ORAL ARGUMENT SCHEDULED FOR MARCH 28, 2007, AT 9:30AM

United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC, and TEXAS PNEUMATICS SYSTEMS, INC., *Petitioners* FORTNER ENGINEERING & MANUFACTURING, INC., and MR. MINAS SEROP JILIZIAN, *Intervenors as Party Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: **06-1091**

and

SOLUTIONS MANUFACTURING, INC., and MR. RANDALL C. HIGHSMITH, a natural person, *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: **06-1092** (consolidated with Case No. **06-1091**)

ON PETITION FOR REVIEW OF A FINAL AGENCY RULE

JOINT REPLY BRIEF OF ALL PETITIONERS AND INTERVENORS

Marshall S. Filler
OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

Albert J. Givray
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 17th Street, Suite 1500
Denver, CO 80265
Telephone: (303) 892-4456

Jere W. Glover and
Andrew D. Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 662-9700

United States Court of Appeals

District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC, and TEXAS PNEUMATICS SYSTEMS, INC., *Petitioners* FORTNER ENGINEERING & MANUFACTURING, INC., and MR. MINAS SEROP JILIZIAN, *Intervenors as Party Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1091

and

SOLUTIONS MANUFACTURING, INC., and MR. RANDALL C. HIGHSMITH, a natural person, *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1092 (consolidated with Case No. 06-1091)

ON PETITION FOR REVIEW OF A FINAL AGENCY RULE

RULE 28(a)(1) CERTIFICATE OF COUNSEL OF ALL PETITIONERS AS TO PARTIES, RULINGS, AND RELATED CASES

As required by D.C. Cir. Rule 28(a)(1) and Fed. R. App. P. 28(a)(1), all Petitioners and Intervenors hereby make the statements below concerning parties, rulings, and related cases.

Parties and Amici	This is an appeal from a final rule of the Federal Aviation Administration ("FAA"). Several parties submitted comments in response to the FAA's notices of proposed rulemaking. In this appeal, Aeronautical Repair Station Association, Inc. ("ARSA"), Premier Metal Finishing, Inc. ("PMF"), Pacific Propeller International LLC ("PPI"), Texas Pneumatics Systems, Inc. ("TPS"), Solutions Manufacturing, Inc. ("SMI"), and Mr. Randall C. Highsmith, a natural person ("Mr. Highsmith"), appeared as Petitioners on Mar. 10, 2006 and Mar 13, 2006. The Respondent in this appeal is the FAA, which appeared on May 3, 2006. Each of Fortner Engineering & Manufacturing, Inc. ("FEM"), and Mr. Minas Serop Jilizian ("Mr. Jilizian") filed a separate motion to intervene in this consolidated appeal, which were granted on Jun. 23, 2006. The only amicus party in this appeal is Aircraft Mechanics Fraternal Association which filed its notice of appearance on May 10, 2006.

Rulings Under Review	The ruling at issue in this Case is the Final Rule of the FAA published on January 10, 2006, at 71 Fed. Reg. 1666 (Tue., Jan. 10, 2006). The Final Rule being challenged is entitled "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities" and relates to 14 CFR Part 121 (Docket No.: FAA-2002-11301; Amendment No. 121-315). The Final Rule appears as the first item in the Joint Appendix, pp 1-13

Related Cases	The case presently on review has not been previously before this Court or before any other court. There are no related cases currently pending in any other court. The Court on its own motion issued an order on March 21, 2006 consolidating the only two appeals pending in this Court from the FAA's final rule, namely 06-1091 and 06-1092.

Attorneys for Petitioners and Intervenors

JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 892-4456

By: Albert J. Givray
Albert J. Givray

Marshall S. Filler
OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

Jere W. Glover
Andrew D. Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC, and TEXAS PNEUMATICS SYSTEMS, INC., *Petitioners* FORTNER ENGINEERING & MANUFACTURING, INC., and MR. MINAS SEROP JILIZIAN, *Intervenors as Party Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1091

and

SOLUTIONS MANUFACTURING, INC., and MR. RANDALL C. HIGHSMITH, a natural person, *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1092 (consolidated with Case No. 06-1091)

ON PETITION FOR REVIEW OF A FINAL AGENCY RULE

RULE 26.1 DISCLOSURE STATEMENT COVERING ALL PETITIONERS AND INTERVENORS

As required by D.C. Cir. Rule 26.1 and Fed. R. App. P. 26.1, each Petitioner and each Intervenor hereby makes the disclosures shown opposite such party's name below.

Petitioner Aeronautical Repair Station Association, Inc. ("ARSA") 121 North Henry Street Alexandria, VA 22314-2903 (703) 739-9543	ARSA is headquartered in Alexandria, Virginia, and exists as a not-for-profit corporation organized under the laws of Virginia. ARSA is a continuing trade association of roughly 700 organizations, aircraft repair stations, and others operated for the purpose of promoting the general, commercial, and other interests of the ARSA membership in the aeronautical industry. ARSA's members have no ownership interest in ARSA.
General nature and purpose, as relevant to the appeal	ARSA regular members are maintenance entities certificated under 14 CFR Part 145 by the Federal Aviation Administration ("FAA"); many members perform maintenance or preventive maintenance for air carriers by contract or subcontract; many members have Department of Transportation ("DOT")/FAA anti-drug and alcohol programs which will require them to ensure that all persons (certificated or non-certificated) performing maintenance functions or steps by contract be tested under the regulations of the Final Rule promulgated on 1-10-2006.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Premier Metal Finishing, Inc. ("PMF") 640 North Meridian Avenue Oklahoma City, OK 73107 (405) 947-0200	PMF is a privately held corporation organized under the laws of the State of Oklahoma.
General nature and purpose, as relevant to the appeal	PMF is not certificated or approved by the FAA but performs maintenance functions for 14 CFR Part 145 certificated repair stations. PMF has no direct contract with any air carrier. Until the promulgation of the 1-10-2006 Final Rule, neither PMF nor its employees were required to be tested under the anti-drug and alcohol requirements of the DOT/FAA, since the certificated repair stations for which PMF performed work were tested and took airworthiness responsibility for the work PMF performed. Under the regulations of the new Final Rule, PMF must either test its employees or cease to perform work for certificated repair stations.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Pacific Propeller International LLC ("PPI") 5802 South 228th Street Kent, WA 98032-1810 (800) 722-7767	PPI is a privately held limited liability company formed under the laws of the State of Washington.
General nature and purpose, as relevant to the appeal	PPI is a repair station certificated under 14 CFR part 145 by the FAA; PPI performs maintenance and preventive maintenance by contract for air carriers. PPI has contracts with non-certificated maintenance providers that will now have to be brought under a DOT/FAA anti-drug and alcohol testing program or be discontinued as a maintenance provider by PPI.
Parent Companies	As a limited liability company, PPI has one member: Precision Aerospace Products LLC, which is itself a limited liability company formed under the laws of the State of Washington
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Texas Pneumatics Systems, Inc. ("TPS") 2404 Superior Drive Arlington, TX 76013-6015 (817) 794-0068	TPS is a privately held corporation organized under the laws of Texas.
General nature and purpose, as relevant to the appeal	TPS is a repair station certificated under 14 CFR part 145 by the FAA; TPS performs maintenance and preventive maintenance by contract for air carriers. TPS has contracts with non-certificated maintenance providers that will now have to be brought under a DOT/FAA anti-drug and alcohol testing program or be discontinued as a maintenance provider by TPS.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Solutions Manufacturing, Inc. ("SMI") 1938 Murrell Road Rockledge, FL 32955 (321) 636-2041	SMI is a privately held corporation organized under the laws of the State of Florida.
General nature and purpose, as relevant to the appeal	SMI is not certificated or approved by the FAA. It manufactures and rebuilds articles for persons holding FAA production approvals under 14 CFR Part 21 (Part 21). Recently, SMI has also been requested to perform various maintenance functions by contract for a repair station certificated in accordance with 14 CFR Part 145 (Part 145). SMI has no direct contract with any air carrier. Neither SMI nor its employees are currently required to be tested under the anti-drug and alcohol requirements of the DOT/FAA. Prior to SMI performing a maintenance function for a certificated repair station under the regulations of the new 1-10-2006 Final Rule, SMI's employees who perform those functions will have to be tested under an FAA-mandated anti-drug and alcohol program. Otherwise, SMI will be forced to lose this maintenance business.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Petitioner Randall C. Highsmith ("Mr. Highsmith") 192 Turtle Place Rockledge, FL 32955 (321) 636-2041	Mr. Highsmith is a natural person.
General nature and purpose, as relevant to the appeal	Mr. Highsmith is employed by Petitioner SMI as a Testing Manager. Mr. Highsmith performs tests on manufactured and rebuilt articles. He performs a test on each article before it is returned to the customer. The test is the same regardless whether the article has been manufactured or rebuilt by SMI. Mr. Highsmith's employer, SMI, has recently been requested to perform various maintenance functions by contract for a repair station certificated under Part 145. Among the contracted maintenance functions are testing of components after the work has been performed. Mr. Highsmith has been an employee of SMI for some time and has never been subject to FAA-mandated anti-drug and alcohol testing as an employee of SMI. Prior to Mr. Highsmith performing a maintenance function for a Part 145 repair station under the regulations of the new 1-10-2006 Final Rule, he will have to submit to anti-drug and alcohol testing, including "pre-employment" testing. Otherwise, he will be prohibited from testing these repaired articles.
Parent Companies	N/A
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	N/A

Intervenor Fortner Engineering & Manufacturing, Inc. ("FEM") 918 Thompson Avenue Glendale, CA 91201-2079 (818) 240-7740	FEM is a privately held corporation organized under the laws of the State of California.
General nature and purpose, as relevant to the appeal	FEM is a repair station certificated under 14 CFR part 145 by the FAA; FEM performs maintenance and preventive maintenance by contract for air carriers. FEM has contracts with non-certificated maintenance providers that will now have to be brought under a DOT/FAA anti-drug & alcohol testing program or be discontinued as a maintenance provider by FEM.
Parent Companies	None
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	None

Intervenor Minas Serop Jilizian ("Mr. Jilizian") 11003 Penrose Street, Unit F Sun Valley, CA 91352-2757 (818) 252-7491	Mr. Jilizian is a natural person.
General nature and purpose, as relevant to the appeal	Mr. Jilizian is the owner and operator of R&V grinding, a non-certificated company that provides grinding services to aviation customers. Mr. Jilizian performs grinding work on repaired articles on behalf of 14 CFR Part 145 certificated repair stations. Mr. Jilizian has never been subject to FAA-mandated drug and alcohol testing because neither he nor his company could take airworthiness responsibility for the maintenance they performed. Under the regulations of the new Final Rule, Mr. Jilizian must submit to drug and alcohol testing, including "pre-employment" testing, or cease testing repaired articles for aviation customers.
Parent Companies	N/A
Publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Petitioner	N/A

Each Petitioner and each Intervenor will file a revised Rule 26.1 Disclosure Statement should a change in corporate ownership interests occur that would affect the above disclosures.

Attorneys for Petitioners and Intervenors

JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 685-4800

By: Albert J. Givray
Albert J. Givray

Marshall S. Filler
OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

Jere W. Glover
Andrew Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

* There are no primary authorities upon which this Brief chiefly relies.

CONSTITUTION

STATUTES AND REGULATORY MATERIALS

OTHER AUTHORITIES

GLOSSARY

1. A.....Addendum
2. AB.....Amicus Curiae Brief of AMFA
3. AMFA.....Aircraft Mechanics Fraternal Association
4. APA.....Administrative Procedure Act
5. ARSA .....Aeronautical Repair Station Association
6. FEM .....Fortner Engineering & Manufacturing, Inc.
7. FRFA .....Final Regulatory Flexibility Analysis
8. IRFA .....Initial Regulatory Flexibility Analysis
9. Final Rule .....71 Fed. Reg. 1666 (Jan. 10, 2006)
10. JA .....Joint Appendix
11. NPRM.....Notice of Proposed Rulemaking, 67 Fed. Reg. 9366 (Feb. 28, 2002)
12. OTETA .....Omnibus Transportation Employee Testing Act
13. PPI .....Pacific Propeller International LLC
14. PJB.....Petitioner's Joint Opening Brief
15. PMF .....Premier Metal Finishing, Inc.
16. RB.....Brief for the Respondent
17. RFA .....Regulatory Flexibility Act
18. SBA .....Small Business Administration
19. SMI.....Solutions Manufacturing, Inc.
20. SNPRM .....Supplemental Notice of Proposed Rulemaking, 69 Fed. Reg. 27,980 (May 17, 2004)
21. TPS ....Texas Pneumatics Systems, Inc.

SUMMARY OF ARGUMENT

Petitioners and Intervenors submit that the FAA's own Brief In Opposition bolsters -- rather than undermines -- their challenges to the Final Rule.[1] Careful analysis shows that: (1) the FAA lacked statutory authority to issue the Final Rule; (2) the FAA violated the RFA in doing so; (3) the Final Rule embodies intolerable vagueness and incoherence; (4) the FAA violated the APA; and (5) the Final Rule offends Fourth Amendment constraints.

ARGUMENT

I. The FAA has failed to overcome Petitioners' assertion that the Final Rule exceeds the FAA's statutory authority.

A. Noncertificated-subcontractor employees are not "air carrier employees."

1. At the heart of this case lies the essential theory on which the FAA based the Final Rule -- namely, that the term "air carrier employees" as used in section 45102 covers "*all* employees performing safety-sensitive functions for an air carrier." **RB at 20.**[2] It will not do, however, for the FAA to say that a person is an "air carrier employee" simply because that person performs work "for" an air carrier. An air carrier's own food service employee, for example, might well prepare cookies to serve on board a flight. Yet if the airline instead contracts with a caterer, which in turn hires a local bakery shop to do the job, it hardly follows that one of the bakery's ten night-shift employees, who happens to work on this order, somehow has become an "air carrier employee." Nor will it work for the FAA to say that the present case is distinguishable from the cookie-making case because workers covered by the Final Rule (unlike the bakery worker) engage in "safety sensitive functions." The reason why is that the

---

[1] Petitioners and Intervenors will be collectively called "Petitioners," and their Joint Opening Brief will be cited as "**PJB at ____**." The FAA's Brief In Opposition will be cited as "**RB at ____**," and the Brief Of Aircraft Mechanics Fraternal Association as *Amicus Curiae* will be cited as "**AB at ____**." All other citation forms will be the same as in the **PJB**.

[2] The FAA's brief repeatedly trumpets this proposed standard. *E.g.,* **RB at 3-5, 18, 20, 25, 30, 39.** *Amicus Curiae* relies on it, too. *E.g.,* **AB** at 3-5 (referring to "function-based testing").

statute expressly – and separately - requires that workers properly subject to testing must be *both* "responsible for safety sensitive functions" *and* "air carrier employees." **PJB at 18.** It will not wash to say that workers satisfy the latter statutory requirement because they satisfy the former, for to do so is to give a one-prong reading to a two-prong statute. *See, e.g., Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[a party] *cannot* plausibly make a *Chevron* step one argument" to support interpretation that makes other statutory language "surplusage") (emphasis in original)).

2. The FAA nonetheless argues that noncertificated subcontractor workers must be "air carrier employees" because that designation covers certificated repair station workers, including in the highly unusual circumstances when certificated repair stations operate only as subcontractors. *See* **RB at 14**. In making this argument, the FAA overlooks three key facts. ***First,*** certificated repair stations, just like air carriers, secure licenses that render them subject to intensive regulation by the FAA, the very agency that regulates air carriers. *See* 14 CFR part 145 (setting forth 34 separate regulations). ***Second,*** certificated repair stations, just like air carriers, operate at the very heart of the airline industry. ***Third,*** certificated repair stations, just like air carriers, take airworthiness responsibility and thus, as a legal matter, step into the shoes of air carriers, including by becoming subject to substantial penalties for airworthiness-related defaults. *See* 14 C.F.R. § 121.363. For all these reasons, certificated repair stations – including repair stations that might operate solely as subcontractors – occupy a position identical to air carriers in critical functional and legal respects. Not one of these characteristics, however, carries over to the noncertificated subcontractor. Thus the very reasons for viewing certificated-repair-station workers as "air carrier employees" constitute reasons ***not*** to apply that same designation to workers employed by noncertificated subcontractors.

3. The FAA also attempts to equate the employees of noncertificated subcontractors with the employees of noncertificated direct contractor firms, as to whom FAA testing obligations have long applied. This reasoning is wrong, however, because direct-contractor employees

perform work: (1) that is done solely under the air carrier's own, legally required maintenance authority, 14 C.F.R. § 43.3(f); (2) that is carried out pursuant to the air carrier's own direct instructions, and turned directly over to the air carrier upon completion, due to the existence of contractual privity; and (3) that is subject to airworthiness review and return to service solely by the air carrier itself precisely because no certificated repair station is anywhere on the scene. *See* 14 CFR § 121.363. Noncertificated-*subcontractor* employees do not have any of these close links with the air carrier or any other close link that could render them *de facto* "air carrier employees."[3]

4. The FAA decries the distinctions advanced here as "ad hoc." **RB 14, 23.** These are exactly the same distinctions, however, that the FAA itself (1) drew when it first established its drug and alcohol testing program; (2) had in place when Congress endorsed that program in 1991; and (3) thereafter continued to abide by nearly to the present day. See, e.g., **RB at 8;** *accord* **RB at 3; PJB at 29-31.** They are also the sort of distinctions that must be drawn unless one is to collapse two separate statutory requisites for testing authority into only one, as the agency in effect proposes. Faced with these difficulties, the FAA objects that Petitioners' effort to differentiate noncertificated subcontractors and certificated repair stations based on an "alter ego rationale" goes "way beyond anything that the FAA asserts as a statutory justification for testing employees of certificated repair stations." **RB at 26**. The very question presented here, however, is whether the FAA's "statutory justification" is permissible. And that statutory justification – which focuses "simply" on whether employees "are performing ... safety-sensitive

---

[3] There is also no basis whatsoever for concluding that the Omnibus Act's legislative history concerning "mechanics" renders workers for noncertificated subcontractors "air carrier employees." **RB at 25.** *See also id.* **at 16, 37, 40, 48.** In fact, the term "mechanics" has a highly specialized meaning in law and practice – denoting only those specially trained experts licensed by the FAA at such a high level that they are able to individually discharge the privilege exercised *by air carriers themselves* to take airworthiness responsibility. *See, e.g.,* 14 C.F.R. §§ 65.71 through 65.79, 65.81. For this reason, to say that "mechanics" are "air carrier employees" for statutory purposes does *not* suggest that these terms extend to ordinary workers -- with no remotely comparable training, skills, licenses and job responsibilities -- employed outside the airline industry by such firms as general-service welding and machine shops.

functions," **RB at 26** – is not tenable in light of the statute's wholly separate requirement that the tested worker must also be an "air carrier employee." The decisive point bears repeating: Section 45102 requires that, for testing to occur, the worker must be *both* "responsible for safety sensitive functions" *and* an "air carrier employee." It improperly negates the latter statutory requirement to say that testing is required for "all employees performing safety-sensitive functions for an air carrier." **RB at 20**.

5. Settled rules of statutory interpretation confirm the conclusion that the FAA's non-common-meaning interpretation of the term "air carrier employees" cannot stand. In particular:

a. The FAA's interpretation of the term "air carrier employees" is at odds with a proper contextual reading of that statutory language. All agree that the FAA's testing program has always been intended "to combat the use of drugs and alcohol *in the aviation industry,*" **RB at 6**; **AB 4-6**, by guarding against such use by the "*aviation employee.*" **RB at 3**. This overarching view of the program -- which Congress endorsed in passing the Omnibus Act, see **PJB at 13** (discussing Senate Report) -- requires a rejection of the FAA's position for a simple reason: The ordinary welder in an ordinary local welding shop, or the ordinary painter employed by an ordinary local painting firm, is simply not an "aviation employee" within the "aviation industry." *See infra* pp. 21-22. The overarching understandings against which § 45102 was enacted, and the purposes it was designed to serve, thus demonstrate why the Final Rule pushes the definition of "air carrier employees" beyond its proper limit. *See* **PJB at 13**.[4]

b. The FAA concedes that its interpretation of § 45102 would be disfavored if it triggered "serious constitutional doubts." **RB at 24**. The FAA argues, however, that no such doubts exist

---

[4] The *Amicus Curiae* bemoan the "disturbing revolution" that has occurred in airline maintenance over the last five years. **AB at 2**. According to *Amicus Curiae*, maintenance is no longer performed by the air carriers themselves, but instead is now performed by noncertificated subcontractors. But Congress enacted section 45102 sixteen years ago – well before the so-called "seismic change" in the landscape of airline maintenance. Particularly against this backdrop, there is no reason whatsoever to believe that Congress meant to apply the term "air carrier employees" to the ***non***-air-carrier-employees who work for noncertificated subcontractors.

in this case because Petitioners are merely seeking "to relitigate over 15 years of [Fourth Amendment] jurisprudence." **RB at 48**. On its face, this claim is unpersuasive, given that Petitioners are challenging a *new and much-expanded* testing rule that took effect only months ago. As Petitioners have shown, the drug-testing cases on which the agency has relied differ from this case in important ways -- not the least of which is that this case concerns a program of duplicative, non-suspicion-based, dragnet searches applicable to ordinary workers operating wholly outside the airline industry. *See* **PJB at 44-45**; *see also infra* pp. 21-24.

c. The FAA also recognizes that a federal statute "should not be construed to undermine other legislatively mandated goals" if the statutory text permits that result. **RB at 40**. It logically follows that the term "air carrier employees" in the Omnibus Act should not be interpreted in counter-textual fashion to cover countless small machine shops, plating facilities, plastics firms, and painters. To do so would directly contravene the express directive of 15 U.S.C. § 631(a) and the powerful congressional policy to favor small business enterprises that permeates the U.S. Code. *See, e.g.*, 5 U.S.C. §§ 601 - 612; 26 U.S.C. § 1244; 41 U.S.C. § 405.

d. The FAA does not contest the principle that federal courts must read federal statutes with sensitivity to the importance of local self-governance. Instead, the FAA urges that the Omnibus Act's express preemption provision removes the need to pay heed to this interpretive canon. **RB at 24**. It is precisely the preemptive effect of the Omnibus Act, however, that creates the federalism problem that brings this canon into play. This is so for the simple reason that the more broadly courts interpret the term "air carrier employees" the more expansive will be the scope of federally mandated testing and the consequent displacement of otherwise applicable state law. **PJB at 11-12.** In short, the FAA's argument in no way cuts against the need for this Court to take account of "our dual system of government" in interpreting § 45102. **PJB at 11** (quoting Supreme Court's ruling in *BFP*). *See Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (confirming that state-protective presumption against preemption applies in cases of express, as well as implied, preemption); *id* at 532-33 (concurring opinion; collecting cases).

e. In response to Petitioners' invocation of these canons, the FAA cites the principle of "ejusdem generis" to show that "the phrase 'and other air carrier employees' is not limited to direct employees." **RB at 18**. That point is uncontested, however, so that the FAA's ejusdem generis argument attacks only a straw man. The relevant question in this case concerns *which* workers who are not in a strict master/servant relationship with an air carrier nonetheless are similar enough to the categories of workers listed in the statute to qualify as "air carrier employees." In fact, there are vast and obvious differences between (1) "airmen, crew members, [and] airport screening personnel," 49 U.S.C. § 45102(a)(1), and (2) persons employed in local mom-and-pop subcontractor businesses -- far removed from any aircraft or airport, and from any direct interaction with air carriers -- who occasionally service an aircraft part. It follows under the principle of ejusdem generis that the term "air carrier employees" does *not* reach these workers. Instead, that principle confirms what common sense suggests: that the Final Rule is wrong in positing that the statutory term "air carrier employees" includes *all* employees of *all* subcontractors "at *any* tier," **RB at 1,** who do *any* amount of work, in *any* location, under *any* circumstances, for the ultimate benefit of an air carrier.

6. The *Chevron* principle does not undermine this straightforward reading of the governing statute. In particular, the agency is off the mark in suggesting that Petitioners merely assert that "Chevron deference does not apply, because the FAA is seeking to expand its jurisdiction and because this is a 'political' regulation that is merely an outgrowth of the 'war on drugs.'" **RB at 25.**[5] Petitioners' argument in fact focuses squarely on the controlling impact of

[5] Even so, it is hard to see how the FAA can contend that a sweeping extension of drug and alcohol testing power to an entirely new category of workers does not entail an expansion of its regulatory "jurisdiction." And it is entirely inaccurate to say that "the cry of a 'war on drugs' is political rhetoric, not a legal argument." Thoughtful jurists have voiced concern that drug testing programs are too readily susceptible to adoption, based on "feeble" safety justifications, to express moral condemnation of drug use. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 684 (1989) (Scalia, J., joined by Stevens, J., dissenting); s*ee also Willner v. Thornburgh*, 928 F.2d 1185, 1196 n.3 (Henderson, C.J., dissenting) (citing Justice Scalia's warning that certain drug testing programs are not so much efforts to screen out workers using illegal drugs but more an "immolation of privacy and human dignity in symbolic opposition to

the "air carrier employees" language, particularly when considered in context and in light of governing canons of statutory interpretation. *See* **PJB 9-14, 16-18 & n.5.** In the end, the result in this case is clear because the directive of the statute is unambiguous. Congress "has directly spoken" in a way that bars the agency from extending its testing program to all noncertificated-subcontractor employees, and the FAA's contrary pronouncement is not a "permissible reading of the statute." *Chevron USA, Inc. v. Nat. Res. Defense Council, Inc.*, 476 U.S. 837, 842-43 (1984).[6]

7. All these points show why the FAA errs in suggesting that "facial challenge" principles, together with the assertion that the Final Rule may have some permissible applications, prelude Petitioners from seeking judicial relief from that Rule in this case. **RB at 13.** Petitioners may challenge the Final Rule because it reflects a fundamentally flawed rationale that renders the Final Rule rotten at its root. Who even knows if a more limited rule would have been promulgated -- or even considered -- if the FAA had proceeded with a proper understanding of the limits on its rulemaking authority? In cases such as this one, responsibility for reconsidering a greatly overreaching exercise of agency authority falls to the agency charged by law with the rulemaking function; it is not incumbent on this Court somehow to "draw lines which the [FAA] itself has not drawn." *Transportation Inst. v. U.S. Coast Guard*, 727 F. Supp. 648, 659 (D.D.C. 1989).

---

drug use." These judges are not merely mouthing "political rhetoric," and neither are Petitioners in this case.

[6] The *Amicus Curiae* focuses little on these matters in arguing that the FAA has acted within its statutory authority here. Instead it makes a passionate argument that noncertificated-subcontractor employees must be subjected to testing to help impede air carriers from shifting work away from its members to the "unconscionable" detriment of airline safety. **AB at 15-16.** In making this argument, however, the *Amicus Curiae* raises public policy concerns properly addressed to Congress, rather than taking proper account of section 45102's existing, limiting language. (It is telling that the *Amicus* never even mentions the statutory language, except in a passing reference in a footnote midway through its brief. *See* **AB at 7. n.3.**). Indeed, the *Amicus* emphasizes that maintenance-related work is now "landing in obscure shops" where employees lack even "an appreciation" of the safety implications of their actions. **AB at 16.** This description reveals just how clear it is that the Final Rule reaches far beyond even the most linguistically generous conception who is an "air carrier employee."

B. Noncertificated-subcontractor employees are not "responsible for" safety-sensitive functions.

Petitioners contend that noncertificated subcontractors are not properly subject to testing under section 45102 because they are not, as the statutory language requires, *"responsible for* safety-sensitive functions" involved in performing maintenance work. **PJB at 18.** In responding to this argument, the FAA accepts the notion that noncertificated-subcontractor workers are not "legally responsible" for these tasks. **RB at 26-27.** Nonetheless, according to the agency, they are *causally* "responsible" for "safety-sensitive functions" for the tautological reason that they "carry out" the work they do. ***Id.* at 27.** One problem with this interpretation is that Congress has not spoken (as it easily could have) of simply "carrying out" or "performing" a safety-sensitive function. Use of the separate term "responsible for," 49 U.S.C. § 45102, thus suggests a different and narrower meaning. *See, e.g., Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006). Another problem is that a chain of causation can always be broken, as when a supervening or independent cause comes into play. *See* PROSSER AND KEETON ON TORTS 301 (5th ed. 1984). Where, as here, governing regulations require a wholly independent safety-based evaluation and approval by the certificated repair station before a subcontractor's work is passed back to the carrier for return to service, 14 C.F.R. § 145.217(b)(2), (3); **see PJB at 18,** just such a breaking of the chain has occurred. At the least this conclusion makes sense in this distinctive setting, given the FAA's pervasive pronouncements that only the certificated repair station – and not the noncertificated subcontractor – has "airworthiness *responsibility*" for the "safety-sensitive" features of such work. **RB at 3 n.2, 42, 44;** *see* **PJB at 18.**

II. The FAA violated the Regulatory Flexibility Act, and meaningful relief for that violation is required.

A. Because the Final Rule "directly regulates" more firms than only air carriers, the FAA erred in deeming the RFA wholly inapplicable in this case.

The facts concerning Petitioners' RFA claim are uncontested. On two separate occasions, the FAA issued formal notices of proposed rulemaking in which it recognized that it

should account for non-air-carrier businesses in determining whether the Final Rule had a "significant economic impact" on small businesses for RFA purposes. **PJB at 19.** In these notices, however, the FAA also asserted that no significant impact existed, so that compliance with the RFA was not required. *Id.* In the wake of these notices, the FAA received extensive comments (including from the Office of Advocacy of the Small Business Administration), which revealed that the Final Rule clearly would have a significant impact because the FAA had greatly underestimated the effect of the Final Rule on non-air-carrier firms. Faced with this evidence, the FAA made a complete reversal, declaring in the Final Rule that only air carriers were "directly regulated" by that Rule, so that any and all effects on non-carrier firms were irrelevant for RFA purposes. *Id.* at 20-21. The FAA correctly acknowledges that its newly hatched direct-regulation analysis "may at first appear paradoxical." **RB at 31.** What is more, the FAA's arguments do not remove this paradox because the new rule's entire purpose was to extend the prior testing regime to noncertificated subcontractors and thus to "directly regulate" these small entities. *See* **PJB at 21-22;** *see also* **RB at 32** (acknowledging that "[t]he effect of the regulation is to *force* ...subcontractors ... to allow their employees ... to be tested ....").

The Rule's targeting of noncertificated subcontractors, however, does not provide the surest proof that the Final Rule "directly regulates" businesses in addition to air carriers. Instead, the most powerful proof comes from one, simple fact: The Final Rule directly subjects certificated repair stations with FAA-approved testing programs to FAA-imposed sanctions if their subcontractors perform maintenance functions without testing their employees in conformance with that Rule. **PJB at 22-23.** To say that an FAA rule does not "directly regulate" certificated repair stations when they are directly penalizable by the FAA for violating that very rule is untenable on its face.

The FAA spills much ink seeking to escape this ineluctable conclusion. It argues, for example, that "[i]t is the air carrier's responsibility, enforceable by civil penalty, to ensure that all persons performing safety-sensitive functions for it are subject to drug- and alcohol-testing,

whether those persons work for the air carriers directly or for contractors at any tier." **RB at 30**. But to say that ensuring proper testing "is the air carrier's responsibility, enforceable by civil penalty" is not to say that air carriers ***alone*** are directly regulated by the Final Rule. In fact, as that Rule makes clear, it is *also* the certificated entity's "responsibility, enforceable by civil penalties" to ensure that mandated testing by subcontractors occurs. *See, e.g.,* **RB at 34** (citing "obligation of the primary contractor," which is "subject to enforcement" by FAA action). Put another way, it may be true that "certificated repair stations are ... not regulated employers" for purposes of the FAA's own definitional rules. **RB at 31 (quoting JA at 9)**. But that does not change the fact that certificated repair stations are "directly regulated" entities because they are "subject to" the Final Rule if they have a testing program. **RB at 29** (quoting *Mid-Tex Electric*, 773 F.2d 327, 342 (D.C. Cir. 1985)). At the very least, that is the case for the many certificated repair stations that already had such programs in place long before the FAA subjected them to the duties and penalties imposed by the Final Rule. **JA at 4.**

The FAA argues that none of this matters because these certificated entities are subjected to regulation and penalties only if they "choose to ... take on ... business" with air carriers. **RB at 32**. In effect, the FAA is telling certificated repair stations -- which have long repaired aircraft parts, have built up expertise in this field, and have incurred far-reaching sunk costs in that effort -- that they are not "subject to" direct FAA regulation, because they can now abandon their preexisting business and (for example) fix motorboats instead. On its face, this conception of the law's operation is neither sensible nor fair.

For these reasons, it is not surprising that in one telling passage, even the FAA acknowledges that: "Although ... testing naturally has an effect on the contractors and subcontractors, those companies are not directly regulated under the final rule *unless they choose to establish their own drug- and alcohol-testing programs*." **RB at 14-15.** In fact, most certificated repair stations ***have*** chosen "to establish their own drug- and alcohol-testing

programs." *See* **JA at 4.** *Thus*, under the FAA's own statement of the governing principle, those firms – and not just air carriers -- are "directly regulated under the final rule."

The foregoing analysis readily distinguishes the cases on which the FAA relies. In contrast to its reasoning in the Final Rule itself (where the FAA relied essentially on this Court's *Mid-Tex Electric* and *Cement Kiln* decisions, *see* **JA at 10**), the FAA now places primary emphasis on *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C Cir. 1999), *aff'd in part and rev'd in part,* 531 U.S. 457 (2001), and *Michigan v. EPA,* 213 F.3d 663 (D.C. Cir. 2000), *cert. denied,* 532 U.S. 904 (2001). Those cases involved RFA challenges to EPA regulations that called upon states to adopt clean air rules that met minimum federal standards. The federal regulation thus targeted states, which in turn were required to subject small businesses to penalties imposed by the states (not by the EPA) under rules established by the states (not by the EPA). Here the situation is foundationally different. As the FAA acknowledges, certificated repair stations will be subject to sanctions imposed *by the FAA itself* if they violate a rule (namely, the Final Rule) adopted *by the FAA itself. See* **RB at 31, 33-34.** Again, the governing principle is straightforward: A person is "directly regulated" by an agency if that person is subject to penalties imposed by that agency for violation of that agency's rule. That principle was not implicated in *American Trucking Assn's* or *Michigan v. EPA. See, e.g.,* 175 F.3d at 1045 (emphasizing that the EPA had authority over states but "no authority ... to impose any burdens upon [small] entities"). It does, however, apply here.[7]

[7] The two EPA cases are also distinguishable because there the challenged federal regulations afforded states substantial discretion in forging their own clean-air rules. *See* 175 F.3d at 1044 (noting that "[t]he states have broad discretion in determining the manner in which they will achieve compliance"); 213 F.3d at 689 (noting that EPA rules "would leave to the State the task of determining how to obtain ... reductions"). Under those circumstances, critical policy decisions were made by the states, rather than by the federal government, so that it made perfect sense to say that private firms were "directly regulated" by state, rather than federal, law. Here, in contrast, the FAA alone fully controls the nature of the legal obligations that target both air carriers and certificated subcontractors.

For all these reasons, the FAA was wrong to assert that the Final Rule "directly regulated" only air carriers. By relying on the contrary view in deeming the RFA wholly inapplicable in this rulemaking process, the agency committed clear legal error.

B. The FAA's violation of the RFA is not excused by its actions, which comply with neither the letter nor the "spirit" of the RFA.

As shown above, the FAA violated the RFA by wrongly insisting that only air carriers were "directly regulated" by the Final Rule. Now, however, the FAA argues that its default does not matter because, it says, this legal violation constituted "harmless error." **RB at 36.** The FAA asserts, for example, that any "failure to comply with the RFA ... was harmless," because its "final regulatory evaluation specifically addressed ARSA's objections to the initial regulatory evaluation's economic analysis." **RB at 15**. In fact, the FAA failed to address key objections lodged in the rulemaking process. *See* **PJB at 38-41**.[8] But whatever the FAA did or did not do in this regard, the RFA requires much more than merely acknowledging critical comments lodged by objectors. It requires, among other things, a focused and meaningful investigation of potential regulatory alternatives set out first in an initial, and then in a final, flexibility analysis. See 5 U.S.C. §§ 603(a); 604(a).[9] As to legal requirements concerning the initial regulatory flexibility analysis, the FAA now says that its SNPRM "served the function" of such an inquiry in

[8] In particular, the FAA criticizes Professor Jenkins' methodology for estimating the potential number of noncertificated subcontractors at between 12,000 and 22,000, **JB at 36-37**, but fails to explain how it reached its own conclusions about the number of these entities. Further, the record is clear that in a sample population of approximately 5,000 repair stations (approximately eight percent of the total repair station population), **JA at 77; JPB at 39**, ARSA identified 577 separate noncertificated subcontractors - 280 more than the FAA alleges exists in the entire industry. **JPB at 39.** Assuming that each repair station uses only one noncertificated subcontractor (rather than the 4.53 weighted average calculated by ARSA), the total number of non-certificated contractors would be approximately 16 times the number estimated by the FAA (i.e., 300 entities)! Additionally, the FAA failed to consider the full scope of the rule's effect, as its analysis all but ignores the full extent of maintenance-related costs imposed by this rule. *See* **JA at 81-82.**

[9] Indeed, "it remains the obligation of the agency to *develop* significant alternatives pursuant to the RFA. Otherwise the agency is transferring its statutory RFA mandate to those entities that can least afford or have the least expertise in rulemaking processes to craft alternatives -- small entities." Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 51 (2003) (emphasis added.).

that the SNPRM "stated ... that it was not considering any alternatives, because 'this proposal would simply emphasize sections of existing regulations.'" **RB at 36**. Plainly, however, an agency does not consider alternatives, as strictly required by the RFA, when it declares that it is "*not* considering any alternatives" on the ground that it does not have to.

Likewise, the FAA did not prepare a final flexibility analysis, much less consider any less restrictive alternatives as part of issuing such a document. In this Court, the FAA acknowledges that "the [final] evaluation reiterated that no alternatives were considered, because the rule simply emphasized sections of existing regulations." **RB at 37;** *see* **PJB at 36**. Once again, however, the agency reverses field by now proclaiming that in fact it "did consider alternatives to the proposed subcontractor language." **RB at 37**. The supposed "alternative" it says it considered, however, was "to rely on the airworthiness sign off" to guard against drug-or-alcohol-induced work errors. *Id.* Consideration of the "airworthiness sign off" process, however, involved nothing more than consideration of retaining the regulatory status quo. It did not entail consideration of how the agency might "minimize" the impact of the proposed *new* rule, as RFA less-restrictive-alternative analysis requires. 5 U.S.C. § 604(a); *see, e.g., Environmental Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 879 (9th Cir. 2003) (approving agency's actions when it designed provisions to "minimize impacts on small entities . . . includ[ing] alternative . . . mechanisms responsive to the resources of small entities . . . .").

Finally, the FAA asserts that it "considered the ... alternative of distinguishing between safety-critical and non-safety-critical maintenance ... and rejected that alternative, because '[t]here is no 'non-safety maintenance' recognized in our regulations.'" **RB at 46**. This line of logic illustrates in powerful fashion the sort of outlook and error that pervaded the FAA's promulgation of the Final Rule. This is the case because, by way of this reasoning, the FAA rejected a proposed alternative of modifying its regulations by simply asserting that that alternative would modify its regulations. Such an approach, on its face, involves *not* considering the proposed alternative at all.

This repeated pattern of defaults shows why no harmless error exists here. This is not a case where noncompliance with the RFA was merely "hypothetical." *See Environmental Def. Ctr., Inc.,* 344 F.3d at 879. Rather, it is a case in which the agency's failure to adhere to the Act was self-declared and plain. *Compare id.* (reasoning that any hypothesized RFA violation would have been harmless because the agency (1) went so far as to convene "Small Business Advocacy Panel," which reviewed comments made on the proposed rule "consistent with the procedures described in section 603" and (2) then in fact responded to the Panel's recommendations by "minimiz[ing] impacts on small entities"). This is also not a case in which an agency actually undertook an RFA review but committed an innocent misstep along the way. *See Associated Fisheries, Inc. v Daley*, 127 F.3d 104 (1st Cir. 1997). Rather, it is a case in which an agency emphatically insisted (on plainly dubious grounds, in the teeth of its own prior analysis, and contrary to the views expressed by the SBA), that the RFA did not apply at all.

Finally, this is not a case where a court, after an agency had finished its work, was asked to evaluate independently whether claimed RFA violations were harmless. Rather, here the agency sought to justify its actions in the Final Rule itself on the ground that it had adequately complied with the RFA's "spirit." **JA at 10.** In such a situation, the need for exacting judicial review is great, lest an agency frustrate both the Act's letter and spirit by seeking to hurdle the bar the statute raises only after that bar has been lowered by the agency's own hand.

The principle of *United States Telecom Ass'n v. FCC,* 400 F.3d 29 (D.C. Cir. 2005), controls this case. As this Court stated, there can be no finding of harmless error because "it is impossible to determine whether a final regulatory flexibility analysis which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities ... would have affected the final order when it was never prepared in the first place." *Id.* at 43. The FAA seeks to sidestep this principle by asserting that it did not "utterly fail to follow" the RFA. *Id.* at 42. Petitioners submit that an utter failure did indeed occur, particularly because of the agency's utter failure to consider regulatory alternatives. *See Small Refiner*

Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538 (D.C. Cir. 1983) (indicating, among other things, that a challenged rule should be overturned when the "agency completely fails to respond to a clearly available significant alternative"). Regardless, the alleged absence of an "utter failure" is not the proper touchstone for harmless error analysis. And the sort of clear showing of harmlessness that might justify judicial non-intervention in exceptional circumstances plainly is not present here.

C. There is no reason to leave the FAA's unlawful Final Rule in effect while the FAA complies with RFA requirements that the FAA should have honored at the outset.

Congress has set forth the rules that govern remedies for RFA noncompliance in 5 U.S.C. § 611(a)(4). That section specifies that when an RFA violation occurs, "the court shall order the agency to take corrective action consistent with [the Act]" and that such corrective action includes "deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of rule is in the public interest." Therefore, enforcement of a rule promulgated in violation of the RFA is to be deferred "unless" the court makes a specific determination that the unlawful rule should operate in light of the "public interest."

Here, no special facts support leaving the Final Rule in effect pending proper RFA compliance. Indeed, in advocating non-deferral, the FAA can do no better than to argue – at the highest possible level of generality – that "[a]ll three branches of government concur that furthering aviation safety is in the public interest." **RB at 39.** All three branches of government, however, also concur that the public interest favors supporting small businesses, protecting individual privacy, and safeguarding citizens against unlawful agency action. In practical effect, the FAA's argument means that no unlawful FAA regulation (and probably, by logical extension, no other unlawful regulation said to be founded on serious safety concerns) could ever be kept from operating by a court pending judicially mandated remedial conformance with the RFA. Such a principle cannot stand in light of Congress's insistence -- at the heart of its 1996

amendments to the RFA -- that the Act must operate in a way that genuinely constrains the action of government agencies. *See, e.g., Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15 (D.D.C. 1998). After all, if an entire agency can forego RFA compliance in promulgating any safety-based regulation, without risk that such noncompliance will result in a later deferral of its rule, there will be no meaningful incentive for the agency to comply with the RFA in the initial rulemaking process. Yet insistence upon such an incentive is required by the RFA's repeated use of the mandate "shall" in stating an agency's RFA obligations. *See* 5 U.S.C. §§ 603, 604.

The critical point is that any proper consideration of § 611(a)(4) must involve an inquiry that moves beyond broad appeals to aviation safety without more examination. Here a more particularized inquiry discloses at least four separate reasons why continuing to enforce the Final Rule is not justifiable pending proper compliance with the RFA. ***First,*** the FAA itself recognizes that, wholly apart from the Final Rule, "no aviation accidents are known to have been directly caused by misuse of alcohol or drugs." **RB at 45.** ***Second,*** the risk that such an accident will suddenly occur due to a lapse by a noncertificated-subcontractor employee is negated by the same elaborate airworthiness-review process that has countered such dangers for the past two decades. *See* **PJB at 34-37.** ***Third,*** the agency has not yet considered the possibility -- as it rightly should -- that the Final Rule on balance may increase, rather than decrease, safety-related problems. *See* **PJB at 36-37.** ***Fourth,*** the FAA itself determined that the public interest provided no need-it-now reason for the Final Rule to take hold when the agency itself chose to stay the Rule's operation (even in the absence of any judicial determination of its illegality) for six months following its effective date. *See* **JA 93**. It makes no sense for the agency now to argue that the public interest compels continued enforcement of the Final Order when the agency itself identified no public interest that precluded its own staying of the Rule's operation during a comparable number of months only a short time ago.

In the end, the FAA urges this Court to broadly accede to the FAA's judgment about how to apply § 611(a)(4) in this case, including under the supposed principle that its safety

judgments are entitled to "utmost deference." **RB at 40** (relying on the terrorism-related *Public Citizen* case). This Court, however, owes no deference to the FAA in its application of the RFA -- much less the "utmost deference" to which that agency alludes -- because that agency has no specialized role in implementing this statute. *Accord, American Trucking Assns.,* 175 F.2d at 1044. The only deference this Court owes in applying the remedial provisions of the RFA is to the will of Congress. On these facts, a proper regard for congressional purposes strongly favors deferral of the Final Rule's operation, lest an agency encounter no meaningful consequence when it gives the RFA "lip service at best." 142 Cong. Rec. S3242, S3245.

III. The vague and internally incoherent features of the Final Rule render it unlawful under constitutional and statutory standards.

The FAA dismisses as "utterly without basis" Petitioners' contention that the FAA's promulgation and implementation of Final Rule has created intolerable confusion. **RB at 40.** In doing so, however, the FAA does not pause to mention -- far less to refute -- the wide array of confusion-inducing actions taken by the FAA on which Petitioners base this claim. Instead, the agency notes that its "definitions of maintenance and preventive maintenance have been part of the FAA's regulations since 1962." **RB at 42**. This observation, however, misses the basic point of Petitioners' argument -- which is that promulgation of the Final Rule *in 2006*, and ensuing efforts to explain its operation, replaced preexisting regulatory clarity with far-reaching uncertainty and confusion. *See* **PJB at 25-28.**

The FAA also argues that *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982), forecloses Petitioners' challenge. The basic principle of that case, however, is that rule-of-law values prohibit the undue indecipherability of legal mandates, whether or not those mandates are criminal in nature or concern First Amendment rights. *Id.* at 498-99. In particular, the FAA errs in arguing that *Hoffman* compels application of a feckless vagueness standard in this case. In *Hoffman* itself, the Court observed that "the most important factor affecting the clarity that the Constitution demands is whether [the challenged law]

threatens to inhibit the exercises of constitutionally protected rights." *Id.* at 499. The centrality in this case of fundamental Fourth Amendment rights – which are no less precious than First Amendment rights – thus cuts strongly in favor of judicial vigilance. In addition, any otherwise-warranted ratcheting down of vagueness concerns in this setting should be offset by a ratcheting up of those same concerns because of the untenable "Catch 22" situation into which the FAA has placed the companies it regulates. *See* **PJB at 28-29**. Finally, the FAA's reliance on affected firms' "ability to clarify the meaning of the regulation by [their] own inquiry," **RB at 41**, is deeply ironic and ill-founded. After all, it was the FAA's very effort to "clarify" its Final Rule that created the intolerable confusion of which Petitioners complain. *See* **PJB at 27-28**.

IV. The Final Rule Violates the APA.

Petitioners have spelled out in detail why the agency review process that produced the Final Rule renders that Rule unlawful under the APA. **PJB at 29-42.** In response, the FAA asserts that Petitioners' APA challenge "simply represents a policy disagreement with the choices the FAA has made." **RB at 43.** There are at least three major problems with the FAA's assertion, each of which independently shows why the Final Rule is "arbitrary and capricious":

1. The FAA's rulemaking was and is premised on the fundamentally incorrect premise that the Final Rule did not alter the FAA's preexisting testing regime. In support of this contention, Petitioners presented an avalanche of facts in their Opening Brief that clearly showed why the Final Rule altered, rather than maintained, the governing legal baseline for drug-and-alcohol-testing duties of noncertificated subcontractors. *See* **PJB at 29-31**. The FAA contests none of these facts. It also does not deny that -- despite these facts -- it repeatedly *relied* during the rulemaking process on its view that "[t]his final rule does not expand the scope of FAA-regulated drug and alcohol testing programs." **JA at 4.** Instead, the FAA now says that none of this matters based on a single, key assertion: "the final rule set forth both the FAA's view that the rule was a clarification and the view of commenters that it was a substantive

change." **RB at 43.** This assertion is beside the point. The problem here is not that the FAA failed to identify contesting views on the Final Rule's effect. The problem is that the FAA's view of that matter was fundamentally wrong, and that wrong view led to pervasive error in the agency's justificatory process. *See* **PJB at 32-33**. Petitioners repeat: The FAA committed error by continuously advancing and relying on the view that the Final Rule did not alter the preexisting legal landscape. The FAA cannot now contend that this erroneous view was not erroneous, or erroneously relied upon, simply because the parties it affected were invited to and (not surprisingly) did object to the error it embodied.

2. In their Opening Brief, Petitioners explain why the Final Rule may well have more negative, than positive, effects on airline safety, even assuming the Rule affects safety at all. Among other things, Petitioners note the danger that the agency's new regime will redirect FAA drug-and-alcohol-testing resources away from certificated entities (which make critical airworthiness determinations) to noncertificated entities (which do not). The agency attacks this line of reasoning on the ground that Petitioners present "no evidence" that a problematic dilution of agency testing resources will occur. **RB at 46**. The agency's own rules, however, rely on the notion that overinclusive testing under the FAA program will threaten safety by spreading testing resources too thin. *See* **PJB at 28** (discussing "Catch-22" feature of agency's strong ban on over-testing). In any event, Respondent's argument misses Petitioners' key point. Petitioners do not object to the agency's action on the ground "that there is no conclusive proof that the Final Rule will have a positive impact on aviation safety." **RB at 16**. Rather, they object on the ground that the FAA did not even *consider* the negative, as well as the alleged positive, safety effects of the Final Rule. **PJB at 36-37.** This omission offends the basic APA tenet that an agency must fully consider key aspects of its justifications for promulgating a rule. *See, e.g., Greater Boston TV Corp. v. FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970).

3. Less restrictive alternatives were not the only thing that the FAA categorically refused to weigh in this rulemaking process. *See supra* p. 13. The agency no less insistently brushed

aside all concerns about the new rule's impact on the privacy and dignity of individual workers. In its brief, the FAA acknowledges this fact, reiterating the view that "this issue was 'resolved more than 15 years ago.'" **RB at 47**. The costs to privacy imposed on employees of noncertificated subcontractors, however, clearly were *not* "resolved" when the initial testing rule was promulgated in 1988. Indeed, even according to the FAA's version of events, it was not until the mid-1990s that the agency even raised the possibility of testing these workers.

Nor is the failure of the agency to consider these costs a matter lacking in analytic significance. In the Final Rule, for example, the agency purported to engage in a cost-benefit analysis under which it compared the proposed rule's purported benefits in averting future accidents against the financial costs imposed on businesses forced to comply with the new rule's strictures. **JA at 11**. In this analysis, however, the FAA took no account whatsoever of privacy costs. But why not? More to the point, how can it be said that (as is plainly wrong) the privacy costs of this new rule were tallied up 15 years ago, while (as is obviously right) the financial costs of that new rule were not tallied up? The FAA's wholesale and anomalous disregard of privacy costs imposed by the Final Rule -- which extends its elaborate drug and alcohol testing program to thousands of previously untested employees -- shows with particular clarity why that Rule violates the APA.

V. The Final Rule violates the Fourth Amendment.

1. In their Opening Brief, Petitioners detail why the Final Rule is unreasonable under the Fourth Amendment. The FAA's response to this argument relies heavily on broad pronouncements that lack in accuracy and relevance. For example:

a. It is not true, as the FAA asserts, that Petitioners' "Fourth Amendment arguments have previously been rejected by the courts." **RB at 51**. How could they have been, given that courts obviously have not yet considered the legality of the *new and dramatically expanded* testing regime challenged in this case?

b. It is also not true that "drug-testing of persons for safety-sensitive transportation functions is consistent with the Fourth Amendment." **RB at 48.** In fact, courts have found that safety-based testing programs can and do violate the Fourth Amendment, including in the transportation context. *See* **PJB at 47-48**.

c. Here, as elsewhere, *see supra* p. 10, the FAA asserts that its testing program poses no legal problem because "subcontractors have voluntarily chosen to get into the field." **RB at 49**. But all sorts of people – advertisers, taxi drivers, travel agents, and parking lot attendants -- choose to develop some connection with the aviation industry. That does not mean that all these persons are automatically subject to drug and alcohol testing on a random basis.

d. It is especially wrong to say that this appeal "seeks to relitigate this Court's precedents on the constitutionality of drug-testing programs covering aircraft mechanics." **RB at 16.** As previously shown, this case does not concern aircraft "mechanics" at all. *See supra* note 3.[10]

2. Contrary to the FAA's broad pronouncements, the Fourth Amendment requires a "context specific inquiry" to determine whether government searches are "reasonable." *Chandler v. Miller,* 520 U.S. 305, 314 (1997). Sorting between permissible and impermissible programs requires the court to determine whether a sufficiently pressing need exists to override the principle that "a search ordinarily must be based on individualized suspicion of wrongdoing." *Id.* at. 313. Here the Fourth Amendment balance tips strongly against the government, and close analysis of the FAA's arguments helps to show why.

---

[10] The FAA also again relies *Public Citizen* case, invoking it for the proposition that this Court must give "utmost deference to the agency" as it makes its Fourth Amendment inquiry. **RB at 49**. *Public Citizen*, however, was not a Fourth Amendment case, and nowhere does the United States Constitution say that courts must give the government "utmost deference" in assessing the scope of fundamental, protected liberties. Indeed, the essential impetus for adding the Bill of Rights to the Constitution was that a much strengthened federal government would pay too little heed to the concerns of local citizens far-removed from a distant national capital. *See, e.g.,* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833). That same concern counsels strongly that this Court should not – as the FAA would have it – brush aside the concerns of highly localized workers, in highly ordinary small businesses, about a highly intrusive search-and-seizure program foisted on them by an agency not even accountable to electoral review.

3. The FAA seeks to justify its testing program on the ground that noncertificated-subcontractor employees work "in a highly regulated industry." **RB at 49**. In effect, The FAA says these workers meet this standard, and therefore have diminished privacy interests, because they secure work from firms within the aviation industry. However, all sorts of independent contractors -- plumbers who are called to service an airport restroom, printers who fill orders for an airline customer, or interior decorators who help out with airline offices -- secure work *from* members of the airline industry, without themselves being *in* that industry. The FAA seems to believe that noncertificated subcontractors are "in" the aviation industry because -- in contrast to the plumber, printer or decorator -- they perform "safety-sensitive" work. **RB at 49.** But this suggestion does not answer the key question; it merely reformulates that question at a higher level of specificity.

4. To be more precise, is someone who works for a local machine shop, and who in that capacity receives some aircraft-related work, operating in the highly regulated aviation industry, or is that person working in the highly *non*-regulated machine-shop industry? The FAA favors the former view, while Petitioners favor the latter. But the latter view has much more to be said in its favor because: (i) local workers in local machine shops -- whose expectations of privacy are at issue -- will view *themselves* as machine shop workers, rather than as aviation workers, including (among other things) because their work involves a wide panoply of customers and occurs physically away from air carriers, airports and airplanes; (ii) a clear and workable line divides certificated repair stations and noncertificated subcontractors in this respect because FAA rules specifically target the former, *see* 14 C.F.R. part 145, but in no way purport to regulate the latter; (iii) indeed, the FAA, in this very proceeding, insists that noncertificated subcontractors are entities that the FAA "does not regulate" -- far less heavily regulate -- even under the Final Rule itself, **RB at 29**; *see also* **AB at 3** (describing Final Rule as a "*first* feeble attempt in the FAA's *tardy* efforts" to regulate noncertificated subcontractors); and (iv) some number of subcontractor employees, even by the FAA's own admission, may at least fairly claim

they are outside the aviation industry and, for this reason, not subject to drug and alcohol testing. **RB at 49-50 n. 6.**

5. Wholly apart from whether noncertificated-subcontractor employees work within a highly regulated industry, the FAA's acknowledgment that some such employees may be able to challenge the Final Rule, *see id.*, reveals why the Final Rule cannot stand under the Fourth Amendment. The FAA says that Petitioners focus on "trivial examples" – such as the metal-plating of a seat belt buckle. **RB at 48-49 n.6.** But the FAA itself recognizes that its testing program reaches painters, plastics workers, cargo container repair personnel, and (and at least sometimes) sound-system repairers, and cleaners, *see, e.g.,* **JA at 9, 175-76** – not to mention "any assistant, helper, or individual in training status" associated with them, **RB at 4**. These applications of the Final Rule are not "trivial." Rather, given the agency's unbounded (and now impenetrable) definitions of "maintenance" and "preventive maintenance," **JA at 4-5**, they lie at the core of the agency's testing program. In effect, the FAA argues that all noncertificated-contractor employees must bring separate actions to challenge *pro tanto* the FAA's testing rule. Petitioners disagree. They believe that the Final Rule – which clearly reaches many non-aviation-industry workers -- violates the Fourth Amendment for that very reason. And the proper remedy for that violation is not to invite thousands of individual challenges to the Final Rule, but to have the agency reconsider and narrow it following its invalidation. *See supra* p. 7 (citing, *inter alia*, the *Transport Inst.* case, which struck down *in toto* an overinclusive safety-based testing rule on Fourth Amendment grounds in just such circumstances).

6. As Petitioners have previously explained, the Final Rule's sweeping new testing program is unreasonable because the FAA's already-well-functioning airworthiness review program renders it duplicative and unnecessary. *See* **PJB at 34-36, 46-47.** The FAA responds to this point by arguing that the airworthiness review program will not -- like its newly expanded drug and alcohol testing program -- cause employers to "remove persons who perform safety-

sensitive functions while using drugs or alcohol." **RB at 50**. The premise of this argument is dubious, since common sense suggests that rejection of faulty subcontractor work in the airworthiness review process (including faulty work resulting from substance abuse) will lead to negative consequences for the offending employee. But in any event, the relevant question is not whether the new drug and alcohol testing program serves some purpose different from that of the airworthiness-review process in some marginal way. Rather the question is this: Is a highly intrusive search program, directed in generalized and random fashion at thousands of ordinary, private-citizen subcontractor employees, with no exceptions for non-safety-critical maintenance-related work, "reasonable" when (i) each item of work to be used by an air carrier is individually evaluated for safety by already-tested certificated-repair station experts; (ii) each such item is thereafter evaluated again by other already-tested and specially licensed air-carrier experts; and (iii) this system has produced not one accident attributable to drug and alcohol use by any maintenance-related worker for more than a decade. *See* **RB at 3 n.2 & 45**. The answer to this question must be no.

Attorneys for Petitioners and Intervenors
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 892-4456

By: Albert J. Givray
Albert J. Givray

Marshall S. Filler
OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

Jere W. Glover and Andrew D. Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2007, a true and correct copy of the above and foregoing **JOINT REPLY BRIEF OF ALL PETITIONERS AND INTERVENORS** was served on each individual shown below via personal hand delivery, except as noted below:

Marion C. Blakey, Administrator
(AOA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Mary E. Peters, Secretary (S-1)
U.S. Department of Transportation
400 7th Street, S.W., Room 10200
Washington, D.C. 20590-0001

Robert A. Sturgell, Deputy
Administrator (ADA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Neil R. Eisner, Assistant General
Counsel for Regulation and Enforcement
(C-50)
U.S. Department of Transportation
400 7th Street, S.W., Room 10424
Washington, D.C. 20590-0001

Andrew B. Steinberg, Chief Counsel
(AGC-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Robert C. Ashby, Deputy Assistant
General Counsel for Regulation and
Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, SW., Room 10424
Washington, DC 20590-0001

James W. Whitlow, Deputy Chief
Counsel for Policy and Adjudication
(AGC-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Paul M. Geier, Assistant General Counsel
for Litigation (C-30)
U.S. Department of Transportation
400 7th Street, SW., Room 4102
Washington, DC 20590-0001

Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Patrice M. Kelly, Deputy Division Manager, Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Nicholas A. Sabatini, Associate Administrator for Aviation Safety (AVS-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Diane J. Wood, Division Manager
Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dr. Frederick E. Tilton, Federal Air Surgeon (AAM-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Margaret Gilligan, Deputy Associate Administrator for Aviation Safety (AVR-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Leonard Schaitman, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 7525
Washington DC 20530-0001

Edward Himmelfarb, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.,
Room 7646
Washington, DC 20530-0001

Mark W. Pennak, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.,
Room 7326
Washington, DC 20530-0001

Vicky L. Dunne, Manager, Program Policy Branch, Drug Abatement Division (AAM-820)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dave Cann, Manager, Aircraft Maintenance Division (AFS-300)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

James R. Klimaski, Esq.
Klimaski & Associates, P.C.
1819 L Street, N.W., Suite 700
Washington, D.C. 20036-3830

VIA OVERNIGHT DELIVERY
Lee Seham
Stanley J. Silverstone
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Ave., Suite 1204
White Plains NY 10601

Albert J. Givray

United States Court of Appeals
District of Columbia Circuit

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., PREMIER METAL FINISHING, INC., PACIFIC PROPELLER INTERNATIONAL LLC, and TEXAS PNEUMATICS SYSTEMS, INC., *Petitioners* FORTNER ENGINEERING & MANUFACTURING, INC., and MR. MINAS SEROP JILIZIAN, *Intervenors as Party Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1091

and

SOLUTIONS MANUFACTURING, INC., and MR. RANDALL C. HIGHSMITH, a natural person, *Petitioners* v. FEDERAL AVIATION ADMINISTRATION, *Respondent*	Case No: 06-1092 (consolidated with Case No. 06-1091)

CERTIFICATE OF COMPLIANCE

Petitioners and Intervenors state that their Joint Reply Brief is being filed February 23, 2007. The joint reply brief is filed in compliance with this Court's Order of January 9, 2007, which granted the "Motion for Leave to File Joint Opening Brief and Motion for 2-Day Extension of December 11, 2006 Deadline (Unopposed)" filed by Petitioners and Intervenors on December 7, 2006. The Court's Order of January 9, 2007, also directed Petitioners and Intervenors to file a

joint reply brief. The Joint Reply Brief conforms to the type-volume limitation requirements in Fed. R. App. P. 32(a)(7)(B) and D.C Cir. Rule 32(a)(3)(B).

Attorneys for Petitioners and Intervenors
JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265
Telephone: (303) 892-4456

By: _____
Albert J. Givray

Marshall S. Filler
OBADAL, FILLER, MACLEOD & KLEIN, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903
Telephone: (703) 299-0784

Jere W. Glover and Andrew D. Herman
BRAND LAW GROUP, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301
Telephone: (202) 662-9700

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2007, a true and correct copy of the above and foregoing **CERTIFICATE OF COMPLIANCE** was served on each individual shown below via personal hand delivery, except as noted below:

Marion C. Blakey, Administrator
(AOA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Mary E. Peters, Secretary (S-1)
U.S. Department of Transportation
400 7th Street, S.W., Room 10200
Washington, D.C. 20590-0001

Robert A. Sturgell, Deputy
Administrator (ADA-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Neil R. Eisner, Assistant General
Counsel for Regulation and Enforcement
(C-50)
U.S. Department of Transportation
400 7th Street, S.W., Room 10424
Washington, D.C. 20590-0001

Andrew B. Steinberg, Chief Counsel
(AGC-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Robert C. Ashby, Deputy Assistant
General Counsel for Regulation and
Enforcement (C-50)
U.S. Department of Transportation
400 7th Street, SW., Room 10424
Washington, DC 20590-0001

James W. Whitlow, Deputy Chief
Counsel for Policy and Adjudication
(AGC-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Paul M. Geier, Assistant General Counsel
for Litigation (C-30)
U.S. Department of Transportation
400 7th Street, SW., Room 4102
Washington, DC 20590-0001

Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Patrice M. Kelly, Deputy Division Manager, Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Nicholas A. Sabatini, Associate Administrator for Aviation Safety (AVS-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Diane J. Wood, Division Manager
Drug Abatement Division (AAM-800)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dr. Frederick E. Tilton, Federal Air Surgeon (AAM-1)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Margaret Gilligan, Deputy Associate Administrator for Aviation Safety (AVR-2)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Leonard Schaitman, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 7525
Washington DC 20530-0001

Edward Himmelfarb, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.,
Room 7646
Washington, DC 20530-0001

Mark W. Pennak, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.,
Room 7326
Washington, DC 20530-0001

Vicky L. Dunne, Manager, Program Policy Branch, Drug Abatement Division (AAM-820)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

Dave Cann, Manager, Aircraft Maintenance Division (AFS-300)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

James R. Klimaski, Esq.
Klimaski & Associates, P.C.
1819 L Street, N.W., Suite 700
Washington, D.C. 20036-3830

VIA OVERNIGHT DELIVERY
Lee Seham
Stanley J. Silverstone
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Ave., Suite 1204
White Plains NY 10601

Albert J. Givray