[ORAL ARGUMENT NOT SCHEDULED]

No. 17-1054

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,
SANTA MONICA AIRPORT ASSOCIATION, INC.,
BILL'S AIR CENTER, INC.,
KIM DAVIDSON AVIATION, INC.,
REDGATE PARTNERS, LLC, AND
WONDERFUL CITRUS LLC,
Petitioners,

v.

MICHAEL P. HUERTA, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

Petition for Review of an Order of the Federal Aviation Administration

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PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND PETITIONERS' MOTION FOR A STAY

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INTRODUCTION

Under FRAP 27(a)(3), Petitioners respond to Respondent's Motion to Dismiss. Respondent asserts that there is no Federal Aviation Administration ("FAA") order subject to review under 49 U.S.C. § 46110. Respondent is wrong. The settlement agreement between FAA and the City of Santa Monica ("City") (Exhibit 1) is a final order subject to challenge in this Court. Further, the subsequent issuance of a consent decree by the U.S. District Court for the Central District of California does not deprive this Court of its section 46110 jurisdiction, nor does it obligate Petitioners – not parties to Central District proceedings – to seek remedies in that court.

Petitioners also move for a stay. In reaching its agreement with the City, and thereby relieving the City from grant- and deed-based obligations that, inter alia, require that it continue operating SMO as an airport in perpetuity and maintain its sole runway at its full length, FAA disregarded mandatory statutory and regulatory prerequisites, including specific Congressional direction as to the steps that must be taken before an airport sponsor may be released from obligations accepted in return for federal monies and properties. As a result, FAA lacked the authority to approve the releases that are the foundation of the settlement agreement, and accordingly the settlement agreement is invalid.

The City now imminently intends to shorten the SMO runway from 4,973 feet to 3,500 feet, thereby effectively eliminating most jet operations at SMO. FAA has previously, repeatedly, made clear that such an action would harm not just Petitioners and other SMO tenants and users, which would not be able to utilize a runway reduced in length by 30%, but also would have region-wide irreparable adverse impacts, as jet operations are diverted to other, already impacted, facilities.

Jet aircraft have operated at SMO for more than fifty years, and neither FAA nor the City will be harmed if such operations continue during the pendency of this Court's review. As Petitioners demonstrate, they have a substantial likelihood of success on the merits, yet the settlement agreement does not require further FAA approval, and thus the City can defeat the purposes of this proceeding by taking action to shorten the runway and eliminate most jet operations before this Court can determine if the underlying order exceeded FAA's authority.

Accordingly, Petitioners request that this Court under FRAP 18(a)(2) enter a stay prohibiting FAA from implementing its final order so far as it authorizes the City to shorten the runway at SMO, and further enjoin the City – either as an intervenor or as a party to the underlying order and within the reach of this Court[1]

[1] The City filed a motion to intervene on February 28, 2017.

– to maintain the current full operational length of the runway at SMO during the pendency of this proceeding.

PARTIES

The National Business Aviation Association, Inc. ("NBAA"), a District of Columbia corporation, is the leading voice for companies that operate aircraft in support of their business or are otherwise involved in business aviation. NBAA's 11,000 members can and do make use of SMO and include Petitioners Wonderful and Davidson.

The Santa Monica Airport Association, Inc. ("SMAA"), a California corporation, since 1967 has had the purpose of promoting general aviation at SMO and across the country. Its members include most of the aircraft owners and operators based at SMO and many others who utilize SMO, including Petitioners Wonderful, Bill's, and Davidson.

Bill's Air Center, Inc. ("Bill's") a California corporation, has operated an aircraft inspection and repair facility at SMO since 1989.

Kim Davidson Aviation, Inc. ("Davidson"), a California corporation, is an FAA-certified repair station and factory authorized Cirrus Aircraft service center that has been located at SMO since 1982.

Redgate Partners, LLC ("Redgate"), a California limited liability company, and its subsidiaries engage in commercial vehicle sales, leasing, financing and

repair. Redgate bases aircraft at SMO to enable employee travel to multiple destinations across the western United States.

Wonderful Citrus LLC ("Wonderful"), a Delaware limited liability company, is the largest vertically integrated citrus business in the United States. For more than fifteen years, Wonderful has relied on SMO as a vital hub for employee travel to multiple destinations across the western United States.

FACTS

SMO has more than 100 years of history. For decades it was home to Douglas Aircraft, which built World War II transports and bombers and later airliners there. Jets routinely have operated at SMO for more than 50 years. Nestle v. City of Santa Monica, 496 P.2d 480 (Cal. 1972). SMO is designated as a "reliever" by FAA, accommodating general aviation that otherwise would utilize Los Angeles International Airport ("LAX"). 49 U.S.C. § 47102(23). "The airport's reliever role with respect to high performance jet aircraft is especially important to LAX because those are the aircraft types that could and would otherwise use LAX." Exhibit 2, at 2. SMO currently can accommodate 90% of general aviation aircraft. Id. In 2016, there were approximately 88,000 operations at SMO; more than 17,000 involved jets. Exhibit 3, at 2, 4.

Despite being the steward of this valuable asset, for decades the City has sought means to restrict operations at SMO or to close SMO. A recent gambit – a

unilateral ban on larger jets at SMO – was rebuffed by this Court, which concluded that only FAA could regulate safety and that FAA had more than adequately documented that SMO was safe. City of Santa Monica v. FAA, 631 F.3d 550 (D.C.Cir. 2011). Despite the City's efforts to curtail the airport, SMO remains a vibrant public-use airport – and an irreplaceable resource. The Red Cross recently partnered with SMAA to conduct an exercise demonstrating how SMO would be a gateway for relief efforts in the event of an earthquake or other natural disaster. Exhibit 4.

The background of the settlement agreement extends back to World War II. SMO was leased to the federal government for military use. Afterwards, a much-improved runway-taxiway complex was returned to the City via a 1948 deed under the Surplus Property Act ("SPA"). Exhibit 5. Under the SPA, obligations were imposed upon the City – most importantly, that it operate SMO as an airport in perpetuity.[2] FAA periodically has re-affirmed that perpetual obligation (Exhibit 2, at 55; Exhibit 6, at 3). In 2013, the City initiated litigation under the Quiet Title Act (28 U.S.C. § 2409a) seeking a declaration that its obligations were not perpetual and had expired (C.D.Cal. docket no. 13-8046). FAA opposed the claim.

[2] Approximately 550 airports have similar deed obligations, including both general aviation and commercial service airports. FAA Order 5190.2R (April 30, 1990).

Prior to the settlement agreement, that litigation was ongoing, with a trial scheduled later in 2017.

The City also has accepted grants from FAA pursuant to the Airport Improvement Program (49 U.S.C. § 47107). They are accompanied by similar obligations, and typically endure for 20 years. The City last received grant funds in 2003. In an administrative proceeding initiated in 2014 by some of the same parties to this proceeding (FAA docket no. 16-14-04), FAA ruled that the acceptance of those funds extended SMO's grant-based obligations through 2023. The City sought review of that decision (Ninth Circuit docket no. 16-72827), which was being briefed prior to the settlement agreement.

On January 28, 2017, FAA and the City entered into the settlement agreement. Negotiations between the two entities were conducted in complete secrecy, with no prior notice and no opportunity for stakeholder participation or public comment. The agreement immediately was docketed in the Central District with a request for a consent decree; the court speedily approved that request on February 1, 2017 and closed the case. Exhibits 7-8. Petitioners were not parties to the Central District proceeding.[3]

[3] Davidson and Bill's requested but were denied leave to intervene, on the premise – erroneous, given subsequent developments – that FAA would adequately represent their interests. Exhibit 9.

JURISDICTION

Petitioners' timely petition was filed on February 13, 2017, pursuant to 49 U.S.C. § 46110, which enables the review of FAA final orders in this Court. As discussed below, the settlement agreement comprises an FAA final order, and the Central District consent decree does not divest this Court of jurisdiction.

ARGUMENT

I. FAA'S MOTION TO DISMISS SHOULD BE DENIED

1) The Settlement Agreement Is a Final FAA Order

FAA argues that the settlement agreement is not a final order because it does not "determine rights or obligations or give rise to legal consequences." Motion at 6, quoting Safe Extensions v. FAA, 509 F.3d 593, 598 (D.C.Cir. 2007). But just as in Safe Extensions, that claim "is absurd." Id. The agreement specifies that its purpose is "to resolve the disputes … pertaining to the operation of Santa Monica Municipal Airport." Exhibit 1, at 6. Although the agreement's effectiveness was conditioned upon the entry of a consent decree (e.g., sections VIII(J) and (L)), the Central District promptly did so on a pro forma basis and the agreement entered full effect before the current petition was filed.

The settlement agreement makes clear that it has ongoing consequences and that the decree was only a triggering device: Exhibit 1, at 9 ("this Agreement upon entry of the Consent Decree shall resolve all claims by the Parties"). Exemplary

terms include: section I (terms of the agreement shall survive the expiration of the decree); section V (future curfew application would not be governed by agreement; no mention of decree); section VI (committing City to operate SMO consistent with the agreement, not decree); section VIII(A) (reserving to parties right to judicially enforce agreement, not decree); section VIII(B) (limiting Central District's decree-based injunctive authority to specified sections of agreement).

FAA identifies no authority for the proposition that a settlement agreement is not a final order. There is none. FAA cites Village of Bensenville v. FAA, 457 F.3d 52 (D.C.Cir. 2006), but it concerned a letter of intent – "an odd creature of statute" – which set a schedule for possible funding but did not actually obligate FAA to do anything. Id. at 68. In contrast, the settlement agreement consummated FAA's decision-making; concluded litigation; released existing obligations; created City rights; mandated that FAA seek a consent decree; and since February 1, 2017 has been in full effect. No further FAA or third-party action is required. Id. See also Safe Extensions, 509 F.3d at 598 (FAA advisory circular had "clear legal consequences of enormous significance").

Generally, an expansive interpretation is given to an "order" under section 46110. City of Dania Beach v. FAA, 485 F.3d 1181, 1187 (D.C.Cir. 2007). Other courts have recognized FAA settlement agreements to comprise final orders. Tur v. FAA, 104 F.3d 290, 293 (9th Cir. 1997) ("the settlement agreement Tur entered

into with FAA constitutes an order");[4] Pucciariello v. U.S., 116 Fed. Cl. 390, 407 (2014) (complaint alleging FAA breach of settlement agreement held to be within scope of section 46110). Notably, in Pucciariello, FAA endorsed jurisdiction in an appellate court under section 46110.

Moreover, this Court has established that agency action which causes the very effects that petitioners claim exceed agency authority are final and reviewable; an agency may not avoid judicial review by self-serving choice of form. NRDC v. EPA, 22 F.3d 1125, 1132-33 (D.C.Cir. 1994). See also United Municipal Distributors Group v. FERC, 732 F.2d 202, 206-07 (D.C.Cir. 1984) (settlement bringing administrative proceeding to close was reviewable); Alabama Power v. Department of Energy, 307 F.3d 1300, 1311 (11th Cir. 2002) ("the Department has already done the damage by entering into the unlawful settlement agreement"). That reasoning applies here with equal force. As discussed in section II, FAA did not comply with legal mandates in entering into a final order in the form of the settlement agreement – and that is the basis for Petitioners' motion for a stay that would prevent the shortening of the SMO runway.

[4] FAA acknowledges Tur – Motion at, 8 n.2 – but seeks to distinguish it because no consent decree was issued. But as discussed below, the FAA-City consent decree does not deprive the non-party Petitioners of their rights.

Other courts have reached similar conclusions. Bell v. New Jersey, 461 U.S. 773, 779 (1983) ("[o]ur cases have interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process"); Salt Pond Associates v. Army Corps of Engineers, 815 F.Supp. 766, 773 (D.Del. 1993) (agency position was definitive and had immediate impacts; petition filed after administrative process completed); Texas-New Mexico Power v. Texas Industrial Energy Consumers, 806 S.W.2d 230, 231 (Tex. 1991); Basic Research v. FTC, 807 F.Supp.2d 1078, 1090-91 (D.Utah 2011); Defenders of Wildlife v. EPA, 688 F.Supp. 1334, 1344 (D.Minn. 1988), affirmed in part, reversed in part on other grounds, 882 F.2d 1294 (8th Cir. 1989).

2) The Consent Decree Does Not Deprive This Court of Jurisdiction

FAA further asserts that Petitioners' proper remedy is to challenge the consent decree in the Central District. However, the cases invoked (Motion, at 7) stand for only the uncontroversial proposition that a consent decree is appealable. They do not establish that FAA may deprive this Court of its jurisdiction under section 46110 via a consent decree in another forum concerning its relationship with a third party. Indeed, it is clear that FAA can do no such thing.

For a similar matter, both the Seventh Circuit and a district court were unequivocal that a consent decree did not override section 46110. Suburban O'Hare Commission v. Dole, 603 F.Supp. 1013, 1027 (N.D.Ill. 1985) ("assertion

of the defendants' Consent Decree violations cannot deprive the Court of Appeals of its exclusive jurisdiction conferred by statute to review the FAA decision at issue in this case"); Suburban O'Hare Commission v. Dole, 787 F.2d 186, 192-93 (7th Cir. 1986) ("[i]f a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals"). In both cases, FAA again endorsed jurisdiction in the appellate court.

Similar arguments to that now proffered by FAA have been rejected by other courts. Navajo Nation v. San Juan County, 2015 WL 1137587, *3 (D.Utah 2015) (parties to a consent decree may not challenge it in a separate action, but the doctrine does not apply to non-parties; the "notion that the court in control of the [consent decree] retains exclusive jurisdiction over its subject matter, rendering any action touching its concerns 'collateral'" is "faulty"); U.S. v. Alex. Brown & Sons, 169 F.R.D. 532, 540 n.4 (S.D.N.Y. 1996) (non-parties to consent decree not bound by it and not precluded from separately litigating validity of settlement).

Nor could Petitioners raise the same issues before the Central District that they raise here. An objection to a consent decree must address whether it is "fair, adequate, and reasonable" – Pigford v. Glickman, 206 F.3d 1212, 1215 (D.C.Cir. 2000) – not whether the agency complied with governing law. Nor is the Central District likely to allow Petitioners to intervene and object to the consent decree.

As FAA has acknowledged, the Central District summarily denied a third party request to intervene and object as untimely (Motion at 5, Exhibit 10); two Petitioners previously were denied intervention (Exhibit 9); and the consent decree has been issued and the case closed (Exhibits 7-8). Any objection likely would be futile, and FAA's position would leave Petitioners without any remedy. FAA should not be permitted to "whipsaw" Petitioners with irreconcilable jurisdictional arguments. Vandesande v. U.S., 673 F.3d 1342, 1351 (Fed. Cir. 2012).[5]

II. THIS COURT SHOULD ISSUE A STAY

FRAP 18 provides the foundation for this motion. There is ample basis to deem impracticable a request that FAA stay its own hand. The settlement agreement mandates FAA to defend its terms, and thus proactively aid the City in shortening the SMO runway (section VIII(f)). FRAP 18(a)(1) "is not intended to apply in a case where the application would be an exercise of futility." Commonwealth-Lord Joint Venture v. Donovan, 724 F.2d 67, 68 (7th Cir. 1983).

[5] FAA's position also would justify review of the settlement agreement by this Court under the collateral order doctrine. DRG Funding v. HUD, 76 F.3d 1212, 1220 (D.C.Cir. 1996) (Ginsburg, concurring).

Nevertheless, Petitioners made such a request to FAA – and were rebuffed. Exhibits 11-12.[6]

The four-factor test that must be met for this Court to issue a stay of an agency order is well-established and tracks the requirements for an injunction. Cuomo v. NRC, 772 F.2d 972, 974 (D.C.Cir. 1985); Local Rule 18(a)(1). Petitioners respectfully submit that their motion fulfills all four factors and accordingly a stay should issue prohibiting FAA from implementing its final order so far as it authorizes the City to shorten the runway at SMO.

1) Success on the Merits

Petitioners are likely to prevail on the merits. Even a cursory review of the actions taken – and not taken – by FAA finds that the agency did not comply with requirements both basic and mandatory, and thus the settlement agreement is invalid – as would be any actions taken in reliance upon it.

An agency's authority to settle cases "does not include license to agree to settlement terms that would violate the civil laws governing the agency. … The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality." Executive Business Media v. Department of Defense, 3

[6] NBAA also asked the City to voluntarily refrain from implementing the agreement; the City Council instead unanimously resolved to expedite its implementation. Exhibits 13-14.

F.3d 759, 762 (4th Cir. 1993). See also International Association of Firefighters, v. City of Cleveland, 478 U.S. 501, 526 (1986) (parties may not "agree to take action that conflicts with or violates the statute upon which the complaint was based"); National Audubon Society v. Watt, 678 F.2d 299, 308 n.18 (D.C.Cir. 1982) ("the general authority of the Justice Department over the conduct of … litigation … does not compensate for the Secretary's lack of authority"); Cleveland County Association v. County Board of Commissioners, 142 F.3d 468, 478 (D.C.Cir. 1998). An agency which violates its regulations may be enjoined. Chrysler v. Schelsinger, 412 F.Supp. 171, 177 (D.Del. 1976), vacated on other grounds 441 U.S. 281 (1979).

a) FAA Failed to Provide for Public Notice and Comment

FAA is statutorily mandated to provide public notice of – and an opportunity for comment on – any release of airport obligations. 49 U.S.C. §§ 47107(h)(2), 47151(d), 47153(c). See also Airport Compliance Manual, FAA Order 5190.6B (September 30, 2009), §§ 22.22(d), 22.31(f). Congress specified that this requirement "is effective for any waiver issued on or after the date of enactment" and "[a]fter the FAA gives notice under this section, it should consider any comments it receives." H. Rpt. 106-513, at 157 (March 8, 2000). FAA failed to provide any public notice or opportunity for comment on the release of SMO's grant- and deed-based obligations. Seaboard World Airlines v. Gronouski, 230

F.Supp. 44, 47 (D.D.C. 1964) ("plaintiff does have a right … to certain procedural safeguards before the [agency] can effect a new policy which so substantially affects the relationship between the carrier and the agency"); Sugar Cane Growers v. Veneman, 289 F.3d 89, 96 (D.C.Cir. 2002) ("an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect"); 5 U.S.C. § 706(2)(D).

b) FAA Failed to Show a Benefit for Aviation

By statute and regulation, an airport may be released from obligations only if "necessary to protect or advance the interests of the United States in civil aviation." 14 C.F.R. § 155.3(a)(2). See also 49 U.S.C. § 47153(a)(2); Exhibit 15, at 6. Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1195 (8th Cir. 2001), concluded that in practice a "net benefit" to aviation is required – a standard that FAA routinely cites in guidance. Order 5190.6B, §§ 22.4(a)(3), 22.27(d); Letter from Woodie Woodward to Richard Mussett (April 10, 2002) (Exhibit 16).

When the statute originally was under consideration, a Congressman asked about a scenario akin to that now presented by SMO – and an attorney for FAA's predecessor emphasized that a release would not be easily granted:

> Rep. George Sadowski: "[S]uppose the municipality finds it has an airport on its hands that is costing some money to keep up, they do not feel that they want to keep it up any further, and they would like to use it for a playground or a park, or some other municipal purpose, and they would like to be released from any obligation as far as that land is concerned from maintaining it for airport purposes, could the

> Administrator of the CAA convey this airport over to the city for other purposes than airport purposes?"
>
> Aubrey Edey, Jr., CAA: "No; they could not, unless he made a determination that there was absolutely no need for that airport to continue in operation as an airport. … I cannot imagine an Administrator of the CAA, who is interested in the furtherance of civil aviation, ever approving such a transaction unless there was absolutely no need for the airport in civil aeronautics."

Exhibit 17, at 40.

Thus, however formulated, this is a mandatory and strict requirement. Not only has it not been met; the settlement agreement does not even attempt to do so. There is no explanation of how aviation benefits from the shortening of the runway and the resulting elimination of most jet operations (or other consequences of the releases). Contrast Friends of Richards-Gebaur Airport v. FAA, 251 F.3d at 1183 (in return for release, $5 million plus 20 years of net proceeds made available for projects at other airports). Further, the agreement manifestly does not benefit aviation. Rather than maintaining the complete airport through at least 2023 or in perpetuity, it allows the City to immediately cut the runway, and close SMO in 2028. This enormous gap cannot be filled by post hoc rationalizations. Clark County v. FAA, 522 F.3d 437, 443 n.1 (D.C.Cir. 2008), quoting PanAmSat v. FCC, 198 F.3d 890, 897 (D.C.Cir. 1999) ("we do not ordinarily consider agency reasoning that appears nowhere in the agency's order").

The only apparent justification that FAA can offer for the settlement agreement is the risk of a loss in one or both of the pending litigations. But that still provides no basis for the agency's disregard of the criteria for release of obligations or its near-complete surrender – especially given FAA's prior robust position that SMO's grant-based obligations endured until 2023 and the deed-based obligations were perpetual. "[F]lip-flops … are the sort of post hoc rationalizations to which courts will not defer." Akzo Nobel Salt v. Federal Mine Safety Commission, 212 F.3d 1301, 1304-05 (D.C.Cir. 2000). See also Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988); In re Acevedo, 497 B.R. 112, 119 n.19 (Bankr.D.N.M. 2013); Western Watersheds Project v. Department of Interior, 2009 WL 5218020, *10 (D.Idaho 2009).

c) FAA Failed to Comply with Procedural Requirements

i) Environmental Analysis

A predicate to the settlement agreement was environmental analysis under the National Environmental Policy Act ("NEPA"). FAA guidance provides that certain releases of airport obligations may be exempt from NEPA. FAA Order 5050.4B (April 28, 2006), § 207(c)(5)(a) and FAA Order 1050.1F (July 16, 2015), §§ 5-2, 5-6.1. But an exemption is not automatic; there must be an FAA evaluation to determine that any specific releases fall within a categorical exclusion. Friends of Richards-Gebaur Airport, 251 F.3d at 1186. See also

Anacostia Watershed Society v. Babbitt, 871 F.Supp. 475, 481 (D.D.C. 1994). In this case, no initial evaluation or substantive environmental analysis was performed.[7]

Moreover, the shortening of the runway at SMO is not categorically exempt from full NEPA analysis, because of its consequences. Aircraft at SMO will not cease operations but will relocate, with significant attendant effects. FAA previously has specifically recognized the impacts – including environmental – to restrictions on large jets at SMO that would shift traffic to other airports.

In 2008, the City tried to ban C and D category (larger) jets at SMO, purportedly on safety grounds. FAA responded vigorously. Exhibits 2, 15. The Ninth Circuit upheld FAA's interim cease and desist orders (U.S. v. City of Santa Monica, 330 Fed. Appx. 124 (9th Cir. 2009)) and this Court upheld FAA's substantive ruling that the City lacked authority to impose the ban and that operations at SMO were safe (City of Santa Monica, 631 F.3d at 559). As FAA then stated: "the Los Angeles Area may suffer an environmental impact as a result of SMO's actions" (Exhibit 2, at 7 n.13) and "[a]ll of the other commercial and reliever airports in the Los Angeles area already experience substantial traffic and

[7] Section II(C) of the settlement agreement assigns to the City responsibility for the costs of NEPA studies. But FAA may not delegate its substantive NEPA obligations to the City. Idaho v. ICC, 35 F.3d 585, 595 (D.C.Cir. 1994).

several are proposing some form of access restriction, like SMO. Many, like LAX, have serious capacity limitations. FAA does not view moving additional operations from SMO to these airports as without impact" (id. at 48). See also Exhibit 18, at 32.[8]

ii) Defense Department Consultation

Before releasing a deed-obligated airport, FAA must consult with the Defense Department. The SPA, which authorized such deeds, had twin purposes: the "encouragement and development of civilian aviation and … keep[ing] these airports available for use in time of emergency." Exhibits 20-21. See also 14 C.F.R. § 155.9(a); Order 5190.6B, §§ 7.17(a), 22.9 ("[t]he [National Emergency Use Provision] represents the U.S. Government's interest in and ability to reactivate an airport as a military facility in case of war or national emergency").

The consultation requirement currently is codified at 14 C.F.R. § 155.9(b). See also Order 5190.6B, § 22.9 and p. 2-17. Section 155.9 actually is a recodification of an earlier regulation, without substantive change. 27 Fed. Reg.

[8] Additionally, in 1984 FAA and the City entered into an agreement that imposed certain obligations on SMO through 2015; they agreed that SMO plays "a vital and critical role in its function as a general aviation reliever" and "other similar general aviation reliever airports in the area are already heavily used and do not have the ability to accept or absorb the service provided by [SMO]." Exhibit 19, at 3-4; City of Santa Monica v. FAA, 631 F.3d at 559.

12348, 12362 (December 13, 1962). The prior text made clear that FAA cannot act unilaterally:

> [I]t was also the purpose of each such transfer to ensure the availability of the property transferred and of the entire airport, for use by the United States during time of national emergency or war, if the need therefor should arise. … [A]ny requested release which would involve any abrogation or limitation of the rights of the United States under a national emergency use provision … will be considered a release which might be prejudicial to the interests or needs of the military agencies of the United States and therefore require consultation with the Department of Defense.

19 Fed. Reg. 4603, 4604 (July 27, 1954). See also Order 5190.6B, p. 22-25:

> FAA will not approve a request for release of the National Emergency Use Provision (NEUP) involving the whole airport. In addition, the Department of Defense (DoD) generally does not concur with a request for release of the NEUP that involves actual runways, taxiways, or aprons.

In this case, the underlying SMO deed includes an NEUP (Exhibit 5, at 5) – and the Defense Department was not consulted.

iii) ANCA Requirements

The Airport Noise and Capacity Act (ANCA; 49 U.S.C. § 47524) provides that an airport may implement a noise or access restriction only if a study conducted pursuant to 14 C.F.R. Part 161, justifying the restriction, is submitted to FAA – and only if FAA approves the restriction, after a public comment period. A reduction of the SMO runway would constitute an access restriction; it would have the effect of prohibiting many aircraft – i.e., larger jets – from operating at SMO.

The City has specified that its purpose in shortening the runway is to "eliminate[e] air charter operations and substantially reduc[e] jet traffic." Exhibit 22, at 8. But FAA entered into the settlement agreement without requiring compliance with ANCA and Part 161.

This Court previously determined that ANCA applies to all access restrictions, not just restrictions premised on noise. Millard Refrigerated Services v. FAA, 98 F.3d 1361, 1364 (D.C.Cir. 1996) ("ANCA as interpreted by the FAA in its regulations applies to direct as well as indirect restrictions"). See also Notice and Approval of Airport Noise and Access Restrictions, 56 Fed. Reg. 48661, 48663 (September 25, 1991) ("the Act requires the review of both noise and access restrictions"); 14 C.F.R. § 161.5. ANCA applies to all airports, irrespective of their obligations to FAA, nor is there any provision allowing waiver of its requirements by FAA, in the context of a settlement or otherwise. Friends of the East Hampton Airport v. Town of East Hampton, 841 F.3d 133, 151 (2d Cir. 2016) (ANCA "mandate[s] procedures for the enactment of local noise and access restrictions by any public airport operator").

When the City previously attempted by municipal ordinance to ban larger jets, FAA specifically warned that doing so would violate ANCA. Exhibit 23, at 9. See also Letter from David Bennett to Bob Trimborn (October 15, 2003) ("a proposal to implement the restriction would require compliance with the review

and approval process set forth in 14 C.F.R. part 161, the agency regulations implementing ANCA") (Exhibit 24). It is inconceivable that FAA previously would opine that a paper ban on certain aircraft at SMO could be implemented only in conformity with ANCA, but now conclude that the actual restructuring of the runway and deliberately intended loss of access by much the same aircraft could be authorized without ANCA compliance.

2) Irreparable Harm

In this case, Petitioners are at risk of injury that is "both certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985). The injury is "of such imminence that there is a 'clear and present' need for equitable relief." Id., quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931). As a direct result of the settlement agreement, even if certain assumptions are made (e.g., average temperatures and dry pavement; short-distance flights; and light passenger loads), up to 95.8% of current jet operations would no longer be possible, and 37.6% of current turboprop operations. More than 17,000 annual operations thus would be required to relocate to other airports. Exhibit 25. In effect, the runway reduction would be equivalent to a near-total ban on jets at SMO.[9]

[9] The City acknowledges – indeed, trumpets – the dramatic impact. At a January 28, 2017 press conference, City Manager Rick Cole stated that it "will cause all of the large jets and many smaller jets to not be able to take off from the airport." See https://www.facebook.com/fox11la/videos/10158164772185553/ (c. 13:00). The *(continued…)*

a) Petitioners Would Be Denied Access to Unique Real Property

Petitioners' access to unique real property – i.e., the full-length runway at SMO – is endangered. At a January 28, 2017 press conference, City Manager Cole specified that "the runway asphalt itself will be shortened." See https://www.facebook.com/fox11la/videos/10158164772185553/ (c. 21:00). Real property "is valued for its uniqueness" and a loss of access "cannot be remedied with monetary damages alone." Monument Realty v. WMATA, 540 F.Supp.2d 66, 75-76 (D.D.C. 2008). See also Patriot-BSP City Center II v. U.S. Bank National Association, 715 F.Supp.2d 91, 96 (D.D.C. 2010). Nor must a party have a direct interest in a real property dispute to be irreparably harmed; that a party will endure consequences of such a dispute is sufficient. Peterson v. D.C. Lottery & Charitable Games Control Board, 1994 WL 413357, at *4 (D.D.C. 1994).

Other courts concur. For example, in Fairfield Resorts v. Fairfield Mountains Property Owners Association, 2006 WL 1889152, *4-5 (W.D.N.C. 2006), a threatened eviction from – and demolition of – a leased building constituted irreparable harm. See also Columbia Gas Transmission v. An Exclusive Natural Gas Storage Easement, 688 F.Supp. 1245, 1250-51 (N.D.Ohio 1988) (injunction ordered to prevent irreparable harm to utility and customers from

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City specifically asserted that at least 44% of jet operations at SMO would be eliminated. Exhibit 22, at 5.

shutdown of gas storage field); Tau v. Alpha Omicron Pi Fraternity, 2013 WL 5340904, *14 (D.Minn. 2013) (defendant "demonstrated a willingness to act swiftly and unilaterally" to dispose of property at issue); Hancock Fabrics v. Rutheven Associates, 2006 WL 2459222, *2 (E.D.Va. 2006); International Snowmobile Manufacturers v. Norton, 304 F.Supp.2d 1278, 1287 (D.Wyo. 2004).

b) Enduring Economic Harm Would Be Inflicted on Petitioners

Economic harm "can be 'irreparable' if it is an enduring restraint on the manner in which a business is conducted." Chamber of Commerce v. Reich, 897 F.Supp. 570, 585 (D.D.C. 1995), reversed on other grounds, 74 F.3d 1322 (D.C.Cir. 1996). See also WMATC v. Holiday Tours, 559 F.2d 841, n.2 (D.C.Cir. 1977) ("[t]he harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours").

The shortening of the SMO runway would have such great effects on Petitioners as well as other SMO tenants and users. The attached declarations of Wonderful (Exhibit 26) and Redgate (Exhibit 27) describe the specific significant impacts that their businesses would endure (none of Wonderful or Redgate's current operations could continue in their present form). More importantly, the calculations in Exhibit 25, discussed above, demonstrate that the harm would be widespread and significant to numerous SMO tenants and users, as would the relocation of jet operations to others beyond SMO.

c) FAA Has Opined that Virtually Identical Restrictions at SMO Would Cause Irreparable Harm

FAA itself previously opined that great and irreparable harm would occur if the City imposed similar restrictions to exclude larger jets from SMO:

> [T]he City … has committed to make SMO available to all aircraft on a reasonable and nondiscriminatory basis. This is not accomplished by requiring existing users to substitute other aircraft for the category C and D jets they now have. The City's argument that the ban on Category C and D aircraft imposes no harm on aircraft operations because operations may still be conducted at SMO with Category A and B aircraft is frivolous.

Exhibit 2, at 46, affirmed City of Santa Monica, 631 F.3d 550. In that proceeding FAA issued two interim cease and desist orders, which prevented the City's proposed ban from taking effect, precisely because it would cause not just harm but irreparable harm –and not just at SMO but across the region:

> According to the City's own estimates the ban would affect over 9,000 Category C and D aircraft operations. … Disruption of over 9,000 annual operations is a significant number for the Los Angeles region and nationally as well. … By banning 9,000 or more operations from SMO and forcing them to use other airports, the ban affects Federal air traffic and airspace management in the greater Los Angeles region.

Exhibit 15, at 9. FAA's justifications for the orders were validated by the Ninth Circuit. City of Santa Monica, 330 Fed. Appx. at 124. See also Exhibit 28, at 11-12 (underlying TRO application on behalf of FAA, stating that "[t]his interference with regional and national aviation operations presents a possibility of irreparable injury to the federal government's interest in ensuring safe and efficient use of air space"); Exhibit 29, at 2-3 (subsequent Ninth Circuit brief, stating that "ban would

cause immediate and irreparable disruption to the national air transportation system"); Exhibit 30, at 5 (recent FAA brief, citing prior SMO decisions).[10]

Judicial estoppel should prohibit FAA from asserting any position in this case vis-à-vis SMO (including but not limited to irreparable harm) contrary to those previously litigated, successfully, before this Court and the Ninth Circuit. Comcast v. FCC, 600 F.3d 642, 647 (D.C.Cir. 2010) (judicial estoppel appropriate "[w]here a party assumes a certain position in a legal proceeding, … succeeds in maintaining that position, … [and then,] simply because his interests have changed, assume[s] a contrary position"). See also County of San Miguel v. Kempthorne, 587 F.Supp.2d 64, 73 (D.D.C. 2008) ("[t]he doctrine applies equally

[10] Other courts concur that airport access restrictions cause irreparable harm:

> The curfew has had an adverse effect on the corporate and business aircraft based at the Airport. … Flights in and out of other airports are not an adequate substitute for the flexibility provided by business and corporate air flights in and out of the Airport … On the issue of irreparable harm, plaintiffs have demonstrated negative impact on the airspace in the New York City metropolitan area and beyond, which cannot be measured in monetary damages.

U.S. v. Westchester County, 571 F.Supp. 786, 797-98 (S.D.N.Y. 1983). See also National Aviation v. City of Hayward, 418 F.Supp. 417, 419 (N.D.Cal.1976); Friends of the East Hampton Airport, 152 F.Supp.3d 90, 106-07 (E.D.N.Y. 2015), affirmed in part, vacated in part on other grounds, 841 F.3d 133 (2d Cir. 2016); AOPA v. City of Pompano Beach, FAA docket no. 16-04-01, Director's Determination, at 37 (December 15, 2005) ("[t]he presumption that aeronautical users could use other nearby airports to conduct these activities does not relieve the City of its obligation to accommodate these activities").

against the government as a litigant"); U.S. v. Kellogg Brown & Root Services, 284 F.R.D. 22, 39 (D.D.C. 2012).

d) The Irreparable Harm Is Imminent

The City intends to imminently exercise its purported authority to shorten the SMO runway. In a January 28, 2017 press release, City Manager Cole stated: "Today's historic Consent Decree agrees to an operational runway of 3,500 feet, which we plan to implement immediately." Exhibit 22. At the associated press conference, Cole stated: "We will be moving with maximum speed to actually reduce the length of the airport." See https://www.facebook.com/fox11la/videos/10158164772185553/ (c. 14:00). "We are going to begin today the efforts to design the shortening of the runway, to let out the construction bids, and commence construction as soon as humanly possible." Id. (c. 16:00). On February 28, 2017, the City Council unanimously voted to accept recommendations from Cole, including that the City "provide the required 30-day prior notice to the FAA of the City's determination to shorten the runway at the earliest feasible opportunity." Exhibit 31; see also Exhibit 14.

3) Harm to Others

The requested stay would maintain the status quo at SMO. In contrast to the local and regional injuries described above, no harm would come to FAA, the City

or others by the maintenance of the full runway during this proceeding.[11] Jets have operated at SMO for more than fifty years, larger jets for more than twenty years (Exhibit 15, at 3), and the City has operated the SMO runway in substantially its current configuration since shortly after World War II. There are no special circumstances that differentiate SMO from the thousands of general aviation airports around the country that serve their communities every day. As FAA itself has observed, with reference to SMO: "There are over 800 airports today that were built and improved during WWII, and none of them was originally built or improved with today's jets in mind, yet thousands of jet operations take place safely every day on these airports." Exhibit 2, at 43. See also Exhibit 32.

FAA repeatedly has opined that operations at SMO are safe. In the prior administrative proceeding concerning the City's efforts to ban larger jets, the City's purported safety justification was comprehensively rejected by FAA, which emphasized the safety of larger jets, and FAA's decision was affirmed by this Court. City of Santa Monica v. FAA, 631 F.3d at 554. This Court recognized that "each conclusion was rationally based on substantial evidence in the agency record." Id. at 557. See also Exhibits 2, 15, 29, 30. Additionally, the City

[11] In contrast, other tenants and users of SMO – similarly positioned to Petitioners – would also be harmed if a stay did not issue, as would other airports and their tenants and users, as discussed in sections II(2)(b) and II(1)(c)(i), respectively.

Manager has conceded that the settlement agreement is not premised on safety but rather the City's desire to ban jet traffic and specifically charter operations: "[A]s a way to ward off the threat, it was important for us to shorten this runway." Exhibit 33. See also Exhibit 22, at 8.

In prior SMO-related litigation, the Ninth Circuit concluded that the balance of equities favored an injunction: "[A] large disruption to air traffic is avoided and Santa Monica is required to preserve the status quo only while FAA proceedings conclude." City of Santa Monica, 330 Fed. Appx. at 125. See also Davis v. Mineta, 302 F.3d 1104, 1116 (10th Cir. 2002) ("the state entities involved in this case have 'jumped the gun' … by entering into contractual obligations that anticipated a pro forma result. In this sense, the state entities are largely responsible for their own harm"); Juracek v. City of Detroit, 994 F.Supp.2d 853, 861 (E.D.Mich. 2014); Midwest Retailer Associated, Ltd. v. City of Toledo, 563 F.Supp.2d 796, 812 (N.D.Ohio 2008); International Snowmobile Manufacturers, 304 F.Supp.2d at 1288.

4) The Public Interest

A stay would be in the public interest. The protection of aviation is a statutory mandate. The obligations imposed upon airports ensure that federal largesse benefits the public. For example, 49 U.S.C. § 47104(a) establishes that the purpose of grants is: "To maintain a safe and efficient nationwide system of

public-use airports that meets the present and future needs of civil aeronautics." FAA elaborates that:

> The Airport Compliance Program is designed to protect the public interest in civil aviation. Grants and property conveyances are made in exchange for binding commitments (federal obligations) designed to ensure that the public interest in civil aviation will be served. The FAA bears the important responsibility of seeing that these commitments are met.

Order 5190.6B, § 1.5. A stay would advance the public interest by preventing FAA from neglecting – and the City from undercutting – vital public interests previously recognized by both Congress and FAA.

As the Ninth Circuit concluded: "Given the safety history of Category C and D aircraft at SMO, FAA's role in ensuring aviation safety, and the potential disturbance to air traffic around the Los Angeles area, the preliminary relief requested (and awarded) is in the public interest." City of Santa Monica, 330 Fed. Appx. at 125-26. Other courts similarly have recognized that a "peculiarly vital public interest" fulfills this factor. Columbia Gas, 688 F.Supp. at 1251 (noting "importance of the public interest sought to be protected" in natural gas reserves). In contrast, a nebulous concern about public safety that would "cause the irreversible closure of numerous stores that serve their surrounding communities" is not in the public interest. See also Midwest Retailer, 563 F.Supp.2d at 812.

Additionally, the public interest factor is intertwined with the first factor, the likelihood of success. See, e.g., Serono Laboratories v. Shalala, 158 F.3d 1313,

1326 (D.C.Cir. 1998). As established in section II(1), that factor weighs in favor of Petitioners. As this Court has recognized, "[d]enying an injunction will immediately defeat the public interest in maintaining the status quo pending a final determination on the merits." FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1094 (D.C.Cir. 1981). Similarly, as district courts in this Circuit have recognized:

> [T]he public interest is best served by having federal agencies comply with the requirements of federal law, particularly the notice and comment requirements … and the agency's own stated policies.

Patriot v. HUD, 963 F.Supp. 1, 6 (D.D.C 1997). See also Housing Study Group v. Kemp, 732 F.Supp. 180, 187 (D.D.C. 1990).

III. THIS COURT ALSO SHOULD ENJOIN THE CITY

Because of the circumstances of this case, it is essential that a stay apply not only to FAA but also the City (and, to the extent necessary, that this Court's action be framed as an injunction vis-à-vis the City). The settlement agreement requires only that the City give FAA 30-days notice of the shortening of the runway; it does not provide that any FAA approval is a necessary predicate to the reduction. At the January 28, 2017 press conference, City Manager Cole asserted that the City has unilateral authority to act: "We have the right to shorten the airport. The airport runway length is clear in the consent decree. It is unambiguous. It is 3,500 feet." See https://www.facebook.com/fox11la/videos/10158164772185553/ (c. 13:00). See also Exhibits 14, 33.

Accordingly, although Petitioners have requested a stay which prohibits FAA from implementing its final order so far as the SMO runway is concerned, it does not appear that stay alone would prevent the irreparable harm described above. This Court's directive also must encompass the City in order to ensure that it can render a decision regarding FAA's compliance that is not mooted by the City's unilateral actions.

Although not presently a party to this proceeding, the City was a party to the settlement agreement, and has filed a motion to intervene. If made a party to this case, the City clearly is within this Court's reach. But even if not a party, the All Writs Act (28 U.S.C. § 1651) provides this Court authority to enjoin the City, in order to preserve its jurisdiction over a pending matter. U.S. v. Hughes, 813 F.3d 1007, 1010 (D.C.Cir. 2016) ("[t]he power reaches even 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice'") quoting U.S. v. New York Telephone, 434 U.S. 159, 174 (1977). See also In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985): Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 692 n.32 (1979); Potomac Electric Power Co. v. ICC, 702 F.2d 1026, 1032-33, supplemented 705 F.2d 1343 (D.C.Cir. 1983); NAACP v. Brock, 619 F.Supp. 846, 852 (D.D.C. 1985).

CONCLUSION

An FAA decision to settle lawsuits rather than risk adverse outcomes is well within its power. What FAA did here – and could not do – was to settle in a manner that circumvented the statutory and regulatory protections that Congress, and FAA itself, long ago emplaced to ensure that national aviation interests could not be disregarded, including in the context of litigation settlement. And what the FAA also has done, but should not be permitted to do, is to ignore or brush aside its own multiple assertions, in prior litigations and proceedings, that restrictions on jet operations at SMO pose substantial, irreparable local and regional impacts. At least for the duration of this Court's review, as FAA's actions are scrutinized, any runway shortening should be put on hold and the status quo maintained at SMO.

For the reasons presented, Respondent's motion to dismiss should be denied and Petitioners motion for a stay against FAA and an injunction against the City should be granted, along with all other necessary and proper relief.

Respectfully submitted,

ZUCKERT, SCOUTT & RASENBERGER, LLP

/s/ Jolyon A. Silversmith

Dated: March 6, 2017

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Circuit Rule 28(a) Certificate as to Parties, Rulings, and Related Cases

(A) Parties and Amici. The parties before this court are Petitioners – the National Business Aviation Association, Inc.; the Santa Monica Airport Association, Inc.; Bill's Air Center, Inc.; Kim Davidson Aviation, Inc.; Redgate Partners, LLC; and Wonderful Citrus LLC – and Respondent, Michael P. Huerta, Administrator, Federal Aviation Administration. The City of Santa Monica, California has filed a motion for leave to intervene.

(B) Rulings Under Review. Review is sought of an unpublished final order of FAA, in the form of in a settlement agreement entered into between FAA and the City of Santa Monica, California on January 30, 2017, subsequently docketed as part of a request for a consent decree in the U.S. District Court for the Central District of California, docket no. 13-8046, City of Santa Monica, California v. United States of America, and made fully effective by the issuance of the decree on February 1, 2017.

(C) Related Cases. The settlement agreement between FAA and the City provided for the voluntary dismissal of both City of Santa Monica, California v. United States of America, C.D.Cal. docket no. 13-8046, and City of Santa Monica, California v. Federal Aviation Administration, 9th Cir. docket no. 16-72827, as well as an administrative proceeding brought by FAA against the City, In re

Compliance with Federal Obligations by the City of Santa Monica, FAA docket no. 16-16-13.

In City of Santa Monica, California v. United States of America, C.D.Cal. docket no. 13-8046, an amicus brief was filed by the National Business Aviation Association, Inc. and the Aircraft Owners and Pilots Association, Inc. on February 10, 2014 (and a further amicus brief was filed by them in an appeal to the Ninth Circuit, no. 14-55583, January 22, 2015, which resulted in a remand). Bill's Air Center, Inc. and Kim Davidson Aviation, Inc. were denied intervention on September 23, 2016. Sunset Park Anti-Airport, Inc. and SMO Future were denied intervention on February 1, 2017. In City of Santa Monica, California v. United States of America, 9th Cir. docket no. 16-72827, an amicus brief was filed by Airports Council International-North America on December 23, 2016.

Additionally, some of Petitioners are among the complainants in a pending FAA administrative proceeding (14 C.F.R. Part 16) which separately alleges that the City has not complied with certain of its grant-, deed-, and statute-based obligations – Mark Smith, Kim Davidson Aviation, Inc., Bill's Air Center, Inc., National Business Aviation Association, Inc. and Aircraft Owners and Pilots Association, Inc. v. City of Santa Monica, California (FAA docket no. 16-16-02).

At least two additional complaints are pending against the City pursuant to 14 C.F.R Part 16, filed by Atlantic Aviation FBO, Inc. (FAA docket no. 16-16-12)

and American Flyers, Inc. (FAA docket no. 16-16-14). Both of those entities also have filed complaints in the Superior Court for the County of Los Angeles, California, opposing City efforts to evict them from their leaseholds at SMO (docket no. BC639502 and docket no. BC639679, respectively).

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Circuit Rule 26.1 Disclosure Statement

The National Business Aviation Association, Inc. is an aeronautical trade association, incorporated in the District of Columbia, and has no parent companies; no publicly-held company has a 10% or greater ownership interest.

The Santa Monica Airport Association, Inc. is an aeronautical trade association, incorporated in California, and has no parent companies; no publicly-held company has a 10% or greater ownership interest.

Bill's Air Center, Inc. is a California corporation that offers aeronautical services at Santa Monica Municipal Airport and has no parent companies; no publicly-held company has a 10% or greater ownership interest.

Kim Davidson Aviation, Inc. is a California corporation that offers aeronautical services at Santa Monica Municipal Airport and has no parent companies; no publicly-held company has a 10% or greater ownership interest.

Redgate Partners, LLC is a California limited liability company that utilizes Santa Monica Municipal Airport in support of its business and has no parent companies; no publicly-held company has a 10% or greater ownership interest.

Wonderful Citrus LLC is a Delaware limited liability company that utilizes Santa Monica Municipal Airport in support of its business and is a wholly-owned subsidiary of Wonderful Citrus Holdings LLC which is in turn a wholly-owned

subsidiary of The Wonderful Company LLC; no publicly-held company has a 10% or greater ownership interest.

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Certificate of Compliance

I certify that this motion complies with the word limit of FRAP 18 and 27 and Circuit Rules 18 and 27 because, excluding the parts of the document exempted by FRAP 32, it contains 7,791 words.

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Certificate of Service

I hereby certify that on this 6th day of March 2017, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. Service was accomplished on all counsel through the CM/ECF system.

/s/ Jolyon A. Silversmith

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