U.S. Department of Transportation

DOT LITIGATION NEWS

Office of the General Counsel

Paul M. Geier
Assistant General Counsel for Litigation and Enforcement

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

December 7, 2022 Volume No. 22 Issue No. 2

Highlights

Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases, page 1

Certiorari Petition Filed Regarding Dismissal of Complaints for Failure to Properly Serve the Government, page 2

Petition for Certiorari Filed in Oregon Sacred Site, Religious Freedom Case, page 2

D.C. Circuit Denies Challenge to FMCSA's Hours of Service Final Rule, page 3

Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations, page 4

Appellate Court Rejects One Challenge to Executive Order 13990, Injunction Stayed in Another, page 6

Table of Contents

Supreme Court Litigation	1
Departmental Litigation in Other Federal Courts	3
Recent Litigation News from DOT Modal Administrations	
Federal Aviation Administration (FAA)	10
Federal Highway Administration (FHWA)	21
Federal Motor Carrier Safety Administration (FMCSA)	26
Federal Railroad Administration (FRA)	27
Maritime Administration (MARAD)	30
National Highway Traffic Safety Administration (NHTSA)	32
Pipeline and Hazardous Materials Safety Administration (PHMSA)	35
Subject Matter Index of Cases Reported in this Issue	40
Alphabetical Index of Cases Reported in this Issue	46

The Federal Transit Administration and the Great Lakes St. Lawrence Seaway Development Corporation have no updates for this edition of the Litigation News.

Subject Matter Index

Affirmative Enforcement Litigation 40
Airports 40
Aviation Safety 40
Constitutional Rights 40
Contracts and Grants 40
Disadvantaged Business Enterprise Program 41
Environment (including National Environmental Policy Act) 41
Federal Rules of Civil Procedure 42
Finality and Reviewability of Agency Action 42
Freedom of Information Act and Discovery 42
Fuel Economy 42
Hazardous Materials Safety 43
Highway Construction and Operation 43
Hobbs Act and Similar Review Statutes 43
International and Treaty Issues 43
Labor and Employment 43
Maritime 44
Mootness 44
Motor Carrier Registration and Operation 44
Pipeline Safety, Regulation, and Operation 44
Preemption 45
Railroad Safety and Operations 45
Standing 45
Torts (including Federal Tort Claims Act) 45

Alphabetical Index 46

Glossary of Commonly Used Abbreviations

ALJ	Administrative law Judge
APA	Administrative Procedure Act
CAA	Clean Air Act
CWA	Clean Water Act
DBE	Disadvantaged Business Enterprise
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
SEIS	Supplemental Environmental Impact Statement

Supreme Court Litigation

Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases

On June 30, 2022, the U.S. Supreme Court denied certiorari in two cases 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, Cal. Trucking Ass'n v. Bonta, 142 S. Ct. 2903 (2022). On June 27, 2022, the Court denied certiorari in another FAAAA preemption case. C.H. Robinson v. Miller, 142 S. Ct. 2866 (2022). The United States, in *amicus* briefs filed by the Solicitor General at the invitation of the Court, had recommended the denial of 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. 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 asked the 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 argued that the airlines had not shown that the types of breaks apparently contemplated by the Ninth Circuit would have a significant impact on airline prices, routes, or services.

In California Trucking Association v. Bonta, an industry group asked the 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 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 – made the case a poor vehicle for reviewing the question presented.

In C.H. Robinson v. Miller, a freight broker asked the Court to review a Ninth Circuit decision holding that the FAAAA did not preempt a tort claim brought by a driver injured in a collision with a tractor trailer. The United States argued that the Ninth Circuit correctly determined that the plaintiff's claim, even if it otherwise would be preempted, fell within the FAAAA's exception covering "the safety regulatory authority of a State with respect to motor vehicles."

Certiorari Petition Filed Regarding Dismissal of Complaints for Failure to Properly Serve the Government

On September 9, 2022, a former FAA employee and a former employee of the Department of Homeland Security (DHS) filed a certiorari petition with the Supreme Court, asking the Court to review a decision of the U.S. Court of Appeals for the District of Columbia Circuit that affirmed the dismissal of their employment discrimination complaints for failure to properly serve the government. Morrissey, et al. v. Mayorkas, et al., No. 22-235 (U.S.). The case involves the proper standards for such dismissals when the statute of limitations would bar re-filing.

Federal Rule of Civil Procedure 4(i) requires a plaintiff suing federal agencies (or federal officials in their official capacity) to serve process on the agency (or official), the Attorney General, and the U.S. Attorney for the judicial district where the suit is filed. Rule 4(m) provides that if service is not completed with 90 days, the court must either "dismiss the action without prejudice or order that service be made within a specified time." Extensions are mandatory if "plaintiff shows good cause for the failure" or if plaintiff has served either the Attorney General or the U.S. Attorney.

Plaintiff Kelly Stephenson, a former air traffic controller, brought employment discrimination claims against the FAA. Twenty-three days after the expiration of the 90-day deadline for completing service, the district court issued an order noting that although Stephenson had filed proof of service on the agency, he had not done so with respect to the Attorney General or the U.S. Attorney; the court gave Stephenson fourteen days to complete service. Stephenson, who was represented by counsel, responded by filing an affidavit noting that he had served the agency, but saying nothing about the Attorney General or the U.S. Attorney. The court dismissed the complaint and denied Stephenson's motion for reconsideration, which gave no logical explanation for the service failure. Stephenson argued for the first time in his motion that the statute of limitations would preclude re-filing; the court held that he should have raised this argument before dismissal.

Stephenson's appeal was consolidated with a similar appeal from a DHS employee, and a split panel of the D.C. Circuit affirmed. The court held that the district courts had not abused their discretion when dismissing the complaints, an option expressly provided for by Rule 4(m). While plaintiffs argued that a heightened standard should apply to dismissals that would bar re-filing because of the running of the statute of limitations, the court found that this factor is just one of many that a district court may consider. The court recognized that the Fifth Circuit applies a heightened standard, but disagreed. Judge Millett dissented, arguing that when a dismissal under Rule 4(m) would bar re-filing, the court must make the findings of "repeated misconduct or dilatoriness" required for dismissals under Rule 41(b). The court denied rehearing *en banc*.

In their certiorari petition, plaintiffs argue that the D.C. Circuit's holding is inconsistent with decisions of the Fifth Circuit and several other circuits. The government filed its brief in opposition on December 7, 2022.

Petition for Certiorari Filed in Oregon Sacred Site, Religious Freedom Case

On October 3, 2022, plaintiffs in Slockish, et al. v. USDOT, No. 22-321 (U.S.) filed a

certiorari petition with the Supreme Court seeking review and reversal of the U.S. Court of Appeals for the Ninth Circuit's November 2021 decision dismissing their claims as moot.

The case, brought by a small local group of Yakima Indian Nation members, involved the alleged destruction of a Native America religious site by a federally aided highway-widening project along US-26 in Clackamas County, Oregon in 2008, known as the "Wildwood-Wemme" project. Plaintiffs argued that the destruction of their sacred site and associated artifacts by the highway's construction violated primarily the Religious Freedom Restoration Act (RFRA) because it prevented them from practicing their religious ceremonies at that location.

On June 11, 2018, the U.S. District Court for Oregon dismissed the RFRA claim. The court held that the plaintiffs had not established "substantial burden" under RFRA by showing "they are being coerced to act contrary to their religious beliefs under the threat of sanction or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs," as is required in the Ninth Circuit. In March 2021, the district court granted summary judgment for the government on plaintiffs' remaining claims.

Plaintiffs subsequently appealed to the Ninth Circuit. On November 24, 2021, the court dismissed plaintiffs' appeal as moot. The Ninth Circuit found that any effective relief would require modification of the highway owned by the Oregon Department of Transportation, which the federal defendants lack the authority to do and which the court could not order because the Oregon Department of Transportation had already been dismissed from the case. Plaintiffs filed a motion for panel rehearing and petition for rehearing *en banc*, which the Ninth Circuit denied on May 6, 2022.

The focus of the certiorari petition is the Ninth Circuit's ruling that plaintiffs' RFRA claim was moot. Plaintiffs argue that because some relief is still possible, defendants haven't carried their burden of proving otherwise, and the court failed to adequately consider those forms of potential relief, the ruling is erroneous and contrary to precedent on mootness.

The government's response to the petition is due on January 4, 2023.

Departmental Litigation in Other Federal Courts

D.C. Circuit Denies Challenge to FMCSA's Hours of Service Final Rule

On July 26, 2022, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review challenging FMCSA's June 2020 final rule governing the hours of service of commercial motor vehicle drivers.

Advocates for Highway and Auto Safety, et al. v. FMCSA, et al., 41 F.4th 586 (D.C. Cir. 2022). Petitioners Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers challenged the final rule and FMCSA's August 2020 denial of petitioners' joint petition for reconsideration. The Owner-Operator Independent Drivers

Association intervened in support of the final rule.

Petitioners challenged the provisions of the final rule related to on-duty and geographic limitations for short-haul drivers who are exempt from electronic logging device (ELD) requirements and to the requirement for drivers to take a 30-minute rest break. Petitioners argued that those provisions were arbitrary and capricious under the APA because FMCSA failed to consider the crash risks of allowing short-haul drivers to drive later in the workday and did not adequately justify its conclusions that the short-haul exemption changes would not adversely affect driver health or compliance with the hours of service regulations. Further, petitioners argued that FMCSA 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.

The court upheld both provisions of the final rule, concluding that "[w]hile aspects of the Administration's analysis and reasoning leave much to be desired, at bottom, the Administration sufficiently explained and factually justified its conclusions that the new short-haul exemption and the 30-minute break requirement would not adversely affect safety, driver health, or regulatory compliance." With respect to the short-haul provision, the court found that FMCSA reasonably weighed competing studies to determine that the change was safety neutral and that the record supported FMCSA's conclusion that the change would not adversely affect driver health. The court noted that the short-haul provision in the final rule only expanded the ELD exemption to cover a greater number of drivers. The court also found that FMCSA gave a sufficient explanation "by a narrow margin" to conclude that expanding the ELD exemption for short-haul drivers would not impact regulatory compliance. Although this was a changed position, FMCSA acknowledged the change and provided adequate reasoning for its abandonment of its prior positions.

With respect to the changes to the 30-minute break requirement, the court found that FMCSA sufficiently justified its conclusion that both on-duty and off-duty breaks provide sufficient rest. The court noted that "balancing conflicting evidence is the agency's job, not ours, as long as the agency reasonably weighs evidence both supporting and undermining its final conclusion." The court found that FMCSA also specifically considered driver health and concluded that the change would potentially decrease stress for drivers. Although FMCSA did not directly address the monetary health benefit associated with the change, it adequately justified its conclusion that the change would not adversely impact driver health because FMCSA found that the change would give drivers greater flexibility to take breaks and obtain restorative sleep.

Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations

On October 20, 2022, the U.S. Court of Appeals for the Sixth Circuit in Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022) (6th Cir.), affirmed 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 promulgated during the last Administration pursuant to Executive Order (EO) 13892 and codified in 49 C.F.R. part 5, subpart D. Polyweave Packaging, Inc. v.

USDOT, 2021 WL 4005616 (W.D. Ky. Sept. 2, 2021).

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 rescinded 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. (See No. 21-4202 (6th Cir.), discussed in the next entry.)

On May 19, 2021, Polyweave sued the Department for violation of the APA and for declaratory 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 was a target of an ongoing PHMSA enforcement action and that it would 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.

On September 1, 2021, 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 granting the government's motion to dismiss, the district court agreed with the government that Polyweave lacked standing to bring its claims but rejected the government's alternative argument that the district court also lacked subject matter jurisdiction because Polyweave's challenge of the rescission of subpart D should have been brought in the courts of appeals pursuant to 49 U.S.C. § 5127. 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 filed an appeal of the district court's dismissal in the Sixth Circuit.

While the Sixth Circuit affirmed the lower court's decision to dismiss the case for lack of jurisdiction, it did so on the basis of the

exclusive jurisdiction of the courts of appeals over Polyweave's claims under section 5127. Specifically, the Sixth Circuit concluded that since Polyweave's APA claims regarding subpart D effectively seek a determination of what procedures apply in the underlying enforcement proceeding, Polyweave's APA claims are inescapably intertwined with PHMSA's civil penalty order, which can only be challenged in the courts of appeals pursuant to section 5127. In a concurring opinion, Judge Murphy concurred with the judgment but would have affirmed the district court's dismissal of Polyweave's claims for lack of standing.

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

On July 22, 2022, the U.S. Court of Appeals for the Sixth Circuit ordered that further briefing in Polyweave Packaging, Inc. v. USDOT, No. 21-4202 (6th Cir.), be held in abeyance pending disposition of a motion to vacate the underlying challenged agency decision and remand for further proceedings that DOT filed on July 22, 2022. The abeyance order followed a denial of petitioner's motion to consolidate this case with Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022), dismissed on October 20, 2022, and discussed in the preceding entry. In its motion to vacate and remand, DOT argued that vacatur and remand is appropriate because during the course of preparing its response brief to petitioner's opening brief it determined that PHMSA's Chief Safety Officer, the official who issued the agency decision under review, was not properly appointed at the time that he issued that decision in violation of Article II of the Constitution. DOT informed the court that PHMSA's Chief Safety Officer has since been appointed by the Secretary of Transportation, who also ratified his prior appointment. Although PHMSA's Chief Safety Officer is now properly appointed under Article II, and thus empowered to issue agency decisions, DOT argued that the underlying decision must be vacated and the case remanded for further proceedings so that the petitioner can have its case reviewed by a properly appointed official.

This case involves a challenge to 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. On December 20, 2021, Polyweave Packaging, Inc. filed a petition for review and on April 14, 2022, in its opening brief, presented the following three main arguments. 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.

Appellate Court Rejects One Challenge to Executive Order 13990, Injunction Stayed in Another

On October 21, 2022, the U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the U.S. District Court for the Eastern District of Missouri District Court in Missouri, et al. v. Biden, et al., 52 F.4th 362

(8th Cir. 2022). In this case, thirteen 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. The injury that plaintiffs allege is from hypothetical future regulation possibly derived from these Estimates. DOT is one of many agencies that participates in the Working Group and was named as a co-defendant in this litigation. The Eighth Circuit held that the plaintiff states failed to allege a cognizable injury traceable to the publication of the Interim Estimates. On December 5, appellants filed a petition for rehearing *en banc*.

In Louisiana, et al., v. Biden, et al., 585 F. Supp. 3d 849 (W.D. La. 2022), thirteen states filed a very similar lawsuit challenging Executive Order 13990 and the Interagency Working Group's Technical Support Document. 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.

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. Briefing was completed in July, and oral argument was held before the Fifth Circuit on December 7.

DOT Files Motion for Summary Judgment in Former OST Employee's Title VII Case

On October 14, 2022, DOT filed a motion for summary judgment in Young v. Buttigieg, No. 19-1411 (N.D. Cal.). 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 in the U.S. District Court for the Northern District of California 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. After the parties participated in settlement discussions in August 2022, plaintiff agreed to dismiss with prejudice her *de novo* claims and DOT agreed to dismiss with prejudice its counterclaim that sought to have the court order plaintiff to return the amounts that DOT had previously paid to her as a result of the EEOC's order. Plaintiff's non-selection and constructive removal claims are the only remaining claims in the case.

In its motion for summary judgment, DOT argues that plaintiff failed to establish a *prima facie* case of age discrimination based on her alleged non-selection. Her non-selection claim is not based on any application that she submitted for a position at DOT. Rather, her claim is based on three instances in which she claims DOT failed to reinstate her pursuant to the EEOC's order. In other words, plaintiff's "non-selection" claim is essentially an attempt to resurrect her allegation, which the court had previously dismissed, that DOT did not fully comply with the EEOC's order. In addition, DOT argues that plaintiff's constructive removal claim fails as a matter of law. Not only did plaintiff remain working at DOT for over six years following the job reassignment that spurred her allegations of employment discrimination, but she also praised the positive work environment during the intervening years prior to her voluntary retirement from DOT.

On November 12, plaintiff filed an opposition to the government's motion for summary judgment. In her opposition, plaintiff argues that she was constructively discharged due to DOT's alleged failure to return her to her original position and because she claims the agency targeted her position for inclusion in a voluntary retirement incentive program.

In its November 18 reply brief, DOT argued that in more than one case, the Ninth Circuit has ruled against employees who have continued working for far shorter periods of time after alleged discrimination on constructive discharge claims. DOT also explained that there is ample evidence that plaintiff would have been included in the voluntary retirement incentive program even if she had not been reassigned in 2008. Further, plaintiff's opposition failed to address the requisite elements that she must show to prove a prima facie case of age discrimination in connection with her non-selection claim.

A hearing on DOT's motion for summary judgment is scheduled for December 16.

Challenge to DOT DBE Program Filed, Preliminary Injunction Sought

On September 27, 2022, the United States moved to dismiss a lawsuit challenging the constitutionality of DOT's DBE program, which establishes an aspirational goal for economically and socially disadvantaged businesses to participate in certain transportation programs. Earlier, on August 29, 2022, the government opposed the plaintiffs' motion for a preliminary injunction. Bruckner, et al. v. Biden, et al., No. 22-1582 (M.D. Fla.).

The Infrastructure Investment and Jobs Act (IIJA) reauthorized DOT's DBE program by providing that "[e]xcept to the extent that the

Secretary determines otherwise, not less than 10 percent of the amounts made available" for specified federally-funded highway and transit programs "shall be expended" through DBEs. DBEs are businesses owned by socially and economically disadvantaged individuals. While individuals in certain groups are presumed to be disadvantaged, business owners of any race or gender may qualify. DOT's long-standing DBE regulations prohibit the use of quotas and permit the use of race- and gender-conscious means only if DBE participation goals cannot be met through race- and gender-neutral means.

Plaintiffs are Christian Bruckner, who identifies as a white, disabled male, and his company Project Management Corporation. Plaintiffs allege that the IIJA's DBE provision violates the equal protection component of the Fifth Amendment's Due Process Clause by imposing unsupported race and gender classifications. They seek preliminary and permanent injunctive relief.

In its motion to dismiss, the government argued that plaintiffs do not identify an injury-in-fact sufficient to support standing because they do not allege that they have ever submitted a bid on any DOT-funded project or that their bid would be rejected because of the DBE provision. The government also argued that any injury would not be redressed by enjoining the use of race- and gender-conscious presumptions because plaintiffs do not allege that they meet the requirement for establishing economic disadvantage. And the government argued that plaintiffs fail to state a claim because the DBE program is a narrowly-tailored means of addressing a compelling interest in remedying past and present discrimination, as held by every Court of Appeals to have considered the issue.

The government made similar arguments in opposing plaintiffs' motion for a preliminary injunction. It also contended that plaintiffs had not demonstrated irreparable harm, that the balance of the equities did not support granting an injunction, and that any injunction should be limited to the named plaintiffs.

On November 7, the court held a hearing to discuss both the motion to dismiss and the motion for a preliminary injunction. The court subsequently requested supplemental briefs, which the parties filed on December 2.

Pennsylvania Sub-Contractor Brings Constitutional Challenge to DOT's DBE Program

On October 7, 2022, the owner of a construction sub-contractor filed suit against Secretary Buttigieg and the Pennsylvania Secretary of Transportation in the U.S. District Court for the Middle District of Pennsylvania challenging the constitutionality of DOT's DBE program and Pennsylvania's application of that program. Mueller v. Gramian, et al., No. 22-01576 (M.D. Pa.).

Plaintiff is the owner of a sub-contractor that applied to the Pennsylvania Department of Transportation (PennDOT) for certification as a woman-owned DBE for color concrete staining services on construction projects. PennDOT denied the application on the grounds that plaintiff does not actually control the company. Plaintiff sued to allege that the DBE program's racial classifications—and Pennsylvania's implementation of the program—violate the Equal Protection and Due Process Clauses, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

The deadline for DOT and PennDOT to respond to the complaint is January 3, 2023.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

FAA Prevails in Challenge to UAS Remote Identification Rule

On July 29, 2022, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review challenging FAA's January 2021 rule governing remote identified for unmanned aircraft. Brennan, et al. v. Dickson, et al., 45 F.4th 48 (D.C. Cir. 2022).

Remote identification (Remote ID) is the ability of an Unmanned Aircraft System (UAS) in flight to provide identification and location information that can be received by other parties, akin to a "digital license plate" for UAS. UAS manufactured for use in the United States must be manufactured with Remote ID capability starting September 16, 2022. Beginning September 18, 2023, operators must comply with the rule by using a Standard Remote ID for UAS equipped with Remote ID, equipping their UAS with a Remote ID broadcast module or flying within an FAA-Recognized Identification Area (FRIA or ID Area). A FRIA is a defined geographic area where persons can operate UAS without remote identification if they maintain visual line of sight. Community-based organizations and educational institutions can apply for the establishment of FRIAs beginning September 16, 2022. UAS manufacturers are required to produce UAS that meet the rule's performance requirements by following an FAA-accepted means of compliance.

Petitioners, a drone user and his drone sales and service company, had argued that: (1) the Remote ID rule is an improper search and seizure under the Fourth Amendment; (2) FAA arbitrarily and capriciously either relied upon undisclosed *ex parte* communications or failed to consider relevant information or explain or support changes in the final rule; (3) increasing altitude accuracy while simultaneously switching sensor technology was not a logical outgrowth of the NPRM; (4) FAA failed to comply with the statutory requirement to consult with specified entities; and (5) FAA ignored significant critical comments by failing to explain its constitutional and statutory authority to regulate airspace low to the ground, ignoring material comments challenging the rule's legality, refusing to accept conflicting evidence as to true regulatory costs, not considering an exception for model aircraft, failing to explain why homeowners and local parks could not apply for an ID area, and failing to respond to comments on the safety implications of the rule.

FAA argued that: (1) the Remote ID rule complies with the Fourth Amendment, in that it violates no reasonable expectation of privacy and any constitutionally cognizable search would be minimally intrusive and not require a warrant; and (2) the Remote ID rule is not arbitrary and capricious, because FAA did not consider any *ex parte* communications in issuing it, it is a logical outgrowth of the proposed rule, FAA considered and responded to all material comments, and FAA satisfied all statutory consultation requirements.

The court rejected all of petitioners' arguments. The court rejected petitioners' Fourth Amendment claim because they failed to show that drone pilots have any reasonable expectation of privacy in the location of their

drone systems during flight, that the rule authorized any privacy-invading practice, or that the rule authorizes law enforcement personnel to access drone owners' personally identifying information separate from the FAA's involvement. The court also rejected petitioners' various claims that the rule was arbitrary and capricious, holding that they had not shown that the rule was materially affected by any *ex parte* influence, nor identified any harm they might have suffered if it were, that the rule was a logical outgrowth of the proposed rule, that FAA satisfied all statutory consultation requirements, and that FAA considered and responded to all material comments.

Eleventh Circuit Denies Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD

On September 2, 2022, an Eleventh Circuit panel ruled in favor of FAA in City of North Miami, et al. v. FAA, 47 F.4th 1257 (11th Cir. 2022), which consolidated five petitions for review filed on or after December 11, 2020, 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, FAA is implementing a mid-term step in South Central Florida, the Metroplex Project.

Following oral argument on June 6, 2022, the court on September 2 denied the petition for review. As to petitioners' claim that the Purpose and Need Statement was too narrow because it omitted noise and emission reductions among the seven goals of NextGen, the court found, among other things, that (1) petitioners identified no requirement that FAA account for each and every NEPA objective; (2) contrary to the argument that omission of noise and emission reductions was outcome determinative, FAA adequately considered the Project alternatives and the no action alternative; and (3) FAA considered in detail noise and emissions reduction.

Regarding calculation of cumulative environmental impact of FAA's actions by using a baseline of 2017-18, rather than 2006, the court looked both to NEPA (*i.e.*, 42 U.S.C. § 4332, requiring consideration of the action's environmental impact; and 40 C.F.R. § 1508.7, which focuses on and defines cumulative impact) and FAA Order 1050.1F § 4-2(d)(3), which requires an EIS for a proposed action that would cause "significant

incremental additions to cumulative impacts"). With a baseline of all 1.7 million flights detected by FAA radar, June 2017-May 2018, in the South-Central Florida Multiplex region, FAA compared noise models for the action and no-action alternatives and found no significant noise impact as defined in FAA Order 1050.1F and no increase in reportable noise. As to the 2006, 2015, and 2018 FAA actions cited by petitioners – the 2006 implementation of satellite-based flight procedures, the 2015 addition of maximum altitudes to flight charts without flight procedure changes, and the 2018 establishment, modification, creation, or amendment of 67 high-altitude procedures – the court agreed with FAA that they had no legally significant impact on noise levels and thus did not need to be factored into the baseline.

The court rejected petitioners' claim that FAA was not entitled to the presumption of conformity with CAA and NEPA that the agency applied for changes to flight routes and procedures *above* 3,000 feet AGL and for flight path changes *below* 3,000 feet AGL if designed to improve operational efficiency, and thus failed to evaluate the Project's true air quality. As to the first presumption, petitioners alleged that because the EA said the Project changed "air traffic flows during departures, descents, and approaches of flights," the conclusion that the action would happen either wholly or mostly above 3,000 feet was unsupported. The court, however, agreed with FAA's conclusion that changes likely to produce a change in emissions would occur at those altitudes, where they would not affect ground-level pollution concentrations. As to the second presumption, petitioners claimed that changes below 3,000 feet should not justify the presumption because they would increase fuel burn and decrease efficiency; however, the court found that that argument, with its cramped definition of "efficiency," was inapt, citing FAA's explanation that the Project also would reduce congestion, balance the workload of flight controllers, and improve controller coordination, resulting in decreased flight-procedure complexity, fewer flight path adjustments, and more predictable traffic flows, improvements in efficiency that were not outweighed by a less than 0.5-percent increase in fuel burn. To petitioners' argument that even assuming no CAA violation, FAA violated NEPA's requirement that the agency determine that its action is appropriate for an EA because it is not likely to produce significant effects or the effects' significance is unknown, the court noted that Order 1050.1F at 4-4 defined a NEPA significant air-quality impact as causing pollution concentrations to exceed at least one or more National Ambient Air Quality Standards established under CAA by the EPA, so that the CAA analysis establishing *de minimis* air-quality impact also satisfied NEPA.

The court also rejected petitioners' allegations that FAA violated the Department of Transportation Act Section 4(f) by not considering the Project's impact on all public parks, recreation areas, and wildlife refuges in and around Biscayne Bay and not consulting with all local, state, and federal officials with jurisdiction over affected areas. With respect to the claim that FAA omitted the Biscayne Bay Aquatic Preserve from its noise impact analysis, the court observed that FAA modeled noise pre- and post-Project (*i.e.* 2021 and 2026) at grid points at half-nautical-mile intervals for all areas where planes would fly below 18,000 feet and forecast no significant noise increase at any of more than 94,000 Section 4(f) resource points or any half-mile grid points, thus ensuring that the Preserve would suffer no significant noise increase.

As to the claim of no evidence of proper consideration of potential substantial impairment of protected areas, the court responded that there was ample evidence of the methodology used.

Regarding the claim that FAA failed to use the part 150 land use compatibility table to determine significance of noise impacts relevant to value, significance, and enjoyment of the lands, the court observed that the referenced manual meant at most that FAA could, if it found it appropriate, choose to apply standard noise thresholds to noise-sensitive areas, and that it, in fact, did so.

Finally, to the argument that FAA should have consulted all state and local agencies about potential noise impacts, the court observed that Section 4(f) mentioned no such requirement. FAA Order 1050.1F requires consultation with appropriate federal, state, and local officials with jurisdiction over affected properties to determine whether project-related impacts would substantially impair them, but requires no particular process or method. To petitioners' argument that the consultation "mandate requires specific participants to exchange views on a specific subject at specific time," the court cited notices to all local government petitioners, two representatives of the Florida Department of Environmental Protection, and found that "FAA cannot drag all stakeholders to the proverbial consulting table -- it can only set the table and send the invitations."

Finally, as to the alleged deprivation of the constitutional right to sleep, the court found that the municipality petitioners had no standing to invoke their residents' interests and that only resident petitioner Burkett had standing to pursue a lack of sleep claim. Even had Burkett invoked the Fifth Amendment (applicable to a federal agency) rather than the Fourteenth Amendment, and even had federal courts recognized a Due Process Clause right to sleep, the Project is legislative, not adjudicative, in nature, so the property owners are not entitled to procedural due process.

Petition for Review of FAA Decision to Halt Post-Phoenix Agreement Implementation Dismissed for Lack of Standing

On June 24, 2022, the U.S. Court of Appeals for the District of Columbia dismissed for lack of standing 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, 37 F.4th 678 (D.C. Cir. 2022).

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 believed it would benefit from some FAA proposals and wanted 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

With briefing completed January 27, 2022, and oral argument conducted March 21, the court on June 24, dismissed the petition for review for lack of standing and dismissed all motions as moot. The court stated that though Scottsdale claimed the type of harm that could give it standing (*i.e.,* that FAA approval of the east-bound flights injured it by flying on those paths and produced noise and pollution on its property), it had confined itself to conclusions, such as identifying several city-owned locations that the City Attorney's declaration said now had more noise than before but giving no foundation therefor and not referring to a specific flight causing specific harm to specific property. These claims were partly rebutted by the FAA's study finding no recordable noise increases in Scottsdale after the new flight paths were approved and further refuted by Scottsdale's expert report describing planes flying to or leaving from local non-PHX airports, some flying beneath flights from PHX, leaving open the possibility that any Scottsdale noise problems resulted from flight paths originating or terminating at airports not implicated in the case.

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

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. v. Dickson, No. 22-1004 (D.C. Cir.).

Petitioners pointed to the regulatory history, including: (a) the 1967 rule 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 remand in Flyers Rights Education Fund, Inc. v. FAA, 864 F.3d 738, 744 (D.C. Cir. 2017), holding that in rejecting Flyers Rights rulemaking petition, 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," followed by FAA's July 2018 petition denial,

in turn followed within four months by the 2018 Act.

On April 4, 2022, in response to the court's order, FAA filed an opposition to the petition, arguing that the relief sought is unwarranted because Section 577 only requires FAA "to 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 noted that it 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." FAA also argued that it has comprehensively regulated design standards to ensure that it cannot approve proposed seating configurations that prohibit "rapid evacuation in crash landings," that experiences in actual and simulated evacuations show that even if the seat is relatively narrow, and the passenger is relatively large, emergency evacuation time is not compromised, and that petitioners specified no egregious delay warranting the extreme remedy of mandamus.

Petitioners' April 28 reply brief argued, among other things, that FAA's argument that the 2018 Act does not require minimum dimensions if no minimum dimensions are required for passenger safety posits illogically that safety would not be affected regardless of how small seats were, which is contrary to FAA's own study and demonstrates why mandamus is required, because otherwise FAA would continue to ignore the statutory requirement.

Following completion of briefing, the court heard oral argument on September 12, 2022.

Briefing Underway in Flyers Rights Appeal of D.C. District Court FOIA Decision

On May 25, 2022, appellants filed their opening brief in Flyers Rights Education Fund, Inc., et al. v. FAA, No. 21-5257 (D.C. Cir.), an appeal of a decision of the U.S. District Court of the District of Columbia holding that FAA correctly withheld Boeing 737 MAX certification records as confidential commercial information under FOIA Exemption 4 in its response to appellants' November 2019 FOIA request. Flyers Rights Education Fund, Inc., et al. v. FAA, 2021 WL 4206594 (D.D.C. Sept. 16, 2021). The district court found the records "confidential" as defined by Exemption 4 and rejected plaintiffs' arguments that FAA's general statements about its commitment to transparency qualified as an assurance that it would release specific proprietary documents to the public and that the records should be released as necessary to enable outside experts to assess the safety of the 737 MAX's design change.

In their opening brief, appellants argued that: (1) that the district court erred in finding that the information could be withheld under Exemption 4 because FAA's public statements promising complete transparency as to the ungrounding process put Boeing on notice that FAA would disclose the information Boeing submitted; (2) the "means of compliance," developed and used to demonstrate compliance, instead of published standards, were binding public policy and could not be held confidential without allowing Boeing to create a body of "secret law"; (3) certain withheld records had been generated by FAA; and (4) some of the information in the withheld records was reasonably segregable.

FAA's response brief is due December 14, and Flyers Right's reply brief is due January 30, 2023.

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

The parties have filed their opening briefs in Lowman v. FAA, No. 21-14476 (11th Cir.), a petition for review filed by five owners of residential property in Lakeland, Florida challenging 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 (Airport). The City of Lakeland has intervened in support of respondent.

On October 29, 2021, FAA approved a final EA and issued a FONSI/ROD for the project. 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.

Petitioners' August 1, 2022, opening brief argues that the proposed expansion would dramatically increase aircraft arrivals and departures over residential Lakeland and adjacent communities, as well as truck traffic in and around the airport, increasing noise and emissions and increasing already significant harm to petitioners' and Lakeland residents' health, welfare, and quality of life. Petitioners argue that the court should grant the petition for review, vacate the FONSI/ROD, and order a proper EA because (1) FAA violated NEPA by dividing a unified project into at least four segments with collectively significant adverse environmental consequences that should have been evaluated as such; (2) FAA failed to consider cumulative impacts of the airport's and FAA's past actions, setting a false environmental baseline to evaluate the project's impact; and (3) the Phase II EA failed to satisfy NEPA's air-quality-related requirements by analyzing only air quality impacts meeting the "presumed to conform" standard, failing to analyze or discuss Hazardous Air Pollutants (HAP), and relying on conclusory statements to find no significant air quality impacts.

FAA's September 30, 2022, brief argues that petitioners failed to establish Article III standing because they did not show that Phase II had or imminently would cause disruptive, damaging, or even perceptible increase in noise or air quality impact where they lived or that *vacatur* of the approval would remedy any injury. Petitioners also waived their arguments by failing to raise their objections during the environmental review process, or showing why they had failed to do, as required by 49 U.S.C. § 46110(d).

On the merits, FAA argued, among other things, that petitioners' impermissible segmentation argument fails because it belatedly challenges FAA's actions primarily

as to the Phase I EA's scope, with no showing that Phase II was either proposed or otherwise imminent during the Phase I EA. Petitioners' claim that FAA did not consider present effects of past actions rests on faulty legal and factual ground because the "no action" alternative as the baseline is permissible if it accurately depicts the present environmental condition, which has not been refuted here. Petitioners' argument that FAA must analyze air quality impacts beyond those relevant to whether the Project will significantly impact air quality under FAA's significance standard is contrary to Eleventh Circuit precedent, no specialized HAP analysis was required, and FAA's nonbinding guidance recommends no such analysis. Finally, FAA argues that even if the court agreed with any of petitioners' claims, *vacatur* would be inappropriate because the order's alleged deficiencies are not sufficiently serious, *vacatur* would have disruptive consequences, and petitioners have not shown that further analysis on remand likely would produce a different conclusion.

Petitioners filed their Reply Brief on November 21.

Briefing Commences in Challenge to San Diego County Wind Turbines

Petitioners in Backcountry Against Dumps v. FAA, No. 21-71426 (9th Cir.), challenge FAA's determination that their petition for discretionary review of FAA's "no hazard" determination as to 72 wind turbines associated with the Campo Wind Project (Project) in Campo, San Diego County, California, failed to meet the requirements of 14 C.F.R. § 77.37.

Petitioners 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.

After receiving notice of the proposed project, FAA circulated a notice for public comment on October 21, 2019. Petitioners responded to that notice by objecting to the project. On July 16, 2020, FAA issued an initial determination of no hazard (later reissued on August 31, 2021, after FAA learned of errors in the initial aeronautical studies), including a response to petitioners' comment. On August 17, 2020, petitioners timely filed an administrative petition for discretionary review based on the issues raised in their comment. On December 2, 2020, FAA granted the petition solely as to the objection that FAA had not adequately considered the Project's proximity to airports where pilots used visual flight rules.

On April 7, 2021, FAA published a new public notice for comment related to the Project. No new comments were submitted. On August 31, 2021, FAA issued No Hazard Determinations for all of the turbines in the Campo Wind Project, except for the four that had already been withdrawn from consideration based on prior negotiations with the sponsor. On September 30, 2021, petitioners submitted an administrative petition for discretionary review, which reiterated a subset of the issues raised in petitioners' previous comment and administrative petition for discretionary review in response to the October 21, 2019, public notice. On October 15, 2021, FAA denied the petition because it did not meet the criteria in 14 C.F.R. § 77.37(a) due to petitioners' failure to comment on the April 7, 2021, public notice. This action ensued.

Petitioners' July 13, 2022, opening brief, rather than addressing the merits of FAA's determination that the turbines pose no hazard, urges the court to vacate FAA's denial of their administrative petition on procedural grounds and to order FAA to engage in discretionary review of the petition on the merits. Petitioners claim that FAA erred in rejecting their administrative petition because they "provided a substantive aeronautical comment on a proposal in an aeronautical study" by responding to an earlier public notice related to the Project and were "not given the opportunity to state" their comments because FAA did not give them personalized notice of the 2021 Public Notice related to the Project.

FAA's September 12 response brief argues that (1) petitioners' comments on the October 2019 public notice did not suffice as comments to the separate April 2021 notice; (2) petitioners cannot show that they lacked the opportunity to state their objections because the April 2021 public notice was available on FAA's website and there was no requirement that the public notice be sent directly to petitioners; and (3) petitioners could not show that they were deprived of the opportunity to present any "new information or facts not previously considered" in their administrative petition, as required to qualify for discretionary review under 14 C.F.R. § 77.37(b).

Petitioners' November 2022 reply brief argues, among other things, that FAA was required to give petitioners' direct notice by FAA Order 7400.2, the decision on the August 17, 2020, administrative petition for review, and 14 C.F.R. § 77.31(a) (requiring FAA to notice "all known interested persons" of decisions as to navigation hazards posed by projects).

With briefing complete, the court has scheduled oral argument for January 11, 2023.

UPS First Officer Appeals Airline Transport Pilot Certificate Revocation for Misconduct

The FAA Acting Administrator and NTSB are respondents in a March 23, 2022, petition for review challenging NTSB's January 27 order affirming FAA's revocation of petitioner'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). Brown v. Nolen, No. 22-1047 (D.C. Cir.)

The case, unusual in that it involves interference by one crewmember with the duties of another, arose on November 27, 2016, 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 (CVR) 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.

Petitioner appealed the FAA's revocation order, denying the allegations therein and asserting affirmative defenses. At the conclusion of the July 2019 hearing, the ALJ, without making credibility determinations, but based on limited findings of fact, found the allegations proven, and affirmed the revocation.

On administrative appeal, NTSB rejected petitioner's arguments as to evidentiary rulings (including denial of his spoliation motion arising from failure to unplug the CVR to preserve the evidence of the incident), found FAA's expert testimony as to takeoff performance irrelevant, and rejected petitioner's assertion of the stale complaint rule. NTSB did, however, agree with petitioner's claim that the ALJ erred in failing to make express credibility determinations and findings of fact as to petitioner's leaving his seat and the cockpit.

On remand, the ALJ made credibility determinations and findings of fact supporting all three violations.

In its order on remand, NTSB affirmed the ALJ's conclusions, holding that petitioner violated the following regulations: (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. NTSB found that revocation of petitioner's airline transport pilot certificate was appropriate and affirmed FAA's order of revocation.

In his September 6, 2022, opening brief, petitioner alleges that (1) FAA failed to investigate the alleged threat or interview any of the witnesses, who had provided three different versions of events; (2) because the testimony is virtually the entire case, the judge's credibility determinations – made only on remand, 17 months after he had actually observed the testimony – "arbitrarily and capriciously favor" the witnesses for FAA, mistakenly find consistent testimony from the captain and relief pilot but completely contrary testimony from petitioner, and draw inferences to support the captain's version to the exclusion of all others; (3) full consideration of the variant testimony leaves insufficient substantial evidence to support key findings, credibility determinations aside, and establish no violation; and (4) the ultimate sanction of revocation is unsupported by the facts and is based on the judge's acceptance of the FAA expert's assessment of petitioner's performance on takeoff, which the complaint did not allege and was found irrelevant by the judge and NTSB.

In its October 26 response brief, respondent argues that: (1) NTSB's reliance on the ALJ's credibility determinations, implicitly and on remand explicitly are firmly within the responsibility of a trial judge, and deference thereto was appropriate, notwithstanding the time lapse between the implicit and explicit credibility findings; (2) NTSB's factual findings were supported by substantial evidence, and NTSB correctly found violations of regulations prohibiting threats to crew members and leaving a duty station mid-flight; (3) NTSB properly deferred to the choice of revocation because FAA's conclusion that petitioner lacked qualifications to keep his airline transport pilot certificate was grounded in fact and law; and (4) NTSB properly sustained the ALJ's denial of petitioner's spoliation motion, because the captain's choice to not unplug the CVR was consistent with the CVR's purpose and requirements of governing regulations

and, even if improper, formed no basis to sanction FAA for the captain's action.

Petitioner filed his reply brief on November 18. Oral argument is set for December 6.

FOIA Requester Challenges Exemption 4 Withholdings of NATCA Collective Bargaining Communications with FAA

In *pro se* FOIA litigation brought by a member of the National Air Traffic Controllers Association (NATCA), plaintiff is challenging FAA's final determination supporting NATCA's proposed Exemption 4 redactions of confidential commercial or financial information in records related to negotiations between FAA and NATCA. Smolen v. FAA, No.22-44 (S.D.N.Y.). Plaintiff alleges that FAA violated his right to timely determination of his FOIA appeal to the agency and improperly claimed exemptions to justify redactions in records. He seeks declaratory relief as to the alleged 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 suit in federal court.

After NATCA raised objections to the release of some of the requested records, the government provided plaintiff an interim production of records applying NATCA's proposed redactions and released all other information previously withheld under Exemption 2. Thereafter, FAA issued a final determination supporting the Exemption 4 redactions.

FAA moved for summary judgment on December 2. In its brief, FAA argues, among other things, that the withheld material constitutes NATCA's confidential, commercial or financial information, noting that the Second Circuit has recognized that a labor union's negotiation positions in labor-management controversies were intended to fall within the scope of Exemption 4. In addition, FAA argues that the disclosure of this material would cause significant harm to NATCA's commercial interests by undermining its ability to effectively represent its members in collective bargaining negotiations. Finally, FAA argues that plaintiff's allegation regarding the inadequacy of the FAA's search for records responsive to his FOIA request are barred because he failed to exhaust administrative remedies with regard to that claim, and, in any event, that claim fails on the merits

because FAA's search for responsive documents was adequate and reasonably calculated to locate all responsive records.

Plaintiff's opposition and any cross-motion for summary judgment is due by January 16, 2023.

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

According to Boeing's Fourteenth Status Report on Remaining Individual Actions, filed April 18, 2022, "The parties, the Court, and the mediator . . . have worked together to settle as many cases as possible," settling "all claims for 186 of the 189 persons on board the Lion Air flight JT610 aircraft," leaving three claims in which, "[d]espite their best, good-faith efforts, the parties . . . have been unable to reach settlements," further stays are unlikely to lead to additional settlements, and a new approach is indicated. In one case, *Sethi*, Boeing and plaintiff agreed to a concurrently- filed stipulation and proposed case schedule enabling a damages-only bench trial under the Death on the High Seas Act (DOHSA). Because in the other two cases (Chandra, No. 19-1552, and Smith, No. 19-7091) no agreement as to how to proceed had been reached, Boeing requested that the court set a status conference to discuss a schedule to brief motions to decide "governing law and availability of a jury trial for those two claims."

In Chandra and Smith, the parties are briefing availability of a jury trial, while in *Sethi*, a DOHSA bench trial limited to damages has been set for December 19-22, 2022.

Federal Highway Administration

Appeals Court Affirms District Court Decision for FHWA in Rocky Flats National Wildlife Refuge Case

On July 19, 2022, the U.S. Court of Appeals for the Tenth Circuit affirmed the decision of the U.S. District Court for the District for Colorado in favor of the federal agency defendants' environmental decisions. Rocky

Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., 40 F. 4th 1133 (10th Cir.). In May 2018, plaintiffs sought preliminary and permanent injunctions to halt the opening of the Rocky Flats National Wildlife Refuge to the public and the construction of public trails on the Refuge pending further environmental studies. Some of the public trails were to be constructed by FHWA's Central Federal Lands Highway Division. Plaintiffs alleged that the defendant federal agencies had violated NEPA and ESA by failing to complete the required studies regarding the public opening of the Refuge and the planned trail system to be constructed within it.

On August 9, 2018, the district court denied the motion for a preliminary injunction and dismissed the ESA claim for lack of standing. Following the decision, plaintiffs continued to pursue their request for a permanent injunction regarding the planned construction of multi-use trails based on the alleged violations of NEPA and the National Wildlife Refuge System Administration Act (Refuge Act). On September 9, 2021, the district court denied all of plaintiffs' requested relief and affirmed the agency's decisions. The plaintiffs appealed the dismissal of its ESA claim and denial of its NEPA claims.

The Tenth Circuit affirmed the dismissal of plaintiffs' ESA claim on standing grounds. The court noted that the decision to construct trails in the Refuge was made in 2004 and 2005 and that plaintiffs' injury was not traceable to the action being challenged, which were trail modifications made in a 2018 Environmental Action Statement (EAS).

The court also rejected the claims that the U.S. Fish and Wildlife Service had violated NEPA by segmenting the proposed trail modification into one area of the Refuge, the Wind Blown Area, relying on a categorical exclusion to avoid conducting an EA, and failing to prepare a SEIS based on significant new circumstances. The court found that there was no segmentation, as all trails had independent utility and did not depend on any potential changes to trails in the Wind Blown area, that the use of categorical exclusions was not arbitrary or capricious as there were no extraordinary circumstances regarding the planned trail modifications, and that the extension of one trail into one new parcel on the Refuge did not amount to significant new circumstances that would require an SEIS.

Briefing Completed for Appeal of District Court Order in Mid-Currituck Bridge Project

On June 30, 2022, plaintiffs and defendants filed their final opening and joint response briefs, respectively, before the U.S. Court of Appeals for the Fourth Circuit. Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., No. 22-1103 (4th Cir.). The challenged project proposes the creation of a second crossing of the Currituck Sound in North Carolina's Outer Banks. The new bridge is intended to relieve current and projected congestion and facilitate hurricane evacuations from the Outer Banks. Plaintiffs are appealing a December 13, 2021, order of the U.S. District Court for the Eastern District of North Carolina, which granted a motion for summary judgment in favor of the North Carolina Department of Transportation (NCDOT) and FHWA. 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). The District Court found that FHWA and NCDOT properly determined that a SEIS was not required and that the alternatives analysis for the project was not arbitrary and capricious.

In their reply brief, plaintiffs asked the court to reject the analysis made by the District Court and declare that the ROD approved in 2019 was arbitrary and capricious. Plaintiffs argued the FHWA and NCDOT violated NEPA because the agencies did not prepare an SEIS as required by new information that plaintiffs described as significant. Plaintiffs argued that changes to traffic forecasts, growth and development patterns, and sea level rise projections were significant and that the public should have been afforded an opportunity to provide input on the NEPA alternatives in light of the changes. Finally, plaintiffs argued that the project's no-build scenario was flawed and prevented a valid comparison of alternatives because it presumed project construction.

In their final joint response brief, defendants argued they reasonably decided not to prepare an SEIS, as they took a hard look at the updated information and determined that none of the information revealed significant environmental impacts not evaluated in the original EIS, including traffic forecasting and sea level rise. Defendants also argued that they do not need to prepare an SEIS to inform the public about changes that are neither individually nor cumulatively significant and that their analysis facilitated a fair comparison of the alternatives under review. Defendants explained their decision to rely upon local land use planning data as the starting point for developing build and no-build scenarios is consistent with direction from Congress that federally-funded highway and transit projects can, and ideally should, follow from metropolitan and statewide transportation planning processes. Defendants added that when they prepared the final EIS, the applicable land use plans assumed that the bridge would be built so that the build scenario was a reasonable starting point for analysis. FHWA and NCDOT then calculated a reduced degree of land development for the no-build scenario, thereby providing for a meaningful comparison of build and no-build alternatives as required under NEPA.

District Court Denies Plaintiffs' Motion for Preliminary Injunction in US 50 Round Hill Pines Project Case

On October 4, 2022, the U.S. District Court for the District of Nevada denied plaintiffs' motion for preliminary injunction in Tahoe Cabin, LLC v. FHWA, et al., No. 22-00175 (D. Nev.). Plaintiffs, who are three homeowners in the nearby Sunset Sierra Lane neighborhood, filed a complaint challenging FHWA's EA and FONSI for the US 50 Round Hill Pines Project. The Central Federal Lands Highway Division, in cooperation with the Forest Service Lake Tahoe Basin Management Unit, Nevada Department of Transportation, and the Tahoe Regional Planning Agency, undertook the project, which is intended to improve safety for visitors entering and exiting the Round Hill Pines Resort from U.S. Highway 50. In their complaint, plaintiffs alleged violations of NEPA and the APA, asserting that the EA/FONSI had failed to take a hard look at the human environmental impacts of the project, especially the safety issues for their neighborhood should the project be completed.

In June 2022, plaintiffs filed their motion for preliminary injunction, arguing that it was necessary to stop the project until the court could hear the challenge to FHWA's environmental decision. In rejecting the motion, the court found that plaintiffs were not likely to prevail on the merits and had failed to demonstrate irreparable harm. The court found that plaintiffs' allegations that the EA/FONSI did not take a hard look at the

safety concerns of the proposed construction were merely conclusory and that defendants did recognize the issues with the current area of road, identify solutions to the hazard, and consider impacts of the solutions to the surrounding areas.

The court also found that the plaintiffs failed to show they would face irreparable harm. The court noted that the plaintiffs provided only speculation as to whether they would face irreparable harm and that their delay in filing the case indicated that plaintiffs did not believe they would face irreparable harm.

Another Complaint Filed under APA and NHPA on the I-95 Providence Viaduct Bridge Project

On August 3, 2022, the Narragansett Indian Tribe filed a complaint in the U.S. District Court for the District of Columbia, alleging violations of the APA and Section 106 of the NHPA in relation to the I-95 Providence Viaduct Bridge replacement project. Narragansett Indian Tribe v. Pollack et. al., No. 22-02299 (D.D.C.). This is the third complaint that the Tribe has filed regarding this project.

The Narragansett Tribe originally initiated litigation when FHWA made the determination to replace the I-95 Providence Viaduct Bridge in Providence, Rhode Island. The construction site of the bridge is geographically located near the Providence Covelands Archaeological District (RI 935). The Tribe attaches religious and cultural significance to the Covelands. The Tribe sued FHWA, the Rhode Island Department of Transportation (Rhode Island DOT), the Rhode Island Historical Preservation and Heritage Commission, and the Advisory Council on Historic Preservation (ACHP) in the U.S. District Court for the District of Rhode Island in March 2017. The Tribe challenged Rhode Island DOT's refusal to transfer properties according to a programmatic agreement (PA) entered into pursuant to Section 106 of the NHPA for the bridge replacement project. The district court dismissed that first complaint, and that dismissal was affirmed by the U.S. Court of Appeals for the First Circuit.

On March 29, 2019, after the PA had been terminated, the Tribe filed another complaint in the District of Rhode Island alleging that termination of the PA constituted arbitrary and capricious agency action under the APA. The case was transferred to the U.S. District Court for the District of Columbia. Narragansett Indian Tribe v. Hendrickson, No. 20-576 (D.D.C.). Subsequently, the Tribe filed an amended complaint adding state defendants. 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" there, and the court held that neither the District of Columbia's long-arm statute nor the requirements of the Due Process Clause apply. On March 15, 2022, the district court also granted FHWA's motion to dismiss for a lack of standing, finding that it was unable to discern how the Tribe's alleged harm would be redressed by a determination against just FHWA.

In this third complaint, plaintiffs allege that FHWA did not properly withhold highway funding from the State of Rhode Island for failing to execute the first PA. Plaintiffs further allege that FHWA's decision to terminate the first PA and execute a second PA without consulting the Tribe was arbitrary and capricious. The Tribe also alleges that FHWA failed to provide a sufficient rationale for terminating the first

PA and failed to adequately address ACHP comments. Plaintiffs ask the court to find that FHWA violated NHPA and the APA and to enjoin the agency from taking further action in implementing the project or in transferring the mitigation properties contrary to the first PA. Plaintiffs also request damages for the alleged destruction of sites of cultural and religious significance to the Tribe.

Lawsuit Filed in Project to Replace the Historic Nice Bridge with New Bridge, Injunctions Denied

On September 28, 2022, three bike and trail advocacy organizations filed a complaint and a motion for a temporary restraining order and preliminary injunction in the U.S. District Court for the District of Maryland seeking to enjoin the demolition of the historic Governor Harry W. Nice Memorial Bridge/Senator Thomas "Mac" Middleton Bridge (Historic Nice Bridge). Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., No. 22-02482 (D. Md.). Plaintiffs allege that the U.S. Department of Transportation, FHWA, and Maryland Transportation Authority failed to consider impacts of replacing the Historic Nice Bridge with a new bridge under NEPA, the NHPA, Section 6(f) of the Land and Water Conservation Fund Act, Section 4(f) of the Department of Transportation Act, and the Maryland Environmental Policy Act. Plaintiffs allege that defendants had promised to construct a bridge with a separated and protected 10-foot path for pedestrian and bicycle traffic on the bridge in the Section 4(f) evaluation and FONSI, but instead chose to build the new bridge without the separate path. Plaintiffs also allege that defendants never appropriately considered the environmental impact of demolishing the Historic Nice Bridge.

On October 11, 2022, the district court denied the motion for a temporary restraining order and preliminary injunction. Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., 2022 WL 7051160 (D. Md.). The court found that plaintiffs failed to prove they would be likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tipped in their favor, and that an injunction is in the public interest. The court found that the plaintiffs were unlikely to succeed on the merits of their NEPA claim because there was no indication in the record that defendants failed to follow the proper procedure – defendants had conducted a re-evaluation in 2019 of the new bridge design that determined the new design would have a *de minimis* impact. The court also found that plaintiffs failed to establish a likelihood of irreparable harm to pedestrians and bicyclists from the demolition of the Historic Nice Bridge because demolition of the bridge would not upset the status quo with respect to bicycle and pedestrian access, since the Historic Nice Bridge never provided such access. The court also held that the risk to public safety and the costs of defraying demolition outweighed plaintiffs' alleged harm and that an injunction thus would not be in the public interest.

District Court Dismisses Initial Complaint to I-405 Canyon Park Business Center Project; Plaintiffs File Amended Complaint

On June 28, 2022, the U.S. District Court for the Western District of Washington granted federal defendants' motion to dismiss a NEPA challenge related to an Express Toll Lange improvement project along four miles of I-405 in Bothell, Washington, holding that Plaintiff had failed to establish Article III standing. Canyon Park Business Center

Owners' Assoc. v. Buttigieg, et al., 2022 WL 2317059 (W.D. Wash. June 28, 2022).

In its March 4, 2022, motion to dismiss, federal defendants argued that the complaint failed to establish subject matter jurisdiction and failed to state a claim upon which relief may be granted. Federal defendants argued that the description of harm in the original complaint (increased traffic on access roads owned by plaintiff's members) focused on economic injuries that fell outside NEPA's zone of interest. In addition, federal defendants argued that plaintiff lacked standing, as plaintiff does not have any environmental component or focus to its mission as an organization and failed to clearly articulate how the environmental interests of its individual members were harmed by federal defendants.

The court agreed with federal defendants on both points, noting that while increased traffic can be an environmental impact within NEPA's zone of interests, allegations of only increased traffic and congestion are insufficient. The court also found that it could not determine from the complaint whether plaintiffs possessed standing. The court allowed plaintiff thirty days to amend its complaint, and plaintiff filed an amended complaint on July 27, 2022. Plaintiff's amended complaint sets forth many of the same arguments regarding the traffic analysis in the EA that were in the original complaint, but includes additional details regarding plaintiff's individual members to seek to establish standing.

Federal Motor Carrier Safety Administration

State of Washington Dismisses Challenge to FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers

On August 2, 2022, in Washington v. FMCSA, et al., No. 20-73730 (9th Cir.), the State of Washington voluntarily dismissed its petition seeking review of FMCSA's November 17, 2020, decision preempting Washington's meal and rest break (MRB) rules as applied to property-carrying commercial motor vehicles subject to FMCSA's hours of service (HOS) regulations.

Washington's MRB rules require a thirty-minute meal period for every five consecutive hours of driving as well as a ten-minute rest break for every four additional hours. The federal HOS regulations require long-haul truck drivers to take a break from driving of at least 30 minutes after 8 hours of driving time if they wish to continue driving. FMCSA determined that Washington's MRB rules are preempted under 49 U.S.C. § 31141(c) because they are laws on CMV safety, are more stringent than the agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the federal HOS regulations, and cause an unreasonable burden on interstate commerce. 85 Fed. Reg. 73,335 (Nov. 17, 2020).

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

On July 1, 2022, the U.S. District Court for the Southern District of Texas entered final judgment in favor of the Secretary of Transportation in Buttigieg v. Adversity Transport Inc., et al., No. 22-817 (S.D. Tex.). In this civil action initiated on March 14, 2022, the Secretary sought declaratory and injunctive relief against two motor carriers, Adversity Transport Inc. (Adversity) and 4 Life Transport (4 Life), and their principals, for repeated and serious violations of federal motor carrier statutes and regulations.

Defendants failed to file an answer to the Secretary's complaint and did not respond to the Secretary's motion for summary judgment. As a result, the court granted the motion for summary judgment and declared, among other things, that defendants are prohibited from operating any commercial motor vehicle, operating as a motor carrier, and applying for a USDOT number. Specifically, the court held that the summary judgment evidence established that the injunctive relief sought by the Secretary is necessary to protect the safety of the motoring public and to enforce compliance with FMCSA regulations and orders.

In the complaint, the Secretary alleged 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 alleged that Adversity Transport continued to operate after being declared an imminent hazard by shifting operations to 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 of 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.

Federal Railroad Administration

D.C. Circuit Largely Rejects Challenge to FRA's Final Rule Amending the Brake System Safety Standards

On July 15, 2022, the D.C. Circuit granted in part, denied in part, and dismissed in part a petition for review challenging FRA's final rule concerning miscellaneous amendments to the brake system safety standards and the codification of certain waivers (brakes final rule). Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., 40 F.4th 646 (D.C. Cir. 2022). The challenge was brought by the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen (collectively, the Labor Unions) . The court largely rejected the Labor Unions' arguments (some on the merits, some as forfeited, and some due to a lack of standing), but remanded a single portion of the final rule, which addresses the calibration requirements for end-of-train (EOT) legacy telemetry equipment, for further consideration.

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 EOT devices, helper service, and brake maintenance; and (3) modifying the existing brake-related regulations to improve clarity and remove outdated or unnecessary provisions.

In the D.C. Circuit case, the Labor Unions argued that the brakes final rule was invalid, primarily because: (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 rulemaking 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 by making the rule effective upon publication.

The Association of American Railroads moved to intervene on the side of the government, and the court granted the motion on April 1, 2021. Oral argument was held on February 25, 2022.

In its July 15 decision, the D.C. Circuit rejected on the merits all but one of the Labor Unions' challenges to the brakes final rule's substantive safety requirements. The court also rejected the assertion that the rule must be set aside as untimely; the court assumed, without deciding, that the rule was untimely, but concluded that the statutory deadline did not specify any consequences for missing it. The court dismissed the Labor Unions' "grab bag of meritless objections to the Administration's decisional process" and held that the Labor Unions lacked standing to challenge the changes to the brake tests for tourist, scenic, historic, and excursion railroads because the Labor Unions did not show that their members actually work on these railroads. Moreover, the court rejected as harmless any error on FRA's part in failing to provide for a period of reconsideration, noting that the Labor Unions failed to show any prejudice.

The D.C. Circuit found in the Labor Unions' favor on one issue pertaining to the calibration requirements for EOTs' legacy telemetry equipment. The court concluded that FRA was arbitrary and capricious when it failed to address the safety consequences of its decision on EOT devices that lack self-calibration technology, and it "remand[ed] this portion of the Final Rule to the Administration to address the safety consequences of its rule change for non-self-calibrating end-of-train devices."

Briefing Complete in Challenge to FRA's Decision to Not Expand Automated Track Inspection Waiver to New Territories

On August 25, 2022, the final brief was filed in a case before the U.S. Court of Appeals for the Fifth Circuit concerning FRA's March 21, 2022, decision dismissing the BNSF Railway Company's (BNSF) request to expand an existing waiver to two new territories under BNSF's automated track inspection (ATI) program. BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.). The Fifth Circuit heard oral argument on December 5.

The existing waiver provides limited, conditional relief from certain aspects of 49 C.F.R. § 213.233(b) and (c) of FRA's Track Safety Standards (TSS), allowing BNSF to

partially replace required visual track inspections with inspections using autonomous geometry inspection systems. The Railroad Safety Advisory Committee (RSAC) is currently tasked with developing a consensus recommendation for incorporating ATI technology into FRA's TSS. The RSAC task is designed to examine the feasibility of using a combination of visual inspections and ATI technologies to maximize the effectiveness of railroads' track inspection programs. In its decision letter, FRA concluded that given the ongoing RSAC task related to ATI, FRA would not be justified in granting the expanded relief requested by BNSF.

BNSF filed its opening brief on July 5, 2022. In its brief, BNSF argued that FRA acted arbitrarily in denying its expanded waiver request because: (1) an expanded waiver would increase safet; (2) FRA had ignored that BNSF met the conditions required to expand its original waiver and provided no explanation for its change in position; and (3) FRA's reason for denying the waiver was irrational and insufficient. On July 12, the Association of American Railroads and the National Association of Manufacturers filed amicus briefs in support of BNSF.

On August 4, the government filed its brief, arguing that (1) FRA reasonably denied BNSF's waiver petition in order to pursue a nationally uniform approach to railroad safety, (2) FRA's waiver denial did not prevent BNSF from using ATI technology, (3) BNSF did not demonstrate that FRA improperly relied on RSAC's review of the issue, (4) FRA did not change its policy towards the use of ATI when it denied BNSF's expanded waiver request, and (5) if the court were to find against FRA, it should only remand the case to the agency for further consideration. On August 11, the Brotherhood of Maintenance of Way Employes Division/IBT filed an intervenor brief, emphasizing that BNSF was not precluded from using ATI technology. On August 25, BNSF filed its reply brief, primarily asserting that FRA's "newly-manufactured uniformity rationale" was not a basis to uphold its waiver denial and maintaining that the court should vacate the waiver denial and direct FRA to grant BNSF's waiver expansion request.

Eighth Circuit Holds in Abeyance Lawsuit Concerning Requested Changes to Locomotive Engineer Certification Program

On June 21, 2022, the U.S. Court of Appeals for the Eighth Circuit granted a joint motion of the government and of the Kansas City Southern Railway Company and the Texas Mexican Railway Company (collectively, KCS) to hold in abeyance a lawsuit challenging a March 4, 2022, 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.). The parties' joint motion stated that continuing discussions between the parties could obviate the need for judicial review. FRA's letter requested that KCS address certain deficiencies in its certification program, 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 earlier versions of 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, among other things, 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 in part 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 on the grounds that 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

Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues

On November 27, 2018, Matson Navigation Company filed an action in the U.S. District Court for the District of Columbia seeking administrative review of MARAD's approval of two replacement vessels (APL GUAM and APL SAIPAN) for operation by APL under the Maritime Security Program (MSP). This action followed a similar action that Matson filed in the U.S. Court of Appeals for the District of Columbia Circuit pursuant to the Hobbs Act, which was dismissed for lack of jurisdiction. Matson Navigation Co. v. USDOT, et al., 895 F.3d 799 (D.C. Cir. 2018). The D.C. Circuit determined that it lacked jurisdiction with respect to the APL GUAM because Matson filed its petition after the Hobbs Act's 60-day time limit for such challenges.

Matson's principal argument in the district court was that MARAD's approvals were arbitrary and capricious because the replacement vessels carry cargo to Saipan. Matson claimed that the vessel eligibility requirements of the Maritime Security Act require that, to be eligible for the MSP, a vessel must operate *exclusively* in the foreign trade, without any participation in coastwise trade. According to Matson, the Commonwealth of the Northern Mariana Islands, a U.S. territory that includes Saipan, is subject to the coastwise laws, which require that cargo moving between U.S. ports be carried on vessels that are built in the United States and are 75%-owned by U.S. citizens, requirements that the APL replacement vessels do not meet.

On June 12, 2020, the district court concluded that it lacked jurisdiction with respect to MARAD's approval of the APL GUAM. Matson Navigation Co. v. USDOT, et al., 466 F. Supp. 3d 177 (D.D.C. 2020). With respect to the APL SAIPAN, the court stated that it could not determine from the administrative record how MARAD interpreted the MSP eligibility statute, or if MARAD considered the issue of whether the vessel was ineligible for the MSP because it called on Saipan. Accordingly, on June 30, 2020, the court issued a second opinion and an order vacating MARAD's approval of the APL SAIPAN and remanding the matter to MARAD for its consideration, in the first instance, of several legal issues, and after resolution of those issues, whether the APL SAIPAN is eligible for the program. Matson Navigation Co. v. USDOT, et al., 2020 WL 3542220 (D.D.C. June 30, 2020).

Matson appealed the district court's determination that it lacked jurisdiction with respect to the APL GUAM. Matson Navigation Co. v. USDOT, et al., Nos. 20-5219 & 20-5261 (D.C. Cir.). That appeal was dismissed as moot on July 15, 2021, after MARAD approved the replacement of the APL GUAM with another vessel, the CMA CGM HERODOTE.

With respect to the APL SAIPAN, MARAD issued a new decision on August 3, 2020. Matson challenged the new decision and principally argued that the APL SAIPAN is too old to be eligible as a replacement vessel for the Maritime Security Fleet. Matson Navigation Co. v. USDOT, et al., No. 20-2779 (D.D.C.). After further review, the government sought a voluntary remand in April 2021 due to a recognition that some reasoning in the new decision was incorrect. On June 22, 2021, APL filed an initial application to replace the APL SAIPAN with the CMA CGM DAKAR and later notified MARAD that the DAKAR will not operate to the Northern Mariana Islands. On August 3, 2021, the district court granted MARAD's motion and remanded the matter to MARAD for further consideration. On October 4, 2021, MARAD found that the APL SAIPAN did not meet the age-eligibility requirement of the MSP statute. And finally, on June 15, 2022, MARAD approved the CMA CGM DAKAR as a replacement vessel. Matson challenged MARAD's decision in both the district court and the D.C. Circuit. Matson Navigation Co. v. USDOT, et al., No. 22-1975 (D.D.C.); No. 22-5224 (D.C. Cir.). The district court ultimately dismissed the case for lack of jurisdiction. 2022 WL 3576208.

As noted, MARAD also approved the CMA CGM HERODOTE as a replacement vessel for the APL GUAM, and APL began operating the HERODOTE instead of the GUAM in the MSP on May 18, 2021. Matson filed another petition for review in the D.C. Circuit and another APA action in the district court challenging MARAD's approval of the CMA CGM HERODOTE to replace the GUAM. Matson Navigation Co. v. USDOT, et al., No. 21-1137 (D.C. Cir.); Matson Navigation Co. v. USDOT, et al., No. 21-01606 (D.D.C.). On July 29, 2021, the D.C. Circuit granted the parties' joint motion to hold the case in abeyance pending proceedings in the district court. On August 30, 2021, the government filed a motion to dismiss that case on the ground that the Hobbs Act confers exclusive jurisdiction to the courts of appeals to review MARAD's order on the HERODOTE. The court dismissed the case for lack of jurisdiction on August 4, 2022. Matson Navigation Co. v. USDOT, et al., 2022 WL 3139004 (D.D.C. Aug. 4, 2022). Matson appealed the decision. Matson Navigation Co. v. USDOT, et al., No. 22-5212 (D.C. Cir.).

On October 13, 2022, the D.C. Circuit granted the parties' motion to consolidate the cases pending before the court.

Matson filed its opening brief on November 23. In its brief, Matson argues that the court should reverse the district court's orders holding that it lacks jurisdiction over Matson's challenges filed in that court because the MARAD Orders approving the HERODOTE and the DAKAR as replacement vessels were authorized by 46 U.S.C. § 53105(f), which is not one of the statutes covered by the Hobbs Act's grant of jurisdiction to the courts of appeals. The fact that the Orders referenced 46 U.S.C. § 50501, which is listed in the Hobbs Act, does not alter the forum for review because section 50501 does not direct or authorize the action taken in the Orders. Matson further argues that should the court of appeals retain jurisdiction, the court should vacate the Orders as arbitrary and capricious and contrary to law because the vessels are not replacement vessels and cannot engage in domestic trade, and the Orders authorize unlawful domestic trade in the Northern Mariana Islands.

Reserve Fleet Subcontractor Files, Withdraws Lien Against MARAD Vessel

On August 2, 2022, plaintiff Offshore Inland Oil & Marine, Inc. (Offshore) filed an admiralty Complaint against the United States *in personam* and MARAD's vessel SS Denebola *in rem* in the U.S. District Court for the Southern District of Alabama. Offshore Inland Oil & Marine, Inc. v. United States, et al., 22-00301 (S.D. Ala.). Plaintiff was a subcontractor hired by a MARAD contractor performing work on the National Defense Reserve Fleet vessel SS Denebola. During the repair of the Denebola, disputes developed regarding work delays and out-of-scope work. Negotiations broke down, and Offshore filed a lien against the MARAD vessel on August 8, 2022.

On September 13, 2022, Offshore voluntarily dismissed its lien claim. The dismissal resulted from conversations MARAD had with the prime contractor emphasizing the anti-lien provision of its contract with MARAD. Under that clause, the prime contractor and any subcontractor is obligated to indemnify the government from all costs relating to a lien claim. Once the prime was made aware of the contract's provision, the contractors quickly resolved their issues.

National Highway Traffic Safety Administration

Petitioners Voluntarily Dismiss Second Circuit Litigation Challenging NHTSA CAFE Civil Penalty Rate Rule

On June 17, 2022, the U.S. Court of Appeals for the Second Circuit granted petitioners' motion to voluntarily dismiss the petitions for review in the latest round of litigation over an inflation adjustment to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards, and are unable to offset such a deficit with compliance credits. Natural Resources Defense Council v. NHTSA, Nos. 21-139, et al. (2d Cir.).

This litigation involves a challenge to an interim final rule that NHTSA issued on January 14, 2021, in response to a petition for rulemaking from the Alliance for Automotive Innovation. Under the interim final rule, an inflationary increase to the CAFE civil penalty rate from $5.50 to $14 would have gone into effect beginning with Model Year

2022, instead of Model Year 2019, as it would have done pursuant to an August 31, 2020, decision of the Second Circuit vacating an earlier NHTSA rule.

The parties involved in the previous rounds of litigation on this issue sued again in two cases in the Second Circuit (brought by the Natural Resources Defense Council, the Sierra Club, and a coalition of states led by New York) and one in the Ninth Circuit (brought by Tesla). Natural Resources Defense Council, et al. v. NHTSA, No. 21-139 (2d Cir.); New York, et al. v. NHTSA, No. 21-339 (2d Cir.); Tesla, Inc. v. NHTSA, No. 21-70367 (9th Cir.). Tesla and the Alliance for Automotive Innovation successfully moved to intervene in the Second Circuit litigation, and Tesla successfully moved to transfer its Ninth Circuit case to the Second Circuit, where the cases were consolidated.

Until the dismissal, the case was being held in abeyance pending NHTSA's administrative reconsideration of the January 2021 interim final rule being challenged. NHTSA was reconsidering the interim final rule pursuant to Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis." As part of its reconsideration, the agency had issued a supplemental notice of proposed rulemaking on August 20, 2021, proposing to withdraw the interim final rule.

After reconsideration of the issue, including review of the supplemental comments submitted, NHTSA issued a new final CAFE civil penalties rule that was published in the Federal Register on April 1, 2022. This rule repealed the January 2021 interim final rule, reverting to the December 2016 final rule that increased the CAFE civil penalty rate from $5.50 to $14 beginning with Model Year 2019. In the April 1 rule, NHTSA also applied the statutorily required annual adjustments through 2022, with the rate remaining $14 until Model Year 2022 when it increases to $15. Going forward, NHTSA will continue to make the mandatory adjustments to the CAFE civil penalty rate, as required by law for all civil monetary penalties.

Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

On May 2, 2022, NHTSA published a final rule to set Corporate Average Fuel Economy (CAFE) Standards for Model Years 2024–2026 Passenger Cars and Light Trucks. 87 Fed. Reg. 25,710 (May 2, 2022). Subsequently, numerous parties challenged the rule through petitions for review filed, and later consolidated, in the U.S. Court of Appeals for the District of Columbia Circuit. Natural Resources Defense Council v. NHTSA, No. 22-1080 (D.C. Cir.). This consolidated case includes a petition for review filed by the Natural Resources Defense Council arguing that the adopted CAFE standards were insufficiently stringent because NHTSA did not adequately consider the potential of high-compression ratio engine technologies. Conversely, several other groups of entities filed their own petitions for review of the rule, arguing that the adopted standards were excessively stringent or otherwise arbitrary and capricious or in excess of NHTSA's authority due to the consideration of various improper factors. These groups include a group of ten states and the American Fuel & Petrochemical Manufacturers (AFPM). Following the commencement of these cases, multiple entities were granted leave to intervene in support of both sides. These intervenors include a group of 21 other states,

the District of Columbia, and four cities, all of whom intervened in support of NHTSA's rule.

Petitioners' briefs were filed on November 17. Most of the brief filed by AFPM and the ten states concerns the statute's dedicated vehicles prohibition. Petitioners argue that NHTSA violated this prohibition primarily by considering electric vehicles (EVs) in the baseline. This is principally an argument addressing the construction of 49 U.S.C. § 32902, which the petitioners argue supports a strict interpretation of the prohibition. The brief also seeks to utilize legislative history from the provision to argue that Congress intended the prohibition to allow EVs to offer a compliance flexibility/incentive. By incorporating EVs into the baseline and using that baseline as a point of comparison to inform the stringency of the standards, the petitioners argue that NHTSA effectively turned this EV incentive into an EV mandate. Similarly, the brief also argues that the baseline consideration of EPA's separate greenhouse gas standards and California's Advanced Clean Car Program was a circumvention of the dedicated vehicles prohibition, since each of these other programs so extensively considered EVs. Finally, the brief seeks to link this issue to the major questions doctrine. This argument posits that the CAFE standards seek to fundamentally alter the electrification of vehicle fleets in a way that would result in vast economic and policy impacts, which is allegedly at odds with Congress' expressed lack of intent (evinced in 49 U.S.C. § 32902(h)(1)) that NHTSA regulate EVs in the CAFE program.

NRDC's brief argues that NHTSA's standards were insufficiently stringent because they failed to adequately consider the potential fuel economy improvements offered by Atkinson Engines (*i.e.,* High Compression Ratio (HCR) Engines). This brief argues that although NHTSA's own historical CAFE rulemakings have recognized the promise of HCR engines, more recent CAFE rulemakings have retreated from a robust consideration of the technology. NRDC argues that this retreat was especially pronounced in the SAFE II Rule and that NHTSA essentially carried over this approach from that prior rulemaking. The brief seeks to juxtapose NHTSA's approach with other data submitted by commenters that NRDC argues supports the potential of the technology. Importantly though, the only relief sought by NRDC is a remand without *vacatur* to enable NHTSA to reconsider the feasibility of more stringent standards.

NHTSA's brief is due on February 28, 2023, and petitioners' reply briefs are due on April 14. In addition, the D.C. Circuit indicated that oral argument will occur in September 2023. Finally, in light of these consolidated challenges to NHTSA's 2022 final rule, the D.C. Circuit is also holding in abeyance consolidated litigation over NHTSA's prior CAFE standard, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.).

District Court Litigation Challenging NHTSA's SAFE I Rule Dismissed Now that NHTSA Repealed the Rule

In September 2019, NHTSA promulgated a final rule entitled The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program (SAFE I Rule). 84 Fed. Reg. 51,310 (Sept. 27, 2019). In this rule, NHTSA codified regulatory text and made additional pronouncements regarding the

preemption of state and local laws related to fuel economy standards. Subsequently, numerous parties sued NHTSA to challenge the legality of the SAFE I Rule. These challenges were filed in both the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia. Union of Concerned Scientists v. NHTSA, No. 19-1230 (D.C. Cir.); California v. Buttigieg, No. 19-02826 (D.D.C.). During the pendency of this litigation, NHTSA conducted a subsequent rulemaking to repeal the SAFE I Rule. NHTSA completed this rulemaking in December 2021, publishing a final rule entitled Corporate Average Fuel Economy (CAFE) Preemption that fully repealed the SAFE I Rule. 85 Fed. Reg. 74,236 (Dec. 29, 2021). Since the SAFE I Rule is now repealed, plaintiffs challenging that rule in district court dismissed their cases. The last such case was dismissed by a collection of states in August 2022, and the district court litigation has now concluded. The consolidated litigation in the D.C. Circuit remains pending and in abeyance, while a review of a separate action by the Environmental Protection Agency remains underway.

Pipeline and Hazardous Materials Safety Administration

Pipeline Operator Files Surreply in "Reverse FOIA" Litigation to Prevent PHMSA From Disclosing Safety Information

On September 30, 2022, the U.S. District Court for the District of Columbia granted Sunoco's December 3, 2021, motion to leave to file a surreply in this "reverse FOIA" lawsuit filed by Sunoco Pipeline L.P. in the U.S. District Court for the District of Columbia. Sunoco Pipeline L.P. v. USDOT, No. 21-01760 (D.D.C). On the same day, Sunoco refiled its surreply, which it had initially filed with its motion for leave to file a surreply. Plaintiff seeks to permanently enjoin PHMSA from releasing, in response to multiple FOIA requests, an unredacted version of PHMSA's Notice of Probable Violation (NOPV) issued to Sunoco on May 17, 2019.

In granting Sunoco's motion, the court stated that it considered (1) "whether the movant's reply in fact raises arguments or issues for the first time," (2) "whether the non-movant's proposed surreply would be helpful to the resolution of the pending motion," and (3) "whether the movant would be unduly prejudiced were leave to be granted." The court went on to hold that these factors weighed toward granting the motion. Even though the court found that the first factor slightly favored defendants, the court found that the second and third factors weighed in plaintiffs' favor and that additional discussion may be helpful to the court's understanding of the issue. As a result, the court found good cause to grant the motion.

In its surreply, Sunoco argued that the Trade Secrets Act, 18 U.S.C. § 1905, is at least coextensive with Exemption 4 of the Freedom of Information Act, and that it prohibits the unauthorized disclosure of all data protected by that exemption. Sunoco further argued that the D.C. Circuit has not recognized an exception to this rule, and that the Supreme Court's decision in Argus Leader, 139 S. Ct. 2356 (2019), which addressed what information provided to a federal agency qualifies as confidential under Exemption 4, did not dramatically alter the effect of the Trade Secrets Act.

This case involves Sunoco claims that the NOPV quotes certain confidential and

security-sensitive information that was included in a report that Sunoco provided to PHMSA. PHMSA conducted a review of the information Sunoco seeks to preclude from public disclosure, along with relevant FOIA case law, and decided to release the unredacted NOPV because it was not covered by FOIA Exemptions 4 or 7(F). After PHMSA informed Sunoco of its decision, as is required by Department regulations, Sunoco filed the instant action.

PHMSA filed a motion to dismiss on September 24, 2021, asserting that the lawsuit must fail for two reasons. First, PHMSA asserts that Sunoco failed to state a cognizable "reverse FOIA claim". To sustain such a claim, Sunoco must plausibly allege, through the APA, that the release of the information is a violation of some law other than FOIA, which the complaint failed to do. Second, PHMSA asserts that the case must be dismissed because even if Sunoco could proceed under FOIA alone, it fails to plausibly allege that the risk-analysis data in the NOPV—general information about the possible consequences of a pipeline rupture that does not identify any particular points of vulnerability—falls with FOIA Exemption 4 or Exemption 7(F). Sunoco filed its opposition to the motion on October 15, 2021, and PHMSA filed a reply in support of the motion on November 5, 2021.

Petition for Review of PHMSA's Gas Gathering Final Rule Filed in the D.C. Circuit

On May 2, 2022, GPA Midstream Association sought judicial review in the U.S. Court of Appeals for the District of Columbia Circuit of PHMSA's Final Rule, "Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and Other Related Amendments." GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1070 (D.C. Cir.). The final rule creates a new class of onshore regulated rural gathering lines under 49 C.F.R. § 192.8, Type C lines, that were previously unregulated, and requires operators of unregulated onshore gas gathering lines (Type R) to file annual and incident reports. The final rule employs a risk-based approach to the new class of regulated rural onshore gas gathering lines by imposing certain regulatory requirements in section 192.9 that become more exacting as the outside diameter and pressure of the pipeline increases.

Petitioners allege that in prescribing the final rule, PHMSA violated the Pipeline Safety Act by (1) not conducting a risk assessment identifying the costs and benefits associated with the proposed standards; (2) not considering the reasonably identifiable or estimated costs and benefits expected to result from implementation or compliance with the standard, as well as the comments and information received from the public; and (3) only proposing or issue a standard upon making a reasoned determination that the benefits of a standard justify the costs. Petitioners also alleged that the final rule was arbitrary and capricious, in violation of the APA.

On June 1, the Environmental Defense Fund filed a motion for leave to intervene in support of the final rule.

On June 16, PHMSA filed an unopposed motion to hold the case in abeyance pending informal settlement discussions that were ongoing with GPA. The court granted the unopposed motion on June 27. On July 8, PHMSA published in the Federal Register a Notice of Limited Enforcement Discretion that permitted operators of Type C gathering

lines between 8.25 inches and 12.75 inches in outside diameter until May 17, 2024, to meet the new regulatory requirements of section 192.9, which is a one-year extension for the subset of newly regulated onshore gas gathering lines that present the least risk to person, property, or the environment. On the same day, the parties to the litigation filed a joint status update informing the court of the Notice and that GPA would withdraw its petition when the Notice expires on May 17, 2024. The court directed the parties to file abeyance status reports at 90-day intervals.

Petition for Review of PHMSA's Valve Installation and Rupture Detection Final Rule Filed in the D.C. Circuit

On July 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 Final Rule, "Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards." GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1148 (D.C. Cir.).

PHMSA revised the Federal Pipeline Safety Regulations applicable to most newly constructed and entirely replaced onshore gas transmission, Type A gas gathering, and hazardous liquid pipelines with diameters of 6 inches or greater to require operators of these lines to install rupture-mitigation valves (*i.e.*, remote control or automatic shut-off valves) or alternative equivalent technologies, and to establish minimum performance standards for those valves' operation to prevent or mitigate the public safety and environmental consequences of pipeline ruptures. The final rule also established requirements for rupture-mitigation valve spacing, maintenance and inspection, and risk analysis, among other related requirements. PHMSA promulgated these regulations in response to congressional directives following major pipeline incidents where there were significant environmental consequences or losses of human life. The revisions are intended to achieve better rupture identification, response, and mitigation of safety, greenhouse gas, and environmental justice impacts.

Petitioners' opening brief, filed on October 21, sets forth two main arguments. First, the petitioners' assert that PHMSA disregarded Congress's purported intent that any valve installation requirements only pertain to transmission lines and that PHMSA inappropriately relied on the authority provided under 49 U.S.C. § 60102(n) and its general rulemaking authority under 49 U.S.C. § 60102(a) to extend such requirements to gathering lines. Second, petitioners argue that the final rule as it applies to gathering lines is arbitrary, capricious, and otherwise unlawful with respect to gathering lines because PHMSA did not comply with the Pipeline Safety Act's risk assessment requirements, GPAC/LPAC consultation requirements, and reasoned decision-making requirements. Petitioners ask the court to vacate the final rule as applied to gathering lines and remand for further proceedings.

PHMSA filed its brief on December 5. PHMSA argues that it had discretion to apply the valve requirements to gathering lines under its broad rulemaking authority provided by 49 U.S.C. § 60102(a) and that Congress did not take away that authority when it separately mandated in 49 U.S.C. § 60102(n) that PHMSA issue valve requirements for transmission lines. PHMSA also argued that it provided notice of its intent to apply valve requirements to gathering lines, including

when it proposed changes to regulations that apply to both transmission lines and gathering lines. And PHMSA argued that it conducted a thorough risk assessment, weighing the costs and benefits of the Final Rule and reasonably concluding that its benefits justified the costs.

Petitioners' reply brief is due on January 6, 2023.

PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana

On May 2, 2022, PHMSA, EPA, and the State of North Dakota filed suit against two subsidiaries of the True Companies, Inc., Bridger Pipeline LLC and Belle Fourche Pipeline Company (True Companies), for violations of the Pipeline Safety Regulations, the Clean Water Act, and various state laws related to two separate pipeline spills. United States, et al. v. Bridger Pipeline, LLC, et al., No. 22-00043 (D. Mont.).

This case involves two significant oil spills into the waters of the United States. The first spill occurred on January 17, 2015, when a pipeline operated by defendants ruptured where it crosses the Yellowstone River, resulting in the discharge of approximately 1,257 barrels of crude oil into the Yellowstone River near Glendive, Montana (the Yellowstone Spill). The second spill occurred in late 2016 when another pipeline ruptured in Billings County, North Dakota, resulting in the discharge of approximately 14,400 barrels of crude oil into an unnamed tributary to Ash Coulee Creek, Ash Coulee Creek itself, the Little Missouri River, and their adjoining shorelines (the Ash Coulee Spill).

On May 23, 2022, the government amended its complaint and removed the claims relating to the North Dakota spill from the Montana litigation. On that same day, the government filed a new complaint in the U.S. District Court for the District of North Dakota. United States v. Belle Fourche Pipeline Co., No. 22-00089 (D.N.D.) for the Ashe Coulee Spill (Belle Fourche litigation). Belle Fourche answered the complaint on July 14, 2022.

On July 8, 2022, in the Bridger litigation, Bridger filed a motion to dismiss for failure to state a claim and a separate motion to dismiss for lack of subject-matter jurisdiction. Bridger argued that PHMSA's integrity management claims are barred by 28 U.S.C. § 2462, the general five-year statute of limitations applicable to actions brought by the United States seeking to impose a penalty or fine when no other limitations period is specified. Bridger separately argued that the that court lacked subject-matter jurisdiction because EPA's Clean Water Act claims were barred by a settlement for the same incident that it had previously reached with the State of Montana and that the government lacked standing to obtain the prospective injunctive relief sought in the complaint.

On July 29, the government filed a combined response in opposition to each of Bridger's motions to dismiss. The government argued that the pipeline safety integrity management regulations impose a continuing obligation on operators for meeting certain compliance obligations, that Bridger continued to be out of compliance well within the limitations period, and that the state law on which Bridger settled certain Montana state claims was not a comparable statute with the CWA and thus it did not serve as a bar to asserting such claims in the litigation. Bridger filed its reply to the government's opposition on August 19.

On September 25, the government and the True Companies participated in private mediation in Bismarck, North Dakota. The mediation sought to resolve all claims in both the Bridger and Belle Fourche cases. On September 27, the parties reached an agreement in principle on all issues in the two cases and jointly moved the court in the Bridger litigation to stay the case for a period of 90 days to allow the parties to finalize the agreement. On October 3, the court granted the stay motion and directed the parties to update the court in 90 days as to the status of the case if no dismissal motion has been filed by that time.

Subject Matter Index of Cases Reported in this Issue

Affirmative Enforcement Litigation

Buttigieg v. Adversity Transport Inc., et al., No. 22-817 (S.D. Tex.) (Secretary Secures Injunctive Relief Against Motor Carrier in U.S. District Court), page 27

United States v. Belle Fourche Pipeline Co., No. 22-00089 (D.N.D.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

United States, et al. v. Bridger Pipeline, LLC, et al., No. 22-00043 (D. Mont.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

Airports

City of North Miami, et al. v. FAA, 47 F.4th 1257 (11th Cir. 2022) (Eleventh Circuit Denies Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD), page 11

City of Scottsdale v. FAA, 37 F.4th 678 (D.C. Cir. 2022) (Petition for Review of FAA Decision to Halt Post-Phoenix Agreement Implementation Dismissed for Lack of Standing), page 13

Lowman, et al. v. FAA, et al., No. 21-14476 (11th Cir.) (Briefing Underway in Homeowner Challenge to Amazon Air Cargo Facility in Lakeland, Florida), page 16

Aviation Safety

Brown v. Nolen, No. 22-1047 (D.C. Cir.) (UPS First Officer Appeals Airline Transport Pilot Certificate Revocation for Misconduct), page 18

Brennan, et al. v. Dickson, et al., 45 F.4th 48 (D.C. Cir. 2022) (FAA Prevails in Challenge to UAS Remote Identification Rule), page 10

Flyers Rights Education Fund, Inc., et al. v. Dickson, No. 22-1004 (D.C. Cir.) (Flyers Rights Seeks Mandamus from D.C. Circuit as to Passenger Seat Width and Legroom Rulemaking), page 14

In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.) (Updated Status of Litigation Related to October 2018 Lion Air Tragedy), page 21

Constitutional Rights

Brennan, et al. v. Dickson, et al., 45 F.4th 48 (D.C. Cir. 2022) (FAA Prevails in Challenge to UAS Remote Identification Rule), page 10

Bruckner, et al. v. Biden, et al., No. 22-1582 (M.D. Fla.) (Challenge to DOT Disadvantaged Business Enterprise Program Filed, Preliminary Injunction Sought), page 8

City of North Miami, et al. v. FAA, 47 F.4th 1257 (11th Cir. 2022) (Eleventh Circuit Denies Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD), page 11

Mueller v. Gramian, et al., No. 22-01576 (M.D. Pa.) (Pennsylvania Sub-Contractor Brings Constitutional Challenge to DOT's DBE Program), page 9

Contracts and Grants

Offshore Inland Oil & Marine, Inc. v. United States, et al., 22-00301 (S.D. Ala.), (Reserve Fleet Subcontractor Files, Withdraws Lien Against MARAD Vessel), page 32

Disadvantaged Business Enterprise Program

Bruckner, et al. v. Biden, et al., No. 22-1582 (M.D. Fla.) (Challenge to DOT Disadvantaged Business Enterprise Program Filed, Preliminary Injunction Sought), page 8

Mueller v. Gramian, et al., No. 22-01576 (M.D. Pa.) (Pennsylvania Sub-Contractor Brings Constitutional Challenge to DOT's DBE Program), page 9

Environmental Issues (including National Environmental Policy Act)

Backcountry Against Dumps, et al. v. FAA, No. 21-71426 (9th Cir.) (Briefing Commences in Challenge to San Diego County Wind Turbines), page 17

California, et al. v. Buttigieg, et al., No. 19-02826 (D.D.C.) (District Court Litigation Challenging NHTSA's SAFE I Rule Dismissed Now that NHTSA Repealed the Rule), page 34

Canyon Park Business Center Owners' Assoc. v. Buttigieg, et al., 2022 WL 2317059 (W.D. Wash. June 28, 2022) (District Court Dismisses Initial Complaint to I-405 Canyon Park Business Center Project; Plaintiffs File Amended Complaint), page 25

City of North Miami, et al. v. FAA, 47 F.4th 1257 (11th Cir. 2022) (Eleventh Circuit Denies Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD), page 11

Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Louisiana, et al., v. Biden, et al., No. 22-30087 (5th Cir.) ((Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another), page 6

Lowman, et al. v. FAA, et al., No. 21-14476 (11th Cir.) (Briefing Underway in Homeowner Challenge to Amazon Air Cargo Facility in Lakeland, Florida), page 16

Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., No. 22-1103 (4th Cir.) (Briefing Completed for Appeal of District Court Order in Mid-Currituck Bridge Project), page 23

Missouri, et al. v. Biden, et al., 52 F.4th 362 (8th Cir. 2022) (Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another), page 6

Natural Resources Defense Council v. NHTSA, Nos. 21-139, et al. (2d Cir.) (Petitioners Voluntarily Dismiss Second Circuit Litigation Challenging NHTSA CAFE Civil Penalty Rate Rule), page 33

Natural Resources Defense Council v. NHTSA, No. 22-1080 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Narragansett Indian Tribe v. Pollack, et al., No. 22-02299 (D.D.C.) (Another Complaint Filed under APA and NHPA on the I-95 Providence Viaduct Bridge Project), page 24

Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., 2022 WL 7051160 (D. Md.). (Lawsuit Filed in Project to Replace the Historic Nice Bridge with New Bridge, Injunctions Denied), page 25

Rocky Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., 40 F. 4th 1133 (10th Cir.) (Appeals Court Affirms District Court Decision for FHWA in Rocky Flats National Wildlife Refuge Case), page 22

Tahoe Cabin, LLC v. FHWA, et al., No. 22-00175 (D. Nev.) (District Court Denies Plaintiffs' Motion for Preliminary Injunction in US 50 Round Hill Pines Project Case), page 23

Federal Rules of Civil Procedure

Morrissey, et al. v. Mayorkas, et al., No. 22-235 (U.S.) (Certiorari Petition Filed Regarding Dismissal of Complaints for Failure to Properly Serve the Government), page 2

Finality and Reviewability of Agency Action

BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.) (Briefing Complete in Challenge to FRA's Decision to Not Expand Automated Track Inspection Waiver to New Territories), page 29

Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022) (Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations), page 4

Freedom of Information Act and Discovery

Flyers Rights Education Fund, Inc. v. FAA, No. 21-5257 (D.C. Cir.) (Briefing Underway in Flyers Rights Appeal of D.C. District Court FOIA Decision), page 15

Smolen v. FAA, No. 22-44 (S.D.N.Y.) (FOIA Requester Challenges Exemption 4 Withholdings of NATCA Collective Bargaining Communications with FAA), page 20

Sunoco Pipeline L.P. v. USDOT, No. 21-01760 (D.D.C) (Pipeline Operator Files Surreply in "Reverse FOIA" Litigation to Prevent PHMSA From Disclosing Safety Information), page 35

Fuel Economy

California, et al. v. Buttigieg, et al., No. 19-02826 (D.D.C.) (Intervenor States File Motion to Proceed in Case Challenging NHTSA/EPA SAFE Part One Rule Following NHTSA's Repeal of the Rule), page 38

Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Natural Resources Defense Council v. NHTSA, Nos. 21-139, et al. (2d Cir.) (Petitioners Voluntarily Dismiss Second Circuit Litigation Challenging NHTSA CAFE Civil Penalty Rate Rule), page 33

Natural Resources Defense Council v. NHTSA, No. 22-1080 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Union of Concerned Scientists, et al. v. NHTSA, et al., No. 19-1230 (D.C. Cir.) (District Court Litigation Challenging NHTSA's SAFE I Rule Dismissed Now that NHTSA Repealed the Rule), page 35

Hazardous Materials Safety

Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022) (Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations), page 4

Polyweave Packaging, Inc. v. USDOT, No. 21-4202 (6th Cir.) (Petition for Review of PHMSA Administrative Enforcement Decision Filed in the Sixth Circuit), page 6

Highway Construction and Operation

Canyon Park Business Center Owners' Assoc. v. Buttigieg, et al., 2022 WL 2317059 (W.D. Wash. June 28, 2022) (District Court Dismisses Initial Complaint to I-405 Canyon Park Business Center Project; Plaintiffs File Amended Complaint), page 25

Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., No. 22-1103 (4th Cir.) (Briefing Completed for Appeal of District Court Order in Mid-Currituck Bridge Project), page 23

Narragansett Indian Tribe v. Pollack, et al., No. 22-02299 (D.D.C.) (Another Complaint Filed under APA and NHPA on the I-95 Providence Viaduct Bridge Project), page 24

Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., 2022 WL 7051160 (D. Md.). (Lawsuit Filed in Project to Replace the Historic Nice Bridge with New Bridge, Injunctions Denied), page 25

Rocky Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., 40 F. 4th 1133 (10th Cir.) (Appeals Court Affirms District Court Decision for FHWA in Rocky Flats National Wildlife Refuge Case), page 22

Slockish, et al. v.USDOT, No. 22-321 (U.S.) (Petition for Certiorari Filed in Oregon Sacred Site, Religious Freedom Case), page 2

Tahoe Cabin, LLC v. FHWA, et al., No. 22-00175 (D. Nev.) (District Court Denies Plaintiffs' Motion for Preliminary Injunction in US 50 Round Hill Pines Project Case), page 23

Hobbs Act and Similar Review Statutes

Matson Navigation Co. v. USDOT, et al., No. 21-1137 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

Matson Navigation Co. v. USDOT, et al., No. 21-01606 (D.D.C.), (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues) page 30

Matson Navigation Co. v. USDOT, et al., No. 22-5212 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

International and Treaty Issues

In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.) (Updated Status of Litigation Related to October 2018 Lion Air Tragedy), page 21

Labor and Employment

California Trucking Ass'n v. Bonta, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Morrissey, et al. v. Mayorkas, et al., No. 22-235 (U.S.) (Certiorari Petition Filed Regarding Dismissal of Complaints for Failure to Properly Serve the Government), page 2

Smolen v. FAA, No. 22-44 (S.D.N.Y.) (FOIA Requester Challenges Exemption 4 Withholdings of NATCA Collective Bargaining Communications with FAA), page 20

Virgin America v. Bernstein, 142 S. Ct. 2903 (2022) (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Washington v. FMCSA, et al., No. 20-73730 (9th Cir.) (State of Washington Dismisses Challenge to FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers), page 26

Young v. Buttigieg, No. 19-1411 (N.D. Cal.) (DOT Files Motion for Summary Judgment in Former OST Employee's Title VII Case), page 7

Maritime

Matson Navigation Co. v. USDOT, et al., No. 21-1137 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

Matson Navigation Co. v. USDOT, et al., No. 21-01606 (D.D.C.), (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues) page 30

Matson Navigation Co. v. USDOT, et al., No. 22-5212 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

Mootness

Slockish, et al. v.USDOT, No. 22-321 (U.S.) (Petition for Certiorari Filed in Oregon Sacred Site, Religious Freedom Case), page 2

Motor Carrier Regulation

Advocates for Highway and Auto Safety, et al. v. FMCSA, et al., 41 F.4th 586 (D.C. Cir. 2022) (D.C. Circuit Denies Challenge to FMCSA's Hours of Service Final Rule), page 3

Buttigieg v. Adversity Transport Inc., et al., No. 22-817 (S.D. Tex.) (Secretary Secures Injunctive Relief Against Motor Carrier in U.S. District Court), page 27

California Trucking Ass'n v. Bonta, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

C.H. Robinson v. Miller, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Washington v. FMCSA, et al., No. 20-73730 (9th Cir.) (State of Washington Dismisses Challenge to FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers), page 26

Pipeline Regulation and Operation

GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1070 (D.C. Cir.) (Petition for Review of PHMSA's Gas Gathering Final Rule Filed in the D.C. Circuit), page 36

GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1148 (D.C. Cir.) (Petition for Review of PHMSA's Valve Installation and Rupture Detection Final Rule Filed in the D.C. Circuit), page 37

United States v. Belle Fourche Pipeline Co., No. 22-00089 (D.N.D.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

United States, et al. v. Bridger Pipeline, LLC, et al., No. 22-00043 (D. Mont.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

Preemption

California Trucking Ass'n v. Bonta, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

C.H. Robinson v. Miller, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Virgin America v. Bernstein, 142 S. Ct. 2903 (2022) (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Washington v. FMCSA, et al., No. 20-73730 (9th Cir.) (State of Washington Dismisses Challenge to FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers), page 26

Railroad Safety and Operations

BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.) (Briefing Complete in Challenge to FRA's Decision to Not Expand Automated Track Inspection Waiver to New Territories), page 29

Kansas City S. Rwy. Co., et al. v. FRA, et al., No. 22-1924 (8th Cir.) (Eighth Circuit Holds in Abeyance Lawsuit Concerning Requested Changes to Locomotive Engineer Certification Program)), page 30

Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., 40 F.4th 646 (D.C. Cir. 2022) (D.C. Circuit Largely Rejects Challenge to FRA's Final Rule Amending the Brake System Safety Standards), page 28

Standing

Bruckner, et al. v. Biden, et al., No. 22-1582 (M.D. Fla.) (Challenge to DOT Disadvantaged Business Enterprise Program Filed, Preliminary Injunction Sought), page 9

Lowman, et al. v. FAA, et al., No. 21-14476 (11th Cir.) (Briefing Underway in Homeowner Challenge to Amazon Air Cargo Facility in Lakeland, Florida), page 16

Missouri, et al. v. Biden, et al., 52 F.4th 362 (8th Cir. 2022) (Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another), page 6

Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022) (Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations), page 4

Torts (including Federal Tort Claims Act)

C.H. Robinson v. Miller, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.) (Updated Status of Litigation Related to October 2018 Lion Air Tragedy), page 21

Alphabetical Index of Cases Reported in this Issue

Advocates for Highway and Auto Safety, et al. v. FMCSA, et al., 41 F.4th 586 (D.C. Cir. 2022) (D.C. Circuit Denies Challenge to FMCSA's Hours of Service Final Rule), page 3

Backcountry Against Dumps, et al. v. FAA, No. 21-71426 (9th Cir.) (Briefing Commences in Challenge to San Diego County Wind Turbines), page 17

BNSF Rwy. Co. v. FRA, et al., No. 22-60217 (5th Cir.) (Briefing Complete in Challenge to FRA's Decision to Not Expand Automated Track Inspection Waiver to New Territories), page 29

Brennan, et al. v. Dickson, et al., 45 F.4th 48 (D.C. Cir. 2022) (FAA Prevails in Challenge to UAS Remote Identification Rule), page 10

Brown v. Nolen, No. 22-1047 (D.C. Cir.) (UPS First Officer Appeals Airline Transport Pilot Certificate Revocation for Misconduct), page 18

Bruckner, et al. v. Biden, et al., No. 22-1582 (M.D. Fla.) (Challenge to DOT Disadvantaged Business Enterprise Program Filed, Preliminary Injunction Sought), page 8

Buttigieg v. Adversity Transport Inc., et al., No. 22-817 (S.D. Tex.) (Secretary Secures Injunctive Relief Against Motor Carrier in U.S. District Court), page 27

California, et al. v. Buttigieg, et al., No. 19-02826 (D.D.C.) (District Court Litigation Challenging NHTSA's SAFE I Rule Dismissed Now that NHTSA Repealed the Rule), page 34

California Trucking Ass'n v. Bonta, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Canyon Park Business Center Owners' Assoc. v. Buttigieg, et al., 2022 WL 2317059 (W.D. Wash. June 28, 2022) (District Court Dismisses Initial Complaint to I-405 Canyon Park Business Center Project; Plaintiffs File Amended Complaint), page 25

C.H. Robinson v. Miller, (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

City of North Miami, et al. v. FAA, 47 F.4th 1257 (11th Cir. 2022) (Eleventh Circuit Denies Miami Petitioners' Consolidated Challenges to FAA's South-Central Florida Metroplex FONSI/ROD), page 11

City of Scottsdale v. FAA, 37 F.4th 678 (D.C. Cir. 2022) (Petition for Review of FAA Decision to Halt Post-Phoenix Agreement Implementation Dismissed for Lack of Standing), page 14

Competitive Enterprise Institute v. NHTSA, No. 20-1145 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Flyers Rights Education Fund, Inc., et al. v. Dickson, No. 22-1004 (D.C. Cir.) (Flyers Rights Seeks Mandamus from D.C. Circuit as to Passenger Seat Width and Legroom Rulemaking), page 14

Flyers Rights Education Fund, Inc. v. FAA, No. 21-5257 (D.C. Cir.) (Briefing Underway in Flyers Rights Appeal of D.C. District Court FOIA Decision), page 15

GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1070 (D.C. Cir.) (Petition for Review of PHMSA's Gas Gathering Final Rule Filed in the D.C. Circuit), page 36

GPA Midstream Ass'n, et al. v. USDOT, et al., No. 22-1148 (D.C. Cir.) (Petition for Review of PHMSA's Valve Installation and Rupture Detection Final Rule Filed in the D.C. Circuit), page 37

In re: Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.) (Updated Status of Litigation Related to October 2018 Lion Air Tragedy), page 21

Kansas City S. Rwy. Co., et al. v. FRA, et al., No. 22-1924 (8th Cir.) (Eighth Circuit Holds in Abeyance Lawsuit Concerning Requested Changes to Locomotive Engineer Certification Program)), page 30

Louisiana, et al., v. Biden, et al., No. 22-30087 (5th Cir.) ((Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another), page 6

Lowman, et al. v. FAA, et al., No. 21-14476 (11th Cir.) (Briefing Underway in Homeowner Challenge to Amazon Air Cargo Facility in Lakeland, Florida), page 16

Matson Navigation Co. v. USDOT, et al., No. 21-1137 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

Matson Navigation Co. v. USDOT, et al., No. 21-01606 (D.D.C.), (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues) page 30

Matson Navigation Co. v. USDOT, et al., No. 22-5212 (D.C. Cir.) (Litigation with Matson over Replacement Vessels in the Maritime Security Program Continues), page 30

Mid-Currituck Bridge Concerned Citizens, et al. v. North Carolina Dep't of Transp., et al., No. 22-1103 (4th Cir.) (Briefing Completed for Appeal of District Court Order in Mid-Currituck Bridge Project), page 23

Missouri, et al. v. Biden, et al., 52 F.4th 362 (8th Cir. 2022) (Injunction Stayed in One Challenge to Executive Order 13990, Appellate Briefing Completed in Another), page 6

Morrissey, et al. v. Mayorkas, et al., No. 22-235 (U.S.) (Certiorari Petition Filed Regarding Dismissal of Complaints for Failure to Properly Serve the Government), page 2

Mueller v. Gramian, et al., No. 22-01576 (M.D. Pa.) (Pennsylvania Sub-Contractor Brings Constitutional Challenge to DOT's DBE Program), page 9

Narragansett Indian Tribe v. Pollack, et al., No. 22-02299 (D.D.C.) (Another Complaint Filed under APA and NHPA on the I-95 Providence Viaduct Bridge Project), page 24

Natural Resources Defense Council v. NHTSA, Nos. 21-139, et al. (2d Cir.) (Petitioners Voluntarily Dismiss Second Circuit Litigation Challenging NHTSA CAFE Civil Penalty Rate Rule), page 33

Natural Resources Defense Council v. NHTSA, No. 22-1080 (D.C. Cir.) (Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks), page 34

Offshore Inland Oil & Marine, Inc. v. United States, et al., 22-00301 (S.D. Ala.), (Reserve Fleet Subcontractor Files, Withdraws Lien Against MARAD Vessel), page 32

Polyweave Packaging, Inc. v. USDOT, 51 F.4th 675 (6th Cir. 2022) (Sixth Circuit Affirms Dismissal of Challenge to DOT's Rescission of Enforcement Procedure Regulations), page 4

Polyweave Packaging, Inc. v. USDOT, No. 21-4202 (6th Cir.) (Petition for Review of PHMSA Administrative Enforcement Decision Filed in the Sixth Circuit), page 6

Potomac Heritage Trail Ass'n, et al. v. USDOT, et al., 2022 WL 7051160 (D. Md.). (Lawsuit Filed in Project to Replace the Historic Nice Bridge with New Bridge, Injunctions Denied), page 25

Rocky Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., 40 F. 4th 1133 (10th Cir.) (Appeals Court Affirms District Court Decision for FHWA in Rocky Flats National Wildlife Refuge Case), page 22

Slockish, et al. v.USDOT, No. 22-321 (U.S.) (Petition for Certiorari Filed in Oregon Sacred Site, Religious Freedom Case), page 2

Smolen v. FAA, No. 22-44 (S.D.N.Y.) (FOIA Requester Challenges Exemption 4 Withholdings of NATCA Collective Bargaining Communications with FAA), page 20

Sunoco Pipeline L.P. v. USDOT, No. 21-01760 (D.D.C) (Pipeline Operator Files Surreply in "Reverse FOIA" Litigation to Prevent PHMSA From Disclosing Safety Information), page 35

Tahoe Cabin, LLC v. FHWA, et al., No. 22-00175 (D. Nev.) (District Court Denies Plaintiffs' Motion for Preliminary Injunction in US 50 Round Hill Pines Project Case), page 23

Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., 40 F.4th 646 (D.C. Cir. 2022) (D.C. Circuit Largely Rejects Challenge to FRA's Final Rule Amending the Brake System Safety Standards), page 28

Union of Concerned Scientists, et al. v. NHTSA, et al., No. 19-1230 (D.C. Cir.) (District Court Litigation Challenging NHTSA's SAFE I Rule Dismissed Now that NHTSA Repealed the Rule), page 35

United States v. Belle Fourche Pipeline Co., No. 22-00089 (D.N.D.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

United States, et al. v. Bridger Pipeline, LLC, et al., No. 22-00043 (D. Mont.) (PHMSA Sues Pipeline Operator for Oil Spills in North Dakota and Montana), page 38

Virgin America v. Bernstein, 142 S. Ct. 2903 (2022) (Supreme Court Denies Certiorari in Aviation and Trucking Preemption Cases), page 1

Washington v. FMCSA, et al., No. 20-73730 (9th Cir.) (State of Washington Dismisses Challenge to FMCSA Preemption of State Meal and Rest Break Rules for Truck Divers), page 26

Young v. Buttigieg, No. 19-1411 (N.D. Cal.) (DOT Files Motion for Summary Judgment in Former OST Employee's Title VII Case), page 7