ORAL ARGUMENT SCHEDULED ON 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

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY; FORT MCDOWELL YAVAPAI NATION; TOWN OF FOUNTAIN HILLS,
Amici Curiae for Petitioner.

FINAL OPENING BRIEF OF PETITIONER CITY OF SCOTTSDALE

[Petition for Review of an Order of the Federal Aviation Administration]

SHERRY SCOTT,
City Attorney
ERIC ANDERSON,
Senior Assistant City Attorney
City of Scottsdale, Arizona
3939 N. Drinkwater Blvd.
Scottsdale, Arizona 85251
Telephone: (480) 312-2405
Facsimile: (480) 312-2548
sscott@scottsdaleaz.gov
ecanderson@scottsdaleaz.gov

STEVEN M. TABER
ESTHER CHOE
Leech Tishman Fuscaldo & Lampl, Inc.
200 South Los Robles Ave., Suite 300
Pasadena, California 91101
Telephone: (626) 796-4000
Facsimile: (626) 795-6321
staber@leechtishman.com
echoe@leechtishman.com

Attorneys for Petitioner City of Scottsdale, Arizona

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Under Circuit Rule 28(a)(1), Petitioner City of Scottsdale certifies:

Parties and Amici. The Petitioner is the City of Scottsdale, Arizona ("Scottsdale"). Respondents are Stephen Dickson, Administrator of the Federal Aviation Administration (FAA), and FAA. Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation and the Town of Fountain Hills, Arizona are Amici Curiae for Petitioner.

Rulings under Review. The final agency action under review is FAA's January 10, 2020, decision it had completed its obligations related to its implementation of the Court's February 7, 2018, Judgment. That decision allowed FAA to implement new departure routes, known as Area Navigation (RNAV) routes, at Phoenix Sky Harbor International Airport without conducting an adequate environmental review of the routes or addressing Scottsdale's requests to study the impacts of those routes, including the adverse noise impact of the routes, and the impact of the routes on Scottsdale's parks and historic properties.

Related Cases. While Scottsdale's challenge to FAA's final agency action has not been before this Court or any other court, the matter is substantially related to *City of Phoenix v. Huerta*, U.S. Circuit Court of Appeals for the District of Columbia Circuit, Case No. 15-1158 (consolidated with Case No. 15-1247), namely the Judgment and Opinion originally entered on August 29, 2017, (869

F.3d 963) and the Judgment and Opinion reissued following revisions on February 7, 2018, (881 F.3d 932) and the Mandate issued on June 6, 2018.

Respectfully submitted on February 24, 2022.

Dated: February 24, 2022

LEECH TISHMAN FUSCALDO & LAMPL

By: Steven M. Taber

Steven M. Taber
Esther J. Choe
Attorneys for the City of Scottsdale, Arizona

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

GLOSSARY OF TERMS AND ABBREVIATIONS

§ 4(f)		Section 303 of the Department of Transportation Act (49 U.S.C. § 303).
2014 Departure Procedures		MAYSA, LALUZ, SNOB, YOTES, BNYRD, FTHLS, IZZZO, JUDTH and KATMN implemented on September 24, 2014, and vacated by the Court's February 7, 2018, Judgment
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 (42 U.S.C. § 4321 *et seq.*)
NextGen		The Federal Aviation Administration's "Next Generation of Air Transportation System."
Historic Preservation Act		National Historic Preservation Act (54 U.S.C. § 300101 *et seq.*)
Airport		Phoenix Sky Harbor Airport
Pre-Satellite-Based Departure Procedures		CHILY, ST. JOHNS, SILOW, MAXXO, STANFIELD, & BUCKEYE, which were made redundant by the 2014 Departure Procedures
Replacement Departure Procedures		BROAK, ECLPS, FORPE FYRBD, KEENS, MRBIL, QUAKY, STRMM, and ZEPER, implemented on May 24, 2018

RNAV		Area Navigation. Refers to the ability to navigate directly between any two points on earth using satellite technology.
West Flow		Departures using Runways 25R, 25L, or 26 from the Airport.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the City of Scottsdale's ("Scottsdale") petition for review of the Federal Aviation Administration's (FAA) January 10, 2020, final decision not to modify or take any further action to alleviate the noise and pollution impacts caused by FAA's implementation of the new flight departure routes, known as Area Navigation (RNAV) routes, at Phoenix Sky Harbor International Airport (Airport) under 49 U.S.C. § 46110 (a).

FAA's January 10, 2020, decision ("Final Order") conclusively stated that FAA would be taking no further action to revise the RNAV departure procedures then in existence, and that it would take no further action regarding its proposed action under "Step Two" of FAA's agreement with the City of Phoenix. It, therefore, is a final order under § 46110 (a). Scottsdale timely filed this petition for review on March 10, 2020, within the 60-day period for seeking review under § 46110(a).

STATEMENT OF ISSUES

1. Under NEPA, agencies must consider the environmental impacts of an agency action before taking that action.

a. Did FAA violate NEPA when it failed to assess the environmental impacts of the east flow departures implementing new or changed departure procedures without a complete environmental review required by NEPA and FAA's NEPA implementing order?

b. Did FAA violate NEPA when it failed to assess the environmental impacts of the two actions it proposed as part of Step Two and alternatives presented by Scottsdale?

2. The National Historic Preservation Act ("Historic Preservation Act"), 54 U.S.C. § 300101 *et seq*., and Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303 (c), ADD006, require agencies to consider an agency action's impact on historic resources, public parks, and recreation areas before acting.

a. Did FAA violate the Historic Preservation Act and Section 4(f) when it failed to include the east flow departure procedures in its consultation on, and analysis of, resulting impacts on historic resources, public parks, and recreation areas created by the Replacement Departure Procedures?

b. Did FAA violate the Historic Preservation Act and Section 4(f) when it failed to initiate consultation on, or analysis of, resulting impacts on historic resources, public parks and recreation areas by the two actions FAA proposed as part of Step Two and alternatives presented by Scottsdale?

3. By providing no environmental analysis for the east flow portions of the nine Replacement Departure Procedures, did FAA violate the Court's February 7, 2018, Judgment?

STATEMENT OF LAW AND FACTS

I. Statement of Law

A. National Historic Preservation Act, 54 U.S.C. § 300101 et. seq.

Congress passed the National Historic Preservation Act ("Historic Preservation Act") to protect historic buildings and districts. 54 U.S.C. § 300101 (5), ADD012. Under Historic Preservation Act, a federal agency having jurisdiction over a proposed "undertaking" shall "take into account the effect of the undertaking on any historic property." *Id.* § 306108, ADD013.

Historic Preservation Act regulations require agencies, in consultation with the State Historical Preservation Officer ("SHPO"), local governments, and other parties, to identify the project's "area of potential effect," locate all historic properties in that area eligible for listing on the National Register and assess the effect of the undertaking on those properties. *See* 36 C.F.R. §§ 800.4(a)–(c), 800.5, ADD021-ADD026. Agencies must "[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." *Id.* § 800.4(a)(3), ADD021. The agency must consult with and consider the views of local governments with jurisdiction over the properties. *Id.* § 800.2(c)(3), ADD017, ADD021-ADD026.

An "adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* § 800.5(a)(1), ADD024. Criteria for an adverse effect include the "[i]ntroduction of . . . audible elements that diminish the integrity of the property's significant historic features." *Id.* § 800.5(a)(2)(v), ADD024.

If an agency proposes a finding of "no adverse effect" it must "notify all consulting parties . . . and make the documentation available for public inspection prior to approving the undertaking." *Id.* § 800.4(d)(1), ADD022. Consulting parties have 30 days to review the finding. *Id.* § 800.5(c), ADD025. If the SHPO or other consulting party disagrees, the agency must either consult with the disagreeing party or request that the Advisory Council on Historic Preservation review the finding. *Id.* § 800.5(c)(2)(i), ADD025.

If historic properties would experience adverse effects, the agency must consult with the Advisory Council, SHPO, and others to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects...." *Id.* § 800.6(a). Historic Preservation Act regulations require agencies to reinitiate consultation if presented with new information that shows adverse effects after initiating the federal action. *Id.* § 800.13(b)(1).

B. Section 4(f) of the Department of Transportation Act

Section 303 of the Department of Transportation Act (49 U.S.C. § 303, ADD006-009), commonly called "Section 4(f)," allows FAA to approve a project "requiring the use of publicly owned land of a public park . . . or land of an historic site of national, State, or local significance . . . only if—(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." 49 U.S.C. § 303(c), A006. "[N]oise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose is a 'use' of that land." *City of Grapevine v. Dept. of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

FAA Order 1050.1F—which provides FAA's procedures for implementing NEPA, Historic Preservation Act, and Section 4(f)—mandates that FAA "must consult all appropriate Federal, state, and local officials having jurisdiction over the affected Section 4(f) properties when determining whether project-related impacts would substantially impair the resources." Order 1050.1F, § 5.3.2, ADD036.

C. National Environmental Policy Act

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") requires agencies to "consider every significant aspect of the environmental impact of a proposed action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Agencies must take a "hard look" at the environmental

consequences and alternatives of a proposed action. *Id.*; 42 U.S.C. § 4332(2)(C), ADD004. Environmental effects are usually evaluated in environmental assessments (EAs) or environmental impact statements (EISs). *See* 40 C.F.R. § 1501.2–.4, ADD027-ADD031.

However, NEPA regulations allow agencies to categorically exclude certain types of activities from a more detailed EA or EIS review. Categorical exclusions are "category[ies] of actions which do not individually or cumulatively have a significant effect on the human environment ...." *Id.* § 1508.4, ADD032. NEPA regulations prohibit an agency from using a categorical exclusion if there are "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.* If extraordinary circumstances exist, agencies must prepare an EA or EIS.

Under Order 1050.1F, a significant noise impact normally exists where "the action would increase noise by DNL 1.5 dB or more for a noise sensitive area that is exposed to noise at or above the DNL 65 dB noise exposure level, or that will be exposed at or above the DNL 65 dB level due to a DNL 1.5 dB or greater increase, when compared to the no action alternative for the same timeframe." ADD033. However, FAA must give "special consideration" when evaluating the "significance of noise impacts on noise sensitive areas within national parks, national wildlife and waterfowl refuges; and historic sites including traditional

cultural properties." *Id.*, ¶ 11-3, ADD040. Noise levels even below DNL 65 constitute a significant impact or adverse effect where quiet is a critical attribute of or contributing element to historic status. *See id.*, ADD040. FAA recognizes that the DNL 65 threshold may not sufficiently protect historic sites where "a quiet setting is a generally recognized purpose and attribute." *Id.*

II. Factual Background

Petitioner, the City of Scottsdale, Arizona, ("Scottsdale"), is located approximately three miles northeast of Phoenix Sky Harbor Airport ("Airport"). Due to its proximity to the Airport, Scottsdale has always experienced overflights of aircraft. See Figure 1. However, as depicted in Figure 1, before September 18, 2014, those overflights were widely dispersed.

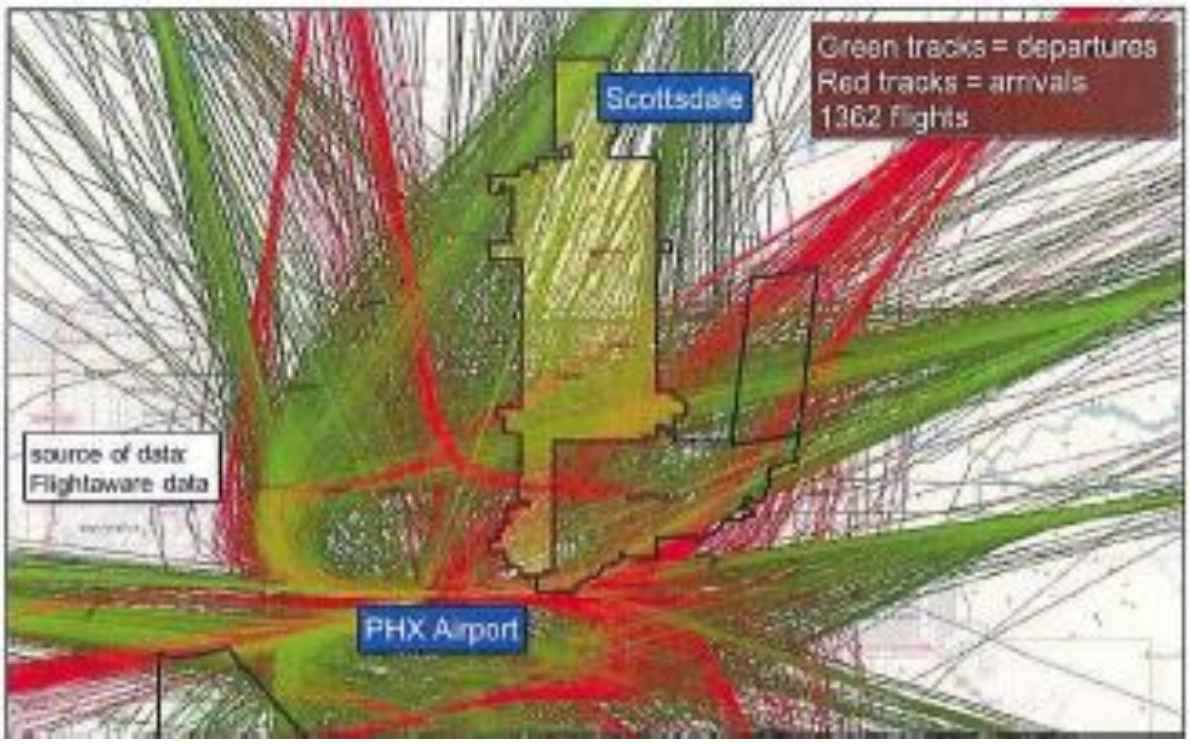


Figure 1 Airport Arrival and Departure Flight Tracks May 5 & 6, 2014 A2059

Due to the long-standing dispersal patterns of aircraft traffic, Scottsdale had established its zoning and other environmental ordinances based, in part, on the flight tracks of arrivals and departures at the Airport to ensure that the heaviest concentration of overflights is over the areas of Scottsdale that are not as noise sensitive, such as commercial areas, instead of residential areas.

A. On September 18, 2014, FAA Published New Flight Procedures that Concentrate Flights Over Scottsdale and Other Areas in the Phoenix Metroplex.

That long history of dispersed flight tracks ended in 2014. As part of its move to "Next Generation of Air Transportation System" ("NextGen"), which involves the implementation of satellite-based Area Navigation procedures or "RNAV" flight procedures, the Federal Aviation Administration ("FAA") published a raft of new flight procedures on September 18, 2014, for the Greater Phoenix airspace including the Airport. Included in those new flight procedures were nine departure procedures for the Airport.[1] Each of these departure procedures had two components: procedures for "west flow" departures and

[1] The nine Departure Procedures are MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN (collectively, "2014 Departure Procedures").

procedures for "east flow" departures.[2] These new flight procedures fundamentally changed how aircraft flew through the Phoenix airspace.

After implementing the 2014 Departure Procedures, the flight tracks became much more concentrated and included three new flight procedures, MAYSA, SNOBL, and YOTES, that bisect Scottsdale. See Figure 2.

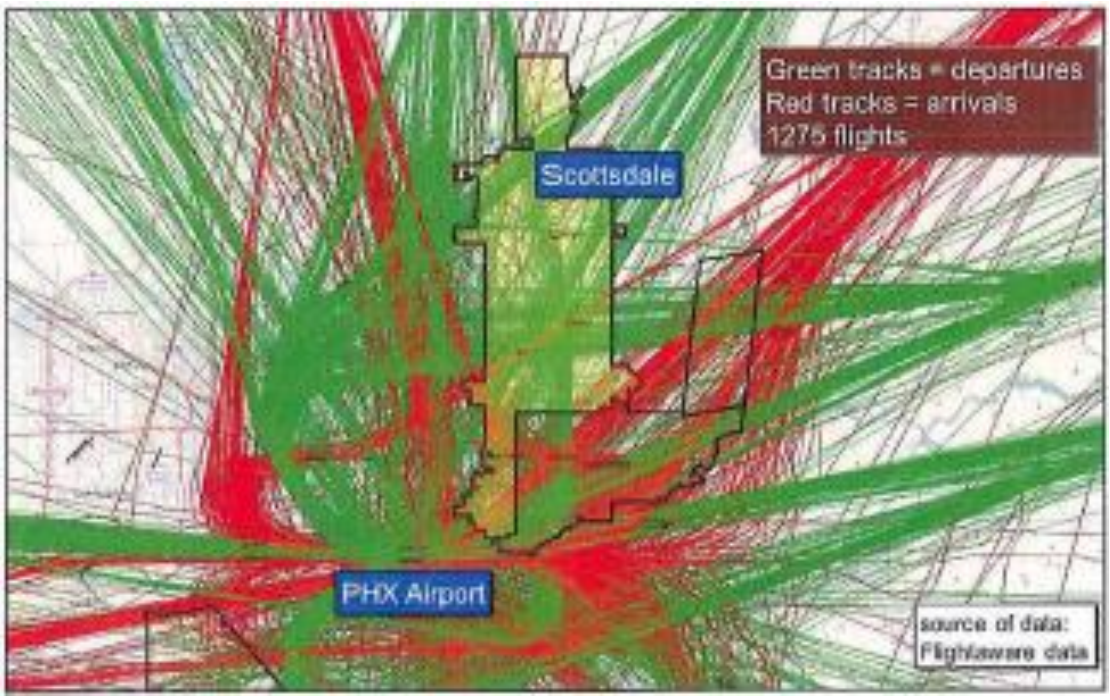


Figure 2 Airport Arrival and Departure Flight Tracks March 15 & 16, 2018; A2059

[2] The Airport has three runways that run East-West. When air traffic departs to west, or "west flow," aircraft use Runways 25 Right ("25R"), 25 Left ("25L"), and 26. When air traffic departs to the east, or "east flow," aircraft use Runways 7 Right ("7R"), 7 Left ("7L") and 8.

Although the flight tracks are much more concentrated in Figure 2, Figures 1 and 2 represent approximately the same number of flights. The concentrated green line in the center of Scottsdale results from the MAYSA, SNOBL and YOTES departure procedures.

B. City of Phoenix and Various Historic Neighborhoods File a Petition for Review Challenging FAA's Implementation of the New Departure Procedures.

After numerous discussions with the City of Phoenix and various historic neighborhoods (collectively, "Phoenix"), FAA failed to produce acceptable alternatives to 2014 Departure Procedures, Phoenix filed petitions for review with this Court, challenging FAA's implementation of the September 14, 2014, procedures. RJN01. Phoenix alleged that the new procedures were implemented without conducting the proper analyses under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("Historic Preservation Act") and § 303 of the Department of Transportation Act("4(f)"). *Id.*, ADD006-009.

On August 29, 2017, this Court granted Phoenix's Petition for Review ordering that "the [FAA's] September 18, 2014, order implementing the new flight routes and procedures at Sky Harbor International Airport be vacated; and the matter be remanded to FAA for further proceedings in accordance with this opinion." RJN02-RJN03 *City of Phoenix, Arizona v. Huerta*, 869 F.3d 963, 975 (D.C. Cir. 2017) ("*Phoenix"*). In granting Phoenix's petition, the Court concluded

that FAA failed to address three issues when it developed and implemented the 2014 Departure Procedures: NEPA (869 F.3d at 971-973); the National Historic Preservation Act (869 F.3d at 971); and Section 4(f) of the Department of Transportation Act (869 F.3d at 973-975). Thus, any replacement flight procedures would have to be "in accordance with [the Court's] opinion" and address those issues.

C. After the Court's Decision, FAA and Phoenix Sign an Agreement that Prioritizes "West Flow" Departures.

Because FAA believed that it would be difficult to return to the flight procedures that existed before September 2014 ("pre-Satellite-Based flight procedures"), after the Court's initial Judgment was issued, FAA and Phoenix came to an agreement regarding implementation of the Court's Order. This agreement, the Memorandum Regarding Implementation of Court Order ("Agreement"), sets forth a two-step plan to implement flight procedures for aircraft using the Airport that focused first on "west flow" departure routes. A073.

In Step One, FAA agreed to modify the 2014 Departure Procedures at the Airport by changing only the west flow departures from the Airport to return the flight tracks over western Phoenix to those that existed before 2014. A076. While the Court's August 29, 2017, Judgment stated that *all* September 14, 2014, flight procedures were to be vacated and reviewed in accordance with the Court's Opinion, Step One, and the modified departure procedures to be developed did not

address the "east flow" component of the soon-to-be-vacated departure procedures. See A077-079.

In Step Two of the Agreement, however, FAA agreed to consider developing procedures that would address the long-term issues covering the entire Phoenix Metroplex. As described in the Agreement, Step Two was intended to develop new or modified procedures to provide relief from aircraft noise and pollution for the entire Phoenix Metroplex. A079-080. FAA stated in the Agreement that after receiving public comments it would decide which further actions it would take to alleviate aircraft noise and pollution issues in the Phoenix Metroplex. *Id.*, *see also* A076-077.

FAA clarified in the Agreement that all its decisions – in both Steps One and Two – would comply with all its statutory and regulatory obligations. As stated in ¶ 7 of the Agreement: "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." A080-082.

The Agreement was submitted for approval on November 30, 2018, as part of the Joint Petition for Panel Rehearing ("Joint Petition"). A036. The Joint Petition also requested that the Court revise its August 29, 2017, Opinion and Judgment to include the following language:

> For the foregoing reasons, we grant the petitions and remand to the FAA, *without vacating*, the portion of the September 18, 2014 order implementing the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN procedures at Phoenix Sky Harbor International Airport *departing Runways 25L, 25R or Runway 26* for further proceedings *consistent with this opinion and the Memorandum Regarding Implementation of Court Order* filed with this Court on November 30, 2017. This Court will stay the issuance of its mandate until June 15, 2018, unless the parties notify this Court prior to that date that the mandate should issue. The parties may each file a status report of no more than 2,500 words on or before May 15, 2018, in the event the mandate has not yet issued.

A056 (emphasis added). This language explains that FAA would not address any "east flow" issues because of the litigation. Instead, as the Agreement clarifies, any east flow issues would be addressed in Step Two and at the discretion of FAA. A079-080.

On February 7, 2018, the Court ruled on the Joint Petition. In its *per curiam* ruling, RJN02, the Court rejected the language proposed by FAA. Instead, it modified its Judgment to state:

> ORDERED and ADJUDGED that the petitions for review be granted; the September 18, 2014 order

> *implementing the new flight departure routes at Sky Harbor International Airport be vacated*; and the matter be remanded to the FAA for further proceedings, in accordance with the opinion of the court filed herein this date.

RJN02 (emphasis added).

While the Court did acknowledge that the August 29, 2017, Judgment would only vacate *departure routes* from Airport instead of all the 2014 Departure Procedures, the Revised Judgment issued on February 7, 2018, represented a substantial difference from what FAA requested. First, instead of remanding the matter without vacatur, the Court vacated the nine departure flight procedures that FAA published on September 18, 2014. Second, instead of limiting the vacatur to the "west flow" portions of the nine departure procedures the Court vacated the entire 2014 Departure Procedures, which included the portions of those procedures that departed Runways 7L, 7R, and 8 (that is, the "east flow" portions).

D. Undeterred by the Court's Revised and Reissued Judgment, FAA Proceeded with Step One of the Agreement Without Any Changes Reflecting the Court's Revisions.

1. FAA's community involvement efforts for Step One focused entirely on the environmental impacts of west flow departures.

Instead of revising its Agreement with Phoenix to comply with the Court's revised Judgment, FAA proceeded with public workshops in the Phoenix area supporting the Agreement and the "Two-Step" process set out therein. These

workshops presented the Agreement to the public and outlined FAA's planned implementation of changes to "west flow" departure routes. In none of the materials presented at the public workshops, however, did FAA mention that the Court's Order required FAA to review the environmental impacts of the entire departure procedures, not just the west flow portions of the procedures. As part of those workshops, FAA drafted a FAQ for its "Step Two" process. In that FAQ, FAA indicated that:

> During Step Two, the FAA would develop new, permanent satellite-based procedures that replace the temporary Step One routes. The FAA would consider permanent routes that approximate the pre-September 2014 routes within a 15-mile radius of the airport. As part of Step 2, the FAA also would consider feedback on procedures throughout the Phoenix area – not just on the westerly departure routes.

A1301. Unaware that the Court had required FAA to consider both east and west flow departures, Residents who lived within that 15-mile radius of the Airport, which includes Scottsdale, thought that their concerns about east flow flights would be addressed in Step Two. A1946.

Also included in FAA's FAQ is the following Q&A:

> Q: Does making the changes depend on the court approving the agreement? What if the court doesn't accept the agreement?
>
> A: We intend to proceed with the plan outlined in the agreement unless the court directs us otherwise.

A1302. However, the Court did direct FAA otherwise and it did not accept the Agreement. Yet, FAA made no changes to its plan outlined in the Agreement to account for the Court's vacatur or the east flow departures.

Soon thereafter, on February 16, 2018, FAA closed the comment period for the new departure routes without analyzing the east flow routes under NEPA, Historic Preservation Act, and section 4(f). From February 1, 2018, until February 16, 2018, FAA received 267 comments from Scottsdale residents most of which indicated their belief that FAA needed to change the current flight routes back to the pre-Satellite-Based Flight Procedures. A1946. Never did FAA indicate to the public that both the west flow and the east flow routes would be vacated once the Mandate issued in June 2018.

On March 1, 2018, almost two months after the revised Judgment was issued, FAA issued an update on its Community Involvement webpage that included a hyperlink to "information on the court ruling and joint agreement." A1347. But the link takes the reader to a press release from November 30, 2017, and refers to the August 29, 2017, court ruling that had been set aside by the February 7, 2018, ruling. *Id.* FAA leaves the impression that the Agreement has been accepted by the Court and that FAA need only address "westerly departure routes." *Id.*

Thus, the communities east of the airport, including Scottsdale, were led to believe that the environmental impacts of east flow departures and revisions to east flow departure routes would be implemented in Step Two.

2. Environmental Documentation Does Not Mention East Flow Departure Routes

FAA implemented the Agreement almost immediately after it was signed. In January 2018, FAA issued a Draft Environmental Review for Proposed Categorical Exclusion and a Draft Noise Screening Report to begin its environmental review. A1044 and A1246. However, both documents were limited to assessing the environmental impacts of *only* the "western flow departure" part of the departure procedures from the Airport. As explained in both documents:

> The Proposed Action would revise the western flow of aircraft flying the RNAV SID procedures from runways 25 Left (L), 25 Right (R) and 26, at Phoenix Sky Harbor. The RNAV SIDs being revised are the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, JUDTH, KATMN, and IZZZO as per the Memorandum.

A1250; A1052. The Noise Screening clarifies that it only evaluated the noise impacts emanating from the "westerly" portions of the departure procedures. A1248. No mention is made in either document about whether an environmental review of eastern portion of the departure procedures was done or forthcoming. Instead, the Environmental Review states that "Step Two of the agreement, which

is not part of the current action, … will consider other proposed changes to the Phoenix airspace." A1048.

In February 2018, FAA sought to address its failure to properly engage the State Historic Preservation Officer as required by the National Historic Preservation Act. A1306. FAA sent a letter to Kathryn Leonard, Arizona's State Historic Preservation Officer for a "Section 106 Consultation." FAA indicated that the "undertaking" only concerned "the west flow Area Navigation (RNAV) Standard Instrument Departure (SID) procedures from runways 25 Left (L), 25 Right (R) and 26 …" A1306. No mention is made in the Section 106 Consultation Letter about the potential effects on the east flow flights even though the Court had ordered FAA to consider them.

3. FAA's Reports Fail to Mention East Flow Departure Routes

On May 15, 2018, FAA and Phoenix filed their Joint Status Report. RJN07. In the Status Report, FAA stated that it would publish "nine new RNAV procedures" that will "meet the Court's *vacatur* requirements." RJN07-005. However, FAA indicated that the new procedures "will approximate to the extent practicable, actual departure routes flown prior to September 18, 2014, for all nine of the *western* departure routes." RJN07-004 (emphasis added). FAA knew at the time that the Court's Judgment would vacate *all* "departure routes," not just "western departures." It was clear at this point that FAA had no intention of

addressing east flow departures, either through environmental review or returning east flow departures to approximate actual departure routes flown before September 18, 2014. FAA offered the Court no indication when FAA would meet that portion of the Court's Judgment.[3]

FAA issued a Record of Decision ("ROD") for Step One of the Agreement on May 18, 2018. A1619. That ROD indicated that FAA was approving the "proposed action" to "amend the West Flow Area Navigation (RNAV) Standard Instrument Departure (SID) procedures from runways 25 Left, 25 Right, and 26 at [the Airport]" A1619. While ROD calls for "nine new RNAV SID procedures," the environmental documentation supporting the ROD concerned the "west flow" portion of those procedures, claiming that the "proposed action" could be categorically excluded. *Id.*

4. On May 24, 2018, FAA Implements the nine Replacement Departure Procedures.

On May 24, 2018, FAA implemented the nine departure routes with changes only to the west flow component of the departure route. BROAK, ECLPS, FORPE, FYRBD, KEENS, QUAKY, STRZM, and ZEPER flight procedures (collectively,

[3] FAA and Phoenix also filed a Joint Status Report on June 4, 2018. RJN08. That status report says essentially the same thing as the May 15, 2018, status report, except that FAA indicates that the nine departure routes had been implemented.

"Replacement Departure Procedures") replaced the September 2014 pre-Satellite-Based Departure Procedures. Despite the Court's Judgment vacating the 2014 Departure Procedures, the Replacement Departure Procedures kept in place the same east flow departure routes. Consequently, those east flow departure routes had not been reviewed under NEPA, Historic Preservation Act, and 4(f), and not in accordance with the Court's February 7, 2018, Judgment. To forestall complaints from the public for this failure by FAA, it held out the promise of "Step Two" to rectify those wrongs.

E. Step Two Does Not Include Environmental Review of East Flow Departure Procedures or Result in Changes That Address the Issues Raised in the Court's Order.

On June 6, 2018, the Mandate of the court issued. RJN09. But, because of FAA's focus on west flow, FAA's work to comply with the Court's Order was only half done. The Agreement said that FAA would consider additional changes to the Phoenix airspace in Step Two. A079-080. And FAA made promises during Step One that east flow departures would be addressed in Step Two. Soon after the Mandate issued, local governments in the East Valley weighed in about Step Two.

After FAA implemented the Replacement Departure Procedures, the Chairman of the Maricopa County Board of Supervisors, Steve Chucri, wrote to FAA on June 18, 2018, telling them that "The communities to the east of Sky Harbor are now impacted by the new NextGen eastbound departure routes. I ask

that the FAA undertake meaningful changes to address the eastbound NextGen departures, like the western departures, as this is affecting the quality of life of thousands of northeast Maricopa County residents." A1947. In response, FAA told him on July 31, 2018, to wait until Step Two, because "[u]nder Step Two of the Memorandum, the FAA agreed to consider comments on procedures outside the scope of Step One. The proposal and adoption of any procedure changes other than those related to western departures would be solely at the FAA's discretion. Nevertheless, the FAA will conduct community outreach meetings with the public as part of Step Two. The purpose of the meetings will be to inform the public regarding any changes to procedures being considered and to solicit public comments." A1950.

In September 2018, the DC Ranch[4] Community Council contacted FAA voicing its concern "about public safety and noise due to the new paths being over far more densely populated areas, as well as the lack of opportunities for public comment during the NextGen National Environmental Policy Act (NEPA) process. The FAA specified that its 'Step 2' will include an opportunity for citizens to address concerns regarding east-bound flights." A1952. In response, the DC Ranch community council was told, "[t]he FAA is committed to engaging the public in

[4] DC Ranch is a neighborhood in the northern part of Scottsdale, next to the McDowell Sonoran Desert Preserve.

accordance with the National Environmental Policy Act and FAA regulations, policies, and procedures….” While the agreement focused on west-flow departure procedures, FAA also agreed to consider feedback on procedures throughout the Phoenix area under Step Two. A1959.

On December 18, 2018, Bud Kern, Chair, of Scottsdale Coalition for Airplane Noise Abatement, wrote to both the Acting Administrator and the Western Pacific Regional Administrator. A1960. In his letter, Mr. Kern told FAA that “The D.C. District Court of Appeals ruled that the FAA’s NextGen implementation at Sky Harbor was ‘arbitrary and capricious.’ Your agency complied with that judgment’s requirement to move nine NextGen westbound departure routes back to their original paths. However, the other new NextGen flight routes out of Sky Harbor were implemented in the same improper process…. The FAA should use the Step Two process to present to the public and Scottsdale the process to move the three flight paths using the ZEPER, QUAKY and MRBIL waypoints back to their original and historical routes or as can be mutually agreed to with Scottsdale.” A1961.

On January 18, 2019, Mayor Jim Lane of Scottsdale wrote to then Acting Administrator Dan Elwell stating that “[t]he FAA ‘Step Two’ public meetings … are court ordered to ‘inform the public regarding the alternatives being considered [emphasis added]’ after it was determined by the D.C. Circuit Court of Appeals

that the FAA was 'arbitrary and capricious' in the establishment of the new flight paths, and Scottsdale residents are extremely disappointed that it appears no 'alternatives' are planned for presentation." A1965.

On January 28, 2019, Steve Chucri, the Chairman of the Maricopa County Board of Supervisors, once again sent a letter to FAA. A1969. Unaware that the Court had ordered FAA to change the east flow departures and the west flow, Chairman Chucri pleaded that "the FAA undertake meaningful changes to address the east bound Next Gen departures, like the western departures, as this is affecting the quality of life of thousands of northeast Maricopa County residents." Chairman Chucri sensed that FAA was still considering revisions to the departure procedures. *Id.*

After the government shutdown of December 2018-January 2019, FAA responded to Chairman Chucri, Mayor Lane and Mr. Kern on March 27, 2019 and April 10, 2019, regarding their letters from January 2019 and December 2018, providing all three with the same response. A2010, A2013, and A1973. Characterizing the Agreement as a "settlement agreement," FAA in its letters asks for patience, telling them that at the Step Two workshops "the FAA will provide information about the recent implementation of Step One and accept any additional comments for Step Two when considering future changes within the Phoenix Metropolitan area. The FAA will be presenting conceptual designs for comment at

the workshops related to departures and arrivals at [the Airport], including eastern departures." *Id.*

On April 22, 2019, FAA announced the beginning of Step Two and that it would accept public comments until May 23, 2019, regarding its proposed action to implement "Concepts One and Two." A1970. In addition, FAA announced that it would hold several "public workshops" about "Concept One," "Concept Two" and other issues of concern to the community. *Id.*

During those workshops and the ensuing comment period, FAA received many comments from the public including: 90 comments regarding Air Quality, 33 comments regarding wildlife and/or habitats, 36 comments regarding environmental justice, 794 comments regarding noise, 133 comments regarding the National Historic Preservation Act, Section 106, 56 comments regarding the performance of Step One, 104 comments regarding airspace changes since 2014, 280 comments regarding what FAA classified as "other," and 352 comments regarding conceptual airspace changes. A1946. Altogether, FAA received 1,878 comments about the changes it was making and proposed to make to the airspace over Scottsdale (population 255,310), Mesa (population 439,041), Tempe (population 192,364), Fountain Hills (population 22,489) and Salt River Pima-Maricopa Indian Community (population 9,357). A014. It was during this comment period that Scottsdale submitted extensive comments regarding the

impact of east flow departure procedures on Scottsdale and offered alternatives to FAA's proposed action. A2035.

On January 10, 2020, FAA issued its Final Order regarding the Step Two process, including its decision on its two proposed actions, and its response to public's comments and proposals. A014. No environmental analysis of the proposed actions or the public's suggested alternatives accompanied the Final Order, nor has any such analysis been made public. Despite receiving many comments and comprehensive proposals indicating a purpose and a need for further changes to flight procedures to address the noise and pollution problems in the Greater Phoenix Area, FAA simply concluded, upon review of the comments, that "[t]he FAA will not be taking further action under Step Two" without providing its rationale between the facts alleged in the public comments and its decision. A014.

After the January 10, 2020, Response to comments were issued, it was immediately apparent that FAA had no intention of finishing its compliance with the Court's Order or reviewing the environmental effects that the Departure Procedures have had or will have on the Scottsdale and the rest of the East Valley.

On March 10, 2020, Scottsdale filed this petition for review.

SUMMARY OF ARGUMENT

Over the past seven years, Scottsdale and its residents have suffered through an increase in aircraft noise due to the Federal Aviation Administration's implementation of satellite-based "RNAV" procedures at Phoenix Sky Harbor Airport that changed the way aircraft flew through the Phoenix airspace. Because of the City of Phoenix's successful Petition for Review, the Court vacated nine departure procedures from the Airport.

While this would have seemed to benefit both Phoenix and Scottsdale, FAA had other ideas. It entered into an agreement with Phoenix that allowed FAA to change only that part of the departure procedures where the aircraft depart to the west. The agreement made no promises about studying the environmental impacts or revising departures to the east. FAA did promise, though, that it would consider revising its departure procedures that would include departures to the east. But, after developing proposed actions and submitting them for comment, and hearing many public comments regarding the need for such action, on January 10, 2020, the Federal Aviation Administration decided it was finished with implementing the Court's February 7, 2018, Judgment.

The Final Order left in place departure procedures that have never subjected to environmental analysis under NEPA, Historic Preservation Act, and Section 4(f). And it terminated FAA's proposed action to revise those departure procedures

with no environmental analysis. It is just this intransigence, opacity, and lack of environmental review which NEPA, the Historic Preservation Act, and Section 4(f) are designed to prevent.

Therefore, the Court should grant Scottsdale's Petition for Review and vacate and remand the May 24, 2018, Departure Procedures for the following reasons:

1) Final Order. The January 10, 2020, decision is a Final Order that marked the conclusion of FAA's implementation of the Court's February 7, 2018, Judgment and the conclusion of FAA' implementation process for the departure procedures published on May 24, 2018. In the alternative, if the Court finds that FAA's May 24, 2018, publication of the departure procedures is the reviewable order, the 60-day period for filing a Petition for Review was tolled due to FAA's statements and actions leaving the public with the impression that FAA would address their concerns about the east flow departures during Step Two.

2) Failed to Comply with the Court's February 7, 2018, Judgment. By providing no type of environmental analysis on the east flow portions of the departure flight procedures, FAA has failed to comply with the Court's February 7, 2018, Judgment.

3) NEPA, the Historic Preservation Act, and Section 4(f). (a) FAA's decision to allow the east flow of departure procedures to continue to fly over

Scottsdale—despite the absence of environmental review—has resulted in aircraft flying new or modified east flow departure procedures that have not been subject to *any* environmental review, in violation of NEPA, the Historic Preservation Act, and Section 4(f). (b) FAA's decision to adopt the "no action" scenario and not proceed with either Concept One or Concept Two and providing no environmental analysis violates NEPA, Historic Preservation Act and Section 4(f).

STANDING

Under Circuit Rule 28(a)(7), Scottsdale has standing to sue because it has suffered an "injury in fact" brought about by FAA's implementation of the 2014 Departure Procedures that directed concentrated flights over Scottsdale and other areas in Phoenix Metroplex departing out of Phoenix Sky Harbor International Airport ("Airport").

To establish standing, Scottsdale must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *D&F Afonso Realty Trust v. FAA*, 216 F.3d 1191, 1194 (D.C. Cir. 2000).

Following this Court's judgment on August 29, 2017 (the "Court Order") vacating FAA's 2014 Departure Procedures (which included both westerly and easterly departures out of the Airport over Phoenix and Scottsdale neighborhoods), FAA signed an agreement (the "Agreement") with Phoenix regarding implementation of the Court Order. The Agreement called for implementing a two-step plan. Step One, which primarily focused on westerly flights over Phoenix, was intended to be a short-term remedial measure for concentrated flights over Phoenix; and Step Two, which affected the entire Phoenix Metroplex, including Scottsdale, was intended to implement a long-term remedial procedure

for the aircraft noise and fumes resulting from FAA's implementation of the 2014 Departure Procedures that affected the Phoenix Metroplex. Thereafter, FAA requested public comments on the two proposed actions and solicited public input regarding long-term solutions to the noise problems in the Phoenix Metroplex as well. FAA stated in the Agreement that after receiving public comments it would decide which further actions it would take to alleviate aircraft noise and pollution issues in the Phoenix Metroplex. A076-077. However, several months after the public comment period closed, FAA issued a final decision by stating unequivocally that "FAA will not take further action under Step Two." A014.

I. Scottsdale Suffered Injury in Fact

Scottsdale suffered actual injury that is concrete and particularized, and that is fairly traceable to the challenged flight procedures and FAA's Final Order.

A. Concrete and Particularized Injury

Scottsdale is a municipal government incorporated in June 1951. Declaration of Sherry Scott ("Scott Decl."), ¶3. The Arizona Constitution in Article XIII grants cities such as the City of Scottsdale with the ability to adopt a city charter form of government. Scott Decl. ¶4. City charters establish the powers of local city government necessary to respond to its citizens' needs. Scott Decl. ¶4. Title 9 of the Arizona Revised Statute further supplements Scottsdale's Charter authority to define the powers and functions of the City of Scottsdale's government

within the State of Arizona. Scott Decl., ¶ 4. Title 9 of Arizona Revised Statutes and Article 1, Section 3 of Scottsdale's Charter empower Scottsdale with a wide range of authority to make and enforce ordinances and regulations to manage its infrastructure, to protect the health, safety, and welfare of its citizens and to preserve and enhance the environment, livability, and aesthetic quality of the City. Scott Decl., ¶ 5. When FAA implemented the September 2014 Departure Procedures and the Final Order, such actions harmed the particularized and concrete interests of the City of Scottsdale, for example, the authority and ability to make and enforce ordinances to regulate and manage its infrastructure, to preserve and enhance the environment, livability, and aesthetic quality of the City, among other harms it suffered.

B. Actual Injury to its Concrete Interests

1. Scottsdale's Real Property Interests

FAA's implementation of September 2014 Departure Procedures and the Final Order, have harmed Scottsdale's real property interests. Scottsdale owns parks, libraries and event and recreational centers being adversely affected by the 2014 Departure Procedures. Scott Decl., ¶ 11-15. FAA's implementation of 2014 Departure Procedures, by placing properties such as McDowell Mountain Ranch Park for which quiet is a fundamental attribute, in direct path of the overflights, have caused the value of such properties to decline. Thus, substantial increase in

noise and air pollution, to great extent, have defeated the purpose of those public parks and libraries. Scott Decl., ¶ 15.

Additionally, Scottsdale also owns facilities, such as Westworld, which is a City event center which includes outdoor venues for equestrian and other uses. In these places, the aviation noise has not only been detrimental to the purpose of various cultural and equestrian events where quiet can be an essential element to enjoying the music and other sound effects, but the characteristics of these places have been altered by the noise and fumes emanating from the constant overflights. Scott Decl., ¶ 14-15

II. Procedural Harm

Where a party has been accorded a procedural right to protect his concrete interests, "the primary focus of standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n. 7 (1992). Nonetheless, the injury in fact requirement is a hard floor of Article III jurisdiction that cannot be altered by statute. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Scottsdale's harm to its real property interests, discussed in preceding paragraphs, satisfies the injury in fact requirement.

A. Scottsdale Has Been Accorded a Procedural Right

Scottsdale has been accorded procedural rights in connection with its role as a municipal government and as an owner of public lands. To sufficiently show it has suffered procedural harm, Scottsdale must show that a federal agency (i.e., FAA) has failed to make an effects determination and has failed to consult with Scottsdale. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (1996). Furthermore, Scottsdale must also show that FAA's failure to make an effects determination or to consult with Scottsdale affects its concrete aesthetic and recreational interests to sufficiently allege procedural harm. *Fla. Audubon Soc'y*, 94 F.3d at 666. *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183 (2017).

Specifically, "[t]o establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (citation omitted).

B. Proprietary Interests of Scottsdale

When FAA implemented the 2014 Departure Procedures, Scottsdale's ability to enact ordinances to protect the City's properties and to enhance the aesthetic and historic characteristic or to protect the City's environmental quality from the noise and air pollution were severely restricted because of a federal

government decision. This constitutes injury to Scottsdale's proprietary rights. Here, because of FAA's action, City of Scottsdale was unable to prevent the alteration in the character of its parks and cultural event venues from taking place because of aircraft noise and pollution. Scott Decl., ¶ 9-12.

As a municipal government, Scottsdale's ability to protect the health, safety, and welfare of its citizens and to preserve and enhance livability, aesthetic, and environmental quality of the city, are some of the city's most valuable and intangible proprietary interests. Scott Decl., ¶ 8. Scottsdale's proprietary interests are concrete interests because such interests are germane to the purpose of any municipal government. The following situation illustrates Scottsdale's procedural harm to its concrete interest: Scottsdale owns the Scottsdale Airport which has been adversely affected by FAA's implementation of the departure routes out of the Airport. While it is the local proprietor (i.e., the City of Scottsdale) that is primarily responsible for regulating airport noise, its hands were tied from managing the noise over its own airport resulting from the aircraft departing from the Airport in Phoenix upon FAA's implementation of the 2014 Departure Procedures. *See Di Perri v. Federal Aviation Admin.*, 671 F.2d 54, 58 (1st Cir. 1982) ("The FAA itself has steadfastly maintained that the local proprietor has primary responsibility for the regulation of airport noise.").

C. FAA's "Decision" Harms Scottsdale's Concrete Economic, Environmental and Aesthetic Issues and its Procedural Rights.

FAA's actions have also adversely affected the Scottsdale's interest in protecting its historic resources. Scottsdale expends substantial resources and exercises its powers to protect its aesthetic and historical character. A city's interest in managing its historic properties is explicitly recognized in the National Historic Preservation Act of 1966 which requires consultation with local governments with jurisdiction over affected areas. 36 C.F.R. § 800.2(c)(3). *See City of Jersey City v. CONRAIL*, 668 F.3d 741, 744–46 (D.C. Cir. 2012) (recognition of the harm to City's "historic and environmental interest" due to NEPA and Historic Preservation Act violations).

D. Scottsdale's Injury is Fairly Traceable to the Challenged Action

Scottsdale's interest in protecting its historic resources, its procedural injuries and direct harm to its real property interests are all shown to have a causal connection to FAA's implementation of the 2014 Departure Procedures. Furthermore, to the extent that FAA decided to not take any further action without offering any explanation, Scottsdale could ultimately show that such Final Order was arbitrary and capricious or otherwise not in accordance with the law under 5 U.S.C. § 706(2)(A), (D), ADD003. *See Utah v. Evans*, 536 U.S. 452, 464 (2002). Because Scottsdale can show success on the merits, it would likely be able show it

would obtain relief that directly redresses the injuries suffered. *Id. See also Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7, (D.C. Cir. 2005).

1. Scottsdale Continues to Suffer Concrete Injuries Which Would be Redressed by Court's Favorable Decision Vacating Flight Procedures for Aircraft Departing to the East of the Airport

When FAA made its Final Order to "take no further action under Step Two," that decision fell squarely within the definition of an agency's final decision because it determined the rights or obligations of Scottsdale from that point forward. In other words, after FAA made that decision, it was patently clear that the increased overflights throughout Scottsdale neighborhoods would continue to adversely affect Scottsdale considering FAA's refusal to take any further action. Indeed, FAA took no further action and Scottsdale continues to suffer concrete injuries. Thus, there is a causal connection between Scottsdale's injuries described in the preceding paragraphs, FAA's 2014 Departure Procedures, and the Final Order. Therefore, should the Court vacate the disputed departure procedures, Scottsdale would not continue to suffer concrete injuries described herein and such order to vacate the current disputed departure procedures would fully redress Scottsdale's injuries.

ARGUMENT

The U.S. Supreme Court held in *Burbank v. Lockheed Air Terminal* 411 U.S. 624, 638-9 (1973) that "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency, . . . and the protection . . . of persons on the ground." In its February 2018 Judgment, RJN05, this Court vacated nine departure flight procedures from Phoenix Sky Harbor Airport (Airport) because, in part, due to FAA's failure to protect people on the ground. By focusing solely on the environmental impacts of the "west flow"[5] portions of those nine vacated departure procedures, FAA has ignored the legitimate concerns of the people on the ground underneath the "east flow"[6] portions of the vacated departure procedures. By concluding its implementation of departure procedures at the Airport without fully complying with the Court's February 7, 2018, Judgment and without fully complying with the National Environmental Policy Act ("NEPA"), National Historic Preservation Act ("Historic Preservation Act"), Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 FAA has failed to achieve "balance," rendering its decision on January 10, 2020, arbitrary and capricious and not in accordance with law.

---

[5] "West Flow" refers to when aircraft depart the Airport using Runways 25R, 25L, or 26.

[6] "East Flow" refers to when aircraft depart the Airport using Runways 7R, 7L, or 8.

I. Events Leading to the January 10, 2020, Final Order.

As explained in greater detail in the Statement of Facts, a series of events led to FAA's Final Order on January 10, 2020.

- *September 14, 2014*, FAA implemented, among other flight procedures, nine new departure routes, (collectively, "2014 Departure Procedures") at the Airport.
- *June 9, 2015*, City of Phoenix and several of its historic neighborhoods (collectively, "Phoenix") file Petitions for Review in this Court challenging FAA's September 14, 2014, Decision. RJN01
- *August 29, 2017*, this Court grants Phoenix's Petition for Review and orders the vacatur and remand of the 2014 Departure Procedures. RJN02 and RJN03.
- *November 30, 2017*, Phoenix and FAA sign Memorandum Regarding Implementation of Court Order (the "Agreement"). The Agreement sets up a two-step process for addressing the Court's Order granting the Petitions for Review. A073.
- *February 7, 2018*, the Court revises its Judgment and Opinion limiting its vacatur to the nine 2014 Departure Procedures from the Airport. It stays issuance of the Mandate until June 6, 2018. RJN04, RJN05, and RJN06.

- *May 24, 2018*, FAA implements nine new departure procedures, (collectively, "Replacement Departure Procedures") to replace the pre-Satellite-Based Departure Procedures and the vacated 2014 Departure Procedures. The current east flow operations of Replacement Departure Procedures are the same as the vacated 2014 Departure Procedures. This represented the end of Step One under the Agreement.
- *June 6, 2018*, the Court's Mandate issued vacating the nine 2014 Departure Procedures and requiring FAA to comply with NEPA, Historic Preservation Act and Section 4(f) in developing new procedures. RJN09.
- *January 10, 2020*, FAA announced that it completed Step Two and the Agreement. FAA stated that it will not be evaluating the environmental impacts of any Step Two proposals and will not follow through on any proposals to revise the east flow portions of the Replacement Departure Procedures . A014.

II. The January 10, 2020, Decision was the Consummation of FAA's Decision-Making Process Indicating It Had No Intent to Assess the Environmental Impacts of the East Flow Departure Procedures.

A. The January 10, 2020, Decision Is a Final Order that Marked the Conclusion of FAA's Flight Procedure Implementation Process.

An "order" is "the whole or a part of a final disposition . . . of an agency in a matter other than rule making...." 5 U.S.C. § 551(6), ADD001. "To be deemed 'final' and thus reviewable as an order under 49 U.S.C. § 46110, an agency disposition 'must mark the consummation of the agency's decision-making process,' and it 'must determine rights or obligations' or give rise to legal consequences.'" *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (quoting *Dania Beach*, 485 F.3d 1181 (D.C. Cir. 2007)). The term "order" in § 46110 "should be read 'expansively.'" *Dania Beach*, 485 F.3d at 1187. Under § 46110, "an 'order' must be final, but need not be a *formal* order, the product of a *formal decision-making process*, or be issued personally by the Administrator." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998) (emphasis added). The "core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); see also, *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (a final order is one that "mark[s] the consummation of the agency's decision-making process" and that either determines "rights or obligations" or is a source of "legal consequences").

Ever since FAA signed the Agreement in November 2017, it has always looked to the Agreement as the controlling document, not the Court's Order. The Agreement sets out clearly FAA's decision-making process for the "implementation of the Court's [February 7, 2018] Order." A073. Each environmental document, each interaction with the public, FAA spoke in terms of compliance with the Agreement. Thus, it was not until January 10, 2020, when FAA told the public that "FAA will not be taking further action under Step Two, and has now completed all of its obligations under the Implementation Agreement," A014, that FAA's decision-making regarding implementation of the departure procedures at the Airport was concluded.

Likewise, the January 10, 2020, Decision determined the "rights [and] obligations" and produced "legal consequences." *Friedman*, 841 F.3d at 541; see also *Phoenix*, 869 F.3d at 969. FAA repeatedly promised that it would explore revisions to the Replacement Departure Procedures that would address the environmental impacts of the east flow departures, as part of Step Two, because the Agreement required it to consider those revisions. FAA promised in a FAQ that in Step Two it "would consider permanent routes that approximate the pre-September 2014 routes within a 15-mile radius of the airport. A1301. As part of Step 2, FAA also would consider "feedback on procedures throughout the Phoenix area." *Id*. FAA's decision-making process did not end with implementing the

Replacement Departure Procedures on May 24, 2018, it ended on January 10, 2020, when FAA told the public it was finished with its obligations under the Agreement. At that point, the rights and obligations of Scottsdale became manifest and pursuing a legal challenge against FAA's actions became ripe. FAA's reconsideration of Replacement Departure Procedures, given the Court's Order did not end until it issued the Final Order on January 10, 2020. At which time FAA clarified that it would not (1) change the Replacement Departure Procedures to mimic pre-Satellite-Based east flow routes; and (2) conduct any environmental analysis as required by NEPA, Historic Preservation Act and Section 4(f) of the east flow components of the Replacement Departure Procedures or its "Step Two" proposed actions "Concept One" and "Concept Two." And never had FAA, until then, concluded its own decision-making and finally determined Scottsdale's rights and obligations under Historic Preservation Act, Section 4(f), and NEPA. *Dania Beach*, 485 F.3d at 1187.

B. Even if the Court Finds that FAA's May 24, 2018, Commencement of the Replacement Departure Procedures Is an Order, the 60-day Period for Filing a Petition for Review Was Tolled.

Even if the Court accepts the argument that the initial implementation of the Replacement Departure Procedures on May 24, 2018, was FAA's final "order," Scottsdale's petition remains reviewable under 49 U.S.C. § 46110(a). A petition for review may be filed after 60 days if "there are reasonable grounds for not filing

by the 60th day." 49 U.S.C. § 46110(a). This Court has found "reasonable grounds" where a petitioner waited to file a legal challenge due to agency representations it would address petitioner concerns. *See, City of Phoenix v. Huerta*, 869 F.3d 963, 968-970 (D.C. Cir. 2017). In *Paralyzed Veterans of America v. Civil Aeronautics Board*, 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), the D.C. Circuit found that petitioners had "reasonable grounds" for waiting over 60 days when it was "[a]ware that the rule might be undergoing modification, and unable to predict how extensive any modification would be . . . ." 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), *rev'd on other grounds*, *Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). Petitioners were reasonable in "elect[ing] to wait until the regulation was in final form before seeking review." *Id.*

Similarly, in *Safe Extensions*, this Court found that a manufacturer had reasonable grounds to delay its petition for review of an FAA advisory circular establishing requirements for its products. 509 F.3d at 602–604. In response to "significant uproar in the industry," FAA represented that it would revise the circular. *Id.* at 603. *Safe Extensions* allowed the 60-day petition filing period to expire "[b]ased on [FAA's] representation, and hoping to avoid litigation, the company decided to wait and see if the FAA [would] address[] the issues . . . ." *Id.* *Safe Extensions* had reasonable grounds for filing after 60 days. *Id.* at 604. The "delay simply served properly to exhaust the petitioners' administrative remedies,

and to conserve the resources of both the litigants and this court." *Id.* (quoting *Paralyzed Veterans*, 752 F.2d at 705 n.82).

As this Court pointed out in *Phoenix* "the key in *Safe Extensions* was that the agency left parties 'with the impression that [it] would address their concerns' by replacing its original order with a revised one. There we were concerned that the agency's comments 'could have confused the petitioner and others.'" 869 F.3d at 970.

Any "delay" by Scottsdale in filing its petition resulted from repeated representations by FAA it would consider revisions to the east flow departure routes as part of "Step Two." FAA's promises it would consider revisions to address community concerns began during the public comment phase of Step One. A1946. That belief was underscored by FAA not performing any environmental analysis of the east flow departure routes before implementing the Replacement Departure Procedures in May 2018. See A1044-1246; A1313-1551; A1567-1930.

Scottsdale reasonably relied on the commitment from Acting Administrator Elwell—the most senior FAA official—to establish a process in which Scottsdale could participate. A2010. Accordingly, Scottsdale submitted extensive comments and noise impact information to FAA in May 2019, including suggestions for alternative departure procedures. A2035. Over almost nine months, from February 7, 2018, to January 10, 2020, FAA repeatedly invited Scottsdale, its residents, and

the residents of the East Valley to participate in processes with the promise that FAA would consider alternative departure routes to address the concerns about east flow departures over the East Valley. FAA's pattern of practice led Scottsdale and other reasonable observers to think FAA might fix the noise problem with east flow departures without being forced to do so by a court. *See Phoenix*, 869 F.3d at 970. And, given FAA's serial promises, petitioning for review soon after the May 2018 "Order" might have shut down the Step Two process or, at least, stopped any dialogue between the petitioners and FAA. *See, Id.* Scottsdale relied on FAA's repeated commitments and did not file a petition in the reasonable expectation that FAA's ongoing consideration would address its concerns.

If the Court decides, as it did in *Phoenix*, that the May 24, 2018, implementation of the Replacement Departure Procedures is the final "order," then the Court should find, as it did in *Phoenix*, that the 60-day period for filing a petition for review should be tolled because of Scottsdale's reasonable belief that FAA would address the east flow issues without resorting to litigation.

C. FAA's Action on January 10, 2020, Was a Final Agency Action in and of Itself.

If the Court rejects both of the above arguments, then the Court should consider the January 10, 2020, Final Order as the conclusion of "Step Two" of the Agreement that constitutes a final order of the FAA. As FAA stated in its January

10, 2020 decision, it "will not be taking further action under Step Two, and has now completed all of its obligations under the Implementation Agreement." A014.

FAA made this decision (i) without complying with agency procedures for issuing a final agency order, and (ii) without conducting the required environmental review of its actions, such as Concept One and Concept Two. Thus, its Final Order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The January 10, 2020, decision constitutes a final order of the FAA because it is not "merely tentative or interlocutory," but an "unequivocal statement that "the FAA will not take further action under the Step Two." *See Amerijet Int'l, Inc. v. United States Dep't of Homeland Sec.*, 43 F.Supp.3d 4, 13 (D.D.C. 2014). In *Amerijet*, the court determined that the Department of Homeland Security's "security directive," constituted a final order because it marked the consummation of the agency's decision-making process and determined the rights or obligations or caused legal consequences to the individuals affected by the security directive. *Id.* at 13; *City of Dania Beach* 485 F.3d at 1188. FAA's decision to terminate the Step Two process determined the rights of Scottsdale, the residents of Scottsdale, and all other citizens who provided comments describing the aviation noise and pollution they have suffered because of FAA's changes to the flight paths. *Id.*

By taking "no further action" on Step Two FAA has indicated it has concluded its consideration of the Step Two process. Thus, that decision constitutes a "final agency action." In *Smirnov v. Clinton*, 806 F.Supp.2d 1, 11 (D.D.C. 2011) the court held that, "[i]n the Court's view, this decision to take no further action on, and in effect, to conclude consideration of, pending applications constitutes final agency action. . ." Similarly, here, FAA's decision not to take any further action constitutes a final agency action amenable to a Petition for Review under 49 U.S.C. § 46110.

D. FAA Has Not Complied with The Court's February 7, 2018, Judgment and In So Doing Has Not Complied With NEPA, Historic Preservation Act or Section 4(f)

The Court's February 7, 2018, Judgment orders that the "September 18, 2014 order implementing the new flight departure routes at Sky Harbor International Airport be vacated; and the matter be remanded to the FAA for further proceedings, in accordance with the opinion of the court filed herein this date." RJN05. The Order does not draw a distinction, as FAA has, between "west flow" departures and "east flow" departures. Because FAA's environmental analysis for the Replacement Departure Procedures focused exclusively on the "west flow" departures leaving the east flow departures unanalyzed, FAA has not complied with the Court's Order, NEPA, Historic Preservation Act, or Section 4(f).

E. Vacatur Requires that FAA Replace Pre-Satellite-Based Flight Procedures with Flight Procedures that Account for Both West Flow and East Flow.

The ordinary effect of vacatur is to "set aside" the challenged action, 5 U.S.C. § 706(2), ADD003, and return the parties to the *status quo ante*. See *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671-72 (D.C. Cir. 2006) (holding that Commission's order vacating its previous investigation into telephone rates restored its prior determination that the rates were lawful); *Air Transport Ass'n of Canada v. FAA*, 254 F.3d 271, 277 (D.C. Cir. 2001), *judgment modified*, 276 F.3d 599 (D.C. Cir. 2001) (noting that vacatur of agency fee schedule "had the effect of restoring the *status quo ante*").

By vacating the nine 2014 Departure Procedures, the Court restored the *status quo ante*, namely that the Pre-Satellite-Based departure routes were in effect and the 2014 Departure Procedures never existed. *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("By vacating or rescinding the recissions [sic] … the judgment of this court had the effect of reinstating the rules previously in force…."). Yet, FAA, in establishing the Replacement Departure Procedures, presumed that the 2014 Departure Procedures were still in existence, at least regarding "east flow" departures. For example, in FAA's May 2018 Noise Screening Analysis, FAA states that the "Proposed Action would revise the current western flow of aircraft," but "there are no proposed

changes to east flow operations" therefore they were not included in the noise screening analysis. A1894. Because the Proposed Action is the west flow departure routes, the noise impact of the west flow routes, but not the east flow routes, was compared with the pre-Satellite-Based flight procedures in use before September 2014. A1902-1903. Based on the Court's vacatur, when FAA assessed the environmental effects of the Replacement Departure Procedures, FAA had to compare the environmental impacts of its proposed departure procedures with those that existed before September 2014. FAA has not done this, at least not for the east flow departures.

Because of the vacatur, in developing and implementing new departure procedures for the Airport to replace the Pre-Satellite-Based routes, FAA had to comply with its obligations under NEPA, 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 as if the 2014 Departure Procedures never existed. This is true for both the west flow departures and the east flow departures. Instead, FAA only analyzed the environmental impacts of the

west flow departures and failed to comply with its statutory and regulatory obligations for the east flow departures.

By rejecting FAA's proposed revisions to the Judgment, the Court required FAA to develop replacement departure procedures (both west and east flow) for the Airport that would replace, not the vacated 2014 Departure Procedures, but the pre-Satellite-Based flight procedures. Any replacement departure procedures must be developed and implemented in "accordance with the Court's opinion," and comply with FAA's statutory duties under NEPA, Historic Preservation Act, 4(f) and FAA Orders and regulations. Finally, while the Court granted the request to stay the Mandate until June 15, 2018, it did not give its blessing to the Agreement. FAA has never mentioned the Court's February 7, 2018, Judgment in any of its materials submitted for public review or on its "Community Involvement" website. Although the Joint Petition and the Agreement were included as part of this Administrative Record, the Court's reissued February 7, 2018, Judgment and Opinion were not.

Therefore, the Court's vacatur of the 2014 Departure Procedures required FAA to consider both west and east flow departures in its environmental analysis. Because it did not, FAA's decision is arbitrary and capricious.

F. FAA's January 10, 2020, Final Order Violates NEPA.

FAA's refusal to take any action to assess and mitigate the environmental impacts of east flow departure procedures in either Step One or Step Two allowed a change in the departure procedures to occur without environmental review, in violation of NEPA. NEPA requires agencies to "consider every significant aspect of the environmental impact of a *proposed* [agency] action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (emphasis added) (citation omitted). NEPA thus ensures "that *before* an agency acts, it will 'have available' and 'carefully consider detailed information concerning significant environmental impacts.'" *Phoenix*, 869 F.3d at 971 (alteration in original) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The NEPA process also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of [the] decision." *Robertson*, 490 U.S. at 349.

FAA's own NEPA order requires that it review the environmental impacts of proposed new flight procedures or changes to existing procedures—like the east flow departures. *See, e.g.*, FAA Order 1050.1F, ¶ 3-1.2.b.(12) (requiring an environmental assessment for new air traffic control procedures and modifications to currently approved procedures that routinely route aircraft over noise sensitive areas at less than 3,000 feet above ground level (AGL)); *id*. ¶ 5-6.5 (identifying

"actions involving establishment, modification, or application of airspace and air traffic procedures" as eligible for a categorical exclusion under NEPA).

However, in violation of NEPA, FAA has not environmentally reviewed the east flow Departure Procedures. Nor has it provided any environmental analysis for Concept One and Concept Two it raised in Step Two. FAA's environmental reviews for Steps 1A and 1B, which included the west flow Departure Procedures, assumed that the court would modify its Judgment to remand without vacatur only the west flow departure procedures. A1044-1246; A1313-1551; A1567-1930. Thus, FAA considered the environmental, including noise effects, of only the west flow Departure Procedures. *Id.* Because the nine departure procedures vacated by the Court included both west flow and east flow components, FAA had to comply with NEPA regarding the east flow components. However there has been *no* NEPA analysis of east flow flight routes currently being flown.

By limiting environmental review of the Replacement Departure Procedures to the west flow flight routes, FAA's Replacement Departure Procedures affirmed and perpetuated new east flow flight patterns for aircraft departing the Airport implemented with no environmental review and without providing the public with an opportunity to review, or comment. The January 10, 2020, Final Order therefore violates NEPA and FAA's own order requiring environmental analysis of new or modified flight procedures and is arbitrary and capricious. *See* FAA Order

7400.2M, ¶ 32-2-1 (requiring environmental review for "procedural changes that create new or alter existing flight tracks over noise sensitive areas"); FAA Order 1050.1F, ¶ 3-1-2.b.(12) (requiring an environmental assessment for "modifications to currently approved procedures" under certain circumstances).

G. FAA's January 10, 2020, Final Order violates Historic Preservation Act and Section 4(f) because FAA has not considered impacts to historic resources, parks, or recreation areas due to East Flow.

The January 10, 2020, Final Order allowed the Replacement Departure Procedures to continue with no analysis of the impacts of the east flow departure routes on historic properties, parks, and other public resources, in violation of Historic Preservation Act and Section 4(f). FAA must "document compliance" with its Historic Preservation Act and Section 4(f) obligations, including "any required consultations, findings, or determinations." FAA Order 1050.1F, ¶ 5-5. FAA's obligations under Historic Preservation Act and Section 4(f) are independent of FAA's obligations under NEPA and must be satisfied *prior* to making a flight procedure decision. *See id.*

Historic Preservation Act "requires Federal agencies to take into account the effects of their undertakings on historic properties." 36 C.F.R. § 800.1(a). For any undertaking—including modifying an existing flight procedure—that has the potential to affect historic properties, FAA must identify the project's "area of potential effects," locate all historic properties listed or eligible for listing on the

National Register of Historic Places and assess the effect of the undertaking on those properties. 36 C.F.R. §§ 800.3(a), 800.4(a)–(c), 800.5. In fulfilling those requirements, FAA "must consult with certain stakeholders in the potentially affected areas, including representatives of local governments." *Phoenix*, 869 F.3d at 971; 36 C.F.R. § 800.2(c)(1), (3). If FAA determines that no historic structures will be adversely affected, "it still has to 'notify all consulting parties'"—including the State Historic Preservation Officer and representatives of local governments—"and give them any relevant documentation." *Phoenix* 869 F.3d at 971 (quoting 36 C.F.R. § 800.5(c)).

Section 4(f) provides that FAA may approve a project "requiring the use of publicly owned land of a public park, recreation area . . . or land of an historic site of national, State, or local significance . . . only if—(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." 49 U.S.C. § 303(c). FAA first must "identify as early as practicable in the planning process section 4(f) properties that implementation of the proposed action and alternative(s) could affect." FAA Order 1050.1F app. B, ¶ B-2.1. FAA then makes an "initial assessment . . . to determine whether the proposed action and alternative(s) would result in the use of any of the properties." *Id.* ¶ B-2.2. "[N]oise that is inconsistent with a parcel of land's continuing to serve its recreational,

refuge, or historical purpose is a 'use' of that land." *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994). FAA must consult "all appropriate . . . *local officials* having jurisdiction over the affected Section 4(f) properties" when assessing whether a noise increase might "substantially impair the resources." *See* FAA Order 1050.1F app. B, ¶ B-2.2.2 (emphasis added).

FAA's interactions regarding Historic Preservation Act and Section 4(f) have been solely on the effects of west flow departures. A1306 (proposed action is "to amend the west flow Area Navigation (RNAV) … procedures…"); A1664, 1675, 1681, 1695, 1703, 1711, 1719, 1725, 1733, 1741, 1749, 1758, 1769, 1780, 1792, 1801, 1808, 1817, 1826, 1836 and 1846 (all of which define the proposed action or undertaking as "air traffic procedure amendments to the west flow RNAV SID procedures from runways 25L, 25R and 26). East flow procedures are not mentioned in any of the Historic Preservation Act and Section 4(f) interactions and consultations. Historic Preservation Act and Section 4(f) impose certain requirements on FAA before it amends or modifies flight procedures. FAA has not fulfilled its legal obligations under Historic Preservation Act and Section 4(f), including consulting with Scottsdale regarding east flow departures.

FAA violated Historic Preservation Act and Section 4(f) when it issued the January 2020 Final Order ending consideration of east flow revisions to the Replacement Departure Procedures and thereby allowed the Replacement

Departure Procedures to continue without the consultation and analysis required by Historic Preservation Act and Section 4(f). The record includes no evidence that FAA conducted consultation regarding the potential impact of the east flow flight routes on historic and Section 4(f) properties.

FAA has been on notice that the environmental impacts of the east flow flight routes have not evaluated by FAA as part of its environmental review of the Replacement Departure Procedures, as required under Historic Preservation Act and Section 4(f). Because FAA relied on its Agreement with Phoenix instead of the Court's Judgment in which FAA focused solely on the west flow departure routes, FAA's consideration of the impact on historic and Section 4(f) properties was limited to the area underlying the west flow departure routes. Although the Court vacated the entire 2014 Departure Procedures, and not just the west flow components of those procedures, FAA has conducted no analysis of east flow flight routes. FAA has failed to conduct this analysis and correct this issue even though the Court in its opinion specifically admonished FAA to do so. RJN06.

Scottsdale also provided FAA with evidence establishing Section 4(f) resources affected by east flow departure routes. A2065. Among those resources, Scottsdale and other parties identified areas such as the McDowell Sonoran Preserve, which encompasses 30,500 acres of permanently protected, sustainable desert habitats. *Id*. Increased noise due to east flow departures interferes with

visitors' enjoyment and threatens the wildlife habitat within the McDowell Sonoran Preserve, constituting a constructive use for Section 4(f). *Id.* FAA has not considered the impact of east flow departures on this particular noise sensitive resource or any others.

FAA has simply ignored the potential impacts that the east flow flight routes may have on Historic Preservation Act and Section 4(f) properties. When FAA issued the January 2020, Final Order indicating its decision not to review the environmental impacts of the east flow departure routes, FAA allowed east flow to continue even though FAA was fully aware of many potentially affected resources and properties it had failed to consider, and even though no Historic Preservation Act or Section 4(f) analysis had been conducted.

The January 2020 Final Order therefore was issued in violation of Historic Preservation Act and Section 4(f).

H. Because FAA's "Step Two" Process Failed to Comply with NEPA, Historic Preservation Act, and Section 4(f), Its Decision to Abandon It Without Complying Is Arbitrary and Capricious.

NEPA "requires federal agencies . . . to consider and report on the environmental effects of their proposed actions." *Wild Earth Guardians v.* Jewell, 738 F.3d 298, 302 (D.C. Cir. 2013). "NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the

public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v.* NRDC, 462 U.S. 87, 97 (1983). As part of Step Two, FAA presented two proposed actions to the public. Concept One and Concept Two. A1994-1995. FAA asked the public to comment on them. *Id.* However, FAA provided no environmental analysis to allay the public's fears about the environmental impacts of the proposed action. Thus, when FAA issued its January 10, 2020, Final Order without complying with NEPA, Historic Preservation Act and Section 4(f), FAA's decision was arbitrary and capricious. FAA claims that because "during Step Two it would have sole discretion whether to make any changes to flight procedures that are unrelated to the westbound departures that were at issue in the [Phoenix] lawsuit," A32-33, it could decide whether it would perform a NEPA environmental analysis. However, FAA's "sole discretion" is not unfettered discretion. Paragraph 7 of the Agreement sets forth the requirement that FAA perform its obligations under Step One and Step Two under:

> 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.

A080-081. Because FAA offers no environmental analysis of Concept One or Concept Two, its Final Order to end those proposed action without such analysis was arbitrary and capricious.

FAA has an obligation under these statutes, regulations, and orders to environmentally analyze its action in terminating the Step Two process, and "take no further action under Step Two" warrants the Court's review as to whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *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), ADD003). The question for the court is "whether the agency has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made.'" *Id*. at 1005. Scottsdale alleges that FAA has articulated no rational connection and considered the relevant factors.

CONCLUSION AND RELIEF REQUESTED

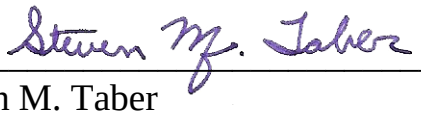
Scottsdale respectfully requests that the Court vacate and remand FAA's decision to implement the Replacement Departure Procedures and require FAA to (1) adequately consider the noise impacts of the routes and FAA's Concepts One and Two under NEPA, (2) enter into consultation with the proper authorities in compliance with Historic Preservation Act and Section 4(f), and (3) analyze and

determine measures that could avoid, minimize, or mitigate adverse effects on Historic Preservation Act and Section 4(f) properties.

Vacatur of FAA's action is appropriate. *See New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 473 (D.C. Cir. 2012) (vacating NRC's rulemaking because of deficient NEPA environmental review). Under *Allied-Signal v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), a decision to vacate "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.") (citation and quotation marks omitted). Both *Allied-Signal* factors support vacating FAA's implementation of Replacement Departure Procedures. First, FAA's knowing failure to consult with the proper authorities under Historic Preservation Act and Section 4(f), and adequately assess the noise impacts of the east flow routes, led to an action that, by FAA's own admission, has substantial noise impacts on Scottsdale. FAA's compliance with Historic Preservation Act, Section 4(f), and NEPA will likely result in a modification of the departure procedures to address noise impacts. Second, vacatur would not disrupt FAA's operations at the Airport. During FAA's reevaluation of the departure procedures, FAA can safely and efficiently use the pre-September 18, 2014, arrival and departure flights paths that is currently accessible.

Respectfully submitted on February 24, 2022

LEECH TISHMAN FUSCALDO & LAMPL,

By: 

Steven M. Taber
staber@leechtishman.com
Esther J. Choe
echoe@leechtishman.com
LEECH TISHMAN FUSCALDO & LAMPL,
200 South Los Robles Ave., Suite 300
Pasadena, California 91101
(626) 796-4000
(626) 795-6321 (fax)

Attorneys for City of Scottsdale, Arizona

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 12,953 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: February 24, 2022 LEECH TISHMAN FUSCALDO & LAMPL

By: Steven M. Taber
Steven M. Taber
Attorneys for City of Scottsdale, Arizona

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 February 24, 2022. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: February 24, 2022 LEECH TISHMAN FUSCALDO & LAMPL

By: 

Steven M. Taber
Attorneys for City of Scottsdale, Arizona