U.S. Department of Transportation

DOT LITIGATION NEWS

Office of the General Counsel

Charles E. Enloe *Charles E. Enloe*
Assistant General Counsel for Litigation and Enforcement

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

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590
Telephone: (202) 366-4731

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A Note to Readers: Paul M. Geier, who founded the DOT Litigation News and served as Assistant General Counsel for Litigation and Enforcement for 34 years, has transitioned to serving as DOT's Assistant General Counsel for International and Aviation Economic Law. A tribute to Paul and his exceptional career will appear in the Spring/Summer 2025 issue.

Highlights

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

Subject Matter Index

Glossary of Commonly Used Abbreviations

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

Supreme Court Litigation

Supreme Court Ends Chevron Deference

On June 28, 2024, the Supreme Court in Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), overruled Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984). Under the doctrine described in Chevron, a federal court deferred to an agency's interpretation of a statute it administered if: (1) the statute did not unambiguously answer the interpretive question; (2) the agency's interpretation was reasonable; and (3) the agency used sufficiently formal or otherwise proper procedures to issue the interpretation. The Court—in an opinion written by Chief Justice Roberts and joined by five other Justices—held that courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Loper Bright and a companion case before the Court, Relentless, Inc. v. Dep't of Commerce, No. 22-1219 (U.S.), involved the Magnuson-Stevens Fishery Conservation and Management Act, which seeks to prevent overfishing and to promote conservation. The Act directs the Commerce Department to review and approve fishery management plans to issue implementing regulations. The petitioners challenged agency rules, adopted in connection with these plans, that require fishing vessel owners to pay for monitors who collect data during fishing trips. Both Courts of Appeals upheld the rules under Chevron. One court held that the statute was ambiguous as to the agency's authority to enact the rule and that the agency's interpretation was reasonable. Loper Bright Enterprises v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022). The other held that the agency's interpretation was reasonable but declined to decide whether the statute was ambiguous. Relentless, Inc. v. Dep't of Commerce, 62 F.4th 621 (1st Cir. 2023).

The Court's central rationale for overruling Chevron was that deferring to agency interpretations violates the APA, which specifies that "'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions." The government had argued that when a court defers to an agency interpretation under Chevron, it *does* interpret the relevant statute, by presuming that the statute implicitly gives the agency the authority to resolve ambiguities. But the Court held that there was no basis for believing that Congress intends to delegate authority in this way, and that the purported benefits of Chevron—including reliance on agency technical expertise, promotion of uniform statutory interpretation, and resolution of policy disputes by the political branches—were unfounded and did not justify the presumption. The Court also held that *stare decisis* could not save Chevron in light of what the majority perceived as Chevron's poor reasoning, the doctrine's unworkability, and the lack of any justifiable reliance on Chevron's continued viability.

The Court acknowledged that many statutes authorize agencies to "exercise a degree of discretion," including statutes that "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme" or allow them "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with

flexibility,'" such as "'appropriate' or 'reasonable.'" The Court suggested that agencies will still be able to exercise their discretion with respect to such statutes, holding that when "the best reading of a statute is that it delegates discretionary authority to an agency," a court's role is to "fix[] the boundaries of the delegated authority, and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."

Justice Thomas, in a concurring opinion, wrote that Chevron, in addition to violating the APA, violated constitutional separation of powers principles. Justice Gorsuch, in his own concurring opinion, wrote at length about his views of *stare decisis* and its applicability to Chevron. Justice Kagan vigorously dissented, in an opinion joined by Justice Sotomayor and Justice Jackson. She argued that Chevron was a "cornerstone of administrative law" that had "become part of the warp and woof of modern government," that the Chevron framework was correct and rooted in historical practice, and that the majority's decision "mak[es] a laughing-stock" out of *stare decisis*.

The Supreme Court's opinion in Loper Bright can be found here: https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

Supreme Court Grants *Certiorari*, Hears Argument in FAA Differential Pay Case

On June 24, 2024, the Supreme Court granted the petition for in Feliciano v. USDOT, No. 23-861 (U.S.), filed by a former FAA employee seeking review of the Federal Circuit's decision affirming the Merit System Protection Board's (MSPB) denial of his claim for differential pay pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under one of the provisions of USERRA (5 U.S.C. § 5538), a federal employee is entitled to the pay differential between his military pay and federal service pay if he is called to duty pursuant to a "contingency operation," as defined by 10 U.S.C. § 101(a)(13)(B). That statute defines a "contingency operation" to include a "military operation" that "results in the call or order to, or retention on, active duty of members of the uniformed services" under a long list of statute sections "or any other provision of law during a war or during a national emergency declared by the President or Congress."

Nick Feliciano was an air traffic controller and a reserve officer in the U.S. Coast Guard. From 2012 to 2014, Feliciano was called to voluntary active duty several times under 10 U.S.C. § 12301(d). That provision is not on the list of statutes set forth in section 101(a)(13)(B)'s definition of a "contingency operation." To support his claim for differential pay, Feliciano attempted to rely upon the definition's catchall reference to "any other provision of law during a war or national emergency declared by the President or Congress." The Federal Circuit, relying on its precedents, held that "for voluntary activation under 10 U.S.C. § 12301(d) to qualify as a contingency operation, there must be a connection between the voluntary military service and the declared national emergency." Feliciano v. USDOT, No. 2022-1219, 2023 WL 3449138 (Fed. Cir. May 15, 2023). Because Feliciano did not allege (or prove) any connection between his service and an ongoing national emergency, he failed to demonstrate that his service met the statutory definition of a "contingency operation," and the Federal Circuit affirmed

the MSPB's decision denying his claim for differential pay.

The question presented by Feliciano's petition for *certiorari* is: Whether a federal civilian employee called or duty during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

In his merits brief, Feliciano contends that section 101(a)(13)(B)'s catchall provision (service under any other provision of law "during" a war or during a national emergency declared by the President or Congress) should be interpreted as any service at the same time a national emergency exists, regardless of whether the service is connected to the national emergency. The Solicitor General, on behalf of the FAA and the Department of Transportation, contends in its brief on the merits that the catchall provision should be interpreted as active duty in the course of a national emergency—not merely while an unrelated emergency declaration happens to be in effect. The Solicitor General further contends that the service member's orders will generally make clear whether he is being called to active duty in the course of a national emergency because the Department of Defense and Coast Guard regulations require that orders note whether they are in support of a contingency operation, list the name of the operation supported, and reference the relevant executive order.

The Court's decision will affect all federal agencies. Indeed, the issue in Feliciano was also raised by petitions for writs of *certiorari* in Flynn v. Department of State, No. 23-868, and Norby v. Social Security Administration, No. 23-866. The Court has not ruled on the petitions in those cases.

The Court heard oral argument on December 9, 2024. The petition for *certiorari*, the briefs on the merits, and related materials in Feliciano can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-861.html.

Supreme Court Considers Whether Fraud on the Disadvantaged Business Enterprise Program Meets the Elements of Criminal Wire Fraud

On June 17, 2024, the Supreme Court granted a petition for writ of *certiorari* in Kousisis v. United States, No. 23-909 (U.S.), to consider whether sufficient evidence supported petitioners' convictions for conspiring to commit wire fraud, in violation of 18 U.S.C. § 1349, and wire fraud, in violation of 18 U.S.C. § 1343, where they falsely certified compliance with a requirement that they subcontract to a disadvantaged business enterprise (DBE) and, as a result, overcharged PennDOT with respect to two DOT-financed contracts in Philadelphia: (1) a $70.3 million contract to perform painting and repairs on the Girard Point Bridge over the Schuylkill River, which was awarded to petitioners, among others; and (2) a $50.8 million contract to perform repairs at the Amtrak 30th Street Train Station, which was awarded to other entities, but involved a $15 million subcontract for painting that was awarded to petitioners. Both projects involved DBE requirements, and the contracts for each stipulated that failure to comply with DBE regulations would be a material breach. Petitioners submitted bids stating that they would obtain supplies for these projects from Markias, Inc., a certified DBE in Pennsylvania. Despite this, petitioners independently negotiated for and

obtained supplies from non-DBE entities, then instructed these non-DBE suppliers to send their invoices to Markias, which would then add a mark-up and send an invoice bearing its name to petitioners. Not only did this fraudulent scheme enable petitioners to win the contracts, but it also allowed them to retain more revenue during the execution of both projects. In late 2013, DOT's OIG referred the matter to the Department of Justice for criminal prosecution. On April 3, 2018, a federal grand jury indicted, among other parties, Alpha Painting and Construction, Inc. and its project manager, Stamatios Kousisis, for, as relevant here, conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and wire fraud in violation of 18 U.S.C. § 1343.

In August 2018, the case went to trial and the jury convicted Kousisis and his company of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and wire fraud in violation of 18 U.S.C. § 1343, among others. After the trial, Kousisis and Alpha filed several post-trial motions, including one that argued for acquittal because the government failed to assert a sufficient property interest to support wire fraud charges. Specifically, Kousisis and Alpha alleged that the government failed to establish a scheme to defraud the government of "money or property" within the meaning of the wire fraud statute because defendants completed the construction projects, and thus PennDOT and DOT received the full benefit of their bargain. The court, however, disagreed, finding that DOT and PennDOT were deprived of a cognizable contract-based property right, namely, compliance with DBE requirements. The court explained that "[t]he DBE requirements were a fundamental basis of the bargain, since the [] contracts were awarded based on the representation that a certain amount of supplies would be obtained from Markias, and the contracts included compliance with the DBE regulations as an explicit term of the agreement." United States v. Kousisis, 2019 WL 4126484, at *13 (E.D. Pa. June 17, 2019). After the decision, FHWA proceeded with a suspension and debarment action against the convicted defendants.

Kousisis and Alpha appealed the criminal convictions to the U.S. Court of Appeals for the Third Circuit. United States v. Kousisis, 82 F.4th 230 (3d Cir. 2023). Kousisis and Alpha conceded that Markias did not perform as promised, but they argued that this amounted to a loss of an "intangible interest" at best, falling far short of the true property interest required by the criminal fraud statute. Appellants argued that not only did they perform high quality and timely work, they saved PennDOT millions of dollars by using Markias in this way. The Third Circuit disagreed, finding that appellants set out to obtain millions of dollars from the government that they would not have received but for their fraudulent misrepresentations. The court found the DBE fraud to be merely incidental to the true purpose of the fraudulent scheme—to deprive the government of millions of dollars that they were not entitled to receive given their material breach of the contracts. The court concluded that "PennDOT's dollars establish the requisite property interest here, not the socially laudable objective of ensuring participation by a DBE" in the project. *Id.* at 240-41.

Petitioners' opening brief was filed on August 19, 2024, and the government filed its response on October 2. In its brief, the United States argues that petitioners' scheme satisfied the elements of the criminal wire

fraud statute because they obtained PennDOT's money or property (approximately $85 million) by intentionally providing materially false and fraudulent misrepresentations about compliance with DBE requirements. The brief also notes how an adverse decision would have a destabilizing effect in other similar public programs.

Oral argument was held on December 9, 2024. The petition for *certiorari*, merits briefs, and related materials can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-909.html.

Supreme Court Considers Challenge to Evaluation of Climate Change Impacts under NEPA

In Seven County Infrastructure Coalition, et al. v. Eagle County, Colorado, et al., No. 23-975 (U.S.), petitioners Seven County Infrastructure Coalition, an independent political subdivision composed of seven member counties in the State of Utah, and Uinta Basin Railway, seek review of an opinion of the U.S. Court of Appeals for the District of Columbia Circuit that held that the Surface Transportation Board's (STB) NEPA analysis for an 85-mile-long railway to facilitate the transport of freight, including oil, by rail in Utah should have considered the upstream environmental effects of increased oil development and the downstream effects of refining that oil.

Petitioners claim that the D.C. Circuit erred in directing the STB to study environmental impacts over which the agency has no control, namely the impacts of oil wells and refineries, and in so finding, created a circuit split over the proper interpretation of Department of Transportation v. Public Citizen, 41 U.S. 752 (2004). In Public Citizen, the Supreme Court unanimously found that NEPA's causal requirement is akin to proximate causation, and so agencies must only examine environmental effects for which the agency's action is the legally relevant cause. Respondents Eagle County, Colorado, the Center for Biological Diversity, and various environmental groups, urge the Court to affirm the D.C. Circuit's opinion and maintain the longstanding understanding that NEPA analysis extends to "reasonably foreseeable" impacts, like the upstream and downstream effects at issue here.

The United States filed a brief on behalf of the STB and the U.S. Fish & Wildlife Service in support of Petitioner on August 28, 2024, expressing its views that the STB reasonably limited its consideration of the upstream and downstream effects of petitioners' proposed railway because NEPA permits federal agencies to draw manageable, context-specific lines in determining the scope of their environmental impact statements.

Oral argument was held on December 10, 2024. The petition for *certiorari*, merits briefs, and related materials can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-975.html.

Supreme Court to Hear Case Regarding Interpretation of the Hobbs Act

On December 2, 2024, the Solicitor General filed the government's opening brief on the merits in Nuclear Regulatory Commission v. Texas, No. 23-1300 (U.S.), in which the government seeks the Supreme Court's

review of a decision of the U.S. Court of Appeals for the Fifth Circuit. In 2018, a nuclear storage facility applied for a materials license with the Nuclear Regulatory Commission to store spent nuclear fuel in Andrews County, Texas. Although the Commission's procedures permitted interested parties to petition for leave to intervene in the Commission's adjudication of the application, the State of Texas, one of the respondents in this case, did not do so; a group of private landowners, the other respondent in the case, petitioned for leave to intervene but was denied. In 2021, after the Commission issued the materials license, respondents petitioned for review of the license under 28 U.S.C. § 2342 (known as the Hobbs Act). The Hobbs Act is the judicial review provision for a number of agencies, including several DOT operating administrations (FMCSA, MARAD, and FRA).

Under the Hobbs Act, "parties aggrieved" by a final agency order may file a petition for review of the final order within 60 days of the entry of that order. Although Texas had not intervened in the licensing proceeding or otherwise participated in the proceeding such that it became a party to the proceeding, and the landowners were denied leave to intervene in the Commission's proceeding, the Fifth Circuit granted the respondents' petition for review. Without resolving the party-aggrieved issue, the court relied upon a Fifth Circuit-created *ultra vires* exception to the Hobbs Act's party-aggrieved requirement to determine that the court could consider the respondents' claims. Specifically, the court explained that in rare instances, a person may appeal an agency action even if not a party to the original agency proceeding where the agency action is attacked as exceeding its authority. The court held that under that exception, it could review respondents' claims that the Commission lacks the statutory authority to license offsite storage of spent nuclear fuel. On the merits, the court held that the Commission has no statutory authority to issue the license.

In its opening brief, the government argued that the Fifth Circuit's *ultra vires* exception, which has not been adopted by any other circuit, is irreconcilable with the statutory text. The statute clearly requires one to be a "party" to the underlying agency proceeding to file a petition for review of the covered agencies, and in this context, a party has a precise legal meaning, generally referring to a person by or against whom a proceeding is brought. Since respondents either never sought to intervene or otherwise participate, or were denied leave to intervene in the licensing proceeding, they are not a "party aggrieved" under the Hobbs Act. On the merits, the government argued that the Atomic Energy Act authorizes the Commission to license temporary offsite storage of spent nuclear fuel and that authority is not disturbed by the Nuclear Waste Policy Act.

Respondents' briefs are due on January 15, 2025, and the government's reply brief is due on February 14. The Court has scheduled oral argument for March 5. The petition for *certiorari*, the briefs on the merits, and related materials can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-1300.html.

No Supreme Court Review of Eleventh Circuit's Dismissal of Challenge to PHMSA Administrative Enforcement Decision

On June 24, 2024, the Supreme Court denied Metal Conversion Technologies, LLC's (MCT) petition for a writ of *certiorari* seeking review of a decision of the U.S. Court of Appeals for the Eleventh Circuit dismissing MCT's challenge to a PHMSA order as untimely. Metal Conversion Technologies, LLC v. PHMSA, No. 23-870 (U.S.).

On December 15, 2022, MCT filed a petition for review in the Eleventh Circuit challenging PHMSA's July 25, 2022, 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. Metal Conversion Technologies, LLC v. PHMSA, No. 22-14140 (11th Cir.). On January 31, 2023, the court issued an order directing the parties to address whether the petition for review was timely.

The Department filed its response on February 14, 2023, explaining that the petition for review was filed well beyond the 60-day filing deadline in 49 U.S.C. § 5127(a) and that the late filing was not explained in the petition. In its response to the court's jurisdictional question, MCT argued that the 60-day filing deadline in 49 U.S.C. § 5127(a) is not jurisdictional and is subject to equitable tolling, and that MCT was entitled to postponement or tolling of the statute's deadline.

On July 27, 2023, the Eleventh Circuit issued an unpublished opinion dismissing MCT's petition for review as untimely, holding that section 5127(a)'s 60-day time limit is a mandatory claim-processing rule not subject to equitable tolling.

On September 7, MCT filed a petition for panel rehearing and rehearing *en banc* of the court's decision. On October 12, the court denied MCT's petitions. On February 9, 2024, MCT filed a petition for a writ of *certiorari*, requesting that the Supreme Court review this case. The government filed its brief in opposition on May 15, arguing that the Eleventh Circuit's decision does not warrant review because it was correct and does not conflict with the decision of any other courts of appeals with respect to section 5127 or any other statute. On June 4, 2024, Metal Conversion Technologies LLC filed its reply brief in support of its petition for *certiorari*. The Supreme Court denied *certiorari* on June 24, 2024.

Seventh Circuit Affirms Summary Judgment in Presidential Center Case, Petition for Writ of *Certiorari* Filed

On September 19, 2024, Petitioners Protect Our Parks (POP) and other local community members sought Supreme Court review of the Seventh Circuit decision affirming summary judgment in favor of the government. Protect Our Parks, Inc. v. Buttigieg, No. 24-311 (U.S.).

Petitioners challenge federal decisions relating to roadwork necessitated by the construction of the Obama Presidential Center in Chicago's Jackson Park. Petitioners' claims are based on NEPA, NHPA, and Section 4(f) of the U.S.

Department of Transportation Act. This case's procedural history can be summarized in four phases leading up to the Petition for Writ of *Certiorari*: *POP I*, *POP II*, *POP III*, and *POP IV*.

POP I – In 2018, Petitioners filed suit challenging the City of Chicago's plan to construct the Presidential Center, arguing that the plan violated the Fifth and Fourteenth Amendments. The district court granted summary judgment for the defendants, which the Seventh Circuit affirmed on the constitutional theories but vacated on the state-law theories without prejudice. Protect Our Parks v. Chicago Park District, 971 F.3d 722 (7th Cir. 2020).

POP II – Petitioners filed a complaint in April 2021 against, *inter alia*, the Barack Obama Foundation, Secretary of Transportation Buttigieg, then-FHWA Administrator Shailen Bhatt, and the Environmental Programs Engineer of FHWA's Illinois Division. Petitioners relied on the APA for seven of fifteen counts, arguing that defendants violated Section 4(f), NEPA, and NHPA, among other federal laws. The eight remaining counts alleged violation of state laws. Petitioners moved for a preliminary injunction. On August 12, 2021, the U.S. District Court for the Northern District of Illinois denied the injunction, concluding that the agencies had no obligation to consider alternative locations. Protect Our Parks v. Buttigieg, No. 21-2006, (N.D. Ill. Aug. 12, 2021). On August 19, 2021, the Seventh Circuit denied interim relief. Protect Our Parks v. Buttigieg, 10 F.4th 758 (7th Cir. 2021).

POP III – On September 20, 2021, Petitioners appealed the August 12, 2021, District Court Order. Petitioners argued that the failure to prepare an EIS was arbitrary and capricious. Petitioners also alleged unlawful segmentation of the project to make impacts appear smaller. On July 1, 2022, the Seventh Circuit held that petitioners failed to make a "strong" showing of likelihood of success and concluded the district court had properly denied the prior preliminary injunction. Protect Our Parks v. Buttigieg, 39 F.4th 389 (7th Cir. 2022).

POP IV – Following *POP II*, Chicago and the Obama Foundation filed a motion to dismiss the state-law counts for failure to state a claim. In November 2021, after the motion to dismiss was briefed and argued, but before the court ruled on it, petitioners sought leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a) to add breach-of-contract and unjust-enrichment theories. On March 29, 2022, the district court denied leave and subsequently granted the motion to dismiss the state-law counts. Protect Our Parks v. Buttigieg, No. 21-2006 (N.D. Ill. Mar. 29, 2022). Petitioners appealed in December 2022.

On April 8, 2024, the Seventh Circuit affirmed the district court ruling, rejecting all of petitioners' challenges under NEPA, Section 4(f), and NHPA, in addition to their state law claims, and also affirmed the denial of plaintiffs' Rule 15 motion to amend. Protect Our Parks v. Buttigieg, 97 F.4th 1077 (7th Cir. 2024). On June 10, 2024, the court denied petitioners' petition for rehearing *en banc*.

On September 19, 2024, petitioners filed a Petition for Writ of *Certiorari* requesting the Supreme Court reverse the Seventh Circuit's April 8, 2024, decision in light of the recent Supreme Court decision in Loper Bright v. Raimondo. Petitioners argue, *inter alia*, that

the Seventh Circuit erred in deferring to the agencies' environmental analyses and regulatory interpretations.

The government filed a brief in opposition on December 10. In its brief, federal respondents first argue that the court of appeals correctly rejected petitioners' APA claims because the federal agencies did not act arbitrarily and capriciously in completing their reviews under NEPA and Section 4(f) of the Transportation Act. Respondents assert that the administrative record showed that FHWA had thoroughly analyzed potential environmental effects and concluded that none would have a significant impact. Second, federal respondents argue that Supreme Court review is unwarranted here because the courts of appeals' NEPA and Section 4(f) decisions do not conflict and are consistent with the Supreme Court's decisions in Loper Bright and Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Respondents note that Loper Bright concerns deference to agency interpretations of statutory text, an issue not presented in this case, which concerns APA arbitrary and capricious review. And in applying the APA standard here, the court of appeals did not misconstrue Overton Park.

The petition for *certiorari* and brief in opposition can be found here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-311.html.

Departmental Litigation in Other Federal Courts

D.C. Circuit Vacates Air Tour Management Plan for Bay Area National Parks and Determines CEQ Lacks Authority to Issue Binding NEPA Regulations; Government and Petitioners Seek Rehearing *En Banc*

On November 12, 2024, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit vacated the air tour management plan (ATMP) issued by the FAA governing air tour flights over four San Francisco Bay Area National Park Service (NPS) properties. Marin Audubon Society, et al. v. FAA, et al., No. 23-1067 (D.C. Cir.). On December 5, the government and petitioners each filed petitions for rehearing *en banc*. The lawsuit challenging the ATMP was filed by two environmental groups, the Marin Audubon Society and Watershed Alliance of Marin and Public Employees for Environmental Responsibility, and an individual. The Air Tour Management Plan sets the number of air tours permitted over the parks, as well as conditions and restrictions to mitigate their impacts (*e.g.*, times they can fly, specific routes and altitudes, and the types of aircraft). The court unanimously remanded the plan to the FAA, finding that it was arbitrary and capricious for the FAA and the NPS to treat the existing air tours in the Parks as the status quo for their environmental analysis under NEPA and the National Park Air Tour Management Act (NPATMA). The panel majority, with Chief Judge Srinivasan dissenting, also determined that it was unnecessary to address regulatory compliance arguments because the Council on Environmental Quality (CEQ) lacked statutory authority to issue binding regulations under NEPA. As noted above, the majority also vacated the Plan on remand.

The court indicated that the parties may seek a stay of the mandate to keep the Plan in place while the agencies restart the NEPA review. Chief Judge Srinivasan would have remanded without vacatur.

CEQ Authority to Issue Binding NEPA Regulations

The parties largely centered their arguments on compliance with the CEQ regulations. Petitioners' main argument was that the use of a Categorical Exclusion (CE) violated the NPATMA because NPATMA specifically refers to the preparation of an EA or EIS under NEPA. Petitioners argued that the agencies' use of a CE was arbitrary and capricious. In addition, petitioners contended that extraordinary circumstances existed and that therefore the use of a CE violated NEPA. The FAA/NPS briefs contended that NPATMA did not eliminate the agencies' discretion to rely on a CE. The agencies followed the normal process to comply with NEPA. The NPATMA's plain text neither mandates a particular level of NEPA review nor forbids the agencies from applying a CE. The NPATMA only required that the agencies "each sign the environmental decision document required by" NEPA. The NPATMA's structure and purpose reinforced the agencies' discretion to apply a categorical exclusion.

The majority of the court found it unnecessary to address compliance with the CEQ regulations because it determined that CEQ had exceeded its authority by attempting to promulgate binding NEPA regulations. The court reasoned that reliance upon an Executive Order of the President, rather than legislation, raised "what is essentially a 'separation of powers' issue." The court also noted that, although questions about this were raised during oral argument, neither party sought leave to file post-argument briefs. The court emphasized that it retained the power to identify and apply the proper construction of governing laws despite the parties' acquiescence in CEQ's authority. In the opinion of the court, "[t]here are good reasons, indeed there are compelling reasons, for us to determine the validity of the CEQ regulations once and for all." After a detailed analysis of the evolution of the regulations, the court determined that CEQ had no lawful authority to promulgate mandatory regulations pursuant to Executive Order 11991 and that they were "*ultra vires*." The court determined that no statute conferred rulemaking authority on CEQ. It found that prior pronouncements by the U.S. Supreme Court in this area were of no assistance. For example, the court indicated that it could not credit the Supreme Court's statement about affording substantial deference to CEQ's regulations considering that court's own ruling in Loper Bright Enterprises v Raimondo, 144 S. Ct. 2244 (2024).

The majority found it unnecessary to address whether CEQ rules adopted or incorporated by reference into an agency's NEPA regulations would be a permissible exercise of the agency's rulemaking authority because the agencies had obeyed the instructions in the CEQ regulations to "confine themselves" to issuing only supplemental implementing procedures that comply with, and do not paraphrase, the CEQ's rules.

Use of the Existing Air Tour Flights Baseline

Petitioners, without invoking the CEQ regulations, argued that the agencies improperly used the existing level of flights

as the baseline for assessing the impacts of the plan. The agencies contended that the choice of baseline was reasonable because Congress established interim operating authority as the status quo in the NPATMA. In the ROD, the agencies explained that they had decided to implement the existing condition in the Plan because impacts associated with the existing condition, with mitigation measures included in the Plan, would not result in significant adverse impacts on the parks.

The full court agreed with petitioners, holding that the agencies had violated the NPATMA and NEPA by using the number of flights allowed under interim operating authority as the benchmark for the decision. "By treating interim operating authority as the baseline, the Agencies enshrined the status quo without evaluating the environmental impacts of the existing flights." The court found that this outcome was at odds with the agencies' duties under the NPATMA and NEPA. The court reasoned that "Congress did not intend for the Agencies to treat the level of pre-[NPATMA] air tours as a legal status quo against which to compare all flights." In the opinion of the court, the intent of the NPATMA to protect and enhance the environment by mitigating or preventing adverse effects of aircraft overflights on national parks was not met by an approach that could grandfather all pre-NPATMA air tours without ever conducting a NEPA analysis. The court concluded that "by treating interim operating authority as the baseline for assessment of a Plan, the Agencies effectively transform a stopgap into a permanent part of a Plan that never undergoes a NEPA analysis." The court accordingly remanded the plan to the agencies to restart the NEPA review.

Vacatur of the Plan on Remand

Turning to the remedy, the panel's majority also determined that vacatur was necessary under Section 706(2) of the APA because "the Agencies' actions were *ultra vires* when they determined that the plan would have no environmental impacts compared with the existing air tour flights permitted on an interim basis." Section 706(2) states that a reviewing court "shall . . . hold unlawful and set aside" agency action that violates the APA." The court reasoned that the agencies would need to take a completely different approach and had not shown "at least a serious possibility" that they would be able to reach the same outcome on remand. The court indicated that the parties may move for a stay of the mandate if they desire to keep the current plan in place while the agencies restart their NEPA review.

Chief Judge Srinivasan dissented with the majority on aspects of the decision concerning the authority of CEQ and vacatur of the plan on remand. First, in his opinion, there was no cause to reach the issue of CEQ's authority in this case because no party challenged the regulations. He found that doing so contravened the principle of party presentation. He reasoned that this was not a case where the party presentation principle should give way because the restrictive effect of the regulations here fell not on private parties, but on the agencies, and those regulations enabled them to circumscribe, not expand, their regulatory duties under NEPA.

Second, Chief Judge Srinivasan found that ordering a remedy that no party desired was inconsistent with past decisions. He noted that vacatur of the agencies' plan would reinstate the pre-Plan regime, resulting in a situation worse than the status quo. It would

defeat the goal of enhanced protection of the environment because there would be no mitigation of air tour impacts on the Bay Area national parks while the agencies restart the NEPA review.

On December 5, the government and petitioners each filed petitions for *en banc* rehearing limited to the CEQ regulatory issues. The government argues that *en banc* rehearing is warranted because (1) the panel's decision violated the party-presentation principle and that the panel's reason for departing from that principle – that CEQ's rulemaking authority implicated separation-of-powers concerns – misapplies and conflicts with Supreme Court and circuit precedents, including circuit precedents applying party-presentation principles to decline review of the very question of CEQ's regulatory authority and (2) the panel's decision is incorrect and departs from the long-held understanding of the Supreme Court and Congress recognizing CEQ's authority to issue regulations interpreting NEPA.

Tenth Circuit Rejects Mandamus Action Over Commuter Air Carrier Application

On April 15, 2024, SkyWest Charter, LLC (SWC) sued DOT in the U.S. District Court for the District of Utah over the Department's alleged failure to act on SWC's pending commuter air carrier application. SkyWest Charter, LLC v. USDOT, No. 24-00036 (D. Utah). This case involved an APA claim and, in the alternative, a claim seeking mandamus. The APA claim alleged that DOT's failure to adjudicate the application amounts to an agency action "unlawfully withheld or unreasonably delayed" in violation of 5 U.S.C. § 706(1) and has caused the company and small communities undue harm. SWC further alleged that DOT's inaction was "arbitrary and capricious" because DOT has not treated similarly situated entities in a similar fashion. The mandamus claim alleged that SWC has exhausted all other avenues of relief and requests that the court order DOT to issue a final decision on its application within 60 days. DOT informed SkyWest that it intended to move to dismiss for lack of jurisdiction. SkyWest agreed to file a stipulation of dismissal in order to refile the case in the U.S. Court of Appeals for the Tenth Circuit. On June 17, the parties filed a joint stipulation of dismissal, and the court dismissed the case.

On June 18, SkyWest filed a petition for writ of mandamus in the Tenth Circuit. DOT filed a response brief on July 10, which explained that DOT's careful consideration of SkyWest's application demonstrated a commitment to reasoned decision-making, not egregious conduct warranting extraordinary mandamus relief. The brief also noted that this is the first time DOT has received an application that requests approval authorizing an existing Part 135 air carrier, SkyWest, to operate in some of the same markets as its affiliated Part 121 carrier, SkyWest Airlines, using similar aircraft, but under the former's Part 135 certificate and in accordance with Part 380. On July 16, SkyWest filed a motion for leave to file a reply in support of its mandamus petition. On August 1, the court denied mandamus relief to SkyWest, explaining that the company did not meet its burden for such extraordinary relief. The court did not retain jurisdiction or ask for updates about the status of the application. On September 10, SkyWest filed a petition for rehearing *en banc*. SkyWest argued that the practice of

forcing litigants to file agency-delay actions as mandamus petitions in the court of appeals deprives it of its statutory right under the APA to judicial review of agency inaction. SkyWest also argued that the court should have retained jurisdiction while DOT decides the application. DOT filed a response on September 20, which argued that SkyWest's petition for rehearing should be denied because, in part, SkyWest raised new arguments that it did not raise in its merits briefs. On October 16, the court denied the petition for rehearing *en banc*.

Ninth Circuit Rules in Favor of DOT in Long-Running Title VII Case

On October 23, 2024, the U.S. Court of Appeals for the Ninth Circuit affirmed a decision of the U.S. District Court for the Northern District of California that granted summary judgment in favor of the government. Young v. Buttigieg, No. 23-15219 (9th Cir.). Cheryl Young, a former employee of the Bureau of Transportation Statistics (BTS) 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 when she was reassigned to a new position within BTS. 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 EEOC Administrative Judge (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. Young v. Buttigieg, No. 19-1411 (N.D. Cal.). In addition, she added two new claims, a non-selection claim and a constructive removal claim. After the parties participated in settlement discussions in August 2022, Young 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 Young to return the amounts that DOT had previously paid to her as a result of the AJ's order.

On February 15, 2023, Young filed a notice of appeal in the U.S. Court of Appeals for the Ninth Circuit after the district court granted summary judgment in favor of the government on Young's constructive removal and non-selection claims, the two remaining claims in the case. The district court held that Young failed to meet the high bar for a constructive discharge claim because she continued to work for DOT for years after the inter-agency transfer that was the basis of her constructive discharge claim before she voluntarily retired from DOT. On the non-selection claim, the district court held that even assuming Young established a prima facie case of discrimination when she was not hired for the specific position she desired when DOT was attempting to restore her to her previous position, DOT met its burden of providing a non-discriminatory reason for not reinstating her.

In affirming the district court's decision, the Ninth Circuit adopted the district court's rationale on both the constructive removal and non-selection claims.

Fifth Circuit Hears Argument in Airlines' Challenge to DOT's Ancillary Fee Rule

On May 10, 2024, Airlines for America, Alaska Airlines, American Airlines, Delta Air Lines, Hawaiian Airlines, JetBlue Airways, and United Airlines filed a petition for review of DOT's ancillary fee rule in the U.S. Court of Appeals for the Fifth Circuit. Airlines for America, et al. v. USDOT, No. 24-60231 (5th Cir.). Spirit Airlines and Frontier Group Holdings intervened as petitioners. The final rule requires air carriers and ticket agents to clearly disclose baggage and cancellation fees—known as ancillary or "junk" fees—whenever fare and schedule information is provided for flights to, within, or from the United States. 89 Fed. Reg. 34,620 (Apr. 30, 2024). Petitioners challenge the rule on grounds that it exceeds the Department's statutory authority, is arbitrary and capricious in violation of the APA, is an abuse of discretion, and is otherwise contrary to law.

The Fifth Circuit stayed the rule on July 29, 2024, finding that the Department likely exceeded its statutory authority in promulgating the rule. Merits briefing was completed on October 31, 2024. Petitioners all argue that the Department exceeded its statutory authority under 49 U.S.C. § 41792 and acted arbitrarily and capriciously in violation of the Administrative Procedure Act. The ultra-low-cost carriers (Spirit and Frontier) also make First Amendment challenges to the rule. In response, DOT defended the legality of the rule, arguing that Congress unambiguously granted statutory authority to the Department under § 41792 as well as 49 U.S.C. § 40113(a) (granting authority to the Secretary to prescribe regulations to "carry out" § 41712). DOT further relied on the Department's decades-long history of rulemaking to prohibit unfair and deceptive practices and explained that the Department did not impermissibly rely on new data in finalizing the rule. Oral argument, before Judges Southwick, Haynes, and Douglas, was heard November 18, 2024, over Zoom.

Parties File Briefs in Consolidated Case Challenging FRA's Train Crew Size Final Rule

Between July 26 and October 1, 2024, parties filed briefs in a consolidated case concerning FRA's final rule on Train Crew Size Safety Requirements. Florida East Coast Rwy., LLC v. FRA, et al., No. 24-11076 (11th Cir.).

On April 2, 2024, FRA announced the final rule addressing Train Crew Size Safety Requirements; the rule was published in the Federal Register on April 9. The rule includes a general requirement that most railroad operations must have a minimum of two crew members, effective June 10, except for certain identified one-person train crew operations. The final rule includes requirements for railroads seeking to continue existing one-person train crew operations, as well as a special approval process for railroads seeking to initiate new one-person train crew operations.

Multiple railroads and railroad associations filed petitions for review challenging the final rule in the Fifth, Seventh, Eighth, Eleventh Circuit Courts of Appeal, and D.C. Circuits. Because petitions for review were filed in multiple circuits within ten days of

the final rule's issuance, the government filed a notice with the Judicial Panel on Multidistrict Litigation (the Panel) pursuant to 28 U.S.C. § 2112. On April 24, the Panel randomly selected the Eleventh Circuit in which to consolidate the petitions for review. The International Association of Sheet Metal, Air, Rail and Transportation Workers–Transportation Division (SMART-TD) intervened in the consolidated case.

Between July 26 and October 1, consolidated opening briefs were filed by the Class 1 railroad petitioners and by the short line railroad petitioners. A response brief was filed by FRA, and an intervenor brief was filed by SMART-TD. In addition, the U.S. and Ohio Chambers of Commerce and the National Taxpayers Union Foundation submitted amicus briefs in support of petitioners. The Academy of Rail Labor Attorneys and the Brotherhood of Locomotive Engineers and Trainmen and a group of fifteen states and the District of Columbia filed amicus briefs in support of FRA.

Petitioners' arguments focused on the safety basis for the rule, arguing that it was not "necessary" for railroad safety and thus exceeded FRA's authority. The short line petitioners, in particular, argued that certain provisions concerning exemptions and pre-approvals for single-person crew operations were arbitrary and capricious. Petitioners also contended that FRA did not adequately consider labor costs and did not explain its apparent change in position, having found in a previous rulemaking that a crew staffing requirement was not appropriate at that time. Moreover, petitioners asserted that the final rule conflicts with an already existing risk reduction rule. Finally, petitioners argued that FRA failed to comply with statutory and regulatory deadlines to complete the rulemaking within twelve months.

FRA's brief responded that (1) the agency reasonably exercised its broad authority to regulate railroad safety, including by reconsidering previous information, as well as citing new information, (2) FRA acted reasonably in drawing lines providing exemptions and limited relief from the rule's requirements in certain circumstances, (3) the final rule does not conflict with the risk reduction statute and regulations, and (4) petitioners' procedural arguments did not establish a basis for setting aside the rule. In the alternative, FRA argued that petitioners' request to vacate the rule was overbroad, that the appropriate remedy would be remand, and that, in any event, the provisions in the rule are severable.

Petitioners' reply briefs were filed on November 14.

Supplemental Briefing in Challenge to NHTSA's CAFE Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

On July 29, 2024, the U.S. Court of Appeals for the District of Columbia Circuit ordered the parties to file supplemental briefing in litigation challenging the May 2022 NHTSA rule setting Corporate Average Fuel Economy (CAFE) Standards for Model Years 2024–2026 Passenger Cars and Light Trucks. *See* 87 Fed. Reg. 25,710 (May 2, 2022). Natural Resources Defense Council, et al. v. NHTSA, et al., No. 22-1080 (D.C. Cir.). The case involves challenges from ten states and the American Fuel & Petrochemical Manufacturers (AFPM), who argue that the rule was excessively stringent, as well as a challenge from the National Resources Defense Council (NRDC), who

contends that the rule was not stringent enough. Numerous intervenors and amici are also participating, with some in support of the petitioners and others defending the rule.

Supplemental briefs were requested to address the relevance of Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024), to petitioners' standing to bring their petitions for review in this case, and the relevance of Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), to issues of statutory interpretation presented in the case. All of the parties in the case filed supplemental briefs on August 19 and supplemental reply briefs on August 29. With respect to the Ohio case, the briefs recognized that none of the parties in the NRDC litigation had previously raised standing arguments in the case. Supplemental briefing on behalf of the petitioners generally explained how the petitioners considered themselves to meet the requirements for standing, including under the standing analysis applied by the Ohio court. With respect to Loper Bright, all parties agreed that following the Supreme Court's decision in that case, the court could not properly accord Chevron deference in deciding whether NHTSA acted within its statutory authority. In light of this, the supplemental briefing also included arguments as to how each of the parties considered their respective constructions of the applicable statutory language as the best reading of the statute.

In light of the consolidated challenges to NHTSA's 2022 final rule, the D.C. Circuit is also continuing to hold 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.).

Parties Challenge NHTSA's Latest Corporate Average Fuel Economy Standards

On June 24, 2024, NHTSA published a final rule to set Corporate Average Fuel Economy (CAFE) standards for passenger cars and light trucks for model years 2027 and beyond and fuel efficiency standards for heavy-duty pickup trucks and vans for model years 2030 and beyond. 89 Fed. Reg. 52,540. Subsequently, numerous parties challenged the rule through petitions for review filed in the U.S. Courts of Appeals for the First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits. These cases were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In re Corporate Average Fuel Economy Standards for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, No. 24-7001 (6th Cir.). Five entities subsequently filed motions to intervene in the consolidated litigation in support of NHTSA's rule. The court ordered a briefing schedule that set petitioners' briefs as due by November 19, 2024, briefs by amici curiae in support of the petitioners as due by November 26, the brief of the respondents as due by January 17, 2025, briefs of amici in support of the respondents as due by January 24, briefs of respondent-intervenors as due by February 14, and reply briefs of the petitioners as due by March 7. The court's order reserved the decision of when and whether to hold oral argument in the case.

On November 19, two opening briefs were filed on behalf of two groups of petitioners. The first brief was filed by state and industry

petitioners, who argued that NHTSA's standards were too stringent. These petitioners argued that when setting standards, NHTSA impermissibly considered factors that were prohibited by the Energy Policy and Conservation Act. In particular, these petitioners argued that both the light-duty and heavy-duty aspects of the rulemaking considered electric vehicles in a manner not authorized by Congress. The second opening brief was filed by a collection of environmental organizations, who argued that the CAFE standards were too lenient. These petitioners argued that NHTSA insufficiently considered the extent to which vehicle manufacturers could modify their vehicle production plans to meet more stringent standards.

On November 26, two briefs were filed on behalf of amici curiae in support of the petitioners. One of these briefs argued that flaws in NHTSA's cost-benefit analysis led the agency to set too stringent of standards. The other brief argued that NHTSA did not sufficiently consider the potential benefits of biofuels when setting standards.

Boutique Air Challenges Three Essential Air Services Awards

In October 2024, Boutique Air, Inc. filed three petitions for review challenging the Department's selection of a competitor to provide Essential Air Services (EAS) to Jackson, Tennessee, and the Department's awards of grants to provide Alternate Essential Air Services (AEAS) to Muscle Shoals, Alabama, and Show Low, Arizona. Before filing the petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit, however, Boutique Air had filed petitions for agency reconsideration with the Department. Because the petitions for agency reconsideration rendered Boutique's petitions for review before the D.C. Circuit incurably premature, the parties filed joint stipulations of voluntary dismissal pursuant to Federal Rule of Appellate Procedure 42(b)(1). After the Department denied Boutique's petition for agency reconsideration of the Jackson order, the carrier filed a new, timely, and ripe petition for review in the D.C. Circuit. Boutique Air, Inc. v. USDOT, No. 24-1369 (D.C. Cir.). Boutique's agency reconsideration petitions for Muscle Shoals and Show Low are still pending before the Department.

Lawsuit Filed Over DOT's Order Selecting EAS Carrier at Morgantown

On November 18, 2024, Southern Airways Express, LLC filed a petition for review of DOT's order granting the contract for Essential Air Service (EAS) in Morgantown, West Virginia, to a competitor airline. Southern Airways Express, LLC v. USDOT et al., No. 24-1358 (D.C. Cir.). In its petition, Southern alleges that DOT's order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because it fails to provide a reasoned explanation for the Department's rejection of Southern's proposal and the selection of another carrier's proposal. Southern also filed an emergency motion for a stay pending appeal and a request for expedited briefing. DOT opposed the motion, arguing that DOT's decision to select another carrier was based on a reasoned evaluation of the selection factors set forth in 49 U.S.C. § 41733(c)(1). On December 12, the court issued a *per curiam* order denying Southern's request for a stay and for expedited briefing.

FHWA Appeals Decisions of U.S. District Courts in Texas and Kentucky Striking Final Rule Requiring States to Set Declining Targets for Greenhouse Gas Emissions

On May 23 and 31, 2024, the United States filed notices of appeal in the Fifth and Sixth Circuits with respect to district court decisions in Texas and Kentucky that set aside FHWA's greenhouse gas (GHG) emissions Final Rule (Rule) establishing a performance measure for GHG emissions on the National Highway System (NHS). Kentucky, et al. v. FHWA, et al., No. 24-5532 (6th Cir.); Texas, et al. v. FHWA, et al., No. 24-10470 (5th Cir.).

On March 27, 2024, the U.S. District Court for the Northern District of Texas granted the State of Texas and the Texas Department of Transportation's Cross-Motion for Summary Judgment challenging FHWA's GHG emissions Rule and denied DOT's Cross-Motion for Summary Judgment. Texas, et al. v. USDOT, et al., 726 F. Supp. 3d 695 (N.D. Tex. 2024). The court vacated and remanded the Rule to USDOT, which has the effect of nullifying the rule nationwide. In separate but related litigation, on April 1, the U.S. District Court for the Western District of Kentucky likewise granted the Cross-Motion for Summary Judgment of the State of Kentucky and twenty other States that challenged the GHG emissions Rule on similar grounds and denied DOT's Cross-Motion for Summary Judgment. Kentucky, et al. v. FHWA, et al., 2024 WL 1402443 (W.D. Ky. Apr. 1, 2024). On April 22, the Department and plaintiff States filed a joint status report in lieu of supplemental briefing, in which the plaintiff States agreed not to seek a permanent injunction because the Department agreed to abide by the declaratory judgment.

The rule at issue sets forth a GHG performance measure consistent with FHWA's Transportation Performance Management framework under 23 U.S.C. § 150. The rule would require States and Metropolitan Planning Organizations (MPOs) to report GHG emissions on their NHS roadways and establish declining targets for GHG emissions. The rule would not mandate the level of the targets that states or MPOs set—apart from it being declining—nor would it penalize States and MPOs that do not achieve their targets. The two U.S. District Courts found that FHWA does not have authority under 23 U.S.C. § 150 or 23 U.S.C. § 119 for a GHG measure. The rule is remanded pending appeal.

The government filed its opening briefs for the Kentucky and Texas appeals on August 30 and September 4, respectively. The briefs argue that the lower courts erred on a number of grounds and misinterpreted FHWA's authority and requirements. Specifically, the Department's brief in the Sixth Circuit appeal argued that the rule falls well within FHWA's statutory authority, as Congress instructed FHWA to exercise its discretion to establish performance standards, which may include environmental performance, and which may provide for declining GHG emissions targets. Similarly, before the Fifth Circuit, the Department defended the rule as a proper exercise of statutory authority and further argued that the U.S. District Court for the Northern District of Texas had abused its discretion in ordering universal vacatur instead of awarding only plaintiff-specific equitable relief.

Court Issues Limited Preliminary Injunction Against DOT Disadvantaged Business Enterprise Program

On September 23, 2024, the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction with respect to DOT's Disadvantaged Business Enterprise (DBE) program in Mid-America Milling Co. v. USDOT, No. 23-72, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024). The court held that plaintiffs are likely to prevail on their constitutional challenge to the program's requirement—mandated by Congress—that individuals be presumed to be disadvantaged if they are women or members of certain racial or ethnic groups.

Certain recipients of DOT financial assistance are required to establish narrowly-tailored goals for participation in contracts by DBEs, which 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. Funding recipients must meet their goals to the maximum extent practicable using race- and gender-neutral means. If a recipient cannot meet its goal solely using such means, then it sets DBE goals on certain project contracts. Prime contractors on these contracts must demonstrate good faith efforts to use DBE subcontractors but cannot be penalized for failing to meet the goal.

The plaintiffs are Mid-America Milling Company and Bagshaw Trucking, two companies based in Indiana. Plaintiffs contend that they are unable to compete for federally-funded contracts on an equal footing with DBEs and that the program discriminates on the basis of race and gender in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. They seek broad preliminary and permanent injunctive relief.

In its opposition to the preliminary injunction motion, DOT argued that the DBE program survives strict scrutiny and that plaintiffs therefore are unlikely to prevail on their equal protection challenge. DOT contended that there is a strong basis in evidence that the program is necessary to remedy past intentional discrimination and that the program is narrowly tailored to that goal. DOT also filed a motion to dismiss the case on standing grounds, arguing that plaintiffs did not plausibly allege that the DBE program had injured them because they did not show that they have ever unsuccessfully bid on contracts with DBE goals or identify any specific contracts with goals on which they intended to bid in the future. Additionally, DOT argued that eliminating the race- and gender-based presumptions of disadvantage—the only components of the program that make racial or gender classifications—would not redress plaintiffs' alleged injuries because they did not allege that they meet the race- and gender-neutral requirements for DBE status (such as the requirement that a business's owner not have a net worth exceeding a certain amount).

In granting plaintiffs' motion for a preliminary injunction, the court first held that plaintiffs has standing, finding that it was sufficient that they have bid on contracts with DBE goals in the past and that Kentucky and Indiana routinely advertise contracts with DBE goals, and that even though plaintiffs would themselves not qualify as DBEs absent the presumptions, the elimination of the presumptions would help them by reducing the number of DBEs against whom they have to compete. On the merits, relying on recent

precedent in the Sixth Circuit, the court held that plaintiffs are likely to succeed on their constitutional challenge because although DOT contended that the program is necessary to remedy past and continuing discrimination, DOT did not provide sufficient evidence of such discrimination or narrowly tailored the program to meet that goal. The court, however, denied the plaintiffs' request for a nationwide injunction. Instead, it issued a limited injunction that applies only to the two plaintiff companies. Specifically, the court enjoined DOT from "mandating the use of race- and gender-based rebuttable presumptions for [DOT] contracts impacted by DBE goals upon which the Plaintiffs bid." The court specified that "the scope of the preliminary injunction shall apply to the Plaintiffs in the states within which they operate, Kentucky and Indiana." In an October 31 opinion and order, the court clarified the scope of the preliminary injunction, stating that it applied to "all states in which the Plaintiffs operate or bid on DOT contracts impacted by DBE goals."

Seven Suits Challenge Environmental Review of the Manhattan Central Business District Tolling Program

Seven lawsuits that challenge the environmental review of a first-in-the-nation congestion pricing program in New York City—the Manhattan Central Business District (CBD) Tolling Program—have been filed in three U.S. District Courts. Two of the lawsuits have been filed in the District of New Jersey, four have been filed in the Southern District of New York, and one has been filed in the Eastern District of New York.

The CBD Tolling Program creates a congestion pricing program in certain parts of Manhattan by tolling vehicles entering or remaining in the Manhattan CBD. The tolling program seeks to reduce the number of vehicles entering the Manhattan CBD, reduce the daily vehicle-miles traveled in the Manhattan CBD, and generate revenue for transportation improvements in the Metropolitan Transit Authority's (MTA) Capital Plan or successor plans. Some roadways within the Manhattan CBD are part of the National Highway System and receive federal funding. In order to toll these roadways, FHWA, through its Value Pricing Pilot Program (VPPP), must evaluate the potential effects of the CBD Tolling Program in accordance with NEPA. In June 2019, the CBD Tolling Program was submitted to FHWA for review. On May 12, 2023, FHWA issued an EA, and on June 23, 2023, FHWA issued a FONSI.

The first lawsuit was filed on July 21, 2023, by the State of New Jersey in the U.S. District Court for the District of New Jersey. New Jersey v. USDOT, et al., No. 23-3885 (D. N.J.). New Jersey alleges that FHWA violated NEPA and the APA by (1) failing to prepare an EIS; (2) failing to consider the extent of direct, indirect, and cumulative effects of the congestion pricing program in New Jersey and propose adequate mitigation measures; (3) failing to adequately consider the impacts of certain traffic pattern shifts leading to noise and air pollution and limiting the analysis to a subset of New Jersey counties and propose adequate mitigations; (4) failing to consider the impact on New Jersey communities with environmental justice concerns; (5) failing to consider a reasonable range of alternatives; and (6) failing to afford New Jersey and its transportation agencies a meaningful

opportunity to engage in the consultation process. New Jersey further alleges that FHWA violated the CAA and the APA by failing to conduct a transportation conformity analysis for New Jersey's State Implementation Plan and failing to provide New Jersey a reasonable opportunity for consultation on the project's transportation conformity. In a two-day hearing on April 3 and 4, the court heard argument on the parties' cross motions for summary judgment.

The second lawsuit was filed on November 1, 2023, by the Mayor of Fort Lee, New Jersey and a Fort Lee resident, also in the District of New Jersey. Sokolich, et al. v. USDOT, et al., No. 23-21728 (D. N.J.). This lawsuit is a putative class action on behalf of commuters to New York City who will allegedly be subjected to increased costs, inconvenience, and negative health impacts as a result of the CBD Tolling Program. Like the initial lawsuit, this lawsuit alleges that FHWA failed to properly conduct an EA that considered impacts to New Jersey. This case has been stayed pending the outcome in the first lawsuit.

The third lawsuit was filed on November 22, 2023, in the U.S. District Court for the Southern District of New York by two litigants who live in Battery Park City (BPC), which is within the Manhattan CBD. Chan, et al. v. USDOT, et al., No. 23-10365 (S.D.N.Y.). Plaintiffs allege, among other things, that FHWA failed to adequately consider the tolling program's alleged impacts on BPC, such as increased traffic and pollution. Plaintiffs filed a motion for summary judgment on March 18, 2024, and the government filed a motion for summary judgment on April 1.

On January 4, 2024, several plaintiffs filed a fourth lawsuit against DOT and FHWA, among others, in the U.S. District Court for the Eastern District of New York. Mulgrew, et al. v. USDOT, et al., No. 24-81 (E.D.N.Y.). Plaintiffs include the United Federation of Teachers (UFT), Local 2, which represents New York City school teachers and paraprofessionals, nurses employed in New York City hospitals, and New York City Department of Education employees, several UFT members residing in Staten Island and other locations, and the Staten Island Borough President. The complaint alleges four causes of action: (1) violation of NEPA for failure to prepare an adequate environmental review that considers all environmental impacts of the proposed action, and to provide for public comment and participation in the public review process; (2) violation of NEPA for failure to reevaluate the EA based on the Traffic Mobility Review Board's recommendations regarding the toll rates by vehicle, time of day, credits, discounts, and exemptions, released in November 2023; (3) violation of the Dormant Commerce Clause by imposing an impermissible burden on interstate commerce; and (4) violation of the fundamental right to travel. On January 26, 2024, plaintiffs filed an Amended Complaint that added a fifth cause of action: violation of the New York State Constitution, Green Amendment, which grants New Yorkers the right to "clean air and water, and a healthful environment." In February 2024, the court transferred the case to the U.S. District Court for the Southern District of New York. On March 18, the government filed a motion to dismiss, arguing that plaintiffs' NEPA claims are time-barred and plaintiffs' claims regarding FHWA's re-evaluation of the final tolling schedule are unripe. Plaintiffs moved

for partial summary judgment and defendants cross-moved for partial summary judgment.

A fifth lawsuit, a putative class action, was filed against DOT and FHWA, among others, in U.S. District Court for the Southern District of New York on January 18, 2024. New Yorkers Against Congestion Pricing Tax, et al. v. USDOT, et al., No. 24-367 (S.D.N.Y). Plaintiffs, a group of community-based organizations and a cross-section of citizens representing various communities in New York City, allege several causes of action similar to those alleged by plaintiffs in Mulgrew, et al. v. USDOT. In addition, the complaint alleges a violation of the New York Administrative Procedure Act for failure to assess congestion pricing's impact on job retention and creation, as well as economic impacts upon small businesses. On January 30, 2024, several plaintiffs filed a Notice of Voluntary Dismissal, without prejudice, against all defendants. On March 18, 2024, the government filed a motion to dismiss, claiming that plaintiffs' NEPA claims are time-barred and plaintiffs' claims regarding FHWA's re-evaluation of the final tolling schedule are unripe.

A sixth lawsuit was filed against DOT and FHWA, among others, in U.S. District Court for the Eastern District of New York on May 1, 2024. Town of Hempstead, et al. v. USDOT, et al., No. 24-3263 (E.D.N.Y.). Plaintiffs, the Town of Hempstead and the Hempstead Town Supervisor, allege that congestion pricing violates the U.S. Constitution and New York State Constitution. The complaint further alleges that congestion pricing constitutes a major question subject to the Major Questions Doctrine.

On May 17, 2024, the court heard arguments on the pending motions in all three cases in the Southern District of New York, including the summary judgment motions in Chan and the motions to dismiss in Mulgrew and New Yorkers Against Congestion Pricing. On June 20, 2024, the court issued a decision in favor of the Federal defendants, finding that FHWA's NEPA review was a "painstaking examination" of congestion pricing's environmental impacts, which was neither arbitrary nor capricious. The court found plaintiffs' assertions of procedural defects and arbitrary action to be meritless, concluding that plaintiffs' cases are "at bottom a policy disagreement with the wisdom of Congestion Pricing." The court ordered supplemental briefing on FHWA's reevaluation, which issued on June 14, 2024, and found that the conclusions in the Final EA remain valid in light of the final tolling schedule adopted by MTA, and thus that no further environmental review is warranted.

On May 31, a seventh congestion pricing lawsuit was filed. Trucking Association of New York v. MTA, et al., No. 24-04111 (S.D.N.Y.). Plaintiff filed this lawsuit only against MTA and TBTA; USDOT and FHWA are not defendants. The complaint sets forth three causes of action: (1) the tolling program violates the Commerce Clause because it is not a fair approximation of use and is excessive in relation to the benefit conferred; (2) the tolling program violates the Constitutional right to travel; and (3) the tolling program is preempted by federal law because it has a significant effect on the prices, routes, and services of commercial trucks. One day earlier, on May 30, plaintiff filed a motion for preliminary injunction to prevent the implementation of the congestion pricing program, which was set to begin June 30, 2024. The motion remains pending. The parties are currently engaged in briefing on cross-motions to dismiss.

On June 5, New York Governor Kathy Hochul directed MTA to pause implementation of the CBD Program under state law. The courts ordered briefing on whether the Governor's action moots the cases, and all parties agreed it did not. On November 14, Gov. Hochul announced a plan to reinstitute the CBD Program with a reduced tolling structure in January 2025. On November 21, FHWA issued a second re-evaluation finding that the conclusions in the Final EA and FONSI remain valid in light of the most recent tolling schedule adopted by TBTA, and thus that no further environmental review is warranted. Also on November 21, the Project Sponsors and FHWA officials signed the VPPP agreement, which allows for the establishment, maintenance and monitorship of the CBD Program and permits the FHWA to allow the collection of tolls. Further briefing on the second re-evaluation is underway in S.D.N.Y.

Lawsuit Filed over FRA's Buy America Waiver for Brightline West Trainsets

On July 17, 2024, Alstom Transportation Inc. (Alstom) sued FRA in the U.S. District Court for the District of Columbia, challenging FRA's decision to issue a Buy America waiver to the Nevada Department of Transportation (NDOT) to purchase two trainsets that would be manufactured in Germany by Siemens Mobility, Inc. (Siemens) for use in the Brightline West high-speed rail project (Brightline West project). Alstom Transportation Inc. v. FRA, et al., No. 24-02098 (D.D.C.).

The lawsuit alleges that FRA acted arbitrarily and capriciously and beyond its statutory authority by granting a waiver under FRA's "Buy America" statute, 49 U.S.C. § 22905(a), to NDOT and its rail operator partner, Brightline West. The waiver allows Brightline West, the project sponsor, to purchase the first two out of ten Siemens high-speed trainsets even though they are not manufactured in the United States. Alstom also bid on the project to manufacture and deliver trainsets for the Brightline West project and alleges it would have been able to produce all ten trainsets in the United States. As such, Alstom argues that FRA incorrectly determined that both Siemens and Alstom manufactured high-speed rail trainsets outside of the United States, and it should not have granted a waiver for the first two Siemens' trainsets that would not be manufactured in the United States. Alstom asks the court to vacate FRA's waiver and to declare it unlawful and arbitrary and capricious to the extent the waiver covers Siemens' foreign-made trainsets. Alstom further seeks that the court enjoin FRA from disbursing funds to the Brightline West project to the extent the foreign-made Siemens trainsets are used in the Brightline West project.

On August 1, Alstom filed a motion for summary judgment. While Alstom's motion raises the same arguments as its complaint, it also contends that summary judgment is appropriate because there are no genuine issues as to any material fact and that it is therefore entitled to judgment as a matter of law. The court ordered FRA to respond and file its own cross-motion for summary judgment in lieu of answering the complaint. FRA filed its opposition and cross motion for summary judgment on October 8. In its brief, FRA argued that Alstom lacks standing to challenge FRA's decision to grant the waiver because Alstom had not established injury in fact, causality, or redressability, as there is no evidence to indicate that Alstom would have been selected as Brightline West's rolling

stock supplier had FRA not granted the waiver to Siemens. Alternatively, FRA argued that it appropriately determined that no trainset meeting Brightline West's specifications was domestically available and that the Siemens trainsets qualified for the non-availability exception to FRA's Buy America statute. FRA also argued that Alstom misinterprets the statute by asserting that it requires FRA to grant a waiver to the proposal from the supplier with more domestic trainset production. FRA contended that where neither proposal was fully Buy America-compliant, both products would have required a waiver, and FRA finalized the waiver to align with the project sponsor's procurement decision.

Both Brightline West and Siemens filed motions to intervene, which were granted by the court on October 10. On October 15, Brightline West and Siemens filed motions for summary judgment. Alstom's filed its reply brief on November 5, and FRA filed its cross-reply brief on November 20.

States Challenge Constitutionality of Executive Order on Voting

Two federal district court lawsuits related to Executive Order 14019, which directs federal agencies to consider ways to expand citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process, were recently filed in the U.S. District Court for the Eastern District of Missouri. Plaintiffs in the first lawsuit are the Secretaries of State from Missouri and Arkansas, in addition to two local Missouri election officials. Ashcroft, et al. v. Biden, et al., No. 24-1062 (E.D. Mo.). Plaintiff in the second lawsuit is the State of Missouri. Missouri v. Biden, et al., No. 24-1063 (E.D. Mo.). Each suit names as defendants the President and Cabinet-level Secretaries, including Secretary Buttigieg, and requests declaratory and injunctive relief. Both suits claim, among other things, that Executive Order 14019 is unconstitutional because the Tenth Amendment and the Elections Clause grants the states principal authority to conduct elections.

On September 25, 2024, plaintiffs in both suits filed a motion for an expedited preliminary injunction, asking the court to enjoin defendants from implementing Executive Order 14019 initiatives. On October 21, the government filed an opposition to the motion for preliminary injunction and a motion to dismiss. In the dismissal motion, the government argues that plaintiffs have not shown Article III standing because they have not suffered an injury and that they fail to state a plausible claim for relief under the APA because the complaints fail to identify any final agency actions. The court heard oral argument on the motions on October 28.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Supreme Court Grants Petition for *Certiorari* in Uniformed Services Employment and Reemployment Rights Act Differential Pay Case

Feliciano v. USDOT, No. 23-861 (U.S.), *supra* at 2.

D.C. Circuit Vacates Air Tour Management Plan for Bay Area National Parks and Determines CEQ Lacks Authority to Issue Binding NEPA Regulations; Government and Petitioners Seek Rehearing *En Banc*

Marin Audubon Society, et al. v. FAA, et al., No. 23-1067, (D.C. Cir.), *supra* at 9.

Ninth Circuit Finds for U.S. Regarding King County, Washington, Executive Order Prohibiting Deportation Flights from Boeing Field

On November 29, 2024, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court for the Western District of Washington, which granted summary judgment to the United States and issued a declaratory judgment invalidating and enjoining enforcement of a King County, Washington Executive Order (EO), "King County International Airport—Prohibition on immigration deportations." United States v. King County, Washington, No. 23-35362, 2024 WL 4918128 (9th Cir. Nov. 29, 2024), aff'g United States v. King County, Washington, 666 F.Supp.3d 1134 (W.D. Wash. 2023). In this case, the United States sued King County and the King County Executive to challenge the EO because it effectively prohibited U.S. Immigration and Customs Enforcement (ICE) from conducting deportation flights to and from King County International Airport, also known as Boeing Field.

The EO prohibited Boeing Field from supporting the transportation and deportation of immigration detainees in the custody of ICE either traveling within or arriving or departing the United States or its territories. It also directed King County officials to "ensure that all future leases, operating permits, and other authorizations for commercial activity at King County International Airport contain a prohibition against providing aeronautical or non-aeronautical services to enterprises engaged in the business of deporting immigration detainees (except for federal government aircraft), to the maximum extent permitted by applicable law." The EO has the purpose and effect of prohibiting ICE contractors from using King County Airport as a terminal for flights to remove individuals from the United States or transport immigration detainees within the country. As a result of the EO, fixed base operators at Boeing Field and other airports in the Seattle area advised ICE contractors that they would no longer service ICE flights. The ICE contractor was accordingly forced to relocate these flights to Yakima, Washington, creating significant operational challenges and additional costs for ICE.

The lawsuit challenged the EO as, among other things, unlawful under principles of intergovernmental immunity and as repudiating obligations undertaken by King County in the instrument that transferred ownership of Boeing Field from the United States to King County (Instrument of Transfer) under the Surplus Property Act of 1944, Public Law 78-457, as amended, subsequently recodified at 49 U.S.C. §§ 47151 - 47153.

The panel affirmed the procedural and substantive aspects of district court's decision. Turning first to the procedural issues, the panel agreed that the United States had Article III standing to bring the lawsuit for three reasons. First, the United States had two related concrete and individualized injuries. The inability to conduct the charter flights—which has increased ICE's operational costs—constituted a de facto injury that affected the United States in a particularized, individual way. The United States also faced an imminent risk of future injury from the EO. Second, the United States's injuries were fairly traceable to the EO. Third, the United States's injuries are likely, as opposed to merely speculative, where there is a strong inference that a fixed base operator would resume servicing ICE charter flights in the absence of the EO.

The United States similarly prevailed on ripeness and primary jurisdiction grounds. The panel held that the United States's claims were ripe because the lease terms under the EO had already caused fixed base operators at Boeing Field to stop servicing ICE charter flights, forcing the United States to shift its operations elsewhere. The court then determined that the circumstances of the case did not support the application of the primary jurisdiction doctrine to the Surplus Property Act claim. Practically speaking, this means that the FAA did not have to take an initial administrative enforcement action, for example issuing a decision after a 14 C.F.R. part 16 investigation, to enforce the terms of the Instrument of Transfer.

On the merits, the panel upheld the determination that the EO violates both the Supremacy Clause's intergovernmental immunity doctrine and the parties' World War II-era Instrument of Transfer for Boeing Field. The panel ruled that the EO violated the intergovernmental immunity doctrine because the EO improperly regulated the way in which the federal government transported noncitizen detainees by preventing ICE from using private fixed base operators at Boeing Field and on its face discriminated against the United States by singling out the federal government and its contractors for unfavorable treatment. The court then held that the Surplus Property Act deed gave the United States nonexclusive use of the airfield, which includes ICE deportation flights. It mattered not that the flights were chartered flights, not government-owned or leased aircraft. For more background about the case, see the Spring-Summer 2024 DOT Litigation News, pages 19-20, at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-spring-summer-2024.

First Circuit Upholds Suspensions Imposed for Illegal Part 135 Flights

On September 25, 2024, the U.S. Court of Appeals for the First Circuit denied two pilots' petitions for review challenging 270-day suspensions of their respective licenses for piloting flights as air carriers or commercial operators without the required certificates. Bonnet, et al. v Whitaker, 118 F.4th 154 (1st Cir. 2024). The suspensions had previously been affirmed by the National Transportation Board (NTSB).

In April 2019 and again in May 2019, petitioners Luis Bonnet and Carlos Benitez piloted passenger-carrying flights departing from San Juan, PR to and among various destinations in the Caribbean on behalf of Benitez Aviation, Inc. (BAI) (owned by Benitez). Benitez served as Bonnet's second-in-command for the May flights. After an investigation, the FAA issued a Notice of Proposed Certificate Action alleging that petitioners operated these flights as direct air carriers or as commercial operators, carrying passengers for compensation or hire without the proper air carrier or commercial operator certificates, and did so when they lacked the requiring training and check rides.

On July 30, 2020, the FAA issued orders suspending both petitioners. Petitioners appealed the proposed suspensions to the NTSB. After a hearing, an NTSB ALJ affirmed the suspensions. Petitioners next appealed to the full NTSB, which affirmed the ALJ in Whitaker v. Bonnet, NTSB Order No. EA-5962 (Oct. 27, 2023). The Board held that the flights were subject to the requirements for air carriers or commercial operators because BAI was acting as a common carrier, that the ALJ appropriately found a residual violation of 14 CFR § 91.13(a), that the ALJ did not exhibit bias, and that the FAA's sanction was warranted. Petitioners then filed their petition for review before the First Circuit.

The court determined that the two pivotal questions were whether the FAA showed by substantial evidence that there was a "holding out" and whether the flights were "for compensation." The court upheld the FAA's reliance upon the common law meaning of "holding out." The court found the testimony and the facts did not support petitioners' arguments that the passengers on the flights were "families and friends and relatives" of the aircraft's owner. Both petitioners testified that they had never flown with any of the passengers prior to the flights in question. The court ruled that the evidence "makes pellucid that it was reasonable to find that BAI went well beyond transporting family and friends and held itself out as available to the public." Further, the court determined that BAI "held out" because it had a reputation for being willing to perform the requested services even though it did not explicitly advertise itself as operating commercial flights. As to the "compensation" element of the "common carrier" test, the court determined that the record contained substantial evidence showing that passengers were billed for more than operational costs and that, in any event, a bill for operational costs was sufficient to establish the "for hire" element of the common carrier construct. The court reasoned that FAA's order was valid in any event, without regard to the "holding out" requirement applicable solely to air carriers. In the opinion of the court, the flights in question were also governed by 14 C.F.R. part 135 because they were operated "for compensation or hire" and were not subject to any exception under 14 C.F.R. part 91.

The court rejected petitioners' remaining arguments that the NTSB lacked jurisdiction because BAI was not a party, that the ALJ showed bias in asking clarifying questions, and that the alleged violation of 14 C.F.R. § 91.13(a) as a residual violation was inappropriate.

The court also rejected petitioners' final argument that the 270-day suspensions imposed by the FAA were unwarranted. In terms of petitioners' personal culpability for the regulatory violations, the court noted that while petitioners claimed they did not know that the flights were being operated contrary to FAA regulations, "pilots have a

responsibility to adhere affirmatively to the governing regulations . . . [and] cannot avoid these requirements by sticking their heads in the sand." Turning to the FAA's sanction, the court noted that both the NTSB and the court itself were required to defer to the FAA's sanction determination and "must adhere to the FAA's remedy unless it is 'unwarranted in law or is without justification in fact,'" quoting Pham v. NTSB, 33 F.4th 576 (D.C. Cir. 2022) and American Power & Light Co. v. SEC, 329 U.S. 90 (1946). The court found the suspensions imposed by the FAA "not only compliant with FAA Order 2150.3C but also within the universe of reasonable sanction for the petitioners' regulatory violations."

Briefing Completed in Operators' Challenge to Air Tour Management Plan for Badlands National Park and Mount Rushmore National Memorial

Petitioners Badger Helicopters, Inc., Blackhills Aerial Adventures, Inc., and Rushmore Helicopters, Inc. filed their opening briefs on July 8, 2024, while the agencies filed their brief on October 3. Badger Helicopters, Inc., et al. v. USDOT, et al., Nos. 24-1065 & 24-1066 (8th Cir). The petitioners filed their reply brief on October 11. On October 3, Public Employees for Environmental Responsibility filed an *amicus curie* brief. The court has not yet scheduled oral argument.

As background, on January 11, 2024, Badger Helicopters, Inc., Blackhills Aerial Adventures, Inc., and Rushmore Helicopters, Inc. filed petitions for review of orders of the FAA and NPS approving Air Tour Management Plans (ATMPs). Badger Helicopters challenged the "Air Tour Management Plan – Badlands National Park" (dated November 15, 2023) in case No. 24-1065 and Blackhills Aerial Adventures and Rushmore Helicopters challenged the "Air Tour Management Plan – Mount Rushmore National Memorial" (dated November 15, 2023) in case No. 24-1066. The Eighth Circuit consolidated the cases for review and decision. On June 7, 2024, the court denied petitioners' request to stay the ATMPs pending decisions in the cases.

The National Parks Air Tour Management Act of 2000 (NPATMA), as amended by the FAA Modernization and Reform Act of 2012, requires the FAA, in coordination with the NPS, to implement ATMPs or voluntary agreements at NPS units that have more than 50 commercial air tour overflights per year. The objective of an ATMP is to develop acceptable and effective measures to mitigate or prevent the significant adverse impacts, if any, of commercial air tour operations upon the natural and cultural resources, visitor experiences, and tribal lands of national parks. In May 2020, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for a writ of mandamus filed by two environmental organization in Re Public Employees for Environmental Responsibility and Hawaii Island Coalition Malama Pono v. FAA, 957 F.3d 267 (D.C. Cir. 2020). This mandamus order directed the FAA and the NPS to submit a joint schedule for the completion of air tour management plans at 23 national parks within two years of the order. The court also ordered the agencies to file quarterly progress updates. To date, plans have been established for 21 parks.

Petitioners argue that the ATMPs are arbitrary and capricious because the agencies stopped the Voluntary Agreement process with petitioners without a satisfactory explanation. The FAA and NPS answering brief contends that the agencies reasonably

chose to terminate the voluntary agreement process and transition to an ATMP process for both Parks. Notwithstanding the agencies' "good faith efforts to enter into an Agreement with commercial air tour operators" in the Parks, "these efforts have been unsuccessful because not all commercial air tour operators" were willing to participate in that process. Any flaw in that process is not a basis for vacating the ATMPs.

Petitioners also argued that the agencies failed to use relevant and reliable data and resources and failed to articulate a satisfactory explanation for their ATMP decision, including that (1) the agencies failed to use reliable data in the noise analysis of the current condition; (2) the scientific articles cited and relied upon by the agencies contradict their impact determinations on the species; and (3) the agencies failed to consider a reasonable range of alternatives as required under NEPA in developing the ATMPs. Regarding the NEPA arguments, the agencies argue that petitioners' position is outside the zone of interests protected by NEPA and that petitioners' NEPA challenges fail on the merits. The agencies' noise analysis was appropriate, the agencies reasonably analyzed the effects of commercial air tours on species, and the agencies analyzed a reasonable range of alternatives.

In addition, petitioners maintain that the ATMPs are arbitrary and capricious because the agencies failed to consider aviation safety when developing the ATMPs' ban on flights. The agencies assert in response that they adequately considered public safety and that petitioners have identified no safety issues warranting vacatur of the ATMPs.

Briefing Completed in Operator Challenges to Air Tour Management Plan for Hawai'i Volcanoes National Park

On June 20, 2024, petitioners Helicopter Association International and Safari Aviation, Inc., d/b/a Safari Helicopters Hawai'i, filed their opening brief in Helicopter Association International, et al. v. FAA, et al., No. 24-1008 (9th Cir). The agencies filed their brief on August 21, and petitioners filed their reply brief on October 11. Petitioners seek review in the U.S. Court of Appeals for the Ninth Circuit of the December 19, 2023, order of the FAA and NPS, issuing the FONSI/ROD approving the Air Tour Management Plan (ATMP) for Hawai'i Volcanoes National Park. Petitioners allege that the ATMP drastically reduces the annual number of flights allowed over the Park and imposes route, time, and altitude restrictions that are arbitrary and capricious and not in accordance with the law. The agencies maintain that they reasonably considered all relevant factors and responded to significant comments when they adopted the ATMP and that it permits operators to conduct 1,548 air tours per year along three designated routes that avoid the most significant adverse impacts to the Park's resources by diverting flights away from the summit of Kīlauea, cultural and visitor use areas, designated wilderness, and key avian habitat, while at the same time providing desirable views for air tour patrons.

Regarding compliance with NEPA, petitioners argue that the FONSI/ROD and ATMP are arbitrary and capricious because the agencies failed to evaluate and assess safety issues raised in numerous comments and failed to consider the impact of the ATMP on elderly persons, persons with disabilities, and persons with mobility

impairments. The agencies argue that they reasonably addressed public comments about safety, rationally determined that the ATMP is safe, and reasonably analyzed and responded to public comments. The agencies contend that (1) they reasonably considered concerns about the ATMP's potential impacts to elderly, disabled, and mobility-impaired persons, (2) that they sufficiently considered and responded to public comments about accessibility, and (3) that petitioners' substantive arguments about accessibility lack support under NPATMA.

NPS and FAA File Responsive Brief in Challenge to Air Tour Management Plan for Bandelier National Monument

Petitioner Bruce Adams, doing business as Southwest Safaris, filed his opening brief on July 24, 2024, in Adams v. FAA, et al., No. 24-9528 (10th Cir). The agencies' brief was filed October 23, and petitioner's reply brief was filed on November 14.

This case challenges the ROD that the FAA and NPS issued approving an ATMP for helicopter operations at the Bandelier National Monument (New Mexico) based upon an EA. Petitioner argues that the ATMP is inherently unsafe and will require operators to fly in a dangerous manner. Regarding the EA, petitioner contends that the air tours do not cause environmental impacts on the parks and that the environmental findings from park to park are inconsistent. The agencies' position is that they complied with the National Park Air Tour Management Act (NPATMA). The agencies argue that they rationally found that Southwest Safaris was conducting commercial air tours over Bandelier that cause significant adverse impacts on the Park's cultural resources and on private religious and cultural ceremonies in the Park. The agencies developed an ample record to support this finding, including evidence from many Pueblos with centuries-old ties to Bandelier. The agencies argue that they rationally found that prohibiting air tours over the Park was an acceptable and effective measure for mitigating or preventing significant adverse impacts. The agencies considered whether less stringent measures would be effective, but they found they would not be. Despite Southwest Safaris' claim that the NHPA and NEPA are irreconcilable, the agencies contend that they harmonized their work under and complied with both statutes.

Briefing Underway in Challenge to Amendments to Three Arrival Procedures into Los Angeles International Airport

On October 7, 2024, Culver City and the City of Malibu filed their opening briefs in City of Culver City v. FAA, et al., No. 24-2477 (9th Cir.) and City of Malibu v. FAA, et al., No. 24-2503 (9th Cir.), in which petitioners challenge amended north downwind arrival procedures to Los Angeles International Airport. The FAA's answering brief is due on January 13, 2025.

The FAA approved these procedures in April 2024, based upon a Categorical Exclusion (CE) under NEPA as part of a ROD. The Cities make two main arguments in their brief. First, the Cities contend that the FAA violated NEPA by improperly relying upon a CE and outdated scientific methods and standards to analyze potential noise impacts. The Cities assert that extraordinary circumstances exist precluding the use of a CE and requiring a more comprehensive environmental review through an EA. Second, the Cities allege that the FAA

violated substantive and procedural statutory obligations under Section 4(f) of the Department of Transportation Act (49 U.S.C.§ 303(c)), Section 106 of the National Historic Preservation Act, the Federal Aviation Act (49 U.S.C. § 40103(b)(2)), the Noise Control Act (49 U.S.C. § 4901, *et seq*.), and NEPA by failing to properly consider noise impacts from the amended procedures and the use of vectors to direct aircraft over local communities, including communities with environmental justice concerns and culturally and historically significant resources.

This is the third challenge to these changes, which the FAA initially approved in 2018. Additional information about the prior litigation is available in the Fall 2023 DOT Litigation News Update, page 26, at: https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-fall-2023.

Briefing Underway in Lawsuit to Overturn Runway Extension and Terminal Replacement at Tweed New Haven Airport

On November 15, 2024, petitioners filed their joint brief in Save the Sound, Inc., et al. v. FAA, et al., No. 24-1028 (D.C. Cir.). In this case, the Town of East Haven, Connecticut and Save the Sound, Inc. dispute the sufficiency under NEPA of the EA and FONSI/ROD that the FAA issued approving a runway extension, terminal replacement, and parking projects at Tweed New Haven Airport. In their opening brief, petitioners argued that the FAA violated NEPA by: (1) segmenting connected pieces of the project when FAA failed to analyze potential impacts from a parallel full-length taxiway; (2) failing to take a hard look at cumulative impacts from that parallel taxiway; (3) relying upon unsupported and internally inconsistent reasoning to determine that the projects would not increase projected enplanements; and (4) failing to meaningfully analyze and mitigate localized flooding, stormwater pollution, and wetlands impacts from the proposed action.

The FAA's answering brief is due January 15, 2025. For additional information about the case, see the Spring-Summer 2024 DOT Litigation News, Page 22-23, available at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-spring-summer-2024.

State of Idaho and Wind Turbine Petitioners Challenge FAA Determinations of No Hazard to Air Navigation

On September 9, 2024, the State of Idaho filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit contesting the FAA's August 1, 2024, Notice of Invalid Petition Received for Discretionary Review of 509 Determinations of No Hazard to Air Navigation concerning the Lava Ridge Wind Project (Lava Ridge). Idaho v FAA, No. 24-5488 (9th Cir.). The FAA's Notice indicated that the petition to the agency did not meet requirements under 14 C.F.R. §77.37(a) and included substantive responses to Idaho's comments. In its initial administrative petition for discretionary review to the FAA, Idaho argued it was not given an opportunity to state its comments and concerns regarding the proposed Lava Ridge wind turbine project because the FAA did not provide particularized notice of the study to the Idaho Transportation Department's Division of Aeronautics. Idaho also contended that (1) its petition included "new information or facts" and "valid aeronautical reasons," (2) the

proposed wind turbines present a significant hazard to low-level aviation in the area, specifically for aerial farm and ranch applications, as well as for wildlife management, pilot training, and wildfire suppression and rangeland rehabilitation, and (3) the Lava Ridge's wind turbines will have significant and adverse cumulative impacts when combined with the impacts of existing and proposed wind turbine projects in the area.

On October 1, 2024, the Wind Turbine Petitioners (WTP) filed a petition for review challenging the FAA's August 1, 2024, Notice of Invalid Petition. Van Tassell, et. al. v. FAA, No. 24-6108 (9th Cir.). The WTP are a group of concerned citizens, farms, and agricultural businesses. The FAA filed a motion to dismiss the WTP petition for review on the grounds that the deadline to file under 49 U.S.C. § 46110 was September 30, 2024. WTP argues that there were reasonable grounds for the delay. WTP asserts that the FAA did not state that the Notice of Invalid Petition Received was a final determination as required under 14 C.F.R. § 77.41(b). WTP also maintains that it needed time to review the FAA's response to a FOIA request that Idaho made to determine if grounds for administrative review existed. The FAA responded to the FOIA request on September 5, 2024. The briefing on the motion to dismiss has been completed and it is pending for decision.

Boeing Settles in Principle Remaining Claims in Lion Air Litigation

On October 25, 2024, Boeing agreed to settle in principle the remaining claims in five lawsuits filed on behalf of the 189 persons on board a Lion Air Boeing 737 Max 8 who were killed when it crashed in the Java Sea off the coast of Indonesia on October 29, 2018. In re Lion Air Flight JT 610 Crash, No. 18-7686 (N.D. Ill.). This occurred after the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the U.S. District Court for the Northern District of Illinois finding that the claimants were limited to a bench trial under the Death on the High Seas Act. *See* 110 F.4th 1007 (7th Cir. 2024). For additional information about the case, see the Spring-Summer 2024 DOT Litigation News, page 21, available at https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-spring-summer-2024.

Court Dismisses Trademark Infringement Challenge to the FAA's Use of "FAADroneZone" Following Parties' Agreement

On August 29, 2024, the U.S. District Court for the Southern District of California granted the parties' joint motion to dismiss Hanscom v. FAA, No. 23-1550 (S.D. Cal.). The motion was based on the entry of the FAA and plaintiff into a "Co-Existence Agreement" and the FAA's agreement to not use the phrase "Drone Zone" without an accompanying "FAA" in any of its current FAA uses. In addition, the parties agreed to work together to resolve any future confusion in the unlikely event that confusion occurs.

This was an action by Eric Hanscom, the registered owner of the "Drone Zone" trademark, for trademark infringement and unfair competition/false designation of origin. For more background, see the discussion at page 25 of the Fall 2023 DOT Litigation News: https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-fall-2023.

Space X Moves to Dismiss Environmental Groups' Amended Complaint in Challenge to SpaceX Starship Launches

On September 13, 2024, in Center for Biological Diversity, et al. v. FAA, No. 23-01204 (D.D.C.), intervenor-defendant SpaceX filed a motion to dismiss the complaint against the company for failure to state a claim upon which relief can be granted. SpaceX argued that the FAA could not supplement the Programmatic Environmental Assessment (PEA) at issue in the case because the FAA had completed its federal action. On September 26, plaintiffs filed their memorandum in opposition to dismissal, and on October 9, SpaceX replied. The motion to dismiss is now pending for decision by the court.

In this case, plaintiff environmental advocacy groups (Center for Biological Diversity, American Bird Conservancy, Surfrider Foundation, and Save RGV) and one cultural interest organization (the Carrizo/Comecrudo Nation of Texas, Inc.) challenge on environmental grounds the FAA's decision to issue and modify SpaceX's vehicle operator license for Starship/Super Heavy vehicle launches at SpaceX's facility at the Boca Chica Launch Site on the Texas Gulf Coast. After initially seeking to supplement the complaint, plaintiffs filed an amended complaint in the action on August 19, 2024. The amended complaint alleges that the FAA violated NEPA by failing to supplement the PEA to support the FAA's modifications to the SpaceX vehicle operator license.

The FAA contends that it has fully complied with NEPA and other applicable environmental laws. After issuing the initial environmental documents, the FAA conducted additional environmental reviews to consider additional information provided by SpaceX to support the subsequent modifications of SpaceX's vehicle operator license. The FAA completed three Written Reevaluations to confirm the validity of the PEA. The FAA also issued an EA tiered from the PEA to specifically assess the impacts of Starship/Super Heavy landings in the Indian Ocean. SpaceX has launched the Starship/Super Heavy from its Starbase facility five times to date (April 2023, November 2023, March 2024, June 2024, and October 2024). For additional information about the case, see the Spring-Summer 2024 DOT Litigation News, page 20, available at: https://www.transportation.gov/mission/administrations/office-general-counsel/litigation-news-spring-summer-2024.

Boulder Municipal Airport Challenges Grant Obligations to Keep Airport Open

On July 26, 2024, the City of Boulder, Colorado, the sponsor of Boulder Municipal Airport, filed a lawsuit against the FAA seeking a judicial declaration that would allow the City to legally close the airport by 2040. City of Boulder v. FAA, No. 24-02057 (D. Colo). Plaintiff specifically seeks declaratory relief on a quiet title action and alleged constitutional violations (Separation of Powers, Spending Clause, Anti-commandeering Doctrine, and Due Process Clause). Plaintiff also seeks a judgment that the airport's 1959, 1977, and 1991 grant agreement obligations have expired, and that plaintiff is not obligated to keep Boulder Municipal open after the expiration of its last grant agreement. Boulder contends that the perpetual duration of the 1959, 1977, and 1991 grant agreements are unconstitutional.

This case arose when, in January 2024, the City of Boulder sent a letter to the FAA Denver Airports District Office seeking a response to several questions regarding obligations related to the terms of prior accepted grants. Those grants were accepted in 1959 (Federal Aid to Airports Program (FAAP) grant), 1977 (Airport Development Aid (ADAP) Program grant), and 1991 (Airport Improvement Program (AIP) grant). The City also accepted a 2020 grant of federal funding under the Coronavirus Aid, Relief, and Economic Security Act. Under the most recent grant, the City has federal grant obligations relating to the airport until 2040. The FAA responded via letter to the City in March 2024 clarifying that an airport sponsor who accepted FAAP, ADAP, or AIP grants agreed that covenants on real property acquired with federal funds run in perpetuity unless released by the FAA.

Aniak Traditional Council Challenges Airport Runway Project

On July 2, 2024, the Aniak Traditional Council (ATC) filed a complaint in the U.S. District Court for the District of Alaska against the Alaska Department of Transportation (ADOT), the University of Alaska, and the FAA. Aniak Traditional Council v. State of Alaska et al., No. 24-00139 (D. Alaska). The ATC is the federally recognized tribe for the Kuskokwim River community about 90 miles northeast of Bethel, Alaska. The lawsuit stems from a project to relocate Aniak's airport runway to comply with federal aviation runway safety standards. During the runway construction, a contractor found human remains and artifacts, which were sent to the University of Alaska for examination. Plaintiff claims that the project cut through a "previously intact prehistoric burial site," that the University has kept the remains, that the FAA has not assisted with the return of human remains in the possession of the State of Alaska, and that the defendants are preventing the ATC from practicing its cultural and religious traditions. The complaint asserts violations of the Native American Graves Protection Act, 42 U.S.C. § 2000bb-1 (Religious Freedom Restoration Act of 1993), 42 U.S.C. § 2000cc(b)(3) (Religious Land Use and Institutionalized Persons Act of 2000), and Executive Order 13007 (Indian Sacred Sites). The University of Alaska has been voluntarily dismissed from the lawsuit.

Federal Highway Administration

Seventh Circuit Affirms Summary Judgment in Presidential Center Case, Petition for Writ of *Certiorari* Filed

Protect Our Parks, Inc. v. Buttigieg, No. 24-311 (U.S.), *supra* at 7.

FHWA Appeals Decisions of U.S. District Courts in Texas and Kentucky Striking Final Rule Requiring States to Set Declining Targets for Greenhouse Gas Emissions

Kentucky v. FHWA, No. 24-5532 (6th Cir.); Texas v. FHWA, No. 24-10470 (5th Cir.), *supra* at 18.

Seven Suits Challenge Environmental Review of the Manhattan Central Business District Tolling Program

New Jersey v. USDOT, et al., No. 23-3885 (D. N.J.); Sokolich, et al. v. USDOT, et al., No. 23-21728 (D. N.J.); Chan, et al. v. USDOT, et al., No. 23-10365 (S.D.N.Y.); Mulgrew, et al. v. USDOT, et al., No. 24-81 (E.D.N.Y.); New Yorkers Against Congestion Pricing Tax, et al. v. USDOT, et al., No. 24-367 (S.D.N.Y); Town of Hempstead, et al. v. USDOT, No. 24-3263 et al., (E.D.N.Y.); *supra* at 20.

Plaintiff Files Motion for Summary Judgement in Challenge to Interconnecting Gulfport Project

On October 18, 2024, the National Council of Negro Women, the Education, Economics, Environmental Climate and Health Organization, Healthy Gulf, and the Sierra Club filed a motion for summary judgment in National Council of Negro Women, et al. v. Buttigieg, et al., No. 22-314 (S.D. Miss.). Plaintiffs also filed a motion for consideration of extra-record evidence. Federal defendants filed their response brief on December 13.

Plaintiffs filed the complaint in this case on November 17, 2022, against the Secretary of Transportation and USDOT in the U.S. District Court for the Southern District of Mississippi seeking declaratory and injunctive relief to stop construction of the Interconnecting Gulfport Project (Project) in Gulfport, Mississippi. The purpose of the project is to provide transportation infrastructure that will improve the flow of vehicular traffic around the Interstate 10 and US 49 interchange and that will encourage existing and support new commercial and economic growth. The FHWA Mississippi Division signed an EA and FONSI for the project on September 14, 2022. The project is funded through a U.S. DOT BUILD Grant awarded to the City of Gulfport.

The complaint asserts four causes of the action. First, plaintiffs allege that USDOT violated NEPA and the APA by approving the project with an EA rather than an EIS. Plaintiffs assert that the "Airport Road Extension" portion of the project meets the requirement for significance set forth by CEQ in 40 C.F.R. § 1508.28, therefore requiring an EIS. Next, plaintiffs allege that the EA lacked analysis of direct, indirect, and

cumulative environmental impacts. Plaintiffs specify a failure to produce and use induced traffic growth analysis, cost-benefit analysis, and analysis of the effects arising from induced growth and impacts to wetlands, including Wetlands of National Significance. Third, plaintiffs allege USDOT failed to consider a range of reasonable alternatives. Finally, plaintiffs allege USDOT failed to adequately respond to comments regarding several issues including traffic forecasting and induced development.

On July 14, 2023, federal defendants filed the administrative record for the project. The record includes 702 documents comprising approximately 18,428 pages. On July 21, plaintiffs filed a motion to compel production of a privilege log, arguing that production of a privilege log is required. On August 18, federal defendants filed a motion in opposition, arguing that production of a privilege log runs counter to the presumption of regularity that federal agencies enjoy and that production of a privilege log is not necessary because courts have recognized that the types of pre-decisional, deliberative documents not included in the record are "not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record." Oceana, Inc. v. Ross, 920 F.3d 855, 865 (D.C. Cir. 2019) (cleaned up).

On March 26, 2024, the court issued an order granting plaintiffs' motion. In reaching its decision, the court stated that "[n]o authority binds the Court to either order or decline to order a privilege log in an APA record review case under 5 U.S.C. § 706, and there is no prevailing consensus in the persuasive authority." The court explained that "requiring Defendants to produce a privilege log does not undermine the limited nature of APA record review because it does not expand the record but does allow oversight into whether the 'whole record' is before the Court." Federal defendants submitted the privilege log on June 4.

In their December 13 response to plaintiffs' motion for summary judgment, federal defendants argue that FHWA thoroughly evaluated the reasonably foreseeable impacts of the project and appropriately considered reasonable alternatives. In addition, federal defendants argued that FHWA's mitigation analysis and its methodological choices were reasonable and well-supported.

The U.S. Army Corps of Engineers has not yet issued a permit for the Project under Section 404 of the CWA. Construction on the Project cannot begin until the permit is issued.

Lawsuit Continues in Florida Concerning Contracting Exclusions Connected to Miami Bridge Collapse

On March 18, 2024, Linda Figg, FIGG Group, Inc., and several affiliated FIGG companies filed suit against FHWA in the U.S. District Court for the Northern District of Florida alleging that FHWA's proposal to debar Linda Figg and ten of her companies as affiliates of a previously debarred company, FIGG Bridge Engineers, Inc. (FBE), and the time spent in the proposed debarment proceedings violates the APA and their substantive due process rights under the Fifth Amendment. Figg, et al. v. FHWA, No. 24-00129 (N.D. Fla.).

The complaint describes the underlying facts presented by the NTSB's investigation of a March 2018 bridge collapse in Miami at Florida International University. The complaint notes that NTSB's investigation found that FBE's bridge design calculation

errors were a probable cause of the bridge collapse and that FBE's failure to identify the significance of structural cracking was a contributing factor.

On January 19, 2021, FHWA debarred FBE for nine years based on the NTSB's findings, with the debarment ending on July 20, 2029. On September 27, 2023, FHWA proposed to debar Ms. Figg and the bridge companies she owns based on their affiliation with FBE for the same period of debarment as FBE. FHWA has not made a final decision on the proposal to debar, and because this is only a proposal, FHWA does not have in place an exclusion for Ms. Figg and the FIGG affiliated companies.

FHWA filed a motion to dismiss the March complaint, which the court granted on July 10, 2024. The court found that it lacked subject-matter jurisdiction over plaintiffs' claim in the first count that the Nonprocurement Common Rule suspension and debarment regulations, 2 C.F.R. §§ 180.630 & 180.800, do not allow affiliation debarment absent evidence of a wrongful act by a contractor, since the agency had not issued a final agency decision. The court found that the second count's substantive due process allegations lacked subject-matter jurisdiction because the due process claim was sufficiently "intertwined with the agency process" that the court could not consider the claim absent a final agency decision on affiliation debarment.

Concerning the third count, the court found that plaintiffs failed to state a claim upon which relief could be granted when it alleged that FHWA's continued proposal to debar proceedings were unreasonably delayed. The court reasoned that the complaint relied upon a Federal Acquisition Regulation that did not govern the proposal to debar proceedings and had failed to allege that the official record had closed. In granting the motion to dismiss on this third count, the court allowed plaintiffs' leave to amend their complaint.

On July 22, 2024, plaintiffs amended their complaint, alleging that the proposal to debar record had closed "substantially" more than 45 days before the filing of the amended complaint. The amended complaint alleged that FHWA's requests for more information were "pretext" to keep the record open. The amended complaint sought a judgment that FHWA failed to act or unreasonably delayed a decision regarding the proposal to debar proceedings and that FHWA be ordered to announce a final decision by a date certain.

On August 12, 2024, FHWA moved to dismiss the amended complaint. FHWA argued that plaintiffs failed to state a claim upon which relief could be granted because the facts alleged by plaintiffs in their response did not show unreasonable agency delay. FHWA argued that the agency's continued requests for additional information —seeking relevant information from plaintiffs to explain the corporate changes made by plaintiffs after the proposal to debar proceedings began—were reasonable. FHWA' motion explained how the debarring official continued to keep the record open to meet the agency's ongoing obligation to protect the government from business risks presented by the FBE's connections to plaintiffs. FHWA described the agency's consistent and active actions taken to consider accurate, current information to decide the matter, and not to rely only upon plaintiffs' preferred redacted, incomplete record.

Lawsuit Filed Over I-93 Exit 4A Project in New Hampshire

On August 26, 2024, plaintiffs Committee to Save the Derry Rail Trail Tunnel and Rails to Trails Conservancy filed a complaint in the U.S. District Court for the District of New Hampshire against FHWA and New Hampshire Department of Transportation officials alleging that the I-93 Exit 4A project will harm the integrity of the Manchester and Lawrence Railroad Historic District. Committee to Save the Derry Rail Trail Tunnel and Rails to Trails Conservancy v. Bhatt, et. al, No. 24-00262 (D.N.H.). Specifically, plaintiffs allege that the federal defendants' approval of the 2024 Section 4(f) Re-Evaluation is flawed, arbitrary and capricious, thereby violating Section 4(f) of the U.S. Department of Transportation Act of 1966. Plaintiffs seek a declaration that the federal defendants violated the APA and Section 4(f). Plaintiffs also request that the court vacate FHWA's 2024 approval of the modified project and issue a preliminary and permanent injunction.

Lawsuit Filed Over Brent Spence Bridge Project in Ohio and Kentucky

On October 16, 2024, a group of plaintiffs including Devo Good Project, Inc. a/k/a Greater Cincinnati Coalition for Transit and Sustainable Development filed a lawsuit in the U.S. District Court for the Southern District of Ohio against DOT, Secretary Buttigieg, and other federal and state officials challenging the Brent Spence Bridge (BSB) project based on the Revised Supplemental Environmental Assessment (RSEA) and FONSI. Devo Good Project, Inc. a/k/a Greater Cincinnati Coalition for Transit and Sustainable Development, et al. v. USDOT, et al., No. 24-00585 (S.D. Ohio). The BSB project is located between Cincinnati, Ohio and Covington, Kentucky. The project will construct a new double-deck companion bridge west of the existing bridge, reconfigure the existing bridge, add several collector-distributor lanes in Ohio and Kentucky, and rebuild overpass bridges and interchanges in the corridor.

Plaintiffs allege that defendants violated NEPA by failing to adequately consider and recognize the impacts of the BSB project on the natural and human environment. They allege that defendants failed to comply with NEPA by arbitrarily and capriciously issuing a FONSI, rather than preparing an EIS. Plaintiffs seek preliminary and permanent injunctions against the project.

NEPA Lawsuit Filed in Wisconsin Challenging I-94 East/West Project

On August 19, 2024, Milwaukee Intercity Congregations Allied for Hope, Inc. (MICAH) and several environmental and community organizations filed suit against FHWA and WisDOT in the U.S. District Court for the Eastern District of Wisconsin alleging that the ROD authorizing the selected alternative to reconstruct a portion of the I-94 East/West Corridor in Milwaukee violated NEPA. MICAH, et. al. v. USDOT, et. al., No. 24-1043 (E.D. Wis.). The project seeks to modernize a 3.5-mile stretch of I-94 between 70th and 16th Streets in Milwaukee to improve safety, replace aging infrastructure, and relieve congestion.

The complaint presents three claims under the APA. Plaintiffs allege that FHWA's final approval of the Final Supplemental EIS (FSEIS) violated NEPA because defendants prepared an: (1) unreasonably restrictive purpose and need statement; (2) without adequate consideration of a wide range of

project impacts, including social, racial, economic, land use, environmental, employment, indirect and cumulative impacts; and (3) without adequate consideration of mitigation requirements. Plaintiffs claim that the FSEIS purpose and need statement is unreasonably restrictive because it failed to adequately consider all reasonable alternatives, including an expansion of public transit. Plaintiffs claim that the FSEIS failed to address how improving and expanding transit development in the region would benefit the social, economic, employment, health, and racial effects on persons of color and persons with disabilities. Finally, plaintiffs assert that the project failed to mitigate the health and pollution effects of expanding the highway capacity on a transit-dependent community, which is disproportionately composed of persons of color and persons with disabilities. Plaintiffs seek declaratory and injunctive relief, as well as attorney's fees.

Some of the same plaintiff groups filed a Title VI administrative complaint against the project in May 2023. FHWA's Office of Civil Rights (HCR) is currently investigating the Title VI complaint.

Federal Motor Carrier Safety Administration

DOT Obtains Favorable Judgment in FMCSA Household Goods Case

On September 11, 2024, the U.S. District Court for the Central District of California entered final judgment against USA Logistics, Inc., a household goods motor carrier, finding that the carrier operated without the requisite authority in violation of FMCSA's statutes and regulations. Buttigieg v. USA Logistics, Inc., No. 24-2573 (C.D. Cal.). In addition to ordering the carrier to pay a civil penalty of $25,000, the court ordered the carrier to comply with all applicable FMCSA statutes and regulations.

As a motor carrier for the transportation of property, USA Logistics must obtain and maintain operating authority registration pursuant to chapter 139 of title 49 of the U.S. Code. In addition, household goods carriers such as USA Logistics are required to meet and maintain a minimum financial security requirement. FMCSA revokes operating authority registration for carriers that fail to meet or maintain this requirement, and carriers that operate without operating authority registration are liable for a civil penalty of not less than $37,400 for each unauthorized transportation of household goods. FMCSA revoked USA Logistics' operating authority registration on July 25, 2023, for failure to maintain and/or provide FMCSA with evidence of sufficient financial responsibility. Following that revocation of its authority, USA Logistics continued to operate as a household goods carrier on at least four occasions.

On March 29, 2024, the Department of Justice, on behalf of the Secretary, filed a complaint against USA Logistics, Inc. to recover civil penalties pursuant to 49 U.S.C. § 14702 for the carrier's multiple violations of FMCSA's consumer protection regulations.

Federal Railroad Administration

Parties File Briefs in Consolidated Case Challenging FRA's Train Crew Size Final Rule

Florida East Coast Rwy. LLC v. FRA, et al., No. 24-11076 (11th Cir.), *supra* at 14.

Lawsuit Filed over FRA's Buy America Waiver for Brightline West Trainsets

Alstom Transportation Inc. v. FRA, et al., No. 24-02098 (D.D.C.), *supra* at 23.

Fifth Circuit Reverses FRA's Automated Track Inspection Waiver Decision

On June 21, 2024, the U.S. Court of Appeals for the Fifth Circuit ruled that FRA's 2023 decision denying a petition from BNSF Railway Company (BNSF) to expand an existing track inspection waiver to two new territories under the railroad's automated track inspection (ATI) program was arbitrary and capricious. BNSF Rwy. Co. v. FRA, et al., 105 F.4th 691 (5th Cir. 2024). The court remanded the matter to FRA and ordered it to grant BNSF's petition. One judge on the panel concurred in part and dissented in part.

BNSF's existing waiver, originally granted in 2021, 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 by track inspectors with inspections using autonomous geometry inspection systems. At the time, the Railroad Safety Advisory Committee (RSAC) was examining the feasibility of using a combination of visual inspections and ATI technologies to maximize the effectiveness of railroads' track inspection programs. In an initial 2022 decision letter, FRA concluded that, given the ongoing RSAC task related to ATI, FRA would not be justified in expanding the waiver to new territories, as requested by BNSF.

BNSF petitioned for review of that initial decision in the Fifth Circuit. In its briefs, BNSF argued that FRA acted arbitrarily in denying its expanded waiver request because (1) an expanded waiver would increase safety, (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. The Association of American Railroads and the National Association of Manufacturers filed amicus briefs in support of BNSF.

FRA argued that (1) the agency reasonably denied BNSF's waiver petition in order to pursue a nationally uniform approach to railroad safety, (2) the 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. The Brotherhood of Maintenance of Way Employes Division/IBT (BMWED) filed an intervenor brief, emphasizing that BNSF was not precluded from using ATI technology.

In a 2023 decision, BNSF Rwy. Co. v. FRA, 62 F.4th 905 (5th Cir. 2023), the court found that FRA's justification for dismissing BNSF's expanded waiver petition was insufficient. Accordingly, the Fifth Circuit vacated and remanded the decision for

reconsideration by the agency and retained jurisdiction over the matter.

On remand, FRA reconsidered BNSF's expansion request and requested additional data and information relating to the implementation of its ATI program. On June 21, 2023, FRA issued a new decision (June 2023 decision letter), in which it again concluded that expanding BNSF's existing waiver was unjustified at that time. In its June 2023 decision letter, FRA explained that the public interest and railroad safety still favored addressing ATI issues in a comprehensive manner through the RSAC process and that BNSF had not provided data demonstrating that expanding the use of ATI would increase railroad safety.

At the Fifth Circuit's direction, the parties filed letter briefs addressing FRA's new decision. BNSF again argued that the new decision was unlawful. FRA maintained that the decision was lawful and that the court should take no further action or, in the alternative, the Fifth Circuit should order full briefing and arguments before the court. On August 18, 2023, BNSF filed a new petition for review, attaching FRA's June 2023 decision letter; the court filed the petition in the existing case docket. On March 24, 2024, FRA notified the court that the RSAC track inspection task had been closed, without consensus having been reached, and that FRA was considering how to proceed.

On June 21, 2024, the Fifth Circuit issued an order finding in BNSF's favor and holding that FRA's June 2023 decision letter was arbitrary and capricious. The court first found that FRA's justification for denying the expanded waiver petition due to the RSAC process was insufficient because that process had ultimately terminated without any consensus recommendation, and FRA had granted the original waiver while the RSAC task was already ongoing. Second, the Fifth Circuit found that BNSF did not need to establish that the waiver expansion would improve railroad safety, only that the expansion would be consistent with railroad safety. Third, the court found that the original 2021 decision included "a set of conditions under which the FRA would be compelled to expand the waiver's scope" and concluded that the "implementation of ATI pursuant to the prior waiver appears to have been an unqualified success." The court ordered FRA to expand the waiver under the same terms and conditions as the original waiver.

Judge Graves concurred in part and dissented in part. In his dissent, Judge Graves wrote that the majority erroneously ordered FRA to grant the waiver without briefing on the implications of the majority decision and without regard for FRA's safety expertise. His dissent also stated that the appropriate remedy is remanding the matter to FRA for further review.

FRA petitioned for a panel rehearing and reconsideration of the relief ordered, but that petition was denied on August 19, 2024. FRA issued a letter approving BNSF's waiver expansion request on September 3.

Parties Stipulate to Voluntary Dismissal of Case Concerning FRA's Approval of Locomotive Engineer and Conductor Certification Programs

On July 5, 2024, as stipulated by the parties, the U.S. Court of Appeals for the Eighth Circuit dismissed a case concerning FRA's process for approving Union Pacific Railroad Company's (UP) locomotive engineer and conductor certification programs. Union Pac. R.R. Co. v. FRA, et al., No. 24-1793 (8th Cir.).

UP had filed a petition for review on April 16, seeking review of a February 22 letter from FRA that acknowledged UP's submission of its locomotive engineer and conductor certification programs under 49 C.F.R. parts 240 and 242. Additionally, the FRA letter stated that although the agency endeavored to complete its review within 30 days, due to the complexity of the review, approval might take longer and would only come in the form of a written confirmation of approval.

UP's petition contended that FRA had changed its certification approval process, citing regulations in parts 240 and 242 that provide that unless a submitting railroad is notified otherwise, its submitted programs will be considered to have been approved after 30 days. UP requested that the court set aside FRA's February 22 letter and hold that UP's programs were approved by operation of law after 30 days had passed.

After FRA issued a letter on July 2, which affirmatively approved the certification programs in question, the parties filed a stipulation for voluntary dismissal, which the court granted.

Lawsuits Filed Challenging FRA's Consideration of Waiver Petitions

On November 8, 2024, three railroads filed petitions for review in three U.S. Courts of Appeals challenging FRA's consideration of their requests to waive their obligations to comply with certain FRA safety regulations. BNSF Rwy. Co. v. FRA, et al., No. 24-60576 (5th Cir.) (waivers concerning yard transfer movements, air flow levels in distributed power trains, and virtual air brake training requirement); Union Pac. R.R. Co.v. FRA, et al., No. 24-3284 (8th Cir.) (waivers concerning extended haul trains and locking tests); CSX v. FRA, et al., No. 24-13683 (11th Cir.) (waiver concerning locking tests). The petitions note that FRA is required by its own regulations to decide waiver requests within specified timeframes (specifically, nine months for waiver requests and four months for reconsideration requests of waiver decisions). The petitions allege that, instead, FRA has adopted a policy of refusing to rule in a timely way on waiver requests. The petitions request the courts to either treat FRA's inaction as a deemed denial of the waiver requests and reverse the denials with instructions to grant the waivers or compel FRA to rule on the pending waiver requests within 30 days. On December 9, the parties in CSX v. FRA, et al. filed a joint stipulation to voluntarily dismiss the case after FRA granted the CSX waiver request.

Complaint Filed Against Norfolk Southern for Delays on Amtrak's Crescent Route

On July 30, 2024, the United States filed a complaint in the U.S. District Court for the District of Columbia against Norfolk Southern Corporation and Norfolk Southern Railway (collectively, Norfolk Southern) to enforce the statutory requirement in 49 U.S.C. § 24308(c) that provides preference to the National Railroad Passenger Corporation's (Amtrak) passenger trains over freight trains on Amtrak's Crescent route. United States v. Norfolk Southern Corp. et al., No. 24-2226 (D.D.C.).

The complaint alleges that delays to Amtrak's passenger trains on the Crescent route, which occur when Norfolk Southern fails to provide those trains preference, result in harm to Amtrak's passengers, Amtrak's finances, and the public investment in passenger rail transportation. The complaint cites several examples of Norfolk Southern failing to provide Amtrak with preference, including Norfolk Southern running trains longer than available sidings, which requires

Amtrak trains to move onto sidings or follow slower freight trains. The complaint seeks injunctive and other equitable relief. This is the first preference enforcement action brought by the Government since 1979.

On September 23, 2024, Norfolk Southern filed a consent motion for a 90-day extension to answer or otherwise respond to the complaint, which the court granted. Norfolk Southern's response to the complaint is due on December 27.

Federal Transit Administration

DOT Dismissed from Florida Suit Challenging Labor Certification Process; Summary Judgment Granted for DOL

On October 27, 2024, the U.S. District Court for the Southern District of Florida dismissed DOT from the State of Florida's challenge to the U.S. Department of Labor's (DOL) application of protective arrangements under 49 U.S.C. § 5333(b) to Florida. Further, it granted summary judgment for DOL. Florida v. Buttigieg, et al., 2024 WL 4536647 (S.D. Fla. Sept. 27, 2024). The court agreed with the government's argument that Florida lacked standing to sue DOT. Regarding DOL, the court found that Section 13(c) is not unconstitutional under the Spending Clause because it does not require states to accept funds under ambiguous conditions. By the time Florida accepts funds from the government, DOL has already determined that its agreements are fair and equitable and there are no rules attached to the funds that Florida is required to interpret. The court also agreed with the D.C. Circuit's observation in ATU v. Donovan, 767 F.2d 939 (D.C. Cir. 1985), that the text of Section 13(c) confers broad discretion to DOL to determine whether employee agreements are fair and equitable, and DOL does not violate the APA by doing what Congress said it could do.

Florida filed this lawsuit against DOT, FTA, and DOL on October 4, 2023, alleging that DOL's application of protective arrangements under 49 U.S.C. § 5333(b) to the State of Florida is unconstitutional. Section 5333(b), commonly referred to as Section 13(c) due to a prior version of the statute, requires that recipients of federal funds agree to "provisions that may be necessary for . . . the continuation of collective bargaining rights." 49 U.S.C. § 5333(b)(2)(B). Florida argued that the provision is vague and that DOL's application of the provision prevents the State from enacting "reasonable regulations" governing its collective bargaining process, thus potentially resulting in the loss of access to hundreds of millions of dollars in FTA funds under the Bipartisan Infrastructure Law. The complaint sought preliminary and permanent injunctive and declaratory relief. In December 2023, the government filed a motion to dismiss, or in the alternative, for summary judgment. Florida subsequently filed its own motion for summary judgment in January 2024.

Transit agencies across Florida receive federal grant funds under chapter 53 of title 49 of the U.S. Code to operate, maintain, and construct transit systems. These funds are subject to certain federal requirements such as 49 U.S.C. § 5333(b). Before FTA may award federal funds, DOL must first certify that the interests of employees affected by the assistance are protected under arrangements the Secretary of Labor concludes are fair and equitable. Out of the six topic areas that the statute covers, the State took issue with the requirement under 49 U.S.C. § 5333(b)(2)(B), which states that grant agreements "shall include provisions that

may be necessary for … the continuation of collective bargaining rights."

On May 9, 2023, Florida Governor DeSantis signed SB 256, which reformed collective bargaining in Florida to ensure public employees in the state make a "conscious and deliberate decision regarding their constitutional right to participate or not in a union." The law also requires the support of 60% of its employees before a union may act as their exclusive bargaining agent. When enacting SB 256, the Florida legislature anticipated that DOL might find that it conflicts with 49 U.S.C. § 5333(b) and thus granted a state agency the authority to waive the new provisions until the current collective bargaining agreement expired. DOL, however, found the scope of that waiver insufficient under the federal statute because it did not extend for the life of the federally-funded project. Affected Florida transit agencies sought another waiver from the state agency, which it conditionally granted until DOL or a court of competent jurisdiction issued a final decision as to whether SB 256 (and the related waivers) violated 49 U.S.C. § 5333(b). The state agency asserts that it granted the waivers at issue to preserve access to the hundreds of millions of dollars in federal funding before the fiscal year ended. The State then filed suit to resolve the conflict between SB 256 and 49 U.S.C. § 5333(b).

The complaint alleged violations of the Spending Clause and the APA. In Count I, the State alleged section 5333(b) violates the Spending Clause's requirement that any condition attached to funding under the Spending Clause is unambiguous. Under the federal statute, the State alleged that DOL's "broad authority" to decide what arrangements are "fair and equitable" to "protect the interest of employees affected by" 49 U.S.C. chapter 53 is unlawfully ambiguous. The State further alleged that the standard for denying funding applications under the law is so vague that it is unreviewable under the APA. In Count II, the State alleged that if Congress intended to prevent Florida from incrementally reforming collective bargaining in the state, the APA required it to use more precise language than "the continuation of collective bargaining agreements." In addition, the State argued that DOL's decision on the waiver process is arbitrary and capricious due to sparse reasoning and the failure to meaningfully consider the Spending Clause.

The State sought to enjoin defendants from withholding grants from Florida transit agencies under section 5333(b) and declare section 5333(b) unconstitutional, both facially and as applied to Florida, or in the alternative, either hold DOL's decision on the state's waiver provisions unlawful under the APA or declare that SB 256 complies with 49 U.S.C. § 5333(b).

It its motion to dismiss, the government initially argued that plaintiff lacked standing to sue either DOT or DOL. First, the government argues that DOT has no control over the actions giving rise to the Florida's alleged injury, as it is a program under DOL's exclusive control. Additionally, the government argued that Florida has no standing to sue DOL because Florida has suffered no cognizable injury, as no Florida transit agency has lost federal funding. The government rebutted Florida's argument that it is being coerced into accepting FTA grants with "unascertainable conditions" by arguing that Florida failed to state with any specificity how Section 13(c) is coercive, and thus exceeds Congress's spending authority.

In the alternative, the government moved for summary judgment because Florida failed to establish that Section 13(c) exceeds

Congress's authority under the Spending Clause. Florida argued the statute violated the Spending Clause because Section 13(c) lacks sufficient clarity required of any condition attached to federal funding. However, the government pointed out that Section 13(c) does not require transit agencies to interpret the statute to inform their expenditure of funds. If the transit agency receives federal funds, then DOL has already determined the required protective arrangements have been met, and thus, Section 13(c) is satisfied. Plaintiff's APA claims should fail because for the same reason - there is no interpretation of Section 13(c) required at the state level.

Florida contended that it suffered an injury for purposes of standing by its need to accept or reject an "unascertainable funding offer" from the federal government and that it is inconsequential that no transit agency has lost funding because the State's "coerced acquiescence" is a "present and continuous infringement on state sovereignty." Another alleged basis for injury is Florida's inability to enforce its sovereign prerogatives since it must either waive portions of the recent state law or lose millions in federal funding. Plaintiff argued that DOT is a proper party because it must enforce DOL's determination under Section 13(c) of what is fair and equitable to award grant applications. Regarding the Spending Clause, plaintiff argued that Congress, not DOL, must speak "unambiguously" through the statute and that DOL's implementation of Section 13(c) does more than simply fill in gaps. Under the APA, Florida argued there is nothing plain or clear about DOL's interpretation of the statute, and thus, the court must apply an interpretation that resolves all ambiguities in favor of plaintiff.

The Amalgamated Transit Union International and the Transit Workers Union of America jointly intervened in the case.

Following full briefing by the parties, the court dismissed DOT from the case and granted summary judgment for DOL. The court dismissed DOT from the action on standing grounds, agreeing with defendants that Florida failed to show how its alleged injury was caused by DOT or could be redressed through its requested relief. Florida conceded that its complaint rested solely on the application of Section 13(c), which DOL administers. Thus, DOT has no control over the actions that gave rise to Florida's injuries, and thus, no order against DOT would remedy the allegations.

Turning to Florida's substantive claims against DOL, the court disagreed with Florida's argument that Section 13(c) is unconstitutional because it requires the state to accept funds under ambiguous conditions. The court pointed out that by the time the state accepts the federal funds, DOL has already determined the state's expenditures are fair and equitable and no rules attach to the state's expenditure of funds to satisfy Section 13(c). Therefore, any statutory ambiguities do not affect the state or its transit agencies' expenditure of funds.

The court found no authority offered for the state's argument that Section 13(c)'s eligibility requirements render it unconstitutional as applied because it was unclear to the state whether SB 256 would have made Florida's recipients ineligible for federal funds. The plain reading of Section 13(c) expressly and unambiguously confers broad discretion on DOL to determine whether it's certification for funding may be lawfully given based on the parameters laid out in the statute and there is no violation of Congress's spending power as applied.

The state also argued that Section 13(c) is unconstitutional on its face. Finding two cases from other jurisdictions unpersuasive, the court concluded that while the terms "fair and equitable" and "continuation of collective bargaining right" may be viewed as somewhat vague in isolation, the state failed to meet the high threshold of showing no circumstances where the statute would be valid.

On the APA count, Florida argued that Section 13(c) does not unambiguously prevent it from implementation SB 256 reforms, DOL's actions are contrary to the "clear-statement rule" under the APA. However, the clear statement rule is misplaced here, since it is based on a condition imposed on federal funding. As stated above, under Section 13(c), DOL has already determined the statute's conditions are met before the state receives the funds. Florida offered no support that DOL violated the APA by doing what Congress said it could, which is to determine whether provisions that affect employee collective bargaining rights are "fair and equitable."

National Highway Traffic Safety Administration

Supplemental Briefing in Challenge to NHTSA's CAFE Standards for Model Years 2024–2026 Passenger Cars and Light Trucks

Natural Resources Defense Council, et al. v. NHTSA, et al., No. 22-1080 (D.C. Cir.), *supra* at 15.

Parties Challenge NHTSA's Corporate Average Fuel Economy Standards for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond

In re Corporate Average Fuel Economy Standards for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, No. 24-7001 (6th Cir.), *supra* at 16.

Distributors of Pulsing Brake Lights Appeal District Court Decision Finding No Final Agency Action in Challenge to NHTSA Investigation

On September 25, 2024, Williams & Lake, LLC and Brakes Plus, NWA, Inc., filed an appeal in the U.S. Court of Appeals for the Eighth Circuit of a September 24, 2024, decision of the U.S. District Court for the Western District of Arkansas denying a preliminary injunction that would bar NHTSA from notifying plaintiffs' motor vehicle dealer customers that plaintiffs' product could not be installed in a manner

consistent with federal law, and dismissing the case. Brakes Plus, NWA, Inc., et. al. v. USDOT, et. al., 24-2951 (8th Cir.); Brakes Plus, NWA, Inc., et. al. v. USDOT, et. al., 2024 WL 4479880 (W.D. Ark. Oct. 10, 2024). On October 11, the district court denied a stay pending appeal, and on October 22, the Eighth Circuit also denied an injunction pending appeal. Appellants' merits brief was filed on December 5. In its brief, appellants requested that the Eighth Circuit reverse the district court's dismissal of the case and denial of the preliminary injunction, arguing that NHTSA's notification letters constitute final agency actions and that a preliminary injunction was appropriate. The government's brief is due on January 6, 2025.

Appellants Williams & Lake and Brakes Plus sell a device that when installed in a motor vehicle causes the vehicle's center high mounted stop lamp (CHMSL) to pulse rapidly three times when the vehicle's brake is depressed. Williams & Lake and Brakes Plus sell these devices primarily to motor vehicle dealers who install the device in connection with the sale of a vehicle. On July 26, 2023, NHTSA sent letters to Williams & Lake and Brakes Plus requiring the companies provide their list of customers, explaining that installation of their products took motor vehicles out of compliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, and informing the companies that installation of the product by motor vehicle dealers is prohibited by the National Traffic and Motor Vehicle Safety Act's prohibition on making equipment installed in compliance with an FMVSS inoperative in 49 U.S.C. § 31022. Federal Motor Vehicle Safety Standard No. 108, Lamps, Reflective Devices, and Associated Equipment, 49 C.F.R. § 571.108, requires brake lights to be steady burning. After NHTSA declined to extend the deadline for the companies to provide their customer information past October 25, 2023, Williams & Lake and Brakes Plus filed suit.

The district court found that the companies have standing to sue. The court explained that it is not merely speculative that their customers will stop installing the devices rather than facing potential penalties and that there is a causal connection between that injury and the agency's planned letters to the companies' customers informing them of the law. In addition, the court found redressability since an injunction preventing NHTSA from sending letters to the companies' customer would likely prevent the loss of business. The court also found that the companies' claim is ripe because plaintiffs face the likely destruction of their businesses once their customers are notified about federal law and the agency definitely intended to send notification letters. However, the court found that there was no final agency action since NHTSA's letters "will merely express the agency's view of the law and warn car dealerships about the consequences of non-compliance." The court explained that the companies will suffer practical but not legal consequences from NHTSA sending letters to their customers. The court explained that "they will not incur compliance costs, enforcement penalties, or the loss of the use of any property once their customers receive the letters." Therefore, the court found that the agency's actions were not subject to judicial review under the APA and dismissed the case for failing to state a claim for relief.

Pipeline and Hazardous Materials Safety Administration

No Supreme Court Review of Eleventh Circuit's Dismissal of Challenge to PHMSA Administrative Enforcement Decision

Metal Conversion Technologies, LLC v. PHMSA, No. 23-870 (U.S.), *supra* at 7.

Adverse Decision in INGAA Challenge to PHMSA 2022 Gas Transmission Rule; INGAA Rehearing Request Granted

On August 16, 2024, the U.S. Court of Appeals for the District of Columbia Circuit granted an industry petition for review challenging PHMSA's August 2022 final rule enhancing the safety of gas transmission pipelines. INGAA v. PHMSA, No. 23-1173 (D.C. Cir.). The court had heard oral argument on May 16, 2024.

On July 10, 2023, a large industry trade group, the Interstate Natural Gas Association of America (INGAA), filed a petition for review of PHMSA's August 2022 final rule, 87 Fed. Reg. 52,224 (Aug. 24, 2022), following a lengthy administrative reconsideration proceeding. The petitioner challenged five discrete, technical requirements of the final rule. These deal with new regulations on corrosive constituents in the gas stream, immediate repair criteria for anomalies, the safety factor for allowing dent anomaly assessment using engineering critical assessment, and the direct examination step of stress corrosion cracking direct assessment.

INGAA filed its opening brief on December 5, 2023, arguing that PHMSA's rule should be set aside because PHMSA failed to (1) provide a cost-benefit analysis on certain aspects of the rule, (2) consider the recommendations of the Technical Pipeline Safety Standards Committee, (3) provide adequate notice of two requirements in the rule, and (4) explain why the benefits of the challenged standards justify their cost as required by statute.

The government filed its response brief on February 26, 2024. That brief responded to petitioners' arguments by highlighting administrative record evidence demonstrating that the provisions being challenged were added at the request of petitioners during PHMSA's mandatory advisory committee meeting for the proposed rulemaking. PHMSA responded to petitioners' cost-benefit analysis arguments by referencing controlling precedent evincing that agency cost-benefit analyses need not employ quantified cost and benefit data for each unique provision of a rulemaking as urged by petitioners. The Pipeline Safety Trust filed an *amicus* brief in support of the final rule on March 4, 2024, providing the court additional historical context animating PHMSA's policy decisions in the rulemaking.

The court's decision vacated four of the five challenged elements of the final rule because of PHMSA's failure to have evaluated the costs and benefits of those elements in its NPRM and accompanying risk assessment as required by the heightened procedural requirements for rulemakings within the Pipeline Safety Laws. The court's decision frequently referenced language in another recent decision (in GPA Midstream et al. v. DOT, 67 F.4th 1188 (D.C. Circ 2023)) vacating elements of an earlier PHMSA rulemaking on similar grounds.

Notably, for one of the elements of the rulemaking (involving an exception to default dent repair requirements), the court's decision granted PHMSA's recommended remedy and vacated the entirety of an exception that INGAA had challenged. On October 16, INGAA filed an unopposed petition for rehearing requesting that the court change its remedy on the dent repair exception to remand without vacatur. The court on October 25, directed PHMSA to respond to the petition by Tuesday, November 12.

On November 12, PHMSA filed a response to INGAA's petition for rehearing. In PHMSA's response, the agency explained that although the court did not err in its remedial analysis, the remedy of remand without vacatur is justified in this case because the agency can cure the identified deficiency on remand. PHMSA also noted that by permitting the dent repair exception to go into effect on remand would strike an appropriate balance between avoiding unnecessary costs for pipeline operators without compromising safety. On December 10, the court granted INGAA's petition for rehearing and ordered that the dent repair exception be remanded without vacatur.

Loss in Fifth Circuit Challenge to Explosive Reclassification Leads to Agency Remand for Further Consideration

On August 21, 2023, MCR Oil Tools (MCR) filed an appeal in the U.S. Court of Appeals for the Fifth Circuit following PHMSA's final administrative action denying MCR's appeal of an explosives approval classification of their product, a proprietary thermite mixture known as the "B15 mix," as a regulated flammable solid, rather than an unregulated material. MCR Oil Tools v. DOT, No. 23-60458 (5th Cir.). MCR claimed that PHMSA's final agency action was arbitrary, capricious, and an abuse of discretion within the meaning of the APA and was otherwise contrary to law and unsupported by substantial evidence.

MCR utilizes the B15 mix in various capacities and has contended for a number of years that mixture should be unregulated. Following research on the properties of thermites and their risks in transportation, however, PHMSA adopted an interim policy concerning the appropriate hazmat classification of thermites. While thermites meet PHMSA's regulatory definition for explosives and pyrotechnic substances, PHMSA determined that thermites that pass certain exclusion tests can be reclassified as flammable solids instead of explosives—a policy that PHMSA developed to provide regulatory relief to companies that use thermites. Several companies have been issued Class 4 flammable solid classification approvals for thermites on this basis.

In February 2022, MCR submitted a request for an explosives approval classification for the B15 mix, to PHMSA. MCR had previously been shipping the B15 mix unregulated and sought to continue to do so. Pursuant to PHMSA's policy of providing regulatory relief to companies that use thermites, the agency issued MCR an explosive classification approval for MCR's product as a flammable solid, which requires MCR to ship their product as a hazardous material, though not as an explosive (which carries more stringent regulatory requirements). MCR submitted a reconsideration request, which PHMSA reviewed and denied. MCR then submitted an appeal from that reconsideration request, which the Deputy Administrator reviewed and denied.

At the same time that MCR sought judicial relief from the Fifth Circuit of PHMSA's decision to classify the B15 mix as a flammable solid, MCR also sought approval from PHMSA to ship its pipeline cutting tool, the radial cutting torch (RCT), as unregulated, though the RCT uses the B15 mix as fuel to produce a stream of superheated plasma to cut metal pipe. On November 1, 2023, the Fifth Circuit granted MCR's unopposed motion to stay proceedings related to PHMSA's classification of the B15 mix until PHMSA made a final determination regarding classification of the RCT.

On May 10, 2024, PHMSA determined that the RCT was an unapproved explosive that was not authorized for transportation and denied MCR's application for a classification approval for the RCT. MCR sought an immediate stay, which the Fifth Circuit granted on May 24 after expedited briefing. The court further set the schedule for expedited merits briefing, and on July 30, 2024, the court dismissed PHMSA's arguments that MCR had failed to seek reconsideration within the agency and ruled that PHMSA's denial of MCR's application for a classification approval of the RCT was arbitrary and capricious. The court found that MCR did not need a separate approval for the RCT because the RCT component pieces function as packaging for the B15 mix, which PHMSA had already classified as a flammable solid. The case was remanded to PHMSA for further consideration.

In accordance with the court's ruling, PHMSA issued MCR a rejection letter on September 23, 2024. The letter stated that a classification approval for the RCT was unnecessary given the court's ruling that the RCT component pieces function as packaging for the B15 mix, which already has an approval to ship. In October, the court granted PHMSA and MCR's joint motion to remand the B15 mix case (that had been in abeyance) to PHMSA to consider new evidence and arguments regarding its classification.

Challenge in Fifth Circuit to PHMSA's Enforcement of Pipeline Safety Violations that Caused Pipeline Rupture and Fire

On August 16, 2024, Florida Gas Transmission Co. filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit challenging a Final Order issued by PHMSA that found the company violated the pipeline safety regulations in connection with a 2020 gas pipeline rupture and fire in Sanford, Florida, which resulted in the evacuation of 125 homes and businesses. Florida Gas Transmission Co. v. USDOT, No. 24-60420 (5th Cir.). The Final Order assessed a civil penalty of $409,000 for the violations. Petitioner did not seek administrative reconsideration of the Final Order prior to filing a petition for review with the court.

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