U.S. Department of Transportation

DOT LITIGATION NEWS

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Highlights

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

Subject Matter Index

Supreme Court Litigation

Supreme Court Hears Arguments in Case Involving the Regulation of Billboards

On November 10, 2021, the Supreme Court heard arguments in City of Austin, Texas, Petitioner v. Reagan National Advertising of Austin, LLC, et al., No. 20-1029 (U.S.). The case concerns the constitutionality of a provision of the City of Austin's sign code that allows the digitization of signs that advertise activities on the premises where the sign is installed, but prohibits the digitization of other off-premise signs.

In 2017, Reagan National Advertising applied to the City of Austin to digitize its existing off-premises non-digital billboards, and the City of Austin denied the applications. Reagan National Advertising sued the City of Austin in state court, arguing that the code violated the First Amendment because the distinction of what signs could be digitized is content based and therefore subject to strict scrutiny. The City of Austin removed the proceedings to the U.S. District Court for the Western District of Texas. The district court held in favor of the City of Austin, holding that the sign code was content neutral. On appeal, the Fifth Circuit reversed the district court's ruling and remanded the case for further proceedings, holding that the City of Austin's distinction between on-premise and off-premise signs was content based and failed under strict scrutiny, therefore violating the First Amendment. On June 28, 2021, the Supreme Court granted a writ of certiorari.

The United States submitted an amicus brief to protect its interests in highway safety and aesthetics, which are furthered through the regulations set forth in the federal Highway Beautification Act (HBA), its implementing regulations, and related state laws. The government's brief states that the United States has a strong interest in ensuring that these provisions are correctly interpreted and subject to appropriate First Amendment review. The brief further argues that if the Court decides that the determination of what signs can or cannot be digitized is subject to strict scrutiny and is therefore content based, then the vast majority of States that have similar content based distinction laws would need to revise those laws to protect against the inevitable lawsuits that would follow from such a decision. Finally, the brief argues that a Supreme Court decision along those lines would require FHWA to consider potential impacts of the "on-premise" definition in the HBA, which relies on the content of the sign to provide an exception to HBA requirements.

Certiorari Granted in Case Interpreting When a Locomotive Is "In Use"

On December 15, 2020, the Supreme Court granted certiorari in LeDure v. Union Pacific Railroad Co., No. 20-807 (U.S.). The issue before the Court is whether a locomotive is "in use," pursuant to the Locomotive Inspection Act (LIA) and its implementing regulations, when the train makes a temporary stop in a rail yard, as part of a unitary journey in interstate commerce, or whether such use does not resume until the

locomotive has left the yard as part of a fully assembled train. Petitioner Bradley LeDure seeks review of a decision of the U.S. Court of Appeals for the Seventh Circuit, which affirmed a motion for summary judgment granted by the U.S. District Court for the Southern District of Illinois, holding that a locomotive was not "in use" under the LIA when the locomotive was stationary, on a sidetrack, and part of a train that had not yet been assembled.

On November 9, in response to an invitation from the Supreme Court for the views of the United States, the Solicitor General's Office filed an amicus brief urging the Court to grant certiorari on the question related to whether a locomotive is in "use" under the LIA when it is stopped on a sidetrack of a railyard undergoing preparations for its next journey.

FOIA Requester Seeks Supreme Court Review of Ninth Circuit's Adoption of Consultant Corollary

On March 2, 2021, the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc,* issued a decision interpreting FOIA's Exemption 5 as including the "consultant corollary" and found that "intra-agency" includes "at least in some circumstances, documents prepared by outside consultants hired by the agency to assist in carrying out the agency's functions." Rojas v. FAA, 989 F.3d 666 (9th Cir. 2021). Rojas filed a Petition for Writ of Certiorari on July 29, 2021, the Justice Department filed an opposition brief on FAA's behalf on November 29, 2021, and Rojas filed his reply brief on December 13. Rojas v. FAA, No. 21-1333 (U.S.). In opposing Supreme Court review, the government primarily argues that further review is not warranted because there is no split in the circuit courts on the "consultant corollary."

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

In a 7-4 opinion, the court joined six other circuits by adopting the consultant corollary. The main question for the court was whether documents created by FAA's contractor were "intra-agency" memoranda or letters and thus protected from disclosure. Looking to FOIA's context and purpose, the majority found that Exemption 5 seeks to shield privileged communications from disclosure to protect the internal decision-making process and allow frank discussion and candor. In light of this, the court could not imagine that Congress intended for Exemption 5 to only apply to communications authored by agency employees. In the majority's view, Congress

had a broad understanding of "intra-agency," and thus "a fair reading of the term 'intra-agency'" encompasses a consultant hired by an agency to perform work in a capacity similar to that of an employee of that agency. However, the consultant must not represent its own interests when it advises a Federal agency. In the court's view, the inquiry must be applied on a document-by-document basis, and the relevant inquiry is "whether the consultant acted in a capacity functionally equivalent to that of an agency employee in creating the document or documents the agency seeks to withhold." After conducting an *in camera* review of the three documents at issue, the court found Exemption 5 and the attorney work-product doctrine to apply to two documents, but remanded the third document, as FAA's declarations and Vaughn Index did not provide enough information for the court to make a determination on that document.

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

Supreme Court Calls for Views of United States in Trucking and Aviation Preemption Cases

In October and November 2021, the U.S. Supreme Court asked the Solicitor General to provide the views of the United States with respect to three pending certiorari petitions involving the parallel express preemption provisions of the Airline Deregulation Act of 1978 (ADA) and the Federal Aviation Administration Authorization Act of 1994 (FAAAA). Virgin America v. Bernstein, No. 21-260 (U.S.); Cal. Trucking Ass'n v. Bonta, No. 21-194 (U.S.); C.H. Robinson Worldwide v. Miller, No. 20-1425 (U.S.).

The ADA preempts State laws "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), while the FAAAA preempts State laws "related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property," *id.* § 14501(c)(1). Both preemption provisions contain certain exceptions: as relevant here, the FAAAA does not "restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A).

In Virgin America v. Bernstein, an airline asks the Supreme Court to review a decision by the U.S. Court of Appeals for the Ninth Circuit, which held that the ADA does not preempt the application to flight attendants of California rules requiring meal and rest breaks for employees. The Ninth Circuit held that the outcome was controlled by its decision in 2014 holding that the same California break rules were not preempted by the FAAAA as applied to short-haul delivery truck drivers. Dilts v. Penske Logistics, Inc., 769 F.3d 637 (9th Cir. 2014). Both the airline and the United States, which filed an *amicus* brief in support of preemption, explained to the Ninth Circuit that the impacts of California's break requirements would be far different in the airline context than in the motor delivery truck context. The Ninth Circuit, however, did not discuss these impacts. In its petition for certiorari, the airline argues that the decision is part of a pattern in which the Ninth Circuit has inappropriately applied a heightened

standard when considering ADA and FAAAA challenges to generally applicable State employment laws.

In California Trucking Association v. Bonta, an industry group asks the Supreme Court to review a Ninth Circuit ruling that the FAAAA does not preempt the application to motor carriers of a California statute adopting the so-called "ABC" test to govern the classification of workers as employees or independent contractors. The Ninth Circuit held that although the California statute may preclude motor carriers from contracting with independent owner-operators, any impacts that the statute has on the carriers' prices, routes, and services are too tenuous and remote to support preemption. As in Virgin America, the petitioner contends that the decision is part of a pattern of Ninth Circuit ADA and FAAAA cases that do not appropriately examine the impacts of generally applicable State employment laws.

In C.H. Robinson v. Miller, a freight broker asks the Supreme Court to review a Ninth Circuit decision holding that the FAAAA does not preempt a tort claim brought by a driver injured in a collision with a tractor trailer. The injured driver contends that the broker negligently selected the truck's owner to carry goods for a shipping customer. The Ninth Circuit held that although the claims are "related to" the broker's services—and therefore are covered the FAAAA's preemption provision—they are saved from preemption by the FAAAA's exception for the "safety regulatory of the State with respect to motor vehicles." In its cert petition, the broker argues that common law claims cannot constitute the "safety regulatory authority of a State," and that in any event a common law claim against a *broker* cannot constitute the "safety regulatory authority of a State *with respect to motor vehicles*."

Departmental Litigation in Other Federal Courts

D.C. Circuit Rejects Challenge to FRA's Risk Reduction Program Rule

On August 20, 2021, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion rejecting a challenge to FRA's Risk Reduction Program (RRP) final rule brought by the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers, the Brotherhood of Locomotive Engineers and Trainmen (a division of the Rail Conference of the International Brotherhood of Teamsters)' and the Academy of Rail Labor Attorneys (collectively, the Unions). Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, and Transp. Workers, et al., v. FRA, et al., 10 F.4th 869 (D.C. Cir. 2021).

The RRP final rule requires Class I freight railroads and railroads with inadequate safety performance to implement a written RRP plan, which is reviewed and approved, and later audited for compliance, by FRA. The RRP final rule also requires railroads to consult, using good faith and best efforts, with directly affected employees (including labor organizations) as part of their development of their RRPs. The RRP final rule protects certain RRP information from

use in court proceedings for damages involving personal injury, wrongful death, or property damage.

The Unions' April 10, 2020, petition for review challenged: (1) the timing of the RRP final rule, which was promulgated nine years after the advance notice of proposed rulemaking; (2) the absence of a fatigue management plan (FMP) requirement in the RRP final rule; (3) the information protection provisions in the RRP final rule, the reliance on a final study report produced by Baker Botts in FRA's development of these provisions, and the omission from the administrative record of certain communications related to this report; and (4) the inclusion of performance-based standards in the RRP final rule, based on petitioners' allegations of FRA's inadequate oversight and monitoring of the railroad industry.

On August 20, 2021, the D.C. Circuit denied the Unions' petition. Although the court acknowledged that FRA issued the RRP final rule more than 12 months after the NPRM, it recognized that vacatur is not warranted because exceeding the 12-month period for issuance of a regulation did not deprive FRA of its statutory authority to issue the rule. The court addressed the allegations regarding the absence of an FMP in the RRP final rule by explaining that FRA's establishment of the FMP requirements in a separate rulemaking is permissible. With respect to petitioners' other assertions, the court concluded that FRA's justifications for the information protection provisions and the performance-based standards are consistent with consideration of "safety as the highest priority."

D.C. Circuit Affirms Dismissal of Case Challenging Pre-employment Screening Program

On September 24, 2021, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the District of Columbia District Court decision in Mowrer, et al. v. USDOT, et al., 14 F.4th 723 (D.C. Cir. 2021). The issues before the court were (1) whether the district court correctly dismissed plaintiffs' suit for failing to state a claim because FMCSA was not acting as a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act (FCRA); (2) whether the FCRA's damages provisions waive the Federal government's sovereign immunity; and (3) whether the district court erred by denying plaintiffs' motion to amend their complaint to add claims under the Privacy Act.

The D.C. Circuit upheld the district court's ruling that FMCSA is not a "consumer reporting agency" within the meaning of the FCRA and explained that FMCSA does not act as a "consumer reporting agency" for purposes of the FCRA when it provides information gathered for safety purposes to prospective employers. The D.C. Circuit further ruled that the district court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to add Privacy Act claims.

While the district court did not reach the question of whether Congress waived the Federal government's sovereign immunity from damages claims under FCRA because it dismissed the case on alternate grounds, the majority of the D.C. Circuit panel considered the issue to be a jurisdictional question that must be decided first before reaching the merits. The majority further held that FCRA's damages provisions waive the Federal government's sovereign immunity.

In a concurring opinion, Senior Circuit Judge Randolph concurred in the judgment but disagreed that the D.C. Circuit must decide the question of sovereign immunity first. Judge Randolph explained that Federal courts are not required to decide statutory jurisdiction (as distinguished from Article III jurisdiction) before getting to the merits of a case.

Petitioners File Brief in Challenge to FMCSA's Hours of Service Final Rule

On December 3, 2021, a group of petitioners, including Advocates for Highway and Auto Safety, International Brotherhood of Teamsters, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers, filed their opening brief in their petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging FMCSA's June, 2020 final rule that made various changes to the agency's regulations governing the hours of service of truck drivers (HOS regulations), 85 Fed. Reg. 33,396, and FMCSA's August, 2020 denial of petitioners' joint petition for reconsideration of the final rule. Advocates for Highway and Auto Safety, et al. v. USDOT, et al., No. 20-1370 (D.C. Cir.).

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

Petitioners' opening brief challenges the final rule's latter two categories of changes. Petitioners argue that FMCSA's changes to the short-haul exemption did not adequately consider the risks of driving later in the workday or that drivers using the short-haul exemption are found to have a high crash risk. Additionally, petitioners argue that FMCSA did not justify its conclusion that the short-haul exemption changes will not adversely affect driver health or compliance with hours-of-service regulations. Further, petitioners argue the final rule's changes to the 30-minute break requirement ignore fatigue from non-driving tasks and do not address the health effects of the changes.

The government's brief is due on January 18, 2022. The brief for the Owner-Operator Independent Drivers Association, as intervenors in support of the government, is due on January 25. Petitioners' reply brief is due on February 15.

NHTSA Litigation on CAFE Civil Penalty Rate Remains in Abeyance While Rulemaking Proceeds

On April 6, 2021, the U.S. Court of Appeals for the Second Circuit granted the government's motion to hold in abeyance the latest round of litigation over an inflation adjustment to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards, and are unable to offset such a deficit with compliance credits. NRDC v. NHTSA, Nos. 21-139, et al. (2d Cir.). On August 10, 2021, Tesla moved to end the abeyance and renewed its earlier request for summary vacatur. NHTSA and the intervening Alliance for Automotive Innovation opposed the motion, arguing that the administrative process of NHTSA's reconsideration of its interim final rule should be allowed to continue. NHTSA is reconsidering the rule pursuant to Executive

Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis." The agency issued a supplemental notice of proposed rulemaking on August 20, 2021, proposing to withdraw the interim final rule. Environmental and state petitioners supported Tesla's motion. The Second Circuit has not yet ruled on the motion.

This litigation involves a challenge to an interim final rule that NHTSA issued on January 14, 2021, in response to a petition for rulemaking from the Alliance for Automotive Innovation. Under the interim final rule, an inflationary increase to the CAFE civil penalty rate from $5.50 to $14 will go into effect beginning with Model Year 2022, instead of Model Year 2019, as it would have done pursuant to an August 31, 2020, decision of the Second Circuit vacating an earlier NHTSA rule.

The parties involved in the previous rounds of litigation on this issue sued again in two cases in the Second Circuit (brought by the Natural Resources Defense Council, the Sierra Club, and a coalition of states led by New York) and one in the Ninth Circuit (brought by Tesla). NRDC, et al. v. NHTSA, No. 21-139 (2d Cir.); New York, et al. v. NHTSA, No. 21-339 (2d Cir.); Tesla, Inc. v. NHTSA, No. 21-70367 (9th Cir.). Tesla and the Alliance for Automotive Innovation successfully moved to intervene in the Second Circuit litigation, and Tesla successfully moved to transfer its Ninth Circuit case to the Second Circuit, where the cases are now consolidated. The government has filed monthly status reports with the court asking that the cases remain in abeyance while NHTSA continues to make progress on its new rulemaking.

DOT Opposes Mandamus Petition Seeking to Compel Enforcement on Aviation Mask Complaints

DOT has opposed a November 9, 2021, petition for writ of mandamus, and an accompanying request for preliminary relief, filed by an individual who seeks to compel action on approximately 40 aviation consumer complaints that he has submitted to DOT's Office of Aviation Consumer Protection (OACP). Abadi v. DOT, No. 21-2807 (2d Cir.). Petitioner contends that OACP has not yet acted in response to complaints that he has filed since late 2020 regarding his allegations that various airlines have violated their obligations under the Air Carrier Access Act by requiring him to wear a mask to travel. Petitioner argues that he has a condition that prevents him from wearing a mask, but that the airlines have nonetheless required him to wear one or have imposed unduly restrictive procedures for obtaining an exemption from the mask requirement. DOT opposed petitioner's request for preliminary relief, arguing that he had not met the high standard applicable here. Instead, the Department explained that it was investigating consumer complaints as expeditiously as possible while receiving a record number of complaints during the public health emergency, and that it was improper and premature to compel DOT to take action on the petitioner's complaints at this time. Instead, DOT plans to continue its investigations of complaints as required under the ACAA and retains substantial discretion about taking further enforcement action in individual cases. The Second Circuit denied petitioner's request for preliminary relief on November 18. While the parties await further direction from the court, petitioner has submitted additional filings to the Second Circuit seeking

immediate relief, and also filed an emergency application to the Supreme Court.

DOT and Other Federal Agencies Defend Challenge to Transportation Mask Mandate

The United States has moved to dismiss a district court lawsuit aimed at striking down the Federal Transportation Mask Mandate (FTMM). Wall v. CDC, et al., No. 21-975 (M.D. Fla.). Plaintiff Lucas Wall filed this suit on June 7, 2021, against President Biden, DOT, the Centers for Disease Control and Prevention (CDC), and the Transportation Security Administration (TSA). Wall alleges that he is fully vaccinated against Covid-19 but is nonetheless unable to wear a mask on flights that he purchased for travel over the past several months, given his anxiety-related condition. In particular, Wall contends that TSA and Southwest Airlines refused to allow him to board a flight originating in Orlando, Florida in early June due to his refusal to wear a mask. Wall also argues that he has purchased additional tickets for travel to other locations over the ensuing months, which he has not been able to use due to the mask mandate.

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

Wall's complaint primarily focuses on the actions of CDC and TSA, but he nonetheless asserted several claims regarding DOT's actions and programs as they relate to the mask mandate. Although DOT did not issue the specific orders forming the FTMM, the Department works in partnership with these other Federal agencies, as well as State and local transportation stakeholders, to carry out the FTMM in the interest of public safety. In addition, DOT administers aviation statutes and, through FAA, is responsible for aviation safety regulation and enforcement. Of particular relevance here, DOT administers the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, and has promulgated implementing regulations, codified at 14 C.F.R. part 382. The ACAA prohibits airlines from discrimination on the basis of disability in air travel. Consistent with the ACAA, as well as with exceptions recognized by CDC in the FTMM, DOT issued enforcement policy guidance in early 2021, making clear that airlines must continue to operate under ACAA requirements and must make allowances for passengers who cannot wear a mask due to a disability or underlying condition.

Although Wall alleges that he has such a condition that makes him unable to wear a mask, the government argues that Wall has not presented any persuasive evidence of such a condition to the airlines. The government also contends that Wall did not seek appropriate pre-litigation relief from DOT's Office of Aviation Consumer Protection (OACP), which investigates consumer complaints, including alleged

ACAA violations, and takes enforcement action against airlines as appropriate under governing law. Wall has argued that submitting a complaint to DOT would be futile.

The district court denied Wall's motion for a temporary restraining order and also rejected his various additional requests for "emergency" relief. The U.S. Court of Appeals for the Eleventh Circuit refused to overturn those decisions. The Supreme Court also denied Wall's request for emergency relief. Upon return to the district court, Wall moved for summary judgment, alleging that there were no issues of material fact in the case, and that he was entitled to judgment as a matter of law under various constitutional theories and other grounds. Wall has persisted in asserting most of his claims, but has laid aside various claims that he initially made regarding some of DOT's operating administrations, including claims relating to transit operations and the trucking industry.

The United States opposed Wall's summary judgment motion and moved to dismiss the case, arguing that his claims were not cognizable, and that the district court also lacked jurisdiction over several of his claims. For example, the government argued that some of Wall's claims against DOT and TSA were not reviewable in the district court, and could only be pursued, if at all, in the court of appeals, pursuant to 49 U.S.C. § 46110. The government also argued that Wall's rights had not been violated; that he had means of recourse to avoid the mask mandate if he actually showed evidence of a legitimate condition affecting him; and that he was essentially seeking to have the courts second-guess the expert judgment of the Federal defendants on questions of public health and safety. The United States filed its reply brief on September 17.

On October 7, the magistrate judge issued a Report and Recommendation in the government's favor. Adopting largely the arguments in the government's briefs, the magistrate recommended that Wall's complaint be dismissed, primarily with leave to re-plead, except for the claims against DHS, TSA, and DOT, which could not be pursued in district court. Wall filed his objections to the magistrate's report, and the government successfully moved to strike Wall's filing for noncompliance with applicable court rules. Wall then filed an updated set of objections, and the United States filed its opposition on December 1.

In addition, Wall is pursuing another lawsuit on related issues in the same court against a group of airlines, contending that they have violated Federal law and have engaged in a conspiracy to violate his rights and the rights of other passengers with respect to mask requirements. Wall v. Southwest Airlines et al., No. 21-975 (M.D. Fla.).

Court Dismisses Challenge to DOT's Rescission of Enforcement Procedure Regulations, Plaintiff Appeals

PHMSA recently prevailed in a lawsuit brought by a packaging company alleging irreparable harm as a result of DOT's rescission of certain enforcement procedures codified during the last Administration in 49 C.F.R. part 5, subpart D. Polyweave Packaging, Inc. v. USDOT, 2021 WL 4005616 (W.D. Ky. Sept. 2, 2021). This case concerned the lawfulness of the Secretary of Transportation's rescission of 49 C.F.R. §§ 5.53–5.111.

Executive Order (EO) 13892, issued in October 2019, outlined transparency and due process guidelines for Federal agency

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

In July 2020, prior to filing its lawsuit, Polyweave was the subject of an administrative proceeding that culminated in PHMSA issuing a final order and assessing a significant civil penalty against the company. Polyweave is currently appealing that decision through administrative channels. On May 19, 2021, Polyweave Packaging, Inc., sued the Department for violation of the APA and for declarative and injunctive relief to prevent the Secretary from rescinding the Department's enforcement procedure regulations (49 C.F.R. part 5, subpart D). To support its standing in the case, plaintiff alleged that it is a target of an ongoing PHMSA enforcement action and that it will suffer irreparable harm without the Department's enforcement procedure rules. Polyweave contended the Secretary erred when he failed to account for, explain, or justify the rescission of those substantive rights in the final rule rescinding Subpart D. As the court noted in its Memorandum and Opinion granting DOTs Motion to Dismiss, "[t]he gist of Polyweave's allegations is that Subpart D, despite its label as a rule of agency procedure, provided several substantive rights to companies targeted in DOT enforcement proceedings."

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

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

Polyweave is appealing the district court's decision in the U.S. Court of Appeals for the Sixth Circuit. Polyweave Packaging, Inc. v. USDOT, No. 21-5929 (6th Cir.). Polyweave filed its opening brief on November 15 and the government's responsive brief is due on January 12.

California High-Speed Rail Litigation Settled with Re-Obligation of Funds

On June 10, 2021, the parties reached a settlement in litigation over FRA's decision to terminate a $929 million grant for the construction of high-speed rail in California. California, et al. v. USDOT, et al., No. 19-02754 (N.D. Cal.).

On May 16, 2019, FRA terminated Cooperative Agreement No. FR-HSR-0118-12, as amended, between FRA and CHSRA, while also de-obligating 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, 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.

In their complaint, plaintiffs argued that FRA's decision was arbitrary and capricious and in violation of the APA. The government filed its answer to plaintiffs' complaint on July 22, 2019. On March 5, 2020, the parties participated in a settlement conference after exchanging settlement offers and settlement conference statements. Settlement negotiations continued until June 10, 2021, when the government and the State of California reached a final settlement to resolve the litigation. Following the execution of the settlement agreement, plaintiffs filed a Joint Stipulation of Dismissal with the court and executed an amended FY10 Agreement re-obligating the $929 million to CHSRA.

Two Groups of States Challenge Executive Order 13990

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

The plaintiff States filed an appeal with the Court of Appeals for the Eighth Circuit and filed their opening brief on December 3. Missouri, et al., v. Biden, et. al., No. 21-3013 (8th Cir.). The government's response brief is due on January 3, 2022.

In Louisiana, et al., v. Biden, et al., No. 21-1074 (W.D. La.), ten states filed a very similar lawsuit challenging Executive Order 13990 and the Interagency Working Group's

Technical Support Document. The parties have fully briefed plaintiffs' Motion for a Preliminary Injunction and the government's Motion to Dismiss. The court held a hearing on December 7, 2021, and has now ordered the parties to file supplemental briefs addressing certain issues by January 7, 2022.

USMMA Students Challenge Academy Vaccination Requirement

On November 19, a group of students from the U.S. Merchant Marine Academy (USMMA) filed an action in the U.S. District Court for the Eastern District of New York challenging the Academy's COVID-19 vaccination requirement. Guettlein v. USMMA, No. 21-6443 (E.D.N.Y.). Plaintiffs, who filed a putative class action on behalf of similarly situated individuals, allege that the Academy's vaccination requirement violates their constitutional and civil rights under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Due Process Clause of the Fourteenth Amendment. They are seeking a temporary restraining order and preliminary injunction.

On December 3, the Academy filed an opposition to the plaintiffs' request injunctive relief and a motion to dismiss for lack of jurisdiction. As a threshold matter, the government argued that the court lacks subject matter jurisdiction over the plaintiffs' claims because the purported jurisdictional bases for their action – 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343 – do not provide causes of action against the Federal government or its officials or waive the sovereign immunity of the United States. Consequently, plaintiffs cannot demonstrate a likelihood of success on the merits of their claim, and therefore, their request for injunctive relief should be denied on that basis alone. Moreover, students have until December 14 to inform the Academy of an intent to seek a medical or religious exemption from the vaccination requirement or until December 28 to become fully vaccinated. The Academy currently does not have any plans to take any adverse action against students who do not become vaccinated. Finally, plaintiffs failed to provide support for their claims of irreparable harm and to demonstrate that granting them injunctive relief would be in the public interest.

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

On September 30, 2021, a construction sub-contractor filed suit against Secretary Buttigieg and the City of Philadelphia in the U.S. District Court for the Eastern District of Pennsylvania, in order to challenge the constitutionality of DOT's Disadvantaged Business Enterprise (DBE) program and Philadelphia's application of that program. Devault Group v. City of Philadelphia, et al., No. 21-04295 (E.D. Pa.).

The DOT DBE program is designed to ensure that state and local recipients of DOT funds for highway, transit, and, airport projects do not to conduct their construction projects in a manner that perpetuates discrimination and its effects. The primary remedial goal and objective of the DOT DBE program is to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally-funded transportation contracts. Several courts of appeals have rejected equal protection challenges to the DOT DBE program, holding that the program is supported by a compelling interest and narrowly tailored to advance that interest.

Plaintiff is a sub-contractor that had been certified as a woman-owned DBE for construction work at Philadelphia International Airport, but was threatened with de-certification by the City when it appeared that the company was not in fact controlled by its purported owner. The company sued to allege that the DBE program's racial classifications—and Philadelphia's implementation of the program—violate the Equal Protection and Due Process Clauses, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

On December 3, 2021, the Pennsylvania Unified Certification Program (UCP) held an administrative hearing to consider whether to decertify the plaintiff. Plaintiff sought a temporary restraining order to block the hearing, but the Court rejected that request. Briefing addressing the preliminary injunction that plaintiff has also sought is ongoing. On December 13, the Pennsylvania UCP ruled in favor of plaintiff, finding that the City had not met its burden of proof of demonstrating that plaintiff was not controlled by its purported owner.

Recent Litigation News from DOT Modal Administrations

Federal Aviation Administration

D.C. Circuit Dismisses Arapahoe County's Petition for Review of Denver Metroplex Project

On March 20, 2020, the Arapahoe County Public Airport Authority and the Board of County Commissioners of Arapahoe County sought review in the U.S. Court of Appeals for the District of Columbia Circuit of FAA's Finding of No Significant Impact and Record of Decision (FONSI/ROD) for the Denver Metroplex project, alleging, among other things, that an Environmental Impact Statement was required, that FAA should not have proposed and implemented any changes in arrival and departure procedures before completion of various congressionally mandated studies, and that FAA committed numerous errors in violation of the National Historic Preservation Act. On June 8, 2021, the court issued a *per curiam* opinion dismissing the consolidated petitions for review because the court found petitioners lacked standing. Arapahoe Cty. Pub. Airport Auth., et al. v. FAA; Board of Cty. Comm'rs of Arapahoe Cty., et al. v. FAA, 850 F.App'x 9 (D.C. Cir. 2021).

FAA began evaluating changes to the airspace in the Denver Metropolitan area several years ago. After extensive community outreach sessions and internal analysis, FAA released a draft Environmental Assessment (EA) in 2019 for public comment. The EA analyzed changes to the Denver Metroplex. FAA held 12 public workshops before closing the public comment period on June 6, 2019. After revising the EA, FAA released a Final EA for additional comment on November 18 and closed the public comment period on December 20. On January 24, 2020, FAA issued its FONSI/ROD for the Denver Metroplex Project.

Petitioners filed their opening brief on November 23, 2020. The FAA's brief was filed on February 19, 2021. Petitioners reply

brief was filed on March 12, 2021. Oral arguments were held on May 6.

Challenge to FAA's UAV Remote Identification Rule Briefed and Argued

Briefing has been completed and oral argument has been held in Brennan v. Dickson, No. 21-1087 (D.C. Cir.), a petition for review filed March 12, 2021, by Tyler Brennan and RaceDayQuads LLC challenging a January 15, 2021, FAA Final Rule, "Remote Identification of Unmanned Aircraft," 86 Fed. Reg. 4390.

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

The Second Amended Brief of Petitioners, filed October 5, 2021, argues that (1) the Unlimited Remote ID rule is an improper search and seizure under the Fourth Amendment; (2) FAA arbitrarily and capriciously either relied upon undisclosed *ex parte* communications or failed to consider relevant information or explain or support changes in the final rule; (3) increasing altitude accuracy while simultaneously switching sensor technology was not a logical outgrowth of the NPRM; (4) FAA failed to comply with the statutory requirement to consult with specified entities; and (5) FAA ignored significant critical comments by failing to explain its constitutional and statutory authority to regulate airspace low to the ground, ignoring material comments challenging the rule's legality, refusing to accept conflicting evidence as to true regulatory costs, not considering an exception for model aircraft, failing to explain why homeowners and local parks could not apply for an ID area, and failing to respond to comments on the safety implications of the rule.

In its October 5 brief, FAA argued that (1) the remote ID rule complies with the Fourth Amendment, in that it violates no reasonable expectation of privacy and any constitutionally cognizable search would be minimally intrusive and not require a warrant; (2) the Remote ID rule is not arbitrary and capricious, because FAA did not consider any *ex parte* communications in issuing it, it is a logical outgrowth of the proposed rule, FAA considered and responded to all material comments, and FAA satisfied all statutory consultation requirements.

Petitioners November 2 Reply Brief argued, among other things, that (1) Remote ID does not provide any option equivalent to the regulatory anonymity procedure that permits Air Traffic Control to track aircraft without identifying them; (2) Remote ID does violate the Fourth Amendment by diminishing the reasonable expectation of privacy; (3) the

rule is arbitrary and capricious because *ex parte* communications were considered; (4) FAA has not that shown changes in the final rule were a logical outgrowth of the NPRM; (5) FAA has not shown it properly considered or responded to material comments; and (6) FAA did not satisfy the statutory consultation requirements.

The court heard oral argument in the case on December 15.

FAA Prevails in Flyers Rights FOIA Case, Plaintiff Appeals

On September 16, 2021, the U.S. District Court for the District of Columbia dismissed a challenge to FAA's withholding of Boeing certification records as confidential commercial information under FOIA Exemption 4 in response to plaintiffs' November 2019 FOIA request. Flyers Rights Educ. Fund, Inc., et al. v. FAA, No. 19-03749, 2021 WL 4206594 (D.D.C. Sept. 16, 2021). In so doing, the court granted FAA's motion for summary judgment and denied plaintiff's similar motion. An appeal of the district court decision was docketed by the U.S. Court of Appeals for the District of Columbia Circuit on November 15, 2021. Flyers Rights Education Fund, Inc., et al. v. FAA, No. 21-5257 (D.C. Cir.).

On December 16, 2019, Flyers Rights Education Fund, Inc. (Flyers Rights) and Paul Hudson sued FAA alleging wrongful withholding of records subject to FlyersRights' November 2019 FOIA request and asking that the court, among other things, (1) enjoin FAA from withholding expedited treatment of its FOIA request, (2) order that FAA search for any and all responsive records to plaintiff's FOIA request with search methods reasonably likely to lead to discovery of all responsive records, (3) order that FAA expeditiously produce all non-exempt responsive records and a *Vaughn* index of any responsive records withheld under an exemption claim, and (4) enjoin FAA from continuing to withhold any non-exempt responsive records.

FlyersRights' FOIA request to FAA sought, aircraft certification records submitted by Boeing to support the 737 MAX's return to service. Specifically, Flyers Rights sought (1) all software changes, including the Maneuvering Characteristics Augmentation System (MCAS), that Boeing had submitted to FAA for 737 MAX since October 28, 2018; (2) all software changes for the Boeing 737 MAX, including MCAS, proposed, required, or requested by the FAA since October 29, 2019; and (3) solutions or fixes to flaws in the MCAS that were proposed by Boeing or any government agency or submitted to the FAA, Joint Authorities Technical Review, or Technical Advisory Board by Boeing. When FAA did not respond within 20 business days, Flyers Rights filed suit.

On March 20, 2020, the parties filed a Joint Status Report (JSR) indicating that (1) Boeing had objected to all but 20 of 94 documents at issue in the litigation; (2) of the remaining documents, Defendants intended to produce the records subject to redactions under FOIA Exemption 6 by March 27; and (3) the parties and Boeing had agreed to a rolling production of 1,000 pages per month. FAA completed productions on September 20, having withheld the vast majority of Boeing's proprietary certification records as confidential commercial information under FOIA Exemption 4.

On October 28, plaintiffs moved for summary judgment, challenging the FAA's application of Exemption 4 to several categories of information within the withheld records. On November 18, FAA filed a cross

motion for summary judgment and opposition to plaintiffs' motion.

On September 16, 2021, the district court issued a memorandum opinion, agreeing with the FAA's arguments that the records were "confidential" as defined by Exemption 4 and rejecting plaintiffs' argument that the FAA's general statements about commitment to transparency qualify as an assurance that it would release specific proprietary documents to the public. The court also rejected plaintiffs' argument that the records were necessary to enable outside experts to assess the safety of the 737 MAX's design change. Instead, the court found that the "importance" or "necessity" of information to external scrutiny is irrelevant to whether information is confidential commercial information under FOIA Exemption 4.

In Flight Paths PFR Case, No FAA Order, Thus No Ninth Circuit Jurisdiction

On October 26, 2021, the U.S. Court of Appeals for the Ninth Circuit denied on jurisdictional grounds a December 12, 2019, petition for review by the City of Los Angeles, which had sought judicial review of a letter from an FAA attorney explaining that a "southern shift" in the median flight tracks of some departing operations from Hollywood Burbank Airport (BUR) did not result from any action taken by FAA. City of Los Angeles v. FAA, No. 19-73164 (9th Cir.). Los Angeles alleged that FAA either took an action not reviewed under NEPA or failed to take action required by law to ensure compliance with assigned flight procedures.

In the summer of 2019, in response to citizen complaints about aircraft noise south of BUR, the airport's contractor had conducted a study that concluded that the median flight tracks of some aircraft departing to the south had drifted farther to the south (by about 1/3 nautical mile) over the previous two years. FAA had not independently verified the report, but its data suggested that the shift was real and that many possible variables, including changing climate and the volume of traffic, might explain the shift. The City of Los Angeles wrote to FAA asking what actions the agency had taken to cause the southern shift, to which FAA responded on November 19, 2019, that it had done nothing to cause the shift. The Benedict Hills Estates Association and the Benedict Hills Homeowners Association intervened in support of the City, claiming an interest in preserving a settlement agreement reached with FAA in early 2018 to implement new departure procedures from Burbank to the south.

Following unsuccessful court-supervised mediation efforts, the court on November 17 denied without prejudice FAA's motion for summary affirmance because Los Angeles's arguments were sufficiently substantial to merit consideration by a merits panel. The court also denied Los Angeles's motion to stay the proceedings to await FAA's responses to a related FOIA request.

Petitioner's December 2020 opening brief argued, among other things, that the FAA Letter was reviewable because FAA compiled an administrative record for it, it definitively stated FAA's position, it directly and immediately affected petitioner and its communities, and it "envisioned immediate compliance."

FAA's March 12, 2021, answering brief argued, among other things, that the petition should be dismissed for lack of subject-matter jurisdiction because the challenged "order" was only attorney correspondence to correct a misunderstanding as to what an FAA official said at a public hearing, did not

definitively state FAA's position, and had no direct or immediate effect and did not demand compliance.

Having heard oral argument on September 14, 2021, the court on October 26, 2021, issued an unpublished memorandum opinion denying the petition for review for lack of subject-matter jurisdiction because the FAA Letter did not meet the requirements for a "final order" subject to direct review by the court. Specifically, the court concluded that the FAA Letter only "comments briefly upon an earlier statement made by the City," it announced no "change from the status quo" and had no bearing on ATC procedure, and it contained "no terms with which the FAA could have envisioned compliance."

Ninth Circuit Finds Fault with FAA's Review of LAX Flight Procedures

In an unpublished July 8, 2021, decision in City of Los Angeles v. Dickson, No. 19-71581, 2021 WL 2850586 (9th Cir. 2021), the U.S. Court of Appeals for the Ninth Circuit granted in part and dismissed in part a petition for review, which alleged that FAA failed to follow environmental requirements in flight procedures at Los Angeles International Airport (LAX).

On June 21, 2019, the City of Los Angeles filed a petition for review challenging (1) the May 2021 amendments to "North Downwind approach procedures" for LAX, which FAA had approved on May 24, 2018, and (2) FAA's "decision to restrict public comments regarding FAA flight procedures" in a "disclaimer [that] prohibits access to [FAA's Instrument Flight Procedures (IFP)] Gateway site unless the user affirmatively acknowledges that FAA will not consider comments submitted on the Gateway site relating to environmental impacts of proposed flight procedures." On August 22, the court granted a July 19, motion of Culver City, California to intervene in support of Los Angeles.

In 2018, the FAA had amended three arrival procedures that were originally part of the Southern California Metroplex, by changing altitudes, adding a waypoint, and otherwise improving the procedures' compliance with current criteria. The City of Los Angeles objected, and the parties agreed that Los Angeles did not have to file suit within 60 days (as usually required) so the parties could attempt resolution. After year-long discussions, FAA and Los Angeles could not reach agreement on all changes sought by Los Angeles, and the City then filed its petition for review.

Los Angeles alleged a violation of NEPA, claiming that FAA did not document its application of categorical exclusions to the amendments or otherwise document compliance with Section 4(f) or the National Historic Preservation Act (NHPA).

FAA moved to supplement the administrative record with explanatory material on the theory that the new documents memorialized its contemporaneous decision-making process used before making the decision. Petitioner Los Angeles moved to add documentation received under the Freedom of Information Act (FOIA), including internal email correspondence suggesting that FAA did not conduct adequate NEPA review of procedures when they were approved.

In its July 8, 2021, decision, the Ninth Circuit granted in part and dismissed in part the petition for review. The court in so doing (1) granted Los Angeles's motion to consider the tolling agreement, finding that Los Angeles reasonably delayed filing the

petition for review to seek resolution; (2) granted substantially all requests for supplementation of the record but denied FAA's motion to complete the record, absent a showing of reliance on the proffered documents in FAA's environmental review; (3) held that FAA violated NEPA, the NHPA, and Section 4(f) of the Department of Transportation Act; (4) declined to vacate the "amended Arrival Routes" given the uncontradicted assertions in an FAA declaration the vacating them "would be severely disruptive in terms of cost, safety, and potential environmental consequences"; and (5) remanded the amended routes to permit "proper NEPA analysis and NHPA and section 4(f) consultation."

On September 6, 2021, the court denied petitioner's request for publication of decision.

Ninth Circuit: No Basis to Reverse FAA Decision in Regency Air Drug- and Alcohol-Testing Case

On July 1, 2021, the U.S. Court of Appeals for the Ninth Circuit denied the petition for review in in Regency Air LLC v. Dickson, F.4th 1157 (9th Cir. 2021), finding no basis to reverse the FAA Administrator's decision (FAA Order 2020-2) that Regency Air violated regulations requiring air carriers to test each employee for drug and alcohol misuse if performing a safety-sensitive function like plane maintenance and upheld the Administrator's decision assessing a $15,600 civil penalty for petitioner's violations of drug and alcohol testing regulations.

In a September 2017 Complaint, FAA's Assistant Chief Counsel for Enforcement (Complainant) had sought a $17,400 civil penalty for violations of FAA and DOT drug- and alcohol-testing regulations arising from Regency's failures (1) to ensure two contract mechanics and one direct employee were subject to testing per 14 C.F.R. part 120, subparts E and F and (2) to obtain, or make a documented good faith effort to obtain, the drug- and alcohol-testing history from the prior employers of a safety-sensitive employee it hired (§ 40.25).

In his April 2019 Initial Decision, the DOT Administrative Law Judge (ALJ) (a) found unproven one alleged contractor mechanic violation (as to Gary Geis, Regency's Director of Maintenance under an agreement with SoCal Jet, then Geis's employer), under § 120.7(i)'s dual-employee exception (which allows an employer, such as Regency, to use a contract employee, such as Geis, not included under its drug- and alcohol-testing program to perform a safety sensitive function, but only if that contract employee was included under the contractor's FAA-mandated drug- and alcohol-testing program and performing a safety-sensitive function within the scope of the employment with the contractor); (b) found proven the remaining violations (*i.e.*, failure to include in its testing program Ernest Long, who performed aircraft maintenance as a favor to his friend, Regency's president; similar failure as to Geis after directly hiring him; and failure to obtain Geis's history when he first performed a safety-sensitive function for Regency as a directly hired employee); and (c) assessed a civil penalty of $11,900 (given fewer violations and perceived mitigating factors).

Regency appealed the violations and civil penalty and complainant appealed the penalty mitigation. In his May 27, 2020, Final Order (FAA Order No. 2020-2), the Administrator (1) affirmed the violations found, finding no merit to petitioner's claim that it did not commit the violations and rejecting petitioner's claim that the Complaint

provided insufficient notice of the violations attributed to the "friend" who performed safety-sensitive maintenance work for Petitioner "without any compensation"; and (2) granted complainant's penalty-mitigation appeal, finding that the ALJ inappropriately reduced the sanction for violations found based on factors that were not mitigating and assessing a civil penalty of $15,600. On July 16, 2020, Regency petitioned for review.

Regency's October 2, 2020, opening brief argued (1) the Complaint failed to give it due notice of the case against it, thus denying it due process; (2) 14 C.F.R. §§ 120.35 and 120.39(b) are unconstitutionally vague and ambiguous and violate due process; (3) 14 C.F.R. § 40.2 is void for vagueness and violates due process; and (4) the penalty merits no deference.

Eleventh Circuit Denies Presidential Aviation's Petition for Review of FAA Civil Penalty for Records and Airworthiness Violations

In an unpublished opinion filed August 17, 2021, in Presidential Aviation, Inc. v. FAA, No. 20-14841, 2021 WL 3627628 (11th Cir. 2021), the U.S. Court of Appeals for the Eleventh Circuit denied Presidential Aviation's petition for review, filed December 30, 2020, challenging the FAA Administrator's November 3, 2020, Decision and Order (FAA Order No. 2020-7) assessing a $36,750 civil penalty for Presidential's failure to record a mechanical discrepancy (in violation of 14 C.F.R. § 135.65(b)) and subsequent operation of an unairworthy aircraft (in violation of 14 C.F.R. §§ 135.25(a)(2) & 91.7(a)).

Presidential holds an air carrier certificate with operations specifications issued under 14 C.F.R. parts 135 and 91. On October 21, 2014, Presidential operated civil aircraft N180NL, a Dassault Mystere Falcon 50EX, on a series of flights that began with an extradition flight operation under part 135 out of El Dorado International Airport in Bogota, Colombia. However, when the aircraft landing gear failed to retract on initial takeoff from El Dorado Airport and an "AUTO SLATS" light illuminated, the aircraft returned to El Dorado Airport. While on the ground, Presidential's flight crew, in consultation with the company's remotely located Director of Maintenance, cleaned grease off of a proximity switch, verified that the light was extinguished, but took no other action. Presidential did not make a record of the discrepancy before again departing El Dorado Airport. Thereafter, Presidential operated the aircraft on two flights under part 135 (Bogota to Cuba to New York), then two flights under part 91 (New York to Pennsylvania to Pensacola, Florida).

In its petition, Presidential challenged (1) the Administrator's prehearing order granting summary judgment to the FAA on its claim that Presidential failed to document a mechanical irregularity in violation of 14 C.F.R. § 135.65(b); (2) the Administrator's finding that its aircraft was not in airworthy condition during the four October 21, 2014, flights, and the operation of the aircraft therefore violated 14 C.F.R. §§ 91.7(a) and 135.25(a)(2); and (3) the Administrator's partial grant of the FAA's appeal and assessment of a $36,750 civil penalty.

After the filing of appellant's initial brief on May 10 and FAA's brief on June 9, the court, without holding oral argument, denied the petition for review and affirmed the Decision and Order in an unpublished opinion. The court held that the Administrator's prehearing order of summary judgment on Complainant's claim that Presidential failed to document a mechanical irregularity in

violation of section 135.65(b) was correct because interpretation of regulatory terms was "a pure question of law" and Presidential failed to support its argument that determining "whether 'the wiping of the grease and/or the mere illumination of the Auto Slats enunciator'" constituted a mechanical irregularity requiring an entry in the aircraft maintenance log was a question of fact not subject to resolution by summary judgment. Presidential's next argument—that the lack of maintenance to resolve the landing gear and indicator light issue before the plane left BOG a second time meant there was no "mechanical irregularity" to record—also failed because even though the regulations do not define "mechanical irregularity," the Administrator did not err in concluding that malfunctioning landing gear qualifies as such. The court further found that the Administrator's finding that Presidential's aircraft was not in airworthy condition during the four October 21, 2014, flights, was supported by substantial evidence. Finally, the court affirmed the Administrator's partial grant of the FAA's appeal and assessment of a $36,750 civil penalty, finding unpersuasive Presidential's various arguments that the penalty was contrary to law in failing to defer to the ALJ's assessment of a lesser sanction or beyond the Administrator's jurisdiction, or otherwise inconsistent with FAA precedent.

Atlantic Beechcraft Services Challenges FAA Order Affirming Dismissal of Grant Assurance Violation Claim

On November 3, 2021, Atlantic Beechcraft Services filed its brief in its February 2, 2021, petition for review of a December 10, 2020, Final FAA Decision that affirmed the Director's Determination, pursuant to 14 C.F.R. Part 16, dismissing Atlantic Beechcraft's allegations against the City of Fort Lauderdale. Atlantic Beechcraft Servs. v. FAA, No. 21-1047 (D.C. Cir.).

Atlantic has raised issues including whether FAA's Grant Assurance 23 (no exclusive rights) permits airport operator City of Fort Lauderdale to grant an exclusive right to its major tenant, Sheltair, that prevents Petitioner, a competitor of Sheltair's major tenant Banyon, from performing turbine engine maintenance services in competition with those that Banyan provides.

On June 8, 2021, the court granted the City of Fort Lauderdale's April 29 motion for leave to intervene.

Petitioner's November 3 brief alleges that (1) Grant Assurance 23-Exclusive Rights prohibits permitting a power, privilege, or right to one airport user while denying the same power, privilege, or right another airport user; (2) the FAD is erroneous as a matter of law because it misunderstands FAA's role in Part 16 complaint procedures; (3) the Prohibition against permitting exclusive rights extends to agreements between airport users; and (4) the City and the FAD both erroneously argue that no exclusive rights violation occurs unless the entire airport is implicated—that is, if Atlantic could have worked on turbine engine aircraft somewhere else on the airport, "there can be no exclusive rights violation on Sheltair's leasehold."

In its December 8 response brief, FAA argued that it correctly concluded that the City had not granted any entity an exclusive right to service turbine-engine aircraft at the airport given that uncontroverted evidence showed that no entity has an exclusive right to perform turbine engine maintenance at the airport. FAA further argued that petitioner's alternative reading of the exclusivity

assurance finds no support in the text of the condition or the statutory provisions it implements, is inconsistent with the assurance's purpose, and would produce absurd results. FAA's interpretation of the provision, moreover, is consistent with FAA's guidance and past decisions. Finally, FAA argued that it did not impose an unduly demanding burden of proof on petitioner.

Petitioner's reply brief is due January 5, 2022.

Briefing Completed, Oral Argument Held in Dueling Petitions for Review by Airman Pham and Administrator Dickson

Briefing has been completed and oral argument was held on December 13, 2021, in Pham v. NTSB and FAA; Dickson v. Pham and NTSB, Nos. 21-1062 and 21-1083, consolidated (D.C. Cir.). On February 11, 2021, Ydil Pham filed a petition for review challenging NTSB's decision (NTSB Order No. EA-5889), issued on January 4, 2021, affirming the finding of the Administrative Law Judge (ALJ) that he refused a required drug test, for which the Board imposed a 180-day suspension of Pham's pilot and airman medical certificates. Cross-petitioner Stephen Dickson's petition for review, filed March 5, 2021, in his official capacity as FAA Administrator, also seeks review of the NTSB order, on grounds that, in modifying the NTSB ALJ's order of revocation to one of suspension, the Board failed to accord due deference to the Administrator's choice of sanction and departed from precedent without adequate explanation.

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

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

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

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

of drugs, when an airman argued he did not know that leaving constituted a refusal, and after an airman was not apprised of shy-bladder procedures.

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

Petitioners' consolidated opening brief was filed on October 27, 2021, in City of North Miami, et al. v. FAA, No. 20-14656 (11th Cir.), consolidating five petitions for review filed by North Miami, the Village of Indian Creek, Town of Surfside and Charles W. Burkett, the Village of Biscayne Park, the City of North Miami Beach, Friends of Biscayne Bay, and Maureen Harwitz, and the Town of Bay Harbor Islands.

On October 15, 2020, FAA issued a FONSI/ROD for the South-Central Florida Metroplex project, which includes 106 Standard Instrument Departures (SIDs) and Standard Terminal Arrivals (STARs) with 11 Area Navigation (RNAV) transition routes (T-routes) in a study area containing 21 airports. On December 11 and 14, 2020, five petitions for review of the FAA final order were filed on behalf of seven local governments, two residents, and one nonprofit corporation.

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

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

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

Petitioners' October 27 consolidated opening brief argued that all petitioners have standing as a result of the air traffic control changes at area airports and the resulting increase of air traffic over the Towns in that they suffered concrete and particularized injury to their ability to manage infrastructure, protect and improve the environment, livability, and aesthetics of the Towns, protect their citizens' health, safety, welfare, and property values, which injuries are fairly traceable to the FAA Project because it increased aircraft noise and emissions and would be redressed by the court's favorable decision vacating or otherwise altering flight procedures under the project. As to the merits, petitioners argue that FAA violated NEPA by defining the purpose and need of the South-Central

Florida Metroplex Project so narrowly that only one alternative to "no action" could fulfill that purpose, by not considering the cumulative impact of its past actions, and by improperly invoking a "Presumption of Conformity" that applies to air operations at 3,000 feet or more above the ground to avoid evaluating the air quality impacts of the project. Petitioners also argue that FAA's implementation of the Project violates the 14th Amendment due process rights of the individual petitioner and the citizens of the communities impacted by the Project by depriving them of a constitutionally protected liberty, their right to sleep.

FAA's response brief is due December 29, and petitioners' reply brief is due January 26, 2022.

Oral Arguments Anticipated in Palm Beach County's Economic Discrimination Petition for Review

With briefing completed, oral arguments in Palm Beach County v. FAA, No. 21-10771 (11th Cir.) likely will be scheduled during early 2022. The March 10, 2021, petition for review of Palm Beach County and the City of Atlantis, Florida, challenged a Final Agency Decision (FAD) that affirmed the Determination of the Director of Airport Compliance (Director), in a 14 C.F.R. Part 16 action, that Palm Beach County violated 49 U.S.C. § 47107(a) and its obligations under Grant Assurance 22, Economic Nondiscrimination, by unreasonable and unjustly discriminatory restrictions on operation of certain aircraft. Petitioners assert that, as a result of the decision, county residents might experience aircraft noise and safety impacts. FAA maintains that the FAD was correctly decided, and the County should not be permitted to discriminate against jet traffic.

In the underlying proceeding, former airline Boeing 727 Captain Errol Forman alleged that Palm Beach County unjustly restricted jet aircraft at Lantana Airport (LNA) in violation of Grant Assurance 22. The Associate Administrator's FAD upheld the Director's decision that the Palm Beach County restriction on jet aircraft was in violation of 49 U.S.C. § 47107(a) and its obligations pursuant to Grant Assurance 22, Economic Nondiscrimination. The Associate Administrator held the County's ban did not comply with the sponsor's obligation to provide reasonable access without unjust discrimination.

The June 15 joint opening brief of petitioners Palm Beach County and the City of Atlantis, Florida, argues that (1) FAA lacked Part 16 jurisdiction to resolve whether the jet restriction was grandfathered under Airport Noise and Capacity Act (ANCA), 49 U.S.C. § 47524; (2) even if FAA had jurisdiction, its determination that the jet restriction is not grandfathered under ANCA is arbitrary and capricious; (3) FAA's determination that the jet restriction violates Grant Assurance 22 is arbitrary and capricious, unsupported by substantial evidence, and ignores important aspects of the problem.

FAA's July 23, 2021, response brief argues that (1) FAA correctly determined that the County's restrictions on jet and certain heavy aircraft are unreasonable and unjustly discriminatory, in violation of Grant Assurances 22 and 49 U.S.C. § 47107(a)(1), because they violate ANCA, which sets forth procedural requirements to restrict Stage 3 aircraft; and (2) substantial evidence supports the FAA's alternative conclusion that the restrictions have no valid justification because, among other things, the County had decided to allow noisier and more maintenance-intensive aircraft to operate at LNA and it had been authoritatively

determined that jet aircraft could be safely operated at LNA, thus undermining its purported noise and maintenance justifications.

Petitioners filed a joint reply brief on August 27, 2021, further supporting the positions advanced in their opening brief. The court has not yet set a date for argument.

PANYNJ Petitions for Review of Part 16 Determination Held in Abeyance

The Port Authority of New York and New Jersey (PANYNJ) seeks review of an FAA Final Agency Order, issued January 11, 2021, affirming in part and remanding in part the Director's Determination in a 14 C.F.R. Part 16 action. Port Authority of New York and New Jersey v. FAA, No. 21-1086 (D.C. Cir.). The Director of the FAA Office of Airport Compliance and Management Analysis found that PANYNJ violated Grant Assurances 22 and 25, relating to Economic Nondiscrimination and Airport Revenues, in operating Newark Liberty International Airport (EWR).

On April 8, United Airlines moved for leave to intervene.

PANYNJ's Statement of Issues to be Raised, filed April 12, indicates that petitioner will argue that the Final Order's findings that PANYNJ violated Grant Assurances 22 and 25 are arbitrary and capricious and/or contrary to law.

On April 26, FAA filed a Joint Motion to Hold Case in Abeyance stating that "[a] period of abeyance is warranted to permit the petitioner to undertake its corrective action plan and for the agency to complete additional administrative proceedings" in the form of a partial remand to the Director and that the resolution of those "pending issues could alter the scope of the court's "review, including by potentially eliminating" entirely the need for review. On May 10, the court granted the motion and directed the parties to "file motions to govern future proceedings by" August 24. The parties filed motions on August 20 and November 22, stating that the pending issues have not yet been resolved but that continuing discussions could still affect the conduct of or the necessity for the review.

Abeyance Granted in Riverkeeper Petition for Review of LaGuardia Environmental Reviews

On December 3, 2021, in Riverkeeper, Inc. v. FAA, No. 21-2243 (2d Cir.), the U.S. Court of Appeals for the Second Circuit granted FAA's November 19 motion to hold in abeyance a September 20 petition for review of FAA's July 20 order approving the Environmental Impact Statement (EIS) and Department of Transportation Act of 1966 Section 4(f) Evaluation of the proposed LaGuardia Airport (LGA) Access Improvement Project. The petition for review, filed by Riverkeeper, Inc., Guardians of Flushing Bay, Inc., and Ditmars Boulevard Block Association, Inc., and naming as Respondents FAA, Administrator Dickson, and the Port Authority of New York and New Jersey (PANYNJ), alleges that the FAA's ROD, Final EIS, and Section 4(f) evaluation were arbitrary and capricious and requests the court to order FAA to prepare a new EIS.

The LaGuardia AirTrain is a proposed 2.3-mile rail system that connects LaGuardia Airport to two public transit rail systems—the Long Island Rail Road and Metropolitan Transportation Authority's (MTA) New York City Transit—at Flushing Meadows.

Petitioners allege that former New York Governor Andrew Cuomo and PANYNJ

inappropriately pressured the FAA to expedite and approve the project and that as a result FAA (1) inappropriately constrained the EIS's Purpose and Need statement to preclude meaningful consideration of non-rail transit alternatives; (2) applied arbitrary and exclusory screening criteria in an uneven manner to exclude alternatives other than those PANYNJ preferred; (3) failed to identify and consider cumulative impacts of this and other past, present, and future proposed projects; (4) approved use of parkland property along Malcolm X Promenade despite existence of feasible and prudent alternatives; (5) failed to complete all possible planning to mitigate impacts to Malcolm X Promenade from construction and operation of the AirTrain; (6) inappropriately granted PANYNJ authorization to use passenger facility charges to move employee parking offsite to make room for concessions; and (7) failed to consider the impact of these concessions, thus depriving the public of important data as to feasibility, cost, environmental impacts, and regional transit and jobs benefits of the alternatives.

The FAA position is that the EIS process for the AirTrain has been independent and impartial, the screening criteria the FAA developed were broader than those in the project sponsor's original proposal and were evenly applied to all 47 alternatives (including 27 new alternatives suggested by the public during the EIS scoping process), and the Cooperating and Participating agencies concurred with FAA's alternatives analysis.

Contemporaneously with its petition for review, petitioners moved Administrator Dickson for an administrative stay of the agency's ROD pending the court's review. On October 29, 2021, the Administrator denied the motion.

Earlier, on October 21, respondent PANYNJ moved to intervene in support of respondents, stating its concern that it was not a proper respondent, but instead should participate in the case as an intervenor. On October 26, the court granted PANYNJ's motion to intervene. On November 19, FAA filed an Unopposed Motion for Abeyance Pending the Port Authority's Review Process, seeking "abeyance until the Port Authority has completed its review of alternative mass transit options to LaGuardia Airport and determined how to proceed, or until the Port terminates its pause of the LaGuardia Access Improvement Project." The court granted the motion on December 3.

Warbird Adventures Seeks Review of FAA Order on Limited Category Aircraft Flight Training Rule

On July 30, 2021, petitioners Warbird Adventures, Inc., and Thom Richard filed a petition for review seeking review of (1) a letter to certain members of industry, signed June 6, 2021, by the Associate Administrator for Aviation Safety; and (2) a Notification of Policy for Flight Training in Certain Aircraft, 86 Fed. Reg. 36,493 (July 12, 2021). Warbird Adventures, Inc. v. FAA, No. 21-1160 (D.C. Cir.). Both documents provided clarification on flight training for compensation in certain aircraft that hold special airworthiness certificates including limited category, experimental category, and primary category aircraft. The notification also provided owners and operators of these aircraft a streamlined process for obtaining a letter of deviation authority (LODA) to conduct flight training in their aircraft.

On April 2, 2021, the U.S. Court of Appeals for the District of Columbia Circuit dismissed an earlier petition for review brought by Petitioners challenging an FAA emergency cease and desist order involving

operation of their limited category aircraft. In an unpublished *per curiam* order, the court denied the petition because the aircraft was not certified for paid flight instruction and substantial evidence supported the FAA order.

On November 9, pursuant to a joint motion to stay proceedings during mediation, the court revised the briefing deadlines, with Petitioner's Brief now due on January 31, 2022, Respondent's Brief due on March 2, and Petitioner's Reply Brief due on March 23.

Alex Jones's Infowars Voluntarily Dismisses First Amendment Challenge to FAA Temporary Flight Restriction

On October 4, 2021, Free Speech Systems, LLC, d/b/a Infowars, voluntarily dismissed its September 17 suit against FAA and its Administrator. Free Speech Systems, LLC v. Dickson, No. 21-00826, dismissed under No. 21-00051 (W.D. Tx.). Infowars had filed a complaint "pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the First Amendment of the United States Constitution" alleging that FAA had violated its First Amendment rights by establishing temporary flight restrictions (TFR) prohibiting, with specified exceptions, unmanned aerial systems (UAS) operations from September 16 through 30, 2021, for a specific area of Del Rio, Texas. Infowars also filed a Motion for Temporary Restraining Order and for Preliminary Injunction, asking that the court enjoin the TFR's enforcement.

During a September 2021 immigration surge, the FAA had established a TFR around the trans-border bridge at Del Rio. The TFR was announced via a Notice to Airman (NOTAM) on September 16, establishing a TFR prohibiting unmanned aerial systems (UAS) operations for a zone with a radius of two miles in Del Rio, Texas The NOTAM provided exceptions for various types of UAS operations, including commercial operations with a valid statement of work. Excepted operators were required to obtain a Special Governmental Interest (SGI) airspace waiver per instructions in the NOTAM.

The Complaint, naming as Defendants FAA Administrator Dickson and FAA, and identifying Free Speech Systems' principal as "Alex Jones, a political pundit, commentator, and journalist," asserted, *inter alia*, that Defendants issued the TFR prohibiting press from operating UAS at or near the site of the migrant crisis "to ensure that the narrative coming out of Del Rio will be either government-controlled, or fed selectively to 'journalists' who are willing to promote the government's chosen narrative in a manner more akin to paid public relations mouthpieces."

FAA's Response in Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, filed September 20, noted, among other things, that "[t]he face of the TFR contains instructions detailing how various entities, including commercial drone operators, can seek waivers to the restriction" and "instructs commercial drone operators, such as press organizations, to send waiver requests via email to the FAA" and that as of September 20, "Infowars had not submitted the required information to the FAA in order for Infowars' waiver to be processed by FAA."

On September 21, one day after receiving FAA's response, plaintiff filed a Notice of Withdrawal of Motion for Temporary Restraining Order, stating that it was withdrawing the "Motion for Temporary

Restraining Order and for Preliminary Injunction . . . without prejudice" and that "[s]ince the filing of the Motion, the FAA has implemented a procedure whereby the Press may access the air in order to gather the news, thus mooting the request for preliminary injunctive relief." A Notice of Voluntary Dismissal was filed October 4.

Updated Status of Litigation Related to October 2018 Lion Air Tragedy

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

After FAA received multiple administrative claims, five lawsuits were filed and consolidated in the U.S. District Court for the Northern District of Illinois. In re: Lion Air Flight JT 610 Crash, No. 18-07686 (N.D. Ill.). Three were served on the United States. The complaints contain counts against the United States alleging negligence in design, certification, Organization Designation Authorization (ODA) oversight, and training. On December 28, 2020, litigation was continued through February 28, 2020, "to allow the parties to continue to engage in mediations," with a Boeing status report ordered two months thereafter; and, in each subsequent minute order continuing the stay, another such status report was ordered. According to Boeing's Eleventh Status Report on Remaining Individual Actions, filed November 11, 2021, as a result of mediations commenced on July 16, 2019, "Boeing has fully settled . . . claims filed on behalf of 183 decedents[, and] another claim was fully settled without litigation being filed," leaving only "three decedents whose families have brought claims in this litigation that have not yet settled," two of them in negotiation and the third in which the parties are discussing pre-mediation data exchanges. Additionally, Boeing states, its counsel has been "contacted by an attorney representing the families of the last two decedents whose claims have not yet settled or been filed in this litigation." Boeing concludes that it "does not believe that an impasse has been reached in any of the ongoing settlement negotiations." As of November 21, the docket itself lists 42 total docket numbers, which involve 40 plaintiffs; one intervenor; 14 defendants, including Boeing, DOT, and FAA; five respondents, and two movants. As of the court's November 12 minute entry, the stay of the litigation is continued, the *forum non conveniens* briefing schedule is suspended, and Boeing is to file a written status report no later than January 14, 2022.

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

Discovery Pending in IEX's Third-Party Claims against FAA and U.S. in Kobe Bryant Wrongful Death Case

Discovery remains pending in third-party wrongful death claims by Island Express Helicopters (IEX) against FAA/United States stemming from the helicopter accident that resulted in eight fatalities, including Kobe Bryant.

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

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

The court accepted the settlement agreement between plaintiffs and IEX; however, IEX still pursues its third-party claims against FAA/United States. On July 20, the court issued a Scheduling Order for parties to initiate discovery, but IEX has not yet served any discovery on FAA/United States.

ATCS Candidates Sue FAA, Seek Class Certification from D.C. District Court

In Brigida v. Buttigieg, No. 16-2227 (D.D.C.), a 2015 case alleging racial discrimination in FAA's filling prospective Air Traffic Controller Specialist (ATCS) positions, plaintiffs have replied to Defendants' opposition to their September 10, 2021, motion for class certification. The case was filed on December 30, 2015, by Air Traffic-Collegiate Training Initiative (AT-CTI or CTI) graduates who applied for ATCS positions in 2014, claiming race-based disparate treatment resulting from FAA having "purged" the list of qualified CTI graduate applicants and utilizing the 2014 biographical assessment. Plaintiffs also allege that these decisions violated their Fifth Amendment right to equal protection by depriving them of a protected interest without due process, but admit that such violations can only be enforced through Title VII.

On October 27, 2020, plaintiffs filed a Fourth Amended and Supplemental Class Action Complaint and, on November 13, 2020, defendants moved to dismiss it in part. After briefing was completed and the court conducted a hearing on the defendants' motion to dismiss, on May 12, 2021, the court denied defendants' motion, finding that plaintiffs had "plausibly alleged|" they were "applicants for employment." As to defendants' argument that the "decision to withdraw the separate hiring process previously afforded CTI-applicants was not an adverse employment action," the court found that, "more than the mere withdrawal of a preference," the complaint alleged that FAA decided "to abolish, for allegedly discriminatory purposes, a purportedly race-neutral application process that the FAA designed and implemented and in which the plaintiffs had invested substantial time, energy, and resources at the encouragement of the FAA itself."

On September 10, 2021, plaintiffs moved for class certification, arguing (1) that the proposed class of CTI students qualifies under Fed. R. Civ. P. 23(a), in that (a) numerosity is satisfied by a class exceeding 1,000 members; (b) commonality

is met by use of the biographical questionnaire and a common policy striking the AT-SAT, as well as common defenses, sub-issues, and back pay elements; (c) plaintiffs' claims are typical of the class; and (d) the named plaintiffs are adequate class representatives; and (2) that a Rule 23(b)(2), Rule 23(b)(3), or hybrid certification under Rule 23(b)(3) or 23(c)(4) is appropriate, because (a) Rule 23(b)(2) is met by an injury caused by FAA practices applying generally to the class and for which declaratory and injunctive relief would benefit that entire class; and (b) hybrid certification is warranted because common questions predominate, bifurcation of the case may be considered in the predominance analysis, class action is the superior method of adjudication, and certification of an issues class is appropriate under Rule 23(c)(4).

In their October 26, 2021, opposition brief, defendants argued (1) that plaintiffs had not demonstrated satisfaction of Rule 23(a), in that (a) commonality was not met by vague and conclusory assertions that the biographical assessment (BA) was biased, use of a BA that might also have benefited women and other minority groups, cancellation of the AT-SAT scores, or requests for injunctive relief and back pay; (b) typicality was not met because Plaintiffs do not represent the class's diversity, the variation in eligibility and qualifications, or the range of mitigation efforts; (c) plaintiffs cannot adequately represent the entire proposed class because they did not timely exhaust their AT-SAT claim and inclusion of women, Hispanics, and Asians might create a class conflict; and (d) plaintiffs' class definition lacks ascertainability; and (2) that Rule 23(b)'s requirements cannot be satisfied, because (a) plaintiffs' proposed class cannot be certified under Rule 23(b)(2) absent a showing that injunctive relief would be "appropriate respecting the class as a whole," or that legality of challenged behavior could be settled regarding the entire class, (b) plaintiffs cannot certify a class under Rule 23(b)(3) due to failure to show either predominance of common over individualized issues or superiority of a class action, and (c) plaintiffs have not demonstrated that an alternative certification approach would resolve the defects for their proposed class.

Briefing on the plaintiffs' motion for class certification is complete and the court is scheduled to hold a hearing on the motion on January 13, 2022.

Federal Highway Administration

Injunctive Relief Denied in Construction of Obama Presidential Center Case

On August 19, 2021, the U.S. Court of Appeals for the Seventh Circuit affirmed the U.S. District Court for the Northern District of Illinois' denial of injunctive relief for a group of individuals attempting to stop construction on the Obama Presidential Center (OPC) in Chicago, Illinois. Protect Our Parks, Inc., et al. v. Buttigieg, et al., 10 F.4th 758 (7th Cir. 2021). Appellants, which included the non-profit organization Protect Our Parks and several local community members, challenged FHWA decisions stemming from roadwork necessitated by the OPC in Chicago's Jackson Park under NEPA and Section 4(f).

On June 15, 2021, plaintiffs filed a Motion for a Preliminary Injunction, which the district court denied on August 5. In their arguments on appeal to the Seventh Circuit, plaintiffs maintained that FHWA's environmental assessment (EA) improperly

segmented particular elements of the OPC project. Plaintiffs further alleged that FHWA violated NEPA because the EA failed to consider other potential sites for the construction of the OPC. Plaintiffs also claimed that FHWA's decision violated NEPA because the OPC project is "highly controversial" and, therefore, requires an Environmental Impact Statement. Lastly, plaintiffs argued for the first time before the Seventh Circuit that Federal agencies are obligated to complete a more comprehensive analysis of indirect impacts, such as noise, dust, and tree damage, where a project does not incorporate land from a Section 4(f) property. In responsive pleadings before the Seventh Circuit, Federal defendants emphasized that much of the proposed OPC project is under local control, and that FHWA does not have authority to override the City of Chicago's selection of the site for the OPC. Therefore, FHWA argued that it is not obligated to consider other sites that have not been approved by the City of Chicago, as such an approval is not a major Federal action. Additionally, FHWA argued that many of the gaps alleged in the EA, which plaintiffs claimed are the result of improper segmentation, are not actually the result of Federal actions subject to NEPA or other Federal statute. FHWA also noted that the existence of objections to a project does not itself make a project "highly controversial" under NEPA.

On August 13, the Seventh Circuit denied plaintiff's request for an Emergency Stay pending Appeal in an abbreviated order and indicated a full explanation of its ruling would follow. On August 16, plaintiffs submitted an Emergency Application for Writ of Injunction to Supreme Court Justice Amy Coney Barrett, which was denied in a docket entry dated August 20. On August 19, the Seventh Circuit issued its more extensive opinion. The Seventh Circuit agreed with FHWA that the crux of plaintiff's complaint stems from a local decision regarding the location of the OPC, a decision over which the Federal government has no authority.

On August 27, plaintiffs renewed their request to the Supreme Court for a Writ of Injunction. Plaintiffs argued that at the time of their initial application to the Supreme Court, the Seventh Circuit's full opinion was not yet available for review and, therefore, plaintiff's request for injunctive relief and the Seventh Circuit's opinion warrants review by the full Supreme Court. The case was scheduled for discussion at the September 27 conference of the Supreme Court. That following day, former President Barack Obama and first lady Michelle Obama attended the official groundbreaking for the OPC. On October 4, the Supreme Court denied plaintiffs' renewed request for a Writ of Injunction.

Second Circuit Upholds Grant of Summary Judgment in Favor of FHWA in NEPA Challenge to Highway Modernization Project

On September 17, 2021, the U.S. Court of Appeals for the Second Circuit, by Summary Order, affirmed the July 8, 2020, judgment of the U.S. District Court for the District of Vermont denying plaintiff's motion for summary judgment and granting judgment in favor of defendants. R.L. Vallee, Inc., et al. v. Vermont Agency of Transp., et al., No. 20-2665, 2021 WL 4238120 (2d Cir. 2021).

The district court had reasoned that the case presented a single issue: whether FHWA's decision to proceed with construction of a Double Crossover Diamond (DCD), a type of intersection developed to reduce delay from left-turning traffic at highway interchanges, for the Double Diamond Interchange (DDI)

project qualifies for a categorical exclusion (CE), or whether FHWA should have prepared an Environmental Impact Statement (EIS) before taking action. The court found that the decision of the Vermont Agency of Transportation (VTrans) and FHWA to consider the DCD project for a Documented Categorical Exclusion (DCE) reflected a reasonable interpretation of the regulations and was not arbitrary or capricious.

On August 11, 2020, plaintiff appealed the district court's ruling, arguing that the case should be remanded to the district court with instructions to permit plaintiffs to amend their 2018 Complaint. In addition, plaintiffs argued that it was entitled to judgment as a matter of law because, under NEPA, an EIS is required for the DDI project; that VTrans and FHWA failed to take a required hard look at all of the DDI Project's "indirect effects;" that VTrans' application for the 2013 DCE was insufficient because it failed to state that "significant environmental effects will not result" from the DDI Project; and because the 2013 DCE was not supported by the administrative record.

Defendants argued that FHWA's approval of a 2020 Reevaluation did not reopen its earlier DCE determination or do anything to render it non-final; instead, FHWA's approval of the Reevaluation confirmed that there were no significant environmental impacts and its earlier decision that the CE classification was the appropriate level of NEPA classification for the project. Defendants further argued that the project fit squarely within FHWA's categorical exclusions for "modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes" (23 CFR 771.117(d)(1)) and "highway safety or traffic operations improvement Projects including the installation of ramp metering control devices and lighting" (23 CFR 771.117(d)(2)). In addition, defendants argued that the Project did not create any new points of access or drive traffic to new and undeveloped areas and, therefore, makes no significant change to travel patterns and is unlike the massive, new interchanges that courts have concluded do not qualify for categorical exclusions.

Oral argument was held on September 3, and on September 17 the Second Circuit panel affirmed the lower court's decision and held that the Reevaluation was required by regulation and that an EIS was not required because the project will not involve significant impacts. The Second Circuit summarily concluded that plaintiff's remaining arguments were without merit.

Plaintiffs Appeal Grant of Summary Judgment in Favor of FHWA in Maine Bridge Project Case

On March 9, 2021, plaintiffs filed an appeal with the U.S. Court of Appeals for the First Circuit of the district court's grant of summary judgment in Friends of the Frank J. Wood Bridge v. Chao, 517 F.Supp.3d 9 (D. Me. 2021); Historic Bridge Foundation v. Buttigieg, No. 21-1188 (1st Cir.).

On February 3, the U.S. District Court for the District of Maine granted summary judgment in favor of FHWA in a challenge to FHWA's Finding of No Significant Impact (FONSI) associated with the replacement of the Frank J. Wood Bridge and its determination that no feasible and prudent avoidance alternative existed to the use of Section 4(f) resources, including use of the historic bridge located in Brunswick, Maine. The court found that the record adequately supported FHWA's use of the Service Life Cost methodology and deferred to the agency's expertise in

determining that the cost of rehabilitating the bridge rendered it not prudent.

The appeal argues that the lower court committed reversible error in finding that FHWA and MaineDOT's reliance on Service Life Cost estimate methodology instead of Life-Cycle Cost Analysis (LCCA) methodology was proper. Appellant also argues that FHWA arbitrarily inflated the cost estimates for the rehabilitation alternative and underestimated the cost estimates for the replacement alternatives, and that the district court's finding on this use was also erroneous. Finally, appellant argues that it sufficiently established that a controversy exists in terms of the appropriate methodology to apply, and therefore, an EIS was required, and the lower court erred in holding otherwise.

FHWA argues that summary judgment was appropriate because the agency is entitled to deference in making a determination as to which methodology to apply. The cost between replacement and rehabilitation will invariably be different between the two alternatives, especially with regard to future maintenance, given the nature of rehabilitating an old bridge versus replacing it with a new one. Finally, FHWA argues that controversy over cost estimates does not fit into the controversy on environmental grounds requirement under NEPA.

The First Circuit held oral arguments virtually on September 13, 2021.

District Court Grants Motion to Dismiss in Florida NEPA Assignment Case

On May 26, 2021, the U.S. District Court for the Middle District of Florida granted a motion filed by FHWA and USDOT to be dismissed as parties in McClash, et al. v. Florida DOT, et al., No. 20-543 (M.D. Fla.). Several local residents, proceeding *pro se*, had alleged that Federal defendants (1) violated NEPA by improperly designating the Cortez Bridge replacement project in the vicinity of Sarasota, Florida as a Categorical Exclusion (CE). rather than conducting an Environmental Impact Statement (EIS) to consider project impacts, and (2) demonstrated inappropriate bias in selecting a fixed bridge to replace the existing draw bridge. Plaintiffs alleged that the 65-foot clearance of the proposed bridge replacement is too low to permit their sailboats from traversing under the bridge and that its approaches will traverse a historic neighborhood resulting in environmental impacts that warrant more detailed study than the CE provided.

On February 26, 2021, Federal defendants filed the motion to dismiss, arguing that because the Florida Department of Transportation (FDOT) had approved the CE in September 2020, nearly four years after signing a Memorandum of Understanding (MOU) accepting NEPA assignment in December 2016, FDOT is solely liable and responsible for the project under the terms of the MOU and 23 U.S.C. § 327. Plaintiffs filed a response to the motion to dismiss on March 10, 2021, arguing that Federal defendants' approval of a Location and Design Concept Acceptance (LDCA) early in the project history, and an independent responsibility to ensure compliance with Executive Order 12898, rendered Federal defendants an indispensable party notwithstanding the MOU. On May 20, 2021, FDOT filed a response to FHWA's motion to dismiss, indicating that the State concurred with Federal defendants' motion to be dismissed as parties to the suit. Following a brief hearing on the motion on May 26, 2021, in which Federal defendants pointed

out the MOU expressly assigned compliance with E.O. 12898 to FDOT, and that its approval of the LDCA, essentially a planning document, did not constitute a final NEPA decision, the court ruled in Federal defendants' favor with a minute entry releasing them as parties.

District Court Grants FHWA's Motion for Summary Judgement in South Carolina I-73 NEPA Challenge

On September 2, 2021, the U.S. District Court for the District of South Carolina in South Carolina Coastal Conservation League v. USACE, et al., No. 17-3412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021), granted summary judgement in favor of the FHWA. Plaintiff had challenged the planned Interstate 73 project in South Carolina, alleging violations of NEPA, the Clean Water Act (CWA), and the APA. The court's decision included a thorough discussion regarding FHWA's issuance of two Reevaluations and the agency's determination that no SEIS was required. The court found that there were no violations of the APA, NEPA, or the CWA.

Federal defendants had argued in their Motion for Summary Judgment that FHWA and the U.S. Army Corps of Engineers (Corps) complied with NEPA and that plaintiff's NEPA claims regarding the 2008 FEISs were time barred. In addition, Federal defendants argued that they properly concluded that an SEIS was not required and that there was no final agency action authorizing tolls on I-73 in South Carolina, depriving the court of jurisdiction over that claim. FHWA also argued that there was no significant new information relevant to I-73's potential environmental impacts. FHWA argued that wetland impacts from I-73 overall have decreased, calculated changes are due to changes in wetland delineation, and plaintiffs' "new" reports presented no new information. FHWA claimed that the effects of increased truck traffic were considered in the re-evaluation and were not determined to be significant, induced development resulting from the project was not new, and economic development was one of the project purposes. Federal defendants also argued that the Corps complied with the CWA, that the Corps can and should rely on FHWA's NEPA records and that it reasonably did so here, and that the EIS was not biased against upgrading existing roads. Lastly, Federal defendants argued that the Corps reasonably found that SCDOT's proposed project was the least damaging practicable alterative and that plaintiff's claims against EPA are baseless.

The I-73 corridor project will provide a direct link from North Carolina and states to the north to the Grand Strand (Myrtle Beach area) of South Carolina. The project is approximately 80 miles in length and has been separated into two portions. The Southern portion of the project runs from I-95 near Dillon, South Carolina to the Grand Strand/Myrtle Beach area. The Northern portion of the project runs from I-95 to Hamlet, North Carolina.

Arkansas District Court Grants FHWA's Motion for Summary Judgment, Finding the Case Moot

On May 27, 2021, the U.S. District Court for the Eastern District of Arkansas issued an order granting Federal and State defendants' motions for summary judgment and denying plaintiffs' cross motion for summary judgment. Wise, et al. v. USDOT, et al., No. 18-00466, 2021 WL 2165268 (E.D. Ark. May 27, 2021).

Plaintiffs had filed their initial lawsuit on July 19, 2018, two days after construction began, to stop the work to widen 2.5 miles of I-630 from six to eight lanes, alleging that the 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. After the trial court denied plaintiffs' petition for injunctive relief and the U.S. Court of Appeals for the Eight Circuit affirmed the denial, defendants filed a motion for summary judgment in the U.S. District Court for the Eastern District of Arkansas on November 20, 2020. The court agreed with defendants' argument that the case became moot when the challenged project, widening a 2.5-mile section of I-630, was completed in April 2020. The court rejected plaintiffs' argument that the case was not moot because the court could still fashion an equitable remedy if it finds that the defendants failed to comply with FHWA regulations implementing NEPA. The court stated, "Plaintiffs seek to enjoin construction on the Project. Construction on the Project is now finished. An order enjoining the Defendants from further construction on the Project would serve no purpose and afford Plaintiffs no relief. As the case no longer presents a live controversy, the case is moot."

Addressing the merits of plaintiffs' arguments that the project was improperly classified as a CE considering its magnitude and several alleged unusual circumstances, the court noted that it had previously determined that plaintiffs were not likely to prevail on the merits of those arguments in the order it issued on July 24, 2018, denying plaintiffs' motion for a temporary restraining order. The court further noted that the Eighth Circuit affirmed that order in an opinion it issued on December 6, 2019.

District Court Dismisses Challenge to Little Missouri River Crossing

On September 2, 2021, the U.S. District Court for the District of North Dakota dismissed Short, et al. v. FHWA, et al., No. 19-00285 (D. N.D.), pursuant to a Stipulation of Dismissal signed by all parties.

On December 27, 2019, a group of landowners filed a Complaint for Injunctive and Declaratory Relief alleging violations of NEPA, the National Historic Preservation Act, Section 4(f), and the APA. Plaintiffs challenged the Final Environmental Impact Statement/Record of Decision (FEIS/ROD) for the Little Missouri River Crossing Project in western North Dakota. The project is approximately 8.3 miles long and includes a new crossing of the Little Missouri River. The proposed roadway would cross a ranch owned by plaintiffs.

The Stipulation states that plaintiffs and Billings County, the project sponsor, have settled certain disputes and that all parties agree to bear their own costs.

U.S. District Court Denies Plaintiffs' Requested Relief in Rocky Flats National Wildlife Refuge Case

On July 9, 2021, the U.S. District Court for the District of Colorado entered an order affirming the Federal agencies' environmental decisions and denying all of plaintiffs' requested relief filed asserting violations of NEPA and the Endangered Species Act. Rocky Mountain Peace & Justice Ctr., et al. v. U.S. Fish and Wildlife Serv., et al., No. 18-01017, 2021 WL 2885942 (D. Colo. July 9, 2021). Additionally, the court ordered plaintiffs to pay the defendants' costs. A Final Judgment

was entered dismissing the case. On September 7, plaintiffs filed a Notice of Appeal, which has been lodged with the U.S. Court of Appeals for the Tenth Circuit.

On August 9, 2018, the district court had denied plaintiffs' motion for a preliminary injunction, which sought to halt the opening of the Rocky Flats National Wildlife Refuge to the public. Plaintiffs' requested relief would have halted the construction of public trails on the Refuge, a portion of which were to be constructed by FHWA's Central Federal Lands, pending further environmental studies. Following the court's decision on the motion, plaintiffs continued to pursue their request for a permanent injunction regarding the planned construction of multi-use trails based on the agency's alleged violations of NEPA and the National Wildlife Refuge System Administration Act (Refuge Act). In its July 2021 order, the court denied all of plaintiffs' requested relief and affirmed the agency's decisions.

As to claims that the U.S. Fish and Wildlife Service (USFWS) had violated NEPA by failing to prepare an Supplemental Environmental Impact Statement (SEIS) for the proposed trail modifications and improperly relying on a categorical exclusion, the court found that plaintiffs had not identified any "significant new circumstances or information relevant to environmental concerns" connected to trail modification, so an SEIS was not required and the USFWS' use of a categorical exclusion was not arbitrary and capricious, where there was no substantial evidence in the record to indicate that any extraordinary circumstance existed.

As to plaintiffs' assertions that the USFWS' decision to use the Refuge for public trails violated the terms of the Refuge Act, plaintiff argued that there was no compatibility determination (CD) permitting the use of public trails within the Refuge and that a "significant" change had occurred regarding the planned trails since they were originally outlined in 2004 that required a new CD. Although the CD the USFWS had prepared and approved for multi-use trails had expired in 2014, the court found that two existing CDs covered the use of trails within the Refuge. The court also held that the 2018 Environmental Impact Statement adequately addressed the modifications to the proposed trails and that no new CD was required.

The court affirmed the agency's decisions and entered judgment in favor of defendants. The Final Judgment entered by the clerk specifically taxed costs to plaintiffs.

Summary Judgment Granted in Challenge to Contract Award Nonconcurrence

On September 22, 2021, the U.S. District Court for the District of Rhode Island issued its opinion in its grant of summary judgment to defendants in Cardi Corp. v. Rhode Island Dep't of Admin., et al., No. 21-00233, 2021 WL 4296182 (D. R.I. Sept. 22, 2021).

On May 26, 2021, Cardi Corporation filed suit in the U.S. District Court for the District of Rhode Island against FHWA and the Rhode Island Department of Transportation. Cardi Corp. v. Rhode Island Department of Administration, No. 21-00233 (D. R.I.). The Rhode Island Department of Transportation (RIDOT) had selected plaintiff in August 2020 as the "Apparent Best Value" bidder for the award of the Washington Bridge Rehabilitation and Redevelopment Project. On September 16, RIDOT requested a concurrence in the award from FHWA's Rhode Island Division. On December 23, FHWA determined that it would not concur in the award given the deficiencies in plaintiff's proposal. As a result of

FHWA's nonconcurrence, RIDOT cancelled the initial solicitation and initiated a new procurement process.

In its Complaint and Motion for a Temporary Restraining Order (TRO) under the APA and the Federal-Aid Highway Act, plaintiff alleged that FHWA's decision to not concur was arbitrary and capricious and that due to the FHWA's "failure" to issue a required "concurrence" in the award, plaintiff suffered irreparable harm by being denied the opportunity to compete fairly for a contract award.

The TRO was denied on July 7, 2021, with the court finding that the record did not support plaintiff's argument that the State violated the Federal-Aid Highway Act and that it was therefore unnecessary to decide whether FHWA's decision to not concur was arbitrary and capricious. On August 11, the court granted defendants' Motion for Summary Judgment in a brief Order, and on September 22, the court issued its full opinion. The court noted that RIDOT had cancelled the first solicitation and that a new solicitation was already underway. The court stated that it was therefore unnecessary to decide on whether FHWA's actions violated Federal law because plaintiff would be unable to obtain relief either way. Since the first solicitation had been cancelled, the only way for plaintiff to obtain relief would be to force the State to cancel the second solicitation, renew the first, and award the contract to plaintiff. The court found that there was no basis for taking this action against RIDOT and thus "[a]ny relief pertaining solely to FHWA would be illusory."

District Court Grants Summary Judgment for Defendants in Mid-Currituck Bridge Project

On December 13, 2021, the U.S. District Court for the Eastern District of North Carolina granted summary judgement in favor of the North Carolina Department of Transportation, FHWA, and the other defendants in North Carolina Wildlife Fed'n, et al v. North Carolina Dep't of Transp., et al., No. 19-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021). Plaintiffs had challenged a proposed corridor project that will provide a second crossing of the Currituck Sound in the Outer Banks, North Carolina.

The court rejected plaintiffs' claim that the no-build alternative improperly presumed construction of the project and its attendant growth. In so doing, the court noted that defendants had acknowledged and responded to comments concerning the assumptions underpinning the no-build alternative and that the record shows that development plans in the study area were not contingent upon construction of the bridge. The court also concluded defendants satisfied the procedural requirements of NEPA. Regarding plaintiffs' allegation that defendants failed to evaluate a full range of reasonable alternatives, the court disagreed, stating it could not conclude defendants failed to meet their obligation to provide a brief discussion for the reason a particular alternative was eliminated from further study in the Final Environmental Impact Statement.

In relation to plaintiffs' allegation suggesting that defendants failed to supplement the 2012 Environmental Impact Statement prior to entry of the 2019 record of decision (ROD), the court concluded defendants, in fact, did take a hard look at the new information. The court held that, in light of this hard look, defendants' decision not to prepare a supplemental environmental impact statement (SEIS) was neither arbitrary nor capricious. The court noted that the majority of the asserted errors constituted "flyspecking" or would otherwise improperly invade areas of expertise well within defendants' discretion.

FHWA Moves for Summary Judgment in Idaho Pedestrian Trail Case

On May 5, 2021, Federal defendants, including FHWA, asked the U.S. District Court for the District of Idaho to grant them summary judgment in a challenge to the multipurpose pedestrian trail in Custer County, Idaho. Sawtooth Mountain Ranch LLC, et al. v. FHWA, et al., No. 19-00118 (D. Idaho).

The Stanley to Redfish Lake project involves the construction of a non-motorized, multipurpose 4.5-mile trail that would serve pedestrians, bicyclists, and equestrians in south-central Idaho between the City of Stanley and Redfish Lake. FHWA's Western Federal Lands Highway Division designed and is constructing the trail in partnership with the U.S. Forest Service, which is also a named defendant in this litigation.

Plaintiffs alleged violations of the Endangered Species Act (ESA) and the Clean Water Act (CWA). Federal defendants argued that FHWA and the United States Forest Service (USFS) complied with NEPA, ESA, CWA, the National Forest Management Act, and the Sawtooth National Recreation Act. In addition, Federal defendants argued that the conservation easement purchased by the Forest Service in 2005, upon which the trail is being constructed, unambiguously allows construction of a trail. Plaintiff filed a Response and Cross-Motion for Summary Judgment on June 25, and oral argument was held on September 8. Plaintiffs argued that the conservation easement does not allow or contemplate construction or maintenance of a trail and that plaintiffs are entitled to summary judgment on the remaining claims because Federal defendants failed to take a "hard look" at the potential environmental impacts of the project, the USFS failed to properly consult under ESA, and the nationwide permit was granted in violation of the CWA based on a misrepresentation to the U.S. Army Corps of Engineers.

Lawsuit Filed Challenging Portland Highway Project

On April 2, 2021, three advocacy groups filed suit in the U.S. District Court for the District of Oregon against FHWA for its approvals of the Rose Quarter Improvement Project located in Portland, Oregon. No More Freeways, et al. v. USDOT, et al., No. 21-00498 (D. Ore). The project is a safety and operational improvement project on 1.5 miles of Interstate between Interstate 405 and Interstate 84. It aims to add auxiliary (merge) lanes and shoulders, reconfigure ramps, and add a cover over a portion of the freeway to provide new green space and reconnect the surface street grid. FHWA and the Oregon Department of Transportation (ODOT) published the final environmental assessment (EA) and finding of no significant impact (FONSI) on November 9, 2020.

Plaintiffs present two claims under the APA. First, plaintiffs allege that, under NEPA, FHWA should have prepared an Environmental Impact Statement (EIS) because of the project's alleged underestimated and significant environmental impacts and should redo several of its impact analyses because they relied on flawed traffic modeling. Second, plaintiffs assert that under Section 4(f) of the Department of Transportation Act, the project will involve the unauthorized use of a public park for construction of a noise wall, which was not analyzed or disclosed. Plaintiffs seek various forms of declaratory and injunctive relief, including vacating the FONSI and finding that FHWA must prepare

an EIS, as well as attorney's fees. FHWA filed its answer on June 14, and a scheduling conference was held in July 2021.

New Lawsuit Filed Seeking Deposition Testimony of FHWA Employees

On April 6, 2021, the Terrebonne Parish, Louisiana Consolidated Government (TPCG), through its Parish President Gordon Dove, sought judicial review of FHWA's denial of a Touhy request for deposition testimony of the FHWA Louisiana Division Administrator and Major Project Engineer. Dove v. USDOT, et al., No. 21-00701 (E.D. La.). Plaintiff seeks the testimony for use in its defense in Conti Enterprises, Inc. v. Providence/GSE Associates, LLC, et al. in Louisiana state court. In the underlying action, the contractor, Conti, seeks recovery of damages in tort, for breach of contract, relief as a third-party beneficiary, and under other alleged theories of relief.

Plaintiffs submitted written requests seeking to depose FHWA employees to ascertain if they could provide relevant testimony in the underlying action. FHWA denied the deposition requests on July 1, 2020, and reaffirmed the denial on January 19, 2021. Plaintiffs claim that the decision denying the deposition was arbitrary and capricious and thus violates due process of law under the Fifth Amendment of the U.S. Constitution and constitutes an unlawful abuse of discretion. Plaintiffs claim that deposing FHWA employees is necessary because these individuals have information that is relevant to the claims of defendant and the defenses and exceptions raised by plaintiff in the underlying action. The parties' motions for summary judgment are due by January 18, 2022, and responses are due by February 2.

Federal Motor Carrier Safety Administration

First Circuit Affirms District Court Dismissal of Hazardous Materials Carrier Suit Alleging Civil Rights Violations

On December 7, 2021, the U.S. Court of Appeals for the First Circuit summarily affirmed the U.S. District Court for the District of New Hampshire's dismissal of a complaint against FMCSA and DOT officials for lack of subject matter jurisdiction under the Hobbs Act, 23 U.S.C. § 2342. Spencer, et al. v. Doran, et al., No. 21-1139 (1st Cir. 2021). The First Circuit affirmed "[f]or substantially the reasons set forth in the district court's opinions and orders" (Spencer v. Doran, 2020 WL 4904826 (D.N.H. Aug. 20, 2020); Spencer v. Doran, 2021 WL 294556 (D.N.H. Jan 28, 2021)).

In their December 2018 complaint, William Spencer and Spencer Bros, LLC alleged civil rights violations and common law torts against employees of FMCSA and DOT in their individual capacities, as well as New Hampshire state officials and the State of New Hampshire. An FMCSA compliance review found the carrier committed hazardous materials violations. FMCSA then reported them to the New Hampshire State Police and issued an Unsatisfactory Safety Rating and Order to Cease Operations. After the U.S. District Court for the District of New Hampshire dismissed all claims against the state defendants, plaintiffs filed a second amended complaint in September 2019. In addition to due process violations under the Fifth and Fourteenth Amendments, plaintiffs alleged that Federal defendants violated the Racketeering Influenced Corrupt Organizations Act (RICO) by acting in

concert to commit mail fraud and obstruction of justice.

The Federal defendants filed a motion to dismiss the second amended complaint and argued, *inter alia*, that because plaintiffs' due process and RICO allegations were based on findings from the compliance review, jurisdiction was in the courts of appeals, not the district courts, in accordance with the Hobbs Act, 28 U.S.C. § 2342(3)(A).

The district court granted Federal defendants' motion on January 28, 2021. The court agreed that plaintiffs' claims were premised on the alleged invalidity of FMCSA's final agency order and thus fell within the exclusive jurisdiction of courts of appeals under the Hobbs Act.

District Court Dismisses Small Business in Transportation Coalition Claims Against FMCSA Related to a Variety of Exemption Requests

On November 30, 2021, the U.S. District Court for the District of Columbia dismissed plaintiff's final claim against FMCSA alleging a violation of its First Amendment right to petition the government regarding exemption requests. Small Bus. in Transp. Coal. v. USDOT, No. 20-883, 2021 WL 5578674 (D.D.C. Nov. 30, 2021).

On April 1, 2020, a trucking industry trade group, the Small Business in Transportation Coalition (SBTC), filed an action against FMCSA alleging unreasonable delay in publishing or issuing decisions for exemption requests filed by SBTC related to regulatory requirements regarding electronic logging devices (ELDs), hours-of-service (HOS) requirements, and broker bond financial responsibility. Subsequently, plaintiff filed multiple motions for either discovery or emergency declaratory relief throughout the summer of 2020 while FMCSA's original Motion to Dismiss, filed May 5, was still pending. FMCSA opposed each of plaintiff's motions.

On July 28, 2020, after FMCSA had already acted on most of the exemption requests forming the basis of the original complaint, plaintiff filed a motion for leave to file an amended complaint seeking to add new claims against the government for failure to suspend HOS rules nationwide in response to protests occurring in cities across the nation following the death of George Floyd and for failure to arrest protesters interfering with interstate transportation. Plaintiff also included a new First Amendment claim arguing that SBTC's rights were violated because "its members are not given the same opportunity to petition FMCSA on issues and regulations that affect them as members of other similarly situated trucking associations." Before the court ruled on plaintiff's motion, plaintiff filed a Second Motion to Amend Complaint on September 23. On September 24, the court granted SBTC's motion to file the second amended Complaint, noting that the court's jurisdiction was in question and that no additional amendments would be entertained.

On October 8, FMCSA filed a second motion to dismiss for lack of jurisdiction because all of plaintiff's exemption requests were authorized under provisions subject to judicial review pursuant to the Hobbs Act, 28 U.S.C. § 2342(3)(A), which vests in the courts of appeals exclusive jurisdiction over such challenges. Plaintiff's responses throughout the litigation contended that the Hobbs Act does not vest the appellate court with exclusive jurisdiction. Further, plaintiff argued its First Amendment claim is not

ancillary, giving the court independent jurisdiction over that claim.

Despite the court's September 24 Order rendering the Second Amended Complaint the operative complaint, on August 20, 2021, plaintiff filed a Motion to file an Amended Complaint, adding a claim for FMCSA's alleged failure to act on a petition for issuance of a Federal Motor Vehicle Safety Standard, establishing certification requirements for ELD manufacturers under 49 U.S.C. § 30162. Plaintiff also acknowledged that some matters in the operative complaint were either resolved or moot and should be dismissed. On September 3, FMCSA filed an opposition to plaintiff's motion to the extent plaintiff was seeking relief from FMCSA for a petition for which authority to act is specifically reserved to the Secretary or another component of DOT, the National Highway Traffic Safety Administration.

On September 27, the court dismissed the claims based on specific exemption requests. The court held that plaintiff's ELD and HOS exemption requests claims are moot because the agency already provided all relief plaintiff sought in its complaint. The court requested additional briefing on the First Amendment claim, to the extent the relief sought is based on Section 702 of the Administrative Procedure Act. Citing American Bus Association v. Rogoff, the court noted in its decision "that the First Amendment right to petition government agencies does not 'guarantee[ ] a citizen's right to receive a government *response* to *or* official *consideration* of a petition for redress of grievances.'" 649 F.3d 734, 739 (D.C. Cir. 2011). The parties completed briefing on this issue on October 15, and the court issued a decision dismissing the plaintiff's First Amendment claim on November 30.

Federal Railroad Administration

Briefing Begins in Challenge to Final Rule that Amends FRA's Brake System Safety Standards and Codifies Waivers

On November 10, 2021, petitioners in Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail and Transp. Workers, et al. v. FRA, et al., No. 21-1049 (D.C. Cir.) filed their opening brief in this petition for review of FRA's final rule concerning miscellaneous amendments to the brake system safety standards and the codification of certain waivers (brakes final rule). In the brakes final rule, FRA revised its regulations governing brake inspections, tests, and equipment, including (1) extending the amount of time freight rail equipment can be left "off-air" before requiring a new brake inspection; (2) incorporating relief from various provisions in long-standing waivers related to end-of-train devices, helper service, and brake maintenance; and (3) modifying the existing brake-related regulations to improve clarity and remove outdated or unnecessary provisions.

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

The Association of American Railroads moved to intervene on the side of the

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

In its December 10 response brief, FRA argues that its changes to existing regulations pertaining to brake tests, extended haul trains, and end-of-train device communication failures were reasonable and that the agency reasonably chose to incorporate longstanding waivers pertaining to train equipment operation and safety into its regulations. In addition, FRA argues that it did not deprive petitioners of an opportunity to seek reconsideration of the final rule and that petitioners' contention that the rule must be set aside as untimely lacks merit.

Petitioners' reply brief is due January 3, 2022.

Motion Granted to Voluntarily Remand Case Involving Certification of Mexican Locomotive Engineers

On September 17, 2021, the U.S. Court of Appeals for the District of Columbia Circuit granted a motion for voluntary remand in litigation challenging an FRA order approving a modified Program of Certification for Locomotive Engineers and Remote Control Operators (Part 240 Program) submitted by Kansas City Southern Railway (KCSR). Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., No. 20-1461 (D.C. Cir.). KCSR's Part 240 Program describes the procedures for KCSR's certification of locomotive engineers from Kansas City Southern de Mexico (KCSM) to operate freight trains for KCSR over a limited stretch of track within the United States. The Brotherhood of Locomotive Engineers and Trainmen and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers had filed a petition for review, requesting that the D.C. Circuit review FRA's order approving KCSR's Part 240 Program. The court's September 17 order remanded the matter to FRA for further agency proceedings.

In 2018 the same petitioners filed a petition for review with the D.C. Circuit that challenged (among other things) FRA's previous approval of a modified locomotive engineer certification program under a passive approval process that permitted FRA approval of a modified locomotive engineer certification program without any formal written notice of approval. The D.C. Circuit granted this petition for review with respect to the modified program, and in a decision issued on August 28, 2020, it vacated and remanded FRA's approval of the modified program. Bhd. of Locomotive Eng'rs and Trainmen, et al. v. FRA, et al., 972 F.3d 83 (D.C. Cir. 2020). The court directed FRA to offer a fuller explanation of the agency's reasoning for its previous approval or take new agency action, and FRA decided to proceed by taking new agency action. Accordingly, KCSR re-submitted a substantially similar modified program describing its procedures for certification of locomotive engineers from KCSM, and after requesting and considering comments from the labor unions on the modified program, FRA approved the modified program on October 9, 2020, in a letter containing a

detailed explanation of the rationale for approving the program.

Petitioners filed a new petition for review on November 19, 2020, challenging FRA's approval of KCSR's 2020 program submission. On December 16, KCSR filed a motion for leave to intervene in this second case, and the D.C. Circuit granted KCSR's motion on January 5, 2021. Petitioners filed their opening brief on February 22, but the court subsequently held the case in abeyance at the government's request to allow new agency officials sufficient time to become familiar with the issues in the case after the change in administration.

On July 28, the government moved to voluntarily remand the case to FRA. The motion reported that the agency had initiated an administrative review to re-evaluate the approval of KCSR's 2020 program submission and that a new agency action at the conclusion of that review would likely moot the present case. Petitioners did not oppose the motion; intervenor KCSR opposed but elected not to file a response. The court granted the motion on September 17, remanding the case to FRA for further agency proceedings.

Plaintiffs Voluntarily Dismiss Challenge to FRA Texas High-Speed Rail Rule

Litigation against FRA's November 3, 2020, issuance of a rule of particular applicability that established safety standards for the Texas Central Railroad High Speed Rail (HSR) system and the record of decision (ROD) for the environmental impact statement for the Dallas to Houston HSR Project was voluntarily dismissed on August 18, 2021. Plaintiffs in Texans Against High-Speed Rail, Inc., et al. v. USDOT, et al., No. 21-00365 (W.D. Tex.), had claimed numerous procedural and substantive violations of NEPA and sought to vacate the rule and the ROD. Because the complaint was filed more than 60 days from the issuance of the final rule, it was outside the statute of limitations imposed by the Hobbs Act (28 USC § 2342). The government had filed a motion to dismiss on June 22, 2021.

Maritime Administration

Litigation with Matson over Vessels in U.S.-Saipan Trade Continues

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

Matson's principal argument in the district court was that MARAD's approvals were arbitrary and capricious because the replacement vessels carry cargo to Saipan. Matson claimed that the vessel eligibility requirements of the Maritime Security Act require that, to be eligible for the MSP, a vessel must operate *exclusively* in the foreign trade, without any participation in coastwise trade. According to Matson, the Commonwealth of the Northern Mariana

Islands, a U.S. territory that includes Saipan, is subject to the coastwise laws, which require that cargo moving between U.S. ports be carried on vessels that are built in the United States and are 75%-owned by U.S. citizens, requirements that the APL replacement vessels do not meet.

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

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

With respect to the APL SAIPAN, MARAD issued a new decision on August 3, 2020. Matson challenged the new decision and principally argued that the APL SAIPAN is too old to be eligible as a replacement vessel for the Maritime Security Fleet. Matson Navigation Co. v. USDOT, et al., No. 20-2779 (D.D.C.). After further review, the government sought a voluntary remand due to a recognition that some reasoning in the new decision is incorrect. On August 3, 2021, the district court granted the motion and remanded the matter to MARAD for further consideration.

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

Endangered Species Act Lawsuit Filed Over Grants Under America's Marine Highways Program

On October 12, 2021, the Center for Biological Diversity filed a complaint against MARAD in the U.S. District Court for Eastern District of Virginia alleging violations of the Endangered Species Act (ESA) arising from grants under the America's Marine Highways (AMH) program. Specifically, plaintiff alleges that

MARAD awarded grants for the expansion of vessel traffic on rivers, bays, and coastal areas without engaging in a programmatic consultation and/or project-specific consultations with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to ensure that the actions of the AMH program did not jeopardize endangered or threatened species or impair their critical habitats under Section 7 of the ESA (16 U.S.C 1536(a)(2)). Center for Biological Diversity v. MARAD, No. 21-132 (E.D. Va.).

National Highway Traffic Safety Administration

D.C. Circuit Issues Decision in Challenge to Trailer Fuel Efficiency Rule

On November 12, 2021, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in the challenge to the joint EPA/NHTSA rule, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2. Truck Trailer Mfrs. Ass'n, Inc. v. EPA, 17 F.4th 1198 (D.C. Cir. 2021). The court granted a petition for review filed by the Truck Trailer Manufacturer's Association and vacated the portions of the rule that apply to trailers.

The court held that EPA may not rely upon a provision in the Clean Air Act that vests EPA with the authority to set emissions standards for new motor vehicles and their engines if they emit harmful air pollutants to regulate trailers as motor vehicles or trailer manufacturers as motor-vehicle manufacturers. Specifically, the court concluded that because trailers are not self-propelled, they are not motor vehicles, which is defined in the Clean Air Act as "any self-propelled vehicle designed for transporting persons or property on a street or highway." In addition, the court rejected EPA's argument that the pertinent vehicle to consider is a tractor-trailer since the tractor cannot accomplish its intended purpose of transporting property unless the tractor is pulling a trailer. The court noted that because tractors can carry people and things without a trailer attached, tractors can still accomplish what it is designed for without a trailer. In other words, it is not necessary for a tractor, which is self-propelled, to have a trailer attached to it for a tractor to be a "motor vehicle" as defined in the Clean Air Act. Primarily based on the same reasoning, the court also held that EPA may not regulate trailer manufacturers as motor-vehicle manufacturers.

Although 49 U.S.C. § 32902, a provision of the Energy Independence and Security Act of 2007 (EISA) which requires NHTSA to establish fuel economy standards for certain vehicles, does not define "vehicle," the court concluded that given the context of the statute, Congress intended to limit the term to mean machines that consume fuel. The court explained that since trailers do not consume fuel, they are not vehicles in the context of section 32902. Therefore, the court held that under section 32902, NHTSA lacks the authority to regulate trailers.

In an opinion concurring in the judgment in part and dissenting in part, Judge Millett agreed with the majority opinion regarding EPA's lack of authority to promulgate the regulations at issue in this case based on the Clean Air Act's definition of a "motor vehicle." She noted that in seeking to reduce emissions, EPA could instead regulate the tractors, including the types of trailers they are allowed to pull. However, Judge Millett disagreed with the majority opinion regarding NHTSA's lack of authority to issue

fuel economy regulations for trailers. As an initial matter, while the majority did not deem it necessary to decide whether Chevron deference applies because the majority concluded that the relevant statutory terms are unambiguous, Judge Millett would have conducted a Chevron analysis because the statute does not define the term "vehicle." Judge Millett concluded that NHTSA's interpretation of "vehicle" to include trailers was reasonable and consistent with EISA's statutory text, structure, context, and purpose. In addition, she determined that NHTSA's inclusion of commercial trailers in its fuel economy regulations comports with statutory and dictionary definitions of the term "vehicle," as well as common usage. For example, she noted that as far back as NHTSA's organic statute, Congress has defined a motor vehicle as "any vehicle driven or drawn by mechanical power," which would include trailers. Finally, had NHTSA's regulations been upheld, Judge Millett would not have vacated NHTSA's regulations because she concluded that even though the two agencies' regulations had some overlap, NHTSA's regulations could have functioned independently of EPA's regulations.

Court of Appeals Affirms Vehicle Safety Act Does Not Provide Private Cause of Action

On March 1, 2021, the U.S. Court of Appeals for the Eleventh Circuit affirmed the ruling of the U.S. District Court for the Middle District of Florida dismissing *pro se* plaintiff Robert Caldwell's Amended Complaint alleging that DOT violated his Fourteenth Amendment due process and equal protection rights and violated the National Traffic and Motor Vehicle Safety Act of 1966 (Vehicle Safety Act) when DOT allegedly failed to ensure that he was notified that his vehicle was recalled by FCA US, LLC. Caldwell v. USDOT, 847 F.App'x 677 (11th Cir. 2021). The court rejected appellant's arguments that his claims were not barred by prior case law in the circuit and found that the district court correctly applied binding precedent in holding that the Vehicle Safety Act does not provide a private cause of action.

DOT and NHTSA File Statement of Interest in Challenge to State "Right to Repair" Ballot Initiative

On November 20, 2020, the Alliance for Automotive Innovation filed a complaint in the U.S. District Court for the District of Massachusetts challenging the recently passed Massachusetts ballot initiative known as a "right to repair" law. Alliance for Automotive Innovation v. Healey, No. 20-12090 (D. Mass.). The law requires manufacturers to equip all vehicles using telematic systems for model years 2022 onward with "an inter-operable, standardized and open access platform across all of the manufacturer's makes and models." This platform would allow owners and independent repair facilities to have bi-directional access to the vehicles' telematic systems. The law further requires manufacturers to either standardize and open access to their vehicles' on-board diagnostic systems or standardize such access under the administration of an unaffiliated third-party. The Alliance for Automotive Innovation argued, among other things, that the law poses cybersecurity risks and that it is preempted by the National Traffic and Motor Vehicle Safety Act (Vehicle Safety Act).

Though DOT and NHTSA are not parties to the litigation, the United States filed a statement of interest on June 11, 2021, explaining the process that manufacturers must follow when a safety defect exists in

their vehicles per the Vehicle Safety Act. Further, the United States explained that if in practice the Massachusetts law's requirements create a safety issue constituting a defect under the Vehicle Safety Act, motor vehicle manufacturers would be required by Federal law to recall and stop selling new vehicles compliant with that requirement.

A trial was held during the week of June 14. Massachusetts stipulated to refrain from enforcing the law prior to a decision in the case. On October 22, Massachusetts filed a motion to reopen trial evidence, arguing that since the trial concluded, Subaru, an Alliance manufacturer/member, had made its Model Year 2022 vehicles ineligible for its telematics system if the vehicle is associated with an address in Massachusetts. According to the State, this indicates that manufacturers can comply with both Federal law and the Massachusetts law, contrary to the Alliance's arguments, and that the State law is therefore not preempted. The court granted the motion in part after a hearing on October 28, and directed the parties to negotiate and update the court about the potential scope of discovery that might be undertaken to address the State's new evidence and arguments. The United States will continue to monitor developments in the case to determine whether additional action is appropriate.

Pipeline and Hazardous Materials Safety Administration

Pipeline Operator Petitions the Sixth Circuit for Review of a PHMSA Final Order

On September 2, 2021, Wolverine Pipe Line Company filed its opening brief in U.S. Court of Appeals for the Sixth Circuit alleging that PHMSA acted arbitrarily and capriciously and contrary to law in finding Wolverine in violation of certain pipeline safety regulations in a Final Order dated September 3, 2020. Wolverine Pipe Line Co. v. USDOT, No. 21-3405 (6th Cir.). The violations arose out of Wolverine's repair of a pipeline in 2015, which PHMSA determined was conducted in violation of applicable safety standards. PHMSA issued the Final Order after a full administrative hearing. Wolverine alleges that PHMSA violated the basic due process principle that an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Wolverine's further argues that even if PHMSA had provided it with adequate notice of the theory on which PHMSA ultimately relied, the imposition of civil penalties on Wolverine would still violate due process because neither PHMSA's regulations nor its guidance allowed Wolverine to identify, with 'ascertainable certainty,' the standards with which the agency expected it to conform. Finally, Wolverine alleges that one of the findings from the Final Order relied on a clear error of fact.

PHMSA filed a response brief on November 3. PHMSA argued that Wolverine failed to show that the agency's determination was arbitrary and capricious. Instead, PHMSA argued it determined that Wolverine performed pipeline repairs without taking appropriate protective measures called for by the regulations. PHMSA's regulations classify the dent in Wolverine's pipeline that was being repaired as an "immediate repair condition" that required pressure reduction or shutdown of the line until repair was completed, steps that Wolverine never undertook. In addition, PHMSA argued that Wolverine was not free to change the calculation method it chose to determine

applicable pipeline strength, and that a contrary ruling would allow operators to pick and choose between methodologies in a post hoc effort to obtain the most favorable result.

Wolverine filed its reply brief on November 24. The court is expected to schedule oral argument for early 2022.

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

On June 30, 2021, Sunoco filed a "reverse FOIA" lawsuit in the U.S. District Court for the District of Columbia to permanently enjoin PHMSA from releasing, in response to multiple FOIA requests, an unredacted version of PHMSA's Notice of Probable Violation (NOPV) issued to Sunoco on May 17, 2019. Sunoco Pipeline L.P. v. USDOT, No. 21-01760 (D.D.C). Sunoco claims that the NOPV quotes certain confidential and security-sensitive information that was included in a report that Sunoco provided to PHMSA. PHMSA conducted a review of the information Sunoco seeks to preclude from public disclosure, along with relevant FOIA case law, and decided to release the unredacted NOPV because it was not covered by FOIA Exemptions 4 or 7(F). After PHMSA informed Sunoco of its decision, as is required by Department regulations, Sunoco filed the instant action.

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

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