United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1070 **September Term, 2019**

FILED ON: February 4, 2020

FLYERS RIGHTS EDUCATION FUND, INC., D/B/A FLYERSRIGHTS.ORG AND PAUL HUDSON,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION AND ELAINE L. CHAO, IN HER OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF TRANSPORTATION,
RESPONDENTS

On Petition for Review of an Order of the Department of Transportation

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Before: GRIFFITH, SRINIVASAN, and KATSAS, *Circuit Judges*.

JUDGMENT

This case was considered on the record from the Department of Transportation and the briefs of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

ORDERED and **ADJUDGED** that the petition for review be **DENIED**.

Federal law allows the Department of Transportation (DOT) to prevent an airline from charging an unreasonable price for international air travel. *See* 49 U.S.C. §§ 41501, 41509. Flyers Rights Education Fund, Inc., a passenger advocacy group, and its president Paul Hudson petitioned DOT to use its pricing authority to regulate change fees for international flights. They asked DOT to issue a rule capping such fees at $100, "absent a convincing cost justification" in "specific flight circumstances." Petition for Rulemaking: Limitation on Change Fees for International Flights at 12, 16 (Feb. 11, 2015), J.A. 26, 30 (the "Petition").

DOT denied the petition. *See* Order Denying Petition for Rulemaking at 17 (Feb. 1, 2019), J.A. 146 (the "Order"). DOT explained that the proposed rule "would be inconsistent with the obligations of the United States under its international Open Skies agreements." *Id.* at 13, J.A. 142; *see also* 49 U.S.C. § 40105(b)(1)(A). Those bilateral agreements, which number more than

one hundred, require the United States to "allow prices for air transportation to be established by airlines"—not by government regulation. Order at 13, J.A. 142 (quoting Model Air Transport Agreement art. 12, ¶ 1, Jan. 12, 2012, J.A. 12). DOT also justified its denial on economic grounds, on the logic that higher change fees ultimately benefit passengers by allowing airlines to offer lower base fares. *Id.* at 15-16, J.A. 144-45. Flyers Rights and Hudson now ask us to review DOT's denial of their petition for rulemaking. *See* 49 U.S.C. § 46110(a).

DOT disputes Petitioners' standing to sue, an issue we must resolve before we reach the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). We hold that Paul Hudson has standing to sue. Hudson alleges that his job frequently requires him to take international flights, that "unavoidable change fees make [him] hesitant" to change those flights, and that expensive change fees have "caused [him] inconvenience in travel plans and wasted time and money." Pet'rs Br., Hudson Decl. ¶¶ 8-10. Those allegations suffice to establish injury-in-fact, as Hudson has demonstrated a substantial risk that expensive change fees will inconvenience him again. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). A regulation capping international change fees would make it less expensive and more convenient for Hudson to change his flights, rendering his injury traceable to DOT's action and redressable by a favorable judicial decision. Because Hudson has standing to sue, we need not decide whether Flyers Rights does as well. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

On the merits, our review of an agency denial of a petition for rulemaking is "extremely limited" and "highly deferential." *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007)). We "will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises." *Id.* at 653 (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989)). We are "particularly reluctant to compel rulemaking when the interests at stake are 'primarily economic,' as they are here." *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004) (quoting *Nat'l Customs*, 883 F.2d at 97).

Applying that extremely deferential standard of review, we find no error in DOT's conclusion that the Open Skies agreements bar the requested rule. None of Petitioners' arguments convince us otherwise. *First*, Petitioners compare their proposed rule to a DOT regulation that allows passengers to cancel their reservation "without penalty for at least twenty-four hours after the reservation is made." DOT Customer Service Plan, 14 C.F.R. § 259.5(b)(4) (punctuation omitted). If DOT can enact that rule without violating the Open Skies agreements, Petitioners say, DOT must be able to cap international change fees as well. *See* Pet'rs Br. 18.

Not so. The Open Skies agreements state that *prices* for air travel shall be established by airlines. DOT reasonably concluded that Petitioners' requested rule would violate the Open Skies agreements by requiring it to establish a price of $100 for international change fees. *See* 49 U.S.C. § 40102(a)(39) (defining "price" as "a rate, fare, or charge"); Model Air Transport Agreement art. 1, ¶ 8, J.A. 2 (same). The 24-hour cancellation rule, by contrast, does not require DOT to establish any price. It merely tells airlines to give passengers their money back. *See* DOT Br. 17.

That the 24-hour rule was issued under DOT's authority to regulate unfair and deceptive practices under 49 U.S.C. § 41712, not DOT's separate authority to regulate unreasonable prices under 49 U.S.C. § 41509, underscores the distinction. *See* 14 C.F.R. § 259.5; Order at 14 n.21, J.A. 143; DOT Br. 17-18.

Second, Petitioners observe that approximately 30% of flights from the United States depart for countries not party to an Open Skies agreement. *See* Pet'rs Br. 18-19 (citing U.S. DEP'T OF STATE, OPEN SKIES PARTNERSHIPS: EXPANDING THE BENEFITS OF FREER COMMERCIAL AVIATION (Sept. 16, 2016), https://2009-2017.state.gov/documents/organization/262234.pdf). Because "[n]othing prohibits federal agencies from moving in an incremental manner," Petitioners say, DOT could have regulated change fees for flights to or from those countries. Pet'rs Reply 17 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009)); *see also* Pet'rs Br. 18-20. Petitioners' reliance on *FCC v. Fox* is misplaced. That case permits, but does not require, an agency to act incrementally. And DOT need not explain why it declined to adopt a rule quite different than the one Petitioners proposed, which would have covered all international flights, not 30% of them.

Third, Petitioners argue that certain Open Skies agreements, including the United States' agreement with Canada, expressly allow DOT to protect consumers from unreasonably high prices. *See* Pet'rs Br. 20-22 (citing Air Transport Agreement, U.S.-Can., art. 6, ¶ 1(b), Mar. 12, 2007, https://2009-2017.state.gov/documents/organization/114887.pdf). But those agreements also contain "double-disapproval" provisions, which state that neither country "shall take unilateral action" regarding an unreasonably high price. Air Transport Agreement, U.S.-Can., art. 6, ¶ 3. Under a double-disapproval regime, prices can be regulated only "via cooperative diplomatic avenues—not unilateral action," such as the rulemaking Petitioners request. DOT Br. 16.

Fourth, Petitioners argue that the Model Air Transport Agreement, on which many Open Skies agreements are based, "appears" to permit the regulation of international change fees. Pet'rs Br. 22. They cite the following provision: "Nothing in this paragraph shall limit the rights of a Party to require airlines . . . to adhere to requirements relating to the protection of passenger funds and passenger cancellation and refund rights." *Id.* (quoting Model Air Transport Agreement art. 2, ¶ 5, J.A. 4). DOT, noting the repeated use of the word "charter" in the paragraph in question, says the quoted language concerns cancellation and refund rights for charter flights only. *See* DOT Br. 18. That plausible interpretation is bolstered by another provision of the Model Agreement, which links the aforementioned "cancellation and refund rights" to charter flights more explicitly. *See* Model Air Transport Agreement art. 8, ¶ 4, J.A. 8 ("An airline of a Party may engage in the sale of air transportation in the territory of the other Party . . . except as may be specifically provided by the *charter* regulations of the country in which the *charter* originates that relate to *the protection of passenger funds, and passenger cancellation and refund rights*." (emphases added)).

In the end, none of Petitioners' Open Skies objections provide the compelling cause we require to overturn a denial of a petition for rulemaking. Because we will "uphold an agency action resting on several independent grounds if any of those grounds validly supports the result," *Pierce*

v. SEC, 786 F.3d 1027, 1034 (D.C. Cir. 2015), we decline to reach Petitioners' challenge to DOT's economic justification for denying their petition.

For the foregoing reasons, we deny the petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk