRights (Feb. 1, 2019), JA 543-44

SUMMARY OF THE ARGUMENT

Contrary to the assertion of the Department of Transportation ("DOT"), Petitioner Flyers Rights Education Fund, Inc. ("FlyersRights") has associational standing because its members interact with the organization's leadership, guide the organization's activities and play a significant role in financing the organization's activities. Further, the record before this Court demonstrates, and DOT does not appear to dispute, that at least one FlyersRights member, Leopold de Beer, suffered an injury in fact from the lack of adequate disclosure of passenger rights, under the Montreal Convention, to compensation for delay in international air travel.

On the merits, DOT contends, first, that airlines cite the literal disclosure language of the Montreal Convention in their contracts of carriage and are required to repeat the same language in notices on tickets and at ticket counters. But this language states only that there is a treaty and that it limits the liability of airlines. The language says nothing at all about the *existence or nature* of any passenger rights to compensation for delay. DOT's reliance on this language as the basis for concluding that current disclosure requirements are adequate is manifestly not reasoned.

Second, DOT argues that the evidence of consumer confusion presented by FlyersRights is insufficient. The key evidence, however, is the language of

the airline contracts of carriage, which on its face obfuscates and conceals the nature of international passenger rights to compensation for delay. DOT suggests that the relevant language has been approved by the agency and does note the existence of passenger rights. But in its decision denying the Rulemaking Petition, DOT failed to consider that the contracts of carriage do not accurately or adequately inform passengers of the nature of their rights. More importantly, DOT simply overlooked the contradictory and confusing language in those same contracts –language with the manifest intent and effect of confusing passengers and preventing them from understanding the nature of their rights.

Finally, DOT has failed to provide any rational basis for its decision to regulate disclosure of information about compensation for lost or damaged baggage, but not for passenger delay.

For these reasons, DOT's decision was not reasoned. It has relied on facts—language supposedly actually telling passengers about their rights—that do not exist and therefore are not in the record. And the agency has not explained what policy consideration, if any, underlies its decision to allow these deceptive and misleading practices of the airlines to continue.

ARGUMENT

I. PETITIONERS HAVE DEMONSTRATED STANDING TO PETITION FOR REVIEW

In challenging the standing of Petitioner FlyersRights to pursue review in this Court, the Department of Transportation ("DOT") contends first, that Petitioner Flyers Rights Education Fund, Inc. ("FlyersRights") does not have "members" on whose behalf it can assert associational standing; and second, that Robert Lax, one of the two FlyersRights members that submitted sworn declarations in support of Petitioners' opening brief, has suffered no injury in fact because his injury arises from issues he dealt with on behalf of his parents. (Brief for Respondents, Doc. No. 1804779, filed September 3, 2019 ("DOT Br.") at 24-30).

Associational standing requires an organization to establish that it "actually has… members," or at least is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002). An organization must then establish standing by showing a cognizable injury to one or more of its members. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342–43 (1977). An association has standing to sue on behalf of its members "when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c)

neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 344.

A. FlyersRights Has Members, and Is the Functional Equivalent of a Traditional Membership Organization

The ability to assert associational standing is not limited to organizations with a formal membership structure. An organization can still have associational standing if it "is the functional equivalent of a traditional membership organization." *Fund Democracy*, 278 F.3d at 25 (citing *Hunt*, 432 U.S. at 343–45). The court in *Hunt* identified several criteria that should be used to determine whether a non-membership organization sufficiently represents its constituents' interest to be able to bring suit on their behalf. These "indicia of membership" are: whether the members play a role in selecting the organization's leadership, guiding the organization's activities, and financing the organization's activities. *Hunt*, 432 U.S. at 344–45.

Lack of member voting rights does not in itself preclude a finding that the organization has associational standing. *Citizens Coal Council v. Matt Canestrale Contracting, Inc.*, 40 F.Supp.3d 632, 640 (W.D. Pa. 2014). Further, "[c]orporate formalities and formal membership structure are not constitutional requirements for associational standing." *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F.Supp.2d 663, 675 (E.D. La. 2010). However, associational standing has been denied to organizations whose "members" are mere customers or subscribers.

See, e.g., Gettman v. DEA, 290 F.3d 430, 435 (D.C. Cir. 2002) (readers of magazine were not members for associational standing purposes); *Fund Democracy*, 278 F.3d at 25–26 (D.C. Cir. 2002) (past work with groups of individual investors did not render the investors "members" of Fund Democracy); *Am. Legal Found. v. FCC*, 808 F.2d 84, 89–90 (D.C. Cir. 1987) (viewers who merely watch the news regularly were not members of media watchdog group for associational standing purposes). The courts have required a level of mutual interaction between the organization and individual members to invoke associational standing. That requisite level of mutual interaction exists in this case.

Though not a traditional membership organization, FlyersRights does have sufficient "indicia of membership" to invoke associational standing. Members interact with the organization's leadership, guide the organization's activities, and finance the organization's activity. *See* Supplemental Declaration of Paul Hudson ("Hudson Supp. Decl."), Standing Evidentiary Addendum hereto.[1] FlyersRights

[1] DOT avers that Petitioners are not permitted to submit facts relevant to standing after the opening brief. However, the court has allowed parties to submit additional substantiation of standing in the reply when parties "reasonably assumed that [their] standing was self-evident" from the administrative record. *Am. Library Ass'n v. F.C.C.*, 401 F.3d 489, 494 (D.C. Cir. 2005). Here, along with the Petition, FlyersRights submitted an appendix providing background on the organization relevant to standing, as well as emails submitted from FlyersRights members alleging concrete harm. (Rulemaking Petition Appendix 1, JA 414; Petition Appendix 5, JA 423-28). Further, the Supplemental Declaration is not being used to "propose a new theory of injury," its sole purpose is to provide further evidence of

operates a hotline for airlines passengers, run by the Board of Directors and staffed by volunteers from the membership. (Hudson Supp. Decl. ¶ 3). FlyersRights frequently polls members on issues important to them as commercial airline passengers, in order to determine which policy issues and types of action FlyersRights will pursue on their behalf. (Hudson Supp. Decl. ¶ 4). FlyersRights leadership also considers the petitions members have signed when determining issues and policies to pursue on their behalf. (Hudson Supp. Decl. ¶ 5). The structure of the organization enables FlyersRights members to have direct input, and member input in fact guides the organization's activity. (Hudson Supp. Decl. ¶ 4-5). Further, a majority of FlyersRights' funding comes directly from its members, and most of the organization's members have contributed some amount of money to support FlyersRights' advocacy effort. (Hudson Supp. Decl. ¶ 6).

As an organization, FlyersRights is similar in these respects to the American Association of Retired Persons, a nonprofit organization advocating and serving the interests of senior citizens, which was found to have sufficient associational standing. *AARP v. EEOC*, 267 F. Supp. 3d 14, 23 (D.D.C. 2017). FlyersRights members may "play less of a role in the running of the organization" than members

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FlyersRights' organizational structure and activities in order to bolster the argument made in the opening brief that FlyersRights has standing to petition DOT for review. *See Twin Rivers Paper Co. LLC v. Sec. & Exch. Comm'n*, 934 F.3d 607, 614–16 (D.C. Cir. 2019).

or more traditional membership organizations, but like AARP members they are more than mere customers or subscribers – they participate in the organization. *AARP*, 267 F. Supp. 3d at 23. Like AARP members, FlyersRights members participate in polls that guide the organization's activities. *See AARP v. EEOC,* 226 F. Supp. 3d 7, 17 (D.D.C. 2016) ("… AARP's members play a role in guiding AARP activities by participating in various annual opinion polls and surveys, which are designed to solicit member input on AARP policy positions, and through participation in AARP's various policy committees, which advise the Board of Directors through the National Policy Council"). Like AARP members, *id*. at 17, FlyersRights members play a role in in financing the organization's activities. Importantly, as the Court acknowledged in both *AARP* cases, allowing only organizations with a formal membership structure to assert associational standing would set an undesirable precedent: "[T]he Court is wary of a ruling that would bar not only AARP from asserting associational standing, but also bar other repeat litigators whom courts have routinely held are able to assert associational standing as 'traditional membership organizations.'" *AARP*, 267 F. Supp. 3d at 23.

FlyersRights is also similar, in the relevant respects, to Louisiana Bucket Brigade ("LBB"), a nonprofit environmental organization found to have associational standing in *Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd*., 365 F. Supp. 3d 118, 122 (D.D.C. 2019). LBB's membership was

made up of contributors to the organization, volunteer air samplers, members of local community groups, and the organization's officials. *Air All. Houston* at 122. Although members of LBB lacked the level of governance found in some other membership organizations, "that fact is not fatal." *Id.* at 129. In LBB, a subset of members, namely the board members and executive director or president, exercised the governance function of the organization. *Id*. The same is true of FlyersRights. (Hudson Supp. Decl. ¶¶ 1, 3). Members of LBB fund the organization through voluntary contributions. *Id*. That is also the case with FlyersRights. (Hudson Supp. Decl. ¶ 6). As with FlyersRights, there is "little doubt that LBB's fortunes are tied to those of its constituency." *Id.* The LBB Court found that those qualities were sufficient to find that LBB had associational standing. *Id.*

DOT also questions the membership status of FlyersRights members Leopold de Beer and Robert Lax. (DOT Br. at 27). Although Petitioners do not allege Mr. de Beer and Mr. Lax are involved in the organization's leadership, their active participation in the organization is sufficient. "Declarant A has as much right to participate in the activities that the Court identified as any other member…, and courts do not appear to analyze to what extent an identified member partakes in membership activities in determining whether an organization has associational standing." *AARP,* 267 F. Supp. 3d at 23. Practically, it would subvert the purposes

of associational standing if only a select few highly-involved members were considered to be "member enough" to sustain standing.

B. FlyersRights Members Have Demonstrated Cognizable Injuries Sufficient to Confer Standing

An organization must establish standing by showing a cognizable injury to one or more of its members. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342–43 (1977). To have standing in his own right, at least one member must demonstrate an "injury in fact," meaning a particularized, actual or imminent invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

DOT apparently does not take issue with the injury in fact asserted by FlyersRights member Leopold de Beer—that he personally experienced a seven-hour delay on a Delta international flight and was unaware of his rights to compensation for such delay. (Declaration of Leopold de Beer, Petitioners' Opening Brief, Doc. #1797012, Standing Evidentiary Addendum Ex. 1 ¶¶ 2-3, 5; *see* original e-mail from De Beer to Hudson, Rulemaking Petition Appendix 5, JA 427). Associational standing requires only that ***one member*** demonstrate an injury in fact. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("The association must allege that its members, ***or any one of them***, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit") (emphasis added).

DOT challenges the injury in fact alleged by FlyersRights member Robert Lax, because his declaration "does not state at any point that Mr. Lax himself has suffered any flight delays that would be compensable under the Montreal Convention, or that he will do so in the future." (DOT Br. at 28). Mr. Lax's Declaration evidences two points. First, he was personally injured by having to spend his own time dealing with the delay issues on behalf of his parents, including negotiating relief directly with American Airlines. (Petition Exhibit 5 at 32). Second, Mr. Lax's Declaration shows that even a person with legal training, in this case with a specialization in public international law, can be unaware of the passenger rights under the Montreal Convention. (Petitioner's Opening Brief, Standing Evidentiary Addendum, Lax Decl. ¶¶ 2-5).

Mr. de Beer and Mr. Lax have demonstrated injuries that are caused by DOT's failure to require airlines to provide adequate notice to passengers of their right to delay compensation under the Montreal Convention. The requested relief would redress the injuries to Mr. de Beer, Mr. Lax, and those of other FlyersRights members by compelling DOT to institute a rulemaking to ensure that airlines provide adequate notice to passengers regarding their rights.

Because FlyersRights has associational standing, FlyersRights members have established individual standing based on concrete injuries, and the interests at stake

are germane to FlyersRights' purpose, FlyersRights has have standing to bring this action.

II. DOT'S DECISION TO DENY THE RULEMAKING PETITION WAS ARBITRARY AND CAPRICIOUS

To be sure, judicial review of denial of a rulemaking petition is "extremely limited" and "highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat'l Customs Brokers and Forwarders Ass'n of American v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)). "Nonetheless, even with respect to a denial to engage in rulemaking, '[i]n these, as in more typical reviews . . . , we must consider whether the agency's decisionmaking was "reasoned."'" *New York v. EPA*, 921 F.3d 257, 261 (D.C. Cir. 2019) (quoting *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (internal quotation omitted)). FlyersRights agrees with DOT that, to set aside an agency's decision to deny a rulemaking petition, the Court "must conclude that [the agency] had not 'adequately explained the facts and policy concerns it relied on' or that those facts did not 'have some basis in the record.'" DOT Br. at 20 (quoting *New York*, 921 F.3d at 261 (internal quotations omitted)).

The law requires that, in carrying out its responsibilities to regulate air transportation, DOT "shall consider the following matters," including "preventing unfair, deceptive, predatory or anticompetitive practices in air

transportation." 49 U.S.C. § 49101(a)(9). The question in this case is whether DOT engaged in reasoned decision making, and adequately explained its decision, in deciding that its obligation to prevent unfair and deceptive practices does not require any regulation of the disclosure of passenger rights to compensation for delay in international air transportation.

In the Rulemaking Petition, FlyersRights presented compelling evidence of deliberate concealment and obfuscation, by commercial air carriers, of the *existence and nature* of those rights. DOT's response, set forth in a single paragraph in its decision to deny the Rulemaking Petition, was simply to assert that that carriers are adequately disclosing in their contracts of carriage, and in airport signage and ticket notices, "the availability of compensation for delays on international flights subject to the Montreal Convention." (DOT Decision, JA 543).

The problem is that this conclusion is belied by the actual language of the contracts of carriage and of the other signage and notices on which DOT relies. That language tells passengers only that there is such a thing as the Montreal Convention and that the liability of carriers is limited. It does not advise passengers in any way of the existence or nature of their rights. To the extent the contracts of carriage allude to the existence of such rights, they do so in a way calculated to conceal, deceive and confuse. DOT now offers three grounds

to support the agency's flat refusal to consider or come to terms with those facts. None of those grounds withstands scrutiny.

A. Parroting the Language of the Montreal Convention Disclosure Requirement Does Not Advise Passengers of the Existence or Nature of Their Rights

Article 3, paragraph 4 of the Montreal Convention provides that:

> The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage and for delay.

(JA 2). DOT contends that the airlines' contracts of carriage parrot this exact language and thus "provide the notice required by Article 3, paragraph 4 of the Montreal Convention, and therefore that rulemaking was unnecessary to enforce compliance with the Convention." (DOT Br. at 22). DOT notes that "[n]o further details are required by the Convention." (*Id*. at 21). DOT also notes that, as a result of a rulemaking concluded earlier this year[2], its rules now require carriers to include on the ticket or ticket envelope, and to be displayed at each ticket counter, language advising international passengers that "the provisions of an international treaty… as well as a carrier's own contract of carriage or tariff provisions, may be applicable to their entire journey. . . . The applicable treaty

[2] U.S. Dept. of Transportation, *Elimination of Obsolete Provisions and Correction of Outdated Statutory References in Aviation Economic Regulations, Final Rule*, 84 Fed. Reg. 15920-01 (April 16, 2019).

governs and may limit the liability of carriers to passengers for death or personal injury, destruction or loss of, or damage to, baggage and for delay of passengers and baggage." 14 C.F.R. § 221.105(a)(1); *see* DOT Br. at 23-25.

Even if this language complies with the Montreal Convention, it certainly does not show that carriers are providing "adequate notice regarding the availability of compensation for delays on international flights," as DOT claimed in denying the Rulemaking Petition. (DOT Decision, JA 543). To the contrary, informing passengers only that there is a treaty that limits the airline's liability manifestly does nothing to inform passengers that they have any rights to compensation for delay in the first place. This language on its face does not, as DOT would have it, "mention. . . possible rights under the Montreal Convention in the event of delay." (DOT Br. at 24). The language does not mention passenger rights at all. In short, the language does *nothing* to inform passengers of the existence of any rights, or of the *nature* of those rights, including such fundamental information as:

(i) The potential amount of compensation they could receive, in US dollars (now 4,694 Special Drawing Rights or $6,410 per passenger, unless the conduct was reckless in which case there is no limit on the amount of recoverable compensation; *see* Montreal Convention Articles 19, 22(1), (5) and 26, JA 4-5);

(ii) How they could obtain such compensation (by filing a claim with the airline and, if denied, by filing an action in U.S. District Court within two years of the delay; *see* Montreal Convention Article 35, JA 6);

(iii) That such compensation is on a quasi-no fault basis, with the burden on the carriers to show prevention or mitigation of delay could not reasonably have been avoided (Montreal Convention, Article 19, JA 4);

(iv) The nature of the damages that can be recovered (out of pocket expenses, lost earnings and other consequential damages, including physical injuries, but excluding emotional injuries. *E.g., Rubin v. Air China Ltd*., No. 5:10-CV-05110-LHK, 2011 WL 2463271 at *2-4 (N.D. Cal., June 21, 2011);

(v) That the Court may award litigation expenses in certain circumstances (Montreal Convention Article 22(6), JA 5); and

(vi) That any provision in a carrier's contract of carriage tending to relieve the carrier of liability or fix a lower limit on compensation than that set forth in the Convention, is null and void (Montreal Convention, Article 26, JA 50).

Thus, to the extent DOT relies on the requirement to parrot the Montreal Convention language as a requirement for "adequate notice" of passenger rights

to compensation for delay, that reliance is manifestly not "reasoned." It is irrational.

B. DOT Failed to Recognize That The Airlines' Contracts of Carriage On Their Face Conceal and Obfuscate Passengers' Montreal Convention Rights to Compensation for Delay

In its decision rejecting the Rulemaking Petition, DOT concluded that, "Our review of the contracts of carriage of several major U.S. carriers revealed that there was adequate notice regarding the availability of compensation for delays on international flights subject to the Montreal Convention." (DOT Decision, JA 543). DOT now defends that conclusion on two grounds.

First, DOT contends that FlyersRights' evidence of consumer confusion consists of e-mails from only seven individuals. (DOT Br. at 25-26). But these e-mails were never presented as any kind of comprehensive consumer survey. FlyersRights' evidence of consumer confusion consists of the contents of the contracts of carriage themselves and the absence of any other disclosure of passenger rights. The e-mails were submitted merely to illustrate the effects of the airlines' deceptive practices on consumers—for example, that even a lawyer experienced in public international law was unaware of any rights to compensation for delay under the Montreal Convention. (Declaration of Robert Lax, Petitioners' Opening Brief, Standing Evidentiary Addendum Ex. 2 ¶¶ 3, 5; JA 428).

Second, with respect to the airlines' contracts of carriage, DOT contends that the relevant language has been approved by DOT as part of a voluntary agreement among the airlines regarding rules for implementing the Montreal Convention. (DOT Br. at 29, citing DOT, *Order on Reconsideration in Air Transport Ass'n of American, Inc: Agreement Relating to International Air Carrier Liability Limits* (Oct. 26, 2006) (Supplemental Appendix ("Supp. App") 1-9)). This agreement does require the airlines to include in their contracts of carriage some information about passenger right to compensation for delay. But that information consists of a single sentence stating that the carrier "shall be liable for damages occasioned by delay in the carriage of passengers by air," followed by four paragraphs of dense legalese explaining everything for which the carriers will *not* be liable. *Implementing Provisions Agreement to be Included in conditions of Carriage and Tariffs Concerning Carrier Liability to Passengers*, § I(C), Supp. App. at 6.

Moreover, the language nowhere informs passengers of the maximum amount they can recover or how to obtain compensation; and the one reference to the nature of the damages that can be recovered is misleading and incomplete at best. That reference is language indicating that recoverable damages "include foreseeable compensatory damages sustained by a passenger and do not include mental injury damages." (*Id*. § I(C)(3), Supp. App. 6). In fact, passengers may

recover out of pocket expenses and the value of lost days at work, and for physical injury, but not for airfare or pain and suffering. *E.g., Rubin* 2011 WL 2463271 at *2-4.

More critically, DOT does not effectively defend the agency's decision simply to overlook contradictory and confusing language in those same contracts—language that has the manifest intent and effect of confusing passengers and concealing their rights. For example, while the Delta Airlines contract of carriage contains the language "blessed" by DOT (DOT Br. at 30), it also contains Rule 80(B), purporting to limit Delta's liability for compensation for passenger delay to a refund of the unused portion of the ticket, a voucher for one night's lodging under certain prescribed conditions, and ground transportation if a flight is diverted to a different airport. (JA 148-149). Under the Montreal Convention, Delta's obligation is not so limited; rather, passengers may recover monetary compensation for out of pocket expenses, lost days at work and for physical injury, up to the maximum allowed amount. Montreal Convention, Article 19, JA 4; *Rubin,* 2011 WL 2463271 at *2-4. Delta's contract of carriage also disclaims any liability in the case of "force majeure." (Rule 80(C), JA 148). The actual rule in the Montreal Convention, however, is very different: the carrier is relieved of liability *only* if "it proves that it and its servants and agents took all measures that could reasonably be required to avoid

the damage or that it was impossible for it or them to take such measures." (Montreal Convention Article 19, JA 4).

Thus Delta's contract of carriage contains detailed provisions directly contradicting its obligations under the Montreal Convention—obligations only vaguely alluded to elsewhere in the contract. DOT's response to this blatant obfuscation and concealment is simply to note that Delta's contract of carriage also alerts passengers that damages for delay "are subject to the terms, limitations and defenses set forth in the … Montreal Convention…." (DOT Br. at 30, quoting Delta Contract of Carriage, JA 130).

DOT itself acknowledges that the conflicting provisions "in no way limit Delta's liability and do not purport to displace the requirements of the Montreal Convention, which are specifically acknowledged in Delta's contract of carriage." (DOT Br. at 31). Acknowledged, yes, but not described or explained. And even if they were, how are passengers are supposed to figure out that they should actually ignore specific provisions of Delta's contract of carriage because they conflict with the Montreal Convention? The Convention itself provides that any term in an airline contract of carriage purporting to limit compensation to a level lower than that prescribed by the Convention is null and void. (Montreal Convention, Articles 26, JA 5). DOT's failure to acknowledge or address the inclusion of null and void terms in airline contracts of carriage

makes the agency a partner with the airlines in misleading the public about their Montreal Convention rights. The agency has not explained or justified that failure.

DOT suggests that evidence presented to an agency must be so compelling "'that it was irrational' for the agency not to address the matter in a rulemaking." DOT Br. at 28 (quoting *Capital Network Systems, Inc. v. FCC*, 3 F.3d 1526, 1533 (D.C. Cir. 1993)). In this case, the provisions in the airline contracts of carriage relating to compensation for passenger delay are blatantly misleading and deceptive, on their face. In denying the Rulemaking Petition, DOT flatly ignored the conflicting, confusing and misleading nature of the airline contract of carriage provisions. And in its Brief, DOT fails to explain how, given the contents of the contracts of carriage, the agency could rationally have concluded that the airlines are not "otherwise attempting to conceal information regarding delay compensation." (DOT Decision, JA 543).

For these reasons, DOT's decision was not "reasoned." The "facts" on which it purported to rely—language actually telling passengers about their rights—do not exists and therefore are not in the record. And DOT has not explained what policy consideration, if any, underlies its decision to allow these deceptive and misleading practices to persist.

C. DOT Has Failed to Explain Why Its Protection of Baggage Over People is Rational

DOT does not deny that it has regulated disclosure of information regarding compensation for lost or damaged baggage, but not for passenger delay. (DOT Br. at 33). Rather, DOT contends that it "was under no obligation to explain why it has engaged in adjudication and rulemaking concerning other aspects of the Montreal Convention but not passenger delay." (*Id.*). As FlyersRights argued in its Opening Brief, however, DOT is under an obligation to explain why it is somehow more important for passengers to know about their rights regarding compensation for loss or delay of baggage than about compensation for delay of their own persons on such flights.

DOT contends that it has engaged in rulemaking "requiring notice for both baggage and delay, treating them similarly." (DOT Br. at 33). That new rule, however, as noted above, does not advise passengers that they have any rights. DOT has issued guidance implementing passenger rights with respect to damage, delayed or lost baggage. *E.g., DOT, Providing Guidance on Airline Baggage Liability and Responsibilities of Code Sharing Partners Involving International Itineraries*, 74 Fed. Reg. 14837-02 (April 1, 2009). It has not done so in the case of passenger delay. Without explanation, the distinction is inherently arbitrary.

DOT suggests that an agency "'need not "make progress on every front before it can make progress on any front."'" DOT Br. at 33 (quoting *Competitive Enterprise Institute v. U.S. Dept. of Transportation*, 863 F.3d 911, 919 n.7 (D.C. Cir. 2017) (internal quotation omitted)). DOT has actually taken the opposite position in another case pending before this Court involving the same parties, challenging DOT's refusal to engage in rulemaking regarding international change fees. *Flyers Rights Education Fund v. Dept. of Transportation*, No. 19-1070. In that case, DOT has argued that it since it cannot regulate only those routes not subject to international agreements, it cannot regulate at all. *Flyers Rights Education Fund v. Dept of Transportation*, Case No. 19-1070, Brief for Respondents, Doc. #1802592 at 14-15 (D.C. Cir., filed Aug. 16, 2019). In any event, the lack of any rational explanation for promoting the protection of baggage over the protection of people is another factor rendering DOT's decision in this case not reasoned.

CONCLUSION

For the reasons set forth above and in Petitioners' Opening Brief, the Petition for Review should be granted and DOT's decision not to institute a rulemaking should be reversed and remanded.

Respectfully submitted,

/s/ Joseph E. Sandler

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Dated: October 4, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that the foregoing Reply Brief of Petitioners complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 4,997 words and was prepared in Microsoft Word using Times New Roman, a proportionally-spaced font.

/s/ Joseph E. Sandler
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CERTIFICATE OF SERVICE

I, Joseph E. Sandler, hereby certify that on this 4th day of October 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in this case who are registered CM/ECF users will be served by the CM/ECF system:

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SUPPLEMENTARY STANDING EVIDENTIARY ADDENDUM

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IN THE UNITED STATES COURT OF APPEALS
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Supplemental 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 ("FlyersRights"). I have been President of FlyersRights since 2013.
2. FlyersRights is the largest nonprofit airline passenger organization with over 50,000 members and supporters nationwide.
3. FlyersRights operates a toll-free hotline for airline passengers. This hotline is operated by the Board of Directors and is staffed by volunteers from the membership.
4. FlyersRights frequently polls members on issues of interest and their positions on these issues as commercial airline passengers. The results of the polls are distributed to the members and are used to guide the organization's

activity. The issues that are most important to members, including notice of passenger delay rights under the Montreal Convention, are the issues FlyersRights pursues.

5. FlyersRights leadership examines the petitions the members have signed in order to determine which issues and policies to pursue.
6. Many FlyersRights members have contributed some amount of money to support FlyersRights' advocacy effort. A majority of FlyersRights' funding comes directly from its members.
7. For the reasons explained above, FlyersRights has members, and operates for practical purposes as a membership organization.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on September 27, 2019 in Valatie, N.Y.

Paul Hudson

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