ORAL ARGUMENT SCHEDULED FOR MARCH 21, 2022

No. 20-1070

United States Court of Appeals
for the District of Columbia Circuit

City of Scottsdale, Arizona,

Petitioner,

v.

Federal Aviation Administration and Stephen M. Dickson, in his official capacity as Administrator, Federal Aviation Administration,

Respondents,

On Petition for Review of an Order of the Federal Aviation Administration

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FINAL AMICUS CURIAE BRIEF OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, FORT MCDOWELL YAVAPAI NATION, AND TOWN OF FOUNTAIN HILLS IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici: Except for amici Salt River Pima-Maricopa Indian Community, Fort McDowell Yavapai Nation, and Town of Fountain Hills, all other parties appearing in this Court are listed in the Brief for Petitioner.

B. Rulings Under Review: References to the rulings at issue appear in the Brief for the Petitioner.

C. Related cases: Although this case was not previously under review before this court, there was a related petition for review filed and resolved by this Court in *City of Phoenix v. Huerta*, 869 F.3d 963, 966 (D.C. Cir. 2017).

Dated: August 6, 2021.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel states and certifies as follows:

Salt River Pima-Maricopa Indian Community is a federally recognized tribe located in the metropolitan Phoenix area. The Community has no parent companies, and no publicly held companies have an ownership interest.

The Fort McDowell Yavapai Nation is a federally recognized tribe located in the metropolitan Phoenix area. The Nation has no parent companies and no publicly held company owns any ownership interest in the Nation.

The Town of Fountain Hills is an Arizona municipal corporation. The Town has no parent companies and no publicly held company owns any ownership interest in the Town.

Dated: August 6, 2021.

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STATEMENT REGARDING CONSENT TO FILE AND NECESSITY OF SEPARATE BRIEFING

All parties have consented to the filing of this amicus brief. Amici filed their notice of intent to participate in this case on August 6, 2021.

Under D.C. Circuit Rule 29(d), counsel certifies that this separate brief is necessary because the agency action at issue affects the citizens of the Salt River Pima-Maricopa Indian Community, the Fort McDowell Yavapai Nation, and Town of Fountain Hills.

This brief focuses on a single issue most relevant to Amici: whether the Federal Aviation Administration acted contrary to this Court's prior mandate.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No other party's counsel authored this brief in whole or in part, no other party or party's counsel contributed money intended to fund preparing or submitting the brief, and no persons other than the amicus curiae contributed money intended to fund the preparation and submission of the brief.

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GLOSSARY

FAA	Federal Aviation Administration
NEPA	National Environmental Policy Act

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner.

STATEMENT OF INTEREST OF AMICI CURIAE

The Salt River Pima-Maricopa Indian Community is a federally recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of June 18, 1934. Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021). Located in Maricopa County, Arizona, the Community borders the cities of Scottsdale, Mesa, Tempe, as well as the Town of Fountain Hills. The Community consists of 56,000 acres, including a 19,000-acre natural preserve. The Community has approximately 10,837 enrolled members and is composed of two distinct Native American tribes: the Onk Akimel O'odham (Pima) and the Xalychidom Piipaash (Maricopa). The Pima are descendants of the Hohokam people who farmed the Salt River Valley and created an elaborate canal irrigation system centuries ago. The Maricopa tribe initially lived along the lower Gila and Colorado Rivers and migrated toward Pima villages in the 19th century.

The Fort McDowell Yavapai Nation is a federally recognized Indian Tribe. *See* 86 Fed. Reg. at 7555. Located to the northeast of Phoenix within Maricopa County, Arizona, the 40-square mile reservation is a small part of the ancestral territory of the Yavapai people, who hunted and gathered food in a vast area of Arizona's desert lowlands and mountainous Mogollon Rim country. The Tribe has about 900 enrolled members.

The Town of Fountain Hills is an Arizona municipal corporation located in Maricopa County, Arizona. The town neighbors Scottsdale, the Fort McDowell Yavapai Nation, and the Salt River Pima-Maricopa Indian Community, and has a population of approximately 25,200 residents.

Amici are affected by the FAA's recent decision to retain the eastern flight path departures for several reasons. The eastern flight path departures traverse through each amicus's territory. Amici are specifically affected by the FAA's decision to retain the flight paths without performing the required consultations under the National Historic Preservation Act, and the required environmental review under the National Environmental Policy Act. By contrast, the FAA did consult

with both the Salt River Pima-Maricopa Indian Community and the Fort McDowell Yavapai Nation with respect to the *western* flight departure routes. A1660, A1703, A1719, A1741.

In addition, in 2019, each amicus sent a letter to the FAA regarding the negative effects of the 2014 flight paths. *See* Letter from the President of the Salt River Pima-Maricopa Indian Community (May 23, 2019), A2109; Letter from the Town of Fountain Hills (May 22, 2019), A2028; Letter from the Eastern Municipal and Tribal Governments of Maricopa County (Dec. 19, 2019), A2124 (including all amici).[1] For example, President Harvier of the Salt River Pima-Maricopa Indian Community explained that "[s]ince the FAA implementation of new routes under the NextGen program in 2015 there has been considerable impact to many community members of the SRPMIC." A2109. For example, "noise from aircraft departing . . . at PHX is adversely affecting the health and quality of life of [Community] residents living under the

[1] The FAA omitted the Letter from the Town of Fountain Hills (May 22, 2019) the Letter from the Eastern Municipal and Tribal Governments of Maricopa County (Dec. 19, 2019), and the FAA's Response Letter (Jan. 9, 2020), A2127, from the administrative record in this case. All parties have stipulated under Fed. R. App. P. 16(b) to supplement the administrative record with these three letters.

new flight paths." *Id.* President Harvier explained to the FAA that "due to the significant changes of eastward departures from PHX the PRIMARY routes now cross directly over the residential areas of the SRPMIC where schools, health care facilities, and government complexes are located." *Id.*

SUMMARY OF ARGUMENT

This is a case about whether an agency may disregard a judgment from this Court that vacated the agency action. In *City of Phoenix v. Huerta*, this Court vacated the FAA's 2014 flight departure routes out of Phoenix Sky Harbor International Airport. On remand, the FAA should have conducted additional analysis under the National Environmental Policy Act and performed consultations required by the National Historic Preservation Act and the FAA's own regulations as to all flight departure routes—both eastern and western routes.

Instead, the FAA retained the eastern flight departure routes and dismissed the concerns of Amici without performing the required analysis and consultation. In its 2020 Decision, the agency asserted that it would need to comply with those laws only if it changed the 2014

eastern flight departure routes in the *future*. Indeed, the agency claimed that it alone had "sole discretion" to implement any changes.

But that is not what this Court's opinion required. The Court should vacate the 2020 Decision and require the agency to comply with the prior opinion, including remanding for the agency to finally perform the required analysis and consultation on the eastern flight departure routes.

ARGUMENT

I. The FAA did not perform the required analysis and consultations for the eastern flight departure routes following this Court's 2017 decision.

A. In 2017, this Court vacated all flight departure routes for Sky Harbor International Airport.

In 2014, the FAA modified *all* flight departure routes out of Phoenix Sky Harbor International Airport, including the eastern flight departure routes at issue here. *City of Phoenix v. Huerta*, 869 F.3d 963, 966 (D.C. Cir. 2017).

The City of Phoenix filed a petition for review challenging the 2014 decision, arguing that the FAA's decision "was arbitrary and capricious and violated the National Historic Preservation Act, the National

Environmental Policy Act, the Department of Transportation Act, and the FAA's Order 1050." *Id.* at 970.

The Court agreed with the City, and held the FAA's action arbitrary and capricious in part because of "the agency's admitted failure to notify local citizens and community leaders of the proposed new routes before they went into effect." *Id.* at 972 (internal quotation marks omitted). The Court ordered that the FAA's decision "implementing the new flight routes and procedures at Sky Harbor International Airport be vacated; and the matter be remanded to the FAA for further proceedings in accordance with" the opinion. *Id.* at 975.

B. In 2018, the Court rejected the FAA's request to limit the vacatur to the western flight departure routes.

Following the Court's decision, the City of Phoenix and the FAA reached an agreement concerning the western flight departure routes that concerned the City of Phoenix. *See* Memorandum Regarding Implementation of Court Order (filed Nov. 30, 2017), A73. The parties wanted the *western* flight departure routes to be "remanded by the Court without vacatur," and wanted "no other routes [to] be remanded or vacated by the Court." A74.

But because the Court had already vacated all of the flight departure routes, the parties needed the Court to change the disposition to accomplish what they wanted. The City of Phoenix and the FAA filed a joint petition for panel rehearing presenting this compromise to the Court and requesting that "the Court alter the remand order . . . to clarify that the Court is remanding only *certain* departure procedures . . . and that those procedures are remanded *without being vacated*." Joint Petition for Panel Rehearing with Exhibit (filed Nov. 30, 2017), A43 (emphases added). Put differently, the parties asked the Court (1) to remand without vacatur, and (2) to limit the remand to nine specified western flight departure routes. A48, A56. To accomplish this, the parties asked the Court to "amend its . . . opinion by deleting the content of Section IV" and replacing it with the FAA's proposed version. A56.

The Court rejected almost all of the proposed changes. The Court amended the opinion to change "flight routes and procedures" to "flight departure routes," but otherwise rejected the proposed changes. *See City of Phoenix v. Huerta*, 881 F.3d 932 (Mem.) (D.C. Cir. 2018) ("ORDERED that the opinion . . . be amended as follows . . . insert the word 'departure' before the word 'routes' and delete the words 'and procedures.'"). In

particular, the Court declined to remand without vacatur, and declined to limit the mandate to just the *western* flight departure routes.

When the mandate ultimately issued, therefore, the judgment would vacate all of the 2014 flight departure routes, both western and eastern. Nothing would be remanded without vacatur.

C. In 2018, before the Court's mandate issued, the FAA did not conduct supplemental analyses or consultations for the eastern flight departure routes.

In late 2017, the agency began implementing changes to the flight departure routes in two parts. A76. Under Step One, the FAA would provide the City of Phoenix "some short-term relief from aircraft noise as soon as practicable." *Id.* And under Step Two, the agency would "develop longer-term procedure changes that will involve the implementation of new or modified . . . procedures at [the airport], including RNAV procedures." *Id.*

In 2017, the FAA began consulting with municipalities and tribes, but repeatedly noted that the Step One process would "involve[] air traffic procedure amendments to the *west flow* . . . procedures." *See, e.g.*, Federal Aviation Admin., *Appendix C to the Draft Environmental Review* (Jan. 2018), A1208. In May 2018, the agency issued a "Record of

Decision" that finalized the "proposed action" to "amend west flow . . . procedures." A1619-A1621.

When community leaders asked about the *eastern* flight departure routes, the FAA stated that it would "consider comments on [those] procedures" during the Step Two process. *FAA Response to the Maricopa County Chairman* (July 2018), A1950. But despite the fact that by then the Court had already rejected the FAA and Phoenix's proposal to limit the scope of the mandate, the FAA took the position that "[t]he proposal and adoption of any procedure changes other than those related to western departures would be solely at the FAA's discretion." *See, e.g.*, *Id.*

D. In 2020, the FAA assumed that it could retain the eastern flight departure routes without performing the required consultations and analysis.

During the Step Two process, the FAA told the community that it "would consider feedback on procedures throughout the Phoenix area—not just on the westerly departure routes." A1301.

Salt River Pima-Maricopa Indian Community President Harvier wrote to the FAA expressing the Community's concerns about the eastern flight departure routes. A2109. The FAA responded to this letter by

stating that it "had not yet determined" whether to implement changes to the eastern flight departures routes from 2014. A2113.

Six months after the Step Two comment period closed, in December 2019, the affected communities again wrote to the FAA to ask whether the agency would make any changes to the eastern flight path departure routes. *See* A2124. The communities "respectfully request[ed] the FAA provide [the communities] with a timely and definitive decision as to whether or not the existing east bound Sky Harbor Flight paths will be returned to the pre-September 2014 status or modified in accordance with" the City of Scottsdale's proposal. A2125. On January 9, 2020, the FAA responded to this letter, stating that "the Implementation Agreement provided that the FAA during Step Two would have sole discretion whether to make any changes to flight procedures" other than the western flight path departure routes. A2127. The FAA noted that it had declined to make any changes. *Id.*

In its January 2020 Decision, the FAA did not analyze many of the concerns raised by community members, including by Amici. A14. The agency reiterated its position that it had "sole discretion" to make changes to the eastern flight departure routes and that the agency "has

not implemented nor proposed implementation of . . . any other changes to the Phoenix airspace beyond the Western departures implemented in 2018." *Id.* The FAA dismissed concerns of the community relating to the noise, environmental, and wildlife impacts of the eastern flight departure routes and stated that "[a]ny airspace or procedural change would be subject to the FAA's environmental review process which includes" each of the listed concerns. *See* A27-A35. The FAA then described what it would do before making any additional changes. A26-A35. The agency noted that "[b]ecause the FAA is not proposing any new changes at this time, the FAA *is not presenting any new analysis*." A28 (emphasis added). The FAA never conducted the required environmental analyses or consultations for the eastern flight departure routes as it did for the western flight paths.

II. The FAA's 2020 decision to maintain the 2014 eastern flight departure routes is contrary to law.

Agency action must be set aside if it is "not in accordance with law." 5 U.S.C. § 706(2)(A). The FAA's January 2020 Decision to retain the eastern flight departure routes is contrary to this Court's prior decision and must be vacated and remanded to the agency.

A. Vacatur has the effect of restoring the status quo ante.

Typically, vacatur is "the standard remedy" if a court finds an agency's action was unlawful. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). Vacating an agency's order "has the effect of restoring the status quo ante" i.e., the legal regime in place before the agency adopted the challenged order. *Air Transp. Ass'n of Can. v. Fed. Aviation Admin.*, 254 F.3d 271, 277 (D.C. Cir. 2001), *judgment modified*, 276 F.3d 599 (D.C. Cir. 2001). The Court "vacate[s] [the] action" and "simply remand[s] for the agency to start again." *Sugar Cane Growers Coop of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

"When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Courts therefore generally cannot "issue a decision for less than all seasons, for some citizens and not others, as an administrator shall later decide." *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regul. Comm'n*, 59 F.3d 1281, 1289 (D.C. Cir. 1995). Accordingly, courts have rejected the argument that an agency should be permitted to "apply [an] invalid rule

with respect to any person who is not the individual who filed the legal action that is before the Court." *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 71 (D.D.C. 2019), *rev'd on other grounds sub nom, Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

When a court issues a general order vacating and remanding agency action, therefore, any affected person may rely on the court's opinion, not just the original petitioner. For example, in *Illinois Commerce Commission*, this Court found agency action unlawful and "vacate[d] the order under review and remand[ed] the case to the Commission for further proceedings consistent with this opinion." *Ill. Commerce Comm'n v. Interstate Commerce Comm'n*, 787 F.2d 616, 637 (D.C. Cir. 1986). On remand, a few "nonprofit organizations[] entered the fray for the first time" and argued that the rulemaking violated NEPA and the Historic Preservation Act. *Ill. Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1248, 1249 (D.C. Cir. 1988). In this second case, the Court considered the non-profits' arguments challenging the agency's decision without hesitation. *Id.* In short, the "the agency . . . start[s] again." *Sugar Cane Growers*, 289 F.3d at 97.

Courts may also remand *without* vacating the agency action when there is "no apparent way to restore the status quo ante" and when vacating the rule would be an "invitation to chaos." *Id.* In that situation, the legally deficient rule remains in place while the agency conducts a supplemental analysis or provides a new rationale for its decision. *See, e.g.*, *Allied Signal Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (1993) (remanding to the agency without vacating to "develop a reasoned explanation based on an alternative justification."). To determine whether remand without vacatur is appropriate, this Court looks at (1) "the seriousness of the order's deficiencies" as well as (2) "the disruptive consequences of" vacating the underlying action. *Sugar Cane Growers*, 289 F.3d at 98.

In sum, courts may decide the scope of the remand, and may decide whether to vacate in addition to remanding. If the court's disposition broadly remands and vacates agency action, then the agency must comply with the mandate and any affected person may challenge the agency's failure to do so.

B. Here, the FAA acted contrary to law by retaining the 2014 flight departure routes following the Court's amended opinion.

The Court in 2018 rejected the FAA's requests to limit the remand to western flight departure routes and to remand without vacatur. *City of Phoenix*, 881 F.3d 932. The Court did not explain its decision, but it could have had several reasons for largely retaining its original remedy. *Id.* For one, vacatur without remand is inappropriate where there are "major shortcomings that go to the heart of" the agency action, where the agency "wholly failed to address the effect[s]" of its decision, and where there are "serious and pervading . . . deficiencies" with the agency's decision making process. *Humane Soc'y v. Zinke*, 865 F.3d 585, 61415 (D.C. Cir. 2017). Here, "the agency's admitted failure to notify 'local citizens and community leaders'" before it changed the departing flight paths, as the Court found, *City of Phoenix*, 869 F.3d at 972, would make it inappropriate to remand without vacatur.

Moreover, this Court has also recognized that "remand without vacatur may in some circumstances invite prejudicial agency delay. . . ." *U.S. Sugar Corp. v. EPA,* 844 F.3d 268, 270 (D.C. Cir. 2016) (per curiam). As the author of the 2017 decision put it in another case, remand without

vacatur "invites agency indifference." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring). In 2018, the Court may have been concerned (for good reason) that without vacating the underlying flight paths, the FAA never would have performed the required analyses or consultations. That is exactly how this case played out after remand, even though the Court *did* vacate.

Putting aside the reasons for the Court's order, after the amended opinion issued in 2018, the FAA was legally required to act on the eastern flight departure routes. The agency had several options. The agency could have imposed the pre-2014 flight path departures to the best of its ability—i.e., make a return to the "status quo ante." *Air Transp. Ass'n of Can.*, 254 F.3d at 277. The agency instead could have conducted supplemental analyses and consultations comparing the pre-2014 eastern flight path departures with the 2014 flight path departures while the Court held the mandate—as it did for the western flight departure routes. *See* A1044. And if the agency was unsure about the scope of the Court's order in 2018, it could have filed a motion for clarification of the mandate, in which a party can inform the Court of a "stark necessity for

recall of a mandate . . . ." *Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980). But the agency did none of those things.

Instead, the FAA chose the one option that was unlawful: it proceeded as if its requested modification to the opinion had been granted in full, and claimed that it had the "sole discretion" to adjust the eastern flight departure routes. A14. But the Court's opinion *vacated* those departures. Absent additional analysis, the FAA could not have retained them. The FAA had no choice. Because "the agency has misconstrued the law"—here the Court's amended opinion—it's 2020 decision retaining the eastern flight departure routes without the required analysis or consultation "cannot stand." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

III. Vacating the FAA's 2020 decision would give Amici an opportunity to be heard on these issues.

The FAA's decision to disregard this Court's opinion meant that it never seriously considered Amici's comments about the effects of the eastern flight departure routes. If the Court grants the petition for review and requires the FAA to comply with the Court's 2018 mandate, then Amici will finally be afforded an opportunity to present their concerns relating to the agency when it is considering different options.

As the Court explained in its 2017 decision, the FAA failed to comply with procedural requirements which made its 2014 decision unlawful. *City of Phoenix*, 869 F.3d at 966-72. That failure affected Amici, too. Any additional environmental analysis will also inform Amici about the scope and significance of the effects of the current eastern flight departure routes as compared to the pre-2014 flight departure routes.

In awarding relief to the City of Scottsdale in this case, the Court need not, and should not, vacate the western flight departures, which were the result of the agreed-upon two-step process between the FAA and the City of Phoenix. The Court likewise need not order the FAA to follow any particular method for considering flight paths on remand beyond the requirements set forth in the Administrative Procedure Act, National Environmental Policy Act, National Historic Preservation Act, and the agency's own regulations. In other words, the FAA does not need to restart the "Step Two" process specified in the bilateral agreement between the FAA and the City of Phoenix. The FAA may instead use any appropriate process that satisfies the agency's statutory obligations. What matters here is that the agency must seriously consider the input from the affected communities in connection with the eastern flight

departure routes and conduct an analysis that compares the pre-2014 eastern flight path departure routes with the current flight paths or a newly proposed alternative.

CONCLUSION

Amici respectfully request that the Court grant Scottsdale's petition for review, and vacate and remand the agency's 2020 decision as to the eastern flight departure routes.

RESPECTFULLY SUBMITTED this 6th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 29(d) because this brief contains 3,679 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1).

2. 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 the brief was prepared in 14-point Century font using Microsoft Word.

Dated this 24th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on February 24, 2022, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated this 24th day of February, 2022.

/s/ Eric M. Fraser
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