ORAL ARGUMENT SCHEDULED FOR MARCH 21, 2022

No. 20-1070

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF SCOTTSDALE, ARIZONA,
Petitioner,
v.

FEDERAL AVIATION ADMINISTRATION;
STEPHEN DICKSON, in his official capacity as
Administrator of the Federal Aviation Administration,
Respondents.

On Petition for Review of Action
of the Federal Aviation Administration

FINAL BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioner is the City of Scottsdale, Arizona. Respondents are the Federal Aviation Administration ("FAA") and Stephen Dickson, in his official capacity as Administrator of the FAA. *Amici Curiae* in support of Petitioner ("Amici") are the Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation, and Town of Fountain Hills.

B. Rulings Under Review

Scottsdale seeks review of the FAA's undated document titled "Summary of Step Two Comments," which was posted on the FAA's community engagement website accompanying an "Update" webpage that is dated January 10, 2020. Corrected Appendix pages ("A__") 14-A35; A2128.

C. Related Cases

This case has not previously been before this Court or any other court. Although Scottsdale's final corrected opening brief ("Br.") identified *City of Phoenix v. Huerta*, Nos. 15-1158 & 15-1247 (D.C. Cir.), as a related case (Br.i-ii), neither Scottsdale nor Amici were parties to that case, in which the City of Phoenix sought review of an agency order arising out of a different proceeding involving meaningfully different facts and issues. Scottsdale's petition does not designate that agency order for review here. *See* Pet'n for Review at 1 (Doc. 1833462).

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GLOSSARY

FAA	Federal Aviation Administration
Modernization Act	FAA Modernization and Reform Act of 2012
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act

INTRODUCTION

In 2020, the City of Scottsdale petitioned this Court to review a 2020 Federal Aviation Administration ("FAA") document summarizing public comments gathered as feedback on flight procedures that the FAA had long since implemented, for potential consideration in future actions. In 2021, Scottsdale's opening brief challenged, for the first time, eastern flight routes departing from Phoenix Sky Harbor International Airport ("Phoenix Airport") that had been flown over the same general pathways for many years before that. But Scottsdale had not sought review of the 2014 order that formalized the modern satellite-based flight departure procedures for those routes. Nor did Scottsdale participate in the prior *Phoenix* litigation in this Court over the 2014 order, which concerned only western departure routes, rather than the eastern routes that Scottsdale now targets. And Scottsdale failed to seek review of the March 2018 and May 2018 orders that each re-implemented, after further environmental review, the procedures for the previously unchallenged eastern routes.

Scottsdale's newfound objections seek an extreme result: to eliminate the FAA's safer and more efficient satellite-based flight procedures for the May 2018 departure routes. The FAA carefully developed those procedures to fulfill a congressional directive. And they were implemented after extensive proceedings involving public engagement, public comment, and environmental analysis—

encompassing the very eastern routes that Scottsdale belatedly challenges. Those proceedings were conducted with the support of parties under a multilateral settlement agreement to which Scottsdale was not a party. The FAA also conducted a further, post-implementation public engagement period that fulfilled that settlement agreement; and the FAA continues to conduct processes on concepts and comments presented during that period.

Scottsdale's late-arising objections, raised to support a petition only challenging the 2020 comment summary, incorrectly describe the proceedings that led to the May 2018 procedures and the post-implementation process that followed them. Scottsdale's own admissions contradict its description. So too do contemporaneous, publicly available materials in the record, which show that the FAA conducted an extensive and well-documented environmental analysis of the 2018 procedures.

At bottom, Scottsdale's objections are unfounded, improperly raised, and insufficient to justify the seriously disruptive remedies it seeks. The FAA's process complied with the National Environmental Policy Act, other environmental statutes, and this Court's decisions. Scottsdale has offered no cognizable reason to abandon statutorily required and now-longstanding flight procedures that improve safety and increase airspace efficiency. Scottsdale's petition should be dismissed, or in the alternative, denied.

STATEMENT OF JURISDICTION

Scottsdale's March 10, 2020 petition for review challenges only an FAA document titled "Summary of Step Two Comments" (for short, "comment summary"). A14-A35; Pet'n for Review at 1 (Doc. 1833462).[2] The FAA posted the undated summary on a community engagement website, accompanying a webpage "Update" dated January 10, 2020. A14-A35; A2128, *available at* https://www.faa.gov/air_traffic/community_engagement/phx/.[3] Scottsdale invokes this Court's jurisdiction under 49 U.S.C. § 46110(a). Br.1. As explained below, this Court lacks jurisdiction because Scottsdale lacks standing and because Scottsdale failed to properly petition from a reviewable order.

STATEMENT OF THE ISSUES

1. May this petition, which designates for review only a document summarizing comments submitted as "feedback on [FAA] procedures," be reviewed by this Court when Scottsdale has failed to demonstrate Article III standing and failed to properly challenge any final order?

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[2] "Doc. __" refers to a document on this Court's docket. "A__" refers to pages of the corrected appendix (Doc. 1935453). "PJA__" refers to pages of the joint appendix in *Phoenix*, Nos. 15-1158 & 15-1247. "Br.__" refers to expected pages of Scottsdale's final corrected opening brief. "ABr.__" refers to pages of Amici's brief. "Resp.Add.__" refers to pages of this brief's addendum. "S.Add.__" refers to pages of Scottsdale's uncorrected opening brief's standing addendum (Doc. 1896114, pp.119-126).

[3] The FAA recently updated that website address.

2. Did the FAA act arbitrarily and capriciously by seeking further input on potential future flight procedures after reissuing flight departure routes that had not been challenged or invalidated in *Phoenix*?

3. Did the FAA violate environmental statutes when it conducted careful environmental analysis and extensive public engagement about routes that replicated previously approved routes on long-flown flight tracks?

STATUTES AND REGULATIONS

Pertinent provisions are in this brief's addendum. Resp.Add.1-9.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Federal Aviation Modernization

The Federal Aviation Act of 1958, 72 Stat. 731, as amended (now codified at 49 U.S.C. § 40101 et seq.), gives the FAA control over the nation's navigable airspace and lets it regulate domestic civil and military aircraft operations. *E.g.*, 49 U.S.C. § 40101(d)(4). The FAA may prescribe air traffic rules and regulations for aircraft flights and navigation to ensure the safe and efficient use of navigable airspace, including by protecting persons and property on the ground and preventing aircraft collisions. *Id.* § 40103(b)(2). This encompasses flight procedures, such as direction and altitude instructions for aircraft departures and arrivals at U.S. airports.

In 2012, Congress directed the FAA to modernize the nation's air transportation system. FAA Modernization and Reform Act of 2012 ("Modernization Act"), § 213, 126 Stat. 11, 46-50. The FAA had until June 2015 to develop "NextGen" flight procedures based on area navigation ("RNAV"). *Id.* §§ 213, 201(5), 126 Stat. at 36, 46-50. Area navigation procedures provide programmable instructions for aircraft flight systems based on Global Positioning System guidance from satellites. *See id.*; A988; Resp.Add.13. This improves flight safety and efficiency by reducing the energy and time that air traffic controllers spend on manually directing flights. *See* A988; Resp.Add.13-14, 16-17. The transition to NextGen area navigation procedures also facilitates flight safety and efficiency by reducing flight delays, thereby reducing fuel usage and carbon dioxide emissions, and by affording flexibility in routing around bad weather and air traffic congestion. Modernization Act, § 213(a)(1)(A), 126 Stat. at 47; FAA, NextGen Implementation Plan (Mar. 2012) (PJA280-283), *available at* https://www.faasafety.gov/files/events/EA/EA03/2013/EA0349322/NextGen_Implementation_Plan_2012.pdf.

NextGen area navigation procedures are particularly helpful at airports like Phoenix Airport, where air traffic control is complicated by high air traffic volume, nearby restricted military airspace and other airports' flight routes, and

mountainous terrain. *See* A1573, A1577-A1579; A1900-A1902; Resp.Add.13-14, 16-17.

2. Environmental Statutes

a. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., is a procedural statute designed to inform and improve decision-making by federal agencies. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Before an agency may engage in "major Federal actions significantly affecting the quality of the human environment," NEPA in some circumstances requires an agency to prepare an "environmental impact statement." 42 U.S.C. § 4332(C). But an agency may instead, pursuant to NEPA compliance regulations that apply to all federal agencies, identify a type of agency action as generally not "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), and thereby categorically exclude that type of action from further NEPA review. 40 C.F.R. § 1508.4 (2017).[4] This can include any "category of actions which do not individually or cumulatively have a significant effect on the human environment." *Id.* Consistent with those regulations, the FAA has

[4] The NEPA regulations at 40 C.F.R. Parts 1500–1508 were recently changed, 85 Fed. Reg. 43,304 (July 16, 2020), and more recently proposed to be changed, 86 Fed. Reg. 55757 (Oct. 7, 2021). This brief cites the prior regulations that were in effect during the relevant period.

promulgated a series of categorical exclusions for flight procedures in FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures." *See* FAA Order 1050.1F ¶5-6.5 (A160-A162); *see* 40 C.F.R. § 1507.3 (2017).

For NextGen area navigation procedures, the Modernization Act, § 213(c)(1), 126 Stat. at 49, states that such procedures "shall be presumed to be covered by a categorical exclusion" listed under FAA Order 1050.1F.[5] That Act's presumption of categorical exclusion applies to proposed area navigation procedures even when they might previously have required further NEPA review. *See* FAA Order 1050.1F ¶¶3-1.1, 5-6.5.q (A128, A162); *see also* A465. But that statutory presumption of categorical exclusion does not apply if the FAA determines that "extraordinary circumstances exist." Modernization Act, § 213(c)(1), 126 Stat. at 49; FAA Order 1050.1F ¶¶5-2, 5-6.5 (A160-A162, A147-A149). For area navigation procedures, the FAA will document its categorical exclusion conclusions, and if no extraordinary circumstances exist, then FAA's compliance with NEPA is complete. FAA Order 1050.1F ¶5-3 (A149-A150); *see also* A465.

FAA has identified types of "extraordinary circumstances" that must be present along with "potential for a significant impact" to preclude a categorical

[5] The Modernization Act cross-references FAA Order 1050.1E, which was updated and renumbered as FAA Order 1050.1F in 2015. *See* A99.

exclusion under FAA Order 1050.1F. FAA Order 1050.1F ¶5-2 (A147-A149). Aircraft noise from flights generally does not meet that description unless its level "impact[s] … noise sensitive areas," as defined in FAA Order 1050.1F, and meets that Order's standard for significance for that area. FAA Order 1050.1F ¶¶5-2.b(7), 4-3, 11-5.b(10), ¶B-1.5 (A148, A134-A144, A204, A214-A215). FAA noise analysis looks for areas of "reportable" noise increases, as described in FAA Order 1050.1F, to provide additional information for assessing whether there are extraordinary circumstances. FAA Order 1050.1F, ¶B-1.4 & nn.17-18 (A212-A214).

b. The National Historic Preservation Act

Similar to NEPA, Section 106 of the National Historic Preservation Act ("NHPA"), § 106, 80 Stat. 915, 917 (Oct. 15, 1966), as amended, is a procedural statute that has been "'universally interpreted as requiring agencies to consult and consider and not to engage in any particular preservation activities per se.'" *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000). Section 106 requires agencies with jurisdiction over a proposed project to "take into account the effect of the undertaking" on any historic resources included in, or eligible for inclusion in, the National Register of Historic Places. 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f (2012)). Agencies may comply with Section 106 by taking five steps: (1) determining whether the proposed Federal undertaking could affect historic

properties; (2) determining the area of potential effects; (3) identifying potentially affected properties within the area of potential effects; (4) assessing whether there will be adverse effects on those properties; and (5) resolving any adverse effects. 36 C.F.R. §§ 800.3-800.6.

An adverse effect occurs only when the undertaking may alter a "characteristic[] of a historic property that qualif[ies] 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." 36 C.F.R. § 800.5(a)(1). For such adverse effects, the agency must consult with state and tribal historic preservation offices and other specified parties to consider ways to resolve them. *Id*. § 800.3-800.6.

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

Section 4(f) of the Department of Transportation Act of 1966, § 4(f), 80 Stat. 931, 934 (now codified at 49 U.S.C. § 303) ("Section 4(f)"), as amended, permits the Department of Transportation to approve use of the publicly owned land of certain public parks, recreation areas, and wildlife and waterfowl refuges, or land of certain historic sites, under certain planning conditions. 49 U.S.C. § 303(c). Only those places that are "of national, State, or local significance," as determined by officials with jurisdiction over the place, are subject to Section 4(f). *Id.* Noise impacts qualify as a Section 4(f) "use" only when they are "so severe" that they

"substantially diminish[]" the "activities, features, or attributes of the resource" that contribute to its significance or enjoyment (that is, that qualify the property for Section 4(f) protection). FAA Order 1050.1F, ¶¶4-3.3, B-2.2.2 (A137, A220); *see* A309. The FAA consults with "appropriate" officials with jurisdiction over such affected properties when assessing if there is such substantial impairment. FAA Order 1050.1F, ¶B-2.2.2 (A220).

B. Factual Background

1. The FAA's Initial Development Of NextGen Flight Procedures

Phoenix Airport is located on the far eastern side of the City of Phoenix. It is one of the busiest airports in the country. In September 2014, after conducting a multi-year process of environmental analysis and consultation, the FAA implemented satellite-based area navigation procedures for arriving and departing flights at Phoenix Airport, pursuant to a 2014 order. *See* A1571. The 2014 procedures replaced the pre-existing mix of ground-based navigation procedures and manual vectoring of flights by air traffic controllers, as part of the NextGen safety and efficiency improvement process. PJA351; PJA274-283; *see* Resp.Add.14, 16-17.

The 2014 procedures shifted some of the routes for flights departing the airport to the west ("western departures"). PJA360; *see* A1572; A1292. For flights departing the airport to the east ("eastern departures"), the 2014 procedures

only supplemented instructions to connect existing routes to the broader air traffic system, without shifting the general pathways over which aircraft had been manually directed by air traffic controllers before 2014. PJA360; *see* A1287; A1575; Resp.Add.12-13. The eastern departures thus continued to overfly only areas that they had overflown before 2014. *See* PJA362 (the 2014 procedures "overlay existing tracks" except for certain areas on western departure routes); PJA344 (the 2014 proposed departure procedures "would not change where air traffic currently flies," except in two scenarios involving only western departures); *compare* PJA337, *with* PJA339 fig.3; *see also* Resp.Add.11-13.

The FAA's noise screening analyses, performed as part of the environmental analysis for the 2014 procedures, showed that those procedures had no significant noise impacts and that their only two areas of reportable noise increase were both to the west of Phoenix Airport. PJA349; PJA367; PJA431; *see* PJA363; PJA366 (listing, as within the areas of reportable noise increase, only National Register of Historic Places sites and public parks that are west of Phoenix Airport). The screening showed no reportable increase in noise exposure to the east of the airport. PJA347.

The FAA's environmental analysis also found that implementing the 2014 procedures would decrease fuel burn by 13%. PJA361.

2. The *Phoenix* Litigation

In 2015, the City of Phoenix, nearly all of which is located west of Phoenix Airport, joined representatives of Phoenix historic neighborhoods west of Phoenix Airport, to petition for review of the 2014 order. Amended Pet'n for Review (Doc. 1556419), *City of Phoenix v. Huerta*, No. 15-1158 (D.C. Cir.); Pet'n for Review (Doc. 1565856), *Phoenix*, No. 15-1247. The *Phoenix* petitioners challenged only the *western* departure routes implemented in 2014.[6] Scottsdale was not a party or *amicus curiae* in that case. Nor were the current Amici.

In 2017, this Court issued a decision in *City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017). The decision concluded that, for the there-challenged routes (the newly-changed 2014 western departure routes), the FAA had not adequately justified its decision or notified or consulted with the *Phoenix* petitioners under environmental law. *Id.* at 970-975.

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[6] *E.g.*, Phoenix Opening Br. 3, 14-15 (*Phoenix* Doc. 16322122) (challenging only routes "that *changed* decades-old flight corridors" (emphasis added); complaining of impact only west of Phoenix Airport; and comparing only "westbound departures" before and after the 2014 procedures); Phoenix Historic Neighborhoods Pet'n for Review app.A (*Phoenix* Doc. 1565856) (providing National Register forms only for Phoenix historic neighborhoods west of Phoenix Airport); Phoenix Historic Neighborhoods Opening Br. 1 (*Phoenix* Doc. 1632209) (challenging only those 2014 routes that "ma[de] significant changes to … settled flight paths" by "direct[ing] [flights] over the [Phoenix] Historic Neighborhoods for the first time," and calling those western departure routes "the New Routes").

Thereafter, the *Phoenix* parties negotiated a settlement agreement ("the *Phoenix* Agreement") and then jointly asked this Court to amend its judgment in November 2017. A73-A98; Joint Panel Rehearing Pet'n 1 & exh. (*Phoenix* Doc. 1706745). The Court responded by amending its judgment in February 2018 to vacate only the "new flight departure routes" from 2014. Amended Judgment (*Phoenix* Doc. 1716849); Order (*Phoenix* Doc. 1716847). Also consistent with the parties' joint request, this Court did not issue its mandate in *Phoenix* until June 2018, affording the FAA time to develop replacement procedures. Mandate (*Phoenix* Doc. 1734567); Order (*Phoenix* Doc. 1734566).

3. Development And Implementation Of Procedures Following *Phoenix*

By May 2018, before the *Phoenix* mandate issued, the FAA completed its proceedings to develop and implement replacement flight departure procedures. *See* A1619-A1621; A1942. Those proceedings fulfilled "Step One" of the agreed-upon process in the *Phoenix* Agreement. *See* A77-A79; A1562; A1942-A1943. Step One consisted of "Step 1A" and "Step 1B," for each of which the FAA conducted an environmental review and issued a categorical exclusion order, consistent with the Modernization Act and NEPA. A1567-A1621; A1313-A1346, A1350-A1352.

During the Step One proceedings that culminated in those 2018 orders, from late 2017 through May 2018, FAA conducted public workshops, an over-two-week

public comment period, and extensive consultation and public engagement in the Phoenix metropolitan area. *See* A1616; A1660-A1888; A1393-A1550; A1119-A1245; *e.g.*, A1394, A1434-A1455, A1472-A1487 (documenting FAA consultation of Amici during that period). Comments were accepted in person and through mail, e-mail, and a website. A1616; A1300. The comment period overlapped with the early February 2018 workshops, including one held at a Scottsdale high school. A1616; *see* A1300.[7]

Although *Phoenix* did not upset the 2014 *eastern* departure routes, FAA's early 2018 public engagement materials revealed that its proposed 2018 procedures would be environmentally reviewed to implement eastern departure routes that were identical to those from 2014, along with revised western departure routes. A1109-A1118; A1649-1658; A1580, A1600 fig. 5.4-2; A1551-A1556; A1380-A1392; *see* A1273-A1277; A1287-1291; Resp.Add.12-13. Scottsdale does not appear to have raised to the FAA its current objections in any comment letter during the Step One proceedings.

With the benefit of information from its public engagement during Step One, the FAA carefully studied noise and other environmental impacts of the proposed

[7] *See, e.g.*, Alexis Egeland, *FAA To Hold Public Flight-Path Planning Meetings With Phoenix Neighbors*, Ariz. Republic (Feb. 2, 2018), https://www.azcentral.com/story/news/local/phoenix/2018/02/02/faa-hold-public-flight-path-planning-meetings-phoenix-sky-harbor-airport/301522002/ (Horizon High School).

2018 procedures. A1567-A1618; A1313-A1346. That environmental analysis showed no reportable noise increase, let alone a significant increase, over or near Scottsdale for the proposed May 2018 procedures as compared to pre-2014 procedures, even though the analysis showed a small area of reportable noise increase *elsewhere* to the east of Phoenix Airport. A1910-A1911 & A1911 fig.9.2; *see* A1575; A1896-A1900 figs.5.2-1 through -9, A1902; *see also* A1859-A1860 (State Historic Preservation Office concurred with using the FAA's area of potential effects for the May 2018 proposed action). In early May 2018, several entities—including historic preservation offices for the State and the City of Phoenix, the *Phoenix* historic neighborhood petitioners, and the Gila River Indian community—concurred with the FAA's finding of no adverse effect on historic properties. *E.g.*, A1860, A1872-A1873, A1879.

The FAA approved and publicly posted the Step 1A order in March 2018 and the Step 1B order in May 2018. A1619-1621; A1350-A1352; A1943; A1564. Each order stated that it was "a final order of the FAA Administrator" as to its respective procedures and provided notice of the 60-day deadline to petition for the order's review. A1621; A1352. And each effected implementation of 2018 departure procedures. For each, the eastern departure routes were the same as those implemented in 2014; only the western departure routes were modified under each order. *See* A1575; Resp.Add.12-13; Br.40; A1551-A1556; A1321-A1322.

The FAA's May 2018 order, and its accompanying environmental analysis, determined that a categorical exclusion under NEPA applied to the May 2018 procedures, and that the FAA had met consultation and other requirements under the NHPA and Section 4(f). A1567-A1621. That month, the FAA implemented the May 2018 procedures for the replacement western routes and for the unchallenged eastern routes. *See* A1942; Resp.Add.12-14, 21-29.[8]

4. Post-Implementation Public Engagement

After issuing the March 2018 and May 2018 categorical exclusion orders and implementing their respective eastern and western departure procedures, the FAA conducted a new round of public engagement. A1955-A1958, A1962-A1964, A1966-A1968, A1970-A1972, A2128-A2130, A1974-A2009, A2015-A2019, A14-A35). This public engagement fulfilled "Step Two" under the *Phoenix* Agreement. *See* A1955; A79-A80.

In concluding Step One with the May 2018 categorical exclusion order, the FAA made clear on its community engagement website that it "ha[d] already developed [area navigation] procedures" as part of Step One, and that it was not committing to take any further action on potential procedure changes in Step Two. A1943. Instead, the FAA described Step Two as a way to gather "feedback on

[8] Each May 2018 named procedure provides instructions for western departures when wind is blowing from the west and for eastern departures when wind is blowing from the east. Resp.Add.12-13.

procedures" implemented in 2018, to consider for "potential future actions." A1955-A1956.

To that end, during Step Two, the FAA conducted another round of public workshops. The public workshop materials provided information about the implemented routes and comments received during the Step One proceedings. *See* A1962; A14; A1974-A2009, A2015-A2019). The FAA also presented some nascent concepts for potential future procedure changes, including to eastern departures, to gather public comments on those and other ideas for future changes. A2010; A1994-A1995; *see* Resp.Add.18. The FAA accepted additional comments through the workshops to consider during Step Two and to inform any future actions that the FAA might take thereafter. A1962; A2016-2019; A2010.

In early 2020, the FAA posted an "Update" dated January 10, 2020 on its community engagement webpage for Phoenix Airport. A2128. By that date, it had also posted an undated document titled "Summary of Step Two Comments" ("comment summary") on that webpage. A2128; A14-A35). That comment summary described how the FAA had involved the public through workshops and otherwise during its Step Two public engagement. A14. It summarized and responded to several categories of comments that the FAA had received. A15-A35. The comment summary observed that the FAA had fulfilled each described step under the *Phoenix* agreement. A14, A33. It also noted that the FAA might

develop and implement other changes to the Phoenix-area procedures in "future actions." A14.

5. Ongoing Engagement About Potential New Procedures

Although its efforts have been delayed by the COVID-19 pandemic, the FAA has been continuing to conduct its processes to consider and gather input on potential new procedures at Phoenix Airport, including for eastern departures. *See* FAA, Memorandum: Management of FAA Instrument Flight Procedures (IFP) Production During the COVID-19 Pandemic (Apr. 16, 2020), *available at* https://www.faa.gov/air_traffic/flight_info/aeronav/procedures/IFPProductionCOVID-19.pdf; Resp.Add.18-19. The FAA has been composing a work group, consistent with FAA Order 7100.41A, to develop new arrival and departure procedures at Phoenix Airport. Resp.Add.18-19. The FAA has reserved a place for the potential new procedures in its data portal, the Instrument Flight Procedure Gateway, and has scheduled the first full work group meeting for late January 2022. Resp.Add.18-19. The work group will study nascent concepts that the FAA presented to the public in 2019 during Step Two's information-gathering process, and other concepts that have arisen or may arise during that process and afterward. Resp.Add.18-19; *see* A1994-A1995.

SUMMARY OF ARGUMENT

1. Scottsdale's petition for review of the FAA's 2020 comment summary is not reviewable for several reasons. First, Scottsdale lacks standing. It has not established that it suffered a cognizable injury, procedural or otherwise, that is traceable to the challenged comment summary or redressable by the requested vacatur of the May 2018 departure procedures. Most of those procedures—including most of the eastern ones—do not even fly over Scottsdale. For the few that do, the record undercuts the assertion that they cognizably impact Scottsdale.

Second, Scottsdale failed to petition for review of a final order, a requirement for this Court's jurisdiction under 49 U.S.C. § 46110. The challenged comment summary did not consummate the FAA's decisionmaking or have the required legal effect, particularly in light of the FAA's ongoing processes to consider new flight procedures. Scottsdale has not even petitioned for review of the order whose procedures it seeks to vacate—the May 2018 order re-implementing procedures for the eastern departure routes. Even if it had sought review of that order, the petition would be late without a reasonable ground for that tardiness: the FAA did not mislead Scottsdale, as it clearly disclaimed committing to take action on new flight procedures, and Scottsdale has evinced understanding of that fact.

Finally, Scottsdale also has not demonstrated that its current objections were presented to the FAA in accordance with 49 U.S.C. § 46110(d), so that statute precludes their consideration now.

2. Even if Scottsdale's petition were reviewable, the FAA did not violate this Court's *Phoenix* decision and amended judgment. *Phoenix* did not invalidate the 2014 eastern departure routes, nor did it find violations with respect to them. The *Phoenix* amended judgment merely vacated the "*new* flight departure routes." The eastern routes overflew only previously overflown areas along the same general flight pathways, and were not "*new* flight departure routes" in the sense referenced by the parties and the Court in the *Phoenix* litigation. Even if the amended judgment were read to also vacate those eastern routes, it did not preclude the FAA's 2018 orders re-implementing them, particularly when the FAA conducted new environmental analysis and consultation before it did so.

3. The FAA also did not violate NEPA, the NHPA, Section 4(f) of the Department of Transportation Act, or the Administrative Procedure Act. No new environmental analysis was required in 2020 when no procedures were ordered or implemented. And the May 2018 eastern routes replicated routes already approved in March 2018 and routes approved in 2014 that were not vacated by the *Phoenix* amended judgment, so they did not constitute a new major Federal action or approval that would trigger those environmental statutes' requirements.

Regardless, the FAA performed additional environmental analysis, including as to the eastern departure routes. And it did not violate statutory consultation requirements, as it conducted extensive public engagement that was easily accessible to Scottsdale. Scottsdale cannot show that particular identified sites or impacts implicate NHPA's or Section 4(f)'s coverage in any event. And the FAA reasonably exercised its explicitly reserved discretion to issue a 2020 summary of comments from a post-implementation public engagement period that did not change the already-implemented 2018 flight procedures, while reserving the possibility of making future changes during a process that has already begun.

STANDARD OF REVIEW

This Court reviews FAA's compliance with NEPA, NHPA, and Section 4(f) under the Administrative Procedure Act's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A). *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004); *CTIA-The Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 112 (D.C. Cir. 2006); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 203 (D.C. Cir. 1991). "'The scope of review is narrow and a court is not to substitute its judgment for that of the agency,' provided the agency has 'examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Airmotive Eng'g Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018)

(quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations omitted). Courts afford an "extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise." *City of Waukesha v. Env't Prot. Agency*, 320 F.3d 228, 247 (D.C. Cir. 2003) (cleaned up). FAA's findings of fact "are conclusive" when "supported by substantial evidence," 49 U.S.C. § 46110(c), which is any "evidence as a reasonable mind might accept as adequate to support a conclusion." *Schoenbohm v. Fed. Comm'cns Comm'n*, 204 F.3d 243, 246 (D.C. Cir. 2000) (cleaned up).

ARGUMENT

I. SCOTTSDALE'S CHALLENGES SHOULD BE DISMISSED.

A. Scottsdale Fails To Establish Its Standing.

Scottsdale, as the party invoking federal jurisdiction, bears the burden to establish its Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). To do so, Scottsdale must demonstrate three elements: (1) "injury in fact"—an invasion of a "concrete and particularized" legally protected interest, that is "actual or imminent, not 'conjectural' or 'hypothetical'"; (2) causation connecting that injury to "the challenged action of the defendant" rather than "of some third party not before the court"; and (3) a likelihood, rather than mere speculation, that granting Scottsdale's requested relief would redress that injury. *Id.* at 560.

To establish those elements, Scottsdale must identify sufficient affidavits or other evidence in the record or submitted to this Court with Scottsdale's corrected initial opening brief. *Sierra Club v. Env't Prot. Agency*, 292 F.3d 895, 898-901 (D.C. Cir. 2002) (citing *Lujan*, 504 U.S. at 561); *Twin Rivers Paper Co. v. Sec. & Exch. Comm'n*, 934 F.3d 607, 613 (D.C. Cir. 2019); D.C. Cir. R. 28(a)(7). Since Scottsdale is not "the object of the government action or inaction" that it challenges, standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562. And "standing is not dispensed in gross," so Scottsdale "must demonstrate standing for each claim that [it] press[es] and for each form of relief that [it] seek[s]." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Scottsdale has met none of these burdens. Its petition challenged only the 2020 comment summary, and it now seeks vacatur of only that and the May 2018 departure procedures, which the comment summary did not disturb. Pet'n for Review at 1 (Doc. 1833462); Br.1, 28, 60-61, x. But Scottsdale has not demonstrated a cognizable injury that is traceable to the May 2018 procedures or 2020 comment summary and redressable by vacatur of either. Thus, Scottsdale has not shown that it has standing for its challenge.

1. Scottsdale Lacks Standing To Vacate The May 2018 Departure Procedures.

a. Most of the May 2018 departure routes do not overfly Scottsdale.

Scottsdale's only theory of injury is based on purported overflying routes producing ground-level impacts. Br.30-33, 37. But most of the May 2018 departure routes, including most of the eastern routes, do not even overfly Scottsdale. A1654-A1658; A1650 (west flow); A1653 (east flow); *see* Resp.Add.12-13 (listing the small number of overflying departure routes); A2060, A2064 (Scottsdale's comment letter attachment identifying, as overflying departure routes, at most those same listed routes; and admitting that one overflies "at higher altitudes" and so lacked impact worthy of further analysis).[9] Of the nine May 2018 eastern departure procedures, only three pass over or near Scottsdale.

b. Scottsdale has not shown that the overflying procedures cognizably harm Scottsdale.

Even for the few May 2018 routes that do overfly Scottsdale, "geographic proximity does not, in and of itself, confer standing on any entity under NEPA or any other statute." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir.

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[9] *See also* City of Scottsdale, Transcript: Regular City Council Meeting 21 (May 21, 2019), https://www.scottsdaleaz.gov/Assets/ScottsdaleAZ/Council/archive-agendas-minutes/2019-transcripts/052119ClosedCaptionTranscript.pdf (on that route, "over Scottsdale, planes [have] attained such height" that their impact is negligible).

2002); *see* A2068-A2070, A2073 (Scottsdale's letter attachment, reporting population numbers in mere geographic proximity to May 2018 routes). Scottsdale's suggestion of its standing to sue on behalf of its citizens in *parens patriae* (Br.35) should be rejected. *See Manitoba v. Bernhardt*, 923 F.3d 173, 181 (D.C. Cir. 2019); *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 850 F. App'x 9, 11 (D.C. Cir. 2021). Scottsdale must show that the challenged overflying procedures likely adversely impact Scottsdale's own proprietary, concrete and particularized interests in particular property—for example, a City-owned museum.[10]

Such adverse impact does not follow automatically from May 2018 departure procedures that overfly such sites. And the record undercuts Scottsdale's claimed traceable injury based on purported noise impact. The FAA's noise screening analysis for the 2014 and 2018 flight procedures measured noise impacts of both the western and eastern departure routes, on areas both east and west of Phoenix Airport. *See, e.g.*, A1575; A1896-A1902; PJA347. The analysis for the 2014 procedures showed that the two areas of "reportable noise increase" were both west of Phoenix Airport, and that there was no reportable noise increase east of the airport. *See, e.g.*, PJA349; PJA367; PJA431; PJA347. The analysis for the May 2018 procedures indicated only a small area of reportable noise increase

[10] FAA has *not* admitted that its challenged action "has substantial noise impacts on Scottsdale" (Br.61).

compared to pre-2014 flight tracks to the east of Phoenix Airport; and that area is south of Scottsdale. A1910-A1911 & A1911 fig.9.2; *see* A1575; A1896-A1900, A1902. Scottsdale has not provided evidence—such as measured, directly observed noise increases attributable specifically to the May 2018 departure procedures—that could directly rebut the FAA's findings in this respect. Even if it had, Scottsdale has not shown that any such increase was perceptible, let alone disruptive in its context, on the ground.[11] Instead, Scottsdale's own letter attachment undercuts an assumption of adverse ground-level impacts from those procedures, as it posits that aircraft fly well over a mile above the ground in that area. A2062.

c. Scottsdale has not shown that claimed impacts flow from the May 2018 routes, rather than other routes.

More generally, Scottsdale has not shown that its purported injuries are attributable to the May 2018 routes, as opposed to *other* arrival or departure routes, from Phoenix Airport or any other area airport. *See, e.g.*, A1996 (pre-2014 flight tracks, including those over Scottsdale); *see Lujan*, 504 U.S. at 560 (no standing for injuries that do not trace to the defendant's challenged action). Scottsdale's own letter attachment, rather than measuring impacts of Scottsdale's complained-

[11] Nor can Scottsdale assume, without demonstrating, adverse noise impacts to itself from claimed concentration of flight tracks (Br.10). Among other issues, concentration of flights would leave many areas of Scottsdale formerly subject to potential noise in a *better* position, as flights would no longer overfly those spaces.

of May 2018 routes, recounts the impacts from operations at Scottsdale's own airport, as well as flight training at "nearby Deer Valley Airport" and operations at Falcon Field airport. A2058, A2064-A2065; *see also* Resp.Add.13-14 (listing four other airports near Phoenix Airport, including Scottsdale's, that have some of the nation's busiest air traffic control towers). Yet Scottsdale admits that its own airport's operations are subject to its own primary responsibility and control. Br.35; *see Swann v. Sec'y, Ga.*, 668 F.3d 1285, 1288-1289 (11th Cir. 2012) (no standing for injuries that a plaintiff causes to himself).

Scottsdale's city attorney's declaration, omitted from Scottsdale's corrected initial opening brief, similarly fails to launch on causation. Scottsdale's attorney generally references FAA's "flight procedures" and "flight procedures at issue" without specifying which ones, issued on which date. S.Add.3-5. Such imprecision cannot suffice. *See Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1277-1279 (D.C. Cir. 2007) (rejecting standing where affidavit only "refer[red] vaguely" to the challenged federal action). Moreover, Scottsdale's attorney merely asserts, without showing, that flight procedures "ha[ve] adversely impacted" Scottsdale and "resulted" in more overflights and "caused" declined enjoyability. S.Add.3-4. Such "bald allegation[s]" are "not enough to survive even a motion to dismiss" in district court, let alone to show standing on direct review. *Renal Physicians*, 489 F.3d at

1278; *see Utility Wkrs. Union of Am. Local 464 v. Fed. Energy Regul. Comm'n*, 896 F.3d 573, 578 (D.C. Cir. 2018) ("bare assertions" and mere "representations of counsel" were insufficient for standing on direct review, even where—unlike here—estimates of amount of impact were proffered).

In addition, Scottsdale's attorney's declaration 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. *See Local 464*, 896 F.3d at 577 (direct-review petitioner's standing burden is the same as for summary judgment); *Lujan*, 504 U.S. at 561 (each standing element must be proven "with the manner and degree of evidence" required for that litigation stage (citing Fed. R. Civ. P. 56)); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1173, 1175 (Fed. Cir. 2017) (rejecting standing for failure to satisfy Fed. R. Civ. P. 56(c)(4)).

The same deficiencies in Scottsdale's documents also undercut its claim of redressability as required for standing. *See Renal Physicians*, 489 F.3d at 1276-1279. And Scottsdale's attorney's assertion (S.Add.4) that flight procedures "will continue to adversely impact" Scottsdale is the type of prediction that this Court generally rejects as speculative. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc) (this Court "routinely refuse[s] to permit such predictive assumptions to establish standing").

The *March* 2018 procedures directly undercut Scottsdale's claim of redressability. The FAA's March 2018 order re-implemented the same eastern departure routes as in 2014 under new names, before its May 2018 order did the same thing. *See supra* Statement of the Case ("Statement"), Section B.3; *see, e.g.*, A1551-A1556; A1321-A1322; Resp.Add.12-13. Accordingly, by Scottsdale's own argument (Br.49), if the May 2018 procedures were vacated, this Court would restore, as a legal matter, the *status quo ante*—namely, the last set of approved procedures before May 2018, which are the March 2018 procedures. As such, Scottsdale's requested vacatur of the May 2018 procedures would not likely redress its purported injuries, because the eastern departure routes of which Scottsdale complains would remain legally authorized for re-implementation under the March 2018 order. The same argument would apply even if Scottsdale had challenged the March 2018 eastern departure routes (which it has not), because those routes replicated the 2014 eastern departure routes that were not vacated by the *Phoenix* amended judgment. *See infra* Argument, Section II.A.

d. Conceptualizing Scottsdale's claimed injuries as "procedural" makes no difference.

None of the above analysis is altered by Scottsdale framing some of its challenges as involving "procedural injury." Br.34. Although, in a procedural injury case, courts are willing to "assume[] the causal relationship between the procedural defect and the final agency action," the petitioner still must show a

concrete and particularized injury. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159-1160 (D.C. Cir. 2005); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). And the petitioner still must show a causal relationship between the final agency action and that injury, with the latter inquiry often merging into issues of redressability. *Ctr. for Law & Educ.*, 396 F.3d at 1160 & n.2; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("a bare procedural violation, divorced from any concrete harm" does not suffice for Article III standing); *Arapahoe*, 850 F. App'x at 10 (procedural injury petitioner still must show that "the agency action threatens their concrete interest").

Here, even assuming the asserted procedural defects caused FAA to promulgate the May 2018 order and routes, Scottsdale lacks standing. It has not adequately shown that the May 2018 routes likely injure it. Nor has it shown that any such injury would be redressed by their vacatur.

2. Scottsdale Lacks Standing To Challenge The 2020 Comment Summary.

Scottsdale also cannot establish its standing to challenge the 2020 comment summary. Any connection between Scottsdale's purported injuries and that comment summary is even more attenuated than for the May 2018 departure routes, because the summary did not establish those or any other routes. *See Louie v. Dickson*, 964 F.3d 50, 54 (D.C. Cir. 2020) (rejecting standing where the challenged FAA action did not approve the transportation program to which

petitioners attributed their injuries). And vacating the comment summary would not redress Scottsdale's claimed injuries from those routes. *See County of Del. v. Dep't of Transp.*, 554 F.3d 143, 150 (D.C. Cir. 2009) (redressability lacking where vacating the challenged action would not require the agency to conduct analyses beyond ones it already completed).

3. Scottsdale Lacks Standing To Enforce The *Phoenix* Judgment.

As to its claim of violation of the *Phoenix* amended judgment (Br.48, 28), Scottsdale's standing falters for another reason: Scottsdale was not a party to the *Phoenix* litigation and therefore cannot enforce that judgment. *See United States v. TDC Mgmt. Corp.*, 827 F.3d 1127, 1133 (D.C. Cir. 2016) (standing principles "prohibit[] a litigant from 'enforc[ing] the rights of third parties'" (citing *Deutsche Bank Nat'l Tr. Co. v. Fed. Deposit Ins. Corp.*, 717 F.3d 189, 194 (D.C. Cir. 2013)). Indeed, particularly here, where the *Phoenix* parties executed a settlement agreement about what process should be used following the *Phoenix* judgment, "[t]he rationale for … bar[ring] most assertions of third-party claims" applies: "'it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless.'" *Schnapper v. Foley*, 667 F.2d 102, 113 (D.C. Cir. 1981).

Any interest that Scottsdale may claim in enforcing the *Phoenix* amended judgment is not concrete and particularized as to Scottsdale. That amended

judgment did not find any deficiency under any requirement to consult Scottsdale or to analyze the limited number of eastern departure routes that overfly Scottsdale. And the amended judgment did not invalidate the eastern departure routes or find any legal violations with respect to them, as they were not challenged in *Phoenix*. *See supra* Statement, Section B.2; *infra* Argument, Section II.A. Accordingly, Scottsdale lacks cognizable injury with respect to the *Phoenix* amended judgment. *See Judicial Watch, Inc. v. Fed. Election Comm'n*, 180 F.3d 277, 278 (D.C. Cir. 1999) (mere "generalized 'interest in enforcement of the law' … does not support standing").

B. Scottsdale's Petition Is Not Reviewable.

1. Scottsdale Has Not Challenged A Reviewable Final Order.

Scottsdale invokes this Court's direct-review jurisdiction under 49 U.S.C. § 46110, which grants this Court "exclusive jurisdiction" to review only an "order" of the FAA. Section 46110 applies only to final orders. *See Sw. Airlines v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016); *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006).[12] To be final, the action both "'must mark

[12] This Court has long held this requirement to be jurisdictional. *See Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015) (this Court's "jurisdiction under [Section 46110] is limited to review of final orders" (cleaned up)); *Bensenville*, 457 F.3d at 68 (same); *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 769 F.3d 1184, 1187 (D.C. Cir. 2014) (this Court has an "independent obligation" to examine finality under section 46110 because it affects the Court's "jurisdiction"). Scottsdale does not contest that holding. Br.1. More recent panel

the consummation of the agency's decisionmaking process'" and "'must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Sw. Airlines*, 832 F.3d at 275 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)).

The only FAA document brought under review by Scottsdale's petition is the 2020 comment summary. Pet'n for Review at 1 (Doc. 1833462); *see* Fed. R. App. P. 15(a)(2)(C); *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 739 (D.C. Cir. 2006). That document is not a final order.

The 2020 comment summary mainly summarized comments from the Step Two public engagement period. A15-A35. It made no final decision about whether to implement any changes—let alone those that Scottsdale now demands—to eastern departure routes, instead expressly deferring any such decision to "future actions" and confirming that "the FAA intends to continue the dialogue with local stakeholders" about such issues. A14-A15; *see Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 43-44 (D.C. Cir. 2016) (agency notice of proposed rulemaking declaring certain issues to be "beyond the scope of th[e] rulemaking" was not a reviewable final order). The comment summary was, in that sense, even

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opinions should not be read to undermine it. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (describing law-of-the-circuit doctrine). Regardless, Scottsdale does not dispute that only a final FAA order is reviewable. *See* Br.i, 1.

less final than the non-final letter of intent in *Village of Bensenville*, 457 F.3d at 69, because the summary did not declare even *an intent* to implement or reject any particular route or procedure.

Even in the comment summary's language that Scottsdale emphasizes (Br.26, 31, 37, 42, 47, 60), the FAA only observed that any future action that it might take regarding potential procedure changes would not be "under Step Two [of the *Phoenix* Agreement]," but instead "unrelated to the [*Phoenix*] Agreement." A14. That is because the FAA correctly described the *Phoenix* Agreement as not requiring the FAA to take action on any potential prospective changes to the eastern departure procedures during Step Two. Scottsdale agrees with this characterization of the Phoenix Agreement's required steps. *See* Br.27 ("The agreement made no promises about studying the environmental impacts or revising departures to the east.").

Thus, the information-gathering and -reporting nature of the comment summary made it a vehicle for sharing information with the public about Step Two's public engagement, not a final order with binding legal consequences. *See Joshi v. Nat'l Transp. Safety Bd.*, 791 F.3d 8, 11-12 (D.C. Cir. 2015). The comment summary "le[ft] the world just as it found it," *Valero Energy Corp. v. Env't Prot. Agency*, 927 F.3d 532, 536-537 (D.C. Cir. 2019), and "[a] decision by an agency to defer taking action is not a final action reviewable by the court," *Am.*

Petroleum Inst. v. U.S. Env't Prot. Agency, 216 F.3d 50, 68 (D.C. Cir. 2000). The comment summary would not be a reviewable final order even if it had denied a petition seeking to replace implemented routes, because it "left the [petitioner] in the same legal position it had occupied beforehand." *Howard Cnty. v. FAA*, 970 F.3d 441, 447, 449 (4th Cir. 2020) (citing *Phoenix*, 869 F.3d at 969). Instead, as in *Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 1 F.4th 34, 37 (D.C. Cir. 2021), the comment summary at most allowed for "proposal[s] that would then be subject to further notice, comment, and revision." And, by contrast to Scottsdale's cited case (Br.43), the comment summary at most indicated that issues were "open to further consideration, or conditional on future agency action." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007) (citing *Bensenville*, 457 F.3d at 69). As such, the 2020 comment summary neither consummated the FAA's decisionmaking process regarding Scottsdale's desired changes to the eastern departure routes, nor had the required legal effect for finality.

The FAA's actions following the 2020 comment summary have reinforced its non-finality. The declaration of the FAA's local airspace manager explains that "[t]he FAA is currently in the process of taking the next step" toward developing new procedures for Phoenix Airport and others nearby. Resp.Add.18. As that declaration describes, building upon nascent concepts for potential new eastern procedures that were presented at a public meeting during Step Two (A2010;

A1994-A1995), which Scottsdale's own letter described as improvements (A2045, A2051), the FAA has begun assembling a formal work group to develop safer and more efficient procedures to potentially replace the 2018 procedures. Resp.Add.18-19. The declaration reports that the FAA has reserved a place for the new procedures in its procedures data portal, the Instrument Flight Procedure Gateway; and has scheduled the full working group's initial meeting for late January 2022. *Id.* (The COVID-19 pandemic has delayed FAA in this process and in conducting the requisite in-person meetings, the declaration notes. *Id.*)

Such ongoing activities, following public comments received, reveals that the 2020 summary of those comments did not consummate the FAA's decisionmaking process. As in *Sw. Airlines*, 832 F.3d at 275-276, the FAA has "invested its time and resources" in a continuing process that would "afford an opportunity to address the issues" raised by the petition for review and could "lead to a final resolution of the matters." The comment summary, which well preceded the still-forthcoming conclusion of that process, was accordingly non-final (*id.*), and in any event, not ripe for review (*see, e.g.*, *Toca Producers v. Fed. Energy Regul. Comm'n*, 411 F.3d 262, 265-267 (D.C. Cir. 2005); *Fla. Power & Light Co. v. Env't Prot. Agency*, 145 F.3d 1414, 1418-1421 (D.C. Cir. 1998)).

Scottsdale also argues that the FAA could have changed the routes during Step Two's public engagement period, and that the May 2018 order that approved

and implemented those routes only became final when the 2020 comment summary did not change them. Br.42-43. But that argument flies in the face of precedent, including this Court's decision in *Phoenix*. In *Phoenix*, this Court held that an order implementing routes is final even if "post-implementation monitoring and review" activities could have led to adjustments to those routes. 869 F.3d at 969. In *Citizens Ass'n of Georgetown v. FAA*, 896 F.3d 425, 430-434 (D.C. Cir. 2018), this Court held that a similar order approving new routes is final notwithstanding later publication of route charts and post-implementation review. And in *Howard County*, 970 F.3d at 450, the Fourth Circuit found that even the FAA's denial of a petition for new routes "didn't provide a fresh avenue to judicial review" of challenges based only on procedural defects in the promulgation of the routes sought to be replaced. Here, as in those cases, the FAA's post-implementation public engagement does not make the May 2018 order non-final, particularly since the FAA's process arising out of that public engagement and studying new potential routes is ongoing. Any other conclusion would discourage agencies like the FAA from conducting such public engagement periods, lest they inadvertently reopen their prior decisions.

2. Scottsdale Did Not Challenge The 2018 Orders, Nor Could It.

a. Scottsdale has not challenged the March 2018 or May 2018 orders. Its petition for review did not even mention them, instead designating only the

2020 comment summary for challenge. Pet'n for Review at 1, 7 (Doc. 1833462). Accordingly, neither 2018 order is properly before this Court for review. *See* Fed. R. App. P. 15(a)(2)(C); *LaRouche's Comm.*, 439 F.3d at 739.

b. Nor could Scottsdale proceed with a challenge to the May 2018 order, even if it had made one. Scottsdale's March 2020 petition for review was untimely as to that 2018 order, because it was filed well beyond the statutory 60-day period for that order's review. 49 U.S.C. § 46110(a); Fed. R. App. P. 26(c); *see Elec. Privacy Info. Ctr.*, 821 F.3d at 41-42 & n.2.

c. Scottsdale has failed to establish "reasonable grounds" for not filing its petition by the 60th day after the May 2018 order's issuance. Instead, Scottsdale filed its petition almost 600 days after that deadline, even then not challenging that order until its opening brief was filed over a year after that. Br.43-46. This Court "ha[s] generally declined to find reasonable grounds for untimely filings under … section 46110(a)." *Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 827 F.3d 51, 58 (D.C. Cir. 2016). Indeed, as this Court has explained, the cases that Scottsdale cites (Br.44) apply only where the delay is caused by the petitioner's reasonable confusion due to the agency's "misstatements" about its future actions, or by the petitioner's reasonable desire to exhaust its administrative remedies. *Id.* at 58 (distinguishing *Safe Extensions, Inc. v. FAA*, 509 F.3d 593 (D.C. Cir. 2007); *Paralyzed Veterans of Am. v. Civil Aeronautics Bd.*, 752 F.2d

694 (D.C. Cir. 1985), *rev'd on other grounds*, 477 U.S. 597 (1986)); *Elec. Privacy Info. Ctr.*, 821 F.3d at 43 (similar); *Maryland v. FAA*, 952 F.3d 288, 291-292 (D.C. Cir. 2020) (same, and distinguishing *Phoenix*, 869 F.3d at 969).

Contrary to Scottsdale's assertion (Br.44, 46), *Phoenix* provides no additional excuse for Scottsdale's years of delay. *Maryland*, 952 F.3d at 292 ("*City of Phoenix* … did not open the floodgates" to such late-filed petitions). Instead, this Court has explained that *Phoenix* involved a delay due to agency misstatements, in which the FAA "'repeatedly'" "expressed its *commitment*," through "near constant engagement with petitioner," to fix the complained-of problem, indicating "inten[t] to amend the challenged procedures." *Id.* at 291-292 (emphasis added); *see Phoenix*, 869 F.3d at 970 (relying on FAA's "serial promises" to excuse delay); *Howard Cnty.*, 970 F.3d at 450-452 (*Phoenix* turned on such a pattern of promises that began soon after the routes order issued).

No such agency false promises or commitment to amend procedures occurred here. To the contrary, the FAA repeatedly made clear to the public, both before and after its 2018 orders issued, that it was promising no action on potential changes to eastern departure routes during Step Two's post-implementation public engagement.[13] And Scottsdale understood that the FAA had made no such

[13] *See, e.g.*, A1976 (Apr. 2019) (stating that "[t]he FAA is not committing to make any changes" and reserving discretion about whether to take action on route changes during Step Two); A1970 (Mar. 2019) ("the FAA is not committing to

promise. *See, e.g.*, Br.27 ("The [*Phoenix*] agreement made no promises about studying the environmental impacts or revising departures to the east."); A2053 (Scottsdale's own comment letter attachment, stating that "'the FAA is not committing to make changes [to departure procedures] as a result of this input'"). Indeed, Scottsdale's city attorney and City Council memorialized that understanding in a 2019 Council meeting.[14]

Despite the FAA's disclaimers, Scottsdale seeks to infer the FAA's commitment to further change procedures from the FAA's statements that it would consider comments during Step Two. Br.45, 27. But an agency's consideration of comments does not necessarily entail acting on them, particularly when any

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make changes"); A1955-A1956 (Oct. 2018) (the FAA reserved discretion about whether to take action on potential procedure design or changes in Step Two); A1301 (Feb. 2018) (the FAA had "not committed to making any" changes to other routes in the Phoenix area); A1297 (Feb. 2018) (confirming that the FAA was not promising to take action during Step Two); A77-A78, A79-A80 ¶¶5.a, 6 (Nov. 2017) (indicating that new routes would issue through Step One, and expressly reserving discretion about whether to take action to make any other changes to routes during Step Two).

[14] *See* City of Scottsdale, Transcript: City Council Regular Meeting 21 (May 21, 2019), https://www.scottsdaleaz.gov/Assets/ScottsdaleAZ/Council/archive-agendas-minutes/2019-transcripts/052119ClosedCaptionTranscript.pdf (the FAA "made it very clear they were not committing to making … changes [to the eastern departure routes]. They weren't even committed to making, to considering making the changes"); City of Scottsdale, City Council Report 1 (May 21, 2019), https://eservices.scottsdaleaz.gov/cityclerk/DocumentSearch (select "Council Reports"; search with keyword "flight"; click "Council Action Report-5/21/2019 Item#21 (.pdf)") ("The FAA emphasized … that there was no commitment to implement [potential changes to eastern departure flight paths]" and that the FAA was not promising to "take any further action").

commitment to act has been disclaimed. In any event, to the extent that Scottsdale claims that the FAA did not consider comments during Step Two, the record shows otherwise.[15]

Nor can Scottsdale claim that it delayed based on reasonable confusion about the 2018 order's finality. Br.44-45. Scottsdale relies on *Paralyzed Veterans*, but there the agency explicitly left its rulemaking docket open to receive comments while indicating a likely intention to revise the rule. 752 F.2d at 705 n.82; *see* 47 Fed. Reg. 25,936, 25,948 (June 16, 1982). By contrast, the FAA's May 2018 order expressly declared its own finality and notified prospective petitioners that the 60-day clock to petition for review had begun to run. A1621; *see Citizens Ass'n of Georgetown*, 896 F.3d at 432 (such an express declaration of finality "alert[s] readers" that the order is final and ready for judicial review). The webpage "Update" accompanying the May 2018 order confirmed that the FAA had "already developed" the area navigation procedures in Step One, and disclaimed any commitment to take "[a]ny further action … under Step Two," which—even if taken—"would be a new federal action." A1943. And after this Court ruled that

[15] *See, e.g.*, A2128(Jan. 2020) (the FAA "has completed its review of comments received during Step Two"); A14-A35(Jan. 2020) (summarizing those comments and providing responses); A1970(Mar. 2019) ("[t]he FAA reviewed and analyzed the previously received comments").

the 2014 order was final in *Phoenix*, 869 F.3d at 969, Scottsdale had every reason to know the May 2018 order was final too.

Accordingly, Scottsdale's years-late attempt to challenge the May 2018 flight procedures should be rejected. As this Court has often recognized, granting review in such circumstances would undercut Section 46110's important purposes to "promote prompt and final judicial review of agency decisions and ensure that agencies and affected parties can proceed free from the uncertainty that an action may be undone at any time." *Maryland*, 952 F.3d at 290-291; *Citizens Ass'n of Georgetown*, 896 F.3d at 436; *see also* Resp.Add.11-12, 14-18 (describing how unsettling these flight procedures would cause serious disruption).

3. Scottsdale's Objections Are Statutorily Foreclosed From Review.

An issue-exhaustion statute further precludes review of Scottsdale's challenge. Under 49 U.S.C. § 46110(d), this Court "may consider an objection … only if [it] was made in the proceeding conducted by the [FAA]," absent "reasonable ground" for such failure. *See, e.g.*, *Wallaesa v. FAA*, 824 F.3d 1071, 1077-1078 (D.C. Cir. 2016); *see Ross v. Blake*, 578 U.S. 632, 638-642 (2016).

Here, the relevant "proceeding" concluded in May 2018, when the FAA issued its order implementing the procedures about which Scottsdale complains. Yet Scottsdale has not shown any objection made before that point that raised Scottsdale's current legal complaints about the 2018 eastern departure procedures.

See Br.45 (describing only Scottsdale's objections submitted in 2019). And Scottsdale has identified no reasonable ground for such objection's absence. *See Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 521 & n.4 (D.C. Cir. 2011) (citing *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 123 (D.C. Cir. 2010)). Nor could it, as Scottsdale had ample opportunity to raise its concerns during the February 2018 comment period for the Step One proceedings. *See supra* Statement, Section B.3 (comments were accepted by mail, e-mail, online, or in person; period overlapped with public engagement, including at a public workshop in Scottsdale). Early 2018 materials available at the FAA's public workshops and on its website informed the public that eastern departure procedures were among those proposed to be implemented. *E.g.*, A1273-A1277; A1287-A1291; A1109-A1118; A1551-A1556; A1649-A1658; A1303-A1305. The FAA alerted the public at that time that it would accept comments "about procedures throughout the Phoenix area – not just on the westerly departure routes." A1301. And the November 2017 publicly available *Phoenix* Agreement described such workshops as designed "to solicit *any* public comments regarding noise concerns with the *existing* airspace and procedures." A79 ¶5.d (emphases added). Thus, Scottsdale's challenge is not properly presented and dismissal is warranted.

II. ALTERNATIVELY, SCOTTSDALE'S PETITION SHOULD BE DENIED.

A. The FAA Complied With The *Phoenix* Amended Judgment.

Because Scottsdale was not a party to the *Phoenix* litigation, it may not enforce the *Phoenix* amended judgment. *See supra* Argument, Section I.A.3. In any event, the FAA did not violate that judgment.

Scottsdale's claim of such violation is predicated on reading the *Phoenix* amended judgment to vacate the *eastern* departure procedures that were not challenged in that case or discussed in the opinion. *See* Br.48; *see also* ABr.15-18, 25-27. But the amended judgment vacated only the "flight departure *routes*" that were "new" in 2014. Amended Judgment (*Phoenix* Doc. 1716849) (emphasis added). Those "new … routes," in the context of the *Phoenix* litigation, were the western ones alone. Because the 2014 eastern departure procedures flew along only pathways that overlay pre-existing eastern departure tracks over which the pre-2014 procedures had manually directed planes (*see supra* pp.10-11), they were not "new … routes" within the *Phoenix* amended judgment's meaning.

This understanding is consistent with how the parties and the Court described the routes at issue in *Phoenix*. *See supra* note 6. The *Phoenix* petitions sought review only as to "*certain* flight departure routes" from Phoenix Airport from the 2014 order, not all of them. *E.g.*, Amended Phoenix Pet'n for Review at 1 (*Phoenix* Doc. 1556419) (emphasis added). The *Phoenix* petitioners defined "the

New Routes" they challenged in a manner that excluded the eastern departure routes. *E.g.*, Phoenix Historic Neighborhoods Opening Br.1 (*Phoenix* Doc. 1632209) (emphasis added) (defining "the New Routes" as having "ma[de] significant changes to the settled flight paths" to "for the first time" pass over the Phoenix "historic neighborhoods"—all west of Phoenix Airport (*see* Pet'n for Review app.A (*Phoenix* Doc. 1565856))). And the Court similarly described the routes at issue in its *Phoenix* decision. *See* 869 F.3d at 965-966, 968 (case was about the FAA having "changed longstanding flight routes" to adopt "new flight paths" to shift from "industrial and agricultural parts of the City [of Phoenix]" to fly "over a major avenue" and the Phoenix "historic neighborhoods"); *see* PJA620 (the newly overflown major avenue was Grand Avenue, which is west of Phoenix Airport); Brittany Hargrave, *Phoenix Neighbors Protest Sky Harbor Flight-Path Change*, Ariz. Republic (Sept. 30, 2014), http://azc.cc/YQlwu5 (referencing Grand Avenue).

Indeed, the *Phoenix* decision was predicated on the FAA's modeling of noise impact over "two areas in Phoenix, which included twenty-five historic properties and nineteen public parks." 869 F.3d at 966. That referred only to *western* departure routes, as those passed over particular lists of sites identified during the 2014 procedures' environmental review that are *west* of Phoenix Airport. *See* PJA620; PJA363 tbl.1; PJA366 tbl.2. The *Phoenix* opinion also

highlighted reliance by the City of Phoenix on the routes in "setting its zoning policy and buying affected homes." 869 F.3d at 968. Because nearly all of the City of Phoenix is west of Phoenix Airport, the Court's references involve those *western* areas. For similar reasons, the *Phoenix* opinion's cited news articles on noise complaints by Phoenix residents cover only *western* areas.[16]

Even if this Court's amended judgment had vacated the eastern departure procedures, the FAA's actions still fully complied with it. At the parties' request, this Court did not issue the *Phoenix* mandate until June 2018. Mandate (*Phoenix* Doc. 1734567). By that time, the FAA had reissued the eastern departure procedures through its March 2018 and May 2018 categorical exclusion orders. A1619-A1621; A1649-A1658; A1350-A1352; A1551-A1556. So there was no violation of the *Phoenix* amended judgment from their uninterrupted use. And, by Scottsdale's own description, the amended judgment did not *invalidate* the eastern departure procedures. Nor did the *Phoenix* amended judgment or opinion identify *violations* based on the eastern departure procedures, which were not there challenged. *See Phoenix*, 869 F.3d at 966-968, 971-974 (finding only violations as to lack of consultation of the City of Phoenix, not Scottsdale or other eastern

[16] *See, e.g.*, Hargrave, *supra*; Miriam Wasser, *Sound and Fury: Frustrated Phoenix Residents Are Roaring Ever Since the FAA Changed Sky Harbor Flight Paths*, Phx. New Times (Mar. 4, 2015), http://www.phoenixnewtimes.com/news/sound-and-fury-frustrated-phoenix-residents-are-roaring-ever-since-the-faa-changed-sky-harbor-flight-paths-6654056.

jurisdictions; and noise increases that—according to FAA's own modeling—were projected to impact the specified "twenty-five historic neighborhoods and buildings and nineteen public parks" in the City of Phoenix that were west of Phoenix Airport). Accordingly, the FAA was not barred from reissuing the eastern departure procedures as to which this Court found no defect in *Phoenix*. *See Heartland Reg'l Med. Ctr. v. Leavitt* ("*Heartland I*"), 415 F.3d 24, 29 (D.C. Cir. 2005).

And even if the *Phoenix* decision had concerned the eastern departure procedures, they were properly reissued in 2018 and not required to be changed in 2020. The FAA's 2018 order and underlying process cured any defects in the 2014 order's issuance, thereby satisfying the *Phoenix* decision. *See Heartland I*, 415 F.3d at 29-30 ("an agency that cures a problem identified by a court is free to reinstate the original result on remand"). Such reissuance followed new categorical exclusion orders supported by new environmental analysis and consultation, including as to those eastern procedures. *E.g.*, A1567-A1621; A1660-A1911; A1313-A1346; A1350-A1352; A1380-A1550; *see supra* Statement, Section B.3.

Scottsdale seeks to paint this case as a repetition of the errors that the Court identified in *Phoenix*. But these circumstances are meaningfully distinct from those in *Phoenix*. Scottsdale—including its highest-level officials—along with

other "local citizens and community leaders" and members of the public, had ample and well-publicized opportunities to consult and comment on the 2018 proposed procedures during the Step One proceedings, including at a workshop meeting held in Scottsdale. *Phoenix*, 869 F.3d at 971-973; *see supra* Statement, Section B.3. And, as to the 2018 eastern departure routes, the FAA was not changing pathways that "had been in place for a long time" (*id.* at 972-973); and its noise analysis followed its usual significance thresholds (*see* FAA Order 1050.1F, ¶B-1.4 (A212-A214).

B. The FAA Did Not Violate NEPA, The NHPA, Or Section 4(f).

1. The FAA Was Not Required To, But Did, Perform Further Environmental Analysis Of The Unchanged Eastern Routes.

a. The same eastern departure routes have been in place since at least 2014. *See supra* Statement, Sections B.1, B.3. Because the May 2018 eastern departure routes were unchanged from the March 2018 eastern departure routes (and from the 2014 eastern departure routes that were not vacated, *see supra* Argument, Section II.A), the FAA was not proposing to take a new "major Federal action" or to make substantial changes to one either in May 2018 or 2020. As a result, the May 2018 eastern departure routes required no further NEPA analysis at those times. 42 U.S.C. § 4332(C); *see W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241-1244 (D.C. Cir. 2018); *Env't Health Trust v. FCC*, 9 F.4th 893, 913-914 (D.C. Cir. 2021); *Kleppe v. Sierra Club*, 427 U.S. 390, 404 (1976). Once the

eastern routes were in place, the FAA's NEPA obligations ended even if activities like flights along those routes are ongoing. *See W. Org.*, 892 F.3d at 1243-1244.

Nor did the FAA violate its FAA Order 1050.1F, contrary to Scottdale's claim. Consistent with the Modernization Act's presumption for NextGen area navigation procedures, § 213(c)(1), 126 Stat. at 49, the May 2018 eastern departure procedures were covered by a promulgated categorical exclusion absent any FAA finding of extraordinary circumstances. *See* FAA Order 1050.1F ¶¶3-1.2.b(12), 5-6.5(g), (i), (q) (A129, A160-A162); FAA Order 7400.2M ¶¶32-2-1, 32-2-2(c)(6). And the FAA Order provisions that Scottsdale invokes (Br.52-54) would not apply on their own terms: Scottsdale has not established that the overflown areas were "noise sensitive" within the relevant regulatory meaning, that the overflights were "at less than 3,000 feet above ground level" in any such areas, or that noise would increase beyond an applicable threshold. *See* FAA Order 1050.1F ¶¶3-1.2.b(12), 11-5.b(10) (A129, A204); FAA Order 7400.2M ¶¶32-2-1.

The FAA also need not have analyzed potential *future* changes to eastern routes under NEPA before posting the 2020 comment summary. *Contra* Br.58-60. "[T]he mere 'contemplation' of certain action is not sufficient to require an [environmental] impact statement" under NEPA. *Env't Health Trust*, 9 F.4th at 913-914 (quoting *Kleppe*, 427 U.S. at 404). Here, future action was no more than "contemplated" in 2020. Materials available to the public during Step Two stated

that the FAA had only "begun considering potential conceptual airspace changes" beyond those adopted in the 2018 implemented routes and that the FAA was open to ideas. A1976. And the comment summary only (1) recounted commenters' suggestions on this point, noting the FAA's intent to continue such dialogue; (2) confirmed that "[t]he FAA has not implemented nor proposed implementation" of any such changes; and (3) indicated that FAA would undergo environmental reviews before reaching such a stage. A14-A15, A31.

b. Although the FAA was not required to perform further NEPA analysis before reissuing the same eastern departure procedures in May 2018, it did so. The FAA's environmental review for the May 2018 procedures included the eastern departure routes and areas east of Phoenix Airport. *See, e.g.*, A1896-A1900 (showing the "bi-directional" nature (A1575; A1894) of the May 2018 departure procedures, including both western and eastern routes); A1894 (noting that the noise screening analysis modeled noise impacts generally of Phoenix Airport "arrivals and departures," not just the western ones); A1900, A1902 (comparison scenarios were composed of "*each* departure procedure" (emphasis added)); *contra* Br. 50-59; ABr.21, 26. Indeed, the FAA's May 2018 noise screening analysis report confirms that the FAA did assess eastern routes and noise effects to the east. A1910-A1911 & A1911 fig.9.2 (depicting both western and eastern routes, and indicating only a small area of reportable noise increase to the east of Phoenix

Airport and south of Scottsdale, as compared to pre-2014 routes). And, like the 2013 and 2014 environmental analyses (PJA349; PJA367; PJA431; PJA347), the FAA's May 2018 analysis found no reportable noise increases over Scottsdale as compared to pre-2014 routes (A1910-A1911 & A1911 fig.9.2).

Based on its analysis, the FAA concluded that the 2018 procedures "would not result in significant noise impacts relative to the [pre-2014 routes]." A1910. Scottsdale has not proffered bases to contest that conclusion. Its attorney's declaration is fatally vague in its attributions of noise to flight procedures generally. S.Add.3-5; *see supra* Argument, Section I.A.1.c. And Scottsdale's letter attachment does not proffer an alternative to FAA's noise significance thresholds, nor does it report noise impacts by reference to any significance measure. A2061, A2068.

c. Even if the FAA had erred in its environmental analysis, any such error would not be prejudicial. *See* 5 U.S.C. § 706 (in an Administrative Procedure Act challenge to agency action as being "arbitrary and capricious," "due account shall be taken of the rule of prejudicial error"). This Court "ha[s] applied the prejudicial error rule in the NEPA context where the proposing agency engaged in significant environmental analysis before reaching a decision but failed to comply precisely with NEPA procedures." *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006). The FAA engaged in significant environmental analysis at

several stages in 2018, culminating in both the March 2018 and May 2018 orders. *See* A1044-A1271, A1306-A1346, A1350-A1556, A1567-A1941). The FAA's analysis and orders were well informed. Scottsdale has not shown that the FAA would have acted differently had it performed additional analysis or consulted more directly with Scottsdale. Indeed, such an expectation is undercut by major safety and efficiency issues with Scottsdale's preferred alternatives (*see* A34-A35); and by Scottsdale's failure even now to demonstrate significant noise increases from the May 2018 procedures. Even Scottsdale's own letter attachment acknowledges that the procedures produce "efficiencies of fuel, time and emission savings." A2059.

Moreover, Scottsdale may yet be able to obtain its objectives for eastern flight procedures through the FAA's ongoing processes to consider potential procedure changes, which any vacatur of existing procedures would be expected to delay. *See supra* Statement, Section B.5; Resp.Add.11-12, 15-19. Accordingly, Scottsdale has demonstrated no prejudice in that respect as well.

2. Scottsdale's NHPA And Section 4(f) Claims Lack Merit.

Scottsdale argues that the FAA violated the NHPA and Section 4(f) by not considering impacts to protected areas in Scottsdale from the 2018 eastern departure routes. Br.54-58. But, as noted, the FAA did consider, and found no reportable increases in, noise over Scottsdale from those eastern routes in its 2013,

2014, and 2018 environmental analyses. *See supra* Argument, Section II.B.1. And no further analysis was required when the 2020 comment summary did not approve routes or route changes. *See* 49 U.S.C. § 303(c) (Section 4(f) applies to the FAA's "approv[al] [of] a transportation program or project"); 54 U.S.C. § 306108 (NHPA requires taking account of effects "prior to the approval" of federal spending on the undertaking).

Scottsdale also has not established that any of its claimed affected places are protected by the NHPA. None seem to be listed on the National Register of Historic Places. *See* Nat'l Park Serv., National Register Database and Research, https://www.nps.gov/subjects/nationalregister/database-research.htm#table (last accessed Oct. 11, 2021) (click "searchable table"; search for "Scottsdale"). Nor has Scottsdale shown they were eligible for inclusion in 2020 when the comment summary was posted. Thus, Scottsdale has no NHPA claim. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1165 (9th Cir. 2018).

Similarly, Scottsdale has not shown that its claimed affected places are Section 4(f) properties. For example, as-yet-undeveloped land may not yet require Section 4(f) treatment. And an events center may not be a "public park, recreation area, or wildlife and waterfowl refuge" or a "historic site." 49 U.S.C. § 303(c).

Moreover, for both the NHPA and Section 4(f), Scottsdale failed to show the requisite severity of impact on those places. *See id.*; 36 C.F.R. § 800.5(a)(1).

Even if the NHPA and Section 4(f) were to apply, Scottsdale cannot complain of lack of consultation under them given Scottsdale's extensive opportunities to raise those issues and identify those properties to the FAA through the early 2018 public workshops and comment period, like the publicized February 2018 workshop meeting in Scottsdale. *See supra* Statement, Section B.3. "Public participation, such as through a period of notice and comment, is … one means by which an agency may fulfill part of its procedural obligations" under the National Historic Preservation Act. *Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 907 (9th Cir. 2020).

Even if the FAA's consultation were deficient, Scottsdale was not prejudiced by such deficiency. *See WildEarth Guardians v. Provencio*, 923 F.3d 655, 678 (9th Cir. 2019). Scottsdale has identified no information that it would have provided if consulted but could not otherwise. It cannot show that the FAA would have acted differently through the 2020 comment summary (*see supra* Argument, Section II.B.1.c), and ongoing processes still afford Scottsdale an avenue for potential relief. Indeed, many consulted entities concurred with the FAA's findings in 2018, including the State Historic Preservation Office. *See, e.g.*, A1860, A1872-A1873, A1879) (State of Arizona and City of Phoenix historic preservation offices, *Phoenix* historic neighborhood petitioners, and Gila River

Indian Community concurred with the FAA's finding of no adverse effect on historic properties).

3. The FAA's Inaction Was Not Arbitrary Or Capricious.

Even if the 2020 comment summary were reviewable, the FAA properly exercised its discretion not to take action on potential changes to the eastern departure procedures during Step Two, and instead to leave that to "future actions." A14. This Court has explained that "'[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of … priorities' and 'need not solve every problem before it in the same proceeding." *Taylor v. FAA*, 895 F.3d 56, 68 (D.C. Cir. 2018); *see Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 525 (1978) (agencies have broad discretion to formulate their own procedures). Here, as in *Taylor*, it was reasonable for the FAA to have addressed the western departure procedures in the earlier proceedings and to defer action on potential changes to the eastern departure procedures. Scottsdale has identified no law that requires the FAA to have taken action to change the already-approved eastern departure procedures (Br.29). And Scottsdale has not addressed the major safety issues with its preferred approach that are shown in the record. *See* A34-A35. As such, Scottsdale cannot challenge the May 2018 procedures on that basis. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004). Given that the FAA's

ongoing process affords Scottsdale an avenue for potential relief, Scottsdale could not establish prejudice anyway.

III. EVEN IF REMAND WERE NECESSARY, VACATUR IS UNWARRANTED.

Even if this Court were to find Scottsdale's challenge reviewable and meritorious, it should grant remand without vacating the FAA's 2020 comment summary, much less any flight procedures implemented under earlier orders—orders from which Scottsdale has not petitioned and could not timely seek review under Section 46110. At the threshold, regardless of vacatur, the Court should deny relief in any form or for any claim as to which Scottsdale lacks standing, such as for the procedures that do not overfly Scottsdale. *TransUnion*, 141 S. Ct. at 2208. As to any eastern procedures for which this Court credits Scottsdale's challenge, both factors under *Allied-Signal v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993), weigh against vacatur. *Contra* Br.61.

First, any error is not serious enough to warrant vacatur. The FAA conducted noise analyses in 2013, 2014, and 2018 that indicated no reportable or significant noise impacts on Scottsdale (PJA349; PJA367; PJA431; PJA347; A1910-A1911 & A1911 fig.9.2), consistent with the fact that the eastern departure routes overflew no new areas. And, for the 2018 routes, the FAA consulted extensively with the State and City of Phoenix historic preservation offices, tribal representatives, and the public, including through processes accessible to

Scottsdale, to assess potential impacts on historic sites and other covered areas. *See supra* Statement, Section B.3; *see, e.g.*, A1660-A1888. Indeed, many of those entities concurred with the FAA's findings upon consultation. *See, e.g.*, A1860, A1872-A1873, A1879. Scottsdale has not shown that further analysis or consultation on remand would produce a different conclusion about a cognizable adverse environmental impact or effect on a protected property in Scottsdale. *See Susquehanna Int'l Grp. v. Sec. & Exch. Comm'n*, 866 F.3d 442, 451 (D.C. Cir. 2017). When, as here, "an agency may be able readily to cure a defect" in its decision, the first *Allied-Signal* factor counsels for remand without vacatur. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009).

Moreover, as the 2020 comment summary acknowledges (A14-A15), and as the FAA local airspace manager's declaration explains (Resp.Add.18-19), the FAA is continuing to consider and develop potential changes to the flight procedures. Accordingly, vacatur may serve no purpose, as the FAA's ongoing processes may address Scottsdale's concerns, regardless of vacatur or remand.

Second, vacatur—particularly of the May 2018 departure procedures as Scottsdale requests—would cause deeply disruptive consequences. The FAA local airspace manager's declaration attests that vacating those satellite-based procedures would reduce air traffic safety, because air traffic controllers would have to manage traffic "manually" by giving pilots individualized instructions until

new satellite-based procedures could be developed, thereby increasing controllers' workload and opportunities for miscommunication. Resp.Add.16-17, 14. To offset these safety risks, the declaration explains, the FAA would need to reduce air traffic capacity by 50%, producing significant delays. Resp.Add.16-17. According to the declaration, such effects would persist during the procedure replacement process, which would take at least two years even if prioritized above all other projects, and which would entail an estimated personnel time cost of $1,317,468. Resp.Add.14-17, 11-12. And, the declaration explains, vacatur of those departure procedures would disrupt not only those procedures, but also others in the same interdependent web. Resp.Add.11-12, 14-15, 17-18. Thus, contrary to Scottsdale's assertion (Br.61), FAA cannot immediately revert to pre-2014 routes. *See* Resp.Add.14-15. Such a "'logistical nightmare'" from disentangling the intertwined 2018 flight procedures justifies remand without vacatur. *Susquehanna*, 866 F.3d at 451.

In short, vacatur is not warranted. Rather, if the Court finds any reviewable error in the FAA's environmental analyses or consultation, it should remand for further analysis and consultation.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed, or, in the alternative, denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Final Brief for Respondents complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), this document contains 12,972 words.

The foregoing Final Brief for Respondents 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font, and italicization for case names and emphasis.

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ADDENDUM

ADDENDUM
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49 U.S.C. § 46110(a), (c), (d)

§ 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(c) Authority of court.--When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

NEPA, 42 U.S.C. § 4332(C) (excerpt)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

…

Section 106 of NHPA, 54 U.S.C. § 306108

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

Section 4(f) of the Department of Transportation Act,
49 U.S.C. § 303 (excerpts)

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites
…
(c) Approval of programs and projects.—Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 2041 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) 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 to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.—

(1) Requirements.—

(A) Requirements for historic sites.--The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges.—The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria.--In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that

are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites.—With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code, that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges.—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) Satisfaction of requirements for certain historic sites.—

(1) In general.—The Secretary shall—

(A) align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 306108 of title 54, including implementing regulations; and

(B) not later than 90 days after the date of enactment of this subsection, coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this

subsection as the "Council") to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) Avoidance alternative analysis.—

(A) In general.—If, in an analysis required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may—

(i) include the determination of the Secretary in the analysis required under that Act;

(ii) provide a notice of the determination to—

(I) each applicable State historic preservation officer and tribal historic preservation officer;

(II) the Council, if the Council is participating in the consultation process under section 306108 of title 54; and

(III) the Secretary of the Interior; and

(iii) request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) Concurrence.—If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (c)(1) shall be required.

(C) Publication.—A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall—

(i) be included in the record of decision or finding of no significant impact of the Secretary; and

(ii) be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) Aligning historical reviews.—

(A) In general.—If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54.

(B) Satisfaction of conditions.—To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the

Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54.

(f) References to past transportation environmental authorities.—

(1) Section 4(f) requirements.—The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89-670; 80 Stat. 934) as in effect before the repeal of that section).

(2) Section 106 requirements.--The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89-665; 80 Stat. 917) as in effect before the repeal of that section).

…

FAA Modernization and Reform Act of 2012,
§§ 201(1), (5), 213(a), (c), 126 Stat. 11, 36, 46-50

SEC. 201. DEFINITIONS.

In this title, the following definitions apply:

(1) NEXTGEN.—The term ‘‘NextGen’’ means the Next Generation Air Transportation System.

(5) RNAV.—The term ‘‘RNAV’’ means area navigation.

SEC. 213. ACCELERATION OF NEXTGEN TECHNOLOGIES.

(a) OPERATIONAL EVOLUTION PARTNERSHIP (OEP) AIRPORT PROCEDURES.—

(1) OEP AIRPORTS REPORT.—Not later than 6 months after the date of enactment of this Act, the Administrator of the Federal Aviation Administration shall publish a report, after consultation with representatives of appropriate Administration employee groups, airport operators, air carriers, general aviation representatives, aircraft and avionics manufacturers, and third parties that have received letters of qualification from the Administration to design and validate required navigation performance flight paths for public use (in this section referred to as ‘‘qualified third parties’’) that includes the following:

(A) RNP/RNAV OPERATIONS FOR OEP AIRPORTS.—The required navigation performance and area navigation operations, including the procedures to be developed, certified, and published and the air traffic

control operational changes, to maximize the fuel efficiency and airspace capacity of NextGen commercial operations at each of the 35 operational evolution partnership airports identified by the Administration and any medium or small hub airport located within the same metroplex area considered appropriate by the Administrator. The Administrator shall, to the maximum extent practicable, avoid overlays of existing flight procedures, but if unavoidable, the Administrator shall clearly identify each required navigation performance and area navigation procedure that is an overlay of an existing instrument flight procedure and the reason why such an overlay was used.

(B) COORDINATION AND IMPLEMENTATION ACTIVITIES FOR OEP AIRPORTS.—A description of the activities and operational changes and approvals required to coordinate and utilize the procedures at OEP airports.

(C) IMPLEMENTATION PLAN FOR OEP AIRPORTS.—A plan for implementing the procedures for OEP airports under subparagraph (A) that establishes—

(i) clearly defined budget, schedule, project organization, and leadership requirements;

(ii) specific implementation and transition steps;

(iii) baseline and performance metrics for—

(I) measuring the Administration's progress in implementing the plan, including the percentage utilization of required navigation performance in the national airspace system; and

(II) achieving measurable fuel burn and carbon dioxide emissions reductions compared to current performance;

(iv) expedited environmental review procedures and processes for timely environmental approval of area navigation and required navigation performance that offer significant efficiency improvements as determined by baseline and performance metrics under clause (iii);

(v) coordination and communication mechanisms with qualified third parties, if applicable;

(vi) plans to address human factors, training, and other issues for air traffic controllers surrounding the adoption of RNP procedures in the en route and terminal environments, including in a mixed operational environment; and

(vii) a lifecycle management strategy for RNP procedures to be developed by qualified third parties, if applicable.

(D) ADDITIONAL PROCEDURES FOR OEP AIRPORTS.—A process for the identification, certification, and publication of additional required

navigation performance and are navigation procedures that may provide operational benefit at OEP airports, and any medium or small hub airport located within the same metroplex area as the OEP airport in the future.

(2) IMPLEMENTATION SCHEDULE FOR OEP AIRPORTS.—The Administrator shall certify, publish, and implement—

(A) not later than 18 months after the date of enactment of this Act, 30 percent of the required procedures at OEP airports;

(B) not later than 36 months after the date of enactment of this Act, 60 percent of the required procedures at OEP airports; and

(C) before June 30, 2015, 100 percent of the required procedures at OEP airports.

(c) COORDINATED AND EXPEDITED REVIEW.—

(1) IN GENERAL.—Navigation performance and area navigation procedures developed, certified, published, or implemented under this section shall be presumed to be covered by a categorical exclusion (as defined in section 1508.4 of title 40, Code of Federal Regulations) under chapter 3 of FAA Order 1050.1E unless the Administrator determines that extraordinary circumstances exist with respect to the procedure.

(2) NEXTGEN PROCEDURES.—Any navigation performance or other performance based navigation procedure developed, certified, published, or implemented that, in the determination of the Administrator, would result in measurable reductions in fuel consumption, carbon dioxide emissions, and noise, on a per flight basis, as compared to aircraft operations that follow existing instrument flight rules procedures in the same airspace, shall be presumed to have no significant affect on the quality of the human environment and the Administrator shall issue and file a categorical exclusion for the new procedure.

40 C.F.R. § 1507.3(a), (b) (2017)

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the *Federal Register*, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its

procedures and before publishing them in the *Federal Register* for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

40 C.F.R. § 1508.4 (2017)

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

No. 20-1070

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF SCOTTSDALE, ARIZONA
Petitioner,

v.

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

On Petition for Review of Action
of the Federal Aviation Administration

DECLARATION OF CHRISTOPHER M. KESLER,
in his official capacity as Support Manager, Airspace and Procedures
Albuquerque District, Central Service Area, Federal Aviation Administration

DECLARATION OF CHRISTOPHER M. KESLER

I, Christopher M. Kesler, hereby declare as follows:

1. I am the Support Manager for Airspace and Procedures for the Albuquerque District at the Federal Aviation Administration ("FAA"). I have been in this role since April 2021 and previously held other positions at the FAA dating back to September 1997. I have 24 years of experience as a member of the Air Traffic Organization and employee of the FAA. In my current position, my responsibilities include managing airspace and procedures for the Albuquerque District which includes Arizona. My duty station has been at the Phoenix Terminal Radar Control Approach Facilities ("TRACON") since 2001. I was working as the Supervisor Traffic Management Coordinator in the Phoenix TRACON in 2014 when the initial Area Navigation ("RNAV") procedures were implemented, and I was Operations Manager at the Phoenix TRACON in 2018 when the current RNAV procedures were implemented.

2. Based on my position and experience, I have the personal knowledge to understand the steps that the FAA would need to undertake if a federal court were to vacate or otherwise invalidate the current RNAV Global Positioning System ("GPS")-based departure procedures at Phoenix Sky Harbor International Airport ("PHX") that were published on May 24, 2018—namely, the ZEPER, QUAKY, MRBIL, FORPE, BROAK, ECLPS, STRRM, FYRBD, and KEENS procedures. Procedure plates for each of these procedures are appended to this Declaration as Attachment A.

3. The City of Scottsdale filed its Corrected Initial Opening Brief on May 10, 2021, asking this Court to "vacate and remand the FAA's decision to implement the Replacement Departure Procedures," referring specifically to the ZEPER, QUAKY, MRBIL, FORPE, BROAK, ECLPS, STRRM, FYRBD, and KEENS procedures used by aircraft departing from PHX. Corrected Initial Opening Br. at 60. (Doc.#1897985). After that filing, other FAA personnel and I considered in detail the feasibility and projected cost of continuing to operate the Phoenix, Arizona airspace in a safe and efficient manner if those nine air-traffic procedures were vacated. As described below, it is clear that the immediate consequences of vacating those procedures would be to impose significant delays at PHX, with cascading delay effects at other airports in the region and throughout the national airspace system. These procedures have been in use for over seven years. The "east-flow" procedures travel over flight tracks that existed even before 2014. If these procedures were to be vacated, it would cause serious impacts to the

entire Phoenix metropolitan area airspace. The procedures at issue in this litigation are part of an interdependent web of procedures necessary for the airport to safely operate, including avoiding conflict and ensuring separation between aircraft. Other procedures in use at the airport were designed based on the location (including direction and altitude instructions) of the challenged procedures. It is therefore not possible to simply eliminate the challenged procedures without causing ripple effects that would contribute to delays at the airport and throughout the national airspace. In addition to those delays, the burden on air-traffic controllers to manage that traffic would be greatly increased and the potential for error and dangerous circumstances would commensurately increase. It is also clear that for the FAA to put new procedures in place to replace the vacated procedures (and make corresponding changes to other procedures at PHX) would be costly and time-consuming, taking approximately two to three years to complete. Most of this time is due to required processes that ensure that new air-traffic procedures are reviewed at multiple stages for safety and for compliance with environmental laws, that air-traffic controllers are properly trained to implement them, and that airspace users are adequately equipped and informed to use those procedures before they are implemented. These processes are necessary and for the most part cannot be circumvented or expedited due to requirements imposed by FAA Order 7100.41A.

4. Should the Court invalidate the ZEPER, QUAKY, MRBIL, FORPE, BROAK, ECLPS, STRRM, FYRBD, and KEENS procedures, or any subset thereof, the result would be substantial delays in air traffic at PHX that would, in turn, spread delays in commercial passenger traffic across the national airspace system. These delays would last until replacement RNAV procedures were implemented (estimated to take two to three years), occurring at the same time that the commercial aviation industry is recovering nationwide from the COVID-19 pandemic. During that period, there would be an increased workload for both controllers and pilots associated with the reversion back to antiquated radar-based navigational technology, which would also deprive the public of the safety benefits of RNAV procedures that are discussed below.

The Phoenix Airspace and the May 24, 2018 Area Navigation Departure Procedures from PHX

5. On May 24, 2018, the FAA published nine Area Navigation ("RNAV") Standard Instrument Departure ("SID") procedures for aircraft that depart from PHX. While these procedures—designated as ZEPER, QUAKY, MRBIL, FORPE, BROAK, ECLPS, STRRM, FYRBD, and KEENS—serve

aircraft departing west when the wind is blowing from the west (called "west flow") and aircraft departing east when the wind is blowing from the east (called "east flow"), the May 24, 2018 procedures only differ from the procedures published in March 2018 and the procedures published in 2014 when departures are in west flow. The FAA made no changes to the eastern departure procedures (when departures are in east flow) in March 2018 or May 2018, as the FAA then reinstated the RNAV eastern departure procedures that were published in 2014. Therefore, the procedures for east-flow departures from PHX did not change in substance between 2014 to the present. The 2014 east-flow departure procedures did not overfly any areas not already overflown by the pre-2014 east-flow departure procedures. The 2014 east-flow departure procedures supplemented the pre-2014 procedures' instructions to connect existing routes to the broader air traffic system, without shifting the general pathways over which aircraft were being directed manually prior to 2014. None of the BROAK, ECLPS, STRRM, FYRBD, or KEENS procedures implemented in May 2018 (or even their September 2014 equivalents) overfly or fly near the City of Scottsdale, either in east flow or west flow. The ZEPER west-flow departure procedure and the FORPE east-flow procedure implemented in May 2018 also do not overfly or fly near the City of Scottsdale. Only three of the nine west-flow departure procedures implemented in May 2018—QUAKY, MRBIL, and FORPE—overfly or fly near the City of Scottsdale. Likewise, only three of the nine east-flow departure procedures implemented in May 2018—ZEPER, QUAKY, and MRBIL—overfly or fly near the City of Scottsdale. Those east-flow departure procedures overfly areas, including parts of Scottsdale, that have been overflown by east-flow departures from PHX since even before 2014.

6. The May 24, 2018 procedures are Next Generation ("NextGen") RNAV procedures that use satellite-based navigation and modern flight management systems to eliminate the need for visual references and ground-based navigation aids while flying the route. Among the many safety benefits of RNAV procedures is the ability to ensure that aircraft are on predictable routes, so that the lateral and vertical separation of aircraft in the sky can be automated and ensured simply by assigning and flying the routes. This separation is of utmost importance in the extremely busy and crowded airspace of Phoenix, Arizona.

7. Located near downtown Phoenix, PHX is one of the busiest airports in the country. It serves as a hub for both American Airlines and Southwest Airlines, as well as a major gateway to Mexico and South America. It is surrounded by some of the busiest general aviation airports in the world, operating flight schools with very high volumes of traffic. Just to the west, Luke Air Force Base operates

the largest F-16 and F-35 pilot training program in the United States, operating in restricted military airspace that further constrains routes taken by commercial aircraft. This area includes five air traffic control towers that are ranked in the top 27 busiest towers in the country—namely, Phoenix Sky Harbor International Airport, Falcon Field Airport, Phoenix Deer Valley Airport, Phoenix-Mesa Gateway Airport, and Chandler Municipal Airport.

8. The nine RNAV Standard Instrument Departures (SIDs) were published on May 24, 2018, in the *U.S. Terminal Procedures Publication*, a document published by the FAA every 56 days that contains instrument procedure navigational charts used by the aviation community. These navigational charts provide courses to fly, including turns to be made of a given radius and at given speeds, altitude restrictions at specific points to separate aircraft, and speed constraints to ensure consistent spacing of multiple aircraft.

9. Once procedures are replaced or updated, the FAA generally cannot revert back to its old procedures. The FAA's general practice is to remove any replaced procedures from publication and cancel them when the new procedures are published. When old procedures are deleted from publication, they are removed from aircraft flight management systems and can no longer be assigned by air-traffic controllers. In other instances, the old procedures may not be officially deleted and linger in the system; nevertheless, these old procedures generally could not be assigned by air-traffic controllers because they would conflict with the updated airspace changes and present unacceptable air traffic conditions. This is because air traffic procedures build off of one another and are an interdependent web. Updating, replacing, or modifying one air traffic procedure often has cascading impacts on arrival, departure, and other procedures at the airport, as well as at other airports across the region. In this case, a few of the pre-2014 SIDs remain formally published, but these SIDs would never be used or assigned by air traffic controllers if the 2018 RNAV SIDs were vacated. This is because the pre-2014 SIDs conflict (go head-on) with current arrival procedures, which would create an unacceptable air traffic risk. Therefore, air traffic controllers would essentially be without published departure procedures and need to "manually" vector departures out of PHX airport (*see* paragraphs 17-18) until new procedures are implemented.

10. As a result, if the court vacated the departure procedures published in May 2018, air-traffic controllers could not simply begin assigning pre-existing departure procedures (*e.g.*, pre-2018 or pre-2014) to departing flights. The FAA would first have to take additional steps to publish new replacement procedures.

The process for publishing new procedures is complex and time consuming, and would need to be followed even if the replacement procedures are very similar to the vacated procedures.

Anticipated Timing and Cost of Implementing Replacement Procedures

11. If the FAA were to replace vacated departure procedures with new procedures, there would be a substantial investment of time and resources. Assuming that there are no delays of any kind, and assuming that all necessary personnel across the country work without interruption on this project, prioritizing it above all others, the Performance Based Navigation ("PBN") implementation process required by FAA Order 7100.41A could be completed in no fewer than 495 business days (2 years), often ranging between a 2 to 3 year timeline. (See paragraph 22 regarding the five phases involved in procedure development and implementation.) The minimum personnel time required for the procedure design and implementation process alone (again, under the same assumptions) would have an estimated cost of $1,317,468 including overtime payments. The following paragraphs provide a more detailed breakdown of these estimates.

12. The bulk of the time and cost of implementing those new procedures would involve the need to design the new procedures and then to train air traffic controllers on the new procedures. For just the procedure design process, the approximate cost would be $250,000. As for training, the training requirements are described in more detail in Chapter 4 of FAA Order 3120.4P, Change One. These changes considered here would require new training for approximately 191 controllers: 63 controllers at the Phoenix Terminal Radar Approach Control facility, another 58 controllers at Albuquerque Air Route Traffic Control Center, and approximately 70 controllers at other facilities in the region. The following estimates assume that training begins *immediately* after the design phase concludes, and that controllers are always available at the first opportunity to leave their stations in order to engage in several days' training. Needless to say, more time than this will likely be required in a real-world application. We estimate the minimum required time for training is:

a. 45 business days to develop the training, including creation of classroom lessons and lab problems, at an estimated cost of $108,195.
b. 192 business days to conduct the training itself, at an estimated cost of $959,273.

13. Publication of new departure procedures would still be subject to federal statutory requirements to consider their potential environmental impacts and the potential to affect historic properties and protected parkland. This process is estimated to take anywhere from 6 to 24 months depending on the extent of analysis, documentation and consultation that is legally required. Any community engagement would be part of the environmental review.

14. It is difficult to give a more precise estimate of the overall timeline without knowing the precise nature of the anticipated replacement procedures.

15. The FAA would incur additional time and expense in order to get the replacement procedures published in the *U.S. Terminal Procedures Publication* and therefore ready to be assigned to pilots. This publication is on a 56-day publication cycle that cannot be changed, as it includes procedures used nationwide by all users of air-traffic services. Inclusion of a procedure in this publication is not simply a matter of placing the chart into the new version of the publication. The FAA's own systems as well as the flight management systems of the airlines and other airspace users must be updated in advance to contain all the required information in order to use the RNAV procedure. Placing a new procedure in this publication typically requires a lead time of several months, because of the many internal required processes that precede publication. Once designed, a new air-traffic procedure must be evaluated for feasibility by the Flight Procedures Team (typically 30 days), evaluated by the Validation Team and Prioritization Team (typically 60 days), and must be further evaluated by Flight Inspection specialists and air-traffic experts who create the charts (a process that can take 6 months). After all of this, the FAA would place a procedure in a publication queue that is already backed up due to COVID-19 and has an estimated delay time of 24 months, and there is no guarantee that the FAA would be able to significantly expedite that timeline.

16. All in all, I estimate that publication of new procedures to replace the 2018 departure procedures, if vacated, would take a minimum of 24 to 30 months.

Interim Effects of Vacating the PHX 2018 Departure Procedures

17. During the period of time described above in which the FAA would conduct the process to develop and implement new RNAV procedures to replace those that were vacated, air traffic controllers would lack available RNAV procedures to assign to aircraft departing PHX to the east or west. Although the

FAA believes that it would still be able to manage traffic at PHX, safety would be greatly reduced, and the airport would experience significant delays as controllers would have to sequence aircraft differently than they are trained to do so today. Notably, without GPS-based RNAV departure procedures following automated headings, controllers would manage traffic "manually" by giving separate, individualized instructions to pilots. The potential for miscommunications with controllers and conflicts with other aircraft operating in this busy airspace would be increased, considerably increasing the burden on air traffic controllers to safely manage the airspace. As an air traffic control expert and manager, this is a situation that we would want to avoid at all costs. To maintain a safe airspace and flow of air traffic under these conditions would require at least a 50% reduction in capacity.

18. When traditional "Classic" procedures are utilized, the procedures are tied to ground-based navigational aids such as Very High Frequency Omnidirectional Range/Tactical Aircraft Controls ("VORTACs"), Very High Frequency Omnidirectional Ranges ("VORs"), and Non-Directional Beacons ("NDBs"). When aircraft are tracking to intercept a radial (*i.e.*, a line in space) on a VORTAC or VOR, wind affects the flight track of the aircraft, resulting in the flight tracks varying in location (*i.e.*, a splay). Additionally controllers must manually assign vectors to move aircraft for traffic and to get the aircraft on course to exit the terminal airspace. In comparison, when RNAV procedures are being used for these operations, appropriate separation between all these aircraft can be ensured. Absent that automatic separation, controllers would have to maintain separation individually for each operation, possibly by applying hard altitude restrictions and issuing individual orders for climbs and descents. Lack of RNAV departure procedures from PHX would result in safety being greatly reduced due to arrival and departure procedures not being procedurally separated. This would force the controller to manually vector each arriving and departing aircraft multiple times as it enters and exits the terminal airspace. The potential for conflict would be greatly increased and the controller and pilot workload would be far more complex.

19. All of these complications would have a "ripple effect," requiring that flights departing PHX to all parts of the national airspace system be spaced further apart, both when arriving and when departing, due to the increased controller workload. These effects would produce delays at PHX and could produce additional delays throughout the national airspace system.

20. The FAA was only able to avoid these serious impacts in its litigation with the City of Phoenix because it entered into a settlement agreement. Based in part on their agreement, this Court delayed issuing its mandate to allow the FAA to develop and implement replacement procedures as detailed in that agreement. In effect, the procedures were not immediately vacated. That situation differed from the current litigation because the challenged procedures in the *Phoenix* litigation were closer to Phoenix Airport, and did not affect any other flight procedures. Due to the location and complexity of the departure procedures that impact Scottsdale, vacating those procedures would require an entire redesign of the Phoenix airspace. Furthermore, due to the impact of the COVID-19 pandemic on agency functioning and efficiency, expedition of developing and implementing certain procedures is not as feasible.

Current Air Traffic Initiatives for the Phoenix Airspace

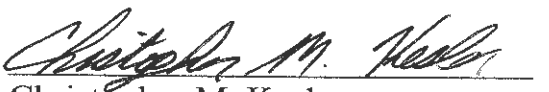
21. The FAA is currently in the process of taking the next step to further capitalize on NextGen PBN procedures to increase safety and efficiency. We are in the process of standing up a JO 7100.41A Core Work Group ("CWG") to develop new PBN procedures that include new arrivals and departures into PHX and other local airports. These new procedures will be further procedurally separated, increasing both safety and efficiency. We have requested a place holder in the Instrument Flight Procedure ("IFP") Gateway[1] for these new procedures. We have developed notional concepts ("Concept 1" and "Concept 2") that were presented in a public meeting near Scottsdale in 2019. These concepts would reduce potential noise exposure to Scottsdale residents. These concepts and others will be studied within the CWG to create the new procedure designs. Scottsdale will be notified during the review of any proposed procedure changes.

22. The PBN Implementation Process is broken into five phases: (1) Preliminary Activities; (2) Design Activities; (3) Development and Operational Preparation; (4) Implementation; and (5) Post-Implementation Monitoring and Evaluation. The FAA has already completed Phase One (Preliminary Activities) for PHX since the FAA has submitted the IFP Gateway request and completed the baseline analysis of current operations to develop a new concept of operation. Phase Two (Design Activities) is when the design process will begin with a larger

[1] The IFP Information Gateway is a centralized instrument flight procedures data portal, providing a single source for charts, IFP Production Plans, IFP Coordination, and IFP Documents. It is available at: https://www.faa.gov/air_traffic/flight_info/aeronav/procedures/.

Full Working Group (FWG) holding a formal project kickoff meeting. We currently have scheduled the FWG's kickoff meeting for late January 2022. A meeting invitation was sent on September 22, 2021. The FAA must go through all the phases to ensure the safest and most efficient airspace procedures in the Phoenix airspace. We would have been farther along in this process if the COVID-19 pandemic did not prevent travel and inhibit the Air Traffic Organization's ability to collaborate through in-person meetings, as is required for the procedure design process under FAA Order 7100.41A.

I declare under penalty of perjury that the foregoing is correct. Executed on October 21, 2021 at Phoenix, Arizona.



Christopher M. Kesler
Support Manager, Airspace and Procedures
Albuquerque District

Attachment A

SW-4, 27 FEB 2020 to 26 MAR 2020

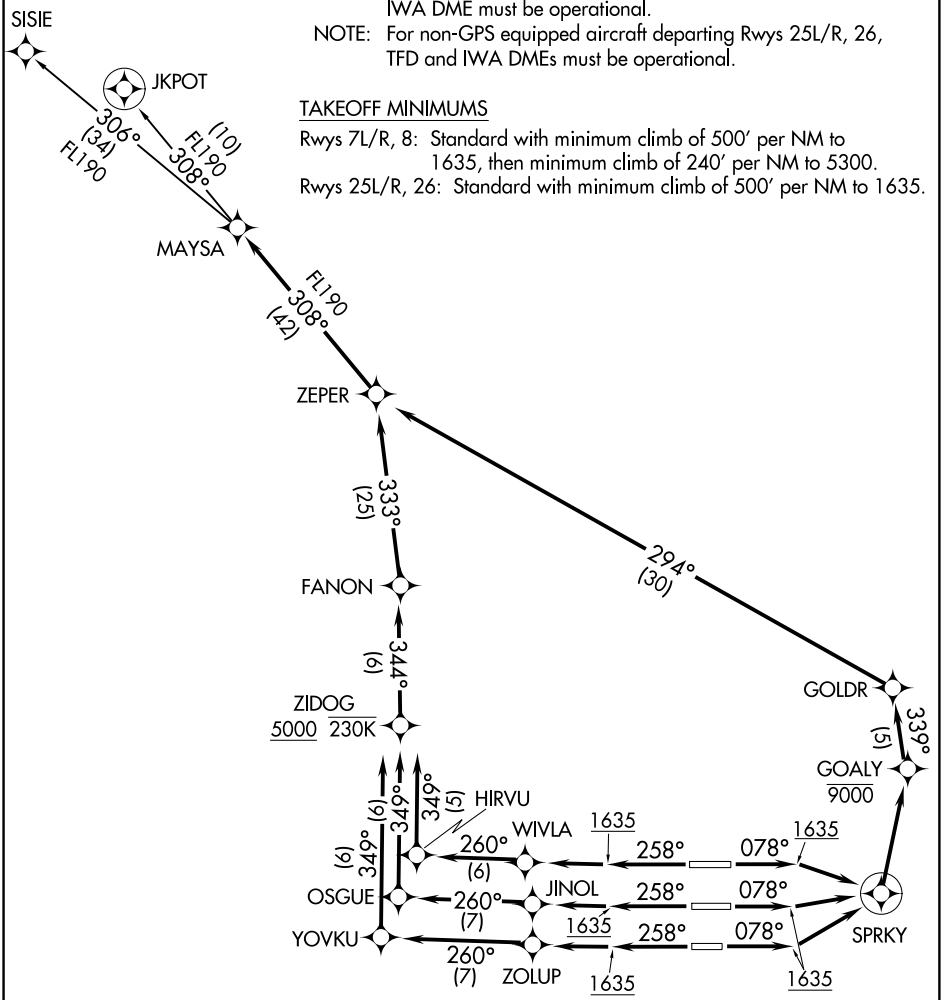
D-ATIS
127.575
CLNC DEL
118.1 269.2
CPDLC
GND CON
119.75 269.2 (NORTH)
132.55 269.2 (SOUTH)
PHOENIX TOWER
118.7 278.8 (Rwy 8-26)
120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON
119.2 281.45

TOP ALTITUDE: 8000

NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
NOTE: Aircraft filing over EED, HEC or PMD, use JKPOT TRANSITION, all others use SISIE TRANSITION.
NOTE: For non-GPS equipped aircraft departing Rwys 7L/R, 8, IWA DME must be operational.
NOTE: For non-GPS equipped aircraft departing Rwys 25L/R, 26, TFD and IWA DMEs must be operational.

TAKEOFF MINIMUMS

Rwys 7L/R, 8: Standard with minimum climb of 500′ per NM to 1635, then minimum climb of 240′ per NM to 5300.
Rwys 25L/R, 26: Standard with minimum climb of 500′ per NM to 1635.



NOTE: Chart not to scale.

(NARRATIVE ON FOLLOWING PAGE)

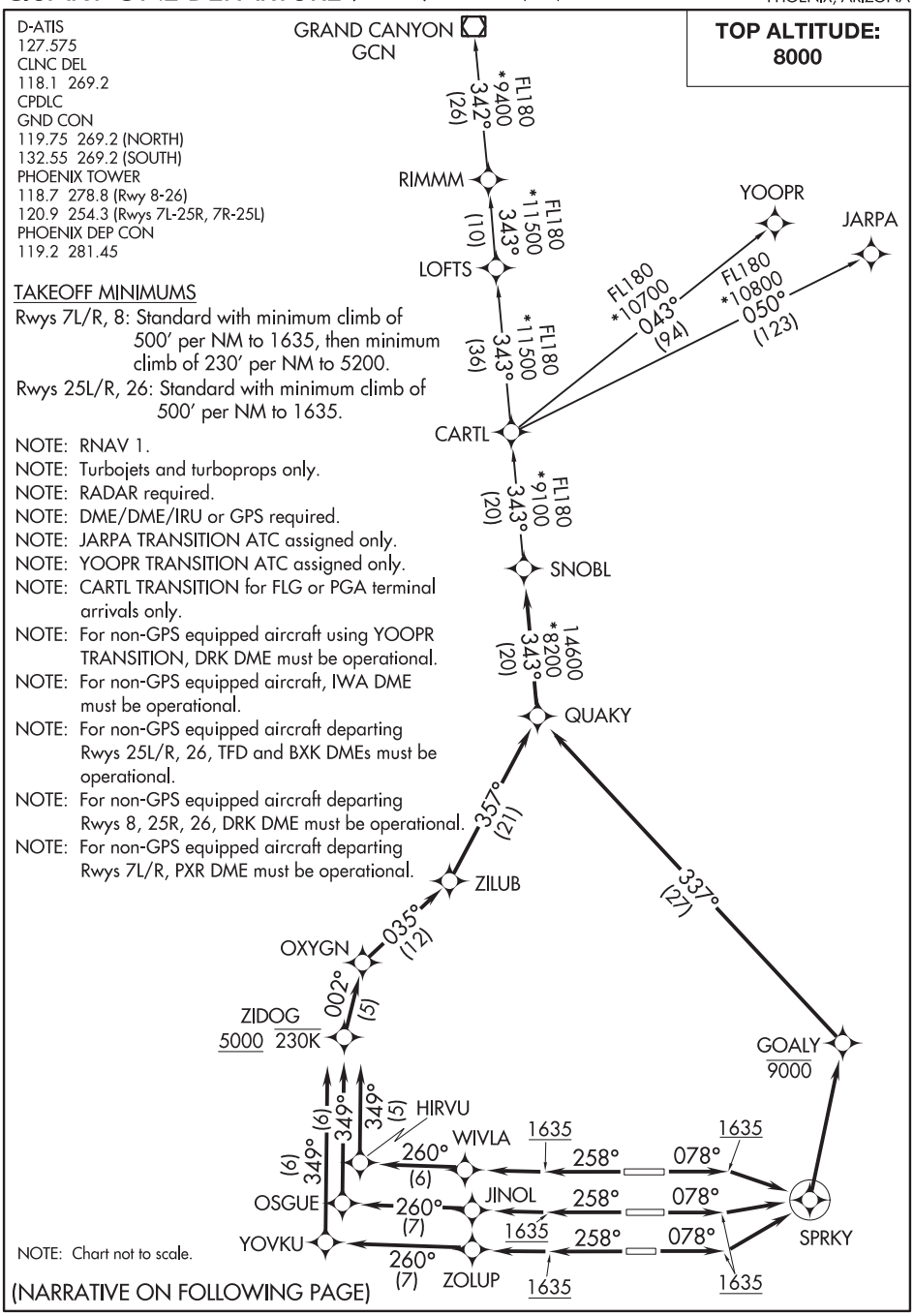
Resp.Add.21

(QUAKY1.QUAKY) 18144

QUAKY ONE DEPARTURE (RNAV)

AL-322 (FAA)

PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA



SW-4, 07 OCT 2021 to 04 NOV 2021

SW-4, 07 OCT 2021 to 04 NOV 2021

QUAKY ONE DEPARTURE (RNAV)

(QUAKY1.QUAKY) 24MAY18

PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)

(MRBIL1.MRBIL) 18144

MRBIL ONE DEPARTURE (RNAV)

AL-322 (FAA)

PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA

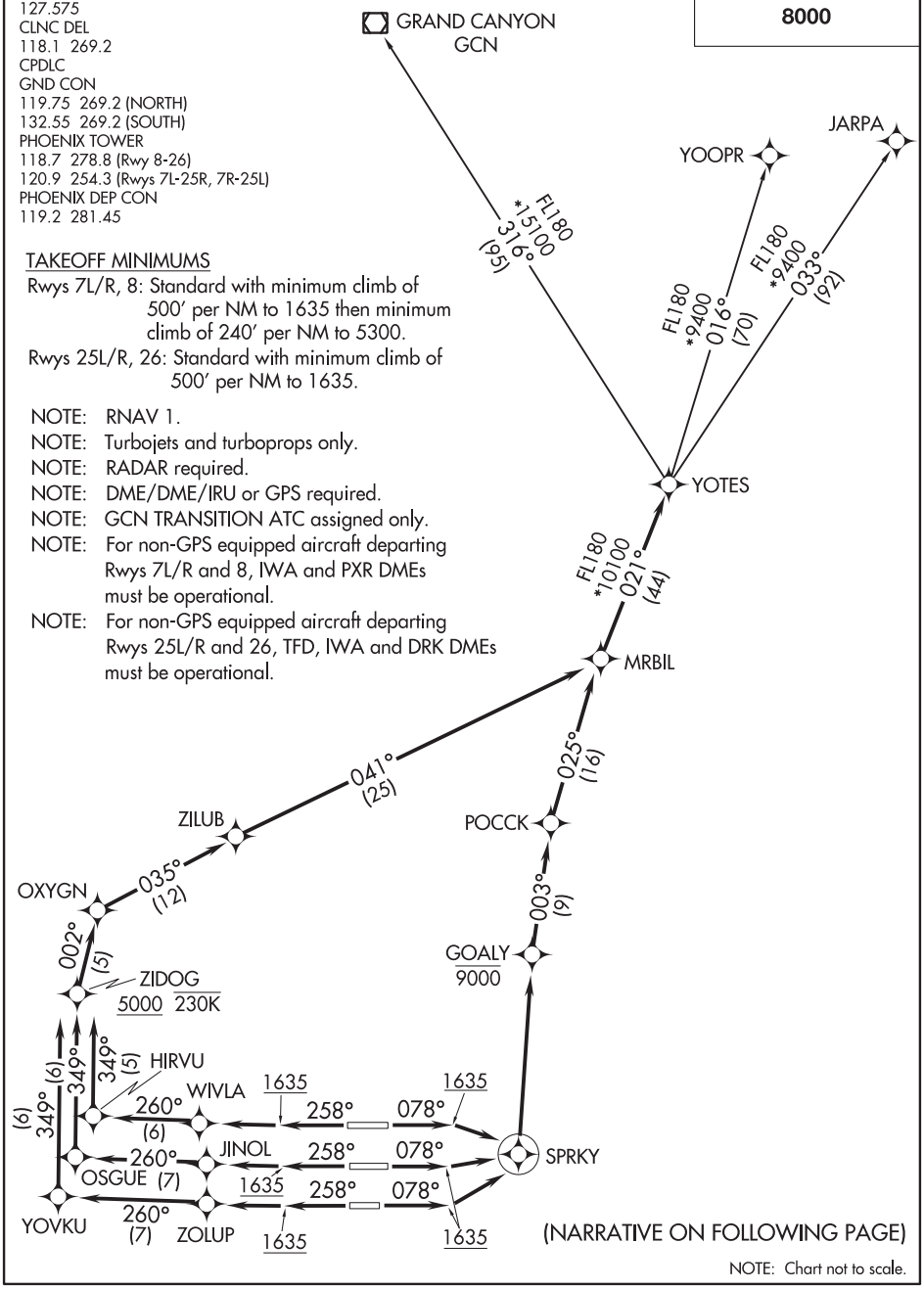
SW-4, 07 OCT 2021 to 04 NOV 2021

D-ATIS
127.575
CLNC DEL
118.1 269.2
CPDLC
GND CON
119.75 269.2 (NORTH)
132.55 269.2 (SOUTH)
PHOENIX TOWER
118.7 278.8 (Rwy 8-26)
120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON
119.2 281.45

TOP ALTITUDE: 8000

TAKEOFF MINIMUMS
Rwys 7L/R, 8: Standard with minimum climb of 500′ per NM to 1635 then minimum climb of 240′ per NM to 5300.
Rwys 25L/R, 26: Standard with minimum climb of 500′ per NM to 1635.

NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
NOTE: GCN TRANSITION ATC assigned only.
NOTE: For non-GPS equipped aircraft departing Rwys 7L/R and 8, IWA and PXR DMEs must be operational.
NOTE: For non-GPS equipped aircraft departing Rwys 25L/R and 26, TFD, IWA and DRK DMEs must be operational.

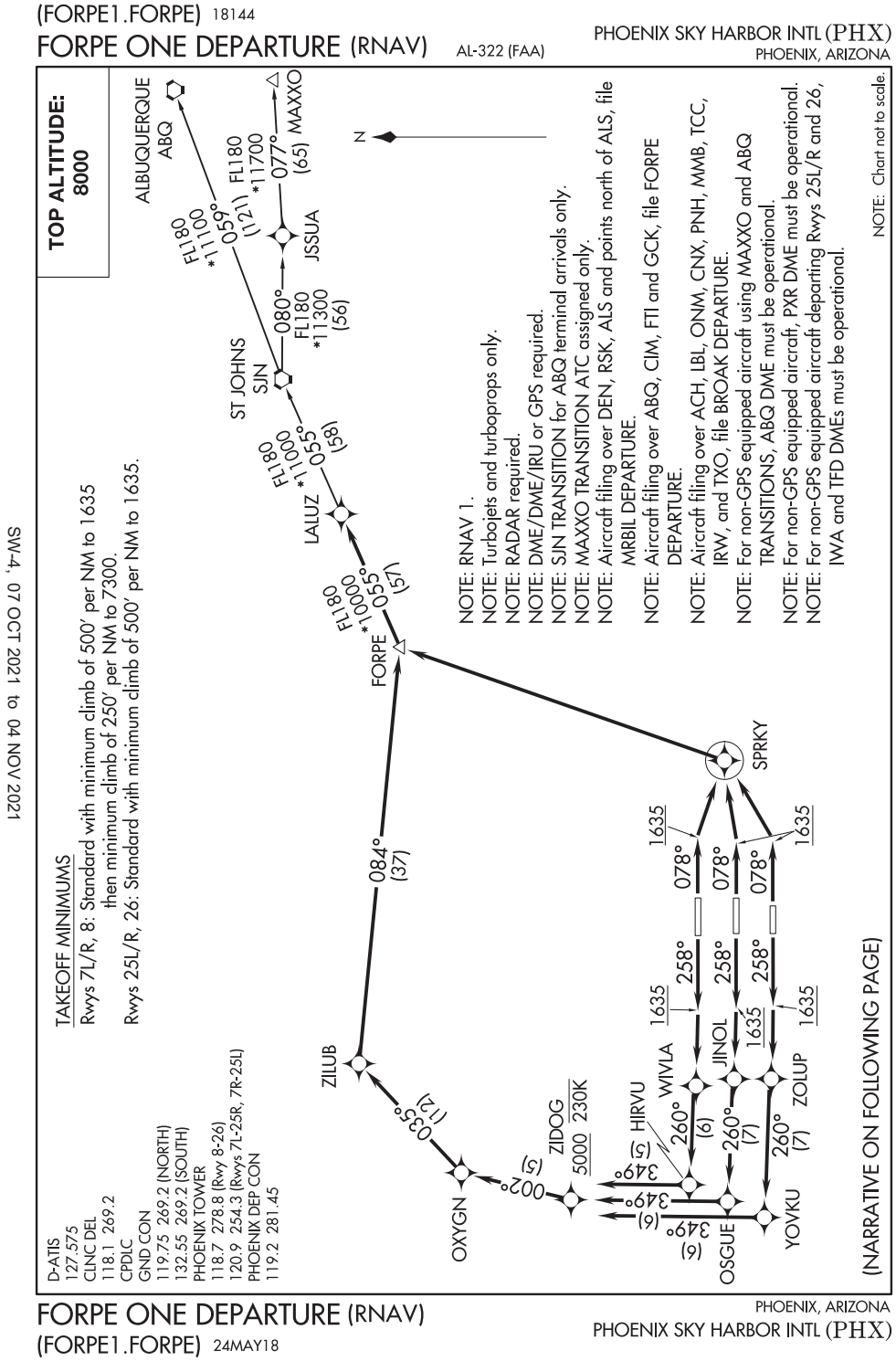


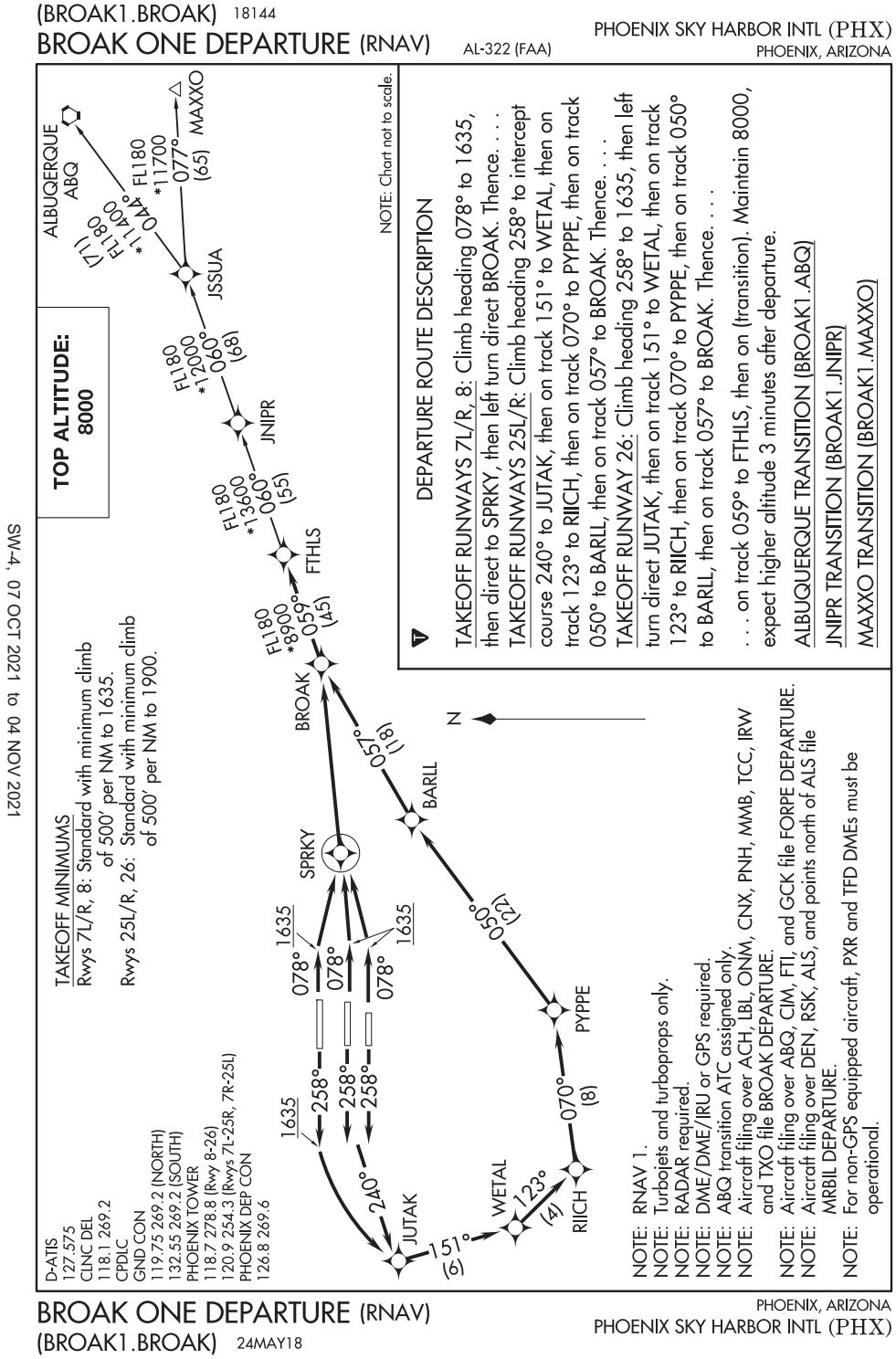
NOTE: Chart not to scale.

SW-4, 07 OCT 2021 to 04 NOV 2021

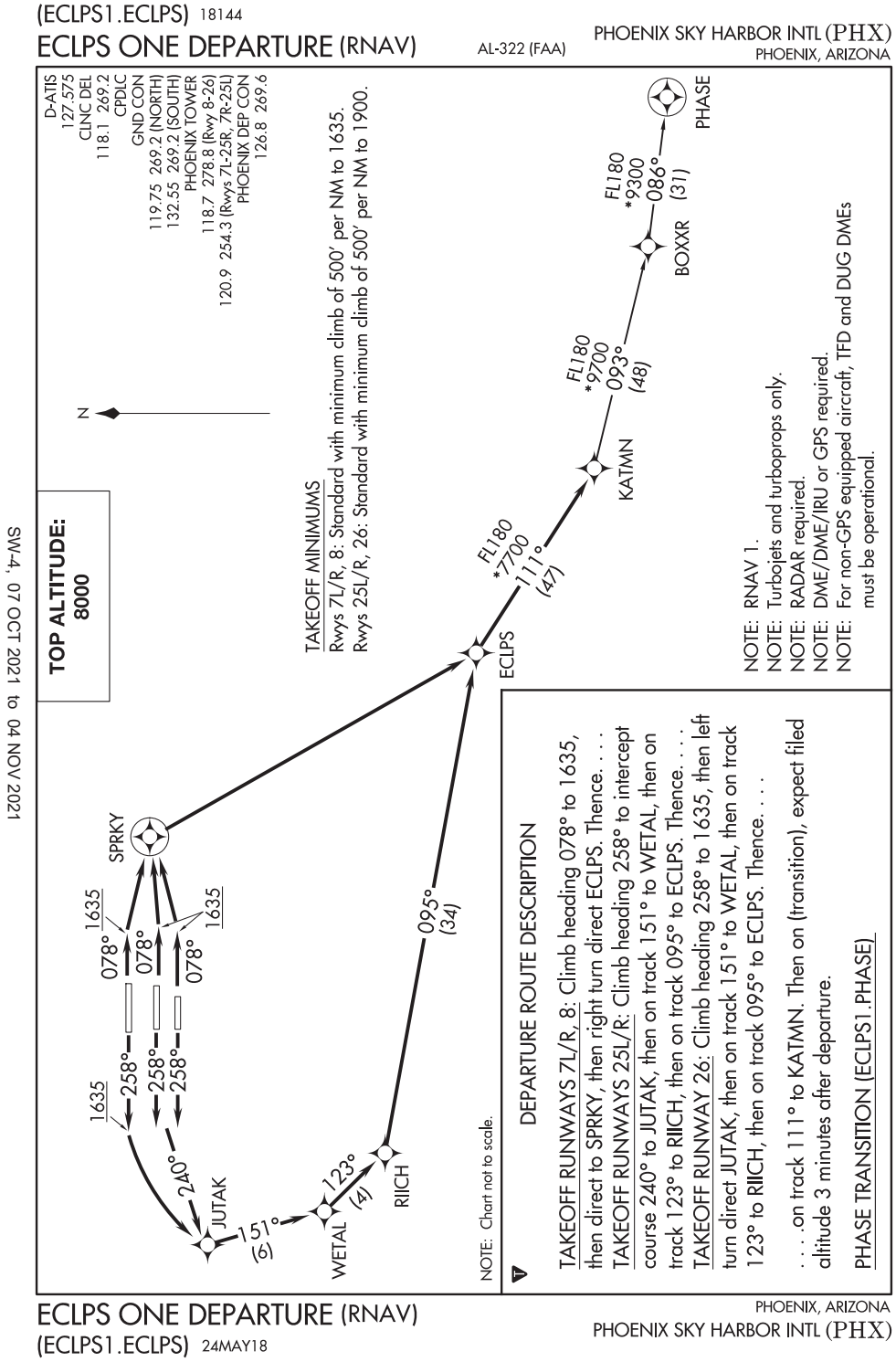
MRBIL ONE DEPARTURE (RNAV)
(MRBIL1.MRBIL) 24MAY18

PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)


(FORPE1.FORPE) 18144
FORPE ONE DEPARTURE (RNAV)
AL-322 (FAA)
PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA
TOP ALTITUDE: 8000
TAKEOFF MINIMUMS
Rwys 7L/R, 8: Standard with minimum climb of 500' per NM to 1635 then minimum climb of 250' per NM to 7300.
Rwys 25L/R, 26: Standard with minimum climb of 500' per NM to 1635.
D-ATIS 127.575
CLNC DEL 118.1 269.2
CPDLC
GND CON 119.75 269.2 (NORTH) 132.55 269.2 (SOUTH)
PHOENIX TOWER 118.7 278.8 (Rwy 8-26) 120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON 119.2 281.45
ALBUQUERQUE ABQ
FL180 *11100 059° (121)
FL180 *11700 077° (65) MAXXO
ST JOHNS SJN
080° FL180 *11300 (56) JSSUA
FL180 *11000 055° (58) LALUZ
FL180 *10000 055° (57) FORPE
084° (37)
ZILUB
035° (12)
OXYGN
002° (5)
ZIDOG 5000 230K
HIRVU
WIVLA
JINOL
ZOLUP
SPRKY
OSGUE
YOVKU
260° (6)
260° (7)
260° (7)
349° (5)
349° (6)
349° (6)
258°
078°
1635
NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
NOTE: SJN TRANSITION for ABQ terminal arrivals only.
NOTE: MAXXO TRANSITION ATC assigned only.
NOTE: Aircraft filing over DEN, RSK, ALS and points north of ALS, file MRBIL DEPARTURE.
NOTE: Aircraft filing over ABQ, CIM, FTI and GCK, file FORPE DEPARTURE.
NOTE: Aircraft filing over ACH, LBL, ONM, CNX, PNH, MMB, TCC, IRW, and TXO, file BROAK DEPARTURE.
NOTE: For non-GPS equipped aircraft using MAXXO and ABQ TRANSITIONS, ABQ DME must be operational.
NOTE: For non-GPS equipped aircraft, PXR DME must be operational.
NOTE: For non-GPS equipped aircraft departing Rwys 25L/R and 26, IWA and TFD DMEs must be operational.
NOTE: Chart not to scale
(NARRATIVE ON FOLLOWING PAGE)
SW-4, 07 OCT 2021 to 04 NOV 2021
SW-4, 07 OCT 2021 to 04 NOV 2021
FORPE ONE DEPARTURE (RNAV)
(FORPE1.FORPE) 24MAY18
PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)



SW-4, 07 OCT 2021 to 04 NOV 2021

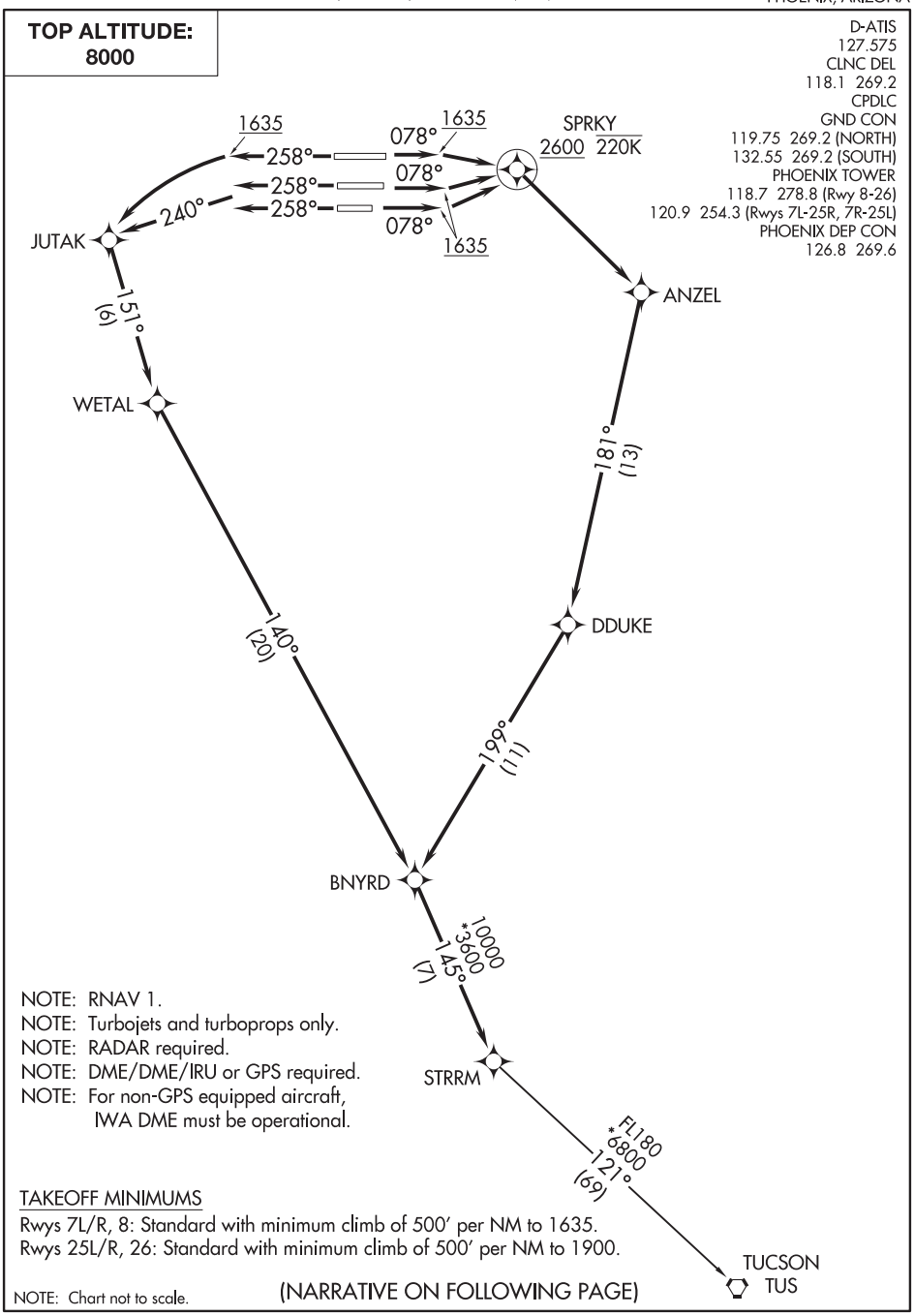

(ECLPS1.ECLPS) 18144
ECLPS ONE DEPARTURE (RNAV)
AL-322 (FAA)
PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA
D-ATIS 127.575
CLNC DEL 118.1 269.2
CPDLC
GND CON 119.75 269.2 (NORTH) 132.55 269.2 (SOUTH)
PHOENIX TOWER 118.7 278.8 (Rwy 8-26) 120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON 126.8 269.6
TOP ALTITUDE: 8000
TAKEOFF MINIMUMS
Rwys 7L/R, 8: Standard with minimum climb of 500' per NM to 1635.
Rwys 25L/R, 26: Standard with minimum climb of 500' per NM to 1900.
N
SPRKY
JUTAK
WETAL
RIICH
ECLPS
KATMN
BOXXR
PHASE
078° 1635
078°
078° 1635
258° 1635
258°
258°
240°
151° (6)
123° (4)
095° (34)
FL180 *7700 111° (47)
FL180 *9700 093° (48)
FL180 *9300 086° (31)
NOTE: Chart not to scale.
DEPARTURE ROUTE DESCRIPTION
TAKEOFF RUNWAYS 7L/R, 8: Climb heading 078° to 1635, then direct to SPRKY, then right turn direct ECLPS. Thence. . . .
TAKEOFF RUNWAYS 25L/R: Climb heading 258° to intercept course 240° to JUTAK, then on track 151° to WETAL, then on track 123° to RIICH, then on track 095° to ECLPS. Thence. . . .
TAKEOFF RUNWAY 26: Climb heading 258° to 1635, then left turn direct JUTAK, then on track 151° to WETAL, then on track 123° to RIICH, then on track 095° to ECLPS. Thence. . . .
. . . .on track 111° to KATMN. Then on (transition), expect filed altitude 3 minutes after departure.
PHASE TRANSITION (ECLPS1.PHASE)
NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
NOTE: For non-GPS equipped aircraft, TFD and DUG DMEs must be operational.
SW-4, 07 OCT 2021 to 04 NOV 2021
ECLPS ONE DEPARTURE (RNAV)
(ECLPS1.ECLPS) 24MAY18
PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)
SW-4, 07 OCT 2021 to 04 NOV 2021

(STRRM1.STRRM) 18144

STRRM ONE DEPARTURE (RNAV)

AL-322 (FAA)

PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA



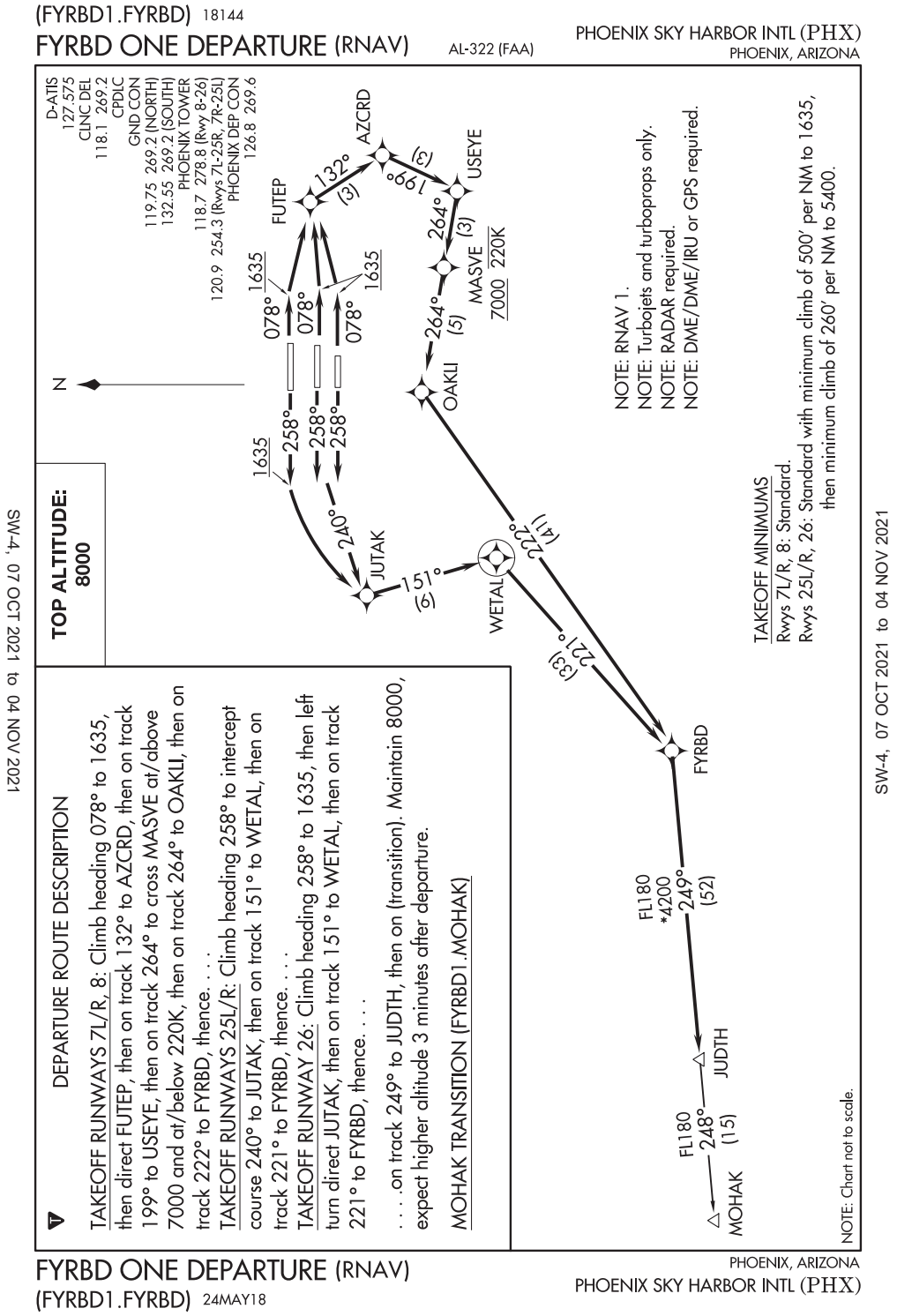
SW-4, 07 OCT 2021 to 04 NOV 2021

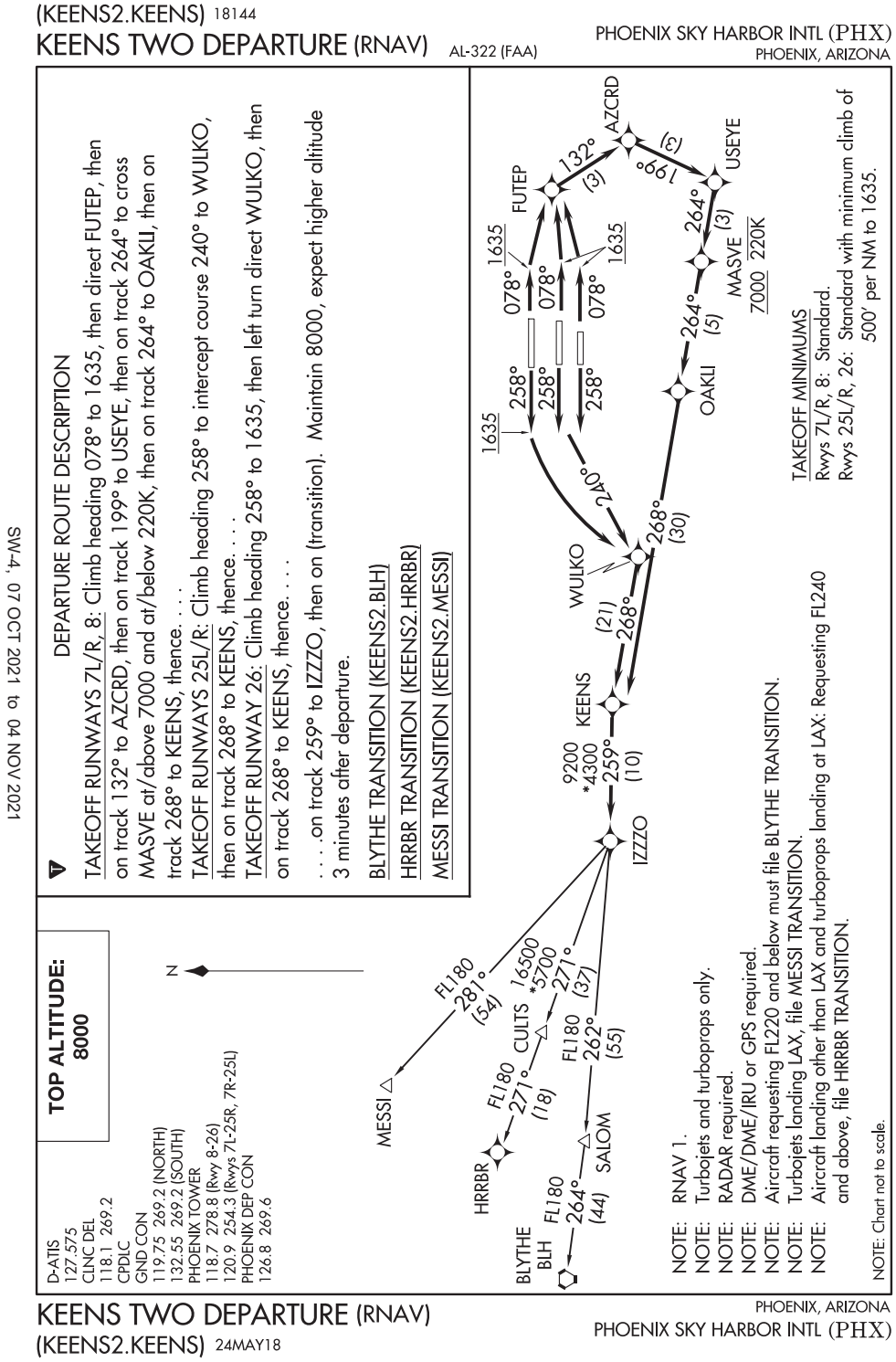
SW-4, 07 OCT 2021 to 04 NOV 2021

STRRM ONE DEPARTURE (RNAV)

(STRRM1.STRRM) 24MAY18

PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)


(FYRBD1.FYRBD) 18144
FYRBD ONE DEPARTURE (RNAV)
AL-322 (FAA)
PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA
D-ATIS 127.575
CLNC DEL 118.1 269.2
CPDLC
GND CON 119.75 269.2 (NORTH) 132.55 269.2 (SOUTH)
PHOENIX TOWER 118.7 278.8 (Rwy 8-26) 120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON 126.8 269.6
TOP ALTITUDE: 8000
DEPARTURE ROUTE DESCRIPTION
TAKEOFF RUNWAYS 7L/R, 8: Climb heading 078° to 1635, then direct FUTEP, then on track 132° to AZCRD, then on track 199° to USEYE, then on track 264° to cross MASVE at/above 7000 and at/below 220K, then on track 264° to OAKLI, then on track 222° to FYRBD, thence. . . .
TAKEOFF RUNWAYS 25L/R: Climb heading 258° to intercept course 240° to JUTAK, then on track 151° to WETAL, then on track 221° to FYRBD, thence. . . .
TAKEOFF RUNWAY 26: Climb heading 258° to 1635, then left turn direct JUTAK, then on track 151° to WETAL, then on track 221° to FYRBD, thence. . . .
. . . .on track 249° to JUDTH, then on (transition). Maintain 8000, expect higher altitude 3 minutes after departure.
MOHAK TRANSITION (FYRBD1.MOHAK)
N
1635
078°
078°
078°
1635
FUTEP
132°
(3)
AZCRD
199°
(3)
USEYE
264°
(3)
MASVE
7000 220K
258°
258°
258°
240°
JUTAK
151°
(6)
WETAL
264°
(5)
OAKLI
222°
(41)
221°
(33)
FYRBD
FL180
*4200
249°
(52)
JUDTH
FL180
248°
(15)
MOHAK
NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
TAKEOFF MINIMUMS
Rwys 7L/R, 8: Standard.
Rwys 25L/R, 26: Standard with minimum climb of 500' per NM to 1635, then minimum climb of 260' per NM to 5400.
NOTE: Chart not to scale.
SW-4, 07 OCT 2021 to 04 NOV 2021
FYRBD ONE DEPARTURE (RNAV)
(FYRBD1.FYRBD) 24MAY18
PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)
SW-4, 07 OCT 2021 to 04 NOV 2021


(KEENS2.KEENS) 18144
KEENS TWO DEPARTURE (RNAV)
AL-322 (FAA)
PHOENIX SKY HARBOR INTL (PHX)
PHOENIX, ARIZONA
SW-4, 07 OCT 2021 to 04 NOV 2021
DEPARTURE ROUTE DESCRIPTION
TAKEOFF RUNWAYS 7L/R, 8: Climb heading 078° to 1635, then direct FUTEP, then on track 132° to AZCRD, then on track 199° to USEYE, then on track 264° to cross MASVE at/above 7000 and at/below 220K, then on track 264° to OAKLI, then on track 268° to KEENS, thence. . . .
TAKEOFF RUNWAYS 25L/R: Climb heading 258° to intercept course 240° to WULKO, then on track 268° to KEENS, thence. . . .
TAKEOFF RUNWAY 26: Climb heading 258° to 1635, then left turn direct WULKO, then on track 268° to KEENS, thence. . . .
. . . .on track 259° to IZZZO, then on (transition). Maintain 8000, expect higher altitude 3 minutes after departure.
BLYTHE TRANSITION (KEENS2.BLH)
HRRBR TRANSITION (KEENS2.HRRBR)
MESSI TRANSITION (KEENS2.MESSI)
TOP ALTITUDE: 8000
D-ATIS 127.575
CLNC DEL 118.1 269.2
CPDLC
GND CON 119.75 269.2 (NORTH) 132.55 269.2 (SOUTH)
PHOENIX TOWER 118.7 278.8 (Rwy 8-26) 120.9 254.3 (Rwys 7L-25R, 7R-25L)
PHOENIX DEP CON 126.8 269.6
MESSI
HRRBR
BLYTHE BLH
CULTS
SALOM
KEENS
IZZZO
WULKO
FUTEP
AZCRD
USEYE
MASVE
OAKLI
FL180 281° (54)
FL180 271° (18)
FL180 264° (44)
16500 *5700 271° (37)
FL180 262° (55)
9200 *4300 259° (10)
1635
258°
078°
132° (3)
199° (3)
264° (3)
240°
268° (21)
268° (30)
264° (5)
7000 220K
TAKEOFF MINIMUMS
Rwys 7L/R, 8: Standard.
Rwys 25L/R, 26: Standard with minimum climb of 500' per NM to 1635.
NOTE: RNAV 1.
NOTE: Turbojets and turboprops only.
NOTE: RADAR required.
NOTE: DME/DME/IRU or GPS required.
NOTE: Aircraft requesting FL220 and below must file BLYTHE TRANSITION.
NOTE: Turbojets landing LAX, file MESSI TRANSITION.
NOTE: Aircraft landing other than LAX and turboprops landing at LAX: Requesting FL240 and above, file HRRBR TRANSITION.
NOTE: Chart not to scale.
SW-4, 07 OCT 2021 to 04 NOV 2021
KEENS TWO DEPARTURE (RNAV)
(KEENS2.KEENS) 24MAY18
PHOENIX, ARIZONA
PHOENIX SKY HARBOR INTL (PHX)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Final Brief and Addendum for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 24, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dina B. Mishra
DINA B. MISHRA
Counsel for Respondents