ORAL ARGUMENT SCHEDULED FOR MARCH 21, 2022

No. 20-1070

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner

v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration,
Respondents

PETITIONER CITY OF SCOTTSDALE'S REPLY BRIEF

[Federal Rules of Appellate Procedure, Rule 15]
[49 U.S.C. § 46110(a)]

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GLOSSARY OF TERMS AND ABBREVIATIONS

§ 4(f)		Section 303 of the Department of Transportation Act.
APA		Administrative Procedure Act
East Flow		Departures using Runways 7R, 7L and 8 from the Airport.
East Valley		Communities in the eastern portion of the Greater Phoenix area, including Scottsdale, Mesa, Tempe, Chandler Gilbert, Fountain Hills, Ahwatukee, Paradise Valley, Apache Junction, and Queens Creek
NEPA		National Environmental Policy Act
NextGen		The Federal Aviation Administration's "Next Generation of Air Transportation System."
NHPA		National Historic Preservation Act
Phoenix Airport		Phoenix Sky Harbor International Airport
Procedure or "Flight Procedure"		"A charted flightpath defined by a series of navigation fixes, altitude, and courses provided with lateral and vertical protection from obstacles from the beginning of the path to a termination point." FAA Order 8900.1, § 11-12-1-5(L).
RNAV		Area Navigation. Refers to the ability to navigate directly between any two points on earth using satellite technology.
Route or "Flight Route"		A "specified course and altitude along a track defined by positive course guidance (PCG) to a clearance limit, fix, or altitude," FAA Order 8690.3B, § 1.1.7,

		indicated within the procedure by lines
Track or "Flight Track"		The actual flight paths that aircraft took in the sky as determined by radar on any given date or range of dates.
West Flow		Departures using Runways 25R, 25L, or 26 from the Airport.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addenda for Petitioner City Scottsdale's Opening Brief and the Respondents' Initial Brief.

SUMMARY OF ARGUMENT

This case is about whether an agency may disregard a judgment from this Court that vacated an agency action. In *City of Phoenix v. Huerta*, this Court vacated FAA's nine 2014 flight departure routes out of Phoenix Sky Harbor International Airport. FAA's January 2020 Decision, the final agency order under review, failed to restore all the vacated departure flight routes and failed to undertake the required environmental analysis.

To implement the Court's Order, FAA entered into an agreement with Phoenix. On remand, though, FAA should have conducted additional analysis under the National Environmental Policy Act ("NEPA") and performed consultations required by the National Historic Preservation Act ("NHPA") and Section 4(f) of the Department of Transportation Act ("4(f)") and FAA's own regulations as to *all* flight departure routes—both east flow and west flow routes. Instead, on January 10, 2020, FAA retained the vacated east flow departure routes and dismissed the concerns of Scottsdale without performing the required analysis and consultation.

The January 2020 decision left in place the vacated departure routes that have never been subjected to environmental analysis under NEPA, NHPA, and 4(f). It also terminated FAA's proposed action to revise those departure routes implemented with no environmental analysis. FAA asserted that it would need to comply with those laws only if it changed the 2014 eastern flight departure routes

in the future. The agency claimed that it alone had "sole discretion" to implement any changes. But that is not what this Court's opinion required.

Therefore, Court should vacate the 2020 Decision and require the agency to comply with the prior opinion, including remanding for the agency to finally perform the required analysis and consultation on the east flow departure routes.

ARGUMENT

Because an agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), the FAA's January 2020 Decision to retain the vacated departure routes that depart Phoenix Sky Harbor International Airport ("Phoenix Airport") without proper environmental analysis is contrary to this Court's prior decision in *City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017)("*Phoenix*") and must be vacated and remanded to the agency.

I. The Court's August 2017 Decision in *Phoenix* Vacated All Flight Procedures and Routes that Were Implemented on September 14, 2014.

When the Court issued its Judgment in August 2017, it held that "the September 18, 2014, order implementing the new flight routes and procedures at Phoenix Sky Harbor International Airport be vacated; and the matter be remanded to FAA for further proceedings, in accordance with the opinion of the court filed herein this date." RJN02. This Judgment required FAA to "start again" on all the departure routes, including re-analyzing their environmental impacts. *Sugar Cane Growers Coop of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

There is no doubt that the August 2017 judgment vacated all new RNAV flight procedures[1], both departures and arrivals, that were published on September 18, 2014, and remanded those procedures back to FAA to "start again." There is also no dispute that to promulgate the new flight procedures to replace the vacated procedures FAA would have to comply with NEPA, NHPA and 4(f), among other laws and regulations.

After receiving the Court's judgment, FAA attempted to limit its impact when it, along with the City of Phoenix, filed a Joint Petition for Rehearing ("Joint Petition"), asking the Court to (1) remand without vacatur the flight procedures and (2) limit the flight procedures remanded to "west flow" departure routes. [2] Included with the Joint Petition was the *Memorandum Regarding Implementation of Court Order* ("Agreement") which sets forth a discrete set of tasks to be conducted in a specific sequence to implement the Court's order. AR02.

II. The February 2018 Judgment Rejected Most of FAA's Requested Changes, Changing the Judgment to Cover Departure Routes, Instead of All Routes.

In February 2018, the Court rejected almost all the proposed changes. The Court amended the opinion to change "flight routes and procedures" to "flight

[1] "RNAV Flight Procedures" are flight procedures designed to take advantage of satellite technology instead of radar.
[2] "West flow departure routes" are departure routes that aircraft take using Runways 25R, 25L, or 26 at Phoenix Airport. .

departure routes," but otherwise rejected the proposed changes. *See City of Phoenix et al. v. Huerta*, 881 F.3d 932 (Mem.)(D.C. Cir. 2018). In particular, the Court declined to remand without vacatur and declined to limit the mandate to just the west flow departure routes. When the mandate ultimately issued, the judgment would vacate *all* 2014 flight departure routes, both west and east flow. Nothing would be remanded without vacatur.

In responding to the Court's Judgment, however, it would not be sufficient for FAA to address solely the issues raised by the Phoenix and the Historic Neighborhoods. Phoenix's claim in *Phoenix* was that FAA breached its – and the public's – entitlement to non-arbitrary decision-making and/or their right to participate in the rulemaking process when it promulgated the RNAV Departure Procedures in September 2014. The Court agreed and vacated FAA's entire FAA decision to promulgate flight departure routes on September 18, 2014 because courts generally cannot "issue a decision for less than all seasons, for some citizens and not others, as an administrator shall later decide." *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regul. Comm'n*, 59 F.3d 1281, 1289 (D.C. Cir. 1995). When a court issues a general order vacating and remanding agency action, any affected person may rely on the court's opinion, not just the original petitioner. *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 71 (D.D.C. 2019), rev'd on other grounds sub nom, *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir.

2020)(rejecting the argument that an agency should be permitted to "apply [an] invalid rule with respect to any person who is not the individual who filed the legal action that is before the Court").

A. The Court's February 2018 Judgment Vacates the East Flow Departure Routes.

Contrary to the plain language of the February 2018 Judgment, FAA argues that the east flow departure routes were not vacated.[3] FAA.Bf.pp.44-46. FAA argues that because the flight tracks that the east flow departure routes followed did not use unused airspace, they were not "new." As a result, the February 2018 Judgment did not apply to them. However, the word "new" in the Judgment unambiguously refers to the fact that the "departure routes" were part of the "new" RNAV flight procedures implemented in September 2014, and not amendments or revisions to existing flight procedures. *See* Scottsdale.Br., pp.15, 39; Amicus.Br., pp.15-18. Even if that were not the case, FAA's argument fails for three reasons.

One, FAA's current claim is an *post hoc* rationalization. The Court knew the context of the litigation when it reissued its judgment, and rejected FAA's requested changes. The Joint Petition explains how the *Phoenix* litigation focused on the west flow departure routes and concludes that the Court should only remand

[3] "East flow departure routes" are routes east departing aircraft take using Runways 7R, 7L and 8 at Phoenix Airport. .

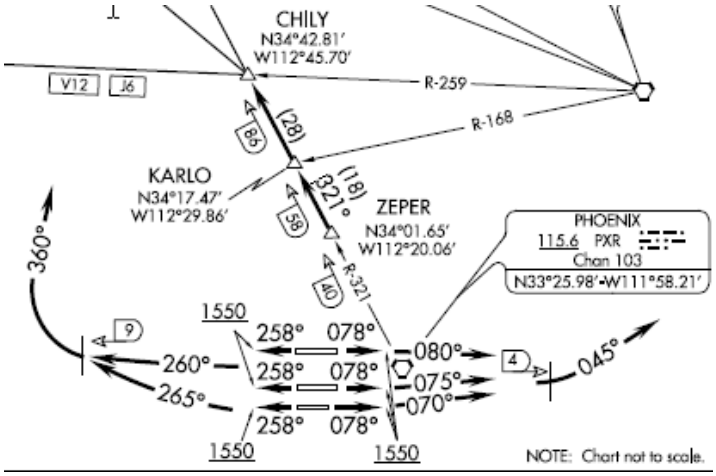
the west flow departure routes without vacatur and no others. FAA recognized when it made the request that "new flight routes" in the Court's August 2017 Judgment meant *all* flight procedures that FAA implemented on September 14, 2014, would be vacated. FAA did not draw the distinction it now makes that somehow some of the "new flight routes" were not "new." Had the Court intended to omit the east flow departure routes from the February 2018 vacatur, it would have adopted language to that effect.

The Court, having denied the request to exclude the east flow departure routes from the vacatur in 2018, should not now allow FAA to interpret the 2018 Judgment as if the Court granted the request.

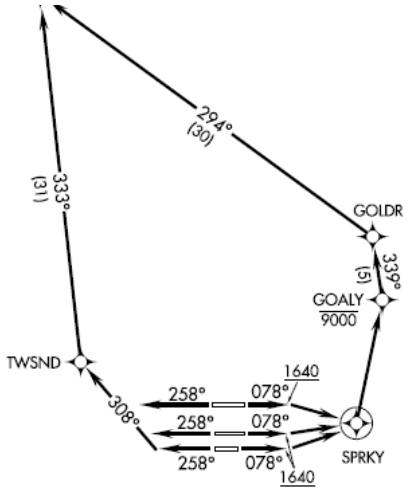
Two, the notion that east flow RNAV departure routes were not "new" defies the purpose of the NextGen program, which is to replace "conventional" ground-radar-based routes with new satellite-based RNAV routes. *See*, FAA Modernization and Reform Act of 2012, 126 Stat. 11. The east (and west) flow departure routes were new RNAV procedures that replaced "conventional" flight procedures.

Three, if one compares the pre-2014 routes with the post-2014 east flow routes, the September 2014 east departure routes were "new" because they differed from the previous departure routes. These graphics show the changes to the east flow

departure routes. The three lines at the bottom center of the graphic represent Phoenix Airport's runways. The solid black arrows pointing to the right, away from the runways are the east flow departure routes.



Pre-2014 routes: PJA493
See also, PJA515 and PJA507



Post-2014 routes, PJA507
See also, PJA503 and PJA513

Instead of continuing to the east, as the pre-2014 routes do, the post-2014 east flow departure routes fly east to waypoint "SPRKY" and then turn almost 90 degrees to the north, over Scottsdale and Amici. Certainly, this change should be characterized as a "new" route.

III. FAA's March and May 2018 Orders Do Not Include East Flow Departure Routes.

After the Court reissued its Judgment in February 2018, FAA issued orders in March and May 2018 amending the west flow departure routes for the Phoenix Airport. Under the Implementation Agreement, these orders were called "Step 1A"

(March 2018) and "Step 1B" (May 2018). These orders included environmental analyses and consultations under NEPA, NHPA, and 4(f), but only for the west flow operations. East flow departure routes were not included in either the March or the May 2018 Orders. Nor were they analyzed as part of the March or May 2018 environmental analyses and consultations.

A. FAA's Records of Decision for Both Its March and May 2018 Amendments to the Departures Do Not "Re-Issue" or "Re-Implement" the East Flow Departure Routes.

FAA claims it "re-issued" or "re-implemented" the east flow departure routes in the March and May 2018 orders. FAA.Bf.pp.1,29,46, and 47. FAA is wrong. The Record of Decision for each order states unequivocally that FAA's decision only affected the west flow departures routes. FAA's May 2018 Record of Decision described its action as a proposal "to *amend* the *west flow* Area Navigation (RNAV) Standard Instrument Departure (SID) procedures *from runways 25 Left, 25 Right, and 26* at Phoenix Sky Harbor International Airport…"[4] AR32:1 (emphasis added). FAA amended the existing 2014 RNAV departure routes with new west flow departure routes. East flow departure routes were left out.

[4] The March 2018 used almost the same language, except that it stated the proposal was "to implement two west flow …" AR26-001

This proposed action - amending the west flow RNAV procedures from runways 25 Left, 25 Right, and 26 – was the action approved by FAA Western Service Area Air Traffic Director.

> Under the authority delegated to me by the Administrator of the FAA, I approve the operational changes necessary to implement the Step 1B *west flow* area navigation standard instrument departure procedures at Phoenix Sky Harbor International Airport.

AR32:3[5] (emphasis added). Had Scottsdale sought judicial review of either the March or May 2018 orders, it would have been asking the Court to review FAA's changes to the west flow area navigation SID procedures only. Because FAA's March and May 2018 orders did not include "re-issuing" or "re-implementing" the east flow departure routes or any other decision regarding its obligation under Step Two, the 2018 orders were not ripe for review of the east flow departure routes.

B. None of FAA's Environmental Analyses for the March and May 2018 Orders Analyzed the Environmental Impacts of East Flow Departure Routes.

FAA does not dispute it is required by NEPA, NHPA and 4(f) to undertake certain environmental analyses and consultations when implementing flight routes. FAA claims that the March and May 2018 environmental analyses and consultations required under NEPA, NHPA and 4(f) included the east flow

[5] The March 2018 Record of Decision approval uses "Step 1A" instead of "Step 1B." AR26-003.

departure routes. FAA.Br.,pp.1,2,14,15,21,47,49-56. Once again, FAA is wrong. FAA did not include the east flow departure routes in the environmental analyses. The environmental analyses conducted for Steps 1A (March 2018) and 1B (May 2018) states that the "proposed action" analyzed are changes to the west flow departure routes only. No reasonable interpretation of the environmental reviews conducted for both the March and May 2018 amendments could conclude that east flow departure routes were analyzed.

1. Environmental Reviews Did Not Include East Flow Departure Routes That Are Presently in Effect.

As part of its legal obligation under NEPA, FAA submitted an "Environmental Review" in support of its proposed action in March and May 2018. The Environmental Reviews looked at the "potential environmental impacts caused by the Proposed Action." See, e.g., AR31:13, AR25:11. The title page of the "Environmental Review Proposed Categorical Exclusion" drafted for the May 2018 amendments (Step 1B) indicates that the "proposed action" is "[t]he *Proposed west flow* Area Navigation Standard Instrument Departure Procedures at Phoenix Sky Harbor International Airport…" AR31:1 (emphasis added); *see also*, March 2018 Environmental Review, AR25:1. East flow departure routes are not mentioned anywhere as being part of the proposed action.

The Environmental Review states that "[t]he Proposed Action would revise the western flow of aircraft flying the RNAV SID procedures from runways 25 Left, 25 Right and 26, at Phoenix Airport. AR31:9, without mentioning "re-issuing" or "reimplementing" the east flow departure routes. *See also*, March Environmental Review, AR25:9; AR31:6 ("The Step 1B RNAV SID procedures are the Proposed Action for this environmental review, and the details of the Proposed Action are discussed below"). Since east flow departure routes were not included in either the March or May 2018 "Proposed Action," the environmental impact of the east flow departure routes was left unexamined.

2. Neither Noise Screening Analysis Included the East Flow Departure Routes.

The Noise Screening Analysis for both Step 1A and Step 1B is no different. The title of the analysis states that the west flow departure routes are the only routes analyzed by FAA. See AR28:1("Noise Screening Analysis Report for The *Proposed West Flow* Area Navigation Standard Instrument Departure Procedures at Phoenix Sky Harbor International Airport…")(emphasis added); see also AR36:1. Once again, neither noise screen mentions that east flow departure routes are being "re-issued" or "re-implemented" as alleged by FAA. The "Summary" section of both noise screening backs up this interpretation.

> This report describes the noise screening analysis conducted in support of the Federal Aviation Administration's (FAA) Proposed Action to *amend the*

> *western flow of aircraft flying the Area Navigation (RNAV) Standard Instrument Departure (SID) procedures* …. Using the FAA-approved noise screening tool, … FAA completed a noise screening analysis to screen for potential increases in noise resulting *from implementation of the proposed amendments* to the western departure procedures.

AR36:2 (emphasis added); *see also* March 2018 Noise Screening, AR28:2. Noise screening was only done for the proposed amendments. There is no mention of noise screening for "re-implementation" or "re-issuance" of east flow.

The Noise Screen "study area" is described in both documents as only encompassing the area affected by the "proposed action," i.e., the west flow amendments. AR28:7 ("The study area for the noise screening analysis is considered to be the geographic area where the potential to be *impacted by noise from the Proposed Action* exists")(emphasis added). Noise screening only covered the proposed action – the west flow – and not the east flow.

The May 2018 noise screening states it evaluated three scenarios: No Action, Proposed Action and Pre-RNAV Western Routes. None of the scenarios screened for the noise impacts created by the east flow configuration and compared them with the pre-2014 flight tracks. "The 'No Action Scenario' comprises the current [i.e., post-2014] *west* configuration RNAV SID procedures." AR36:5. The "No Action Scenario" does not include east flow configuration. The Proposed Action Scenario "models the noise impact if 100% of Phoenix Sky Harbor departure aircraft were assigned one of the proposed RNAV SIDs as appropriate

by the route of flight." AR36:6. The Noise Screen then defines "proposed RNAV SIDs" by stating that "[t]he Proposed Action would revise the current western flow of aircraft flying the RNAV SID procedures from Runways 25L, 25R and 26 at Phoenix Sky Harbor." *Id*.; AR36:14. The Proposed Action Scenario did not analyze the noise impact of east flow of aircraft. Finally, and most important, the "Pre-RNAV Western Routes Scenario" compares "differences in noise between (1) the Pre-RNAV Western Routes and the Proposed Action Scenario." The Noise Screen looked at the changes between the west flow departure routes that existed before the September 2014 implementation of the RNAV routes and compared them to the "proposed action." Had FAA followed the Court's Order, both east and west flow departures would have been compared against pre-RNAV routes. But under these three scenarios, the east flow departure routes are forgotten.

3. None of the Consultations Under NHPA and 4(f) Included Information regarding East Flow Departure Routes.

Neither the March 2018 or the May 2018 4(f) and NHPA consultations sought consultation regarding the impact that the east flow departure routes would have. Scottsdale.Br., pp.54-58. In both cases the letters to the organizations and agencies stated that "[t]he Proposed Action involves air traffic procedure amendments to the west flow RNAV SID procedures from runways 25L, 25R and 26." Contrary to the Court's February 2018 judgment and FAA's commitment in

the Agreement regarding Step Two, no mention is made of east flow, no information is given about east flow. Therefore, no consultation was done about east flow departure routes.

On June 6, 2018, the Court's Mandate issued vacating the nine 2014 Departure routes and requiring FAA to comply with NEPA, NHPA and Section 4(f) in developing new replacement departure routes.

IV. FAA's January 2020 Decision Is Arbitrary and Capricious and Not in Accordance with Law and Must Be Vacated and Remanded.

We now come to the decision that Scottsdale is petitioning the Court to review. After the mandate issued, and after FAA amended the west flow departure, FAA still had an obligation under the Agreement and under the Court's Order to consider changes to the east flow departure routes. While FAA under the Agreement had the "discretion not to take any action," in this context, that means, at the very least, it would be required to re-implement the 2014 east flow departure routes while conducting the requisite environmental analysis. Instead, FAA issued its January 2020 decision performing no further environmental analysis. Even if FAA invoked a Categorical Exclusion (as suggested by FAA in its Brief) as part of

its environmental analysis, FAA Order 1050.1F requires the use of a Categorical Exclusion be carefully documented.[6] FAA Order 1050.1F, § 5-3.

A. FAA's January 2020 Decision Is a Final Agency Order under 42 U.S.C. § 46110.

A final order is one that (1) "mark[s] the consummation of the agency's decision-making process" and (2) that either determines "rights or obligations" or is a source of "legal consequences." *Friedman v. FAA*, 841 F.3d 537, 541, (D.C. Cir. 2016)(quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, (1997)). The January 2018 Decision satisfies both prongs of the finality test.

On January 10, 2020, FAA announced that it (1) completed Step Two of the Implementation Agreement; (2) completed all its obligations under the Agreement; and, as such, (3) completed implementation of the Court's February 2018 order. AR61:1. Further, FAA indicated that it would not evaluate the environmental impact of its Step Two proposals (Concepts One and Two) and will not follow through on any proposals to revise the east flow departure routes. AR61. It is these decisions, which are contained in the document entitled "Summary of Step Two Comments," that Scottsdale challenges. Scottsdale.Br., pp.i, 1, 26, 28; compare FAA.Br., pp.i, 2, 3, 19, 23, 30, 31, 32, 33, 34.

[6] Both the March and May 2018 orders used categorical exclusions. The environmental analyses were appendices to support FAA's categorical exclusion.

The January 2020 Decision was not merely a "summary of comments," As characterized by FAA. FAA.Br., pp.32-38. It represents the final step in the Agreement, and it contains FAA's conclusion it has completed implementation of the of the Court's February 2018 Judgment. It is a final, reviewable agency order under 42 U.S.C. § 46110.

Nothing in the January 2020 Decision indicates that FAA's statements and conclusions are tentative, open to further consideration, or conditional on future agency action. FAA's discursive argument on the finality of the January 2020 Decision avoids addressing the language of finality in the January 2020 Decision. The January 2020 Decision says:

> *The FAA will not be taking further action under Step Two, and has now completed all of its obligations under the Implementation Agreement.* Any future actions that the FAA may undertake regarding airspace changes in and around Phoenix will be considered *new actions that are unrelated* to the Implementation Agreement.

AR61:1 (emphasis added). This language indicates that FAA believes that it has fulfilled its obligations under the Implementation Agreement, including implementation of the Court's February 2018 Order. It also draws a clear line between actions it took before and actions it may take after the January 2020 Decision. The Implementation Agreement does not create an open-ended invitation for FAA to continually revise the airspace in and around Phoenix. Instead, it sets

forth a discrete set of tasks to be conducted in a specific sequence according to a clear timeline. Those tasks were purportedly completed in 2020 with the publication of the January 2020 Decision. Compare *Village of Bensenville v. FAA*, 457 F.3d 52, 69 (D.C. Cir. 2006)(holding that an FAA letter was not "final" because it "only affects [petitioners'] rights adversely on the contingency of future administrative action").

B. Scottsdale Has Standing to Challenge FAA's January 2020 Decision

1. "Flight procedures at issue" means the east flow departure routes.

At the bottom of the first page of document entitled "Summary of Step Two Comments," the FAA has conceded that only Step Two addresses the east flow departure routes, and "that are unrelated to the westbound departures that were at issue in the [*Phoenix*] lawsuit." AR61:1. Therefore, while Scottsdale has referred to the west flow departure routes in providing a background of the present dispute, Scottsdale has only ever complained about the east flow departure routes. Scottsdale.Br., pp.18,19-20, 21, 37, 40-41, 58; AR61:1.

The use of terms such as "2018 flight procedures" and "departure routes" interchangeably conveys an incorrect notion there are numerous flight procedures and routes "at issue." For example, FAA's statement that "Scottsdale lacks standing to vacate May 2018 departure procedures," is misleading because "May

2018 departure procedures" concerns only the west flow departure routes which is that are not at issue. FAA.Br., p 24, Scottsdale.Br., pp.18,19-20, 21, 37, 40-41, 58; AR61:1. Thus, the term "flight procedures at issue," mentioned in the Declaration of Sherry Scott ("Scott Decl.") means the east flow departure routes for which review is sought. Scott Decl. ¶¶ 12, 13. Thus, a general reference to "flight procedures" means the "2018 departure procedures" consisting of both the amended west flow departures that FAA implemented on May 24, 2018, and the 2014 east flow departure routes. Scott Decl. ¶¶ 11, 14.

a. Scottsdale Has Standing to Challenge FAA's Final Decision

Scottsdale has carried its burden to establish standing to challenge FAA's January 2020 Decision by showing (1) it suffered an "injury in fact," (2) that is "fairly traceable" to the respondent's conduct, and (3) "that is likely to be redressed by a favorable judicial decision. *D&F Afonso Realty Trust v. FAA*, 216 F.3d 1191, 1194 (D.C. Cir. 2000)(listing the three elements of Article III standing); *See*, e.g., Scottsdale.Br., pp.32-33, Scott Decl. ¶ 8, ¶¶ 14-15. In *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002), this Court held that a city has standing to sue a federal agency "when a harm to the city has been alleged."

b. Scottsdale's loss of property and economic interests are injuries-in-fact cognizable under Article III.

Scottsdale owns real property that include McDowell Mountain Ranch Park, libraries and Westworld, a cultural and equestrian event center, that are in the

direct path of concentrated overflights that follow the east flow departure routes. Scott Decl. ¶¶ 13-15. Scottsdale showed that substantial increase in aircraft noise and pollution from the concentrated overflights have caused the value of the properties and property tax to decline. Scottsdale.Br. p.33; Scott Decl. ¶¶ 8, 14-15. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 110-111 (1979)(holding that direct injury to a municipality by diminishing tax from reduced property value will establish standing).

And the increased noise and pollution from the concentration of flights, have defeated the aesthetic and recreational purpose of such properties for which a quiet is a fundamental attribute of enjoyment of those properties. Scottsdale.Br., p.32-33; Scott Decl. ¶ 14-16. *See also*, *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704, (D.C. Cir. 1988)(conservation and recreation interests have been accepted for demonstrating injury-in-fact).

c. Scottsdale's suffered procedural injury-in-fact when FAA terminated Step Two without complying with the Administrative Procedures Act.

The Petitioner has been accorded procedural rights as an owner of real property within the City of Scottsdale. It has sufficiently demonstrated that it has suffered procedural injury-in-fact when FAA terminated Step Two without complying with the procedure under the Administrative Procedure Act, by failing to articulate a rationale between the facts FAA found and its decision. Scottsdale.Br., pp.34, 36, 60; *U.S. Air Tour Ass'n v. F.A.A.*, 298 F.3d 997, 1005 (D.C. Cir. 2002)(citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). While Scottsdale had no expectation as to a specific outcome regarding a departure route change because of Step Two, Scottsdale expected that some change or that FAA would provide a reasoned explanation of FAA's termination of Step Two and provide environmental analyses of its decision, both of which were of substantial value to Scottsdale. Such reasoned explanation, which FAA denied, would have allowed Scottsdale to exercise its police power to adopt environmental ordinances or re-establish zoning to protect its real property and economic interests. Scott Decl. ¶¶ 5-9; Scottsdale.Br., p.9 ¶1, 32; AR72.

2. Scottsdale's Petition for Review is timely.

In its Opposition Brief, FAA argues that Scottsdale lacks standing to challenge FAA's 2018 orders because Scottsdale's Petition for Review is untimely

and with no excuse for the delay. FAA.Br., pp.38-39. Until FAA issued a final decision terminating Step Two on January 10, 2020, its decision-making process regarding the east flow was not final. Thus, the dispute between Scottsdale and FAA was not ripe for the Court's review prior to January 2020.

In determining whether a case is ripe, the Court must determine whether the plaintiff suffered injury and whether the defendant's action is sufficiently final. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-387, (D.C. Cir. 2012). at 386-87. Towards that end, the Court must ensure that its adjudication of the dispute would not interfere "with an agency policy that is currently undergoing change or development." *Great Lakes Gas Transmission Ltd. P'ship v. Fed. Energy Regulatory Comm'n*, 984 F.2d 426, 431 (D.C. Cir. 1993). *See* further discussion in Section IV.A. above regarding the finality of FAA's January 2020 decision in 42 U.S.C. § 46110.

3. Scottsdale's injuries are fairly traceable to FAA's Final Decision issued on January 10, 2020.

a. Facts in the Scott Declaration show that Scottsdale's injuries-in-fact are fairly traceable to FAA's conduct.

FAA argues that the declaration of Sherry Scott, Scottsdale's City Attorney, "does not evince the declarant's requisite knowledge and competence on how the flight procedures work, where they fly, which ones are in effect, and their specific

impact on overflown areas, as necessary to establish causation." FAA.Br., p.28. Such matters are properly the subject of expert testimony which is not required to show that Scottsdale's injuries are "fairly traceable" to FAA's conduct. *See D&F Afonso Realty Trust*, 216 F.3d 1191, 1194. Ms. Scott is a fact witness and her declaration shows that Scottsdale's loss of economic, real property and administrative interests resulting from the east flow departure routes (the flight procedures that are at issue in this case) are fairly traceable to FAA's conduct, including its decision to terminate Step Two. Scott Decl. ¶ 11-12.

b. It is reasonable for members of the public to rely upon a FAA's affirmation of its existing obligations stated in a public record.

Here, FAA has raised the issue that Scottsdale does not have standing to enforce the *Phoenix* judgment and FAA's implementation of the Step Two process because Scottsdale was not a party to *Phoenix*. FAA.Br., pp.2, 12, 31 and 44. According to this Court's opinions discussed below, Scottsdale has standing to enforce the judgment in the *Phoenix* and the Step Two process.

First, in *Phoenix*, this Court held that FAA's approval of the new flight routes it implemented in September 2014 was "arbitrary and capricious and violated the National Historic Preservation Act, the National Environmental Policy Act, the Department of Transportation Act, and FAA's Order 1050.1E." *Phoenix*,

869 F.3d 963, 970. The Court, in its holding, did not distinguish between west flow or east flow. Therefore, the procedural deficiencies that the Court pointed out in the *Phoenix* opinion regarding FAA's implementation of the 2014 RNAV flight procedures, stated in FAA's own words that, "[t]he FAA had not adequately justified its decision or notified or consulted with the *Phoenix* petitioners under the environmental law," should apply equally to the west and east flow departure routes. *Id.* at 970-975; FAA.Br., p12. Under its opinion in *Phoenix*, the Court's February 7, 2018, Order vacated *all* the west flow and the east flow departures routes. Scottsdale.Br., p.48; RJN05. Scottsdale is justified in relying on the fact that the east flow departure routes are vacated. *See Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated--not that their application to the individual petitioners is proscribed.").

Second, Scottsdale is justified in relying on FAA's affirmation it would carry out Step Two obligations in compliance with the applicable environmental law. After the Court's Judgment was issued in *Phoenix* on August 29, 2017, FAA and the City of Phoenix came to an agreement regarding implementation of the Court's Order, which the parties memorialized in *Memorandum Regarding Implementation of Court Order* ("Agreement"). AR02. The Agreement, which FAA calls a "settlement agreement," is not a private settlement agreement between

the litigants because it contains public components as described below. Scottsdale.Br., pp.16-17; AR49:1. The Agreement provides a FAA's overall plan to comply the Court Order regarding the 2014 RNAV flight procedures. In addition to the overall plan, FAA made promises regarding Step Two in the FAQ it published on its website during early 2018 that it "would consider permanent routes that approximate the pre-September 2014 routes within a 15-mile radius of the airport." One community within that 15-mile radius includes Scottsdale. Moreover, the Agreement contains FAA's commitment regarding Step Two: "FAA will perform its obligations under Step One and Step Two in accordance with the following authorities: NEPA, 42 U.S.C. § 4321 et seq.; FAA Order 1050.1F, Environmental Impacts: Policies and Procedures; FAA Order 7100.41, Performance Based Navigation Implementation Process; FAA Order 7400.2L, Procedures for Handling Airspace Matters; Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq.; Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c); and other applicable federal laws." AR02:8-9.

The language cited above expresses FAA's commitment made when it published in its policy statements that, in taking an action, it will comply with applicable environmental laws, regulations and other requirements. *See*, for example, FAA Order 1050.1F ¶¶ 1-1, 1-8. AR08:1-2. Towards that end, FAA's

Step Two commitment in the Agreement comes with its affirmation of its existing obligations to comply with laws and regulations in its environmental policies. "[U]nder D.C. law, parties who make representations to second parties can be liable to third parties who act on these representations if such reliance is reasonably expected." *Armstrong v. Accrediting Council for Continuing Educ. & Training*, 961 F. Supp. 305, 309 (D.D.C. 1997). The FAA has made the Step Two commitment publicly available as part of the Court's records in the *Phoenix* and on its website where it reaffirmed its obligations to comply with environmental laws in carrying out Step Two. Thus, Scottsdale is justified in relying on it.

Third, the Administrative Procedure Act ("APA") permits suit to be brought by any person "adversely affected or aggrieved by agency action." *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). *Nat'l Mining Ass'n* is instructive. In *Nat'l Mining Ass'n* this Court held that where a petitioner prevails against an agency action that consists of a rule of broad applicability, such agency action would be invalidated rather than the Court simply prohibiting the application of the agency only as to a particular individual. *Id.* Applying the reasoning in *Nat'l Mining Ass'n* to the Court's vacatur of FAA's September 2014 Order implementing the new RNAV flight procedures results in the vacatur the east flow departure routes as well as the west flow departure routes. *Id.*

c. In reliance of FAA's representations made in the public records, Scottsdale's exercise of forbearance regarding its injuries.

In the Agreement filed with the Court, FAA told the public it planned to prioritize its compliance with the Court's Judgement in a two-step process, starting with the Step One modifying the west flow departures from the Phoenix Airport and then it would proceed to Step Two to modify all other flight procedures, including the east flow departures to return the flight tracks to those that existed before 2014. Scottsdale.Br., p.42; AR49:1. Scottsdale exercised forbearance from seeking redress for its injuries while FAA completed Step One and start the implementation of the Step Two. *Id*. When FAA sent a letter to Scottsdale's mayor on April 10, 2019, informing Scottsdale Step Two meetings will start on April 23, 2019, and that "eastern departures" will be addressed as one issue, Scottsdale, once again exercised forbearance to participate in Step Two. AR74.

Scottsdale has standing to enforce Court's order to vacating the departure routes and remanding it to FAA to start over. And Scottsdale has standing to enforce FAA's Step Two commitment in the Agreement because when FAA made the Final Decision on January 10, 2020, without taking any action to re-implement or re-issue the east flow departure procedures or offering a reasoned explanation for that decision, Scottsdale received nothing of value in exchange for its exercise of forbearance in its justifiable reliance. Scottsdale.Br., p.13; AR02:2, 8-9. When

FAA issued the January 2020 Decision, Scottsdale's forbearance of its loss of economic and real property interests manifested as injuries-in-fact rather than as an exchange of anything of value, including a rationale showing that FAA has taken a "hard look" at the facts before it in making the January 2020 Decision. Therefore, Scottsdale has sufficiently demonstrated in foregoing that its injuries-in-fact are fairly traceable to FAA's January 10, 2020, Decision to terminate Step Two. *D&F Afonso Realty Tr.* 216 F.3d 1191, 1194.

d. FAA had an obligation to comply with FAA Order 1050.1F

Last, FAA implicitly argues that Scottsdale could not establish causation that FAA's termination of Step Two because it had no obligation to conduct environmental review of the east flow departure routes under FAA Order 1050.1F. FAA.Br., p.49. In support of this contention, FAA alleged that Scottsdale has not established that areas overflown by the east flow departures were "noise sensitive" within the relevant regulatory meaning to warrant environmental analysis. FAA.Br., p.49. In another words, FAA argues that Scottsdale had not shown that the overflights following the east flow departures were "at less than 3,000 feet above ground level in noise sensitive areas, or that noise would increase beyond an applicable threshold." FAA.Br., p.49; FAA Order 1050.1F ¶¶ 3-1.2(b)(12), 11-5.b(10); AR08. However, there is ample evidence in the Joint Appendix in *Phoenix* that the fact that aircraft following the east flow departure routes fly over noise

sensitive areas, such as residential areas "at less than 3,000 feet above ground level." *See* PJA876, 884 and 905. The cited portions of the *Phoenix* Joint Appendix show that the average altitude of the aircraft following the east flow departure procedure over noise sensitive areas of residential areas and parks range from 1930 to 2904 feet. *Id.*

4. Scottsdale's injuries-in-fact are redressable by Court's favorable decision.

Since there are residential and other noise sensitive areas surrounding the Phoenix Airport, Phoenix and Scottsdale's respective litigation over FAA's implementation of the west and east flow departure routes is but one-half of the same coin. Scottsdale.Br., pp.i, 8-11,AR49:1. However, it is patently clear that FAA has refused to take any further action regarding Step Two. The east flow departure routes that FAA initially implemented as part of the September 18, 2014, RNAV flight procedures remained undisturbed and were carried over into the May 2018 departure routes, even though on August 29, 2017, the Court vacated *all* September 18, 2014, flight procedures, including the east flow departure routes. Scottsdale.Br., pp.12, 14-15; RJN02. Scottsdale continues to suffer injuries described in preceding paragraphs. Scottsdale.Br., p.37. Therefore, should the Court issue an order confirming that it vacated *all* RNAV flight procedures (including the east flow departures) that FAA implemented on September 18,

2014. Or, if the Court agrees that FAA "re-implemented" the east flow departure routes in March and May 24, 2018, which it did not, the Court should order FAA to conduct environmental analyses and consultation for the east flow departure routes consistent with the Court's opinion in *Phoenix*. Scottsdale.Br., p.37, 60-61.

CONCLUSION AND REQUESTED RELIEF

Petitioner City of Scottsdale respectfully request that the Court grant Scottsdale's petition for review. Clarifying the relief it requested in its Opening Brief, Scottsdale requests the following relief:

(1) confirmation that the Court's February 2018 Judgment and June 2018 Mandate vacated *all* RNAV departure routes, including the east flow departure routes currently being used by FAA;

(2) vacate and remand the agency's 2020 decision regarding the Step Two, directing FAA to address the vacated east flow departure routes that FAA implemented on September 18, 2014, and provide the necessary environmental analysis under NEPA, NHPA and 4(f);

(3) Or, if the Court agrees that FAA re-implemented the east flow departure routes in March and May 24, 2018, that the Court vacated on February 8, 2017, the Court should order for FAA to provide environmental analysis under NEPA, NHPA, and 4(f) for those east flow departure routes consistent with the Court's opinion in *Phoenix*.

Respectfully submitted on January 27, 2022

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Review complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 6,412 words. I further certify that this Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14- point font.

Dated: 1/27/2022 LEECH TISHMAN FUSCALDO & LAMPL

By: 

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on January 27, 2022, I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF System.

Dated: 1/27/2022 LEECH TISHMAN FUSCALDO & LAMPL

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