D.C. Cir. No. 15-1285

NOT YET SCHEDULED FOR ORAL ARGUMENT

CITIZENS ASS'N OF GEORGETOWN, *et al.*,
*Petitioners*

*v.*

FEDERAL AVIATION ADMINISTRATION; MICHAEL P. HUERTA, in his official capacity as Administrator, Federal Aviation Administration,
*Respondents*

ON PETITION FOR REVIEW FROM
THE FEDERAL AVIATION ADMINISTRATION

# FINAL ANSWERING BRIEF OF FEDERAL RESPONDENTS

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

1. **Parties and amici:**

Citizens Association of Georgetown
Burleith Citizens Association
Foxhall Citizens Association
Hillandale Citizens Association
Palisades Citizens Association
Foggy Bottom Association
Georgetown University
*Petitioners*

Federal Aviation Administration ("FAA")
Michael P. Huerta, FAA Administrator
*Respondents*

2. **Rulings:**

The petition for review requests judicial review of the July 23, 2015, and August 20, 2015, publication of certain air-traffic control procedures.

3. **Related Cases:**

This case has not previously been before this Court or any other court, and there are no related cases as defined by D.C. Cir. R. 28(a)(1)(C).

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

## Statutes



## Federal Regulations



*Authorities upon which we chiefly rely are marked with asterisks.

# GLOSSARY

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|---|---|
| **DCA** | Washington Reagan National Airport |
| **DNL** | Yearly Day-Night Average Sound Level |
| **FAA** | Federal Aviation Administration |
| **NEPA** | National Environmental Policy Act |
| **NHPA** | National Historic Preservation Act |
| **RNAV** | Area Navigation |

**Note:** The brief refers to air traffic control procedures called "LAZIR" and "NATIONAL," but these designations are not included in the glossary as they are names and not acronyms.

## STATEMENT OF JURISDICTION

Petitioners are Georgetown University and six neighborhood associations from Northwest Washington, D.C., seeking review of the Federal Aviation Administration's approval of certain air-traffic control procedures for aircraft departing north-bound from Washington Reagan National Airport ("National Airport"). Petitioners allege that this Court has jurisdiction under 49 U.S.C. § 46110(a), which provides for judicial review by this Court of "an order" issued by the Administrator of the Federal Aviation Administration ("FAA"). This Court lacks jurisdiction because the Petitioners failed to timely challenge a final order.

Petitioners allege that the FAA violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, when approving the identified procedures. But the FAA's "order" with respect to compliance with that statute was issued on December 12, 2013, and Petitioners did not file in this Court until August 24, 2015. A petition "must be filed not later than 60 days after the order is issued." 49 U.S.C. § 46110(a). A petitioner may file suit outside of the sixty-day period if there are "reasonable grounds" for a delay. 49 U.S.C. § 46110(a). But as this brief explains, there are no such circumstances

here. This Court lacks jurisdiction to hear this untimely petition for review, and it should therefore be dismissed.

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the separate Statutory Addendum filed with Petitioners' Opening Brief.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

On December 12, 2013, the FAA published its Finding of No Significant Impact and Record of Decision for the Washington, D.C. Optimization of the Airspace and Procedures in the Metroplex. (JA 1485, AR A10.) In that document, the FAA approved 41 new and modified air-traffic procedures to be flown in the greater Washington D.C. area, known as the D.C. Metroplex. That decision included the procedures to be used at National Airport that Petitioners challenge in this case. The decision document represents the agency's final conclusions as to compliance with NEPA, the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101 *et seq.*, and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c). Petitioners

filed their petition for review over a year-and-a-half later. This case presents the following issues:

1. Did Petitioners have "reasonable grounds" for failing to comply with the sixty-day statute of limitations established by 49 U.S.C. § 46110(a)?
2. Did Petitioners comply with the exhaustion requirements of 49 U.S.C. § 46110(d) and applicable NEPA case law, when no one submitted to the FAA any comments on the draft environmental assessment relevant to noise from north-bound departures from National Airport?
3. If the petition for review is properly before this Court, did the FAA comply with NEPA when its environmental assessment relied on FAA's expert modeling of noise impacts to demonstrate that the challenged departure procedures would cause no significant impacts to the human environment?
4. If the petition for review is properly before this Court, did the FAA provide for and consider public input to the extent required by NEPA?

# STATEMENT OF THE CASE

## I. Statutory and Regulatory Background

### A. The FAA is responsible for prescribing safe and efficient air-traffic control procedures for the national airspace.

The Federal Aviation Act of 1958, 49 U.S.C. § 40101 *et seq.*, delegated to the FAA control over use of the nation's navigable airspace and regulation of domestic civil and military aircraft operations in the interest of maintaining safety and efficiency. *See, e.g.*, 49 U.S.C. § 40101(d)(4). Congress has authorized the FAA to prescribe air traffic rules and regulations governing the flight and navigation of aircraft, and to ensure the efficient utilization of navigable airspace. 49 U.S.C. § 40103(b)(2). The FAA must also ensure the protection of persons and property on the ground by prescribing rules for safe altitudes of flight and rules for the prevention of collisions between aircraft. *Id.*

Using this authority, the FAA publishes air traffic "procedures" for use by commercial passenger aircraft operating at airports in the United States. The procedures provide a series of steps for pilots to follow including where to turn, what direction to fly, when and where to ascend or descend, and at what speeds. Published instrument procedures are described as "conventional" when they rely on ground-

based navigation aids, or are based on verbal instructions (or "vectors") from an air traffic controller. The FAA is moving away from the use of these conventional procedures in favor of those that use newer technologies, such as the Global Positioning System and automated navigation guidance systems found in more modern aircraft. This case involves the FAA's environmental review of new procedures for north-bound departures from National Airport.

### B. NEPA requires consideration of the impacts of major federal actions that significantly affect the human environment.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, is a procedural statute designed to foster better and more informed decision-making by federal agencies. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA requires an agency to prepare an "environmental impact statement" before a federal agency may engage in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

But not all agency actions have such an effect. To determine whether significant environmental effects are expected, an agency may prepare a "concise public document," called an "environmental assessment," to "briefly provide sufficient evidence and analysis for

determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9; *see also* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3, 1501.4(b), 1508.13. In an environmental assessment, the agency defines the purpose and need for the proposed action, then examines alternatives to that action, including a "no action" alternative that provides a basis for comparing the potential environmental effects of the proposed action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1502.14(d), 1508.9(b). If the agency ultimately determines that the environmental impacts of the federal action will not be "significant" for NEPA purposes, it may issue a Finding of No Significant Impact and a decision notice authorizing the project, concluding the NEPA process. 40 C.F.R. §§ 1508.9, 1508.13.

Although NEPA applies to air-traffic control procedures such as those at issue in this case, not all procedures require an environmental impact statement or an environmental assessment before they may be implemented. Regulations promulgated by the Council on Environmental Quality permit agencies to identify certain categories of agency actions "which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. These

actions are known as "categorical exclusions." Once an agency has properly identified these categories, any actions fitting in these categories require no further NEPA analysis. 40 C.F.R. § 1507.3(b)(2)(ii). Categorical exclusions are an important means of ensuring that federal agencies prioritize the analysis, disclosure, and mitigation of "significant" environmental effects. Agencies are required by law to "reduce excessive paperwork," in part by "[d]iscussing only briefly issues other than significant ones," 40 C.F.R. § 1500.4(c), "[u]sing the scoping process . . . to deemphasize insignificant issues," 40 C.F.R. § 1500.4(g), and by "[u]sing categorical exclusions" wherever appropriate. 40 C.F.R. § 1500.4(p). Categorical exclusions may not apply when "extraordinary circumstances" arise; in that situation, the agency must further consider whether NEPA requires additional discussion of potential environmental impacts. 40 C.F.R. § 1508.4.

The FAA has promulgated a series of categorical exclusions described in FAA Order 1050.1E, which was the version of the Order applicable at the time of the decisions challenged in this case (it has since been updated to 1050.1F). (JA 81, AR B15.) That Order also specifically defines what "extraordinary circumstances" would require

further review of an otherwise-excluded action. (JA 112-113, AR B15 at 3-3 to 3-4.)

### C. The FAA has defined what levels of noise impacts are "significant" for NEPA purposes.

Aircraft noise is one of the primary concerns when considering the environmental impacts of changes to air-traffic control procedures. The FAA has developed standards for what constitutes a "significant" noise increase, and would therefore require the preparation of an environmental impact statement. (JA 200-204, AR B15 at A-61 to A-65.) The FAA measures noise using the Yearly Day-Night Average Sound Level, referred to most commonly as "DNL." *See* 14 C.F.R. §§ 150.7, Part 150 App. A & B. A particular DNL, which is stated in decibels, represents the average sound exposure at a particular location over a 24-hour time period and then annualized. This average is weighted, assigning a 10-decibel increase to any noise events occurring between 10:00pm and 7:00am to account for the increased annoyance of hearing noise during the night hours. Although noise can be measured with many metrics, "[c]ourts have long accepted the FAA's DNL standard as the appropriate methodology for assessing the impact of aircraft noise." *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 326 (D.C. Cir.

2003); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200-01 (D.C. Cir. 1991); *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985).

## II. Factual background

### A. North-bound runway departures at National Airport have followed the Potomac River for years.

The runways at National Airport run very roughly north to south, and planes may depart in either direction depending on wind and weather conditions. *See* Figure One, *infra* at 10. When the airport is in a "north flow operation," flights land on the southern end of the runways and take off from the northern end. Flights departing north from runways 1 and 33 begin by heading to the north, then make a turn to the northwest to follow the path of the Potomac River.[1]

[1] Runways are generally named with the numbers 1 through 36, indicating in decadegrees the runway's heading with respect to magnetic north. For example, a heading straight off of Runway 9 would be to the east (90 degrees), and a heading straight off of Runway 27 would be to the west (270 degrees). Runways that can be used in opposite directions generally have separate names for each direction, separated by 18 (as they are 180 degrees apart). Runway 33 at National Airport is also called Runway 15 when used in a south-flow operation, and Runway 1 is also Runway 19. *See* Figure One.

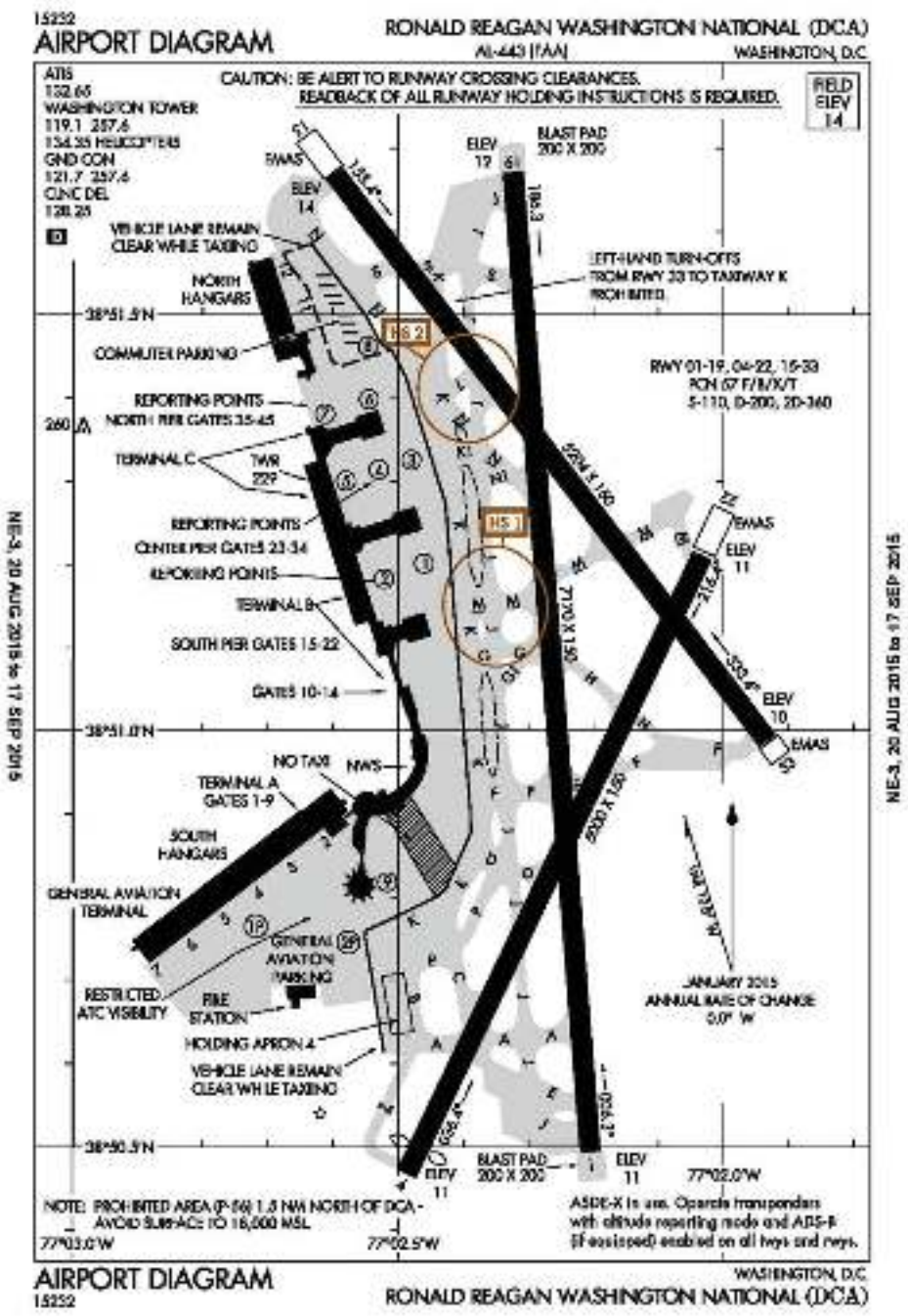



*Figure One*

For most of National Airport's existence, pilots departing to the northwest have followed a conventional departure procedure known as

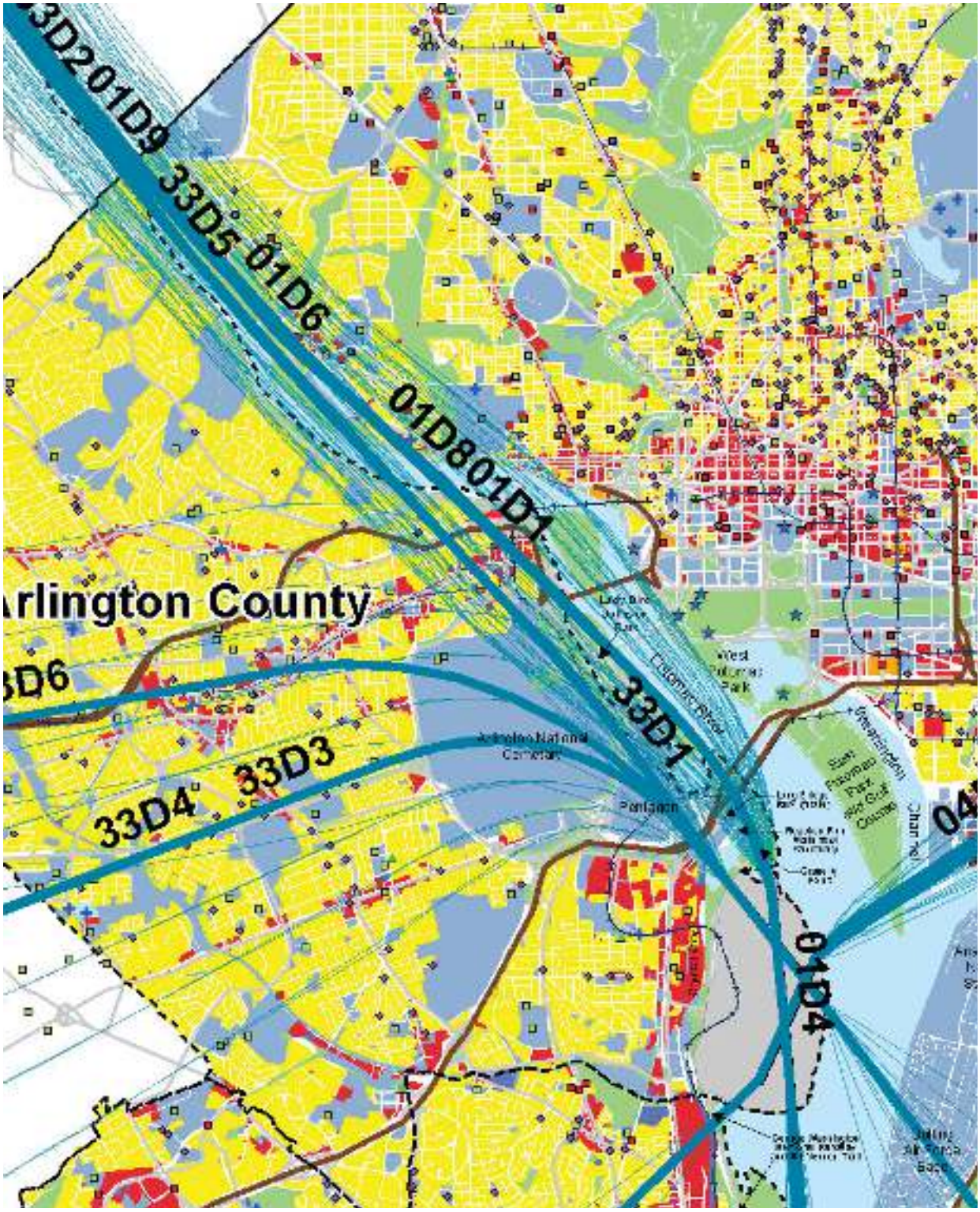
"NATIONAL," and variations thereof (the current version is NATIONAL 7). The Opening Brief calls this same procedure "NATIONAL 328." This departure procedure closely follows the 328-degree radial from National Airport, and travels over Arlington Cemetery and downtown Rosslyn, Virginia. Since jet aircraft began flying at the Airport in the early 1960s, effects on these areas from aircraft noise have been mitigated by a noise abatement measure that diverts pilots over the river and reduces time flying over more populated areas. (Exh. 1 to Resp. Mot. for Judicial Notice at VI-3.)

Currently under this measure, pilots are instructed to depart via the Ronald Reagan Washington National Airport Noise Abatement and Prohibited Area (P-56) Avoidance Procedures, which provide in part: "Follow the Potomac River until abeam the Georgetown reservoir or the DCA VOR 4.0[DME], then join the DCA VOR R-328. * * * If unable to maintain visual reference to the Potomac River, join the DCA VOR 328 radial."[2] Pilots following this procedure would therefore follow the

[2] These refer to points plotted on a navigational chart using technology that became widespread in the 1960s. "VOR" stands for "VHF omnidirectional range" and "DME" stands for "distance measuring equipment."

Potomac River adjacent to Georgetown when first departing the airport, and would not realign themselves with the 328-degree radial until after flying past the Georgetown Reservoir about four miles from the end of the runway. (Exh. 1 to Resp. Mot. for Judicial Notice at VI-4.)

Petitioners' statement that northwest departures prior to 2015 historically "followed a straight-line route along the west side of the Potomac River," Pet. Br. at 2, is not accurate. Proper compliance with the noise abatement measure brings flights abeam the Georgetown Reservoir and therefore very close to the northeastern side (the D.C. side) of the Potomac River. Flights departing northwest from National Airport utilizing noise abatement procedures are dispersed across the width of the Potomac River. Figure 2, on the following page, depicts a representation of noise model flight tracks developed from radar data recorded in 2002. (JA 587-588, AR B34 at E-8 & Exh. E-3; Exh. 1 to Resp. Mot. for Judicial Notice at IV-14, Exh. IV-4, Table IV-6.) These generalized flight tracks account for normal aircraft operations and variations could result from changes in pilot technique, equipment, and other factors. (Exh. 1 to Resp. Mot. for Judicial Notice at IV-14.) The full image is found at JA 588, AR B34 at E-25.


33D201D9
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33D1
33D3
33D4
01D4
Pentagon

*Figure Two*

### B. The FAA developed a next-generation departure procedure in 2011 in part to further address concerns about noise.

As technology improves, conventional procedures such as NATIONAL are being replaced in favor of procedures that take advantage of updated satellite-based procedures that "will allow the FAA to guide and track air traffic more precisely and efficiently." (JA 1490, AR A10 at 2.) The FAA is therefore revising or replacing departure and arrival procedures at major airports to make them safer, more predictable, and more efficient. In 2011, the FAA estimated that nationwide adoption of these next-generation procedures would reduce delays nationwide by 35%, saving $23 billion in excess costs through 2018. (JA 581, AR B31 at 5). This process gained new impetus in 2012, when Congress enacted legislation requiring the FAA "to maximize the fuel efficiency and airspace capacity" of the nation's 30 busiest airports. FAA Modernization and Reform Act of 2012, Pub. L. 112-95. That statute required the FAA to implement next-generation navigation procedures at those airports within three years (by 2015). *Id.* Although the FAA was unable to reach that goal fully, it has made substantial progress.

The Washington, D.C., Optimization of the Airspace and Procedures in the Metroplex, approved in 2013, was an important step towards achieving that goal in the broader Washington, D.C. region. (JA 1490, AR A10 at 2.) But even before that process was completed, the FAA developed new procedures at National Airport in order to address concerns about noise. Given National Airport's location within a major metropolitan area, it is no surprise that aircraft noise has always been a concern. In the early 2000s, the Metropolitan Washington Airport Authority, the FAA, other federal agencies, and a group of elected representatives and citizens from the surrounding communities worked together on a committee to help develop additional ideas for further reducing noise from aircraft operating at National Airport. (Exh. 1 to Resp. Mot. for Judicial Notice at I-1 to I-2.) One of the recommendations of this group was to develop next-generation procedures "to provide pilots the ability to follow more predictable and precise flight tracks along the center of the Potomac and Anacostia River corridors." *Id.* at VI-3.

Partly in response to this concern from the community working group, the FAA began developing new procedures, referred to in the

administrative record as "RNAV procedures," or performance-based navigation procedures, at National Airport. One of the procedures discussed in the Opening Brief, known as "LAZIR," was first published on March 10, 2011 (JA 583, AR E6), but flown only very briefly that year. It was republished as LAZIR TWO in early 2012. (JA 589, AR E8.) The LAZIR procedure (in all its iterations) guided north-bound departures from Runways 01 and 33 along the Potomac River to reduce noise exposure to surrounding communities. It substantially mimicked the noise abatement procedure that had been in place at National Airport for nearly thirty years, keeping aircraft noise over the water rather than over occupied properties, but used updated technologies to do so.

### 1. The FAA considered the potential environmental impacts of the LAZIR procedure under NEPA.

The FAA analyzed any potential changes in noise impacts that might be caused by LAZIR's implementation by using a computer modeling system. (JA 554, AR C10.) The FAA took 10,302 radar tracks of actual flights recorded over fifteen different days in 2009 and 2010 that were representative of the overall air traffic and atmospheric

conditions at National Airport, and used these to establish an environmental baseline. (JA 555.) The FAA then modeled the noise resulting from using the proposed LAZIR departure, and compared that to the baseline in order to find whether there would be any noise increases. *Id.* The FAA found three small areas where noise would increase (as well as one area where noise would be decreased). (JA 571-573.) One area where noise would increase was south of the Airport. (JA 573.) The other two were closer to the Airport to the north, including portions of Haines Point, the Potomac River, the Tidal Basin, and the National Mall. *Id.* None of the areas represented by Petitioners were identified as experiencing any reportable noise increase. *Id.*

Although the computer modeling identified small areas of noise impact, none of these noise increases were so great as to be considered "significant" for NEPA purposes. (JA 584-585, AR B32.) The north end of the runway would experience a noise increase of 1.5 DNL in an area already subject to an overall noise of 65 DNL or more, JA 569, AR C10 at 16, but that change did not trigger further NEPA review because the north end of the runway is not a "noise sensitive area" as defined by FAA Order 1050.1E. (JA 200, AR B15 at A-61.) The other small noise

increases were below the thresholds of concern. (JA 569-573, AR C10.) The environmental analysis also demonstrated that no "extraordinary circumstances" applied, and the FAA documented that the original LAZIR procedure was categorically excluded. (JA 584-585, AR B32.)

FAA has promulgated a categorical exclusion for the "[e]stablishment of new procedures that routinely route aircraft over non-noise sensitive areas," and applied that categorical exclusion to the LAZIR procedure because neither the end of the runway nor the Potomac River are "noise sensitive areas." *Id.* A "noise sensitive area" is defined as one "where noise interferes with normal activities associated with its use." (JA 93, AR B15 at 1-8.) Some examples of noise sensitive areas include residential, educational, religious, and recreational areas. *Id.* In the context of aircraft noise, the FAA has determined that noise generally "interferes with normal activities associated" with these areas if they are within a 65 DNL noise contour, meaning that the average aircraft noise at that location, over the course of a year and weighted to give more consideration to nighttime noise, is above 65 decibels. *Id.* The LAZIR procedure did not increase noise impacts in any noise sensitive area within the 65 DNL contour. (JA 554, AR C10.)

### 2. The Washington, D.C., Metroplex decision approved additional procedures that followed the original LAZIR departure path.

Although the LAZIR procedure was published and available by at least early 2012, it was not regularly flown in the beginning. Just north of National Airport is Prohibited Area 56 (often referred to as "P-56"), above portions of the National Mall, the White House, and the U.S. Capitol Building. (Exh. 2 to Resp. Mot. for Judicial Notice; JA 577, AR B30.) This area is a no-fly zone for all aircraft unless specifically authorized by United States Secret Service, and pilots had concerns about the LAZIR procedure because it brought them closer to the prohibited airspace than they might otherwise have flown. North-bound departures from National Airport followed the approximate path of the LAZIR procedure about 18% of the time in 2011 (after the publication of the procedure in March) and 16% of the time in 2012.[3] In the years 2013 and 2014, however, these percentages dropped to around 3%.

[3] The FAA calculated these numbers after-the-fact for the purpose of furthering public discussion and understanding of aircraft noise from National Airport. The calculations and methodology are contained in the document entitled *FAA – DCA 5 yr North Flow Departure Analysis,* available at http://www.flyreagan.com/dca/community-working-group

Around this same time, the FAA was developing a broader package of new procedures known as the Washington D.C. Optimization of the Airspace and Procedures in the Metroplex (the "Metroplex Project"), an undertaking that established 41 new and modified flight procedures in the greater Washington, D.C., area. (JA 1491, AR A10 at 3.) The Metroplex Project reviewed and revised procedures at National Airport and several other neighboring airports, including Dulles International and Baltimore-Washington International airports, in order to put in place next-generation procedures that would improve the safety and efficiency of the regional airspace. *Id.*

(last visited March 22, 2017). As environmental review of the LAZIR procedure was not completed until August 2011, JA 585, AR B32, and the subsequent approach plate for LAZIR TWO was not published until February 2012, JA 589, AR E8, it is likely that most of the radar tracks used to develop the 2011 percentage represent pilots using conventional departure procedures and complying with the noise abatement measure that directs them to follow the Potomac River to at least the Georgetown Reservoir.

### 3. The Metroplex environmental assessment disclosed the potential noise impacts of increased use of the LAZIR-based path incorporated in the challenged procedures.

The FAA reviewed the Metroplex Project for potential environmental impacts under NEPA, and drafted an environmental assessment for public review and comment. (JA 590, AR A1.) The environmental assessment for the Metroplex decision compared the potential environmental impacts of the new proposed procedures to the anticipated impacts of a "no-action alternative." (JA 772-805, AR A1 at 5-1 to 5-34.) The LAZIR departure procedure had already been approved in 2011, before design of the Metroplex Project was complete. The existence of the LAZIR departure was therefore included as part of the no-action alternative, which was based on procedures existing as of December 2011 at the four major airports involved. (JA 642, AR A1 at 2-17.)

The Metroplex Project added additional north-bound departure procedures at National Airport that began identically to LAZIR, but then branched out in several directions once past the Potomac River depending on the ultimate destination of the flight. This was done because the existing departure procedures "require[d] extensive radar

vectoring," which "contribute[d] to [air-traffic controller] task complexity and flight path variability," and were also inefficient for aircraft. (JA 637, AR A1 at 2-12.) One of the purposes of the Metroplex Project was to increase the use of performance-based navigation (or RNAV) procedures, and so the proposed alternative anticipated an increase in the use of the beginning segment of the pre-existing LAZIR departure procedure, and a reduction in the use of the conventional departure procedure known as NATIONAL. (JA 981, AR C1 at 5-4.)

The environmental assessment analyzed and disclosed the change in noise that was anticipated from this change in use of the two different departure tracks. The full analysis is contained in a separate technical report, totaling over five hundred pages, that accompanied the environmental assessment. (JA 908, AR C1.) For the no-action alternative, the FAA used radar tracks from 282 days of 2011, to accurately represent flights as they were flown in that year. (JA 967-968, AR C1 at 3-48 to 3-49.) However, in the computerized noise model, the FAA assumed that *zero* operations would use the LAZIR-based departure path in the no-action alternative. They then compared this baseline to an assumed 88% usage of LAZIR-based departures for the

years 2013 and 2018, in order to forecast the maximum noise impacts from increased use of LAZIR. (JA 980-981 & 994, AR C1 at 5-3 to 5-4 and pdf87.) The precise assumptions used for the noise model are revealed in the input files for the Noise Integrated Routing System, which were provided as part of the administrative record at C15.

The technical report provided the resulting change in noise for every grid point studied, including those in Northwest D.C. in Petitioners' areas of concern. *See, e.g.*, JA 1380-1384. The only areas in the Metroplex Project experiencing a reportable noise increase under FAA Order 1050.1E (meaning an increase in noise that is not itself "significant," but that warrants further investigation) were near Richmond, VA, involving different procedures than the ones from National Airport at issue in this case. (JA 1867-1896, AR A9; JA 1008, C1 at pdf101.) No reportable noise increases, and therefore no significant noise increases, were projected to occur in Washington, D.C. The FAA did disclose some noise increases in the Georgetown area and other parts of Washington, D.C., even though these increases were below the "reportable" threshold and therefore well below the level of NEPA significance. (JA 1380-1382, AR C1 App. 4 at 1-3.) These results

disclosed the resulting change in noise from no operations following LAZIR-based departure procedures to nearly all of them following those procedures.

The FAA distributed notices of its intent to prepare a draft environmental assessment for the D.C. Metroplex Project in December 2012. (JA 812-820, AR A2 at A.1 (listing 330 parties that were directly provided notice).) The FAA also notified elected officials and other interested parties. (JA 822-823, AR A2 at A-13 to A-14). The FAA also published notice in newspapers, including the *Washington Post*. (JA 834-835, AR A2 at A-25 to A-26.) Although the notice indicated that FAA would consider holding public workshops to further discuss the Metroplex Project, *id.*, the FAA received no requests for a public workshop.

The FAA circulated a draft of the environmental assessment in June 2013, this time to over 450 recipients, and again solicited comments. (JA 892-907, AR A3 at 5-20.) Notice of the comment period and availability of the draft environmental assessment was again published in newspapers. (JA 1503, AR A10 at 15.)

As the actual measurement and modeling of noise can be highly technical, the environmental assessment included a sixteen-page appendix entitled "The Basics of Noise" that provides an explanation of noise measurement and its related vocabulary in layman's terms. (AR A5.) In response to the environmental assessment, no one submitted any comments to the FAA regarding the potential for noise impacts from flights departing north-bound from National Airport.

In October 2013, D.C. Councilmember Jack Evans wrote a letter to the Chairman of the Metropolitan Washington Airports Authority alleging that "the air traffic pattern at Reagan National Airport has changed," and that as a result the noise in some Northwest D.C. neighborhoods "has been loud, disturbing and constant since this happened." (Opening Br., Exh. 3.) The Metropolitan Washington Airports Authority is a quasi-governmental organization completely independent from the FAA. It contains representatives from Virginia, Maryland, Washington, D.C., and the Federal government.[4] The Federal government members of the Board are not FAA employees; they

[4] *See* http://www.mwaa.com/about/board-directors (last visited March 22, 2017).

are appointed by the President and confirmed by the Senate. Four of its members are appointed by the Mayor of Washington, D.C., and confirmed by its City Council.

A month later, shortly before the FAA published its Record of Decision approving the Metroplex Project, the Airports Authority wrote back to Councilmember Evans. (Opening Br., Exh. 4.) Although Petitioners state that the Airports Authority wrote back "after consulting with the FAA," Opening Br. at 13, this claim overstates the evidence in the record. The letter from the Airports Authority states that it "examined Federal Aviation Administration (FAA) historical and recent flight path location data from August 2008 to October 2013," and that arrival and departure paths "in close proximity to the Potomac River near the Hillandale neighborhood have remained consistent during that period." *Id.* The letter also states that the Airport Authority contacted the air-traffic control tower at National Airport to ask if departure flight paths had been affected by construction projects at the airport (they had not). *Id.* The Councilmember's letter was not addressed to FAA, and the Airports Authority's response gives no indication that it consulted the FAA (except with respect to the question

of construction impacts directed to air-traffic controllers) before writing back.

#### 4. FAA gave final approval to the Metroplex Project, including its LAZIR-based departure procedures, in December 2013.

After considering comments on the draft environmental assessment and providing responses, JA 1563, AR A10 at 2-33, the FAA prepared a Record of Decision and Finding of no Significant Impact in December 2013. (JA 1485, AR A10.) In this final decision document, the FAA selected the proposed alternative analyzed in the environmental assessment, and explained its conclusion that implementation of this alternative would have no significant impacts on the human environment as demonstrated by the environmental assessment finalized in November 2013. *Id.* at 1. The document also states that it is "used by the FAA to demonstrate and document its compliance with the several procedural and substantive requirements of aeronautical, environmental, programmatic, and other statutes and regulations that apply to FAA decisions on proposed actions," specifically identifying NEPA, the NHPA, and Section 4(f) of the Department of Transportation

Act. *Id.* In the conclusion, the FAA explained that the decision document "constitutes a final order of the FAA Administrator and is subject to exclusive judicial review under 49 U.S.C. § 46110," the citizen-suit provision of the Federal Aviation Act. *Id.* at 18. In addition to being publicly available on the Internet, notice of the publication of this final decision document was again mailed to the distribution list and published in newspapers. (JA 1599, 1601, AR A14, A16.) No one sued the FAA within sixty days of that decision.

In March 2015, the FAA began flight trial validation activities using the original published LAZIR 5 departure procedures. The purpose of these activities was to ensure that airlines and their aircraft's on-board computer guidance would allow them to avoid Prohibited Area 56 while complying with the original LAZIR-based departure procedures. For the next couple of months, the FAA encouraged airlines to resume flying the LAZIR 5 procedure. A Letter of Understanding between the FAA and the United States Secret Service established that pilots would not be issued a violation for non-egregious incursions into Prohibited Area 56 resulting from anomalies in the usage of automated equipment.

The new LAZIR-based departure procedures approved in the D.C. Metroplex Project were not immediately published in the FAA's *Terminal Procedures Publication*, which is revised every 56 days and contains the relevant charts of each procedure a pilot and controller might use at a particular airport.[5] After the success of the trial validation period in early 2015, the procedures were published in two consecutive charting cycles, with the eastbound RNAV procedures published on April 30, 2015, and the westbound RNAV procedures published on June 25, 2015. Although the name of several procedures changed, the flight paths of the procedures are identical to those approved in December 2013, with the exception of a rarely-used transition for Runway 4 added to certain procedures due to the increased length of that runway.

The procedures continue to be in use today. Although Petitioners note that increased use of the procedures resulted in noise complaints, Opening Br. at 26-27, the great majority of those complaints appear to

[5] Traditionally this publication is printed as a 24-volume set of paper books, but it is also available in an easily-searchable online database (and was available online in 2013 as well). *See* https://www.faa.gov/air_traffic/flight_info/aeronav/digital_products/dtpp/ (last visited March 22, 2017).

have been filed by a single individual.[6] Petitioners filed a petition for review in this Court on August 25, 2015. The FAA moved to dismiss the petition as untimely, and this Court deferred that issue to be considered along with the merits.

## SUMMARY OF ARGUMENT

Petitioners' concerns about noise appear to stem from the approval of the original LAZIR departure procedure in 2011. The record contains numerous instances of Petitioners or their representatives complaining about noise from north-bound departures from National Airport *before* the FAA finally approved the Metroplex Project in December 2013. Accepting Petitioners' allegation of injury for purposes of determining their standing, that injury is fairly traceable to the introduction of LAZIR in 2011, or at least no later than the publication

[6] *See, e.g.*, Lori Aratani, *Are you the person who filed 6,500 noise complaints against National Airport?*, Washington Post, Mar. 7, 2016 (available at https://www.washingtonpost.com/news/dr-gridlock/wp/2016/03/07/are-you-the-person-who-filed-6500-noise-complaints-against-national-airport/?utm_term=.2f4daec0b308) (last visited April 3, 2017); Owen Phillips, *Meet the DC resident who filed thousands of the city's noise complaints*, The Outline, Jan. 4, 2017 (available at https://theoutline.com/post/834/the-dc-resident-who-filed-thousands-of-the-city-s-noise-complaints) (last visited April 3, 2017).

of LAZIR TWO in early 2012. Yet Petitioners did not challenge the implementation of LAZIR within the sixty days provided by 49 U.S.C. § 46110(a).

Nor did they timely challenge the FAA's final decision and approval of the D.C. Metroplex Project in December 2013, even though this decision authorized the increased use of the initial LAZIR departure path from National Airport. That decision was unquestionably final upon publication, and therefore constitutes the "order" that the Administrator "issued" for purposes of judicial review under 49 U.S.C. § 46110(a). But the petition for review instead identifies the publication of the navigational charts of those procedures a year-and-a-half later, despite those charts bearing none of the legal qualities of a judicially-reviewable order under this Court's precedent.

Petitioners argue that they had "reasonable grounds" for their delay, but their explanation is unpersuasive. The draft environmental assessment was publicly available and had been widely circulated for a year before the agency reached its final decision. This Court's precedent makes clear that so long as an agency action is published and available to the public, it has been "issued" for purposes of 49 U.S.C. § 46110(a),

and actual notice to any potential petitioner is not required. Petitioners allege that their failure to file a timely suit was the result of the FAA actively trying "to withhold information about LAZIR from Petitioners and their elected District of Columbia representative." Opening Br. at 25. But this is untrue. When Petitioners contacted the FAA, they did so to complain about noise they were already experiencing, which could not have been the result of the procedures approved in the Metroplex Project decision but that were not yet being flown. The FAA dealt with Petitioners lawfully and in good faith in response to Petitioners' complaints. But this Court's precedents make clear that where the offending agency action was authorized in a published decision document, it is incumbent on a petitioner to file a petition for review within sixty days or lose the opportunity for judicial review.

Petitioners also failed to exhaust their administrative remedies, as is required by 49 U.S.C. § 46110(d), before filing suit. Petitioners submitted no comments on the D.C. Metroplex Project environmental assessment relating to noise from National Airport. Nor did any other party. Both the statute providing Petitioners' cause of action and

general principles of administrative exhaustion require dismissal of the petition for review in those circumstances.

Finally, as to the merits, Petitioners are factually mistaken about how the FAA conducted its analysis of the potential noise impacts of both the original LAZIR departure procedure and the LAZIR-based departure procedures approved as part of the D.C. Metroplex Project. The original LAZIR procedure was independently assessed for its potential noise impacts, and there were no significant noise increases in Petitioners' area of Washington, D.C. Then, in the environmental assessment, the FAA used an environmental baseline that assumed LAZIR was not being used at all, so that the results of the noise analysis would show the maximum possible impact from increased use of LAZIR-based procedures. Petitioners' claim that "the LAZIR component of the new routes has never been subject to required environmental review," Opening Br. at 26, is readily disproven by the record before this Court. And because the FAA published a draft environmental assessment, took comments from the public, and considered those comments before issuing a final decision, the agency

complied with all the requirements of NEPA to provide for public input on its decision.

The petition for review should be dismissed for failure to comply with both the statute of limitations and exhaustion requirements of 49 U.S.C. § 46110(a) and 46110(d). Alternatively, it should be denied because the FAA properly analyzed the noise impacts of its approved procedures under NEPA, and finding no significant impacts using methodologies routinely upheld by this Court, did not violate any applicable federal environmental statute.

## ARGUMENT

### I. Standard of Review

This Court reviews *de novo* Petitioners' compliance with the statute of limitations in 49 U.S.C. §§ 46110(a) and the exhaustion requirement of 49 U.S.C. § 46110(d). *See Seed Company, Ltd. v. Westerman*, 832 F.3d 325, 331 (D.C. Cir. 2016).

This Court reviews the FAA's compliance with NEPA under the standard provided by the Administrative Procedure Act, 5 U.S.C.

§ 706(2)(a). *Karst Envtl. Educ. and Prot., Inc. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007).

This Court must consider all findings of fact by the FAA, including the results of its noise analysis, to be "conclusive" so long as they are supported by substantial evidence. 49 U.S.C. § 46110(c).

## II. The petition for review is untimely and should be dismissed.

The petition for review identifies 49 U.S.C. § 46110(a) as its cause of action, which provides for judicial review in this Court of an "order issued by" the Administrator of the FAA. "The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day." *Id.* Petitioners failed to comply with this statute of limitations and have not demonstrated reasonable grounds for doing so.

Petitioners' theory is that noise from the aircraft following the LAZIR-based departure procedures from National Airport, instead of the conventional NATIONAL departure procedure, is the source of their injury. But the FAA first approved the LAZIR procedure in 2011, and

any suit to challenge it had to be filed within sixty days of the agency's final decision. 49 U.S.C. §46110(a). Petitioners' discussion of the timeliness of their petition for review makes no mention of this decision. Opening Br. at 23-26.

Petitioners have never alleged that the original implementation of LAZIR went unnoticed. A letter from the Hillandale Homeowners' Association notes that noise had increased considerably from 2011 to 2013. (Exh. 6 to Pet. Opp. To Mot. to Dismiss.) One declarant, Mr. Vittori, claims to have been "shocked" by aircraft noise when he first moved into the neighborhood in 2013, Exh. 7 to Pet. Opp. To Mot. to Dismiss at 1 ¶ 2, although this was prior to the approval of the LAZIR-based procedures that were part of the Metroplex Project approved in December 2013. It is clear that whatever noise concerns Petitioners have about north-bound departures from National Airport along the Potomac River, those concerns are "fairly traceable" to the development and approval of the LAZIR departure procedure in 2011. *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013).

Instead, Petitioners ask this Court for review of the navigational charts for six later-developed, LAZIR-based departure procedures that

were published in 2015. Opening Br. 23-24. These navigational charts are not "orders" reviewable under 49 U.S.C. § 46110, however. The procedures depicted in these charts were given final approval in the Record of Decision published in December 2013, which *is* a judicially-reviewable order, and Petitioners could have sought review of that decision within sixty days but failed to do so.

### A. The charts published in 2015 are not judicially-reviewable "orders."

For an "order" of the FAA to be judicially reviewable, it "must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality." *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006) (citing *Aerosource, Inc. v. Slater*, 142 F.3d 572, 577-78 (3d. Cir. 1988) (collecting cases)). And for a decision to be final, it must satisfy two conditions: it must mark the consummation of the agency's decision-making process, and it must be one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citing, *inter alia*, *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)), *as quoted by Village of Bensenville*, 457 F.3d at 68.

The 2015 publication of the LAZIR-based departure procedures has neither of these required characteristics of finality. (JA 1780-1791, AR F10-F21.) The publications do not represent the consummation of the agency's decision-making process. That process was explicitly concluded in December 2013, in a Record of Decision that clearly states the agency's legal conclusions and declares that it is the agency's "final order" with respect to those conclusions. (JA 1506, AR A10 at 18.) "[N]ormally, where an agency has stated that the action in question governs and will continue to govern its decisions, such action must be viewed as final." *City of Tacoma, Washington v. FERC*, 331 F.3d 106, 113 (D.C. Cir. 2003) (quoting *Miss Valley Gas Co. v. FERC*, 68 F.3d 503, 508 (D.C. Cir. 1995)). After the December 2013 Record of Decision, the FAA never reconsidered the environmental impacts of these procedures and never called its earlier approval of these procedures into question. The agency's decision-making process was consummated in December 2013. Publication of the navigational charts in 2015 merely allowed for the implementation of the agency's previously-issued final order.

The 2015 publication of these procedures also resulted in no legal consequences for Petitioners. To be sure, publication of the navigational

charts resulted in more pilots actually using these procedures, and so Petitioners may have experienced some real-world consequences. But while the navigational charts are relevant to pilots and air-traffic controllers, they impose no legal consequences on Petitioners – they do not affect Petitioners' rights in any way. *Bennett*, 520 U.S. at 177-78. The legality of the procedures, and any procedural injury that Petitioners allege under NEPA, flowed from the December 2013 Record of Decision and *not* the later publication of the procedures in the *Terminal Procedures Publication*.

Petitioners mistakenly rely on FAA Order 7100.41, which was published in 2014 to establish guidance for the future development of performance-based navigation procedures. Opening Br. at 24. That order did not apply to the D.C. Metroplex Project, as the final Record of Decision in that matter was published several months before Order 7100.41 took effect. The D.C. Metroplex Project did not follow precisely the stages of development established in that order. Therefore, the language used in that order is not relevant to determining whether *this* Record of Decision was final on its date of publication.

In any event, the Record of Decision was final. Petitioners invoke another case pending before this Court in an attempt to demonstrate that "the publication of a new departure route is a the [*sic*] 'final FAA order' from which an appeal may be taken within 60 days." Opening Br. at 24-25 (citing *City of Phoenix, Arizona v. FAA*, D.C. Cir. No. 15-1158). But the cases are not factually analogous. In *City of Phoenix*, the petitioners sought judicial review of air-traffic procedures that were categorically excluded from NEPA after a noise analysis revealed that no significant noise impacts would result from implementation of the procedures. The agency documented its environmental conclusions but was not required to publish them. This Court has held that an order is "issued" under 49 U.S.C. § 46110(a) "on the date the order is officially made public." *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 519 (D.C. Cir. 2011) (citations omitted). When a categorical exclusion decision is unpublished and no subsequent decision document is made public, the publication of the procedures themselves in the *Terminal Procedures Publication* is the appropriate date for purposes of beginning the sixty-day period of the statute of limitations, because prior to that date the agency's "order" has not been "issued."

In contrast, the FAA's order in this case was "officially made public," and therefore "issued," upon publication (with legal notice of that publication) of the final Record of Decision in December 2013. Actual notice to Petitioners themselves is not required, and is not relevant to calculating the beginning of the sixty-day period in which a petition for review must be filed. *Avia Dynamics*, 641 F.3d at 520. "The fact that Petitioners were not personally aware of the order" until a later date "is irrelevant, as it is the date of the order's issuance that is pertinent under § 46110(a)." *Id.* (quoting *Heide v. FAA*, 110 Fed. Appx. 724, 725 (8th Cir. 2004) (unpublished)). This requirement does not place an impossible burden on Petitioners. Other similarly-situated parties have complied with the statute of limitations and challenged air-traffic procedures at other airports under 49 U.S.C. § 46110(a). *See, e.g.*, *County of Rockland, NY v. FAA*, 335 Fed. Appx. 52 (D.C. Cir. June 10, 2009) (unpublished); *City of Las Vegas, Nev. v. FAA*, 570 F.3d 1109 (9th Cir. 2009); *Seattle Cmty. Council Fed'n v. FAA*, 961 F.2d 829 (9th Cir. 1992).

The 2015 charts identified in the petition for review are not "orders" reviewable under 49 U.S.C. § 46110(a). The petition for review

only seeks review of these documents and should therefore be dismissed. Any challenge to FAA's previous final order is untimely.

### B. Petitioners have no "reasonable grounds" for waiting a year and a half to challenge the December 2013 Record of Decision.

Petitioners suggest, in the alternative, that they had "reasonable grounds" for not challenging the Record of Decision within sixty days. Opening Br. at 25-26. This Court has "rarely found 'reasonable grounds' under section 46110(a)," *Elec. Privacy Info. Ctr. v. FAA*, 821 F.3d 39, 43 (D.C. Cir. 2016), and Petitioners have given this Court no basis for finding them in this case. Petitioners do not develop their argument in detail in the opening brief, and some of the points sparsely mentioned are clearly contradicted by the record.

First, Petitioners allege that they "were not provided with appropriate notice or a reasonable opportunity to comment on the 2013 Metroplex project." Opening Br. at 25. As is discussed further below, the FAA complied with its obligation to provide for public input on the environmental assessment, and was under no legal requirement to contact Petitioners directly. *See infra* at 54. Furthermore, as *Avia*

*Dynamics* illustrates, lack of actual notice to Petitioners is "irrelevant" to determining whether a petition for review is timely. 641 F.3d at 520.

Next, Petitioners allege that "[t]he FAA collaborated with [the Metropolitan-Washington Airports Authority] to withhold information about LAZIR from Petitioners and their elected District of Columbia representative." Opening Br. at 25. This serious allegation is completely unsupported by the record, and Petitioners' brief provides no evidence that the FAA withheld information from Petitioners. The exchange of letters between D.C. Councilmember Evans and the Metropolitan Washington Airports Authority, Opening Br. Exhs. 3, 4, does not support this claim. The Councilmember did not contact the FAA, and Petitioners cannot hold the FAA at fault if the Councilmember was dissatisfied with the Airports Authority's response.

In their final points, Petitioners allege that the FAA met with them several times to discuss noise without expressly discussing the LAZIR departure. These meetings were held in 2013 through early 2015, when the LAZIR departure was being flown by less than four percent of all north-bound departures from National Airport. As Petitioners were concerned with noise that they were already

experiencing, it is hardly surprising that the conversations centered around the *status quo* rather than upcoming procedures not yet in use in any substantial way. And, again, the FAA's publication of its final Record of Decision started the clock for purposes of the statute of limitations. *Avia Dynamics*, 641 F.3d at 520. That Petitioners filed a petition for review within sixty days of learning about the procedures approved in 2013 is not "reasonable grounds" for filing well outside the statute of limitations. 49 U.S. § 46110(a).

The rare circumstances in which this Court has found "reasonable grounds" for delay under 49 U.S.C. § 46110(a), in *Avia Dynamics* and in *Paralyzed Veterans of America v. Civil Aeronautics Bd.*, 752 F.2d 694 (D.C. Cir. 1985), *rev'd on other grounds*, *United States Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), have both involved cases where the agency has taken affirmative steps, or made clear affirmative statements, to cause a potential petitioner to doubt the finality of the challenged action. Never has this Court held that simply being unaware of an order is sufficient. This Court has for good reason "generally declined to find reasonable grounds for untimely filings under both section 46110(a) and analogous statutes." *Nat'l Fed'n for the*

*Blind v. United States Dep't of Transp.*, 827 F.3d 51, 57 (D.C. Cir. 2016). To hold that the FAA's phased implementation of a previously-approved procedure constitutes a new, independently-reviewable "order" under 49 U.S.C. § 46110(a) would subject the agency to the continuous threat of future litigation over decisions reached years ago. Air-traffic control procedures are republished every 56 days. If that publication could be considered to reopen the agency's entire decision-making process with respect to a particular procedure, when that procedure was already approved in a published final order, parties could effectively extend the statute of limitations indefinitely by simply waiting for the next convenient publication date. For the FAA and sponsor airports that make capital improvements in reliance on approved final orders, the viability of investments (sometimes in the billions of dollars) can depend entirely on the ability to use approved complementary procedures.

Such a conclusion is contrary to the very purpose of a statute of limitations. *CTS Corps. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). A theory on which Petitioners can file suit within sixty days of discovering the existence of a previously-published, publicly-available final order of

the FAA has no limiting principle, exposes the FAA to the continued threat of litigation, and has no basis in the law. This is true even when the agency's approved procedures are regularly republished in a formal document. *See Alaska Cmty. Action on Toxics v. United States EPA*, 943 F.Supp.2d 96, 103-105 (D.D.C. 2013) (holding that EPA's "periodic publication" of a schedule of pesticides "and listing of particular products do not restart the limitations period for challenging the agency's decision not to identify the waters and quantities in which listed products may be used."). This petition for review is untimely and must be dismissed for failure to comply with the statute of limitations.

## III. Petitioners failed to raise their objections in comments to the agency and therefore cannot now ask this Court to review those objections.

Should this Court nevertheless hold that the petition is timely, it should be dismissed for Petitioners' failure to satisfy their obligation to first present their concerns to the FAA. Neither Petitioners nor any other party submitted comments on the draft environmental assessment pertaining to noise impacts from increased use of the LAZIR-based departure procedures. Petitioners failed to satisfy both

the prerequisite to judicial review established by 49 U.S.C. § 46110(d) and the jurisprudential requirement that a party first participate in the NEPA process before challenging that process in court.

The statute under which Petitioners seek to proceed requires that they first object to the agency before coming to court. "In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator *only* if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d) (emphasis added). In the context of an environmental assessment circulated for public comment prior to the FAA issuing a final decision, the "proceeding" for purposes of 49 U.S.C. § 46110(d) is the public comment process. As Petitioners did not participate in this public process at all, let alone in a manner that would alert the FAA to concerns now expressed in their brief, they may not now seek judicial relief under 49 U.S.C. § 46110. *Alaska Airlines v. T.S.A.*, 570 F.3d 1116, 1122 (D.C. Cir. 2009) (dismissing claims under 49 U.S.C. § 46110(d) when those claims were not raised before the agency prior to filing a petition for review).

*See also City of Las Vegas v. F.A.A.*, 570 F.3d 1109, 1115-1116 (9th Cir. 2009); *City of New York v. Slater*, 145 F.3d 568, 570 (2d Cir. 1988) (*accord*). The petition should therefore be dismissed.

In addition to the specific requirements of 49 U.S.C. § 46110(d), general principles of administrative law require the same result. "A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)). This is particularly true in the context of a challenge to an agency's NEPA compliance. "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Public Citizen v. United States Dep't of Transp.*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)) (alterations in original).

In this case, only three commenters touched on the general concept of noise forecasting at all. (JA 1564, 1569-1571, 1573; AR A10 at 2-34, 2-39 to 2-41, 2-43.) No comments were submitted regarding noise

from operations at National Airport, let alone any specific comments regarding the LAZIR-based north-bound departure procedures. Where no party has raised an issue as a comment on a draft environmental assessment, a court may not hold an agency to have been arbitrary or capricious for failure to address it. *Public Citizen*, 541 U.S. at 764-765.

Petitioners may respond that "there was a reasonable ground" for failure to comment on the environmental assessment or present their objections to the FAA in any fashion. 49 U.S.C. § 46110(d). But that statute, and this Court's cases requiring prior notice to the agency more generally, have never imposed an actual notice requirement or suggested that only parties that have received notice are obligated to comment. So long as an agency's decision-making process is public, as this one was, Petitioners' obligation to participate in a process that could potentially affect them is not lessened in any way by the fact that other parties got actual notice. This Court has never excused a party for failure to participate in public proceedings, even when discovering that they are ongoing requires some effort. *See, e.g.*, *Avia Dynamics*, 641 F.3d at 520 (holding that FAA's publication of a technical notice on its website was sufficient notice to all potentially-interested parties for

purposes of the statute of limitations). Petitioners can identify no provision of either FAA guidance or a NEPA-implementing regulation that the FAA failed to comply with when it distributed the draft environmental assessment and solicited comment from hundreds of potentially-affected entities, but not Petitioners.

## IV. The FAA properly complied with NEPA when analyzing the potential noise impacts of both the original LAZIR departure and the procedures included in the Metroplex Project.

Should this Court nevertheless hold that Petitioners are entitled to judicial review of their NEPA claims, this Court should deny the petition for failure to identify anything arbitrary or capricious about the agency's decision-making. The agency properly analyzed the changes in noise anticipated as a result of both the 2011 creation of LAZIR and the 2013 approval of additional LAZIR-based departure procedures as part of the Metroplex Project. The record before this Court provides substantial evidence to support the agency's conclusions, which are therefore "conclusive" and must be upheld. 49 U.S.C. § 46110(c).

### A. The FAA properly concluded that the original LAZIR procedure was categorically excluded from further NEPA review.

As described above, the FAA analyzed the change in noise that would result from the implementation of the original LAZIR departure, and correctly determined that any increases in noise would occur only over areas that were not "noise-sensitive." (JA 554, AR C10.) *See* FAA Order 1050.1E at 1-8 (defining "noise-sensitive areas"). Petitioners have not challenged this noise analysis in any way, and the agency's conclusion that a categorical exclusion was appropriate should therefore be upheld.

Petitioners are incorrect that a categorical exclusion was applied to the LAZIR procedure because of a misunderstanding. Opening Br. at 27. Petitioners cite to an email between two FAA employees in which one describes the LAZIR procedure (and its companion, not at issue in this case) as "essentially direct overlays of existing departure procedures, consistent with noise abatement procedures which have been in effect for 30 years." (Opening Br., Exh. 8.) This statement is correct: under the LAZIR procedure, departing flights would follow the Potomac River to about the Georgetown Reservoir, consistent with the

noise abatement measure that flights had been following for many years. *See supra* at 10-13.

But more importantly, this statement was not the basis of the FAA's conclusion that LAZIR was categorically excluded. The agency documented its decision, and clearly stated its reasoning. (JA 584, AR B32.) The agency based its decision on the noise analysis it had prepared, JA 554, AR C10, and concluded that the appropriate categorical exclusion was found in ¶311p from FAA Order 1050.1E. (JA 584, AR B32 at 1.) That categorical exclusion applies to the "[e]stablishment of new procedures that routinely route aircraft over non-noise sensitive areas." *Id.* Importantly, the FAA has also promulgated a categorical exclusion for the establishment of new RNAV procedures "that use overlay of existing procedures," FAA Order 1050.1E at 3-14 ¶ 311g, but it did *not* use that categorical exclusion here. The agency's decision was based on the record, was clearly documented, and is not arbitrary or capricious.

### B. The environmental baseline in the EA was accurate.

Petitioners' second contention under NEPA is that the FAA improperly established the "environmental baseline" for the purpose of forecasting potential environmental impacts from the Metroplex Project in the environmental assessment. The environmental baseline provides a basis for comparison with a proposed federal agency action, so that the difference between the two will indicate the potential environmental effects of taking that proposed action. Petitioners correctly explain that to create the environmental baseline in this case, the FAA "began by aggregating data from 2011." (Opening Br. at 28.) And Petitioners then correctly state that noise impacts that differed from the baseline could be attributable to what Petitioners call "the New Routes." *Id.* at 29. But Petitioners then simply allege an error that the FAA did not commit – namely, that the FAA assumed all or nearly all flights in the environmental baseline were *already* following the LAZIR procedure. *Id.*

A look at the input files for the agency's computer-modeled noise analysis demonstrates that the FAA committed no error.[7] Although LAZIR had been approved in 2011, it was flown infrequently. The FAA established the environmental baseline and then conservatively assumed in the no-action alternative that no north-bound operations from National Airport used a LAZIR-based departure path. Then, for purposes of the comparison in the environmental assessment, the noise analysis assumed that 88% of operations would use a LAZIR-based departure path under the proposed alternative. The noise impacts that were forecasted as part of the environmental assessment therefore represent the expected increase in noise from an 88% increase in usage of the LAZIR departure. And the results of this analysis were that no significant noise increases would occur. Petitioners have given this Court no reason to question that finding, which is based on substantial evidence. The agency's NEPA compliance should therefore be upheld. 49 U.S.C. 46110(c).

[7] These input files are in the administrative record at C15 (and were provided to Petitioners) but are difficult to meaningfully replicate on paper.

## V. The FAA complied with its obligations under NEPA to provide for public comment on the environmental assessment.

Finally, the FAA fulfilled all of its legal obligations under NEPA to provide an opportunity for public comment on a draft of the environmental assessment. The FAA first notified over 450 government officials, libraries, and public entities of its intent to prepare a draft environmental assessment, publishing this information both in newspapers, JA 834, AR A2 at A-25; JA 1503, A10 at 15, and on the FAA's website. This early notice provided contact information for those seeking further information. (JA 835, AR A2 at A-26.)

The FAA then distributed copies of the draft environmental assessment to hundreds of different entities, published notice of its availability in major newspapers covering the General Study Area, and opened a 30-day comment period. (JA 892-907, AR A3; JA 1503, AR A10 at 15.) The draft environmental assessment was also available on the FAA's public website. *Id.*

One of the recipients of the draft environmental assessment was D.C.'s State Historic Preservation Officer, JA 900, AR A3 at B-13, who works in the office of the Mayor of Washington, D.C., within the City's

Office of Planning.[8] That official's duties include the review of any government projects (including federal projects) for potential impacts on any properties listed on the National Register of Historic Places. The State Historic Preservation Officer concurred in the FAA's conclusion that there would be no adverse effects on historic properties under the NHPA, because no significant noise impacts were forecast. (JA 1519, AR A10 at 1-9.) This fulfilled the FAA's obligations to consult with D.C. under the NHPA. 36 C.F.R. § 800.5(d)(1); *see infra* at 60.

Petitioners did not submit comments during the public comment period. Although D.C. government officials (other than the State Historic Preservation Officer) were omitted from the distribution list, nothing in NEPA or its implementing regulations specifies which potentially-interested parties must be personally provided with notice of a public NEPA document. Tellingly, although Petitioners cite a number of general regulatory exhortations to involve the public, with which the FAA complied, Petitioners identify no violation of law committed by the

[8] *See* http://planning.dc.gov/page/historic-preservation-office (last visited March 23, 2017).

FAA in failing to add Petitioners or their City Council representative to the list. Opening Br. at 32 (citing 40 C.F.R. § 1506.6(a)).

Courts have long held that agencies may use publications such as newspapers to provide notice to the public of potential agency actions and the opportunity for public input. In *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), the EPA proposed to extend the City of Los Angeles's previously-approved permit for the discharge of treated sewage, and published notice of its intended action in the *Los Angeles Times* on the following day. 445 U.S. at 207-208. That notice invited public comments during the next 30 days. *Id.* at 208. No one filed a comment or requested a public hearing. *Id.* The Supreme Court held that EPA's use of a newspaper publication complied with the Clean Water Act's requirement of an "opportunity for public hearing." *Id.* at 218. Furthermore, in that case the EPA had sent actual notice of its proposed action to the City of Los Angeles, but not to petitioners or any other interested party. *Id.* at 217. The Supreme Court expressed "no hesitancy" in upholding the EPA's actions despite this lack of actual notice to all conceivably interested parties. *Id.* at 218.

The FAA's provision of notice in this case (which involved substantially more than was provided by EPA in *Costle v. Pacific Legal Foundation*) satisfied all legal requirements and was aimed at soliciting public input. Petitioners' allegations that the FAA affirmatively and intentionally prevented Petitioners from accessing this public information are completely unsupported by the record. (Opening Br. at 31-33.) Prior to the FAA's final decision and publication of its Record of Decision, neither Petitioners nor any D.C. official (save the Historic Preservation Officer) made contact with the FAA or requested any information. As discussed *supra* at 25, the letter from Councilmember Evans was sent to the Airport Authority and not the FAA. And contrary to Petitioners' theory that the FAA tried to exclude them, Petitioners concede that the FAA met with them numerous times after the Record of Decision. (Opening Br. at 31-32.) That the FAA did not discuss the Metroplex Project at meetings about current, ongoing noise in 2013 and 2014 is unsurprising. The LAZIR-based departure routes were not being flown frequently at that time (representing about three percent of all north-bound departures from National Airport in those two years), and therefore were unlikely to be the source of Petitioners' noise complaints.

And the Record of Decision had found that full implementation of those routes in the future would have no significant noise impacts on Petitioners, a conclusion supported by substantial evidence and that remains valid.

The FAA dealt with Petitioners in good faith in those meetings by attempting to address what aspects of the *status quo* might be causing their noise concerns – the agency had absolutely no intention of concealing from Petitioners information about the future.

## VI. Petitioners failed to properly present claims brought under either the NHPA or Section 4(f) of the Department of Transportation Act.

In their opening brief, Petitioners make the occasional incidental reference to both the NHPA and Section 4(f) of the Department of Transportation Act. *See, e.g.*, Opening Br. at 27, 29. But Petitioners have identified no specific violations of either of those statutes, or of their implementing regulations. Instead, the opening brief appears to simply cite these statutes as imposing requirements for environmental analysis and public comment that are identical to those of NEPA.

Petitioners are incorrect – those statutes impose different requirements, which are not addressed by the opening brief.

The bare citation of these two statutes, without identifying either their legal requirements or the specific ways in which Petitioners allege that FAA failed to comply with them, is an insufficient basis for this Court to remand the FAA's decision. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *New York Rehabilitation Care Management, LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (additional citations omitted)). Any further elaboration of these issues in the reply brief should not be considered. This Court has "generally held that issues not raised until the reply brief are waived." *New York Rehab. Care Mgmt., LLC*, 506 F.3d at 1076 (citing *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)).

Nevertheless, the FAA did fully comply with its obligations under both of these statutes. Under the NHPA, the FAA is obligated to consult with the State Historic Preservation Officer responsible for any area potentially affected by a federal undertaking. 54 U.S.C. § 306108. As

noted above, Washington, D.C. has its own State Historic Preservation Officer, who was provided the environmental assessment and who spoke with the FAA's environmental specialist. (JA 1519, AR A10 at 1-9.) Once the FAA found that there would be no significant noise impacts from the Metroplex Project, it concluded that the project would have no adverse effects on historic properties, which is defined as "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. § 800.16(i). The State Historic Preservation Officer for Washington, D.C. concurred in the FAA's conclusion that the Project would have "no adverse effect," JA 1519, AR A10 at 1-9, and that concurrence fulfilled the FAA's responsibilities under the NHPA to consider effects on historic properties and consult with the appropriate authorities. 36 C.F.R. § 800.5(d)(1).

The Department of Transportation Act prohibits the Secretary of Transportation from approving any project that will "use" an historic site listed on the National Register of Historic Places or a public park without first concluding that there is no "prudent and feasible alternative" to use of that land, and then minimizing any resulting

harm to the historic site. 49 U.S.C. § 303(c)(1)-(2). When there is no physical taking of property, as is the case here, "FAA must determine if the impacts would substantially impair the 4(f) resource." (JA 181, AR B15 at A-20.) "With respect to aircraft noise, for example, the noise must be at levels high enough to . . . amount to a taking of a park or portion of a park for transportation purposes." *Id.* As the FAA explained in its final Record of Decision, where the environmental assessment identified no significant noise increases at any Section 4(f) property in Washington, D.C., there was no "use" of that property under the Department of Transportation Act and the agency's duties under that statute were fulfilled. (JA 1498, A10 at 10.)

## CONCLUSION

For the foregoing reasons, the petition for review should be dismissed, or else denied on its merits.

Respectfully submitted,

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DJ # 90-13-1-14549

April 2017

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **11,419** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word 2013 in 14-point Century font.

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## CERTIFICATE OF SERVICE

I hereby certify that all counsel of record were served with this Final Brief on May 31, 2017, by use of the D.C. Circuit's CM/ECF system.

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