DOT LITIGATION NEWS

Office of the General Counsel

Paul M. Geier *Paul M. Geier*
Assistant General Counsel for Litigation and Enforcement

Peter J. Plocki *Peter J. Plocki*
Deputy Assistant General Counsel for Litigation and Enforcement

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Telephone: (202) 366-4731
Fax: (202) 493-0154

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Glossary of Commonly Used Abbreviations

APA	Administrative Procedure Act
CAA	Clean Air Act
CWA	Clean Water Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ROD	Record of Decision

Supreme Court Litigation

Supreme Court Finds City of Austin's On-/Off-Premises Distinction for Signs to be Content Neutral

On April 21, 2022, the U.S. Supreme Court held in City of Austin v. Reagan National Advertising of Austin, LLC, et al., No. 20-1029 (U.S.) that the distinction between on-premises signs and off-premises signs in the city of Austin's sign code is facially content-neutral and therefore not subject to a strict scrutiny analysis under the First Amendment.

The case concerned the constitutionality of a provision in the City of Austin's sign code that allows the digitization of signs that advertise activities on the premises where the sign is installed but prohibits the digitization of other off-premises signs. In 2017, Reagan National Advertising applied to the City of Austin to digitize its existing off-premises non-digital billboards, and the City of Austin denied the applications. Reagan National Advertising sued the City of Austin, arguing that the code violated the First Amendment because the distinction of what signs could be digitized is content based and therefore subject to strict scrutiny.

The Court noted that a regulation of speech that is facially content-based is subject to strict scrutiny if it targets speech based on its communicative content. The Court found, however, that the City of Austin's off-premises distinction requires an examination of speech only for purposes of drawing location-based lines and was agnostic as to content. In doing so, the Court rejected the idea that provisions that require any examination of speech, such as whether a sign is physically located at the same place as its subject content, automatically trigger strict scrutiny. Instead, the Court found that the City of Austin's provisions do not single out any topic or subject matter for differential treatment based on the sign's substantive message. The Court also considered the fact that "for the last 50-plus years, federal, state, and local jurisdictions have repeatedly relied upon on-/off-premises distinctions to address the distinct safety and [a]esthetic challenges posed by billboards and other methods of outdoor advertising." In doing so, the Court suggested that such a distinction would not trigger strict scrutiny.

The United States had submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered by the federal Highway Beautification Act, FHWA's regulations implementing the Act, and related state laws. The brief had argued that if the Court decided that the determination of what signs can or cannot be digitized is subject to strict scrutiny, then the vast majority of states that have similar content-based distinction laws would need to revise those laws.

Equally Divided Supreme Court Affirms Seventh Circuit in Case Interpreting When a Locomotive Is "In Use"

On April 28, 2022, one month after hearing oral argument, an equally divided Supreme Court affirmed without opinion the judgment of the U.S. Court of Appeals for the Seventh Circuit in LeDure v. Union Pacific Railroad

Co., No. 20-807 (U.S.). (Justice Barrett took no part in the consideration or decision of the case.) The issue before the Court was whether a locomotive is "in use," pursuant to the Locomotive Inspection Act (LIA) and its implementing regulations, when a train makes a temporary stop in a rail yard as part of a unitary journey in interstate commerce, or whether such use does not resume until the locomotive has left the yard as part of a fully assembled train. Petitioner Bradley LeDure sought review of a Seventh Circuit decision that affirmed a motion for summary judgment granted by the U.S. District Court for the Southern District of Illinois holding that a locomotive was not "in use" under the LIA when the locomotive was stationary, on a sidetrack, and part of a train that had not yet been assembled.

On November 9, 2021, in response to an invitation from the Supreme Court for the views of the United States, the Solicitor General's Office filed an amicus brief urging the Court to grant certiorari on the question related to whether a locomotive is "in use" under the LIA when it is stopped on a sidetrack of a railyard undergoing preparations for its next journey. The brief argued that the Supreme Court should grant certiorari because: (1) the Seventh Circuit erred in concluding that the locomotive was not "in use;" (2) the Seventh Circuit's decision was erroneous and inconsistent with Supreme Court precedents regarding when a rail vehicle is "in use" for purposes of the Safety Appliance Act (SAA); and (3) the disagreement among the courts of appeal as to when a locomotive is "in use" merited consideration by the Court. The Supreme Court granted the petition for a writ of certiorari on December 15, 2021.

The United States filed a merits amicus brief to protect its interests in railroad safety, which are furthered by the LIA and its implementing regulations. The United States asserted that a locomotive is "in use" when it is in a railroad's regular employment and service. The United States maintained that the text and history of the LIA support such a broad understanding of the term "in use." With respect to the locomotive on which petitioner fell and was injured, it was "in use" because the locomotive had not been withdrawn from service and was standing on a side-track undergoing preparations for its next movement in its journey. The United States further asserted that the Supreme Court's SAA precedents, which recognize that a rail vehicle is "in use" on a railroad's line whenever it is in the service of a railroad, even if the car is stationary on a sidetrack, awaiting assembly into a train, or otherwise between movements, also apply to cases brought under the LIA. The United States finally argued that the Seventh Circuit's narrow understanding of when a locomotive is "in use" was at odds with the Supreme Court's precedents, and the factors upon which the Seventh Circuit relied when making its determination did not support a finding that the locomotive had been withdrawn from the railroad's employment or service.

Supreme Court Denies Certiorari in Ninth Circuit FOIA Consultant Corollary Case

On January 10, 2022, the Supreme Court denied without comment plaintiff's Petition for Writ of Certiorari seeking review of an *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit interpreting FOIA's Exemption 5 as including the "consultant corollary." Rojas v. FAA, No. 21-1333 (U.S.). The Ninth Circuit's March 2, 2021, decision held that "intra-agency" includes "at least in some circumstances, documents prepared by outside consultants hired by the

agency to assist in carrying out the agency's functions." Rojas v. FAA, 989 F.3d 666 (9th Cir. 2021).

In 2014 and 2015, FAA used a biographical assessment as a selection tool for hiring applicants interested in becoming air traffic controllers. APTMetrics, FAA's contractor, created the biographical assessment, which was a computerized test designed to measure certain characteristics, such as self-confidence, stress tolerance, and teamwork. Plaintiff, Jorge Rojas, applied for an air traffic controller position but was rejected based upon his responses to the biographical assessment. Mr. Rojas then submitted a FOIA request seeking documents related to the biographical assessment, including documents created by APTMetrics. Mr. Rojas challenged the adequacy of FAA's search and three documents that FAA withheld under Exemption 5. FAA withheld the documents under the attorney work-product doctrine because the documents had been prepared by APTMetrics at the request of FAA's Office of Chief Counsel in anticipation of litigation. The U.S. District Court for the Central District of California upheld FAA's application of the consultant corollary, but the Ninth Circuit reversed and declined to adopt the consultant corollary. FAA sought rehearing *en banc*, which the Court granted on January 20, 2020.

In a 7-4 opinion, the court joined six other circuits by adopting the consultant corollary. The main question for the court was whether documents created by FAA's contractor were "intra-agency" memoranda or letters and thus protected from disclosure. Looking to FOIA's context and purpose, the majority found that Exemption 5 seeks to shield privileged communications from disclosure to protect the internal decision-making process and allow frank discussion and candor. In light of this, the court could not imagine that Congress intended for Exemption 5 to only apply to communications authored by agency employees. In the majority's view, Congress had a broad understanding of "intra-agency," and thus "a fair reading of the term 'intra-agency'" encompasses a consultant hired by an agency to perform work in a capacity similar to that of an employee of that agency. However, the consultant must not represent its own interests when it advises a federal agency. In the court's view, the inquiry must be applied on a document-by-document basis, and the relevant inquiry is "whether the consultant acted in a capacity functionally equivalent to that of an agency employee in creating the document or documents the agency seeks to withhold." After conducting an *in camera* review of the three documents at issue, the court found Exemption 5 and the attorney work-product doctrine to apply to two documents, but remanded the third document, as FAA's declarations and Vaughn Index did not provide enough information for the court to make a determination on that document.

With regard to the adequacy of FAA's search, the court relied upon Supreme Court precedent in finding that FAA properly limited its search to records in FAA's possession and that FAA was not required to search APTMetric's records. However, the court found that FAA's declarations failed to provide sufficient information about how the search was conducted. The court remanded the case to the district court for further proceedings regarding the adequacy of FAA's search and the application of Exemption 5 to the third document at issue.

Rojas filed a Petition for Writ of Certiorari on July 29, 2021, which the government opposed. In opposing the grant of certiorari, the government primarily argued that further review was not warranted because there was

no split in the circuit courts on the "consultant corollary."

United States Offers Views in Supreme Court Aviation and Trucking Preemption Cases

On May 24, 2022, the Solicitor General, at the invitation of the U.S. Supreme Court, filed amicus briefs setting forth the views of the United States with respect to three pending certiorari petitions involving the parallel express preemption provisions of the Airline Deregulation Act of 1978 (ADA) and the Federal Aviation Administration Authorization Act of 1994 (FAAAA). Virgin America v. Bernstein, No. 21-260; California Trucking Ass'n v. Bonta, No. 21-194; C.H. Robinson v. Miller, No. 20-1425 (U.S.). The United States recommended that the Court deny certiorari in all three cases.

The ADA preempts state laws "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), while the FAAAA preempts state laws "related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property," *id.* § 14501(c)(1). Both statutes have been interpreted to extend to state laws with a "significant impact" on prices, routes, or services, but not to state laws whose effect on prices, routes, or services is "tenuous" or "remote." The preemption provisions contain certain exceptions: as relevant here, the FAAAA does not "restrict the safety regulatory authority of a state with respect to motor vehicles." *Id.* § 14501(c)(2)(A).

In Virgin America v. Bernstein, airlines ask the Supreme Court to review a decision by the U.S. Court of Appeals for the Ninth Circuit, which held that the ADA does not preempt the application to flight attendants of California rules requiring meal and rest breaks for employees. In its brief, the United States noted the Ninth Circuit's conclusion that California law could be satisfied by offering flight attendants in-flight breaks, and it explained that such breaks would only be allowed under FAA regulations if flight attendants could remain on call to respond to emergencies. The United States argued that if that view of California law was correct and underlay the Ninth Circuit's analysis, then the court's preemption conclusion was also correct because the airlines had not shown that a requirement to provide that type of in-flight break would have a significant impact on airline prices, routes, or services. The United States also argued that the airlines did not identify any decision of the Supreme Court or another court of appeals that conflicted with the Ninth Circuit's decision. The United States noted that the Court, as an alternative to denying certiorari, may wish to grant the petition, vacate the Ninth Circuit's judgment below, and remand for further consideration of California law and its interaction with FAA regulations.

In California Trucking Association v. Bonta, an industry group and others ask the Supreme Court to review a Ninth Circuit ruling that the FAAAA does not preempt the application to motor carriers of a California statute adopting the so-called "ABC" test to govern the classification of workers as employees or independent contractors. The United States argued that, even assuming the California law would require motor carriers to classify truck drivers as employees, the Ninth Circuit had correctly concluded that the petitioners had not demonstrated that the law would have a significant impact on prices, routes, and services. The United States also noted that the need to resolve a threshold issue of California law – whether motor carriers might be exempt from the "ABC" test under the California law's "business-to-business" exemption – makes the case a poor vehicle

for reviewing the question presented. And the United States argued that there is no circuit split warranting the Court's review.

In C.H. Robinson v. Miller, a freight broker asks the Supreme Court to review a Ninth Circuit decision holding that the FAAAA did not preempt a state common law tort claim brought by a driver injured in a collision with a tractor trailer. (The driver alleges that the broker negligently selected the truck's owner to carry goods for a shipping customer.) The United States argued that the Ninth Circuit correctly determined that plaintiff's claim, even if it otherwise would be preempted by the FAAAA, fell within the statute's exception covering "the safety regulatory authority of a State with respect to motor vehicles." The United States also noted that no other court of appeals has addressed this question and that the Ninth Circuit's decision does not conflict with any decision of the Supreme Court or another court of appeals.

Supreme Court Denies Review of Challenge to DOT's Handling of Consumer Complaints

On April 18, 2022, the Supreme Court denied a petition for writ of certiorari filed by Aaron Abadi relating to the enforcement of the Federal Transportation Mask Mandate. Abadi v. USDOT, No. 21-7372 (U.S.). This petition arose out of Abadi's previous petition for writ of mandamus, which he filed in the U.S. Court of Appeals for the Second Circuit, seeking to compel DOT's Office of Aviation Consumer Protection (OACP) to act on various consumer complaints that he had filed regarding airline masking policies and practices. Abadi, who had several dozen pending complaints to OACP, argued that he has a condition that prevents him from wearing a mask and that airlines had inappropriately required him to wear a mask or denied him a waiver. Such action, Abadi contended, violated a statute that DOT administers, the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, as well as DOT's implementing regulations, codified at 14 C.F.R. part 382. The ACAA prohibits airlines from discrimination on the basis of disability in air travel. Consistent with the ACAA, as well as with exceptions recognized by CDC in its mask mandate directives, DOT issued enforcement policy guidance in early 2021 making clear that airlines must continue to operate under ACAA requirements and must make allowances for passengers who cannot wear a mask due to a disability or underlying condition. Notice of Enforcement Policy: Accommodation by Carriers of Persons with Disabilities Who are Unable To Wear or Safely Wear Masks While on Commercial Aircraft (Feb. 5, 2021) (available at https://www.transportation.gov/sites/dot.gov/files/2021-02/Mask%20Notice%20Issued%20on%20Feb%205.pdf).

Before the Second Circuit, Abadi argued that DOT had not acted on his complaints and that the court should compel DOT to decide his complaints on the merits and take appropriate enforcement action. Abadi also sought a letter from DOT exempting him from mask requirements. The government argued in response that the extraordinary remedy of mandamus was unwarranted because Abadi's complaints were in the investigation stage; DOT had taken appropriate action to investigate Abadi's complaints consistent with the ACAA; and DOT was acting diligently to process a record number of consumer complaints that had caused a backlog during the Covid-19 public health emergency. The Second Circuit denied Abadi's mandamus petition in a summary order on December 29, 2021.

Departmental Litigation in Other Federal Courts

Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another

In Louisiana, et al., v. Biden, et al., No. 21-1074 (W.D. La.), ten states challenged Executive Order 13990 and the Interagency Working Group's Technical Support Document, which provided interim estimates for the social cost of greenhouse gases. DOT is one of many agencies that participates in the Working Group and was named as a co-defendant in this litigation. On February 11, 2022, the U.S. District Court for the Western District of Louisiana issued a broad preliminary injunction enjoining DOT and other federal agencies from relying upon Section 5 of Executive Order 13990. In granting the injunction, the district court held that the plaintiff states have standing, plaintiffs' claim are reviewable under the APA, and plaintiffs are likely to succeed on the merits because the President exceeded his authority in issuing Executive Order 13990, the interim estimates should have been issued through notice and comment procedures, and the interim estimates are arbitrary and capricious. 2022 WL 438313. On February 19, the government filed a Motion for a Stay Pending Appeal in the District Court and on March 1 filed an Emergency Motion for a Stay Pending Appeal in the U.S. Court of Appeals for the Fifth Circuit. Louisiana, et al., v. Biden, et al., No. 22-30087 (5th Cir.). On March 9, the district court denied the government's stay motion. However, on March 16, the Fifth Circuit granted the government's motion to stay the injunction pending appeal. The court found that the government is likely to succeed on the merits because the plaintiff states lack standing. 2022 WL 866282. The Fifth Circuit subsequently denied the states' motion for *en banc* review. The states filed an application with the U.S. Supreme Court to vacate the Fifth Circuit's stay, which the Court denied without noted dissent on May 26. The government's opening brief on the merits was filed on May 3. The states' response brief is due June 16, and the government's reply brief is due July 7.

On August 31, 2021, the U.S. District Court for the Eastern District of Missouri granted the government's Motion to Dismiss in Missouri, et al., v. Biden, et. al., No. 21-287 (E.D. Mo.). In this case, thirteen states filed a very similar lawsuit challenging Executive Order 13990 and the Interagency Working Group's Technical Support Document. The court noted that the "Interim Estimates, alone, do not injure plaintiffs. The injury that plaintiffs fear is from hypothetical future regulation possibly derived from these Estimates." Because plaintiffs' alleged injury was not concrete, the court found that plaintiffs lacked standing. In addition, the court found that plaintiffs' claims were not ripe as "there is 'considerable legal distance' between the adoption of the Interim Estimates and the moment – if one occurs – when a harmful regulation is issued." The court noted that plaintiffs "will have ample opportunity to bring legal challenges to particular regulations if those regulations pose imminent, concrete, and particularized injury."

The plaintiff states filed an appeal in the U.S. Court of Appeals for the Eighth Circuit and filed their opening brief on December 3. Missouri, et al., v. Biden, et. al., No. 21-3013 (8th Cir.). The government filed its response brief on February 16, 2022, and the states

filed their reply brief on March 15. Oral argument has been scheduled for June 16.

Briefing and Oral Argument Completed in Appeal of Dismissed Challenge to DOT's Rescission of Enforcement Procedure Regulations

After the completion of briefing, the U.S. Court of Appeals for the Sixth Circuit heard oral arguments on May 5, 2022, in Polyweave Packaging, Inc. v. USDOT, No. 21-5929 (6th Cir.), the appeal of a district court decision dismissing a lawsuit brought by a hazardous materials packaging manufacturer alleging irreparable harm as a result of DOT's rescission of certain enforcement procedures codified during the last Administration in 49 C.F.R. part 5, subpart D. Polyweave Packaging, Inc. v. USDOT, 2021 WL 4005616 (W.D. Ky. Sept. 2, 2021). This case concerned the lawfulness of the Secretary of Transportation's rescission of 49 C.F.R. §§ 5.53–5.111, , which were published in the Federal Register pursuant to Executive Order (EO) 13892.

EO 13892, issued in October 2019, outlined transparency and due process guidelines for federal agency enforcement actions. *See* EO 13892, 84 Fed. Reg. 55,239 (Oct. 9, 2019). That EO required "each agency that conducts civil administrative inspections" to publish rules of agency procedure within 120 days and follow those rules in subsequent enforcement actions. 84 Fed. Reg. at 55,241. On January 20, 2021, President Biden revoked EO 13892 through a new EO. *See* EO 13992, 86 Fed. Reg. 7049 (Jan. 20, 2021). The new EO commanded agencies to "promptly take steps to rescind any order, rules, regulations, guidelines, or policies . . . implementing or enforcing" the prior executive order. 86 Fed. Reg. at 7049. In response to the new EO, the Secretary of Transportation rescinded subpart D in its entirety. The Secretary determined that "[m]any of the policies and procedures" in subpart D "were prompted by executive orders that have since been revoked." 86 Fed Reg. 17,292, 17,292 (Apr. 2, 2021). The Secretary decided to rescind the remaining policies because they were "duplicative of existing procedures contained in internal departmental procedural directives" and did not need to be published in the Code of Federal Regulations to be effective. Id. at 17,293. He rescinded subpart D without notice-and-comment rulemaking. That rescission, and a then-pending PHMSA enforcement action against Polyweave Packaging, gave rise to this litigation.

In July 2020, prior to filing its lawsuit, Polyweave was the subject of an administrative proceeding that culminated in PHMSA issuing a final order and assessing a civil penalty against the company. Polyweave is currently appealing that final order in a separate challenge in the Sixth Circuit.

On May 19, 2021, Polyweave sued the Department for violation of the APA and for declarative and injunctive relief to prevent the Secretary from rescinding the Department's enforcement procedure regulations (49 C.F.R. part 5, subpart D). To support its standing in the case, Polyweave alleged that it is a target of an ongoing PHMSA enforcement action and that it will suffer irreparable harm without the Department's enforcement procedure rules. Polyweave contended the Secretary erred when he failed to account for, explain, or justify the rescission of those substantive rights in the final rule rescinding Subpart D. As the court noted in its opinion granting DOT's motion to dismiss, "[t]he gist of Polyweave's allegations is that Subpart D,

despite its label as a rule of agency procedure, provided several substantive rights to companies targeted in DOT enforcement proceedings."

Polyweave moved for an immediate injunction, and DOT filed a motion to dismiss in response on August 6, 2021. DOT asserted the following in support of its motion: (1) Polyweave lacked standing, (2) the court lacked subject matter jurisdiction, and (3) the Secretary's action is an unreviewable decision outside the scope of the APA.

On September 1, the district court granted DOT's motion to dismiss with prejudice on the grounds that plaintiff could not establish injury to confer Article III standing. In addition, the court stated that although not necessary for its decision, plaintiff's claims would fail because the court lacked subject-matter jurisdiction and because plaintiff could not establish that it was likely to succeed on the merits or suffer irreparable harm.

Polyweave appealed and filed its opening brief on November 15. Polyweave argues that the district court erroneously concluded that Polyweave suffered no Article III injury and alleged it had suffered four separate types of injuries, specifically, constitutional injury due to the Department's recission of its alleged rights to Brady disclosure under part 5, due-process violations, informational injuries because it is being denied exculpatory material in an ongoing enforcement proceeding, and pocketbook injuries related to its defense in the proceeding. In addition, Polyweave challenged the district court's denial of it request for injunctive relief.

DOT filed its response brief on January 19, 2022. DOT argued that the district court correctly held that Polyweave lacks Article III standing because the injuries it alleged are either insufficient, not ongoing, or too speculative. DOT argued that Polyweave's asserted procedural injuries do not support the requisite injury-in-fact requirement because Subpart D expressly disavowed the creation of any rights, and its recission cannot provide the procedural injury sufficient to support standing. Additionally, DOT argued that the constitutional right recognized under Brady v. Maryland does not apply to administrative proceedings and as such, Polyweave suffered no injury in fact from the recission of Subpart D's Brady provision.

Polyweave filed its reply brief on February 25, 2022. In its brief, Polyweave reasserted its standing to challenge Subpart D's recission. A decision from the Sixth Circuit is pending.

Petition for Review of PHMSA Administrative Enforcement Decision on Appeal Filed in the Sixth Circuit

On December 20, 2021, Polyweave Packaging, Inc. filed a petition for review in the U.S. Court of Appeals for the Sixth Circuit challenging PHMSA's October 18, 2021, administrative appeal decision upholding a non-compromise order in an enforcement action finding that the company committed four violations of the hazardous materials regulations and assessing a civil penalty. Polyweave Packaging, Inc. v. USDOT, No. 21-4202 (6th Cir.). Polyweave presented three main arguments in its April 14, 2022, opening brief. First, Polyweave argued that PHMSA failed to satisfy the federal hazmat law's "knowingly" standard to prove Polyweave violated the hazardous materials regulations. Second, Polyweave argued that the civil penalty assessed by

PHMSA was improper because the statute of limitations for enforcement of any civil penalty against the company expired in 2020. Third, Polyweave argued that PHMSA's administrative enforcement process deprived the company of its constitutional rights because the framework is structurally biased. DOT's response brief is due on July 28. On June 2, petitioner moved to consolidate this case with Polyweave Packaging, Inc. v. USDOT, No. 21-5929 (6th Cir.), discussed in the preceding entry.

Briefing Completed, Oral Argument Held in Challenge to FMCSA's Hours of Service Final Rule

On September 16, 2020, Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers, filed their opening brief in the U.S. Court of Appeals for the District of Columbia Circuit challenging FMCSA's June 2020 final rule governing the hours of service of truck drivers (HOS regulations), 85 Fed. Reg. 33,396, and FMCSA's August 2020 denial of petitioners' joint petition for reconsideration of the final rule. Advocates for Highway and Auto Safety, et al. v. USDOT, et al., No. 20-1370 (D.C. Cir.).

The final rule changed four provisions of the HOS regulations related to driving hours during adverse driving conditions, the use of sleeper berths to meet off-duty hour requirements, on-duty and geographic limitations for short-haul drivers who are exempt from electronic logging device requirements, and the requirement for drivers to take a 30-minute rest break.

Petitioners' opening brief challenges the final rule's latter two changes. Petitioners argue that FMCSA did not adequately consider the risks of allowing short-haul drivers to drive later in the workday and ignored one study that found drivers using the short-haul exemption have a higher crash risk than drivers not using the exemption. Additionally, petitioners argue that FMCSA did not justify its conclusion that the short-haul exemption changes will not adversely affect driver health or compliance with hours-of-service regulations. Further, petitioners argue that the agency ignored fatigue from non-driving tasks when it changed the 30-minute break requirement to include on-duty breaks and did not address the health effects of those changes.

Respondents' January 18, 2022, response brief argues: (1) petitioners failed to establish standing; (2) FMCSA reasonably determined that the short-haul and 30-minute break changes promote flexibility without adversely affected driver safety or health; and (3) petitioners' contentions do not demonstrate that the agency offered an inadequate explanation of the changes in the final rule.

The Owner-Operator Independent Drivers Association filed an Intervenor's Brief in support of the final rule on January 25, 2022, arguing that the changes to the final rule were common sense updates to the HOS regulations and were supported by ample evidence in the administrative record.

Petitioner's reply brief, filed on February 15, 2022, argues that petitioners have standing. Petitioners also repeat the arguments in their opening brief that FMCSA did not reasonably justify its conclusions that the short-haul and 30-minute break requirement changes would not adversely affect safety or

driver health. Oral argument was held on April 25.

Federal District Court Strikes Down Transportation Mask Mandate; Mask Litigation Continues

On April 18, 2022, Judge Kathryn Kimball Mizelle of the U.S. District Court for the Middle District of Florida issued a ruling that invalidated and vacated the Federal Transportation Mask Mandate (FTMM) and did so on a nationwide basis. Health Freedom Defense Fund, Inc. et al. v. Biden et al., No. 21-1693 (M.D. Fla.). As a result of Judge Mizelle's ruling, CDC and TSA are no longer enforcing the mask mandate, until and unless that adverse ruling is reversed on appeal.

The FTMM encompasses multiple orders and directives issued by the federal defendants in Health Freedom Defense Fund and other related cases. These include the President's Executive Order No. 13998, Promoting COVID–19 Safety in Domestic and International Travel, 86 Fed. Reg. 7205 (Jan. 26, 2021), as well as CDC's order, Requirement for Persons To Wear Masks While on Conveyances & at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021), and related TSA security directives. In general, the FTMM required face masks to be worn by all people while on public transportation (including all passengers and all personnel operating conveyances) traveling into, within, or out of the United States and U.S. territories. The mask mandate also required all people to wear masks while at transportation hubs (e.g., airports, bus or ferry terminals, train and subway stations, seaports, and U.S. ports of entry).

Various parties filed legal challenges to the mask mandate beginning in 2021. The first such case was filed by an individual, Lucas Wall, who also filed suit in the Middle District of Florida, though his case has been reviewed by a different judge in that jurisdiction. Wall v. CDC, et al., No. 21-975 (M.D. Fla.) (Byron, J.). Wall alleges that he is fully vaccinated against Covid-19 and is unable to wear a mask due to an anxiety-related condition, which prevented him from traveling on flights on several occasions over the past year. In particular, Wall contends that TSA and Southwest Airlines refused to allow him to board a flight originating in Orlando, Florida in early June 2021 due to his refusal to wear a mask. Since that time, Wall also argued that he had purchased additional tickets for travel to other locations over the ensuing months, which he has not been able to use due to the mask mandate. The district court denied various requests from Wall for emergency or other preliminary relief, and these denials were upheld by the U.S. Court of Appeals for the Eleventh Circuit and the U.S. Supreme Court in 2021.

Since Wall filed his original challenge, various other parties have also filed suits in other federal courts seeking to strike down and enjoin the government's enforcement of the FTMM. These suits have been filed by coalitions of states, led by Florida and Texas, as well as numerous individual travelers and organizations. Florida, et al. v. Walensky, et al., No. 22-718 (M.D. Fla.); Van Duyne v. CDC, et al., No. 22-122 (N.D. Tex.); Family Research Council, et al. v. Biden, et al., No. 22-209 (N.D. Tex.); Chenge v. CDC, et al., No. 22-165 (W.D. Mich.); Doe v. USDOT, et al., No. 22-402 (W.D. Pa.); Seklecki v. CDC, et al., No. 22-10155 (D. Mass.). DOT is a party to some, but not all, of these cases; the litigation is primarily directed at CDC and TSA, as those agencies' directives are at issue. However, DOT has coordinated with

the Justice Department and the other affected agencies in the defense of these cases, given our critical interests in the legal issues and in the enforcement of the mask mandate across the Nation's system of transportation. These cases are all in the preliminary stages.

In Health Freedom Defense Fund, the district court ruled on April 18, 2022, that the mask mandate is legally infirm and that it must be struck down, for several reasons. First, the court ruled that CDC had exceeded its statutory authority under the Public Health Services Act, reasoning that the mask mandate did not fall within the permissible realm of "sanitation" measures that CDC is empowered to direct. "Sanitation," the court concluded, refers in the Act only to cleaning measures, which masks do not accomplish. Second, the court held that CDC had not followed the typical notice and comment procedures for rulemaking under the APA and had not shown good cause for dispensing with such typical procedures in this instance. Finally, the court held that CDC's action was arbitrary and capricious under the APA, because CDC had not sufficiently explained its reasoning behind the mask mandate.
The United States filed a notice of appeal of Judge Mizelle's ruling to the U.S. Court of Appeals for the Eleventh Circuit on April 20, 2022. However, the government has not sought a stay of that ruling. The FTMM therefore remains invalidated and is not being enforced by federal agencies, pending the outcome of the appeal.

Notwithstanding Judge Mizelle's decision to strike down the mask mandate, on April 29, 2022, Judge Byron, also in the Middle District of Florida, issued a decision in the government's favor in Lucas Wall's related litigation. Judge Byron granted summary judgment to the government, ruling, contrary to Judge Mizelle's decision, that the mask mandate was an appropriate exercise of CDC's authority and expertise; that there was good cause to bypass typical notice and comment procedures; and that reviewing courts should defer to the expert agencies' judgments on matters of public health in response to the Covid-19 public health emergency. Wall filed a notice of appeal of this decision on May 4, setting up both Judge Mizelle's and Judge Byron's conflicting rulings for review in the Eleventh Circuit.

Apart from these district court cases, some of the same challengers have also sought review of TSA's actions in the courts of appeals. These have been consolidated for review in the U.S. Court of Appeals for the District of Columbia Circuit. Wall, et al. v. TSA, et al., No. 21-1220 (D.C. Cir.). Petitioners, acting *pro se*, filed their combined opening brief on April 19, 2022, arguing that TSA's masking directives violate various federal statutes and constitutional provisions. The government's response brief was filed on May 26, arguing that the court already determined in Corbett v. TSA, 19 F.4th 478 (D.C. Cir. 2021), that TSA's mask directives were a permissible exercise of its statutory and regulatory authority to issue security directives to protect transportation security and that petitioners' as-applied challenges to the directives are meritless because the directives do not prohibit individuals with disabilities from traveling.

DOT Files Counterclaim in Former Employee's Title VII Case

On February 11, 2022, DOT filed a counterclaim in Young v. Buttigieg, No. 19-1411 (N.D. Cal.), in which a former DOT employee filed an action in the U.S. District Court for the Northern District of California to pursue *de novo* review of her Title VII claims. Plaintiff Cheryl Young is a former employee of the Bureau of Transportation Statistics (BTS) who previously filed a

formal complaint of discrimination with DOT in January 2009 alleging that she was subjected to disparate treatment on the basis of her race and age, and in reprisal for prior protected activity. After conducting a hearing in August 2013, an Administrative Judge (AJ) from the Equal Employment Opportunity Commission (EEOC) issued a final decision in favor of Young, concluding that she had established race, age, and reprisal discrimination by a preponderance of the evidence. Among other relief, the AJ ordered DOT to restore Young to her former position in BTS and to pay her compensatory damages and her attorney's fees.

After DOT made payments of backpay, compensatory damages, and attorney's fees to Young in satisfaction of the AJ's order, Young filed an action seeking *de novo* review of the discrimination claims that were previously adjudicated before the AJ due to her dissatisfaction with the agency's implementation of the AJ's order. In addition, she also added two new claims, a non-selection claim and a constructive removal claim. On August 20, 2021, the government filed a motion to dismiss arguing, among other things, that Young must disgorge the payments she previously received before she can pursue *de novo* review of her discrimination claims. The court denied the government's motion to dismiss after concluding that Young's continued possession of the payments she previously received is not grounds for dismissal of her claim for *de novo* review. The court noted that since the Secretary had not yet asserted a claim against Young, he could not recover the funds at issue.

The court provided the Secretary with the opportunity to file a counterclaim and a request for preliminary relief to secure the funds at issue, which the government filed on February 11 and May 27, respectively. Young filed a motion to dismiss the government's counterclaim, arguing that the government had waived its right to pursue a counterclaim against her and the court's denial of the government's motion to dismiss estopped the government from pursuing a counterclaim against her for the funds at issue.

On May 10, 2022, the court denied Young's motion to dismiss, holding that the government's counterclaim of unjust enrichment is consistent with the court's order that permitted the Secretary to file "whatever claim the Secretary might have to Young's administrative award if Young fails to prevail in this action." In addition, the court denied Young's motion to dismiss the government's counterclaim under the Federal Debt Collection Procedures Act because Young did not contest that she would be required to return the funds at issue, and such an obligation would fall within the statutory definition of a "debt" under the Federal Debt Collection Procedures Act and be subject to the statute's "exclusive civil procedures" for collection.

The government filed a motion for preliminary relief to secure the funds at issue on May 27, and Young filed an Answer to the government's counterclaim on May 31.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Denies Airman's Petition for Review, Grants FAA's Cross-Petition

On May 10, 2022, the U.S. Court of Appeals for the D.C Circuit denied the petition for review and granted FAA's cross-petition in Pham v. NTSB, et al. and Dickson v. Pham, et al, Nos. 21-1062 and 21-1083 (D.C. Cir.).

On February 11, 2021, Ydil Pham filed a petition for review challenging NTSB's decision (NTSB Order No. EA-5889), issued on January 4, 2021, affirming the finding of the Administrative Law Judge (ALJ) that he refused a required drug test, for which the Board imposed a 180-day suspension of Pham's pilot and airman medical certificates. FAA cross-petitioned on March 5, 2021, seeking review of the NTSB order on grounds that, in modifying the NTSB ALJ's order of revocation to one of suspension, the Board failed to accord due deference to the Administrator's choice of sanction and departed from precedent without adequate explanation.

FAA had issued an emergency order revoking petitioner's airline transport pilot (ATP) certificate and airman medical certificates for refusing a pre-employment drug test in violation of 14 C.F.R. § 40.191(a)(2).

After a hearing, an NTSB ALJ affirmed the FAA's revocation order in its entirety and made a credibility-based factual finding that petitioner was advised by the test collector before he left the facility that doing so would be a refusal. Petitioner appealed the ALJ's decision to the full Board, challenging the ALJ's credibility findings, claiming that the ALJ inappropriately found petitioner refused a drug test as a matter of strict liability, and that the ALJ's finding that petitioner refused a drug test was contrary to precedent.

The NTSB found no merit to any of petitioner's claims and denied his appeal in its entirety. Although petitioner did not raise any issue regarding the appropriateness of revocation for refusing a drug test, the Board addressed the issue *sua sponte* and cited two "mitigating factors" it found warranted reduction of the sanction. Accordingly, the Board affirmed the finding that petitioner refused a drug test but imposed a 180-day suspension of his ATP and medical certificates instead of revoking those certificates.

Petitioner asked the court to vacate the NTSB's Order in its entirety. The FAA's brief argued in support of the Board's decision upholding the revocation of petitioner's pilot and airmen's medical certificate. However, FAA further argued that NTSB erroneously overturned FAA's choice of sanction by (1) acting contrary to law by not deferring to cross-petitioner's choice of sanction; (2) disregarding FAA regulations mandating ineligibility to hold an airman medical certificate for two years after a drug-test refusal; and (3) departing from its own precedent for consistently affirming revocation, even absent evidence of illicit use of drugs, when an airman argued he did not know that leaving constituted a refusal, and after an airman was not apprised of shy-bladder procedures.

In its May 10, 2022, decision, the D.C Circuit held that petitioner's challenge to the

NTSB's Order had no merit and upheld the NTSB's Order insofar as its finding that petitioner refused a required drug test in violation of FAA regulations. However, the court held that the NTSB's modification of FAA's revocation of petitioner's pilot and medical certificates to a 180-day suspension of those certificates was contrary to law and granted the FAA's cross-petition on the first two grounds raised in its petition.

First, with regard to the issue of deference, the court explained that "[b]ecause the Board essentially acts as a court in the split-enforcement regime with the FAA" akin to the one described in Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144 (1991), the NTSB's review of the FAA's choice of sanction must accord with the standard of review to which courts are bound on review of an agency's choice of remedy under American Power & Light Co. v. SEC, 329 U.S. 90, 112-13 (1946) (holding courts should not overturn an agency's choice of remedy unless it "is unwarranted in law or is without justification in fact"). Because FAA's choice of revocation was provided for by law and justified in fact, the D.C. Circuit held the NTSB failed to accord appropriate deference to the FAA's sanction on the reasoning it offered and therefore its modification of FAA's sanction was contrary to law.

Second, with regard to the NTSB's suspension of petitioner's medical certificate, the court held that the NTSB was required to apply the FAA's medical standards, which renders an airman who has refused a drug test ineligible for medical certification for two years. Because the NTSB imposed a sanction that was contrary to FAA's medical standards, the court held the NTSB's modification of the FAA's sanction was contrary to law.

The court did not reach the third issue raised in FAA's cross-petition – whether the NTSB's decision to modify the sanction departed from its precedent. The court noted that under Garvey v. NTSB, 190 F.3d 571 (D.C. Cir. 1999), the Board's role under the split-enforcement regime might necessitate that it deviate from its own precedent if FAA takes a different but reasonable position.

The court vacated the NTSB's order in part and remanded the matter, "instructing the Board on remand to manifest proper deference to the FAA's sanction choice and review only for justification in law and fact."

Warbird Adventures and FAA Agree to Dismiss Challenge to Limited Category Aircraft Flight Training Rule

By an agreement filed January 21, 2022, petitioners Warbird Adventures, Inc., and Thom Richard and respondent FAA have agreed to dismiss the petition for review, with all parties to bear their own costs. Warbird Adventures, Inc., et al. v. FAA, No. 21-1160 (D.C. Cir.). The court dismissed the case on January 24, 2022.

On July 30, 2021, petitioners had sought review of a letter to certain members of industry, signed June 6, 2021, by the Associate Administrator for Aviation Safety, and a Notification of Policy for Flight Training in Certain Aircraft, 86 Fed. Reg. 36,493 (July 12, 2021). Both documents provided clarification on flight training for compensation in certain aircraft that hold special airworthiness certificates including limited category, experimental category, and primary category aircraft. The notification also provided owners and operators of these aircraft a streamlined process for obtaining a letter of deviation authority to conduct flight training in their aircraft. A briefing schedule

had been established but was reset during mediation.

On April 2, 2021, the U.S. Court of Appeals for the D.C. Circuit dismissed an earlier petition for review brought by petitioners challenging an FAA emergency cease and desist order involving operation of their limited category aircraft. In an unpublished *per curiam* order, the court denied the petition because the aircraft was not certified for paid flight instruction and substantial evidence supported the FAA order.

Summary Affirmance Denied in Flyers Rights Appeal from FAA Win at D.C. District Court

Flyers Rights Education Fund, Inc. (FlyersRights) and Paul Hudson have appealed a decision of the U.S. District Court for the District of Columbia rejecting their challenge to FAA's withholding of Boeing 737 MAX certification records as confidential commercial information under FOIA Exemption 4 in response to their November 2019 FOIA request. Flyers Rights Education Fund, Inc. v. FAA, No. 21-5257 (D.C. Cir.). In Flyers Rights Education Fund, Inc. v. FAA, No. 19-03749, 2021 WL 4206594 (D.D.C. Sept. 16, 2021), the district court agreed with FAA's arguments that the records were "confidential" as defined by Exemption 4 and rejected plaintiffs' argument that FAA's general statements about its commitment to transparency qualify as an assurance that it would release specific proprietary documents to the public. The court also rejected plaintiffs' argument that the records should be released because they were necessary to enable outside experts to assess the safety of the 737 MAX's design change. Instead, the court found that the "importance" or "necessity" of information to external scrutiny is irrelevant to whether information is confidential commercial information under FOIA Exemption 4.

On January 31, 2022, FAA moved for summary affirmance in the D.C. Circuit, arguing that (1) the information in FAA and foreign government comments, including charts created jointly by Boeing and FAA and Boeing's descriptions of European Union for Aviation Safety Agency (EASA) comments on Boeing's certification documents, qualified for Exemption 4 protection because it was "obtained from a person"; (2) the court correctly found the withheld information "confidential" as defined in Exemption 4 in that Boeing's "means of compliance" were confidential and not a body of "secret law" and the withheld information was given to the Government under express and implied privacy assurances; and (3) FAA released all reasonably segregable non-exempt information.

On February 22, FlyersRights responded in opposition, arguing that (1) given FAA's public statements, Boeing could not have been assured that the records would remain private because both the FAA Acting Administrator and his appointed and confirmed successor emphasized openness, transparency, and scrutiny, and Boeing echoed those assurances; (2) the district court allowed FAA to withhold Boeing's "means of compliance," a body of "secret law," that is, "procedures that, if followed . . . [would] result in a determination of compliance"; (3) the comments FAA withheld were not "obtained from a person" because Exemption 4 encompasses only information received from persons outside the government, not information permitting extrapolation of their information, information produced by negotiation between them and the agency, or information "substantially reformulated by the agency"; and (4) the court erred in finding that FAA released all reasonably segregable

information and simply accepted FAA's affidavit without making specific findings as to segregability.

FAA filed its reply brief on March 1, and on April 14 the court summarily denied FAA's motion, finding that the merits of the parties' positions are not so clear as to warrant summary action.

Appellants filed their opening brief on May 26, in which they made the same four arguments set forth in their opposition to FAA's motion for summary affirmance. FAA's response brief is due June 24, and appellants' reply brief is due July 15.

IEX's Third-Party Claims against FAA and U.S. in Kobe Bryant Wrongful Death Case Dismissed without Prejudice

On January 3, 2022, the U.S. District Court for the Central District of California, dismissed without prejudice the third-party wrongful death claims by Island Express Helicopters (IEX) against FAA and the United States. Bryant v. Island Express Helicopters, Inc., No. 20-8953 (C.D. Cal.).

In Altobelli v. United States, No. 20-8954 (C.D. Cal.), filed September 30, 2020, IEX, operator of the flight in which Kobe Bryant and others were fatally injured after crashing, had filed a third-party wrongful death claim alleging Air Traffic Control negligence in handling the accident flight. The two air traffic controllers working the flight were sued in state court in their individual capacities. In September 2020, the United States and FAA were substituted as the third-party defendants, and the case was removed to the U.S. District Court for the Central District of California.

On October 19, 2020, defendants moved to dismiss, arguing that the state court lacked jurisdiction over plaintiff's claims, which should have been brought under the Federal Tort Claims Act, and therefore, the district court lacked jurisdiction under the derivative jurisdiction doctrine. The motion to dismiss, along with plaintiffs' motion to remand to Los Angeles Superior Court, was to have been heard on April 8, 2021, but the hearing was taken off the calendar on March 31, with instructions that "[a]n order with the court's rulings and setting case deadlines/dates will issue"; no such order, however, appears in the docket.

After consolidating related litigation consolidated under No. 20-8953, Bryant v. IXE, the court accepted a settlement agreement between plaintiffs and IEX and, pursuant to a December 6, 2021, stipulation of dismissal, entered on January 3, 2022, an Amended Order Dismissing Action. That order also states that "[t]here is no operative pleading against the government."

Briefing Complete in Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD

With briefing completed and oral argument held on June 6, 2022, a decision is pending in City of North Miami, et al. v. FAA, No. 20-14656 (11th Cir.), consolidating five petitions for review filed by North Miami, the Village of Indian Creek, Town of Surfside and Charles W. Burkett, the Village of Biscayne Park, the City of North Miami Beach, Friends of Biscayne Bay, and Maureen Harwitz, and the Town of Bay Harbor Islands.

On October 15, 2020, FAA issued a FONSI/ROD for the South-Central Florida Metroplex project, which includes 106

Standard Instrument Departures (SIDs) and Standard Terminal Arrivals (STARs) with 11 Area Navigation (RNAV) transition routes (T-routes) in a study area containing 21 airports. On December 11 and 14, five petitions for review of the FAA final order were filed on behalf of seven local governments, two residents, and one nonprofit corporation.

FAA is implementing the Next Generation Air Transportation System (NextGen), its plan to modernize the National Airspace System through 2025. NextGen intends to develop and implement new technologies, integrate existing technologies, and adapt air traffic management, which would evolve from primarily ground-based to satellite-based systems and achieve greater efficiency. The process involves RNAV, Required Navigation Performance (RNP) air traffic routes, SIDs, STARs, T-routes, and Standard Instrument Approach Procedures (SIAPs) that use emerging technologies and aircraft navigation capabilities. As part of the transition to NextGen, the FAA is implementing a mid-term step, the Project.

On May 11, 2020, FAA released a draft EA for public comment. Its purpose was to help FAA decide if the Project's implementation would cause significant impacts or have significant effects on the quality of the environment, thus requiring an EIS to more comprehensively and thoroughly analyze such impacts. On October 15, FAA issued the FONSI and approved the Project with a ROD, concluding that the Project would have no significant impacts. The first petition for review was filed on December 11.

Following a February 10, 2021, mediation assessment conference and FAA's February 19 filing of the certified index to the administrative record, the court granted, on April 6, respondents' motion to consolidate the cases.

Petitioners' October 27 consolidated opening brief argued that all petitioners have standing as a result of the air traffic control changes at area airports and the resulting increase of air traffic over the Towns in that they suffered concrete and particularized injury to their ability to manage infrastructure, protect and improve the environment, livability, and aesthetics of the Towns, protect their citizens' health, safety, welfare, and property values, which injuries are fairly traceable to the FAA Project because it increased aircraft noise and emissions and would be redressed by the court's favorable decision vacating or otherwise altering flight procedures under the project. As to the merits, petitioners argue that FAA violated NEPA by defining the purpose and need of the South-Central Florida Metroplex Project so narrowly that only one alternative to "no action" could fulfill that purpose, by not considering the cumulative impact of its past actions, and by improperly invoking a "Presumption of Conformity" that applies to air operations at 3,000 feet or more above the ground to avoid evaluating the air quality impacts of the project. Petitioners also argue that FAA's implementation of the Project violates the 14th Amendment due process rights of the individual petitioner and the citizens of the communities impacted by the Project by depriving them of a constitutionally protected liberty, their right to sleep.

FAA's February 9, 2022, response brief argues that the agency complied with NEPA by stating its purpose (correcting inefficiencies) and, in doing so, considered the alternatives of the status quo or interrelated procedures based on long-term design and public outreach; and, though none of the cited laws required it to do so, FAA did, where practicable, modify procedures to

reduce noise and omissions. As to claims that FAA did not consider noise impact of past actions, the agency argues that the baseline therefor considered existing noise, including from its past actions, which had not increased noise because they implemented procedures overlaying existing flight paths, updated charts without changing flight paths, or established flight paths too high to impact ground noise. As to CAA and NEPA requirements, FAA argues that it reasonably found no CAA violations or significant NEPA effects because the Project did not increase operations but modified flight paths for improved efficiency and, though it would slightly increase fuel burn over the "no action" alternative, most of the operational changes increasing burn would occur above 3,000 feet, with no impact on the ground. Asserting that petitioners ignored much of the FAA's Section 4(f) analysis, FAA argues that it did comply, thoroughly analyzing noise impacts, not only at Section 4(f) resources, but at points located every half-mile throughout the area potentially impacted, and found no significant noise increases. As to petitioners' procedural due process claim, FAA argues that the petitioners failed to establish standing because no declarations establish the requisite injury, and, on the merits, that the Fifth Amendment, not the Fourteenth Amendment relied upon by petitioners, applies to the federal government. In addition, procedural due process does not attach because the Project does not particularly affect petitioners, there is no particularized liberty interest in sleep free of incrementally increased airplane noise, the Project does not deprive petitioners of such an interest because any noise increase is marginal, and adequate opportunities for notice and comment and judicial review were available. Finally, FAA argues that, if legal error were found, the court should remand without vacating the Project because vacatur would be unnecessary and disruptive, and potentially could impact safety and efficiency.

Petitioners' March 9 consolidated reply brief claims that FAA did not comply with NEPA because its statement of purpose and need failed to include congressionally mandated goals concerning noise and emissions, was arbitrary and capricious, and foreclosed other reasonable alternatives. In addition, the EA failed to fulfill NEPA's requirement to include critical background information as to the cumulative effects of past actions and its use of existing noise levels as the baseline resulted in failure to capture impacts of its past actions. As to their procedural due process claim, petitioners argue that they had provided sufficient facts to establish standing, that their claim was supported by the record and authorities cited, and that the claim properly alleged that the Project deprived the individual petitioner and citizens of affected communities of their right to undisturbed sleep, in violation of their due process rights. As to analysis of air-quality impacts and resulting violation of CAA and NEPA requirements, petitioners claim that FAA failed to address their arguments that the agency did not fulfill its obligations under NEPA as to CAA compliance. Finally, petitioners argue that vacatur is appropriate because FAA knowingly and deliberately failed to address congressional mandates, and FAA can "safely and efficiently use the 2021 flight procedures" while it reevaluates the Project.

Decision Pending in Scottsdale PFR of FAA Decision to Halt Post-Phoenix Agreement Implementation

Briefing has been completed and argument has been heard by the U.S. Court of Appeals for the District of Columbia Circuit in the

City of Scottsdale's petition for review of FAA's departure procedures at Phoenix Sky Harbor Airport International Airport (PHX). City of Scottsdale v. FAA, No. 20-1070 (D.C. Cir.).

After the D.C. Circuit invalidated FAA's new Area Navigation (RNAV) departure procedures at PHX in City of Phoenix v. FAA, 869 F.3d 963 (D.C. Cir. 2017), as amended, 881 F.3d 932 (D.C. Cir. 2018), FAA agreed with the City of Phoenix to commit to public outreach about the proposed air-traffic procedures that prompted the litigation. As part of that agreement, FAA created and implemented RNAV overlays of original departure tracks to the west and, in 2019, solicited public comment from other communities on preliminary designs for changes to Phoenix airspace broader than the western departure corridors challenged in the City of Phoenix litigation. Those communities included Scottsdale, which submitted detailed proposals. FAA decided to take no further action and on January 10, 2020, announced the conclusion of its obligations under the agreement with the City of Phoenix. Petitioner believes it would benefit from some FAA proposals and wants the agency to proceed. FAA intends to design and implement new Performance Based Navigation procedures at PHX that, though not intended to provide Scottsdale noise relief, would in FAA's view effect that.

Responding to FAA's announcement that the post-Phoenix public engagement process (Step Two) was over and FAA would not implement further air-traffic procedures at PHX and neighboring airports under the agreement, petitioner sought review of FAA's decision under NEPA and other environmental and special-use statutes

Petitioner's May 10, 2021, corrected opening brief argues that FAA left in effect departure procedures not analyzed or coordinated under NEPA, the NHPA, or Section 4(f) of the Department of Transportation Act and improperly terminated its proposed actions to revise the procedures without environmental analysis and that the court should vacate the final order and remand the 2018 departure procedures because either FAA's January 10, 2020, decision or the publication of the departure procedures on May 24, 2018, is a reviewable order; (b) FAA failed to comply with the court's judgment on February 7, 2018, by failing to conduct an environmental analysis as to the eastern-flowing departure procedures; and (c) FAA's noncompliance had violated NEPA, the NHPA, and Section 4(f) by continuing procedures not environmentally reviewed and adopting a "no action" scenario without any environmental analysis.

FAA's October 22, 2021, response brief contends that (1) the agency's actions are not reviewable because petitioner lacks standing for lack of cognizable injury because most of the procedures either did not fly over or did not cognizably impact Scottsdale, the FAA announcement at issue was not a final order and the May 2018 order was challenged too late; (2) even if FAA's actions were reviewable, FAA did not violate the City of Phoenix decision and amended judgment because the former did not invalidate or find violations as to the 2014 eastern departure routes and the latter merely vacated "new flight departure routes"; and (3) FAA did not violate NEPA, the NHPA, Section 4(f), or the APA because no new environmental analysis was required in 2020 in that no procedures were ordered or implemented.

Petitioner's January 27, 2022, Reply Brief alleges that while the Phoenix decision vacated FAA's PHX flight departure routes and FAA entered into an agreement with Phoenix, FAA on remand failed to conduct

the additional analyses and consultations required by NEPA, the NHPA, Section 4(f), and FAA regulations as to both eastern- and western-flowing routes.

Oral arguments were conducted on March 21, 2022, before Judges Wilkins, Walker, and Randolph.

Flyers Rights Seeks Mandamus from D.C. Circuit as to Passenger Seat Width and Legroom

On January 12, 2022, Flyers Rights Education Fund, Inc. (FlyersRights) and Paul Hudson filed a Petition for a Writ of Mandamus in the U.S. Court of Appeals for the District of Columbia Circuit alleging that FAA's failure to initiate rulemaking to establish minimum seat size and spacing standards for passenger safety on commercial aircraft by October 5, 2019, as required by Section 577 of the FAA Reauthorization Act of 2018, 49 U.S.C. § 42301 note (Section 577 or 2018 Act), constitutes "agency action 'unlawfully withheld' and 'not in accordance with law,' 5 U.S.C. § 706," and entitles them to a writ compelling FAA to promulgate such standards by a date certain. Flyers Rights Education Fund, Inc., et al. v. Dickson, No. 22-1004 (D.C. Cir.). Petitioners point to the regulatory history, including (a) the 1967 rule (resulting from a 1965 accident with 43 fatalities) requiring that any airplane model with more than 44 passenger seats must permit complete evacuation within 90 seconds, with various test conditions, but not specifying point-to-point seat spacing ("seat pitch") or that test passengers reflect the flying public's average size, age, or abilities; (b) FAA's failure to require manufacturers to report data on seat dimension; and (c) the D.C. Circuit's July 2017 holding that FAA had "failed to provide a plausible evidentiary basis for concluding that decreased seat sizes combined with increased passenger sizes have no effect on emergency egress," Flyers Rights Education Fund, Inc. v. FAA, 864 F.3d 738, 744 (D.C. Cir. 2017), and remand, followed by FAA's July 2018 petition denial, in turn followed within four months by the 2018 Act.

On April 4, in response to the court's order for a response to the mandamus petition, respondents filed a Response in Opposition to Petition for Writ of Mandamus, arguing that the relief sought is unwarranted because (1) Section 577 only requires FAA "to seek public seek public comment with regard to safety issues posed by seat dimensions and then issue a rule if it concludes that promulgating standards is necessary for passenger safety," FAA continues to examine that relationship, and on March 31, 2022, reported to Congress the agency's "plans to seek public comment on the issue of minimum seat dimensions," after which it would consider the public comments in determining "minimum seat dimensions . . . necessary to ensure passenger safety"; (2) FAA has comprehensively regulated design standards to ensure that it cannot approve proposed seating configurations that prohibit "rapid evacuation in crash landings," including seating limits based on type and number of emergency exits, prescription of exit locations, minimum aisle width based on seating capacity, and seats per row; (3) experiences in actual and simulated evacuations that were cited in FAA's July 2018 denial on remand show that even if the seat is relatively narrow, and the passenger is relatively large, emergency evacuation time is not compromised; and (4) petitioners specified no egregious delay warranting the extreme remedy of mandamus.

Petitioners filed their reply brief on April 28.

Briefing Underway in Homeowner Challenge to Amazon Air Cargo Facility in Lakeland, Florida

In Lowman, et al. v. FAA, et al., No. 21-14476 (11th Cir.), five owners of residential property in Lakeland, Florida challenge FAA's October 29, 2021, ROD for approval of an Airport Layout Plan (ALP) for a Phase II Amazon Air Cargo Facility Development at the Lakeland-Linder International Airport. Petitioners filed their opening brief on April 19, and court-ordered mediation resumes in early June.

On October 29, 2021, the FAA approved a final EA and issued a FONSI/ROD. Though the project included other components, FAA found only four project elements subject to FAA's ALP approval under Section 163 of the FAA Reauthorization Act of 2018: construction of additional space for aircraft parking; construction of additional space for ground support equipment staging and parking; extension of a taxiway; and modifications to the Airport's storm-water management system. Petitioners allege that the ROD is arbitrary and capricious and not in accordance with the law because FAA failed to protect residents and property owners from the deleterious effects of aircraft noise as required by the Noise Control Act and the Federal Aviation Act and violated provisions of the Clean Air Act, NEPA, and the Council on Environmental Quality's NEPA regulations, Section 4(f) of the Department of Transportation Act, and FAA's regulations and orders.

FAA filed the certified index to its administrative record on March 9, 2022, and participated in court-ordered mediation on March 29.

Briefing Commences in Challenge to San Diego County Wind Turbines

Backcountry Against Dumps (BAD) and two individuals filed a petition for review against FAA on October 15, 2021, challenging FAA's determination that their petition for discretionary review of FAA's August 31 "no hazard" determination as to 72 wind turbines in Campo, San Diego County, California, failed to meet the requirements of 14 C.F.R. § 77.37.

Petitioners in Backcountry Against Dumps, et al. v. FAA, No. 21-71426 (9th Cir.) take issue with FAA's obstruction evaluation determinations made under 14 C.F.R. part 77, Safe, Efficient Use, and Preservation of the Navigable Airspace. Part 77 provides standards and notification requirements for objects affecting navigable airspace. The turbines are expected to be 586 feet above ground level. On July 16, 2020, FAA issued an initial determination of no hazard, which it later reissued on August 31, 2021, after learning of errors with the initial aeronautical studies.

Petitioners' opening brief is due July 13, and FAA's response brief is due August 12. Petitioners may file a reply 21 days after service of FAA's response.

UPS First Officer Appeals Airline Transport Pilot Certificate Revocation for Misconduct

On March 23, 2022, Gerald Brown filed a petition for review, naming the FAA Administrator and NTSB as respondents, as to NTSB Order No. EA-5919. Brown v. Dickson, No. 22-1047 (D.C. Cir.). The January 27, 2002, order affirmed the revocation of Mr. Brown's airline transport pilot certificate for leaving his crewmember

station (14 C.F.R. § 91.105); operating an aircraft in a careless or reckless manner (§ 91.13(a)); and threatening and interfering with the captain in the performance of his duties (§ 121.580).

The case, unusual in that it involves interference by one crewmember with the duties of another, arose while Petitioner was serving as first officer and flying pilot on a United Parcel Service (UPS) cargo flight from Sydney, Australia to Shenzhen, China. After takeoff, the captain attempted to address Petitioner's early rotation of the aircraft (*i.e.*, bringing the nose up) on takeoff, but Petitioner's reaction to the critique was hostile and threatening. The captain missed a radio call during the exchange. When Petitioner stormed out of the cockpit without accomplishing procedures for positive exchange of control, the captain barred him from reentering, relying on a relief pilot as the second flying pilot for the remainder of the flight. The captain and the relief pilot discussed pulling the circuit breaker to the cockpit voice recorder to preserve the exchange with Petitioner, but that would have disabled the voice recorder for the duration of the flight. The captain decided to leave the voice recorder connected. The flight landed at its intended destination in China without further incident.

The NTSB held that Petitioner violated (1) section 121.580 by threatening the captain and interfering with his duties by causing the missed radio call; (2) section 91.105 by abruptly leaving the cockpit without ensuring a transfer of control; and (3) section 91.13(a) by, incident to the section 91.105 violation, operating the aircraft in a careless or reckless manner. The NTSB found that revocation of petitioner's airline transport pilot certificate was appropriate and affirmed the FAA's order of revocation.

Petitioner's opening brief is due September 6, respondents' brief is due October 6, and petitioner's reply brief is due October 27.

ATCS Candidates' Suit against FAA Certified as Class Action by D.C. District Court

Plaintiffs will notify 920 potential class members of their opportunity to participate in or opt out of Brigida v. Buttigieg, No. 16-2227 (D.D.C.), a case filed in December 2015 that alleges racial discrimination in FAA's filling prospective Air Traffic Controller Specialist (ATCS) positions. The court on February 1, 2022, granted class certification, and, on February 23, issued a scheduling order under which fact discovery will conclude by November 2023, expert discovery will conclude by late May 2024, and summary judgment briefing will conclude by September 2024. Plaintiffs, Air Traffic-Collegiate Training Initiative (AT-CTI or CTI) graduates who applied for ATCS positions in 2014, claim race-based disparate treatment resulting from FAA having "purged" the list of qualified CTI graduate applicants and utilizing the 2014 biographical assessment (BA).

Before 2014, FAA used a separate vacancy announcement for each ATCS hiring source – primarily CTI graduates, experienced air traffic controllers, veterans, and the general public. Moreover, CTI students were allowed to take the AT-SAT pre-employment test while still in school and before responding to any vacancy announcement. On recommendations from an Independent Review Panel, barrier analyses conducted by outside contractors, and hiring needs, FAA reviewed and revised its ATCS hiring process. For 2014, FAA switched to one vacancy announcement for all hiring sources and added a BA as a pre-employment test before a revised AT-SAT. CTI graduate

applicants in 2014 were required to take and pass the BA to receive further consideration, even if they had passed the AT-SAT while in school. Plaintiffs claim that FAA purged their qualifications, that the 2014 BA was discriminatory, and that members of the National Black Coalition of Federal Aviation Employees orchestrated the hiring-process changes to benefit African American applicants at the expense of other applicants.

On September 10, 2021, plaintiffs filed their second motion for class certification, arguing (1) that the proposed class of CTI students qualifies under Fed. R. Civ. P. 23(a), in that (a) numerosity is satisfied by a class exceeding 1,000 members; (b) commonality is met by use of the biographical questionnaire (BQ) and a common policy striking the AT-SAT, as well as common defenses, sub-issues, and back pay elements; (c) plaintiffs' claims are typical of the class; and (d) the named plaintiffs are adequate class representatives; and (2) that a Rule 23(b)(2), Rule 23(b)(3), or hybrid certification under Rule 23(b)(3) or 23(c)(4) is appropriate, because (a) Rule 23(b)(2) is met by an injury caused by FAA practices applying generally to the class and for which declaratory and injunctive relief would benefit that entire class; and (b) hybrid certification is warranted because common questions predominate, bifurcation of the case may be considered in the predominance analysis, class action is the superior method of adjudication, and certification of an issues class is appropriate under Rule 23(c)(4).

In FAA's October 26, 2021, opposition brief, the agency argued (1) that plaintiffs had not satisfied Rule 23(a) in that (a) commonality was not established by vague and conclusory assertions that the BA was biased, (b) typicality was not established because plaintiffs do not represent the class's diversity, variation in eligibility and qualifications, and range of mitigation efforts, and (c) plaintiffs cannot adequately represent the entire proposed class because they did not timely exhaust their AT-SAT claim and inclusion of women, Hispanics, and Asians might create a class conflict, and plaintiffs' class definition lacks ascertainability; (2) that Rule 23(b)'s requirements cannot be satisfied, because (a) plaintiffs' proposed class cannot be certified absent a showing that injunctive relief would be "appropriate respecting the class as a whole" or that legality of challenged behavior could be settled regarding the entire class, (b) plaintiffs cannot certify a class due to failure to show either predominance of common over individualized issues or superiority of a class action, and (c) plaintiffs have not demonstrated that an alternative certification approach would resolve the defects for their proposed class.

Following a hearing on January 13 and February 1, 2022, the court issued its order on February 1, 2022, certifying an issues class under Fed. R. Civ. P. 23(b)(2) and (c)(4) to determine liability and equitable relief, with damages and individual equitable relief to be determined individually if liability were found. The issues class consists of "All non-African American CTI graduates who" (1) graduated from a CTI program at an FAA-partnered CTI institution during 2009-13 and passed the AT-SAT by February 10, 2014; (2) applied through the 2014 all-sources vacancy announcement for ATCS training but failed the 2014 ATCS BQ and were not hired; and (3) were never offered FAA ATCS employment. The certification excludes CTI graduates (1) not U.S. citizens as of February 10, 2014; (2) not on February 21, 2014, younger than 31 years (or 35 years if they had 52 consecutive weeks of prior ATC experience); (3) whose academic records as of February 21, 2014, stated they

were ineligible for a letter of recommendation from their CTO schools; or (4) whose AT-SAT scores had expired as of February 21, 2014. Plaintiffs Brigida and Douglas-Cook were appointed as Class Representatives.

On February 18, the parties timely proposed Notices of Pendency of Class Actions. On February 22, the court approved defendant's modifications to plaintiff's proposed notice and rejected plaintiffs' proposal to invite class members to waive compensatory damages and forego a jury verdict, because (1) they had not effectively withdrawn their initial jury demand and defendant had not consented to withdrawal thereof; and (2) the court was concerned that representation of the class would be inadequate if some class members could waive compensatory damages and a liability jury trial while others proceeded with a jury trial. The court rejected plaintiffs' proposal for determination of backpay in the certified stage, because only an issues class under Rules 23(b)(2) and (c)(4) had been certified for determination of liability and equitable relief and individual entitlement to backpay would be determined only after a finding of liability. The court agreed with FAA that the notice must clarify that individual equitable relief would be determined individually and refer only to the BQ when discussing an allegedly racially biased hiring process. Finally, the court approved plaintiffs' proposed Class Notice process and 30-day opt-in period.

On February 23, the court issued a scheduling order under which fact discovery will close in November 2023, expert discovery will close in May 2024, and summary judgment briefing will be completed by early October 2024.

NATCA Claims Exemption 4 Justifies Withholding from Member/Air Traffic Controller Communications with FAA as to Transfer of Air Control Facility

In *pro se* FOIA litigation brought by a member of the National Air Traffic Controllers Association (NATCA), NATCA has requested that FAA withhold as confidential commercial information certain records at issue. In Smolen v. FAA, No. 22-44 (S.D.N.Y.), filed January 4, 2022, plaintiff (1) alleges that FAA violated his right to timely determination of his FOIA appeal to the agency, which FAA received May 25, 2021; (2) alleges that FAA improperly claimed exemptions to justify redactions in records released May 18, 2021; and (3) seeks declaratory relief as to the improper use of exemptions and failure to timely respond to his appeal, as well as injunctive relief through release of redacted portions of documents.

Plaintiff, an air traffic controller at New York Terminal Radar Approach Control Facilities (TRACON), filed a FOIA request seeking certain records of communications or memorandums of understanding (MOU) between FAA and NATCA as to transfer of the Newark International Airport (EWR) area from New York TRACON to Philadelphia (PHL) Air Traffic Control Tower. On April 19, 2021, FAA released responsive records, which prompted plaintiff to request additional records, a request that FAA treated as a new FOIA request.

FAA responded to the new request on May 18, 2021, releasing 58 pages of records, most redacted based on FOIA Exemptions 2, 4, and 6. Plaintiff appealed the withholdings, claiming that FAA improperly relied on Exemption 2 to withhold records "related

solely to internal personnel rules and practices" and erroneously applied Exemption 4 based on unsupported assertions that information in the NATCA correspondence was not merely commercial but confidential. After FAA confirmed receipt of the appeal and notified plaintiff that a response to the appeal would not be provided within the 20-day time frame, plaintiff filed in federal court.

On March 25, 2022, with the consent of plaintiff, the court granted FAA's motion for extension to file its answer, which the agency filed on April 22.

Negligent FAA Designation of Check Airman Alleged in Fatal Helicopter Crash

In litigation as to a 2019 triple-fatality helicopter crash, the United States has been added as a defendant under a count alleging negligent designation of the check airman who cleared the pilot for commercial operations. MacAuliffe v. USA, No. 21-193 (D. Haw.). According to the Amended Complaint filed on January 27, 2022, though the FAA in 2017 prohibited the helicopter tour company's CEO from performing 14 C.F.R. part 135 competency checks and in November 2018 revoked the company's authorization to perform 14 C.F.R. part 91 competency checks due in part to accident history, requiring more rigorous part 135 checks, a Honolulu FAA manager permitted the company's CEO to perform the pilot's competency check. On April 7, 2022, the court granted the parties' request to vacate expert-disclosure and dispositive-motion deadlines pending an appearance for the United States.

Updated Status of Litigation Related to October 2018 Lion Air Tragedy

On October 29, 2018, a Boeing 737 MAX 8 crashed in the Java Sea off the coast of Indonesia, killing all 189 persons on board. The Boeing 737 MAX 8 was being operated by Lion Air as Lion Air Flight JT 610. The accident aircraft had, as part of its flight control system, the Maneuvering Characteristics Augmentation System (MCAS). The Boeing 737 MAX 8 was grounded following a second accident and was later returned to service after an extensive review and several changes to the Boeing 737 MAX 8.

After FAA received multiple administrative claims, five lawsuits were filed on November 19, 2018, and consolidated in the U.S. District Court for the Northern District of Illinois. In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.). Three were served on the United States. The Complaints contain counts against the United States alleging negligence in design, certification, Organization Designation Authorization oversight, and training. On December 28, 2019, the litigation was continued through February 28, 2020, "to allow the parties to continue to engage in mediations," with a Boeing status report ordered two months thereafter; in each subsequent minute order continuing the stay, another such status report was ordered. According to Boeing's Thirteenth Status Report on Remaining Individual Actions, filed March 18, 2022, as a result of mediations commenced on July 16, 2019, "Boeing has fully settled . . . claims relating to 186 of 189 decedents . . . including the claims of 183 of the 186 decedents whose families' filed lawsuits in this court," leaving "only three decedents whose families have not yet settled." In those "three instances, Boeing continues to discuss settlement with

. . . counsel while discussing how to move the cases forward if they cannot be settled at this time" and concludes that it "does not believe that an impasse has been reached in any of the ongoing settlement negotiations." Of the 87 actions, 79 have been dismissed, five are expected to be dismissed, and three remain.

All orders to date approving motions for dismissal pursuant to settlement include a dismissal of all claims, with prejudice and without costs, against all defendants, including the United States.

Federal Highway Administration

First Circuit Affirms in Part and Denies in Part Summary Judgment in Frank J. Wood Bridge Case

On January 4, 2022, the U.S. Court of Appeals for the First Circuit affirmed in part and vacated in part the U.S. District Court of Maine's grant of summary judgment to FHWA in a case alleging that FHWA arbitrarily and capriciously approved a proposal to replace the Frank J. Wood Bridge. Historic Bridge Foundation v. Buttigieg, 22 F.4th 275 (1st Cir. 2022).

On appeal, appellants argued that the district court committed reversible error in finding that FHWA and the Maine Department of Transportation's (MaineDOT's) reliance on Service Life Cost (SCLE) estimate methodology instead of Life-Cycle Cost Analysis (LCCA) methodology was not arbitrary. The appellant also argued that FHWA arbitrarily inflated the cost estimates for the rehabilitation alternative and underestimated the cost estimates for the replacement alternatives and that the district court's finding on this issue was also erroneous. Finally, the appellant argued that they had sufficiently established that a controversy existed in terms of the appropriate methodology to apply and therefore an EIS was required.

The court affirmed the district court's holding that the record adequately supported the construction and maintenance costs attributed to each alternative and that a controversy over whether an agency uses the appropriate methodology is not the sort of dispute that would require an EIS under the then-existing regulations. The court, however, found that FHWA and MaineDOT did not provide a basis for forgoing the generally accepted LCCA methodology for the SLCE methodology. The court remanded the case to the district court with instructions to remand to FHWA.

Tenth Circuit Finds for FHWA in Colorado C-470 Expansion Project NEPA Case

On March 18, 2022, the U.S. Court of Appeals for the Tenth Circuit affirmed the decision of the U.S. District Court for Colorado in favor of FHWA and the Colorado Department of Transportation (CDOT) in Highlands Ranch Neighborhood Coalition v. Cater, et al., No. 15-04987 (D. Colo.). Highlands Ranch Neighborhood Coalition v. Cater, No. 19-1190 (10th Cir.). The case involves the widening of C-470, a highway located in the southwest Denver metropolitan area. The project, which is now nearly complete, will add tolled express lanes to an existing facility.

Plaintiff had claimed in district court that FHWA's FONSI was arbitrary and capricious with respect to the noise analysis contained in the associated revised EA. After two remands to the agency, the district court issued a Final Order on April 26, 2019,

finding that FHWA complied with NEPA based on submissions that supplemented the original administrative record. The Tenth Circuit affirmed the district court's holding in favor of FHWA and CDOT. The court stated that the Highlands Ranch Neighborhood Coalition failed to show that FHWA and CDOT acted arbitrarily and capriciously by evaluating the highway noise using short-term measurements.

Ninth Circuit Dismisses Appeal of Oregon Sacred Site, Religious Freedom Lawsuit as Moot

On November 24, 2021, the U.S. Court of Appeals for the Ninth Circuit in Slockish, et al. v. FHWA, No. 21-35220 (9th Cir.) issued an unpublished memorandum opinion dismissing as moot plaintiff's appeal of the U.S. District Court of Oregon's February 2021 grant of summary judgment in favor of defendants.

The case, brought by a small local group of Yakima Indian Nation members, involved the alleged destruction of a Native American religious site by a federally-aided highway-widening project along US-26 in Clackamas County, Oregon in 2008, the "Wildwood-Wemme" project. The Ninth Circuit found that any effective relief would require modification of the highway owned by ODOT, which the federal defendants lack the authority to do and which the court could not order because ODOT had already been dismissed from the case. Because effective relief was not possible, the court concluded that the case is moot. Plaintiffs subsequently filed a motion for panel rehearing and petition for rehearing *en banc,* which the Ninth Circuit denied on May 6, 2022.

District Court Grants Summary Judgment for Defendants in I-30 Crossing Project

On March 31, 2022, the U.S. District Court for the Eastern District of Arkansas granted summary judgment in favor of the defendants, FHWA and the Arkansas Department of Transportation (ArDOT) in Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., No. 19-00362 (E.D. Ark.). In so doing, the court upheld both the defendants' initial decision to prepare an EA rather than an EIS for the project and their subsequent decision to rely upon a re-evaluation rather than a supplemental EA or EIS to account for design changes resulting from a need to build the project in phases. The project proposes to widen a 7.3-mile section of I-30 passing through downtown Little Rock and replace and expand the current structurally deficient I-30 bridge crossing the Arkansas River.

In its opinion, the court held that FHWA and ArDOT properly concluded an EIS was not warranted, noting the EA and FONSI rested upon the findings of more than eighteen technical studies. The court rejected plaintiffs' allegations that the scope of the study was insufficient, finding that the project's logical termini were based upon traffic studies and that the agencies demonstrated the project would have independent utility whether or not other projects in the area are completed. Addressing plaintiffs' environmental justice claim, the court opined that the EA/FONSI acknowledged the harm the initial construction of I-30 and the adjoining I-630 had upon minority and low-income neighborhoods and that the agencies "actively sought the involvement of minority communities by holding meetings in minority communities and circulating flyers, mailings,

public service announcements and ads in the newspaper." The court concluded that the agencies took a hard look at the impacts and "reached a reasonable conclusion in the EA/FONSI, even if it was not the only conclusion that could have been drawn."

Finally, the court rejected plaintiffs' argument that FHWA and ArDOT should have prepared a supplemental NEPA document to account for several temporary and permanent changes to project design arising from higher-than-expected project costs and a new plan to build the project in two or more phases rather than all at once. The court opined that the agencies correctly engaged in an initial assessment of impacts arising from design changes with a re-evaluation in accordance with 23 C.F.R. § 771.129. It further held that the agencies reasonably concluded there were no significant new impacts that would warrant a supplemental NEPA document as the design changes reduced impacts to streams, wetlands, and floodplains compared to the initial assessment in the EA/FONSI.

D.C. District Court Dismisses Challenges to Viaduct Project in Rhode Island

On March 15, 2022, the U.S. District Court for the District of Columbia granted Motions to Dismiss in favor of FHWA and the State of Rhode Island and other state defendants in Narragansett Indian Tribe v. Pollack, et al., No. 20-576 (D.D.C.), which challenged the termination of a programmatic agreement (PA) entered into pursuant to Section 106 of the NHPA and the re-initiation of a new PA for the I-95 Providence Viaduct Bridge Project of Rhode Island. The Narragansett Indian Tribe filed the Complaint alleging that the termination of the PA after substantial construction had taken place on the project was arbitrary and capricious, and the subsequent final decision to terminate the previous PA and re-initiate a new PA was also arbitrary and capricious.

On March 31, 2017, the Tribe brought suit against FHWA, Rhode Island Department of Transportation, Rhode Island Historical Preservation & Heritage Commission, and the Advisory Council on Historic Preservation (ACHP) challenging the Rhode Island DOT's refusal to transfer properties according to the original PA. On September 11, 2017, the U.S. District Court for the District of Rhode Island dismissed the Complaint on the ground that the statutes on which the Tribe relied to sustain its action, the APA, the NHPA, and the Declaratory Judgment Act, did not create private rights of action or waive the government's sovereign immunity. On appeal, the Tribe contended that the NHPA implicitly creates a private right of action that encompasses the Tribe's claims and that the creation of such a cause of action necessarily waives the federal government's sovereign immunity. The U.S. Court of Appeals for the First Circuit held that nothing in the NHPA, either expressly or implicitly, waived the federal government's sovereign immunity and affirmed the decision of the district court.

On March 29, 2019, the Tribe filed another Complaint in the District of Rhode Island, alleging that the termination of the PA constituted arbitrary and capricious agency action under the APA. After the case was transferred to the District of Columbia, the court on January 7, 2020, denied FHWA's motion to dismiss. The Tribe then filed an Amended Complaint adding the state defendants and a claim for a Fourteenth Amendment violation.

The state defendants and FHWA each moved for dismissal of the amended Complaint. The

district court granted the state defendants' dismissal as none of them reside in the District of Columbia or are at "home" in the District, and it held that neither the District's long-arm statute nor the requirements of the Due Process Clause apply. The district court also granted FHWA's motion to dismiss. FHWA had argued that the Tribe's injuries would only be redressable through the state defendants. The district court granted FHWA's motion to dismiss for lack of standing, finding that it was unable to discern how the Tribe's alleged harm would be redressed by a determination against FHWA.

Lawsuit Over Portland Rose Quarter Project Dismissed

On March 16, 2022, plaintiffs filed a Notice of Voluntary Dismissal without prejudice in No More Freeways, et al. v. USDOT, et al., No. 21-00498 (D. Ore.). The court subsequently "terminated" and closed the case administratively without issuing an official ruling or order on the filing.

On April 2, 2021, three advocacy groups had filed suit against FHWA for its approvals of the Rose Quarter Improvement Project located in Portland, Oregon. The challenged project is a safety and operational improvement project on 1.5 miles of I-5 between I-405 and I-84 – the biggest traffic bottleneck in the state – just across the Willamette River from downtown Portland. The project aims to add auxiliary (merge) lanes and shoulders, reconfigure ramps, and add a cover over a portion of the freeway to provide new green space and reconnect the surface grid. FHWA and Oregon Department of Transportation (ODOT) published the final EA and FONSI on November 9, 2020.

After issuance of the FONSI, the Oregon Governor's office via ODOT advanced a group of major modifications to the project to address long-standing equity concerns in the area raised by stakeholders. On January 18, 2022, because of the scope of those modifications, FHWA rescinded the FONSI, requesting a formal supplemental analysis upon which to base a new decision. Plaintiffs cited the recission of the FONSI as the reason for their voluntary dismissal.

Court Stays and Administratively Closes Lawsuit Seeking Deposition Testimony of FHWA Employees

On April 12, 2022, the U.S. District Court for the Eastern District of Louisiana granted the parties' joint motion to stay and administratively close plaintiffs' civil lawsuit seeking to compel staff members of the FHWA Louisiana Division to provide testimony by deposition. Dove v. USDOT, et al., No. 21-00701 (E.D. La.). Plaintiffs, Terrebonne Parish Consolidated Government (TPCG) by and through Parish President, Gordon Dove, sought to compel testimony from FHWA staff as third parties to a contract dispute involving TPCG, a contractor, and the Louisiana Department of Transportation and Development (LDOTD) pending in state court.

Plaintiffs argued that FHWA's decision to deny plaintiffs' request for testimony under the U.S. DOT employee testimony regulations, 49 C.F.R. Part 9, was arbitrary and capricious and thus violated the APA. Plaintiffs claimed that deposing FHWA employees is necessary because these individuals have information that is relevant to the claims of defendant and the defenses and exceptions raised by plaintiff in the underlying state court action. The parties jointly petitioned the court for a stay in order to allow them to address whether the state court has jurisdiction over FHWA after a

motion was filed to join FHWA as a defendant in the underlying state suit.

Plaintiffs Appeal District Court Order Granting Summary Judgment for Defendants in Mid-Currituck Bridge Project

On January 31, 2022, plaintiffs appealed a December 13, 2021, order of the U.S. District Court for the Eastern District of North Carolina granting a motion for summary judgment in favor of the North Carolina Department of Transportation (NCDOT) and FHWA in North Carolina Wildlife Fed'n, et al v. North Carolina Dep't of Transp., et al., 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021). Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., No. 22-1103 (4th Cir.). The project being challenged proposes the creation of a second crossing of the Currituck Sound in the Outer Banks, North Carolina. The new bridge is intended to relieve current and projected congestion and to facilitate hurricane evacuations from the Outer Banks.

Appellants April 4, 2022, opening brief asks the court to reject the district court's analysis and declare that the ROD approved in 2019 is arbitrary and capricious. Appellants argue that FHWA and NCDOT should have prepared a Supplemental EIS rather than a re-evaluation and ROD for the project in 2019 to account for changes that had occurred since the final EIS for the project was approved in 2012. Those changes include new traffic forecasting projections and changes to projected sea level rise. Appellants also argue that these changes warrant a new analysis of the relative merits of the project alternatives and that the public should have been afforded a new opportunity to comment on the alternatives in light of the changes. Finally, appellants argue that the project's no-build scenario is flawed and prevents a meaningful comparison of alternatives, because it presumes project construction.

Appellees' response brief was filed on June 6, 2022.

Summary Judgment in Favor of FHWA in Litigation Over Pedestrian Trail in Idaho is Appealed

On February 24, 2022, the U.S. District Court for the District of Idaho granted summary judgment in favor of FHWA and the U.S. Forest Service (USFS) in Sawtooth Mountain Ranch LLC, et al. v. FHWA, No. 19-0118 (D. Idaho). On April 22, 2022, plaintiffs Sawtooth Mountain Ranch LLC, David Boren, and Lynn Arnone appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. Sawtooth Mountain Ranch LLC, et al., v. FHWA, et al., No. 22-35324 (9th Cir.). This case concerns the Stanley to Redfish Lake project, which involves the construction of a non-motorized, multi-purpose 4.5-mile trail that would serve pedestrians, bicyclists, and equestrians in south-central Idaho between the City of Stanley and Redfish Lake. FHWA's Western Federal Lands Highway Division designed and is constructing the trail in partnership with the USFS, which is also a named defendant in the litigation.

The district court granted summary judgment in favor of FHWA and USFS on all nine claims, which included alleged violations of NEPA, the ESA, the CWA, the National Forest Management Act (NFMA), and the Sawtooth National Recreational Act (SNRA). As to the ESA claim, the court found that the USFS' "no effect" finding concerning listed aquatic species and their

critical habitat was not arbitrary and capricious, noting that the USFS considered the impact of sediment discharged and offered a plausible explanation for concluding its construction activities would result in little measurable effect. As to the CWA claim, the court found that plaintiffs' allegations did not constitute a challenge to agency action under the APA, nor did they raise a compliance issue with the Nationwide Permit granted for the project. The court also rejected plaintiffs' NFMA claim, holding that the USFS had properly described how the project was consistent with applicable Forest Plan components. As to the NEPA claims, the court found that the USFS properly determined that a categorical exclusion applied and that no extraordinary circumstances existed. As to the SNRA claim, the court determined that the claim was derivative of the claims under the NFMA, NEPA, and the ESA, and that the USFS properly followed the applicable Forest Plan standards.

Because the court found that the USFS conclusions were not arbitrary or capricious with respect to its evaluation of the environmental impacts of the project under the ESA, CWA, SNRA, NFMA, and NEPA, it found that there was no requirement that FHWA conduct its own independent analysis.

In addition, plaintiffs had argued that the conservation easement, purchased by the USFS in 2005, does not allow or contemplate construction or maintenance of a trail. The District Court agreed with FHWA and the USFS that the conservation easement unambiguously allows construction of a trail.

Lawsuit Filed Challenging I-405 Canyon Park Business Center Project

On December 21, 2021, the Canyon Park Business Center Owners' Association filed a Complaint in the U.S. District Court for the Western District of Washington that raises NEPA claims relating to environmental documents prepared in anticipation of an Express Toll Lane Improvement project located along four miles of I-405 in Bothell, Washington. The primary purpose of the project is to provide direct access to existing express toll lanes and increasing vehicle capacity and throughput on the section of I-405. A FONSI was issued for this project on July 29, 2021.

Plaintiff in Canyon Park Business Center Owners' Assoc. v. Buttigieg, et al., No. 21-01694 (W.D. Wash.), alleges that the traffic analysis is flawed and therefore the transportation modeling included in the EA leading up to the FONSI fails to adequately identify the severity of harmful traffic impacts to the Business Park. Plaintiff also alleges that due to the flawed traffic analysis, the FONSI fails to include sufficient mitigation measures to address harmful traffic impacts to the Business Park roadways and that the FONSI's Purpose and Need Statement is narrow and resulted in an inadequate alternative analysis. Finally, plaintiff claims that an EIS should have been prepared.

On March 7, 2021, federal defendants filed a motion to dismiss based on plaintiff's lack of standing. The motion to dismiss argues that the Complaint fails to demonstrate any harm to plaintiffs that fall within the zone of interest of NEPA since the plaintiff's harms are purely economic and do not demonstrate environmental interests that NEPA is

intended to address and that the Complaint fails to establish plaintiff's associational standing, claiming that plaintiff does not show interests protected by NEPA in and of itself and that the Complaint does not show how plaintiff's members would otherwise have standing to sue in their own right.

Plaintiffs have filed a Reply to the Motion to Dismiss, and the parties await a final ruling on the Motion.

Challenge to NEPA Documents in U.S. 50 Round Hill Pines Project

On April 18, 2022, plaintiffs filed a Complaint in the U.S. District Court for the District of Nevada challenging FHWA's EA and FONSI for the US 50 Round Hill Pines project. Tahoe Cabin, LLC v. FHWA, et al., No. 22-00175 (D. Nev.). The Complaint also included as defendants the U.S. Department of Agriculture, the Forest Service Lake Tahoe Basin Management Unit (LTMBU), the Nevada Department of Transportation (NDOT), and the Tahoe Regional Planning Agency (TRPA).

The Central Federal Lands Highway Division, in cooperation with the LTBMU, NDOT, and TRPA, is undertaking this project, which will improve safety for visitors entering and existing the Round Hill Pines Resort from U.S. Highway 50. The Resort is located within the boundary of the Lake Tahoe Basin Management Unit National Forest and is operated under a special use permit issued by the USFS. The project intends to provide a new access road into the Resort for visitors traveling along U.S. 50. An EA was issued for the project on May 28, 2021, and a FONSI was issued on October 1, 2021. A notice of limitations on claims was included in the EA/FONSI and was published in the Federal Register on October 18, 2021. The notice of limitations on claims required actions contesting the EA/FONSI to be filed by March 17, 2022.

Plaintiffs, three homeowners in the nearby Sunset Sierra Lane neighborhood, allege violations of NEPA and the APA, asserting that the EA/FONSI failed to take a hard look at the human environmental impacts of the project; that FHWA did not study, disclose, or mitigate the impacts of the project; that FHWA predetermined the project would not negatively affect the safety of a nearby entrance to plaintiffs' neighborhood at Sierra Sunset Lane; that FHWA based the environmental documents' findings off of incomplete and inaccurate information; and that FHWA failed to perform a necessary traffic analysis or similar type of safety study to determine the impacts of the Sierra Sunset Lane and the US Highway 50 intersection. Plaintiffs also alleged that an EIS should have been prepared.

NEPA Lawsuit Filed Concerning I-11 Tier 1 EIS and Preliminary 4(f) Evaluation

On April 21, 2022, four groups filed a lawsuit against FHWA for its approval of the I-11 Tier 1 EIS and preliminary evaluation under Section 4(f) of the Department of Transportation Act. Coalition for Sonoran Desert Protection, et al. v. FHWA, et al., No. 22-00193 (D. Ariz.). FHWA and the Arizona Department of Transportation had published the Final Tier 1 EIS on July 16, 2021, and FHWA issued its ROD on November 15, 2021. The Tier 1 EIS ROD identified a 2,000-foot-wide corridor between Nogales and Wickenburg, Arizona, including two route options near Tucson, in which individual 400-foot-wide segments of the future Interstate could be constructed

pending further study and the availability of funds at Tier 2.

The Complaint alleges violations under NEPA, claiming that FHWA failed to reconcile land use conflicts in the NEPA analysis; adequately justify the purpose and need for the project; consider non-highway alternatives; take a "hard look" at certain environmental impacts; supplement in light of new circumstances and information; and adequately solicit and respond to comments. The Complaint also alleges that FHWA failed to adequately address impacts on certain properties and erroneously excluded others from consideration in its preliminary analysis under Section 4(f). Finally, the Complaint alleges that FHWA violated a section of the Fish and Wildlife Coordination Act (FWCA) by retaining a route option that would potentially cross an FWCA conservation property, as well as the APA.

Plaintiffs seek various types of declaratory and injunctive relief, including vacating the EIS/ROD and enjoining any further Tier 2 projects.

Pro Se Plaintiffs Bring Claim Based on Uniform Relocation Act

On October 15, 2021, two *pro se* plaintiffs filed suit against FHWA, the State of Colorado, and various local agencies in Serna, et al. v. FHWA, et al., No. 21-0939 (W.D. Tex.). Plaintiffs allege that their real property was acquired in 2017 for the West Side Avenue Action Project in Colorado Springs, Colorado, and that they are entitled to additional benefits under the Uniform Relocation Act, including a land swap and attorney's fees.

On February 28, 2022, FHWA filed a Motion to Dismiss for lack of jurisdiction and failure to state a claim, arguing that the Uniform Relocation Act does not create a private right of action.

Pro Se Plaintiff Challenges Historic Review Process

On January 18, 2022, a *pro se* plaintiff filed a Complaint in Indiana State court that was subsequently removed to federal court. Parker v. FHWA, et al., No. 22-291 (S.D. Ind.). The Complaint concerns Phase 2 of the Complete Streets Loop Project on Maine Street, Fort Wayne Avenue, and North E Street in Richmond, Indiana, which includes pedestrian and bicycle improvements.

The Complaint alleges that the findings of the Section 106 review under the NHPA were incomplete and failed to adequately include input from property owners in the area. Plaintiff further alleges that the bike path is not needed and that the Project planners failed to consider the effect on property values from the loss of trees and narrowing of the street. Plaintiff seeks an injunction to prevent Phase 2 of the Project from commencing. On April 19, 2022, FHWA filed a Motion to Dismiss for lack of jurisdiction and failure to state a claim, arguing that a majority of courts have held that the NHPA does not create a private right of action.

Federal Motor Carrier Safety Administration

Secretary Seeks Injunctive Relief Against Motor Carrier in U.S. District Court

On March 14, 2022, the Secretary of Transportation brought a civil action for declaratory and injunctive relief against two motor carriers and their principals for

violations of federal motor carrier statutes and regulations. Buttigieg v. Adversity Transport Inc., et al., No. 22-817 (S.D. Tex.).

The Secretary alleges in the Complaint that defendants, operating commercial motor vehicles in interstate commerce as for-hire motor carriers, violated orders to cease operating issued by FMCSA, including a January 21, 2022, Imminent Hazard Operations Out-of-Service Order. An Imminent Hazard Order requires a motor carrier to cease operating immediately because its operations substantially increase the likelihood of serious injury or death if not discontinued. The Complaint alleges that Adversity Transport continued to operate after being declared an imminent hazard by shifting operations to 4 Life Transport (4 Life).

On February 7, 2022, a 4 Life driver was involved in a single-vehicle crash in which he was fatally injured. Soon after, following an investigation after the crash, FMCSA declared 4 Life an imminent hazard and ordered it to cease operating in interstate commerce. 4 Life violated that order by continuing to operate.

In addition to violating the imminent hazard out-of-service order, the Complaint alleges that defendants operated without the required operating authority registration and evaded other motor carrier statutes and regulations.

The Secretary seeks a declaration that the defendants' continued operations in interstate commerce after being declared an imminent hazard and without the required operating authority violates federal statutes and regulations. The Secretary also seeks an injunction mandating that defendants comply with FMCSA orders, enjoining defendants from operating commercial motor vehicles in interstate commerce until they comply with federal statutes and regulations, and enjoining them from attempting to operate under another name. Finally, the Secretary seeks civil penalties in the amount of $47,660 against defendants for violations of FMCSA orders enforcing federal motor carrier statutes and regulations.

On April 28, after the Defendants failed to file an answer to the Complaint, the government filed a motion for summary judgment. An initial pretrial and scheduling conference is scheduled for July 15, 2022.

Ninth Circuit Dismisses Petitions for Review of Two FMCSA Final Orders

On October 18, 2021, in DTI Logistics et al. v. USDOT, et al., No. 21-71338 (9th Cir.), eight motor carriers filed a petition for review of an FMCSA final agency decision upholding an Operations Out-of-Service and Record Consolidation Order. The final agency decision, issued on October 5, 2021, held that the motor carriers operated as reincarnated and/or affiliated entities for improper purposes and affirmed the consolidation of their safety records.

The federal respondents moved to dismiss the petition for review on November 10, 2021, on the basis that a non-attorney representative filed the petition for review on behalf of the corporate petitioners. The Clerk of the Court issued an order on January 14, 2022, stating that corporations must be represented by an attorney admitted to practice before the Ninth Circuit and directing the petitioners to retain counsel or otherwise show cause why the petition for review should not be dismissed. The petitioners failed to respond to the January 14 order, and the court dismissed the petition for review on February 20, 2022, for failure to prosecute.

In another matter, Bowen v. FMCSA, No. 21-71203 (9th Cir.), petitioner filed a petition for review in the Ninth Circuit on July 30, 2021, challenging an FMCSA final agency decision denying petitioner's request to remove a violation from his Drug and Alcohol Clearinghouse (Clearinghouse) driver record under 49 C.F.R. § 382.717. The Clearinghouse is a repository for commercial drivers' drug and alcohol program violations. The parties settled the case and the Ninth Circuit granted petitioner's unopposed motion to dismiss on March 1, 2022.

Federal Railroad Administration

Briefing Completed, Oral Argument Held in Challenge to FRA's Final Rule that Amends Brake System Safety Standards and Codifies Waivers

After briefing was completed in January 2022, on February 23, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 21-1049 (D.C. Cir.), in which the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen challenged FRA's final rule concerning miscellaneous amendments to the brake system safety standards and the codification of certain waivers (brakes final rule). In the brakes final rule, FRA revised its regulations governing brake inspections, tests, and equipment, including: (1) extending the amount of time freight rail equipment can be left "off-air" before requiring a new brake inspection; (2) incorporating relief from various provisions in long-standing waivers related to end-of-train devices, helper service, and brake maintenance; and (3) modifying the existing brake-related regulations to improve clarity and remove outdated or unnecessary provisions.

The Association of American Railroads moved to intervene on the side of the government, and the court granted the motion on April 1, 2021. On April 9, the court granted FRA's unopposed motion to hold the case in abeyance to allow new agency officials sufficient time to become familiar with the issues in the case. After the period of abeyance was twice extended, the government filed an unopposed motion to govern future proceedings that stated that the government was prepared for the case to proceed.

On November 10, 2021, petitioners filed their opening brief in which they maintained that the brakes final rule is invalid for the following reasons: (1) FRA violated 49 U.S.C. § 103(c) by issuing a relaxed regulation when FRA is required to "utilize the highest safety standards in its administration of railroad safety;" (2) FRA violated 49 U.S.C. § 20103(b) by initiating the regulation in 2018, but not promulgating the final rule until December 11, 2020; and (3) FRA failed to provide an opportunity for parties to petition for reconsideration in violation of 49 C.F.R. § 211.29.

In its December 10, 2021, response brief, FRA argued that its changes to the existing regulations pertaining to brake tests, extended haul trains, and end-of-train device communication failures were reasonable and that the agency reasonably chose to incorporate longstanding waivers pertaining to train equipment operation and safety into its regulations. In addition, FRA asserted that it did not deprive petitioners of an

opportunity to seek reconsideration of the final rule and that petitioners' contention that the rule must be set aside as untimely lacked merit.

Petitioners filed their reply brief on January 18, 2021. Their brief again argued that FRA's failure to afford petitioners an opportunity to file a petition for reconsideration was arbitrary, capricious, and contrary to law. Additionally, the petitioners maintained that in the brakes final rule, FRA only considered whether the regulatory requirements would be somewhat safe or safe, not whether the regulation considered safety as the "highest priority."

Railroad Challenges FRA Decision to Not Expand Automated Track Inspection Waiver to New Territories

The BNSF Railway Company (BNSF) has filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit challenging FRA's March 21, 2022, decision dismissing BNSF's request to expand an existing waiver that allows the railroad to conduct an automated track inspection test program. BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.). The waiver permits BNSF to partially replace required visual track inspections by its track inspectors with autonomous geometry inspection systems, within certain territories. BNSF had sought to expand the waiver to two additional territories, but FRA found that an expansion was not justified while the Railroad Safety Advisory Committee is currently examining the feasibility of using automated inspection technologies on all railroads. The Fifth Circuit has not yet issued a briefing schedule.

Railroad Sues FRA Over Requested Changes to Locomotive Engineer Certification Program

On May 3, 2022, the Kansas City Southern Railway Company and the Texas Mexican Railway Company (collectively, KCS) filed a petition in the U.S. Court of Appeals for the Eighth Circuit seeking review of an FRA letter noting deficiencies in KCS's locomotive engineer certification program. Kansas City S. Rwy. Co., et al. v. FRA, et al., No. 22-1924 (8th Cir.). FRA's letter, dated March 4, 2022, requested that KCS address the noted deficiencies, including removing an unnecessary section relating to the training of Mexican engineers, and submit a new program.

KCS's petition follows two earlier lawsuits in the U.S. Court of Appeals for the D.C. Circuit that concerned the same certification program. In 2018, two labor unions (the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers) filed a petition for review alleging that FRA had unlawfully allowed locomotive engineers employed by Kansas City Southern de Mexico (KCSM) to operate on KCS's territory in the United States by approving a prior version of KCS's locomotive engineer certification program that addressed the training of Mexican engineers. In a 2020 decision, the D.C. Circuit granted this petition for review because FRA's approval of the certification program had been granted under a passive approval process that permitted approval without any formal written notice or explanation of the approval. The court vacated and remanded the matter to FRA. Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., 972 F.3d 83 (D.C. Cir. 2020). KCS subsequently re-

submitted a substantially similar certification program, again including a detailed description of its procedures for certifying locomotive engineers from KCSM. After requesting and considering comments from the labor unions on the modified program, FRA approved the modifications to the program in an October 2020 letter, which included a detailed explanation for the approval.

The labor unions filed a new petition for review in November 2020 challenging FRA's approval of KCSR's 2020 program submission. After briefing had begun, the government moved to voluntarily remand the case to FRA on the grounds that, after the change of administration in January 2021, the agency had initiated an administrative review to re-evaluate the approval of KCSR's 2020 program submission and that a new agency action at the conclusion of that review would likely moot the case. The D.C. Circuit granted the motion in September 2020, remanding the case to FRA for further agency proceedings.

Maritime Administration

Court of Federal Claims Decision in Port of Anchorage Litigation

On February 24, 2022, the U.S. Court of Federal Claims issued an Opinion and Order in Anchorage v. United States, No. 14-166C (Fed. Cl. Feb. 24, 2022) finding that the Municipality of Anchorage had proven damages of $367,446,809 caused by MARAD's breach of two agreements with the Municipality: a 2003 Memorandum of Understanding (2003 MOU) and a 2011 Memorandum of Agreement (2011 MOA). That decision follows a December 9, 2021, decision in the case that found MARAD liable.

In 2003, MARAD entered into a MOU with the Municipality of Anchorage to administer the Port of Anchorage Intermodal Expansion Project (the Project). The Project was to replace the aging Port of Anchorage (now known as the Port of Alaska) with new and expanded facilities. The Project experienced significant construction difficulties in 2009. In 2011, the parties entered into a new memorandum of agreement that created greater oversight for the project. Subsequent evaluation revealed both design and construction defects that rendered parts of the Project unusable.

On February 28, 2014, the Municipality of Anchorage filed a lawsuit against the United States in the U.S. Court of Federal Claims. After extensive discovery and motions practice, trial began on February 16, 2021, and concluded on March 5, 2021.

In its December 9, 2021, decision on liability, the court found that under the 2003 MOU, "MARAD was obligated to provide Federal project oversight, design, and construction, and for MARAD to deliver a completed defect free project." As such, MARAD was responsible for the defective construction of the project. Additionally, the court found that MARAD breached the 2011 MOA when it settled the contractor's claims with Anchorage's funds, but without Anchorage's input.

In its February 24, 2022, decision on damages, the court held that agreements between MARAD and Anchorage had created an expectation that a defect free project would be delivered to Anchorage. Additionally, the court found that the United States was liable for loss of property value due to the defective work.

The United States filed a notice of appeal in the U.S. Court of Appeals for the Federal

Circuit on April 25, 2022. Anchorage v. United States, No. 2022-1719 (Fed. Cir.)

Briefing Completed in Environmental Challenge to Marine Highways Program

On October 12, 2021, the Center for Biological Diversity filed a Complaint against MARAD in the U.S. District Court for Eastern District of Virginia alleging violations of the ESA arising from grants under the America's Marine Highways (AMH) program. Center for Biological Diversity v. MARAD, No. 21-132 (E.D. Va.). Specifically, plaintiff alleges that MARAD awarded grants for the expansion of vessel traffic on rivers, bays, and coastal areas without engaging in a programmatic consultation and/or project-specific consultations with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to ensure that the actions of the AMH program did not jeopardize endangered or threatened species or impair their critical habitats under Section 7 of the ESA (16 U.S.C. § 1536(a)(2)).

On December 17, 2021, defendants filed their answer to the Complaint, and an administrative record was filed on March 1, 2022. Plaintiff filed its motion for summary judgment on March 25. In its memorandum in support of the motion, plaintiff alleges that defendants violated, and continue to violate, the ESA by failing to engage in Section 7 consultation for the AMH program. Specifically, plaintiff alleges that because the implementing regulations for the ESA require consultation on "programs," defendants are required to conduct a programmatic consultation for the AMH program. Plaintiff also alleges that MARAD failed to conduct Section 7 consultation for specific grant projects funded under the program, such as the 2018 James River Container Expansion Project.

Defendants filed their response and cross motion for summary judgment on April 25. In their memorandum in support of the motion, defendants argue that the establishment of the AMH program is not an "action" as defined by the ESA's implementing regulations and therefore does not require Section 7 consultations. Defendants further argue that plaintiff's claim regarding the 2018 James River Container Expansion Project is not redressable and that therefore, plaintiff does not have standing to raise the claim. Additionally, defendants argue that MARAD was not required to consult for the 2018 James River Container Expansion Project due to MARAD's "no effect" determination.

National Highway Traffic Safety Administration

Intervenor States File Motion to Proceed in Case Challenging NHTSA/EPA SAFE Part One Rule Following NHTSA's Repeal of the Rule

These consolidated petitions for review, Union of Concerned Scientists, et al. v. NHTSA, et al., No. 19-1230 (D.C. Cir.), involve challenges to NHTSA's and EPA's actions in the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program [SAFE I]. This case was originally placed in abeyance in February 2021 while NHTSA and EPA reconsidered their separate agency actions pursuant to Executive Order 13990. NHTSA finalized its reconsideration in December 2021 through a final rule that repealed NHTSA's entire portion of the SAFE I Rule. Following this action, the parties filed a consent motion

to govern, which requested that the case remain in abeyance while EPA finalized its separate reconsideration. EPA finalized its own reconsideration in March 2022 by rescinding the SAFE I action's withdrawal of a California Clean Air Act waiver. Accordingly, on March 15, 2022, the parties filed a notice advising the court of EPA's concluded reconsideration.

On April 11, 2022, the intervening states filed a motion to end the abeyance and proceed into oral argument. The motion seeks to litigate certain issues concerning both EPA's SAFE I action and subsequent reconsideration in this case, rather than a separate challenge to EPA's reconsideration. On April 14, 2022, petitioners and the United States filed their own joint motion to govern that requested the D.C. Circuit keep the case in abeyance pending further disposition of any future challenge to EPA's reconsideration. These competing motions remain pending at this time. Related litigation in the U.S. District Court for the District of Columbia, California, et al. v. Buttigieg, et al., No. 19-02826 (D.D.C.), remains stayed pending disposition of the D.C. Circuit case, although several of the public interest organization plaintiffs voluntarily dismissed their Complaints on May 24, 2022, in light of the completed reconsideration.

In separate litigation challenging NHTSA's denial of a petition for reconsideration of the SAFE I rule, on March 28, 2022, the Chesapeake Bay Foundation (CBF) filed an unopposed motion to voluntarily dismiss its petition, and the D.C. Circuit entered an order on March 31 granting the motion and dismissing CBF's case. Chesapeake Bay Foundation, Inc. v. NHTSA, No. 21-1091 (D.C. Cir.).

Petitioners Move to Keep Challenges to NHTSA's and EPA's SAFE Part Two Rule in Abeyance

On January 26, 2022, NHTSA and EPA filed a motion to keep litigation challenging NHTSA's and EPA's Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE II Rule) in abeyance. Competitive Enterprise Institute (CEI) v. NHTSA, No. 20-1145 (D.C. Cir.). The motion follows the conclusion of EPA's reconsideration of its part of the SAFE II Rule. EPA's final rule was published in the Federal Register on December 30, 2021 (86 Fed. Reg. 74,434). NHTSA's reconsideration concluded on March 31, 2022, when NHTSA signed a final rule finalizing amended corporate average fuel economy standards for passenger cars and light trucks for model years 2024-2026. Accordingly, on April 7, 2022, the agencies filed a notice advising the D.C. Circuit of the concluded reconsiderations. The petitioners filed an unopposed motion to govern further proceedings on May 9, 2022, which requested that the litigation remain in abeyance pending resolution of any subsequent litigation against EPA or NHTSA regarding their respective reconsiderations.

The litigation involves eight consolidated petitions for review, brought by several states, local jurisdictions, and non-governmental organizations challenging aspects of both EPA's and NHTSA's rulemakings. Pursuant to a scheduling order, petitioners' briefs were filed on January 14, 2021, and *amicus* briefs in support of petitioners were filed on January 21, 2021. CEI's opening brief argued that the agencies arbitrarily failed to adequately assess the proposals for less stringent standards, arbitrarily overstated the health risks of particulate matter, and as a

procedural issue, contended that the reports on particulate matter of the Clean Air Scientific Advisory Committee should be added to the rulemaking record.

In separate litigation challenging NHTSA's denial of a petition for reconsideration of the SAFE II rule, on April 21, 2022, the Union of Concerned Scientists (UCS) filed an unopposed motion to voluntarily dismiss its petition. Subsequently, the D.C. Circuit entered an order on April 25 granting the motion and dismissing the case. Union of Concerned Scientists v. NHTSA, No. 21-1094 (D.C. Cir.).

Pipeline and Hazardous Materials Safety Administration

Sixth Circuit Hears Oral Argument in Pipeline Operator's Petition for Review of a PHMSA Final Order

On March 10, 2022, oral argument was held in the U.S. Court of Appeals for the Sixth Circuit in Wolverine Pipe Line Co. v. USDOT, No. 21-3405 (6th Cir.), a petition for review in which petitioner Wolverine Pipe Line Company alleges that PHMSA acted arbitrarily and capriciously and contrary to law in a September 3, 2020, Final Order finding that Wolverine violated certain pipeline safety regulations. The violations arose out of Wolverine's repair of a pipeline in 2015, which PHMSA determined was conducted in violation of applicable safety standards. PHMSA issued the Final Order after a full administrative hearing.

In its September 2, 2021, opening brief, Wolverine alleges that PHMSA violated the basic due process principle that an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Wolverine further argues that even if PHMSA had provided it with adequate notice of the theory on which PHMSA ultimately relied, the imposition of civil penalties on Wolverine would still violate due process because neither PHMSA's regulations nor its guidance allowed Wolverine to identify, with "ascertainable certainty," the standards with which the agency expected it to conform. Finally, Wolverine alleges that one of the findings from the Final Order relied on a clear error of fact.

PHMSA filed its response brief on November 3. PHMSA argued that Wolverine failed to show that the agency's determination was arbitrary and capricious. Instead, PHMSA argued it determined that Wolverine performed pipeline repairs without taking appropriate protective measures called for by the regulations. PHMSA's regulations classify the dent in Wolverine's pipeline that was being repaired as an "immediate repair condition" that required pressure reduction or shutdown of the line until repair was completed, steps that Wolverine never undertook. In addition, PHMSA argued that Wolverine was not free to change the calculation method it chose to determine applicable pipeline strength and that a contrary ruling would allow operators to pick and choose between methodologies in a post hoc effort to obtain the most favorable result. Wolverine filed its reply brief on November 24.

Petition for Judicial Review of PHMSA Interim Final Rule Filed in the D.C. Circuit

On March 1, 2022, GPA Midstream Association and the American Petroleum Institute filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit of PHMSA's Interim Final

Rule (IFR), "Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters." GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1037 (D.C. Cir.). The IFR extends the definition of unusually sensitive areas (USAs) at 49 C.F.R. § 195.6, consistent with language prescribed within a statutory mandate in Section 120 of the PIPES Act of 2020 (Pub. L. 116-260). In addition to the petition for review, petitioners submitted to PHMSA a motion to stay the IFR pending resolution of the litigation.

Petitioners allege that PHMSA violated (1) the Pipeline Safety Act for not having submitted the IFR for review by the Liquid Pipeline Advisory Committee (LPAC) before finalization and (2) the APA by issuing an IFR without demonstrating the "good cause" required by 5 U.S.C. § 553(b)(3)(B) to avoid notice and comment requirements. Petitioners contend that PHMSA's decisions to forgo public comment and amend the regulatory definition of USAs without consulting the LPAC before issuance resulted in irreparable harm to their members, consisting of compliance costs and procedural injury.

On April 15, PHMSA filed a letter in the rulemaking docket notifying the public that the agency is working to promulgate a final rule that will address the comments it has received on the Interim Final Rule. The letter also stated that until that final rule becomes effective, the agency will decline to enforce the portions of the Interim Final Rule that apply the updated "unusually sensitive area" definition to rural gathering lines and rural low-stress pipelines. On the same day, the parties to the litigation filed a joint motion to hold the case in abeyance pending the promulgation of a final rule. On April 20, the court granted the motion and directed the government to file status reports at 90-day intervals.

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