No. 15-1285

NOT YET SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CITIZENS ASSOCIATION OF GEORGETOWN; BURLEITH CITIZENS ASSOCIATION; FOXHALL CITIZENS ASSOCIATION; HILLANDALE CITIZENS ASSOCIATION; COLONY HILL NEIGHBORHOOD ASSOCIATION; PALISADES CITIZENS ASSOCIATION; FOGGY BOTTOM ASSOCIATION; GEORGETOWN UNIVERSITY,

PETITIONERS,

V.

FEDERAL AVIATION ADMINISTRATION; MICHAEL HUERTA, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

RESPONDENTS.

PETITIONERS' OPENING BRIEF

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Petitioners are the Citizens Association of Georgetown, Burleith Citizens Association, Foxhall Citizens Association, Hillandale Citizens Association, Palisades Citizens Association, Foggy Bottom Association, and Georgetown University.

Respondents are Michael Huerta, Administrator of the Federal Aviation Administration ("FAA"), and FAA.

Rulings. This Petition addresses the FAA's decision to implement new departure routes from Ronald Reagan National Airport. The decision was finalized in July 23, 2015 and August 20, 2015 orders.

Related Cases. This matter has not previously been before this Court of any other court. Counsel for the Petitioners is not aware of any related cases.

Corporate Disclosure Statement. The Petitioners certify that none of them has a parent corporation and that none of them has issued stock of which 10% or more is owned by a publicly held corporation.

TABLE OF CONTENTS

Contents: **Page:**

TABLE OF AUTHORITIES

Cases: **Page(s):**

Statutes

Federal Regulations and Other Authorities

GLOSSARY

AR: Administrative Record

EA Environmental Assessment

EIS: Environmental Impact Statement

FAA: Federal Aviation Administration

NEPA: National Environmental Policy Act

NHPA: National Historic Preservation Act

JURISDICTION

This Court has jurisdiction under the Federal Aviation Act, which provides for judicial review of FAA decision-making "by filing a petition for review in the United States Court of Appeals for the District of Columbia." 49 U.S.C. § 46110(a) (Addendum p. 11). Petitions for review must be filed within 60 days of the FAA's "final order" unless there are reasonable grounds for not filing by the 60th day. *Id*. This Petition seeks review of the FAA's decision to implement new flight paths for northern departures from Ronald Reagan Washington National Airport (the "New Routes"). The orders implementing those Routes were published by the FAA on June 23, 2015 and August 20, 2015.[1] The Petition was timely filed on August 24, 2015, well within the 60-day period.

On October 13, 2015, the FAA nonetheless filed a Motion to Dismiss (Doc. # 1577933, later amended by Doc. # 1579229) alleging the Petition was untimely. Specifically, the Motion claimed FAA's final order with respect to the

[1] Petitioners ask the Court to consider the orders implementing the six RNAV routes on June 23, 2015, together with the FAA's subsequent final orders for all nine northern departure routes, on August 20, 2015, as part of this appeal. Each of those final orders is listed on the attachment to the Petition for Review, and each was issued by the FAA within the sixty-day time period prior to the filing of the Petition. All nine routes incorporate the identical LAZIR terminal procedure that is the source of the aircraft noise that now impacts the residents of the District of Columbia.

New Routes had been issued in 2013, in connection with an Environmental Assessment ("EA") and Finding of No Substantial Impact/Record of Decision ("FONSI/ROD") for the agency's Washington D.C. Optimization of the Airspace and Procedures in the Metroplex Project ("Metroplex Project").

Petitioners opposed the Motion (*see* Doc. #1597868), noting that (1) under the FAA's own regulatory orders, the New Routes did not become final until 2015; (2) the Metroplex Project EA and FONSI/ROD had not properly addressed the New Routes; and (3) because the FAA withheld information about the New Routes until 2015, Petitioners' filing date would be supported by "reasonable grounds" *even if* a final order had been issued in 2013.

On April 18, 2016, the Court issued an order declining to rule on the FAA's Motion to Dismiss and directing the parties to submit any arguments regarding the timeliness of the Petition in their merits briefing (Doc. #1609085). Part A of the Argument section of this Opening Brief addresses the timeliness of the Petition.

ISSUES PRESENTED FOR REVIEW

For 70 years, northern departures from Ronald Reagan Washington National Airport ("National") followed a straight-line route along the west side of the Potomac River. This route, known as "National 238," minimized noise and air pollution impacts on designated historic districts in northwest

Washington, DC. Area residents made fundamental choices about where to live and how to invest their savings based on this consistent, settled flight path.

In 2015, the Federal Aviation Administration ("FAA") disrupted these settled arrangements by implementing the New Routes. The initial segment of each of the New Routes is a zigzagging, low-altitude path known as "LAZIR," which follows the east side of the Potomac River before crossing over Georgetown and nearby historic districts in northwest Washington, DC. The FAA has made the New Routes (and with them, LAZIR) the default departure procedure from National for all aircraft equipped with Area Navigation ("RNAV"). Virtually all aircraft using National are RNAV-equipped. Thus, National's northern departures are now concentrated over Georgetown and its neighboring historic districts in northwest Washington, DC.

Noise and air pollution from the New Routes significantly impact the health, well-being, and livelihood of Petitioners (and their residents, students, and members). The FAA has never properly identified, evaluated, disclosed, mitigated, considered reasonable alternatives to, or otherwise addressed these impacts, as required by the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), Section 4(f) of the Department of Transportation Act ("Section 4(f)"), and the agency's own regulatory orders. Petitioners respectfully request that the New Routes be invalidated and set aside

until such time as the FAA complies with these requirements. Therefore, this case presents the following issues:

1. Did Petitioners timely petition for review of the New Routes where (a) the Petition was filed within 60 days after the New Routes were formally published and (b) Petitioners' filing date is supported by reasonable grounds?

2. Did the FAA violate NEPA, the NHPA, and Section 4(f) by implementing the New Routes without fully addressing the impacts to the District of Columbia of requiring all RNAV-equipped aircraft to follow the LAZIR departure segment?

3. Did the FAA violate NEPA and its own regulatory orders by incorporating LAZIR into the New Routes without first providing a meaningful opportunity to participate in that decision-making process?

4. Should this Court, as it did in *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007), order the FAA to revert to the *status quo ante* unless and until the FAA completes an EA or EIS addressing LAZIR?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in a separately-bound Addendum. *See* D.C. Cir. R. 28.1(a)(1)(5).

STATEMENT OF THE CASE

The FAA's decision to adopt and implement the New Routes (including LAZIR) as the mandatory default for all RNAV-equipped aircraft departing northward from National was subject to NEPA, NHPA, § 4(f), and the FAA's own regulatory orders. Those authorities required the FAA to take a "hard look" at the potential consequences of — and alternatives to — its decision. At a minimum, the agency was obligated to (1) accurately identify all potential impacts of adopting the New Routes (including LAZIR) as the mandatory default northern departure from National; (2) provide notice and a meaningful opportunity to comment to the communities that would be affected by that decision; and (3) properly consult with the agencies and officials with primary responsibility for the communities, parks and historic resources of the District of Columbia.

The FAA utterly failed to meet these obligations. Rather than taking a "hard look," the FAA looked the other way. It ignored obvious impacts on residential neighborhoods, schools, historic districts, historic landmarks, and parks on the east side of the Potomac River. It systematically excluded the citizens and elected officials of the District of Columbia from decision-making processes. It did not consult with officials responsible for the preservation of historic resources. And, when District of Columbia stakeholders asked

questions about the source of significant increases in aircraft noise and pollution, the agency withheld crucial information about the New Routes.

A. Legal Framework

1. National Environmental Policy Act

NEPA requires federal agencies to identify, evaluate, and disclose to the public the environmental impacts of proposed actions and to consider reasonable alternatives thereto. *See* 42 U.S.C. § 4332(2)(C), (E) (Addendum pp. 5-6); 40 C.F.R. parts 1500 - 1508. Agencies must fully comply with NEPA *before* taking any action that could have an adverse environmental impact or limit the choice of reasonable alternatives. 40 C.F.R. §1506.1(Addendum pp. 53-54.)

Under NEPA, proposed actions with significant environmental effects must be evaluated in a detailed, comprehensive Environmental Impact Statement ("EIS"). 42 U.S.C. §4332(2)(C) (Addendum pp. 5-6). Actions with environmental effects that are less than significant (and actions whose effects are not fully known) are evaluated in a more concise document known as an Environmental Assessment ("EA"). 42 U.S.C. §4332(2)(E) (Addendum pp. 5-6); 40 C.F.R. § 1501.3 (Addendum p. 52); 40 C.F.R. §1508.9 (Addendum p. 59). In limited circumstances, an agency may proceed without an EIS or an EA if its proposed action falls within a defined Categorical Exclusion — a category of actions which have been found, in properly-adopted procedures, to present no

possibility of a significant environmental impact. *See* 40 C.F.R. § 1508.4 (Addendum p. 58).

2. National Historic Preservation Act

Congress passed the NHPA to protect historic buildings and districts. *See* 54 U.S.C. § 300101(5) (Addendum p. 13). To that end, the statute requires federal agencies to identify and evaluate the potential for their "undertakings" to adversely affect properties that are eligible for listing in the National Register of Historic Places, an official and exclusive inventory, maintained by the Secretary of the Interior, of resources determined to be "significant in American history…and culture." *See* 54 U.S.C. §§ 302101, 306108 (Addendum pp. 14, 16); 36 C.F.R. § 800.1 (Addendum pp. 22-23). An adverse effect occurs whenever an undertaking directly or indirectly alters any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the property's design, setting, materials, feeling, or association. 36 C.F.R. § 800.5(a)(1) (Addendum pp. 35-38). The NHPA's implementing regulations identify several examples of adverse effects, including "[i]ntroduction of visual, *atmospheric, or audible* elements that diminish the integrity of the property's significant historic features." 36 C.F.R. § 800.5(a)(2)(v) (Addendum pp. 35-38) (emphasis added).

For undertakings that have the potential to affect historic properties, agencies must avoid or resolve potential impacts through a series of mandatory consultations. 36 C.F.R. § 800.6 (Addendum pp. 39-43). Agencies must "seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." 36 C.F.R. § 800.4(a)(3) (Addendum p. 30). For undertakings ultimately determined not to affect historic properties, agencies must prepare a Finding of No Adverse Effect and secure the concurrence of the relevant State Historic Preservation Officer ("SHPO"). *See* 36 C.F.R. §§ 800.5(b), 800.11(e) (Addendum pp. 36, 48-50). For undertakings determined to affect historic properties, the agency must consult with the SHPO, the Advisory Council on Historic Preservation, and others to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate effects…" 36 C.F.R. § 800.6(a). (Addendum p. 39). These NHPA requirements must be satisfied *before* the undertaking can be implemented. 36 C.F.R. § 800.1(c). (Addendum p. 22-23).

3. Section 4(f)

Section 4(f) mandates that "special effort should be made to preserve…public park and recreation lands…and historic sites" and, to that end,

it strictly prohibits federal transportation agencies (including the FAA) from approving any project (including new departure routes) that would "use" historic resources or public parks unless there is no feasible and prudent alternative. 49 U.S.C. §303(a),(c) (Addendum p. 8); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971) (Section 4(f) gives "paramount importance" to the protection of parks and historic sites). The concept of "use" is not limited to physical occupation; it also includes substantial impairment of historic or parkland uses. (*See* AR B.15, p. A-20, §6.2e.) "[N]oise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose is a 'use' of that land." *City of Grapevine v. Dept. of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994). Federal agencies must comply with these mandate by identifying 4(f) resources, evaluating their potential use, and consulting with local officials *before* implementing new transportation projects. *N. Idaho Cmty. Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1158-59 (9th Cir. 2008).

4. FAA Order 1050.1E

The FAA has promulgated a series of regulatory orders establishing agency-wide policies and procedures on a variety of issues. At all times relevant to this case, FAA Order 1050.1E set forth the agency's policies and procedures for implementing NEPA, the NHPA, and Section 4(f). (*See* AR B.15.) Among

other things, Order 1050.1E imposes specific requirements on the timing, scope, contents, and participants in the agency's NEPA, the NHPA, and Section 4(f) analyses. (*Id*.) Order 1050.1E also memorializes the FAA's more general commitment to "make complete, open and effective public participation an essential part of its actions, programs, and decisions." (*Id*. p. 2-7, § 208a.)

5. FAA Order 7100.41

FAA Order 7100.41, *Performance-Based Navigation Implementation Process*, specifies a multiple-phase implementation process for the FAA's design and implementation of new departure routes. (Exhibit 9.) The first phase defines the purpose of the routes. (*Id*. § 2-3.) The second phase involves the preparation of environmental analyses and documentation required by NEPA, the NHPA, and Section 4(f). (*Id*. § 2-4-4.) The third phase involves review, testing, and adjustment of the routes. (*Id*. § 2-5.) The fourth phase consists of finalizing and implementing the routes, a process which culminates when the routes are published. (*Id*. § 2-6.) Order 7100.41 specifically provides that new routes are not available for use until the fourth phase is complete. (*Id*.)[2]

[2] The FAA has previously alleged that Order 7100.41 does not apply to the New Routes. (*See* Doc. #1602275, pp. 2-3.) Even if that were true (a point which Petitioners dispute) it would not change the underlying regulatory framework. Other FAA Orders likewise provide that a new route becomes effective and available for use upon (*See, e.g.,* AR B.19 (Order 7400.2G).)

B. Factual Background

1. Historic Georgetown

The community of Georgetown was formally established in 1751, more than 190 years before National first opened for business, and it retains one of the nation's largest concentrations of historic structures. In 1950, Congress passed the Old Georgetown Act in order to preserve the neighborhood as a quiet historical village, protected from the bustling commercial areas of the District of Columbia and Virginia. *See* Pub. L. No. 81-808, 64 Stat. 903 (1950) (Addendum pp. 17-18.) Among other things, the Act established Georgetown as a historic district, and prohibited any alteration, demolition, or building construction within that district without prior approval by the United States Commission of Fine Arts. (*Id*.) In 1967, the village of Georgetown was officially recognized as a National Historic Landmark, a designation reserved for resources of national significance that "possess exceptional value or quality in illustrating or interpreting the heritage of the United States." 36 C.F.R. § 65.4 (Addendum pp. 19-21.)

2. Regional Airport Facilities

The site for National was originally selected in the 1930s, well before the era of jet aircraft. In fact, commercial jets were originally banned from National altogether. In 1950, Congress directed the construction of a second public

airport in the Washington, DC area (*see* 64 Stat. 770 (1950)), which was to be designed specifically for jet aircraft. The resulting facility, Washington Dulles International Airport, continues to have available capacity for additional commercial flights.

3. The National 328 Departure Path

For 70 years, there was only one northern departure flight path from National. That route, known as National 328, took aircraft on a straight line compass course of 328 degrees, generally to the west of the Potomac River until intersecting the River near the Georgetown Reservoir. It was clear, straightforward, and efficient. It also served to minimize impacts on the designated historic neighborhoods of northwest Washington, DC.

4. The LAZIR Departure Path

In 2011, for reasons unstated anywhere in the administrative record, the FAA decided to create a new northern departure flight path from National. The new path, known as LAZIR, zigzagged along the river, bringing aircraft over the Georgetown National Historic Landmark, Georgetown University, and surrounding historic areas of northwest Washington, DC. (AR A.1, p. 2-12.) LAZIR did not immediately replace National 328. Rather, it was approved as an elective flight path that would be made available to — but not required for — RNAV-equipped aircraft. (*See* AR.1, pp. 1-19 to 1-20.) The default departure

path remained National 328. The FAA approved LAZIR without preparing an EA or an EIS, without consulting agencies and officials of the District of Columbia, and without notice to the public. (*See* AR B.32).

5. Initial Reactions to LAZIR

At first, LAZIR was used only occasionally. As noted above, it was not the default northern departure route. Moreover, pilots did not like to fly LAZIR because it brought them in close proximity to Prohibited Area P56, a zone of restricted airspace generally extending over the Capitol, the National Mall, the Lincoln Memorial, the White House, and the Kennedy Center. (*See* Exhibit 1, p. 12; Exhibit 2, ¶ 5.) Those straying into P56 were subject to significant fines and other penalties. (Exhibit 2, ¶ 5.)

But even occasional use of LAZIR was enough to generate significant concerns among the residents of northwest Washington, DC. In October 2013, District of Columbia Councilman Jack Evans asked the Metropolitan Washington Airports Authority ("MWAA"), a public entity created by federal law to run National and Dulles airports, why his constituents in Northwest Washington, DC were experiencing increased airplane noise and whether there had been any changes to northern departure routes from National. (Exhibit 3.) On November 14, 2013, *after consulting with the FAA*, MWAA responded that there had been no departure route changes since 2008. (Exhibit 4.) Neither the

FAA nor MWAA informed Councilman Evans of the FAA's prior approval of LAZIR. (*Id*.)

6. The 2013 Metroplex Project

Nor, for that matter, did the FAA inform Councilman Evans that the agency was *at that very moment* reviewing the Metroplex Project, which addressed arrivals and departures at National, Dulles, and Baltimore-Washington International Airport. (*See* AR A.1, A.10).

In support of the Metroplex project, the FAA prepared an EA which discussed the New Routes, among other things. (AR A.1.) LAZIR formed the initial segment of each of the New Routes. (*Id*., pp. 3-32 to 3-35, 3-39; *see also* AR. E.1 (procedures for butrz, dixxe, doctr, hafnr, horto, pooch, rebll, sooki, wyngs), E.4 (same).) But the EA did not include any specific discussion or analysis of the LAZIR. (AR A.1, pp. 3-1 to 3-60 (alternatives), 4-1 to 4-64 (affected environment), 5-1 to 5-34 (environmental consequences).) Instead it treated LAZIR as an "existing procedure" that required no further discussion or evaluation. (*See, e.g.,* AR A.1, pp. 2-3, 2-12, 3-10 to 3-11.) And while the Metroplex project clearly had the potential to impact residents of the District of Columbia, the FAA did not seek comments on the EA from any of the District's elected officials. (AR. A.2, pp. 4-11, 5-20.) Nor did it send the document to

any of the District of Columbia community organizations which have obvious interests in environmental and historic preservation issues. (*Id*.)

On November 15, 2013 — just four days after Councilman Evans had been (falsely) informed that all flight paths remained unchanged since 2008 — the FAA issued a Finding of No Significant Impact/Record of Decision ("FONSI/ROD") for the Metroplex project concluding that the New Routes would not significantly impact northwest Washington, DC. (AR A.10.) The FAA did not inform Councilman Evans or his constituents of the issuance of the FONSI/ROD.

7. Further Testing and Revision of LAZIR

The FONSI/ROD did not end the FAA's decision-making process with respect to the New Routes. On the contrary, the agency continued to revise several aspects of the Routes, including the LAZIR segment. Working with the Secret Service, the agency it made adjustments to the portion of LAZIR abutting Prohibited Area P-65. (Exhibit 2, ¶ 5-6.) For its part, the Secret Service agreed to liberalize certain aspects of its policy on encroachments into the Prohibited Area. (*Id*.) From March to May, 2015 the FAA and the Secret Service conducted a three-month "test" of these new arrangements. (*Id*.) During the test, the aircraft noise experienced by Petitioners increased substantially, as did their

complaints. (*Id*.) At no time did the FAA (or anyone else) inform Petitioners that the noise was attributable to the testing of an updated version of LAZIR.

8. Further Community Concerns

The FAA's failure to make Petitioners and their representative aware of LAZIR, the Metroplex Project, and the joint Secret Service test is particularly difficult to countenance because throughout 2013, 2014, and 2015 the agency was purporting to work with the community to address noise issues at National. Indeed, between March, 2014 and July, 2015, Petitioners and their representatives had attended more than ten meetings with the FAA. (See Exhibit 2, ¶ 2-5.) Each time, Petitioners voiced questions and concerns about increased overflights, noise, and pollution. At no time did the FAA inform Petitioners of the agency's plans to make LAZIR the default for all northern departures from National. (*Id*.)

9. Publication of the New Routes

After the three-month FAA-Secret Service test period was complete, the FAA proceeded to finalize and publish the New Routes, thereby rendering LAZIR the default path for all RNAV-equipped aircraft departing north from National. The resulting noise was so pervasive and widespread that the FAA received more than 5,233 complaints from Georgetown residents, a total

equivalent to 87% of all noise complaints received about National. (Exhibit 5, ¶ 4-7.)

10. Petitions for Relief

Petitioners first learned of the New Routes (and the role of LAZIR in those Routes) at a meeting in July, 2015. (Exhibit 2, ¶ 4.) In light of that information, Petitioners filed a petition for review in this Court on August 25, 2015. (Exhibit 2, ¶ 7.)

In May, 2016 the Mayor of the District of Columbia, the Chairman of the District of Columbia City Council, six Members of the City Council, and seven community groups (including Petitioners) filed an administrative petition with the FAA requesting that the agency take immediate action to abate the significant impacts of the New Routes. (Exhibit 6.) The Attorney General for the District of Columbia separately urged the FAA to reconsider the New Routes. (Exhibit 7.)

SUMMARY OF ARGUMENT

1. A petition for review of FAA action is timely if it is filed within 60 days of a reviewable order or if reasonable grounds support a later filing date. This Petition is timely under either standard. It was filed with 60 days of the FAA's publication the New Routes. And reasonable grounds support Petitioners'

filing date because the FAA withheld information about earlier portions of the decision-making process.

2. NEPA, the NHPA, and Section 4(f) required the FAA to identify, evaluate, disclose, and identify means of avoiding the New Routes' impacts on environmental and historic resources. LAZIR is an essential component of each of the New Routes. But it has never been subject to the rigorous, public environmental review required by these statutes. In 2011, the FAA decided not to conduct such a review based on an erroneous assumption that LAZIR represented a continuation of the National 328 departure path. In 2013, the agency compounded that error by treating LAZIR as an "existing route" that had been fully reviewed and required no further evaluation.

3. The FAA was required to involve the public in its decision-making concerning the New Routes. Instead, it systematically excluded Petitioners and their elected representatives from the decision-making process and withheld from them material information about the New Routes.

STANDING

A petitioner demonstrates Article III standing by showing that (1) it has suffered a concrete and particularized "injury in fact that is actual or imminent, not conjectural or hypothetical; (2) the injury is :fairly traceable" to the challenged actions of the respondent; and (3) the injury is likely to be redressed

by a favorable decision. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

An association has standing to bring suit on behalf of its members if the members "would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." *Laidlaw*, 528 U.S. at 181.

Petitioners easily meet the above-listed requirements. First, they have been — and continue to be — severely injured by the New Routes. A few illustrative examples:

- "At times planes fly over our home at extremely low altitudes nearly continuously. As the deafening noise from one plane subsides, the noise from another immediately begins. Some plans fly so close to our home that we can feel the house shake" (Addendum p. 65).
- "Every few minutes, I hear the noise of planes … My house was constructed in 1852 and has many old panes of glass which the historic easement on my property prevents me from replacing even if I wished to do so" (Addendum p. 60).
- "We are frequently awoken when planes are 'warming up' for

flights starting at 5:00 a.m. Flight noise begins at 5:30 a.m. and frequently continues the entire day, well into the night. Often multiple flights are still arriving between 1:30 a.m. to 2:30 a.m. … During peak periods, two flights per minute are not unusual." (Addendum p. 62).

- "Our ears hurt when we are outside. I routinely measure over 80 decibels, and often up to 95 decibels when aircraft fly overhead. My 2.5 year old son (who loves airplanes, by the way) complains of his ears hurting. My ears hurt as well. The playgrounds and schools that are right underneath the LAZIR are impacted dramatically." (Addendum p. 73).

Sworn affidavits more fully describing the concrete and particularized injuries arising from the New Routes are attached in Petitioners' Addendum. *See* D.C. Cir. R. 28(a)(7).

Second, each of the Historic Neighborhood Petitioners' injuries is fairly traceable to the FAA's unlawful authorization of the New Routes. (*See* Addendum pp. 60-75.)

Third, each of Petitioners' injuries can be redressed by a favorable decision requiring the FAA to comply with NEPA, the NHPA, and Section 4(f). *See, e.g., City of Dania Beach v. Federal Aviation Admin.*, 485 F.3d 1181, 1185-

87 (D.C. Cir. 2007) ("An agency action that is taken without following the proper environmental procedures can be set aside by this Court and remanded to the agency for completion of the review process").

Finally, Petitioners Citizens Association of Georgetown, Burleith Citizens Association, Foxhall Citizens Association, Hillandale Citizens Association, Colony Hill Neighborhood Association, and Foggy Bottom Association are non-profit groups whose purposes include protection of the quality of the environment quality in their respective neighborhoods. Because the individual members of each group would have standing in their own right, the groups likewise satisfy the requirements of Article III. *Laidlaw,* 528 U.S. at 181.

STANDARD OF REVIEW

The FAA's decision to approve the New Routes is reviewed under the arbitrary and capricious standard, which requires the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D) (Addendum p. 4); *see also D&F Afonso Realty v. Federal Aviation Administration,* 216 F.3d 1191, 1194 (D.C. Cir. 2000).

The arbitrary and capricious standard mandates a "thorough, probing, in-depth review" of agency decision-making. *Citizens to Preserve Overton Park v.*

Volpe, 401 U.S. 402, 416 (1971). Although courts do not substitute their judgment for that of an agency, neither do they "stand aside and rubber-stamp their affirmance of administrative decisions." *Reed v. Salazar*, 744 F. Supp. 2d 98, 110 (D.D.C. 2010) (quoting *Nat'l Labor Relations Bd. v. Brown*, 380 U.S. 278, 290 (1965)). Indeed, "to withstand review, [an] agency must articulate a rational connection between the facts found and the conclusions reached." *Sierra Club v. Bosworth*, 510 F.3d 1016, (9th Cir. 2007); *see also McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004) (no deference to conclusory or unsupported agency assertions).

An agency decision is arbitrary and capricious if it is not supported by substantial evidence in the record as a whole; if the decision does not rely on the factors that Congress intended it to consider; if the agency failed entirely to consider an important aspect of the problem; or if the agency offers an explanation which runs counter to the evidence. *See BFI Waste Sys. of N. Am. v. Federal Aviation Administration,* 293 F.3d 527, 532 (D.C. Cir. 2002). Reviewing courts "should not attempt [ ] to make up for such deficiencies" and "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

A. Petitioners' Claims Are Timely

1. Petitioners Timely Filed This Action Within 60 Days Of The FAA's Final Order Regarding The New Routes

The 60-day period for appealing FAA decision-making begins to run upon issuance of a reviewable order. 49 U.S.C. § 46110(a). To be reviewable, an order "must possess the quintessential feature of agency decision-making suitable for judicial review: finality." *Dania Beach v. Fed. Aviation Admin.*, 485 F.3d 1181, 1187 (D.C. Cir. 2007). To attain finality, in turn, an order "must mark the consummation of the agency's decision making process, and must determine rights or obligations or give rise to legal consequences." *Id*.

While a reviewable FAA order must be final, it "need not be a formal order, the product of a formal decision-making process, or be issued personally by the Administrator." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998). Rather, an order is reviewable if it "authorizes" action and "provides marching orders about how air traffic will be managed." *Dania Beach*, 485 F.3d at 1188. Thus, the concept of finality is pragmatic, flexible, and dependent on the circumstances of the case. *See, e.g., Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 n.7 (D.C. Cir.

1986) (discussing finality and rejecting an "inflexible meaning that precludes pragmatic or functional considerations").

The circumstances of this case demonstrate that the June and August, 2015 orders from which Petitioners appeal are final and reviewable. As explained above, FAA Order 7100.41 sets out a phased process for developing and implementing new departure routes. The fourth phase of that process consists of finalizing and implementing the routes, a process which culminates when the routes are published. (Exhibit 9, § 2-6.) Order 7100.41 specifically provides that new routes are not available for use until the fourth phase is complete. *Id*. The orders from which petitioners appeal represent the end of the fourth phase — *i.e.*, the publication of the routes. As such, they were clearly "final orders" because they "provide marching orders about how air traffic will be managed." *Dania Beach* at 1188.

Indeed, in *City of Phoenix Arizona v. FAA*, D.C. Circuit No. 15-1158, a similar case currently pending before this Court, the FAA has acknowledged that the publication of a new departure route is a the "final FAA order" from which an appeal may be taken within 60 days:

> The phase of the Order 7100.41 process that is relevant to the citizen-suit provision of the Federal Aviation Act, 49 U.S.C. § 46110(a), is the fourth phase appropriately entitled "Implementation." This phase … ends when the procedures and/or routes are published and implemented." … Implementation marked the end of the fourth phase contained

> in Order 7100.41, and the 60-day statute of limitations in 49 U.S.C. § 46110(a) began to run on that date.

Respondents' Motion to Dismiss, *City of Phoenix v. Huerta* (D.C. Cir. Case No. 15-1158) Doc. #1563118, pp. 46-47 , 2015. Here, Petitioners have appealed within 60 days of the FAA's publication the New Routes. The Petition is timely.

2. Petitioners' Filing Date Is Supported By Reasonable Grounds

Even if the FAA had finalized its decision-making before publishing the New Routes, this Petition would be timely. A petition for review may be filed more than 60 days after FAA action so long as there are "reasonable grounds" for the filing date. 49 U.S.C. 46110(a) (Addendum p. 11); s*ee also Avia Dynamics, Inc. v. Fed. Aviation Admin.*, 641 F.3d 515, 520 (D.C. Cir. 2007) (60-day deadline not jurisdictional). Here, Petitioners' filing date is amply supported by reasonable grounds:

- Petitioners were not provided with appropriate notice or a reasonable opportunity to comment on the 2013 Metroplex project.
- The FAA collaborated with MWAA to withhold information about LAZIR from Petitioners and their elected District of Columbia representative.

- Although Petitioners and their representatives specifically inquired about northern departures from National in 2013, the FAA did not inform them of the Metroplex project.
- Although Petitioners discussed National departure routes with the FAA on at least 10 occasions between 2014 and 2015, at no time did the agency disclose the existence of the Metroplex project or identify that project as the last word on departure routes.
- Upon learning of LAZIR, the Metroplex Project, and the New Routes, Petitioners immediately filed this Petition.

These facts support review of Petitioners' claims even if the 60-day period began to run before the New Routes were published.

B. The FAA's Implementation of the New Routes Was Arbitrary and Capricious

1. The LAZIR Component of the New Routes Has Never Been Subject To Required Environmental Review.

The New Routes are discretionary federal actions with the potential to impact historic resources, public parks, and the quality of the human environment. As such, they are subject to review under NEPA, the NHPA, and Section 4(f). (*See* Legal Framework, *supra*, parts 1 to 3). The FAA was required to comply with these laws ***before*** implementing the New Routes. (*Id*.)

Each of the New Routes incorporates LAZIR. Taken together, they make LAZIR the required default path for all RNAV-equipped aircraft departing National. Therefore, before proceeding to implement the New Routes, the FAA was required to ensure that the impacts of forcing all RNAV aircraft to use LAZIR (rather than National 328) had been fully reviewed under NEPA, the NHPA, and Section 4(f). The agency failed to do so, as we explain below.

a. The Impacts Of The LAZIR Component Of The New Routes Were Not Subject to Environmental Review In 2011.

The FAA originally designed LAZIR in 2011. (*See* AR B.32). During the route design process, questions about the need for environmental review arose between Bob Laser, FAA's Operations Manager at National Tower and Jim Arrighi, the FAA's RNAV Technical Lead. (*See* Exhibit 8.) Mr. Laser represented to Mr. Arrighi that LAZIR was a "direct overlay" of the existing National 328 route. (*Id*.) Mr. Arrighi forwarded that inaccurate representation to Lee Kyker, the FAA's environmental compliance specialist. (*Id*.) Ms. Kyker then concluded that LAZIR qualified for a categorical exclusion from further environmental review. (AR B.32) The FAA did not prepare any further environmental analysis under NEPA, the NHPA, or Section 4(f). (*Id*.) Nor did it invite the views of local, state, or federal agencies or members of the public. In short, the LAZIR component of the New Routes was not subject to

substantive review in 2011 because the FAA mistakenly concluded that it represented a "direct overlay" of an existing flight path.

It is also important to note that the 2011 version of LAZIR was merely an *elective* departure route. The default departure for all aircraft remained National 328. In contrast, the New Routes render LAZIR the mandatory default departure path. Therefore, even if the FAA had conducted a full environmental review of the 2011 version of LAZIR (and, as explained above, it did not), by definition that review would not have been sufficient to address the full impact of incorporating LAZIR into the New Routes.

b. The Impacts Of The LAZIR Component Of The New Routes Were Not Subject to Environmental Review In 2013.

The FAA has suggested that the impacts of the LAZIR component of the New Routes were comprehensively evaluated in the 2013 Metroplex EA and FONSI/ROD. *See* Respondents' Motion to Dismiss (Doc. #1577933) at 6. But a close look at those documents reveals the just opposite.

To understand why, it is necessary to examine the process by which the FAA evaluated potential noise impacts of the New Routes. The agency began by aggregating data from 2011 (the most recent year for which data was available) into an environmental baseline. (AR C.1, pp. 3-6, 3-49 to 3-55.) Next, it used a computer model to estimate the additional noise impacts — *i.e.*,

those beyond the baseline — attributable to the New Routes. (AR A.1, pp. 5-3 to 5-5; AR C.1, pp. 5-3 to 5-5.) The additional impacts attributable to the New Routes were then compared to the baseline to in order to determine whether and where noise increases would occur. (*Id*.) And those noise calculations, in turn, served as the foundation of the agency's analysis of potential impacts on the human environment (NEPA), adverse effects on historic resources (NHPA), and use of public parks and historic properties (Section 4(f)). (*See* AR A.1 pp. 5-3 to 5-12 (noise and land use impacts), 5-13 to 5-15 (Section 4(f) resources), 5-15 to 5-20 (impacts to historic resources).)

Central to this analytical process was the FAA's determination of the environmental baseline. By definition, noise that was considered part of the environmental baseline was not addressed as an impact of the New Routes, and vice versa. As noted above, LAZIR was originally designed and implemented in 2011. (AR B.32). Accordingly, it was treated as an "existing procedure — a part of the environmental baseline, not a result of the New Routes — for purposes of the 2013 Metroplex Project. (*See* AR.1 pp. 2-3, 2-10 (LAZIR listed among existing procedures), 3-10 to 3-11 (LAZIR part of "no action" alternative)). And, for that reason, neither the Metroplex EA nor the Metroplex FONSI/ROD properly evaluates the impacts of implementing the LAZIR component of the New Routes, as NEPA, the NHPA, and Section 4(f) require.

2. The FAA Violated NEPA And Its Own Regulatory Orders By Withholding Information About The New Routes From Affected Stakeholders.

One of NEPA's fundamental purposes is to ensure that environmental information is made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). To that end, federal agencies are required to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 C.F.R. §1506.6 (Addendum p. 55). Moreover, all NEPA analyses must be "available to public officials *and citizens* before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (Addendum p. 51) (emphasis added).

The FAA's regulatory orders also require the agency to engage the public in environmental review and decision-making processes. For example, FAA Order 1050.1E states "FAA's commitment to make complete, open and effective public participation an essential part of its actions, programs, and decisions" (AR B.15, p. 2-7, § 208a.) and further mandates that "[a]t the earliest appropriate stage of the action and early in the process of preparing NEPA documentation, the responsible FAA official…must provide pertinent information to the

affected community…and consider the affected communities' opinions" (AR B.15, p.2-8, §208b.).

The FAA utterly and thoroughly failed to comply with these requirements. In fact, the agency affirmatively withheld information from Petitioners and elected District of Columbia officials. A few illustrative examples follow.

(1) When initially designing LAZIR in 2011, the FAA used a decision-making process that involved no consultation with local officials and no notice to the general public. (*See* AR B.32.).

(2) The FAA studiously avoided notifying any District of Columbia stakeholders about the EA process. The agency's original notice of intent to conduct the Metroplex EA was mailed to 330 government officials in the Washington Metropolitan Area. (AR A.2 at 4-11.) None of the 330 recipients was an official of the District of Columbia Government. (*Id.*[3])

(3) The FAA also failed to provide District of Columbia stakeholders with a meaningful opportunity to provide comments on a draft version of the

[3] The only District of Columbia resident on the FAA's mailing list was Eleanor Holmes Norton, the District's Delegate to Congress. (AR A.2, p. 4-11.) The only individual in the District of Columbia government to be sent a copy of the Draft EA was the (unelected) SHPO, who was statutorily required to be notified pursuant to Section 106 of the NHPA. But because the EA treated LAZIR procedure as an existing departure procedure, the FAA inaccurately represented to the SHPO that the new RNAV routes (i) would only affect the flow of air traffic around the DC Metro area and (ii) would not change the noise levels in the District of Columbia itself. (AR A.10, p. 1-9.)

Metroplex EA. In June, 2013 the FAA transmitted the draft EA to an expanded list of approximately 600 public officials and 60 public libraries in Virginia, Maryland, West Virginia and Pennsylvania. (AR A.2, pp. 5-20.) Not a single copy of the draft EA was sent to any elected D.C. government official or to any library in the District of Columbia. (*Id.*)

(4) In 2014, District of Columbia Councilman Jack Evans specifically inquired about community noise impacts northern departures from National. (Exhibit 3.) The FAA and MWAA withheld information about the 2011 approval of LAZIR and failed to inform him of the potential impacts of the ongoing Metroplex Project. (Exhibit 4.)

(5) Petitioners and their representatives met with the FAA on numerous occasions in 2014 and early 2015. (Exhibit 2.) The explicit purpose of those meetings was to identify sources of and solutions to noise impacts associated with northern departures from National. (*Id.*) The FAA never mentioned its plans to implement LAZIR as the default northern departure from National. (*Id.*)

This is precisely the sort decision-making NEPA prohibits. All agencies, including the FAA must make "diligent efforts to involve the public" in environmental review. 40 C.F.R. § 1506.6(a) (Addendum p. 55.) And the agency's own regulatory orders commit to "complete, open, and effective public

participation" throughout the decision-making process. (AR B.15, pp. 2-7 to 2-9, 4-7.) These requirements cannot be satisfied by grudging, pro forma documentation, evasive responses to good-faith inquiries, or strategic silence. *See, e.g., Am. Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (noting that "interested persons cannot request an EA for actions they do not know about, much less for actions already completed.") Agencies must take diligent efforts to promote public engagement and transparent decision-making. 40 C.F.R. § 1506.6(a) (Addendum p. 5). The FAA's actions to limit public involvement, exclude District of Columbia stakeholders, and mislead Petitioners and their elected officials were arbitrary, capricious, and unlawful, and must be set aside.

CONCLUSION

In five distinct steps stretching over four years, the FAA shifted several hundred daily flights from the settled, 70-year-old National 328 flight path to New Routes crossing directly over Georgetown and neighboring historic districts: (1) in 2011, without public notice, agency consultation, or substantive environmental review, the agency approved the original version of LAZIR; (2) in 2013, the agency incorporated LAZIR into the New Routes as an "existing procedure" requiring no further review or evaluation ; (3) in 2013-2014, the agency withheld information about LAZIR from Petitioners and their

representatives, falsely suggesting (with MWAA) that flight paths had remained constant since 2008; (4) in 2015, again acting without public notice, the agency amended LAZIR and collaborated with the Secret Service on a test of the revised procedure; and (5) later that same year, the agency formally published the New Routes, making LAZIR the default northern departure from National.

Nowhere in this process was the LAZIR component of the New Routes subject to the rigorous, public environmental review mandated by NEPA, the NHPA, and Section 4(f). And never were Petitioners provided a meaningful opportunity to participate in the truncated decision-making process that did occur.

For each of the foregoing reasons, Petitioners respectfully ask this Court to vacate the FAA orders implementing the New Routes and to restore the *status quo ante*, as it existed prior to March 2015, unless and until the FAA properly addresses the impact of those Routes on the District of Columbia, its environmental and historic resources, and its residents. *Dania Beach*, 485 F.3d at 1186-87 (D.C. Cir. 2007).

Certificate of Compliance

The undersigned certifies that, according to the word count provide by Microsoft Word 201, the body of the foregoing brief contains 7,248 words. The text of the brief is in 14-point Times New Roman, which is proportionately spaced.

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of January, 2017, I electronically filed this *Petitioners' Opening Brief* with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered to use that system and, to my knowledge, will receive copies of this document upon its filing.

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