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DOT LITIGATION NEWS

Special Nats World Series Victory Edition

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Highlights

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Supreme Court Litigation

Supreme Court Denies AAR's Petition for Certiorari in Amtrak Metrics and Standards Litigation

On June 3, 2019, the U.S. Supreme Court denied the January 2019 petition for a writ of certiorari of the Association of American Railroads ("AAR") asserting that Section 207 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), the statute that grants FRA and Amtrak joint rulemaking authority over establishing metrics and standards for Amtrak's performance and service quality, violates due process and the separation of powers principle and that the constitutional defects cannot be cured by severing the arbitration provision in the statute. AAR v. DOT, No. 18-976 (S. Ct.). The ruling allows FRA and Amtrak to adopt new metrics and standards.

Through PRIIA, Congress directed FRA and Amtrak to "jointly develop" Metrics and Standards for "measuring the performance and service quality of intercity passenger train operations." The Metrics and Standards were to provide Amtrak with an internal evaluation tool it could also use to assess whether freight railroads violated their statutory duty to provide preference to Amtrak in the use of rail lines, junctions, and crossings. The D.C. Circuit initially struck down the Metrics and Standards, holding that PRIIA violated the Non-Delegation Doctrine by vesting rulemaking authority in a non-governmental entity, Amtrak. AAR v. DOT, 721 F.3d 666 (D.C. Cir. 2013).

In 2015, the Supreme Court reversed and remanded, holding that Amtrak is a governmental entity for purposes of the Non-Delegation Doctrine. DOT v. AAR, 135 S. Ct. 1225 (2015). On remand from the Supreme Court, on April 29, 2016, the D.C. Circuit for a second time held that Section 207 was unconstitutional. AAR v. DOT, 821 F.3d 19 (D.C. Cir.). This second ruling concluded that Section 207 violated the Due Process Clause by giving Amtrak, "a self-interested entity[,] regulatory authority over its competitors." The court also found that an arbitration provision, provided in PRIIA to resolve disputes between FRA and Amtrak over the formulation of the Metrics and Standards (but never invoked), violated the Appointments Clause because the arbitrator would be a principal officer of the United States, not appointed by the President with the advice and consent of the Senate.

On September 9, 2016, the D.C. Circuit denied the government's petition for rehearing en banc. On February 1, 2017, the Department of Justice sent a letter to Congress to advise that the government had decided not to seek Supreme Court review of the D.C. Circuit's decision at that time. Instead, the letter stated the government intended to argue in the district court that, under the D.C. Circuit's decision, the arbitration provision should be severed from the rest of the statute. FRA and Amtrak could then jointly develop Metrics and Standards under the remaining provisions of Section 207, unencumbered by the arbitration provision.

The government then sought to obtain a judgment from the district court that would sever the arbitration provision of Section 207, and at the same time preserve the remaining portion of the statute that grants FRA and Amtrak the power to adopt Metrics and Standards. AAR opposed the government's motion, arguing that this was an attempt to

reverse the D.C. Circuit under the guise of a request to enter judgment.

The district court agreed with AAR and entered judgment on March 23, 2017, in favor of AAR, concluding that it must give full effect to the D.C. Circuit's mandate and that it was not at liberty to review or change the D.C. Circuit's decision. In addition, the district court noted that the D.C. Circuit made it clear that Congress is the proper actor to remedy Section 207, not the courts.

On July 20, 2018, the U.S. Court of Appeals for the D.C. Circuit granted the government's appeal, reversing the district court decision, and ruling in a 2-to-1 decision that the proper constitutional remedy was to sever the binding arbitration provision in Section 207(d) of PRIIA and to leave the balance of Section 207 intact. AAR v. DOT, 896 F.3d 539 (D.C. Cir.).

Supreme Court Denies Certiorari in Takings Case Regarding Private Terminal at Dallas Love Field

On June 24, 2019, the U.S. Supreme Court denied Love Terminal Partners' petition for writ of certiorari seeking review of a decision of the U.S. Court of Appeals for the Federal Circuit holding that the Wright Amendment Reform Act ("WARA") did not constitute a physical or a regulatory taking. The Court's denial of certiorari in Love Terminal Partners, LP, et al., v. United States, No. 18-1062 (S. Ct.) put an end to 11 years of litigation and stripped plaintiffs of $133.5 million awarded by the Court of Federal Claims.

Congress has long imposed restrictions on air carrier operations at Love Field under the Wright Amendment to support Dallas-Fort Worth International Airport. In 2006, the concerned parties (the cities of Dallas and Fort Worth, the DFW airport board, Southwest Airlines, and American Airlines) reached agreement (the Five-Party Agreement) on resolving their disputes about the use of Love Field, including providing for the demolition of plaintiffs' private 6-gate terminal at Love Field. The parties urged Congress to adopt legislation permitting the Five-Party Agreement to go forward. Later that year, Congress responded by enacting WARA, which referenced the Agreement, phased out existing restrictions and imposed others. In addition, to ensure that Love Field did not expand, the concerned parties agreed, and WARA included a provision, to cap the number of passenger gates permitted at the airport. In July 2008, Love Terminal Partners, L.P. and Virginia Aerospace, LLC, owners of the private terminal, filed a complaint in the Court of Federal Claims alleging that WARA effected a taking of their private airline terminal and leasehold rights for which they should be compensated.

After the Court of Federal Claims ruled for plaintiffs, the government appealed to the Federal Circuit. The Federal Circuit pointed out that plaintiffs needed to show that their property had value in the regulatory environment that existed before WARA and that the enactment of WARA diminished their property value. Plaintiffs had been unsuccessful in operating the 6-gate terminal, and the court noted that "between [the plaintiffs'] acquisition of the sublease in 1999 and the enactment of WARA in 2006, plaintiffs suffered a net income loss of roughly $13 million. And at no point during that time…did revenue exceed plaintiffs' carrying costs…." Thus, the court found that "[h]ere there can be no regulatory taking because plaintiffs have not demonstrated or even attempted to demonstrate, that their ability to use their property for commercial air passenger service under the pre-WARA

regulatory regime had any value." 889 F.3d at 1343. Essentially, the court found that WARA had no adverse economic impact on the plaintiffs' property.

In addition, the Federal Circuit found that there was no physical taking of the plaintiffs' private terminal because WARA did not codify the Five-Party Agreement in its entirety and specifically did not codify the portions of the Agreement in which the City of Dallas agreed to acquire and demolish plaintiffs' terminal. In reaching this decision, the court found it notable that WARA explicitly provides that federal funds should not be used to remove the plaintiffs' gates, an indication that the federal government was distancing itself from Dallas' intended action.

Plaintiffs' petition for writ of certiorari asked the Supreme Court to review the Federal Circuit's holding that they failed to establish that WARA had a negative economic impact on their leases. Plaintiffs also argued that the court erred in declining to value the leases based on what petitioners assert was a reasonable, investment-backed expectation that the Wright Amendment would be repealed. The United States opposed the Petition and argued that the Federal Circuit properly found that petitioners could not establish that WARA effected a taking of their property because they did not present evidence of an adverse economic impact.

Supreme Court Denies Certiorari Regarding MWAA's Use of Dulles Toll Road Revenue

On October 7, 2019, the U.S. Supreme Court denied certiorari in Kerpen, et al., v. Metropolitan Washington Airports Authority, No. 18-1240 (S. Ct.), an appeal of the U.S. Court of Appeals for the Fourth Circuit's decision affirming the dismissal of a constitutional challenge to the use of Dulles Toll Road revenue by the Metropolitan Washington Airports Authority ("MWAA") to fund construction of the Silver Line Metrorail Project.

In 2016, plaintiffs filed a class action complaint against MWAA, the Department, and the Secretary of Transportation challenging MWAA's use of Dulles Toll Road tolls to pay for the Metro Silver Line expansion. Plaintiffs alleged constitutional violations, including (1) that MWAA is not a valid interstate entity because the District of Columbia is not a "state" for purposes of the Compact Clause; (2) MWAA exercises federal legislative power in violation of Article I of the Constitution; (3) MWAA exercises federal executive power in violation of Article II of the Constitution; (4) MWAA's Dulles Toll Road tolls violate drivers' due process; and (5) MWAA's tolls exceed its authority under its enabling statutes and the APA.

On May 30, 2017, the U.S. District Court for the Eastern District of Virginia issued a 46-page opinion dismissing the case with prejudice. Kerpen v. MWAA, No. 16-1307, 2017 WL 2334987 (E.D. Va. May 30, 2017). The court rejected all of plaintiffs' claims ruling that MWAA, established by an interstate compact between Virginia and the District of Columbia, does not violate the Compact Clause of the Constitution and is not a federal instrumentality exercising federal power in violation of Article II of the Constitution. The court also gave little credence to plaintiffs' claims that the collection of tolls on the Dulles Toll Road was an illegal exaction in violation of the Due Process Clause or 42 U.S.C. § 1983, or that MWAA's use of toll road revenues for the Silver Line Metro Project and improvement of roads surrounding the Dulles Corridor

violated federal law or the lease agreement between MWAA and the Federal government. Plaintiffs then appealed to the Fourth Circuit.

On October 22, the Fourth Circuit affirmed the district court's decision. 907 F.3d 152 (4th Cir. 2018). In affirming the dismissal, the Fourth Circuit ruled that MWAA is not a federal entity. Applying the factors set out in Lebron v. Amtrak, 513 U.S. 374 (1995), the court found that MWAA was not created by the federal government but by Virginia and the District of Columbia. "MWAA is, therefore, a textbook example of an interstate compact." Id. at 159. In addition, the court held that MWAA is not controlled by the federal government, as the President only appoints three of MWAA's 17 board members. The court found that MWAA's lack of federal status was fatal to appellants' APA claim. Next, the court held that MWAA does not violate the non-delegation doctrine because MWAA does not exercise legislative or executive power. MWAA's authority arises from Virginia and the District of Columbia, and not through the federal government.

The Fourth Circuit also rejected plaintiffs' claim that MWAA violates the Guarantee Clause of the U.S. Constitution, which guarantees every state a republican form of government. Quoting the district court's ruling on this issue, the court noted that MWAA "does not violate Plaintiffs' right to a republican form of government because [MWAA's] authority is circumscribed by legislation and can be modified or abolished altogether through the elected legislatures that created it." Id. at 164. Finally, the Fourth Circuit noted that the Transfer Act that approved the creation of MWAA and the MWAA lease allow MWAA to spend airport revenues for the capital and operating costs of Dulles International Airport. The court relied heavily upon DOT's 2008 certification that MWAA was complying with the terms of the lease and found that "[t]he Secretary's approval in this case is entitled to 'great weight.'" Id. Not only did the court defer to the Secretary's certification, but the court also found the certification to be "plainly reasonable." Id. Pursuant to the Transfer Act and the lease, MWAA had a responsibility to carry out the Master Plan for Dulles Airport, which included an extension of Metrorail service to the airport. Thus, the court noted that the Secretary viewed Dulles Airport as more than just a terminal and runways, but also as encompassing "a broader infrastructure and critical adjunct improvements that facilitate access to Dulles." Id. at 165.

Appellants then filed a petition for writ of certiorari arguing again that MWAA is exercising "federal power" because it is a government agency overseeing federal property and that its authority comes from a federal statute. In response, MWAA and DOT argued that certiorari was unwarranted because both the Federal Circuit and the Fourth Circuit concluded that MWAA is not an agent or instrumentality of the federal government. The Court's denial of certiorari concludes the second round of litigation challenging MWAA's use of Dulles Toll Road revenue to fund construction of the Silver Line Metrorail Project. See Corr v. MWAA, 740 F.3d 295 (4th Cir. 2014), cert. denied, 136 S. Ct. 29 (2015).

Supreme Court Denies Certiorari in Alabama Railroad Taxation Case

On June 24, 2019, the Supreme Court denied certiorari in a decades long battle over Alabama's taxation of diesel fuel purchased by railroads. For the third time, the Alabama Department of Revenue and CSX Transportation, Inc., requested the Court to

determine whether Alabama's state sales and use tax discriminates against railroads and thus violates the Railroad Revitalization and Regulatory Reform Act ("4-R Act"). CSX Transp., Inc. v. Alabama Dep't of Revenue, No. 18-612 (S. Ct.).

Alabama applies a sales and use tax on diesel fuel purchased by railroads, but exempts fuel purchased by motor carriers and water carriers. CSX argued that Alabama is discriminating against railroads. In the first case before the Supreme Court, the Court determined that the 4-R Act's catch-all provision did allow CSX to challenge Alabama's sales and use tax and remanded the case for further proceedings. 562 U.S. 277 (2011). In 2013, the case made its way back to the Court, and the Court determined that the proper comparison class was the railroad's competitors, the motor carriers and the water carriers, and that a roughly equivalent tax imposed on a competitor could justify different tax treatment. 135 S. Ct. 1136 (2015). The Court once again remanded the case. On remand, the U.S. District Court for the Northern District of Alabama found that Alabama's tax was not discriminatory because Alabama had justified the exemption for motor carriers and water carriers. The court found that motor carriers paid a roughly equivalent motor fuels tax. As for the water carriers, Alabama argued that if it applied the sales and use tax to interstate water carriers, it could be in violation of the Commerce Clause. Thus, the court found that the threat of Commerce Clause litigation justified the State's decision to continue the sales and use tax exemption for water carriers' purchases of fuel.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's holding with regard to motor carriers, but reversed with regard to water carriers. The Eleventh Circuit held that future litigation risk was not sufficient to justify discrimination against the railroads. 888 F.3d at 1163. The State of Alabama filed a petition for writ of certiorari regarding the water carrier issue, and CSX filed a conditional cross-petition seeking review of the motor carrier issue if the Court granted certiorari. The Court requested the views of the United States, and the United States filed a brief arguing that the Eleventh Circuit correctly resolved the case and that further review was not warranted.

Court Remands Hobbs Act Jurisdictional Channeling Case

On June 20, 2019, the Supreme Court decided PDR Network, LLC v. Carlton & Harris Chiropractic, 139 S. Ct. 2051 (2019), in which the Court considered whether the Hobbs Act's "exclusive jurisdiction" provision requires courts to accept an agency's interpretation of a statute. In a unanimous decision by Justice Breyer, the Court side-stepped the question and remanded the case for consideration of two preliminary issues that had not been addressed by the U.S. Court of Appeals for the Fourth Circuit. The United States participated in this case as an amicus supporting the respondent.

The case arose out of an alleged violation of the Telephone Consumer Protection Act ("TCPA"), which generally prohibits the use of faxes to send "unsolicited advertisements." Petitioner publishes the Physicians' Desk Reference and sent a fax to Carlton & Harris Chiropractic offering a free version of the Reference. The TCPA allows for private rights of action to enforce its provisions, and Carlton & Harris filed a class action lawsuit arguing that petitioners violated the TCPA by sending an "unsolicited advertisement." PDR Network moved to dismiss the case because the fax did not offer anything for sale and, therefore, was

not an "unsolicited advertisement." Carlton & Harris responded by pointing to an Order by the Federal Communications Commission ("FCC") stating that "unsolicited advertisements" could include "free goods or services that are part of an overall marketing campaign to sell property, goods, or services." The U.S. District Court for the Southern District of West Virginia, conducting a Chevron analysis, interpreted the TCPA as only prohibiting faxes with a commercial aim and held that the FCC's Order supported this interpretation. On appeal, the Fourth Circuit reversed, holding that the Hobbs Act precluded the district court from considering the validity of the FCC Order. In addition, the Fourth Circuit held that the FCC Order was clear and that faxes promoting free goods qualify as "unsolicited advertisements."

The Supreme Court granted certiorari limited to the question of whether the Hobbs Act required the district court to accept the FCC's interpretation of the TCPA. In its decision, the Court remanded the case for consideration of two preliminary questions that the Fourth Circuit did not address: is the FCC Order an interpretive rule or a legislative rule, and did PDR Network have a "prior" and "adequate" opportunity to seek judicial review of the Order?

With regard to the first question, the Court noted that if the FCC Order is an interpretive rule, then it would not be binding on a district court. As to the second question, the Court noted that if PDR Network did not have a prior and adequate opportunity to seek judicial review of the Order, then the APA may permit PDR Network to challenge the validity of the Order in an enforcement proceeding. The Court stressed that it is a court of "review," not of "first view," and thus remanded the case for consideration of these two questions.

Justice Thomas (joined by Justice Gorsuch) wrote a concurring opinion explaining that the Fourth Circuit's decision would render the Hobbs Act unconstitutional by making the FCC Order unreviewable in this circumstance, thus stripping the courts of judicial power provided by Article III. Justice Thomas concluded his opinion by stating that the Fourth Circuit's decision "rested on the assumption that Congress can constitutionally require federal courts to treat agency orders as controlling law . . . . A similar assumption underlies our precedents requiring judicial deference to certain agency interpretations [citing Chevron]. This case proves the error of that assumption and emphasizes the need to reconsider it." Id. at 2057.

Justice Kavanaugh (joined by Justices Thomas, Alito, and Gorsuch) wrote a 19-page concurrence rejecting each of the government's arguments and ultimately finding that the Hobbs Act applies to facial, pre-enforcement challenges resulting in a declaratory judgment, but does not preclude as-applied challenges to enforcement actions that might require a court to interpret a statute.

Supreme Court Rules in Fourth Amendment DUI Case

On June 27, 2019, the Supreme Court decided Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019), a case with important implications for prosecutions for driving under the influence of alcohol ("DUI"). Mitchell sought to overturn his DUI conviction, which was based on the results of a post-arrest blood draw taken at a hospital while he was unconscious and unable to give consent. Mitchell argued that the State attempted to "create a new per se exception to the warrant requirement for blood tests of unconscious motorists

suspected of drunk driving." The Court thus was asked to resolve whether a State implied consent statute authorizing a blood draw from an unconscious motorist violates the Fourth Amendment's warrant requirement.

In a fractured decision, the Court held that while the Fourth Amendment normally prohibits unreasonable searches without a warrant, the exigent-circumstances doctrine generally permits a blood test without a warrant for determining blood alcohol concentration ("BAC") in the case of an unconscious DUI suspect. Writing for four justices, Justice Alito explained that there is a compelling public safety need for a blood test of drunk driving suspects who are unable to take a BAC breath test. The Court explained that in cases like this one, BAC evidence dissipates, and police officers should not have to choose between spending time on obtaining a warrant or attending to time-sensitive health, safety, and other law enforcement needs that were caused by the suspected drunk driving. The choice between seeking a warrant and attending to other time-sensitive duties is even more difficult when a drunk driving suspect is unconscious, as was the case with Mitchell. Due to Mitchell's unconscious state, the police officer also had to prioritize a medical emergency over seeking a warrant. The Court remanded the case to the Wisconsin Supreme Court to afford Mitchell the opportunity to show that his case is unusual because: (1) police officers would not have drawn his blood if they had not been seeking his BAC information; and (2) police officers could not have reasonably decided that obtaining a warrant would interfere with time-sensitive needs or duties.

Justice Thomas concurred with Justice Alito's decision, but argued that police officers should not be required to obtain a search warrant for a BAC test in any situation. Justice Thomas explained that dissipating BAC evidence in suspected drunk drivers is, in and of itself, an exigent circumstance.

Writing in dissent for three justices, Justice Sotomayor agreed that drunk driving poses a significant danger, but argued that if police officers have time to obtain a warrant, they must do so under the Fourth Amendment. Furthermore, Justice Sotomayor noted that the State of Wisconsin conceded that it did indeed have time to obtain a warrant and therefore waived a claim to exigent circumstances.

Also writing in dissent, Justice Gorsuch argued that the Court failed to address the question presented in the case—whether a Wisconsin statute that presumes implied consent for drivers who are incapable of consenting to a BAC test is constitutional. Justice Gorsuch explained that the litigants had not raised the exigent circumstances doctrine, and therefore, the Court should not have cited the doctrine in its decision.

This case followed the Court's earlier decisions in Missouri v. McNeely, 569 U.S. 141 (2013), and Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), which addressed Fourth Amendment questions in the DUI context. The United States, with the involvement of DOT and NHTSA, filed briefs and participated in oral argument in those cases, given the government's interest in these law enforcement issues. Although the United States did not file a brief in Mitchell, DOT and NHTSA closely monitored the case in light of the implications for DUI prosecutions and highway safety.

Supreme Court Imposes Limits on Seminole Rock and Auer Deference, But Declines to Eliminate It

On June 26, 2019, the U.S. Supreme Court declined to overrule two cases requiring courts to defer to an agency's interpretation of the agency's own ambiguous regulation, but imposed limits on such deference. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

The case involved a veteran who sought review of the denial of certain benefits by the Department of Veterans Affairs ("VA"), arguing that the denial was inconsistent with one of the agency's regulations. The U.S. Court of Appeals for the Federal Circuit held that the regulation was ambiguous. It then deferred to the VA's interpretation of the regulation, relying on Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) and Auer v. Robbins, 519 U.S. 452 (1997), which provide that an agency's interpretation of its own ambiguous regulation is controlling unless plainly erroneous or inconsistent with the regulation. The veteran then petitioned for certiorari and asked the Supreme Court to overrule Seminole Rock and Auer.

The majority – Justice Kagan, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor – held that Auer and Seminole Rock would not be overruled. The Court emphasized two important limits on Auer and Seminole Rock deference. First, deference is only appropriate if a regulation remains "genuinely ambiguous" after the reviewing court applies all the "traditional tools" of construction. Second, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." For example, the interpretation must be the agency's "authoritative or official position," must "implicate its substantive expertise," and must not be a new interpretation that creates "unfair surprise." The Court then held that stare decisis counsels strongly against overruling Auer and Seminole Rock in light of the decisions' long history and Congress's ability to overrule them. Finally, the Court reversed the Federal Circuit's decision, which did not properly evaluate whether deference was appropriate given the limits discussed above.

In a separate part of her opinion joined only by Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan defended the rationale behind Auer and Seminole Rock deference and responded to the petitioner's statutory, constitutional, and policy arguments against such deference.

Justice Gorsuch – joined by Justice Thomas, and in part by Justices Alito and Kavanaugh – wrote a separate opinion explaining why he would have overruled Auer and Seminole Rock. He argued that the doctrine is inconsistent with the Administrative Procedure Act, permits agencies to exercise the judicial power in violation of constitutional separation of powers principles, and is not justified by policy arguments. He also contended that stare decisis should not save the doctrine.

The Chief Justice and Justice Kavanaugh (joined by Justice Alito) each wrote short opinions. Both noted that the decision did not address the validity of Chevron deference, under which courts defer to agency interpretations of ambiguous statutes.

Supreme Court Calls for Views of United States in Aviation Preemption Case

On June 24, 2019, the U.S. Supreme Court called for the views of the United States in a case involving the question of whether, and to what extent, State law design defect claims

involving aircraft are impliedly preempted by the Federal Aviation Act and FAA's activities thereunder. Avco Corp. v. Sikkelee, No. 18-1140 (S. Ct.).

Plaintiff in the case is the wife of a pilot who died in a crash of a general aviation aircraft. She filed suit in 2007 against the plane's manufacturer and others, asserting State law tort claims based on an allegation that the crash was caused by a design defect in the plane's carburetor.

The U.S. District Court for the Middle District of Pennsylvania held that the Federal Aviation Act impliedly preempted the State law standards of care relied on by the plaintiff, that she could only bring State law tort claims based on violations of Federal standards of care, and that FAA's issuance of a type certificate established that the relevant Federal standards of care had been met. Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429 (M.D. Pa. 2010); Sikkelee v. Precision Airmotive Corp., 45 F. Supp. 3d 431 (M.D. Pa. 2014).

Plaintiff appealed to the U.S. Court of Appeals for the Third Circuit. At the court's request, DOT filed an amicus brief agreeing with the district court's ruling that State law standards of care were preempted. The Third Circuit, however, disagreed. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680 (3d Cir. 2016). Although the court had held in a prior case that State law standards of care were preempted in the "entire field of aviation safety," the court now determined that preemption only applied in cases involving "in-air operations," and not in products liability cases.

On remand, the district court held that the plaintiff's design defect claims were barred by conflict preemption, since it would have been impossible for the manufacturer to unilaterally adopt plaintiff's preferred design without seeking approval from FAA. Sikkelee v. Avco Corp., 268 F. Supp. 3d 660 (M.D. Pa. 2017). The Third Circuit again reversed, holding that conflict preemption did not apply since the manufacturer could have requested the FAA's approval for a design change. Sikkelee v. Precision Airmotive Corp., 907 F.3d 701 (3d Cir. 2018).

The manufacturer has asked the Supreme Court to review both Third Circuit rulings. The Solicitor General's Office at the Department of Justice is preparing a response to the Court's request for the views of the United States, working with DOT's Office of the General Counsel and FAA's office of the Chief Counsel.

Departmental Litigation in Other Federal Courts

D.C. Circuit Dismisses Challenge to FAA Slots Orders at JFK and LaGuardia Airports, New Petition Filed

On August 2, 2019, the U.S. Court of Appeals for the District of Columbia Circuit dismissed on standing grounds two consolidated petitions for review challenging two FAA orders regarding slots at JFK and LaGuardia (LGA) airports. Exhaustless, Inc. v. FAA, Nos. 18-1303, 18-1304 (D.C. Cir.). Petitioner Exhaustless, Inc., a developer of proprietary technology for slot allocation auctions, had claimed, among other things, that in issuing the LGA and JFK slots orders, FAA violated its order authority under 49 U.S.C. § 106(f)(3)(B)(i), the Administrative Procedure Act, the Airline Deregulation Act, and the Regulatory Flexibility Act. The court held that petitioner failed to demonstrate that vacating the orders would redress its alleged injury, finding that vacating the orders would simply leave takeoffs and landings at the airports unregulated, eliminating the need for the company's product at the federal level, and that the possible resulting demand for its product by the local airport authority was too speculative. The court noted that Exhaustless would have standing to seek review of a denial of a petition for rulemaking. On May 24, 2019, FAA dismissed a petition for rulemaking submitted by Exhaustless.

On August 2, 2019, Exhaustless sought review in the D.C. Circuit of FAA's May 24, 2019, decision dismissing Exhaustless' petition for rulemaking related to FAA's New York City area runway slot orders. Exhaustless, Inc. v. FAA, No. 19-1158 (D.C. Cir.). In its May 21, 2018, petition for rulemaking, Exhaustless petitioned FAA to (1) terminate all existing New York City area slots by removing the current airport designations under the International Air Transportation Association Worldwide Slot Guidelines for Newark Liberty International Airport (EWR), New York LaGuardia Airport (LGA), and John F. Kennedy International Airport (JFK); (2) designate EWR, LGA, and JFK as "Level A2OS – slot controlled" in accordance with a new standard created by Exhaustless; and (3) allow Exhaustless to manage the slot volumes at EWR, LGA, and JFK.

Having determined that the petition for rulemaking filed by Exhaustless did not address an immediate safety concern and therefore did not meet the criteria to pursue rulemaking at this time, FAA dismissed the petition in accordance with 14 CFR § 11.73(e).

Exhaustless' opening brief is due on November 12, 2019, FAA's response brief is due on December 12, 2019, and Exhaustless' reply brief is due on January 2, 2020.

Sixth Circuit Affirms Order in Favor of Tennessee Billboard Operator

On September 11, 2019, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court summary judgment ruling in favor of Plaintiff/Appellee William Thomas in Thomas v. Bright, et al., No. 17-6238 (6th Cir.), rejecting the State of Tennessee's appeal of a ruling on the constitutionality of the Tennessee Billboard Regulation and Control Act ("Billboard Act"), which provides for effective control of outdoor signs as required by the Highway Beautification Act ("HBA"). Plaintiff, a billboard operator, challenged the State's

denial of a permit for a non-commercial billboard displaying his thoughts and ideas, on property he owns, at a location in violation of the Billboard Act's sign spacing restrictions. The Billboard Act allows the display of signs along designated highways in commercial and industrial areas, subject to restrictions on size, spacing, and lighting contained in an agreement with FHWA. Had the sign been deemed an "on premises" sign, providing information about the sale of, or activities on, the property on which it is located, it would have been excepted from the restrictions.

The U.S. District Court for the Western District of Tennessee found that the Billboard Act is an unconstitutional, content-based regulation of speech because the "content of the message" on the sign determined whether it meets the on-premises exception. See Thomas v. Schroer, 248 F. Supp. 3d 868 (W.D. Tenn. 2017).

On appeal to the Sixth Circuit, the United States submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered through the sign regulations set forth in the HBA, implementing regulations, and related state laws. The government stated that it has a strong interest in ensuring that these provisions are correctly interpreted and subjected to appropriate First Amendment review. In the amicus brief and at oral argument, the government argued that the Court should uphold the on-premises exception in the Billboard Act as a permissible, content-neutral regulation of speech based on the nexus of the sign to the property, not its content. Moreover, the government argued its compelling interests in traffic safety and aesthetics justifies the legitimate and balanced restrictions in the HBA and parallel state law provisions.

The Sixth Circuit held the Billboard Act "has the effect of disadvantaging the category of non-commercial speech that is probably most highly protected: the expression of ideas." The Sixth Circuit also held that the Billboard Act "is not narrowly tailored to further a compelling interest and thus is an unconstitutional restriction on non-commercial speech." Finally, the Sixth Circuit further affirmed the district court's ruling that the Billboard Act is unconstitutional because there was no indication that the on-premises exception was severable from the rest of the BB Act.

On September 25, Tennessee DOT filed a petition for rehearing en banc, and on October 8, the court ordered appellee to respond to the petition.

Tenth Circuit Affirms Dismissal of Air Ambulance Claims, Leaves Open Important Issues

On April 25, 2019, the U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal of claims brought by a class of patients against an air ambulance carrier, holding that the claims were preempted by the Airline Deregulation Act of 1978 ("ADA"). Scarlett v. Air Methods Corp., 922 F.3d 1053 (10th Cir. 2019). The United States had intervened to defend the ADA's constitutionality and to offer its views on the proper application of the ADA.

The plaintiff class included individuals who were transported by air ambulance and who later received bills for allegedly exorbitant amounts. The patients brought suit in federal district court against the air ambulance carrier, claiming that because they and the carrier did not enter into express contracts and did not discuss the price of the services they received, State law provided that they

entered into implied contracts allowing the carrier to collect only a reasonable amount.

The Tenth Circuit affirmed the district court's determination that these claims were preempted by the ADA, which preempts any State law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

As an initial matter, the court agreed with the United States and the carrier that the ADA's preemption provision applies to any air carrier authorized by DOT to provide interstate air transportation, even when a specific claim is based on transportation that occurred within a single State.

The court did not reach the two preemption arguments raised by the United States. First, the United States had argued that if the patients stated a claim based on "implied-in-fact" contracts – actual agreements manifested by the parties' conduct – the ADA would not preempt that claim. While the court acknowledged that this might be the case, it held that the patients had not pled "implied-in-fact" contract claims and that the patients in fact relied on non-contractual State law equitable principles.

Second, the United States had argued that even if the patients relied on State law equitable principles, the ADA still would not preempt their claims. The United States argued that if the carrier transported a patient without entering into an express or implied contract, and the carrier nevertheless relied on State law equitable principles to insist that the patients were obligated to pay for the services they received, then the ADA should not stop patients from relying on those same principles with respect to the amount of their payment obligations. The court declined to reach this argument based on its view that the carrier does not rely on equitable principles to insist on payment. The court held that if the carrier does rely on equitable principles in collection lawsuits, patients will be free to argue that the carrier is impermissibly "trying to have it both ways."

The court rejected the patients' claim that application of the ADA would violate the Due Process Clause of the Fifth Amendment. Finally, the court held that the ADA did not preempt the request by one group of patients for a declaration that they had not entered into any contracts, and remanded that claim.

Ninth Circuit Declines to Stay FMCSA Decision Regarding Preemption of California's Meal and Rest Break Rules Pending Review

On December 21, 2018, FMCSA granted petitions filed by the American Trucking Associations and the Specialized Carriers & Rigging Association seeking a determination that California's Meal and Rest Break Rules ("MRB rules"), as applied to property-carrying commercial motor vehicle ("CMV") drivers subject to FMCSA's hours-of-service ("HOS") regulations, are preempted under 49 U.S.C. § 31141. Federal law provides for preemption of state laws on CMV safety that are more stringent than Federal regulations and (1) have no safety benefit; (2) are incompatible with Federal regulations; or (3) would cause an unreasonable burden on interstate commerce. In its December 21 decision, FMCSA determined that California's MRB rules are laws on CMV safety, are more stringent than the Agency's HOS regulations, have no safety benefits that extend beyond those already provided by the Federal Motor Carrier Safety Regulations, are incompatible with the Federal HOS regulations, and cause an unreasonable burden on interstate commerce. 83 Fed. Reg. 67,470 (Dec. 28, 2018).

On December 27, 2018, in International Brotherhood of Teamsters, Local 2785, et al., v. FMCSA, No. 18-73488 (9th Cir.), the International Brotherhood of Teamsters ("IBT") Local 2785 and an individual member filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit seeking review of FMCSA's December 21 preemption determination. Additionally, three petitions for review were filed by the International Brotherhood of Teamsters, the California Labor Commissioner, and individual drivers. IBT, et. al v. FMCSA, et al., No. 19-70323; Labor Commissioner for the State of California v. FMCSA, No. 19-70329; Duy Ly, et al. v. FMCSA, et al., No. 19-70413.

On April 2, 2019, IBT filed a motion asking the Ninth Circuit to stay enforcement of FMCSA's December 21 preemption determination until the court renders a decision on the petitions for review. IBT argued that without a stay it is more likely than not that petitioners would be irreparably harmed because their ability to vindicate their rights and to collectively bargain their terms of employment will be frustrated. IBT also argued that petitioners are likely to succeed on the merits because FMCSA exceeded its statutory authority in issuing the preemption determination, and that the balance of harms weighs in petitioners' favor. The government opposed the motion to stay arguing that petitioners have not demonstrated a substantial likelihood of success on the merits, nor have they shown irreparable injury warranting extraordinary relief.

On May 30, the court summarily denied the IBT's motion for stay. Petitioners, intervenor, and amici have filed their opening briefs, and the government's answering brief is due on November 29.

United States Asks Ninth Circuit to Hold That Federal Law Preempts California Meal and Rest Break Requirements for Flight Attendants

On September 3, 2019, the United States filed an amicus brief asking the U.S. Court of Appeals for the Ninth Circuit to hold that federal law preempts California's meal and rest break requirements as applied to flight attendants. Bernstein v. Virgin America, Inc., No. 19-15382 (9th Cir.).

The case was brought in 2015 on behalf of a class of California-based flight attendants for Virgin America, who alleged that the airline had violated the California Labor Code by (among other things) failing to provide required meal and rest breaks, failing to pay minimum wage for all hours worked, and failing to provide accurate wage statements. The U.S. District Court for the Northern District of California largely denied Virgin America's motion for summary judgment by, among other things, rejecting the contention that federal law preempts California's meal and rest break requirements. Bernstein v. Virgin America, Inc., 227 F. Supp. 3d 1049 (N.D. Cal. 2017). The court eventually granted summary judgment to plaintiffs on most of their claims and entered a judgment in the amount of nearly $77.8 million. Virgin America, along with its purchaser Alaska Airlines, appealed to the Ninth Circuit.

The amicus brief filed by the United States addresses only plaintiffs' claims pursuant to California's meal and rest break requirements. The United States argues that the requirements, as applied to flight attendants, are preempted by the Airline Deregulation Act of 1978 ("ADA"), which prohibits enforcement of State laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The United States argues that application of California's meal

and rest break requirements to flight attendants will have a significant impact on airline services and prices. It contends that because FAA regulations contemplate that flight attendants will be on-duty and on-call to perform critical safety tasks during flights, the off-duty breaks required by California can only be taken between flights. Such breaks, moreover, would have serious impacts on the airlines' complex system of flight scheduling. Alternatively, the United States argues that application of the California requirements to flight attendants would interfere with FAA's regulations governing safety and the efficient use of the navigable airspace, and therefore is barred by obstacle preemption principles.

D.C. Circuit Upholds Track Inspection Pilot Program

On October 11, 2019, the U.S. Court of Appeals for the District of Columbia Circuit denied the Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED") petition for review that challenged FRA's approval of a BNSF Railway Company ("BNSF") test program to evaluate automated track inspection technologies ("Test Program") and the temporary suspension of the regulation covering the frequency of visual track inspections, as necessary to carry out the Test Program. Bhd. of Maintenance of Way Employees Division/IBT v. FRA, et al., No. 19-1048 (D.C. Cir.).

On November 5, 2018, FRA issued a notice in the *Federal Register* granting a petition from BNSF to suspend 49 C.F.R.§ 213.233(c), which establishes the frequency of visual track inspections that are required by FRA's Track Safety Standards, to allow BNSF to conduct the Test Program and test new automated track inspection methodologies. BNSF's Test Program proposed multiple phases during which visual inspections (by BNSF track inspectors) and automated inspections (by equipment capable of detecting track defects) would be performed at different intervals. FRA's decision to approve the Test Program was made pursuant to 49 C.F.R. § 211.51(a), which allows FRA to temporarily suspend the compliance of a substantive rule if: (1) the suspension is necessary to conduct an FRA-approved test program, (2) the suspension is limited in scope and application, and (3) the suspension is conditioned on the observance of standards sufficient to assure safety. On November 16, BMWED filed a petition for reconsideration with FRA, requesting that the agency reconsider its decision pursuant to FRA's waiver procedures and/or revoke the suspension of 49 C.F.R. § 213.233(c).

On February 8, 2019, FRA denied BMWED's petition for reconsideration. In its decision, FRA first concluded that it had followed the proper procedures when granting BNSF's Test Program under 49 C.F.R. § 211.51, and it further concluded that it was not required to comply with its waiver procedures set forth under 49 C.F.R. Part 211, Subpart C. Second, FRA explained that the suspension of 49 C.F.R. § 213.233(c) is necessary for BNSF to conduct its Test Program so it can determine the effectiveness of new track inspection methodologies. Third, FRA described how the Test Program contains conditions to ensure safety during the suspension of the regulation regarding the frequency of track inspections. Finally, FRA confirmed how the Test Program's suspension of 49 C.F.R. § 213.233(c) is limited in scope and application.

Separately on February 8, 2019, FRA asked BMWED, the Association of American Railroads ("AAR"), and BNSF to address whether the stay of BNSF's automatic track

inspection program that had been granted during the government shutdown in January should be maintained, modified, or rescinded. FRA received comments from BMWED, AAR, and BNSF, and on April 5, FRA issued a decision letter lifting the stay effective April 15. On April 25, BMWED filed a petition for stay in the D.C. Circuit. On May 23, after briefing on the stay issue had concluded, the D.C. Circuit issued an order, granting in part and denying in part BMWED's stay petition. The order prevents BNSF from reducing the frequency of manual visual inspections below the level of testing performed in phase 2, but permits BNSF to continue with phase 2 with the current frequency of manual visual inspections.

In its brief, and at the September 12 oral argument, BMWED alleged that FRA's determination that the suspension was necessary for the Test Program and its conclusion that the suspension was conditioned on requirements that would assure safety were arbitrary and capricious and were not explained or supported in FRA's denial of its petition for reconsideration. Moreover, BMWED maintained that the reduction in the frequency of manual inspections that results from the suspension of 49 C.F.R. § 213.233(c) is contrary to FRA's regulations, including the regulation regarding the timing for remediation of track defects.

FRA countered BMWED's allegations in its brief and at oral argument. FRA emphasized that the record clearly supported its determination that the suspension was necessary for the Test Program. FRA explained the reduction in the frequency of the manual visual inspections that resulted from the suspension of § 213.233(c) was necessary in order to assess the effectiveness, efficiency, and safety of different combinations of automated and visual inspections. Additionally, FRA argued that it required BNSF to implement multiple conditions to assure safety prior to granting the Test Program. Moreover, FRA argued that its conclusion that the suspension was conditioned on requirements that would assure safety was supported in the record.

In its decision, the DC Circuit held that FRA engaged in reasoned decisionmaking when explaining why the suspension of 49 C.F.R. § 213.233(c) was necessary for the Test Program and it adequately explained how the Test Program implemented sufficient measures to assure safety.

Battery Pack Manufacturer Dismisses Lawsuit Against PHMSA and Agrees to Pay Civil Penalty

On August 22, 2019, the U.S. Court of Appeals for the Seventh Circuit dismissed the National Power Corporation's challenge to a PHMSA order assessing civil penalties for the company's violation of regulations governing the transportation of hazardous materials. The dismissal stemmed from a settlement in which National Power agreed to dismiss its case and pay the entire civil penalty assessed by PHMSA. Nat'l Power Corp. v. PHMSA, No. 19-2106 (7th Cir.).

The case involved PHMSA's finding that National Power had offered lithium ion batteries for transportation without complying with the provisions of a Competent Authority Approval issued by PHMSA. Among other things, PHMSA found that National Power had crossed out "Cargo Aircraft Only" on shipping labels, thereby improperly offering the batteries for shipment on passenger aircraft. The company filed an administrative appeal, arguing that the violations should have been pursued as part of a prior FAA enforcement

proceeding. PHMSA's Chief Safety Officer denied that appeal, noting that the two proceedings involved separate violations that occurred at different times. National Power petitioned the Seventh Circuit for review of PHMSA's determination.

Following a telephonic mediation conference, National Power agreed to dismiss its lawsuit and pay the entire civil penalty assessed by PHMSA. PHMSA agreed that National Power could make the payment in installments.

DOT Urges D.C. Circuit to Affirm Dismissal of Claims Related to Florida Passenger Rail Project

On September 24, 2019, the U.S. Court of Appeals for the District of Columbia Circuit held oral argument in an appeal by Indian River County, Florida, of the dismissal of its lawsuit against DOT related to the Brightline passenger rail project (also known as Virgin Trains USA, and formerly known as All Aboard Florida). Indian River County v. USDOT, No. 19-5012 (D.C. Cir.).

The project is a private passenger railroad that will connect Miami and Orlando. FRA conducted an environmental review of the project and issued its Record of Decision on December 15, 2017. On December 20, 2017, DOT authorized the issuance of $1.15 billion in tax-exempt Private Activity Bonds ("PABs") to fund Phase II of the project between West Palm Beach and Orlando. A group of project opponents brought a variety of claims against DOT, and the district court granted summary judgment for DOT in all respects. Indian River County v. USDOT, 348 F. Supp. 3d 17 (D.D.C. 2018). All plaintiffs except Indian River County settled with the project sponsor before the decision.

Indian River County appeals on two grounds. First, the County asserts that the district court incorrectly upheld DOT's determination that the project is a "surface transportation project which receives Federal assistance under title 23, United States Code" and is therefore eligible for an allocation of PAB authority under 26 U.S.C. § 142(m)(1)(A). Indian River County now concedes that the project is a "surface transportation project," but contends that it has not received Federal assistance under title 23. DOT argues that the County cannot challenge the project's eligibility for PABs because its interests do not fall within the "zone of interests" protected by the eligibility requirements. DOT also argues that the district court correctly held that the project received assistance under title 23 when the Florida Department of Transportation used title 23 funds, after planning for the Project began, to improve grade crossings along the project corridor.

Second, Indian River County challenges the district court's determination that FRA's environmental review process complied with NEPA, focusing on alleged deficiencies in the analysis of safety and noise impacts. DOT argues for the affirmance of the district court's thorough examination of these issues.

California Sues DOT over High-Speed Rail Grant Termination

On May 21, 2019, the State of California and the California High-Speed Rail Authority ("CHSRA") (collectively, "plaintiffs") filed a complaint against FRA and DOT for declaratory and injunctive relief in the U.S. District Court for the Northern District of California, challenging FRA's decision to terminate an agreement that obligated approximately $929 million for the construction of high-speed rail in California. California, et al. v. DOT, et al., No. 19-02754 (N.D. Cal.).

On May 16, 2019, FRA terminated Cooperative Agreement No. FR-HSR-0118-12, as amended (the "Agreement"), between FRA and CHSRA while also deobligating the approximately $929 million obligated by the Agreement. The Agreement funded final design and construction activities related to the First Construction Segment, a 119-mile section of new high-speed rail infrastructure (the "Project"), which CHSRA proposed as part of a larger State-wide system. Congress appropriated the Agreement funds in the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), for FRA's competitive grant program, the High-Speed Intercity Passenger Rail Program. FRA has another cooperative agreement with CHSRA that provided approximately $2.5 billion from the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5). FRA has not made any final decision related to that agreement.

FRA terminated the Agreement because of CHSRA's failure to comply with the terms of the Agreement and its failure to make reasonable progress to deliver the Project. Specifically, FRA found that CHSRA failed to submit essential deliverables, as required by the Agreement, and failed to demonstrate its ability to complete the Project, as defined by the Agreement. FRA's decision was preceded by a February 19, 2019, Notice of Intent to Terminate the Agreement (the "Notice"). In the Notice, FRA described its basis for the proposed termination and provided CHSRA with an opportunity to respond in writing. CHSRA provided a written response on March 4, 2019. After considering the record, including the March 4 response, FRA terminated the Agreement and deobligated the funds.

In their complaint, plaintiffs argue that FRA's decision was arbitrary and capricious and in violation of the APA. Plaintiffs also request that the court enjoin FRA from "reobligating or otherwise transferring the funds to other activities, programs, or recipients." On May 22, the parties filed a stipulation with the court, in which FRA agreed that any action to reobligate, transfer, or award the funds would only occur through a Notice of Funding Opportunity ("NOFO"). Plaintiffs agreed not to move for a temporary restraining order or preliminary injunction unless and until the government issues such a NOFO.

California, Environmental Groups Challenge DOT's SAFE One National Program Final Rule

On September 20, 2019, the State of California, twenty-two states, and three cities filed a lawsuit against DOT in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief against the agencies' SAFE Part One final rule. California, et al. v. Chao, et al., No. 19-02826 (D.D.C.). The lawsuit asserts that NHTSA exceeded its statutory jurisdiction in issuing a regulation on preemption, that the action was arbitrary and capricious in violation of the APA, and that NHTSA failed to comply with NEPA by not preparing an environmental impact statement. On September 27, 2019, the Environmental Defense Fund ("EDF") and eight other nonprofit organizations filed a similar lawsuit against DOT in the U.S. District Court for the District of Columbia, seeking a declaration from the court that the SAFE final rule is unlawful. Environmental Defense Fund, et al. v. Chao, et al., No. 19-02907 (D.D.C.). On the same day, EDF filed a protective petition for review of the SAFE final rule in the U.S. Court of Appeals for the District of Columbia Circuit. Environmental Defense Fund v. NHTSA, No. 19-1200 (D.C. Cir.).

On August 24, 2018, NHTSA and EPA jointly published an NPRM entitled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks." In the NPRM, the agencies proposed new and amended greenhouse gas ("GHG") and Corporate Average Fuel Economy ("CAFE") standards for model year 2021 to 2026 light duty vehicles. EPA also proposed to withdraw the waiver it had previously granted to California for that State's GHG and Zero Emissions Vehicle programs under Section 209 of the Clean Air Act. Additionally, NHTSA proposed regulatory text implementing its statutory authority to set nationally applicable fuel economy standards and preempting State and local programs.

On September 19, 2019, the agencies published a final rule entitled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program." In the rule, the agencies finalized the following two actions: (1) EPA announced its decision to withdraw California's waiver under the Clean Air Act; and (2) NHTSA finalized regulatory text concerning preemption of State and local laws and regulations related to fuel economy standards.

On October 15, defendants filed a motion to dismiss the two district court cases, or, alternatively to transfer them to the D.C. Circuit, because the joint final rule is subject to direct review in the D.C. Circuit and the D.C. Circuit should determine which court has jurisdiction over the final rule. Plaintiffs' opposition brief is due on November 14, and the government's reply brief is due on November 27.

DOT Asks Court to Reject Challenges by Flyers Rights to Denials of Rulemaking Petitions

On March 19 and March 21, 2019, Flyers Rights filed two petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging DOT's denial of two petitions for rulemakings. Flyers Rights Educ. Fund, Inc. v. USDOT, No. 19-1070 and 19-1071 (D.C. Cir.). DOT has asked the court to dismiss the cases because Flyers Rights lacks standing, or alternatively, to rule in its favor on the merits.

The lawsuits stem from two petitions for rulemaking filed by Flyers Rights. The first asked DOT to issue regulations limiting the fees charged by airlines for making changes to international itineraries. The second asked DOT to issue regulations governing the way airlines give passengers notice of their potential ability, under a provision of the Montreal Convention, to receive compensation for certain delays.

DOT denied both petitions on February 1, 2019. With respect to international change fees, DOT explained, among other things, that regulation of change fees would be inconsistent with the obligations of the United States under Open Skies agreements. With respect to delay compensation, DOT found that airlines were providing adequate notice and that there was insufficient evidence of consumer confusion to warrant rulemaking. Flyers Rights claims that both denials were arbitrary and capricious.

In its briefs filed with the D.C. Circuit, DOT contends that Flyers Rights does not have standing to sue on behalf of its purported "members" because it is not in fact a membership organization. DOT also argues that its denials were proper.

Both proceedings have been fully briefed. The court has scheduled oral argument for December 11.

D.C. Circuit Denies Stay of DOT Order Terminating Essential Air Service Eligibility for Hagerstown

On October 17, 2019, the U.S. Court of Appeals for the District of Columbia Circuit denied an emergency stay motion that sought to block DOT's orders terminating the eligibility of Hagerstown, Maryland for Essential Air Service ("EAS") subsidies. Bd. of County Comm'rs of Washington County, Md. v. USDOT, No. 19-1210 (D.C. Cir.).

Under the EAS program, DOT gives subsidies to airlines that provide service to certain small airports. Congress has imposed eligibility requirements that a location must satisfy in order to benefit from subsidies. One requirement provides that a location must have a daily average of at least 10 enplanements each fiscal year. *Id.* § 41731(a)(1)(B). The Secretary may waive this requirement if she is satisfied that the noncompliance "is due to a temporary decline in enplanements." *Id.* § 41731(e).

Hagerstown Regional Airport receives subsidized service from Southern Airways Express, which flies to and from Baltimore-Washington International Airport and Pittsburgh International Airport. Hagerstown, however, was out of compliance with the 10-enplanement requirement in Fiscal Years 2013, 2014, 2015, and 2017. DOT granted waivers for each of those years.

In March 2019, DOT issued an order finding that in Fiscal Year 2018 Hagerstown was again out of compliance with the 10-enplanement requirement, and tentatively deciding to terminate eligibility on that basis. Washington County – the airport's owner – admitted that Hagerstown was out of compliance, but asked for a waiver.

On August 23, 2019, DOT issued an order denying the waiver request and terminating Hagerstown's EAS eligibility effective October 18. The County petitioned for reconsideration, which DOT denied on October 11. The County immediately sued to challenge the decision and filed an emergency motion for a stay that would allow eligibility to continue during the litigation.

In opposing the stay motion, DOT argued that the County had not met the strict requirements for a stay. DOT contended that the County was not likely to succeed on the merits of its claims, because DOT had reasonably determined that Hagerstown's non-compliance in Fiscal Year 2018 was not due to a "temporary" downturn. In particular, DOT noted that Hagerstown had been out of compliance for four of the five years prior to Fiscal Year 2018, that several service changes had not allowed it to come into compliance, and that its close proximity to three major airports would make it difficult to recover enplanements. DOT also argued that the County had not shown that it would suffer immediate irreparable harm absent a stay, and had not shown that a stay would be in the public interest.

In its decision denying the stay, the court held that the County "ha[d] not satisfied the stringent requirements for a stay pending court review." The County's opening merits brief is due November 18, and DOT's response brief is due December 18.

Purple Line Plaintiffs Appeal Denial of EAJA Fees to the D.C. Circuit

On March 5, 2019, the U.S. District Court for the District of Columbia denied plaintiffs' motion for attorneys' fees under the Equal Access to Justice Act in Friends of the Capital Crescent Trail v. FTA et al., No. 14-01471 (D.D.C.). On May 14, 2019, plaintiffs filed an appeal, challenging the district court's finding that they are not a "prevailing party" under EAJA. Friends of the Capital Crescent Trail v. FTA et al., No.19-5138 (D.C. Cir.). Appellants claim they are entitled to $152,000 and argue that they should be granted time and expenses reasonably expended on the phase of the litigation in which plaintiffs contend they "unquestionably prevailed." The government filed its response brief on October 30, 2019, and appellants' reply is due January 15, 2020.

Government Asks Court to Dismiss Challenges to Executive Order

On July 15 and July 31, 2019, the government asked the U.S. District Court for the District of Columbia to dismiss two lawsuits challenging Executive Order 13771, contending that the plaintiffs lack standing to sue. Public Citizen v. Trump, No. 17-253 (D.D.C.); California v. Trump, No. 19-960 (D.D.C.).

Executive Order 13771 generally directs federal agencies to identify two existing regulations to repeal for every new regulation proposed or issued, and generally requires that the costs of certain new regulations stay within certain budgets. Public Citizen and other groups filed suit in February 2017, asserting that the Executive Order requires agencies to act unlawfully. The States of California, Oregon, and Minnesota filed a similar challenge in April 2019. Both suits name as defendants the President and a variety of agency officials, including the Secretary of Transportation.

In February 2018, the court ruled that the plaintiffs in the Public Citizen case lacked standing, but permitted the plaintiffs to file an amended complaint. Public Citizen v. Trump, 297 F. Supp. 3d 6 (D.D.C. 2018). In February 2019, the court held that the amended complaint plausibly alleged standing, but that plaintiffs had not proven they had standing. Public Citizen v. Trump, 361 F. Supp. 3d 60 (D.D.C. 2019).

Following the latest ruling, the court allowed the Public Citizen plaintiffs to obtain limited jurisdictional discovery, including by serving interrogatories and requests for admission on DOT and other agencies. The parties then filed cross-motions for summary judgment. At the same time, the government filed a motion to dismiss (or alternatively for summary judgment) in the California case, and the plaintiffs cross-moved for summary judgment. All the motions in both cases are limited to the question of standing.

The plaintiffs' principal theory of standing in both cases is that the Executive Order has caused agencies to repeal existing rules or delay the issuance of new rules, and these repeals and delays have caused injury to themselves or their members. One of the examples cited in both cases is NHTSA's proposed rule on vehicle-to-vehicle ("V2V") communications. The California plaintiffs also cite FHWA's repeal of the greenhouse gas ("GHG") performance measure. In its discovery responses and declarations, DOT makes clear that the Executive Order has not been a factor affecting any decisions about when or whether to issue a final V2V rule, and that the Executive Order did not cause the repeal of the GHG performance measure.

Tenth Circuit Allows DOT Time to Issue Proposed Rule Regarding Accessible Airplane Lavatories

On May 20, 2019, the U.S. Court of Appeals for the Tenth Circuit issued an order holding in abeyance a mandamus proceeding in which Paralyzed Veterans of America ("PVA") sought to compel DOT to issue a proposed rule governing the accessibility of lavatories on single-aisle aircraft. In re Paralyzed Veterans of Am., No. 18-1465 (10th Cir.). DOT has announced its intention to issue the proposed rule by December 2, 2019, and the court's order has the effect of permitting DOT to proceed on that timetable.

DOT has long required twin-aisle aircraft to include lavatories that are accessible to passengers with disabilities. In 2016, DOT formed a negotiated rulemaking committee to address several issues, including the accessibility of lavatories on single-aisle aircraft. The committee eventually reached a consensus on the lavatory issue.

In its mandamus petition, PVA claimed that Congress required DOT to issue a proposed rule by July 2017, and asked that the Tenth Circuit compel DOT to act. In its response to the petition, DOT noted that it had publicly announced that it intended to issue a proposed rule by December 2, 2019, and explained why issuance before that date would be practically impossible.

In its order, the court held the proceeding in abeyance, and required DOT to file status reports every 45 days through December 2. After DOT published information about the proposed rule it intends to issue, PVA asked the court to take the proceeding out of abeyance, asserting that DOT's proposed rule would not address accessible lavatories. The court denied that request on September 4, 2019, and the case remains in abeyance.

Two Putative Class Action Cases Alleging Discriminatory Hiring Process for Air Traffic Controllers

On September 13, 2019, the U.S. District Court for the District of Columbia in Brigida v. DOT, No. 16-2227 (D.D.C.), denied plaintiffs' Motion for Class Certification without prejudice. Andrew Brigida, a graduate of the Air-Traffic Collegiate Training Initiative ("CTI"), filed a purported class action lawsuit on behalf of himself and other graduates of CTI who applied for air traffic control specialist ("ATCS") positions in 2014, claiming that FAA's decision to abolish existing applicant hiring inventories (sometimes called lists or registers) was motived by an attempt to increase the number of minority and female ATCS hires, and that the decision violated Title VII of the Civil Rights Act of 1964. Plaintiff also alleges these decisions violate the purported class's Fifth Amendment right to equal protection by depriving it of a protected interest without due process. Plaintiff's complaint centers on FAA's use of a biographical assessment in the hiring of ATCS, contending that it was discriminatory. Plaintiffs have until October 31 to file an amended complaint, which would be their fourth amended complaint to date.

On June 26, 2019, in a case similar to Brigida filed in the Northern District of Texas, the court granted FAA's Motion to Transfer Venue to the District Court for the District of Columbia. In Johnson v. DOT, No. 19-1916 (D.D.C.), Lucas Johnson, a 2013 CTI graduate, filed a class action complaint on September 12, 2018, alleging discrimination on the basis of race in the ATCS hiring process. Prior to filing his district court action, Johnson had also filed administrative individual and class action complaints before the EEOC, alleging that he and those

"similarly situated" to him were discriminated against through FAA's implementation of biographical assessments in 2014 and 2015 as part of the ATCS hiring process. Johnson applied for an ATCS position in February 2014 and March 2015, but failed the biographical assessment portion of the applications. As a result, Johnson did not advance to the next step of the hiring process. Johnson and the putative class alleged the changes to the ATCS hiring process violated Title VII because they were designed to favor minority applicants in order to increase diversity among ATCS.

On December 5, 2018, Johnson filed an amended complaint, which was substantially similar to his initial complaint. On March 8, FAA filed a motion to dismiss, or in the alternative, a motion to transfer venue to the District of Columbia.

Mandamus Petition Filed against FAA and National Park Service over Air Tour Management Plans for Certain National Parks

Public Employees for Environmental Responsibility and Hawaii Coalition Malama Pono filed a Petition for Mandamus in the U.S. Court of Appeals for the District of Columbia Circuit on February 14, 2019, seeking to compel FAA and the National Park Service ("NPS") to prepare Air Tour Management Plans or Voluntary Agreements for seven national park units throughout the continental United States and Hawaii. In Re: Public Employees for Environmental Responsibility, No. 19-1044 (D.C. Cir.). Petitioners had previously filed a similar action against FAA only. That case was dismissed on November 13, 2018.

On May 1, 2019, the court ordered FAA and NPS to file a response to the petition. FAA and NPS filed their response brief on July 1. Petitioners filed their reply brief on July 15. On September 30, FAA and NPS filed their comprehensive, proposed project schedule with the court. The court has scheduled oral argument for December 9.

Court Denies Government's Motion to Dismiss Complaint Alleging that PHMSA Violated Provision of Mineral Leasing Act

On May 23, 2019, the U.S. District Court for the District of Montana denied DOT/PHMSA's Motion to Dismiss in WildEarth Guardians v. Chao, et al., No. 18-110 (D. Mont.), in which plaintiff alleges that PHMSA failed to comply with the Mineral Leasing Act ("MLA") by not "causing the examination of all [oil and gas] pipelines and associated facilities on Federal lands" at least once a year and causing "the prompt reporting of any potential leaks or safety problems" on such lands. Specifically, plaintiff alleges that PHMSA violated, and continues to violate, certain provisions of the MLA because PHMSA's regulations exempt certain pipelines from federal oversight, and the MLA provides no such exemption. Plaintiff seeks injunctive relief in the form of requiring PHMSA to identify all oil and gas pipelines and associated facilities on federal lands, catalogue when they were last examined, and ensure that each segment and associated facility is examined at least annually going forward.

The government responded to the Complaint by filing a Motion to Dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The government's position rests on numerous legal grounds. First, the government argued

that the courts of appeals have exclusive jurisdiction over the issues raised in the Complaint. Specifically, the government argued that the Complaint does not seek to compel agency action, but rather it challenges PHMSA's regulations. As such, the issues in the case fall squarely under 49 U.S.C. § 60119(a)(1)'s judicial review provision and must be brought in the courts of appeals.

Second, the government argued that even if appellate court jurisdiction is not exclusive, plaintiff has no viable claim under the APA due to the availability of direct review in the courts of appeals. Finally, the government argued that plaintiff had not properly alleged Article III standing because plaintiff has not pled any facts that tie its alleged injuries – aesthetic harms and health concerns from potential leaks – to PHMSA's purported failure to "cause" pipeline examinations.

Plaintiff's opposition to the government's Motion to Dismiss argued that its claims do not fall within the purview of 49 U.S.C. § 60119, which requires review of substantive challenges to Pipeline Safety Act ("PSA") regulations in the courts of appeals. Rather, plaintiff asserts that its Complaint is a failure to act case under 5 U.S.C. § 706(1) of the APA and is properly before the district court. Plaintiff also argued that the Complaint alleges sufficient facts to support standing at the initial pleading stage.

In denying the government's Motion to Dismiss, the court first rejected the argument that the claims brought by plaintiff are challenges to PHMSA's regulations and therefore can only be brought in the courts of appeals. The court held, among other things, that adjudication in district court would be preferable because there is no administrative record, and "resolution of this issue presumably would require the Court, with its fact-finding capability, to develop a record of PHMSA's inspection activities."

Second, the court rejected the government's position that that even if the claims are not considered challenges to PHMSA's regulations, district court review under the APA is not available since APA review requires that "there is no other adequate remedy in a court", and WildEarth Guardians could have challenged PHMSA's alleged violation of the MLA in a court of appeals.

Third, the government argued that WildEarth Guardians did not state an APA claim to compel an action unlawfully withheld, since its claim relates to the scope of an action that PHMSA *did* take (issuance of the regulations), rather than its failure to take some other action (causing annual inspection of all pipelines crossing federal lands). The court held that the Complaint states a claim, but did not engage with these arguments.

Finally, as to the government's argument that WildEarth Guardians failed to adequately allege an injury caused by PHMSA's purported violation, the court held that it was sufficient at the pleadings stage to make generalized allegations of an injury, which WildEarth Guardians did by alleging that its members can "see, hear, and smell leaking pipelines while recreating on public lands."

On June 6, 2019, the court issued a scheduling order stating that the merits will be resolved via cross-motions for summary judgment, and directed the plaintiff to file its motion for summary judgment by October 26, 2019, and the government to file its response and combined opposition and cross-motion for summary judgment no later than December 12, 2019.

FAA Implementation of D.C. Circuit Decision Regarding Small UAS Registration Challenged Again

On August 9, 2019, the U.S. District Court for the District of Columbia granted FAA's motion to dismiss for lack of standing and failure to state a claim in Taylor v. FAA, No. 18-35 (D.D.C.). Robert Taylor, the owner of a small UAS, had filed an amended complaint to revive his challenge to FAA's small UAS registration requirement after the district court granted the government's motion to dismiss his original complaint for lack of standing on November 26, 2018. Upon reviewing Mr. Taylor's amended complaint, the court found that his standing defect was not cured and additionally that he had not succeeded in stating a claim with respect to alleged violations of the Privacy Act, the Little Tucker Act, or the Constitution, and that there was no basis for Mr. Taylor's claim that FAA benefited from unjust enrichment. This dismissal concludes the last pending litigation regarding the Part 48 Registration Rule.

Robert Taylor's brother, John Taylor, previously challenged the FAA's small UAS registration requirement in D.C. Circuit. Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. 2017). After the D.C. Circuit vacated the small UAS registration requirement to the extent it applied to certain model aircraft that met the definition and operational requirements of section 336 of the FAA Modernization and Reform Act of 2012, the Taylor brothers filed several suits in the U.S. District Courts for the Districts of Maryland and District of Columbia challenging FAA's implementation of the D.C. Circuit's decision. On December 12, 2017, FAA's authority to require registration for small UAS was restored with the enactment of the National Defense Authorization Act for Fiscal Year 2018.

Decertified DBE Challenges DOCR's Decision to Uphold the Decertification

On June 13, 2019, SJA Construction, Inc., a Disadvantaged Business Enterprise ("DBE") that was decertified for exceeding the statutory average annual gross receipts cap, filed an action in the U.S. District Court for the Eastern District of Pennsylvania to challenge a decision of the Departmental Office of Civil Rights ("DOCR") to uphold the decertification. SJA Constr., Inc. v. DOT, No. 19-2572 (E.D. Pa.). Plaintiff is a construction company that had previously been certified as a DBE by the Pennsylvania Unified Certification Program ("PAUCP"). In January 2018, after affording plaintiff notice and an opportunity for a hearing, PAUCP determined that plaintiff's average annual gross receipts for the preceding three years had exceeded the statutory maximum of $23.98 million, and consequently, decertified plaintiff. Plaintiff filed an administrative appeal of the PAUCP's decision with DOCR, which upheld the decertification.

In its appeal before DOCR and in its district court complaint, plaintiff did not dispute that its annual average gross receipts had exceeded the statutory maximum, but instead argued that DOT had failed to make annual adjustments to the statutory maximum for inflation. Plaintiff sought to have the court compel DOT to adjust the $23.98 million gross receipts maximum for inflation and argued that by failing to do so on an annual basis, the Department had violated the APA.

After discussions with plaintiff, DOCR determined, based on new data, that SJA's

gross receipts no longer exceed the current maximum. In addition, DOT agreed going forward to adjust the statutory maximum for inflation. Accordingly, on October 21, the parties filed a joint stipulation of dismissal without prejudice, thus terminating the litigation.

Cause of Action Institute Files FOIA Lawsuit

On May 23, 2019, the Cause of Action Institute filed suit in the U.S. District Court for the District of Columbia against DOT, almost a dozen other federal agencies, the Office of Management and Budget, and the Council of the Inspectors General on Integrity and Efficiency seeking the production of documents in response to its October 29, 2018, FOIA requests seeking records related to each agency or entity's implementation of the "foreseeable harm" standard, which is codified in the FOIA Improvement Act of 2016, 5 U.S.C. § 552(a)(8)(A)(i)(I). Cause of Action Institute v. Dep't of the Interior, et al., No. 19-1507 (D.D.C.). Under this standard, an agency may invoke a FOIA exemption to withhold records only if it reasonably foresees that disclosure would harm an interest protected by the exemption. In addition, Cause of Action also sought all communications between each agency or entity, the DOJ Office of Information Policy, the White House, and Congress regarding the "foreseeable harm" standard.

On July 12, 2019, the government filed an answer, and on July 29, the parties filed a joint status report in which the government indicated an intention to provide Cause of Action with an initial response by September 27. The parties filed another joint status report on October 11. DOT is processing the potentially responsive documents.

Restore Public Trust Files FOIA Lawsuit Seeking Correspondence with the Foremost Group

On June 11, 2019, Restore Public Trust filed suit in the U.S. District Court for the District of Columbia against DOT seeking the production of documents in response to its December 4, 2018, FOIA request seeking all correspondence to or from a list of specific DOT custodians and certain executives of the Foremost Group. Restore Pub. Trust v. DOT, No. 19-1677 (D.D.C.). Restore Public Trust also seeks the production of documents in response to its May 28, 2019, FOIA request seeking records related to the Secretary's travel expenses.

An initial production was processed and released to the plaintiff on September 20, 2019. Additional monthly rolling productions began in October. A joint status report is due on December 16, 2019.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

Motion to Dismiss Deferred, Briefing Ongoing in Howard County, Maryland Challenge to BWI Cargo Facility Improvements

On January 14, 2019, Howard County, Maryland filed a petition for review challenging FAA's October 23, 2018, approval of cargo facility improvements at BWI Airport. Howard County, Maryland v. FAA, No. 19-1062 (4th Cir.). The cargo facility improvements and Written Re-Evaluation, which is being challenged in this case, were requested by the Maryland Aviation Administration, and the State has joined the lawsuit as a respondent. The petitioner claims that FAA made its decision in violation of NEPA, Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act, as well as FAA policy and regulations.

FAA moved to dismiss the petition for review as untimely, and the court initially stayed merits briefing in the case pending resolution of the motion to dismiss. Subsequently, the court referred resolution of the motion to dismiss to the merits panel, and merits briefing has been completed pending the court's decision on FAA's October 25 motion to file a surreply brief.

FAA Seeks Rehearing in FOIA Consultant Corollary Case

On April 24, 2019 U.S. Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgment for FAA in this FOIA case challenging FAA's withholding of certain requested documents related to biographical data and attorney-client communications pertaining to an air traffic control specialist. In Rojas v. FAA, 17-55036 (9th Cir.), the court rejected FAA's reliance on the consultant corollary as a basis for FOIA Exemption 5 withholdings and held that FAA's search had been inadequate. On August 1, FAA filed a petition for panel rehearing or rehearing en banc. The court ordered appellant to file a response to the petition, which appellant filed on October 11.

FAA Part 16 Decision Challenged in the Ninth Circuit

On January 14, 2019, the City of Casa Grande filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging an FAA Part 16 decision which affirmed that the City is in violation of its airport sponsor grant assurance obligations. City of Casa Grande v. FAA, No. 19-70137 (9th Cir.).

In January, 2016, Luther Kurtz and Skydive Coastal California d/b/a Phoenix Area Skydiving (the original complainants) filed a complaint with FAA against the City of Casa Grande under 14 CFR Part 16 claiming that the City of Casa Grande violated Grant Assurances 22 *Economic Nondiscrimination*, and 23, *Exclusive Rights*. The City of Casa Grande is the owner and operator of Casa Grande Municipal Airport in Arizona. Kurtz and Skydive Coastal alleged that they were economically unjustly discriminated against by the City when the City refused to allow a Parachute Drop Zone on the airport. They further argued that the City created an exclusive right by preventing their skydiving business from having offices at the airport. On review of the pleadings and evidence

presented by both parties, the Director determined that the City is in violation of its federal obligations under the grant assurances and that, with proposed mitigation measures, the airport can safely accommodate an on-airport Parachute Drop Zone. The Associate Administrator affirmed the Director's Decision in a Final Agency Decision issued on November 19, 2018.

Petitioner's opening and respondent's answering briefs were originally due in April and May, 2019 respectively, but the court stayed the briefing schedule pending the outcome of mediation. Mediation conferences have been held periodically. A proposal to permit skydiving was on the City's July 8 agenda, but the discussion was postponed due to skydiving accident resulting in a parachutist's death on July 5 near the airport. In light of the tragic event, the mediator on July 19 granted the City an additional 30 days to continue to resolve the matter. A mediation conference is scheduled for November 7.

District Court Issues Final Judgment in Challenge to Drone Advisory Committee Proceedings, Plaintiff Files Interlocutory Appeal

On July 26, 2019, the U.S. District Court for the District of Columbia granted plaintiff's consent motion to enter final judgment as to all claims in Electronic Privacy Information Center v. FAA, et al., No. 18-833 (D.D.C.), allowing plaintiff Electronic Privacy Information Center ("EPIC") to file an interlocutory appeal of the court's partial dismissal of its complaint. EPIC claims that FAA's Drone Advisory Committee violated open meeting requirements and public record access requirements when the parent and subcommittee records were not made available to the public, and their meetings were not publicly open.

Defendants filed a motion to dismiss, which was granted in part. The court dismissed EPIC's claim that subcommittee meetings were subject to the Federal Advisory Committee Act open meeting and public record access requirements. However, the court found that it could not grant defendants' motion to dismiss regarding the public access record requirements pertaining to the parent committee since the record was not clear whether all parent committee records had been made publicly available. FAA was required to compare those documents that had been made available to the parent committee with those made available to the public. Upon review, FAA found there were documents that were required to be made available to the public that were not, and FAA provided them to EPIC and posted them on the FAA website.

On September 4, 2019, EPIC filed notice of appeal pertaining to the court's decision relating to the subcommittee obligations. Electronic Privacy Information Center v. Drone Advisory Committee, et al., No. 19-5238 (D.C. Cir.).

FAA One of Many Defendants in Multidistrict CERLA Litigation

The Atlantic City Municipal Utilities Authority ("ACMUA") has brought suit against FAA for recovery of "response costs" pursuant to CERCLA, 42 U.S.C. 9601 *et seq.* Atlantic City Municipal Utilities Authority v. FAA, et al., MDL 2873, Individual Case No. 19-04973 (D.S.C.). This case, originally filed in the U.S. District Court for the District of New Jersey, is one of over 100 cases nationwide consolidated into multidistrict litigation (MDL) in the U.S. District Court for the District of South Carolina and is styled: Aqueous Film-Forming Foams (AFFF) Products Liability Litigation. Most of the individual cases comprising the MDL

name manufacturers of AFFF, and not federal government agencies, as defendants. The cases that do name federal government defendants primarily name various Department of Defense agencies. The claim against FAA is the only case that names a federal civilian agency as a defendant.

Plaintiff ACMUA is the water purveyor for Atlantic City, New Jersey. Pursuant to a 1984 FAA-ACMUA agreement, nine of ACMUA's 12 drinking water wells are located on the FAA's Technical Center property and draw drinking water from a reservoir located on that property. The lawsuit alleges that since the 1970s, FAA's use and discharge of AFFFs containing, per- or poly-fluoroalkyl substances contaminated the groundwater on FAA property, which subsequently caused contamination of ACMUA's drinking water wells. Plaintiff alleges that because of the contamination, it has incurred and will continue to incur substantial costs to treat the allegedly contaminated drinking water wells. Plaintiff contends that FAA is liable for those costs under CERCLA.

The case is in the early stages of litigation. The Judicial Panel on Multidistrict Litigation determined that the individually-filed AFFF cases involved common questions of law and fact such that centralization of the cases was appropriate. The Department of Justice filed a motion to sever and remand the claims against the federal government, but the court denied that motion, rejecting the argument that the federal environmental claims were sufficiently distinct from the product liability claims against the AFFF manufacturer defendants. Accordingly, the case against FAA and the other federal defendants will remain in the MDL.

On January 2, 2019, the court issued Case Management Order No. 1, which provided initial details regarding case consolidation and related organizational matters. The case is currently in discovery, and in August 2019, FAA received a request for the production of documents.

Federal Highway Administration

Eighth Circuit Hears Oral Arguments in Arkansas Highway Expansion Case

On September 26, 2019, the U.S. Court of Appeals for the Eighth Circuit heard oral argument in Wise, et al. v USDOT, et al., No. 18-03016 (8th Cir.). This environmental case involved a road-widening project along I-630 in Little Rock.

Plaintiffs' complaint alleged that defendants improperly classified the project as a Categorical Exclusion ("CE") and failed to adequately analyze various environmental impacts in violation of NEPA and the APA. Plaintiffs filed a Motion for a Temporary Restraining Order seeking to enjoin construction and block the imminent demolition of a bridge. The district court held an evidentiary hearing and then denied plaintiffs' Motion for a TRO, allowing construction to proceed as planned. The district court held that plaintiffs failed to show "a probability of success in establishing that the defendants' decision to classify the I-630 project as a CE was arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law." The court also found that the project was, in fact, properly classified as a CE. Finally, the district judge held that each of the relevant factors to be considered in deciding whether to issue injunctive relief weighed in favor of Defendants. The parties are now awaiting a ruling by the Eighth Circuit.

District Court Finds for FHWA in Colorado C-470 Expansion Project NEPA Case, Plaintiffs File Appeal

Highlands Ranch Neighborhood Coalition v. Cater, No. 16-1089 (D. Colo), involves the widening of C-470, a highway located in the southwest Denver metropolitan area. The project seeks to add tolled express lanes to an existing facility. In the district court, plaintiff claimed that FHWA's Finding of No Significant Impact was arbitrary and capricious with respect to the noise analysis contained in the associated Revised Environmental Assessment. On April 26, 2019, the district court issued a Final Order finding that FHWA did comply with NEPA based on submissions that supplemented the original administrative record. On May 28, plaintiff filed a notice of appeal to the U.S. Court of Appeals for the Tenth Circuit (No. 19-1190). Appellant's opening brief was filed on September 30, and appellee's response brief is due on November 29.

U.S. District Court in Seattle Grants Summary Judgment Motion in Floating Bridge Replacement Project

On August 20, 2019, the U.S. District Court for the Western District of Washington granted summary judgment in favor of FHWA and the Washington Department of Transportation on all counts in Montlake Community Club v. Mathis, No. 17-1780 (W.D. Wash.). The case involves the SR 520 Floating Bridge Replacement Project in Seattle Washington (SR 520 Project). The court held that: (1) certain claims related to NEPA decisions prior to a 2018 NEPA Reevaluation were time barred; (2) the decision contained in the 2018 Reevaluation was not arbitrary and capricious; and (3) no new action was required by FHWA related to Section 106 of the Historic Preservation Act. Plaintiffs were owners of or otherwise had an interest in the Montlake Market, a neighborhood grocery store that was subject to condemnation as a result of the SR 520 Project. Plaintiffs' initial complaint claimed that FHWA and Washington DOT should have prepared a supplemental environmental impact statement before proceeding with the project. Following the initial complaint, FHWA completed a Reevaluation, concluding that the demolition of the Montlake Market would not result in any new significant impacts and that the original NEPA decision remained valid. Plaintiffs challenged the NEPA Reevaluation in an amended complaint, which has now been dismissed.

Settlement Agreement Signed in the Southeast Extension Project Case – North Carolina

On August 22, 2019, a settlement was reached in Sound Rivers, Inc., et al. v. U.S. Fish and Wildlife Service, et al., No. 18-97 (E.D.N.C.). The settling parties include the North Carolina Department of Transportation, Sound Rivers, Inc., the Center for Biological Diversity, and Clean Air Carolina, which was represented by the Southern Environmental Law Center. The federal defendants did not contribute to the settlement, but were dismissed under the joint Stipulation to Dismiss with Prejudice filed on September 17, 2019.

The case involved challenges under NEPA and the Endangered Species Act to the Southeast Extension project, which will extend the Triangle Expressway from the NC 55 Bypass in Apex, North Carolina to US 64 / US 264 (I-495) in Knightdale, completing the 540 Outer Loop around the greater

Raleigh area. The estimated cost of the project is approximately 2.2 billion dollars.

Lawsuit Filed Challenging Little Rock Highway Expansion

On May 20, 2019, a group of plaintiffs filed suit against FHWA, DOT, and the Arkansas Department of Transportation seeking declaratory and injunctive relief related to the I-30 Crossing Project in Little Rock. Plaintiffs in Little Rock Downtown Neighborhood Assn, et al. v. FHWA, et al., No. 19-00362 (E.D. Ark.), allege the Project warrants an Environmental Impact Statement rather than an Environmental Assessment under NEPA. The Project will widen and re-construct a 7.3-mile corridor of Interstate 30, replacing an existing structurally deficient six-lane bridge with an expanded ten-lane bridge. Plaintiffs agreed to delay seeking a preliminary injunction in the case given that construction will not begin before June 2020.

Complaint Filed Challenging North Carolina's Mid-Currituck Bridge Project

North Carolina Wildlife Federation, et al. v. NCDOT, et al., No. 19-00014 (E.D.N.C.), involves the Mid-Currituck Bridge project in North Carolina, which will create a second crossing of the Currituck Sound in the Outer Banks. The 7-mile toll project includes a two-lane bridge connecting the Currituck County mainland to the Outer Banks. The project also includes a second two-lane bridge that spans Maple Swamp on the Currituck County mainland. The estimated cost of the project is approximately $491 million dollars.

A collection of local citizens and environmental groups filed a complaint against the North Carolina Department of Transportation ("NCDOT") and FHWA on April 23, 2019. Plaintiffs, represented by the Southern Environmental Law Center, seek declaratory and injunctive relief based on alleged violations of the APA and NEPA. Plaintiffs maintain that FHWA and NCDOT improperly issued a NEPA Reevaluation in 2019 and should instead prepare a Supplemental Environmental Impact Statement. The case has been selected for mediation, and the administrative record will be filed by December 13, 2019.

Complaint Filed Challenging Maine DOT's Frank J. Wood Bridge Improvement Project

Historic Bridge Foundation v. Chao, No. 19-00408 (D. Me.) involves a complaint filed on September 6, 2019, by The Friends of the Frank J. Wood Bridge against the DOT. The complaint seeks declaratory and injunctive relief based on alleged violations of NEPA and Section 4(f) of the Department of Transportation Act of 1966. The project proposes replacement of the Frank J. Wood Bridge Project in Topsham, Maine. Plaintiffs allege that defendants failed to comply with NEPA by not preparing an Environmental Impact Statement to evaluate certain significant impacts to the historic bridge and protected marine species and aquatic habitat. Plaintiffs further allege that defendants violated Section 4(f) by dismissing, based on inaccurate cost data, a feasible and prudent avoidance alternative, *i.e.*, rehabilitation of the bridge.

Lawsuit Filed Challenging North Carolina Durham Freeway

Williams v. Resler, et. al., No. 19-631, (M.D.N.C.) is a NEPA challenge by a pro se plaintiff to the selection of the preferred alternative for the East End Connector

Project in North Carolina. Construction on the Project began in 2015. Plaintiff claims that the decision by FHWA and NCDOT to issue a Finding of No Significant Impact for the Project in 2011 violated NEPA, Title VI of the Civil Rights Act of 1964, Executive Order 12898 (Environmental Justice), and the Uniform Relocation Assistance and Real Property Acquisition Act of 1970. Plaintiff filed, and lost, an administrative Title VI claim regarding the project in September 2015. His administrative Title VI claim alleged, among other things, that the project would result in disproportionate air quality impacts upon the minority and low-income residents.

Federal Motor Carrier Safety Administration

Fourth Circuit Affirms Dismissal of Motor Carrier's FTCA Challenge to Compliance Review and Civil Penalty

On October 7, 2019, in Senn Freight Lines v. United States, No. 19-1177 (4th Cir.), the U.S. Court of Appeals for the Fourth Circuit, in an unpublished, per curiam opinion, summarily upheld on briefs the U.S. District Court for the District of South Carolina's dismissal of a complaint filed by Senn Freight. In its complaint, filed pursuant to the Federal Tort Claims Act ("FTCA"), Senn Freight alleged that FMCSA conducted a compliance review and negligently cited the company for financial responsibility and driver record violations. Senn Freight Lines, Inc., v. United States, No. 18-227 (D.S.C.). Senn Freight contended that there was no factual basis for these violations and that the agency improperly downgraded its safety rating to "Conditional" and issued a $17,400 civil penalty. Senn Freight further claimed that FMCSA's negligence resulted in the company incurring increased insurance premiums totaling $195,000. Senn Freight sought money damages of $212,400 for its increased insurance premium and its payment of the civil penalty.

FMCSA filed a motion to dismiss, arguing that although Senn Freight's claims were styled as FTCA claims, they were actually attempts to challenge the compliance review and the resulting civil penalties. The agency contended that the Hobbs Act, 28 U.S.C. § 2342(3)(A), was the governing jurisdictional statute and, therefore, the district court lacked subject matter jurisdiction over Senn Freight's claims. Moreover, because Senn Freight failed to file suit within the 60-day filing period provided under the Hobbs Act, its claims were time-barred. FMCSA argued that the district court also lacked jurisdiction over Senn Freight's claims regarding the civil penalty because Senn Freight failed to exhaust its administrative remedies.

In granting FMCSA's motion to dismiss, the district court agreed with the agency's argument that while Senn Freight's claims were styled as FTCA claims, the motor carrier was essentially attempting to challenge FMCSA actions that may only be reviewed in the courts of appeals under the Hobbs Act.

On Remand, District Court Dismisses Plaintiffs' Challenge to FMCSA's Pre-employment Screening Program

On September 16, 2019, on remand from the D.C. Circuit, the U.S. District Court for the District of Columbia in Owner-Operator Independent Drivers Association, et al. v. USDOT, et al., No. 12-1158 (D.D.C.) dismissed plaintiffs' amended complaint.

On January 12, 2018, in Owner-Operator Independent Driver Association, et. al v. USDOT, et al., 879 F.3d 339 (D.C. Cir.), the D.C. Circuit affirmed in part and reversed in part summary judgment granted by the district court upholding the agency's Pre-employment Screening Program ("PSP") for commercial motor vehicle drivers. In the district court, plaintiffs argued that FMCSA (1) failed to remove from a federal database the drivers' records of violations related to citations that had been dismissed by a judge or administrative tribunal and (2) improperly delegated to the States its responsibility to ensure that motor carrier safety data was "accurate, complete, and timely," in violation of the APA and the Fair Credit Reporting Act ("FCRA"). The D.C. Circuit upheld the district court's dismissal of plaintiffs' APA claims and FCRA damages claims of three drivers. However, the D.C. Circuit remanded the case to the district court on the limited grounds that two drivers adequately pled an Article III injury under FCRA's damages provision.

On remand, plaintiffs amended their complaint to allege that FMCSA failed to comply with provisions of FCRA that apply only to a "consumer reporting agency." On October 10, 2018, the government moved to dismiss the amended complaint for failure to state a claim upon which relief can be granted because FMCSA is not a consumer reporting agency within the meaning of FCRA. The government also argued that the district court should dismiss the amended complaint because even if FMCSA was a "consumer reporting agency" subject to FCRA's substantive provisions at issue in the case, the United States has not waived its sovereign immunity with respect to the damages provision on which plaintiffs rely.

In dismissing the claims of the remaining plaintiffs, the district court agreed with the government that FMCSA is not a "consumer reporting agency" within the meaning of FCRA. The court explained that FCRA defines a "consumer reporting agency" as "any person which, for monetary fees . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). The court determined that FMCSA assembled the information at issue to ensure transportation safety and not to furnish consumer reports to third parties.

In addition, the district court found that while 49 U.S.C. § 31150, the statute authorizing the PSP, directs the Secretary to "ensure that any information that is released" through the PSP "will be in accordance with the [FCRA] and all other applicable Federal law," such language did not serve to subject FMCSA to FCRA liability. The court reasoned that section 31150 "merely instructs the FMCSA to ensure that information released through the PSP conforms with the requirements of the FCRA, and with the requirements of all other relevant federal law."

Court Dismisses Small Business in Transportation Coalition Lawsuit Concerning Exemption Applications, Petition for Rulemaking

On July 10, 2019, in Small Business in Transportation Coalition v. USDOT, et al., No. 19-1311 (D.D.C.), plaintiff Small Business in Transportation Coalition ("SBTC") filed an amended complaint in the U.S. District Court for the District of Columbia seeking to compel FMCSA to take various actions regarding its Electronic Logging Device ("ELD") exemption application, petition for rulemaking, and

Hours of Service ("HOS") exemption application.

In February 2018, SBTC filed an ELD Exemption Application with FMCSA on behalf of its members. The amended complaint alleges that FMCSA violated 49 U.S.C. § 31315(b)(7) by failing to issue a decision on SBTC's ELD exemption application within 180 days and publishing that decision in the *Federal Register*. The agency denied the ELD exemption application on July 17, 2019.

On June 14, 2018, SBTC filed a petition for rulemaking requesting that FMCSA promulgate regulations to allow trade associations to file requests for exemptions to certain FMCSA regulations on behalf of their members. SBTC's amended complaint alleges that the agency failed to acknowledge receipt of its petition and, therefore, "failed to act on it, in violation of Federal law."

On February 12, 2019, SBTC also filed an application with FMCSA for a class exemption from the Hours of Service ("HOS") rules on behalf of SBTC members, as well as all other truck and bus drivers who operate in interstate transportation and pass through Midland, Texas. The City of Midland had enacted an ordinance on October 1, 2018, that prohibited commercial vehicles from parking on public streets and private areas citywide. SBTC's exemption application alleged that the ordinance prevented commercial motor vehicle operators from complying with the HOS rules. On March 15, FMCSA acknowledged receipt of the HOS exemption application but notified SBTC that the application failed to provide the requisite information required by the exemption statute and implementing regulations. SBTC's amended complaint alleges that FMCSA violated the law by not publishing notice of SBTC's HOS exemption application in the *Federal Register*.

On September 9, the government moved to dismiss the case because exclusive jurisdiction to review SBTC's claims lies in the courts of appeals. The government argued that the Hobbs Act, 28 U.S.C. § 2342(3)(A), provides courts of appeals with exclusive jurisdiction to review challenges to "all rules, regulations, or final orders of . . . the Secretary of Transportation, issued . . . pursuant to . . . subchapter III of chapter 311, chapter 313, or chapter 315 of title 49." Citing Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998), the government further argued that when the courts of appeals have exclusive jurisdiction to review an agency's final action, they also have exclusive jurisdiction over claims seeking to compel the agency to take that action. Because SBTC seeks relief pursuant to statutory provisions enumerated in the Hobbs Act, the government contended that the district court lacks jurisdiction to resolve the claims.

SBTC did not respond to the government's motion to dismiss, and on September 30, the district court granted the motion as conceded and dismissed the case without prejudice.

District Court Dismisses Driver Challenge to FMCSA Civil Penalty Order

On November 28, 2018, in Bryson, et. al v. FMCSA, No. 18-12463 (D. Mass), plaintiff filed suit in the U.S. District Court for the District of Massachusetts seeking judicial review of an October 10, 2018, FMCSA final order finding one violation of using a hand-held mobile device while driving and assessing a $2710 civil penalty. On February 13, 2019, the agency filed a motion to dismiss, arguing that pursuant to 49 U.S.C.

§ 521(b)(9), exclusive jurisdiction over this matter lies with the courts of appeals and that the plaintiffs were required to seek judicial review within 30 days of the agency's final order. FMCSA contended that plaintiffs filed their petition more than two weeks late, in the wrong court. On May 24, 2019, the district court dismissed the complaint. Citing Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998), the court held that the plaintiff failed to meet the burden to prove that the district court had jurisdiction over his claim. The district court concluded that the plaintiff should have filed a petition for review with the appropriate circuit court of appeals within 30 days of being notified of the final agency order.

Federal Railroad Administration

Briefing Completed in Labor Unions' Challenge to the Certification of Mexican Locomotive Engineers and Conductors

On July 5, 2019, FRA and DOT filed a brief in the U.S. Court of Appeals for the District of Columbia Circuit requesting that the court dismiss or deny the petition for review filed by the Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (collectively, the "Labor Unions") that challenged unspecified actions FRA took that allegedly authorized and permitted Kansas City Southern de Mexico ("KCSM") to operate freight trains in the United States for the Kansas City Southern Railway ("KCSR"). Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 18-1235 (D.C. Cir.).

The petition for review maintains that KCSM is a Mexican railroad and that prior to July 9, 2018, it only provided railroad transportation in Mexico. The petition for review further contends that KCSM's operations in Laredo, Texas, do not comply with FRA's railroad safety laws and regulations, including the regulation governing the qualification and certification of locomotive engineers and conductors pursuant to 49 C.F.R. parts 240 and 242. The Labor Unions allege that because FRA took the unspecified administrative actions they now seek to challenge without public notice or other published documentation, they are unable to cite to or attach a copy of the document(s) that memorializes FRA's final agency action.

On October 22, 2018, the government and Intervenors KCSR and the Texas Mexican Railway Company filed separate motions to dismiss, alleging that the Labor Unions failed to identify a final agency action that is subject to the court's review. On February 5, 2019, the D.C. Circuit deferred judgment on the motions to dismiss and referred the motions to the merits panel.

In its brief on the merits, the government re-asserted its jurisdictional arguments raised in its motion to dismiss, maintaining that the petition failed to identify a specific agency action under review and the Labor Unions failed to identify any reviewable final agency action. The government also argued that the Labor Unions' claims are meritless because FRA did not act beyond its authority, and FRA did not violate any applicable statutory and/or regulatory provisions.

The D.C. Circuit has scheduled oral argument for December 5.

Labor Unions and States Challenge FRA's Withdrawal of Its Train Crew Staffing Regulation

On July 16, 2019, the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Brotherhood of Locomotive Engineers and Trainmen (collectively, the "Labor Unions") filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging FRA's withdrawal of a notice of proposed rulemaking ("NPRM") that proposed a minimum requirement of two train crewmembers for most railroad operations. Between July 18 and July 29, the California Public Utilities Commission, the State of Washington, and the State of Nevada (collectively, the "State petitioners") individually petitioned the Ninth Circuit for review of the withdrawal, contesting a statement in the withdrawal that FRA's affirmative decision not to regulate train crew size was intended to preempt all state laws attempting to regulate train crew staffing in any manner. Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 19-71787 (9th Cir.) (companion cases: Nos. 19-71802, 19-71916, 19-71918). On August 19, the government filed a motion to consolidate the four petitions for review. The Ninth Circuit granted that motion on October 22.

On March 15, 2016, FRA issued an NPRM that proposed regulations establishing minimum requirements for the size of train crew staffs, depending on the type of operation. FRA received nearly 1,600 comments from industry stakeholders and individuals, and it also held a public hearing. After studying the issue in-depth and performing outreach to industry stakeholders and the general public, FRA ultimately concluded that no regulation of train crew staffing is necessary or appropriate. In issuing the withdrawal, FRA explained that it could not provide conclusive data to suggest whether one-person crew operations are generally more safe or less safe than multiple-person crew operations. In withdrawing the NPRM, FRA also provided notice of its affirmative decision that no regulation of train crew staffing is necessary for railroad operations to be conducted safely and that FRA intends to negatively preempt any state laws concerning train crew size.

The Association of American Railroads ("AAR") moved to intervene in all of the cases, and the Ninth Circuit granted AAR's motion on August 14. On August 19, AAR filed a motion to dismiss the case filed by the Labor Unions, alleging improper venue because the Labor Unions had filed the petition for review in the Ninth Circuit, even though they both have their principal offices in Ohio. On August 28, the Labor Unions responded to AAR's motion, arguing that the Ninth Circuit is a proper venue because the State petitioners also challenging the withdrawal reside in the Ninth Circuit. The Labor Unions also asserted that the appropriate remedy for improper venue is transferring the case to a court in the proper venue, not dismissal. On September 4, AAR filed its reply brief and argued that the Labor Unions appeared to be forum shopping, and it would not be in the interest of justice to transfer the case to another court.

Also on August 19, AAR filed motions to dismiss the petitions for review filed by the State petitioners. In those motions, AAR asserted that the States had not participated in the train crew staffing rulemaking and were therefore not aggrieved parties that could petition for review of the withdrawal. The State petitioners individually filed oppositions to AAR's motions, arguing that they had participated in the rulemaking and

setting forth evidence to support their arguments. AAR's replies in support of its motions to dismiss asserted that the evidence presented by the State petitioners failed to establish participation in the rulemaking. On October 22, the Ninth Circuit denied the motions to dismiss. Briefing on the merits begins in December.

Federal Transit Administration

Court Dismisses NEPA Challenge to FTA Environmental Review for the Walk Bridge Replacement Project in Connecticut

On July 8, 2019, the U.S. District Court for the District of Connecticut granted summary judgment in favor of the defendants, DOT, FTA, and the Connecticut Department of Transportation ("CTDOT"), in Norwalk Harbor Keeper, et al. v. USDOT, et al., No. 18-00091 (D. Conn.). Plaintiffs, Norwalk Harbor Keeper and Fred Krupp, challenged FTA's Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") for the moveable railroad Walk Bridge Replacement Project in Norwalk, Connecticut. In its decision, the court held that plaintiffs lacked standing to bring the lawsuit. In the alternative, the court granted summary judgment in favor of defendants on the merits.

The selected project is a vertically lifting moveable bridge to replace the existing swing railroad bridge on the Northeast Corridor over the Norwalk River (the "Walk Bridge"), which was built in 1896. The Walk Bridge carries four tracks of the New Haven Line of the Metro-North Railroad commuter service and is also used for intercity and high-speed passenger service by the Amtrak and for freight service by CSX and Providence & Worcester Railroad. The project was selected for funding as a resiliency project, post Hurricane Sandy. The Norwalk River is a federally-maintained and designated navigable waterway.

The lawsuit alleged that FTA and CTDOT failed to consider a fixed bridge at the level of the existing bridge ("Existing Level Fixed Bridge") as an alternative in the EA developed under NEPA, which plaintiffs argued would promote resiliency, shorten construction time, significantly reduce construction costs, and otherwise reduce environmental impacts. Plaintiffs asserted that the defendants failed to fulfill their duty to the public to take a "hard look" at the potential environmental consequences of the project arguing four main points: (1) defendants failed to adopt a reasonable Purpose and Need; (2) failed to study a reasonable range of alternatives; (3) failed to meaningfully respond to plaintiffs' public comments; and (4) unlawfully segmented the environmental review of the Project.

First addressing standing, the court held that plaintiffs failed to show that their recreational and aesthetic enjoyment of the area would be lessened if a fixed bridge was chosen instead of the moveable design selected, and therefore failed to satisfy the "injury in fact" requirement of standing. The court noted that the plaintiffs' assertion that the moveable bridge design would yield "needlessly protracted" construction was "nonsensical" because the movable bridge design selected offers a shorter period of disruption to plaintiffs' use and enjoyment of the river. On the merits, the court granted the defendants' motion for summary judgment, finding in the alternative that: (1) defendants had a rational basis for including maintaining or improving navigational capacity in the Purpose and Need Statement and properly narrowed the scope of the Purpose and Need Statement; (2) defendants considered relevant factors, made

an informed decision, and presented a rational basis for the decision reached, and resiliency considerations did not create a requirement that defendants further consider the low-level fixed bridge option; (3) defendants properly responded to plaintiffs' public comments under NEPA; and (4) no project components were improperly segmented.

Limited Discovery Ordered in Beverly Hills Litigation

On September 18, 2019, the U.S. District Court for the Central District of California held a hearing on Supplementation and Remedies in Beverly Hills Unified School District v. FTA, et al., No. 18-716 (C.D. Cal.). During the hearing, the court ordered limited discovery on the availability of the 1950 Avenue of the Stars property/Construction Staging Area 1 (Staging Area 1).

Beverly Hills Unified School District (BHUSD) is challenging FTA's November 22, 2017, NEPA and Section 4(f) Supplemental Record of Decision/Final Supplemental Environmental Impact Statement for Section 2 of the Los Angeles County Metropolitan Transportation Authority (LACMTA) Westside Purple Line Extension (WPLE) Project. The City of Beverly Hills also filed a similar complaint on May 9, 2018. City of Beverly Hills v. FTA, et al., No. 18-3891 (C.D. Cal.). Both BHUSD and the City allege that FTA violated NEPA and Section 4(f), and that the agency predetermined the outcome of its NEPA and Section 4(f) analysis.

The WPLE Project would extend the existing L.A. Metro Purple Line by approximately nine miles west from the Wilshire/Western Station to a new terminus at a new Westwood/VA Hospital Station in Santa Monica. The underground extension will include seven new stations spaced in approximately 1-mile intervals. The WPLE Project is divided into three phases. Section 1 of the WPLE Project is under construction. The subject of the BHUSD litigation is Section 2, a 2.6-mile heavy-rail underground extension of the Metro Purple Line from Wilshire/La Cienega station in the City of Beverly Hills westward to the Century City area of Los Angeles. LACMTA has started construction for Section 2 of the WPLE Project. This is the second lawsuit by the same set of defendants challenging the project.

The court issued an 83-page tentative ruling on June 26, 2019, stating that it would rule in defendants' favor for most of the NEPA issues, including the analysis for methane risk and Section 4(f). However, the court required further briefing on supplementation/relief/injunction if the court were to find that Defendants did not satisfy the necessary "hard look" at the availability of Staging Area 1. In a subsequent status conference, the court reiterated that the Administrative Record did not support a finding that defendants took the necessary "hard look" at the availability of Staging Area 1, and, accordingly, ordered the parties to brief supplementation and remedies.

As part of defendant LACMTA's briefing on the supplementation issue, it submitted additional documentation regarding the availability of Staging Area 1, which LACMTA had not previously provided. Based on LACMTA's submittals, BHUSD filed an ex parte motion requesting a continuance and seeking discovery. The court granted plaintiff limited discovery on the availability of Staging Area 1 and ordered all parties to coordinate the scope of discovery, even though FTA did not produce

any new documents regarding the availability of Staging Area 1 with its Supplementation/Remedies Motion.

On September 30, 2019, the court ruled on categories of documents for Defendants to produce. Defendants have thirty-five days to provide the documents and the next status conference is scheduled for November 14, 2019.

Administrative Record Filed in Sharks NEPA Lawsuit, Court Allows Discovery; Related FOIA Suit Proceeds

On September 24, 2019, FTA filed the certified administrative record in Sharks Sports & Entertainment LLC v. FTA, No. 15-4060 (N.D. Cal.), in which Sharks Sports and Entertainment LLC ("SSE") alleges NEPA violations and challenges FTA's February 2018 Final Supplemental Environmental Impact Statement/Subsequent Environmental Impact Report and its June 4, 2018, Record of Decision in connection with the BART Silicon Valley Phase II Extension Project. Prior to the certification of the administrative record, the court took the unusual step of allowing SSE to conduct discovery in a record review, APA case. The court did not ask for briefing related to discovery, and it summarily denied FTA's motion seeking reconsideration of the court's discovery order.

The project includes a six-mile extension of the BART system from the Berryessa/North San Jose Station through downtown San Jose, terminating near the Santa Clara Caltrain Station. As part of the project, the Diridon Station is proposed to interconnect several modes of transit, including BART, Caltrain, light-rail, the Altamont Express, Amtrak and the planned High Speed Rail. SSE owns and operates the San Jose Sharks, a professional hockey team in the NHL, and is also the parent company that manages the SAP Center. The SAP Center, an 18,000-seat regional multipurpose event center is located adjacent to the planned Diridon Station.

SSE alleges that FTA's NEPA review was improper because an eight-story parking facility was improperly omitted from the project. SSE alleges the parking facility, as noted in previous Draft and Final EIS documents, would serve to mitigate the adverse environmental impacts the Project will cause to the area. SSE's complaint focuses on "FTA's conclusion that the Diridon Station will function as a destination station…" and, therefore, would not need the same amount of parking as other stops along the route. SSE contends that this issue was not properly studied and was prejudged.

The project has been selected for funding under FTA's Expedited Project Delivery Pilot Program. SSE is seeking an injunction prohibiting the FTA from obligating funds to the Project and for it to take no further action on the project until FTA has complied with NEPA. The deadline for SSE to file a motion to supplement the record is December 1, 2019. The deadline for SSE to file for summary judgement is February 21, 2020.

SSE also filed a separate FOIA lawsuit related to the Project on September 29, 2018. Sharks Sports & Entertainment LLC v. FTA, No. 18-5988 (N.D. Cal.). The FOIA lawsuit seeks documents that are part of the administrative record in the NEPA litigation and has been stayed pending SSE's review of the administrative record. A case management conference is scheduled for November 6, 2019.

Maritime Administration

District Court Dismisses MARAD in Jones Act Seaman's Injury Case

On September 26, 2019, the U.S. District Court for the District of Maine dismissed the United States from a seaman's personal injury case involving a U.S.-owned training vessel lent to Maine Maritime Academy ("MMA"). Maine Maritime Academy v. Fitch, No. 17-195 (D. Me.). Previously, the court held that MMA is not an agent of the United States under the Suits in Admiralty Act. In its holding in favor of the government, the court concluded that the contract between MARAD and MMA does not create an agency arrangement "given that the government is not contracting with MMA to perform a specific task on its behalf but rather is supporting an overall shared educational objective." In addition, given that MMA retains considerable control over the operation of the training ship, the court found that for purposes of the Suits in Admiralty Act, MMA was not an agent of MARAD.

Following the court's decision that MMA was not the agent of the United States, a limited bench trial was held on plaintiff's seaman's status and the identity of her employer. In a detailed decision, the court found that plaintiff was indeed a seaman and her employer was an MMA contractor, Sodexo. After that decision, the United States was dismissed from the case.

MARAD Files Motion to Dismiss in Lease Dispute

On January 24, 2018, KUDU Limited II, Inc. ("KUDU") filed a complaint in the U.S. Court of Federal Claims alleging that MARAD violated lease MA-880 when it built certain structures on the leased premises, the Beaumont, Texas Layberth Facility. KUDU Limited II, Inc. v. United States, 18-00118 (Fed. Cl.).

Since the 1950's, pursuant to a perpetual lease, MARAD has occupied certain riparian property on the McFaddin Bend of the Sabine River near Beaumont. Under the lease, MARAD receives the exclusive use of all riparian rights, the right to protect the property from trespass and fire, and the right to construct certain improvements. The owner retains limited rights, including the right to graze animals and lateral exploitation of subsurface minerals.

In March 2012, MARAD awarded McCarthy Buildings, Inc., a contract to construct the Beaumont Layberth Facility, comprised of two T-piers, shoreside electrical service, an access road, parking lots, a security trailer, and other improvements on the leased property. After nearly two years of construction, the landowner raised objections for the first time that the improvements violated the lease. MARAD attempted to negotiate the sale of the property, but the landowner's demands were not supported by market appraisals.

MARAD filed a motion to dismiss on September 20, 2019. The motion asserts several grounds for dismissing the case, including that the landowner has not alleged damages, the lease does not contain a termination clause, and that the improvements are within the rights granted to it by the lease.

Cross-Motions for Summary Judgment before the Court in Maritime Security Program Dispute

On May 31, 2019, the parties in Matson Navigation Co. v. USDOT, No. 18-02751 (D.D.C.), filed cross-motions for summary judgment in this challenge to MARAD's approval of two replacement vessels for participation in the Maritime Security Program ("MSP"). The current case follows a similar action that Matson filed in the D.C. Circuit pursuant to the Hobbs Act, which was dismissed for lack of jurisdiction. 895 F.3d 799 (D.C. Cir. 2018).

In its summary judgment brief, Matson argued that MARAD's approvals of the replacement vessels were arbitrary and capricious because the replacements carry cargo to Saipan and were thus ineligible for the MSP. Matson alternatively argued that MARAD acted arbitrarily and capriciously by paying the full MSP stipend for the replacement vessels without deducting pro rata amounts for days the replacements carried cargo to or from Guam and Saipan. Matson asked the court to vacate MARAD's replacement decisions and enjoin MARAD again from approving these vessels as replacements. It also asked the court to enjoin MARAD from making any further MSP payments, or alternatively, "reduce the MSP subsidies pro rata."

The United States responded with several sequential arguments. First, the government argued that the D.C. Circuit's prior dismissal of Matson's Hobbs Act petition deprives the district court of jurisdiction. The government next argued that transportation to Saipan does not make the vessels ineligible to participate in the MSP. Finally, the government argued that Matson's requested remedies were inappropriate and that the proper remedy would be vacatur and remand to the agency.

Government Moves for Summary Judgment in Port of Anchorage Litigation

On June 6, 2019, the government filed for summary judgment in the long-running dispute over the Port of Anchorage Intermodal Expansion Project. In Anchorage v. United States, 14-166 (Fed. Cl.), Anchorage alleges that MARAD breached duties owed to it under a 2003 Memorandum of Understanding ("MOU") by mismanaging the Project and causing $340 million in damages to the Port.

The government requested summary judgment, arguing that after three years of discovery, Anchorage could not prove the requisite elements of a contract necessary to support its claims. In particular, Anchorage could not demonstrate any evidence of consideration, or that MARAD promised through the 2003 MOU to undertake the duties Anchorage alleges was breached. Instead, the government argued that MARAD's duty and authority to participate in the project came from Congress, precluding Anchorage's contractual claim.

In response, Anchorage argued that the government in fact received valuable consideration in the form of Federal appropriations, military benefits, and project experience. Anchorage also argued that the statutory authority cited by the government merely provided funding for the project and that MARAD could not use that funding or undertake activity on the project without the direction provided by Anchorage through the 2003 MOU. Anchorage further argued that, at a minimum, a genuine dispute of material fact exists regarding MARAD's duties under

the 2003 MOU, and for this reason alone, summary judgment was unwarranted.

National Highway Traffic Safety Administration

NHTSA Returns to Second Circuit to Defend Rule on CAFE Civil Penalty Rate

In August 2019, two petitions for review were filed in the U.S. Court of Appeals for the Second Circuit challenging NHTSA's rule retaining the rate used in calculating civil penalties for violations of Corporate Average Fuel Economy ("CAFE") standards without making an adjustment for inflation. One petition was filed by a group of states and the District of Columbia, and the other was filed by the Natural Resources Defense Council and the Sierra Club. New York, et al. v. NHTSA, No. 19-2395 (2d Cir.); Natural Resources Defense Council, et al. v. NHTSA, No. 19-2508 (2d Cir.). The Association of Global Automakers and the Alliance of Automobile Manufacturers successfully moved to intervene in support of the government in both cases.

In July 2019, NHTSA finalized a rule retaining the current rate of $5.50 per tenth of a mile per gallon for automobile manufacturers that do not meet applicable CAFE standards and are unable to offset such a deficit with compliance credits, concluding that the CAFE civil penalty rate did not need to be adjusted for inflation because the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 did not, as a matter of law, apply to that rate. In the alternative, NHTSA concluded that, even if the inflation adjustment statute applied, an inflation adjustment would not be appropriate for the CAFE civil penalty rate because making the otherwise required adjustment would have a negative economic impact—an exception provided by the inflation adjustment statute.

In a previous case involving largely the same petitioners, the Second Circuit vacated a NHTSA rule that would have indefinitely delayed an increase enacted during the previous Administration. Natural Resources Defense Council v. NHTSA, 894 F.3d 95 (2d Cir. 2018). With the court's vacatur of the indefinite delay, the CAFE civil penalty rate of $5.50 would have increased to $14 for penalties assessed against model year 2019 vehicles if NHTSA had not finalized the rule currently being challenged or taken some other action.

NHTSA has also received a petition for reconsideration of the rule submitted by the Institute for Policy Integrity at the New York University School of Law. The Institute argues that the final rule is unreasonable and not in the public interest because (1) it ignores significant forgone benefits without a reasoned explanation; (2) it relies on letters from the Office of Management and Budget that raise novel arguments not previously presented for public comment and that contain factual misstatements or contradict NHTSA's justifications for the rule; and (3) it relies on illogical interpretations of clear statutory language and of the nature of penalties for violations of the fuel economy standards. Petitioners' opening briefs are due on December 9, 2019.

SEMA Files Mandamus Petition Regarding Replica Car Exemption

On October 17, 2019, the Specialty Equipment Market Association ("SEMA") filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Ninth Circuit seeking a writ compelling the Department and NHTSA to implement a statutory

exemption from federal motor vehicle safety standards for small volume, replica car manufacturers. In re Specialty Equipment Market Assoc., No. 19-72623 (9th Cir.).

Section 24405(a) of the FAST Act (Public Law 114-94) created an "Exemption from Vehicle Safety Standards for Low-Volume Manufacturers" by amending 49 U.S.C. § 30114 to create a specific exemption for "not more than 325 replica motor vehicles per year that are manufactured or imported by a low-volume manufacturer." Section 24405(c) provided that the Secretary (NHTSA, by delegation) "shall issue such regulations as may be necessary to implement" the replica car exemption "[n]ot later than 12 months after the date of enactment of this Act." The FAST Act was signed into law on December 4, 2015. To date, NHTSA has not published any regulations relating to the replica car exemption.

SEMA, an association of manufacturers, distributors, and others, alleges that the Department and NHTSA have unlawfully withheld action by refusing to comply with the FAST Act's mandate to issue any necessary regulations within 12 months. SEMA further alleges that NHTSA's delay in implementing these regulations has caused economic harm to its members, who invested in new facilities, hired employees, and took other actions with the expectation that they would be able to begin production of replica cars within a year after passage of the FAST Act. Based on these allegations, SEMA requests a writ compelling the Department and NHTSA to either (1) propose such regulations as may be necessary to implement the exemption within 60 days and issue or final rule 120 days thereafter, or (2) determine that no regulations are necessary to implement the exemption and take action to permit low volume manufacturing within 60 days.

NHTSA Resolves FOIA Litigation Concerning Carbon Monoxide Rulemaking

NHTSA and the Public Employees for Environmental Responsibility ("PEER") have resolved FOIA litigation regarding NHTSA's 2018 denial of PEER's Petition for Rulemaking. Pub. Employees for Envtl. Responsibility v. NHTSA, No. 19-00013 (D.D.C.). In September 2017, PEER petitioned the agency for a rule to require the equipping of carbon monoxide detectors and engine cut-off devices in vehicles. PEER's FOIA request sought records and information concerning NHTSA's decision to deny this petition. NHTSA completed the response to the FOIA request on April 26, 2019. After reviewing the production accompanying the FOIA response and conferring regarding plaintiff's follow-up questions, the parties agreed to a settlement to resolve the litigation. The parties filed a stipulation of dismissal reflecting the settlement on October 21.

DOT and NHTSA Continue FOIA Litigation Concerning the SAFE Vehicles Rule

DOT and NHTSA recently concluded two of this year's four lawsuits concerning FOIA requests seeking information about the SAFE Vehicles Rule. First, on August 28, 2019, the State of New York, the Environmental Protection Agency, and NHTSA entered into a joint stipulation of voluntary dismissal of the FOIA lawsuit filed by New York in the U.S. District Court for the Southern District of New York in January 2019. New York v. EPA, et al., No. 19-00712 (S.D.N.Y.). This lawsuit concerned a FOIA request that sought records regarding the agencies' compliance with Executive Order 12132 for the SAFE Vehicles Rule. New York alleged that the

records were sought to facilitate an understanding of the agencies' consideration of federalism issues in promulgating the proposed rule. NHTSA completed its response to the FOIA request on May 29, 2019, and EPA responded to the request on June 20, followed by an amended response on July 9. After conferring regarding the productions and responses, New York agreed to dismiss the case.

Likewise, on September 16, 2019, the Center for Biological Diversity ("CBD") dismissed a lawsuit filed against NHTSA concerning a September 2018 FOIA request to the agency. Ctr. for Biological Diversity v. NHTSA, No. 19-00785 (D.D.C.). In that request, CBD sought materials pertaining to NHTSA's consideration of interagency consultation provisions in Section 7 of the Endangered Species Act during the promulgation of the NPRM for the SAFE Vehicles Rule. NHTSA responded to the FOIA request in October 2018. CBD filed an administrative appeal of this response, which NHTSA denied in February 2019. In March 2019, CBD filed suit challenging the scope of the agency's searches and the materials withheld in the response. The case moved directly into dispositive motion briefing, with CBD's Motion for Summary Judgment filed in early August 2019 and NHTSA's Response and Cross-Motion for Summary Judgment filed at the end of August 2019. After reviewing the agency's motion and supporting materials, CBD decided to dismiss the case with prejudice.

DOT and NHTSA remain defendants in two pending FOIA lawsuits pertaining to the SAFE Vehicles Rule. First, the California Air Resources Board ("CARB") sued NHTSA and EPA in April 2019 in the U.S. District Court for the District of Columbia regarding a September 2018 FOIA request. Cal. Air Res. Bd. v. NHTSA, No. 19-00965 (D.D.C.). The request sought twelve categories of materials, modeling information, and data pertaining to the SAFE Vehicles Rule NPRM. Prior to the lawsuit, in October 2018, NHTSA completed a final response to the FOIA request, and EPA provided plaintiff with an interim response. CARB administratively appealed NHTSA's response, but commenced litigation before the agency responded to the appeal or EPA completed its final response. In August 2019, after defendants filed answers in the lawsuit, EPA completed its response to the FOIA request. The parties subsequently agreed on a schedule for dispositive motion briefing, with CARB's motion for summary judgment due in early October 2019, the defendants' response and cross-motion due in early November 2019, and the ensuing replies due in the weeks thereafter.

Finally, DOT and NHTSA remain in litigation with the Environmental Defense Fund ("EDF") in a December 2018 lawsuit seeking records from three separate FOIA requests submitted by EDF to the Office of the Secretary in the fall of 2018. Envtl. Def. Fund v. USDOT, No. 18-03004 (D.D.C.). The FOIA requests seek emails and calendar materials from numerous OST and NHTSA personnel pertaining to the SAFE Vehicles Rule, as well as Phase 2 fuel economy standards for heavy-duty trucks. After answering in February 2019, DOT has completed eight rolling productions and filed numerous joint status reports.

Pipeline and Hazardous Materials Safety Administration

Government Appeals District Court's Split Decision in Challenge to PHMSA Approval of Oil Spill Response Plans

On August 30, 2019, the government filed its opening brief in its appeal of a March 2019 decision of the U.S. District Court for the Eastern District of Michigan in Nat'l Wildlife Fed. v. Sec'y of the Dep't of Transp., 373 F. Supp. 3d 634 (E.D. 2019) in a lawsuit brought by the National Wildlife Federation ("NWF") challenging PHMSA's approvals of certain oil spill response plans.

The Clean Water Act ("CWA") requires operators of certain facilities, including pipelines, to prepare oil spill response plans. PHMSA is responsible for reviewing and approving plans submitted by operators of pipelines (other than pipelines seaward of the coast line). NWF sued PHMSA in 2017 to challenge approvals of spill response plans submitted by Enbridge that cover the company's Line 5 in Michigan and Wisconsin. Enbridge intervened, and the parties all moved for summary judgment.

In its decision, the district court granted summary judgment to PHMSA and Enbridge on three issues. First, the court held that PHMSA reasonably treats each pipeline as a single facility, and rejected NWF's argument that PHMSA is obligated to treat each pipeline segment crossing a waterway as a separate facility requiring a separate plan. Second, the court rejected NWF's contention that Enbridge's plans failed to properly calculate the "worst case discharge." Third, the court rejected NWF's argument that the plans did not contain the types of information required by the CWA.

The court, however, granted summary judgment to NWF on two other issues. The court held that PHMSA's administrative record did not adequately explain its determinations that Enbridge's plans met the requirements of the CWA. And the court held that before approving the plans, PHMSA should have engaged in environmental review pursuant to NEPA, and consultation with federal environmental agencies pursuant to the Endangered Species Act ("ESA"). The court remanded the plan approvals to PHMSA for further consideration consistent with its opinion. The court did not vacate the approvals, and PHMSA's current approvals of Enbridge's plans remain in effect.

Both parties appealed. Nat'l Wildlife Fed'n v. Sec'y of U.S. Dep't of Transp., No. 19-1609 (6th Cir.). In its brief to the Sixth Circuit, the government argued that the district court erred when it found that PHMSA was required to consult with a wildlife agency under the ESA in order to ensure that oil spill response plans would not be likely to jeopardize endangered or threatened species. The CWA requires operators of certain facilities, including pipelines to prepare oil spill response plans for approval by PHMSA. The CWA does not, however, grant PHMSA discretion to either disapprove or require changes to those plans. Instead, PHMSA is required by law to approve plans that meet certain specified criteria set forth in the CWA. Relying on Supreme Court precedent, the government argued that the consultation duty of the ESA does not attach when an agency is required by statute to take action once certain triggering events occur. If an operator's oil spill response plan includes the statutorily mandated criteria, PHMSA has no discretion

to disapprove or change the Plan; it must approve it.

In addition, the government argued that the district court erred when it found that PHMSA's review of oil spill response plans triggers review under NEPA. The government's argument is again premised on the fact that the CWA does not grant PHMSA discretion to disapprove oil spill response plans that meet the statutory criteria or to implement alternatives to those Plans. Again citing to Supreme Court precedent, the government argued that NEPA analysis is not required where an agency lacks discretion to prevent environmental effects by taking alternative action, or where an agency acts to fulfill a mandatory statutory duty based on enumerated criteria. Because PHMSA must approve an oil spill response plan that meets certain statutory mandated criteria, the district court erred in holding that PHMSA was required to undertake NEPA analysis during its review of oil spill response plans.

Reply briefs are due on November 15, 2019.

Railroad Seeks Judicial Review of PHMSA's Final Rule for Hazardous Materials Oil Spill Response Plans and Information Sharing

On April 4, 2019, Union Pacific Railroad Company filed a Petition for Review in the U.S. Court of Appeals for the District of Columbia Circuit challenging a final rule issued by PHMSA on February 12, 2019, titled "*Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Flammable Trains*." Union Pacific Railroad Co. v. PHMSA, 19-1075 (D.C. Cir.).

On June 15, 2019, Union Pacific filed its opening brief arguing that PHMSA's final rule violated the Fixing America's Surface Transportation Act of 2015 ("FAST Act"). The FAST Act requires that PHMSA "establish security and confidentiality protections, including protections from the public release of proprietary information or security-sensitive information, to prevent the release to unauthorized persons" of the "information provided by Class I railroads under this section." Union Pacific argues that PHMSA's final rule violates this congressional mandate by failing to include "security and confidentiality protections" of "information on high-hazard flammable trains" provided to each State emergency response commission, or to prevent the release of such information. Specifically, Union Pacific alleges that the final rule implemented the proposed information-sharing requirements with no confidentiality or security protections beyond a provision allowing railroads to "indicate" information they "believe is security sensitive or proprietary and exempt from public disclosure." According to Union Pacific, such a designation has no effect under federal law.

In its response brief filed on October 4, 2019, PHMSA argued that the information required by the rule is neither sensitive nor confidential business information under federal law and that by instructing railroads to identify submitted information that they regard as confidential as such, PHMSA satisfied the requirements of the FAST Act, noting that petitioner had not even attempted to refute the agency's conclusions that the information is not protected by federal law or that its disclosure would not cause harm.

Union Pacific filed its Reply Brief on October 25.

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