ORAL ARGUMENT NOT YET SCHEDULED

No. 06-1091 (consolidated with No. 06-1092)

IN THE UNITED STATES COURT OF APPEALS
FOR THE 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 MINAS SEROP JILIZIAN,

Intervenors,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

SOLUTIONS MANUFACTURING, INC., and RANDALL C. HIGHSMITH,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW OF A FINAL RULE
OF THE FEDERAL AVIATION ADMINISTRATION

BRIEF FOR THE RESPONDENT

ROSALIND A. KNAPP
Acting General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

REBECCA B. MACPHERSON
Assistant Chief Counsel for Regulations
Federal Aviation Administration

Department of Transportation
Washington, D.C. 20590

PETER D. KEISLER
Assistant Attorney General

LEONARD SCHAITMAN
(202) 514-3441
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES AND AMICI

Parties in this Proceeding:

Aeronautical Repair Station Association, Inc.
Premier Metal Finishing, Inc.
Pacific Propeller International LLC, and
Texas Pneumatics Systems, Inc., petitioners in No. 06-1091

Solutions Manufacturing, Inc., and
Randall C. Highsmith, petitioners in No. 06-1092

Fortner Engineering & Manufacturing, Inc., and
Minas Serop Jilizian, intervenors in No. 06-1091

Federal Aviation Administration, respondent in both cases

Amici in this Proceeding:

Aircraft Mechanics Fraternal Association, amicus supporting respondent

(B) RULING UNDER REVIEW

This appeal involves separate petitions for review from the same final rule issued by the Federal Aviation Administration, "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities," published at 71 Fed. Reg. 1666 (January 10, 2006), J.A. 1-13.

(C) RELATED CASES

We are unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Abbreviation	Definition
Administrator	Administrator of the Federal Aviation Administration
APA	Administrative Procedure Act
ARSA	Aeronautical Repair Station Ass'n (also, collectively, the petitioners in Nos. 06-1091 and 06-1092)
Br.	Petitioners' opening brief
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
J.A.	Joint appendix
NPRM	Notice of proposed rulemaking
Omnibus Act	Omnibus Transportation Employee Testing Act of 1991
RFA	Regulatory Flexibility Act
SBA	Small Business Administration
SNPRM	Supplemental notice of proposed rulemaking

STATEMENT OF JURISDICTION

The Federal Aviation Administration (FAA) has the authority to issue regulations "related to aviation safety." 49 U.S.C. 106(g)(1)(A); see 49 U.S.C. 44701(a)(5) (regulations it "finds necessary for safety in air commerce and national security"). Congress directed the FAA, in "the interest of aviation safety," to prescribe regulations establishing a program for drug- and alcohol-testing of "airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator)." 49 U.S.C. 45102(a)(1). Based on this authority, the FAA has issued a final rule entitled "Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities," which clarifies that employees subject to drug- and alcohol-testing include not only employees of direct contractors of air carriers but also employees of subcontractors "at any tier," if they perform safety-sensitive functions. J.A. 2.

Asserting jurisdiction under 49 U.S.C. 46110, the petitioners in No. 06-1091 and No. 06-1092 filed timely petitions for review on March 10 and 13, 2006, respectively.[1] The two petitions for review have been consolidated by the Court.

STATEMENT OF THE ISSUES

The FAA's drug- and alcohol-testing programs have long covered persons engaging in safety-sensitive functions not only if they are directly employed by an air carrier but also if they perform the same work under contract with the air carrier. This includes performing maintenance or preventive maintenance functions on aircraft components. Since the mid-1990s, the FAA has provided guidance that work under contract included work under a

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[1] The 60th day, March 11, 2006, fell on a Saturday.

subcontract. The FAA proceeded by notice and comment to add language to its regulation stating that employees who must be tested include those performing a safety-sensitive function directly or by contract "(including by subcontract at any tier)."

The questions presented here are:

1. Whether applying the testing programs to employees of subcontractors performing a safety-sensitive function for an air carrier is consistent with the authorizing statutes.

2. Whether the final rule is exempt from, or substantially complies with, the Regulatory Flexibility Act.

3. Whether applying the testing programs to employees of subcontractors performing a safety-sensitive function for an air carrier is consistent with the Due Process Clause, the Administrative Procedure Act, and the Fourth Amendment.

STATUTES AND REGULATIONS

Most of the statutes and regulations relevant to this case may be found in an addendum to the petitioners' opening brief. Additional relevant statutes and regulations may be found in the addendum to our brief.

STATEMENT OF THE CASE

This is a facial challenge to a final rule clarifying that the FAA's drug- and alcohol-testing programs apply to all employees of direct contractors to air carriers, including employees of subcontractors at any tier.

In November 1988, the FAA established its drug-testing program for the aviation

industry, in large part out of a concern that even a single drug-related error by an aviation employee could be disastrous. Congress, in 1991, endorsed the existing program and provided additional statutory authority both for it and for a new alcohol-testing program, which the FAA established in 1994. These two programs required air carriers to ensure that both employees and contractor personnel who performed safety-sensitive functions for the air carrier, including maintenance and preventive maintenance, would be subject to drug- and alcohol-testing.

Shortly after issuing the 1988 final rule, the FAA issued informal guidance that maintenance subcontractors were not covered by these testing programs unless they took airworthiness responsibility.[2] When the FAA later issued its alcohol-testing regulations, it did not repeat that guidance. Beginning in the mid-1990s, the FAA began to advise employers that all subcontractor personnel performing maintenance had to be subject to testing.

In light of this conflicting guidance and the expanding practice of outsourcing aviation maintenance, the FAA's final rule now clarifies that testing is required of personnel performing safety-sensitive functions directly or by contract "(including by subcontract at any tier)." J.A. 13. The final rule notes that "the aviation industry frequently uses subcontractors to perform safety-sensitive functions." J.A. 3. Outsourcing maintenance work does not avoid safety obligations, including the requirement to ensure employees are subject to testing. J.A.

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[2] The person or entity taking "airworthiness responsibility" verifies that the article that has been worked on is airworthy (suitable for return to service). Certified repair stations do this by testing or inspecting the article, thereby "assuming" airworthiness responsibility. Under 14 C.F.R. 121.363, the air carrier bears the ultimate responsibility for the aircraft as a whole, as well as for any part that was worked on by any individual or entity.

3.

Two groups of petitioners, led by the Aeronautical Repair Station Association, Inc. (ARSA), now challenge the legality of this rule. (We will generally refer to the petitioners collectively as "ARSA.")

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background.

The FAA has the statutory authority to issue regulations to carry out the duties and powers of the Secretary of Transportation related to aviation safety, 49 U.S.C. 106(g)(1)(A), and to issue regulations that it "finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5). More specifically, the FAA must require air carriers to

> conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator) for the use of a controlled substance in violation of law or a United States Government regulation * * *.

49 U.S.C. 45102(a)(1). It must issue similar regulations governing testing for the abuse of alcohol. Id.

The FAA's drug-testing and alcohol-testing regulations are found in 14 C.F.R. Part 121, Appendices *I* and J, respectively. These regulations require that an employee who is engaged in a safety-sensitive function for an employer must be tested for illegal drugs and alcohol. Before January 10, 2006, when the final rule at issue in this matter was promulgated, both the drug- and alcohol-testing regulations required testing of "[e]ach employee, including any assistant, helper, or individual in a training status, who performs a safety-

sensitive function listed in this section directly or by contract for an employer as defined in this appendix." The final rule added the phrase "(including by subcontract at any tier)" after the word "contract," J.A. 13, in order to clarify what the FAA had initially attempted to clarify through informal guidance: that subcontractor employees who performed safety-sensitive functions were covered by the drug- and alcohol-testing requirements. J.A. 184.

The FAA's regulations define an employer as "a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military." Appendix *I*, § II; Appendix J, § I.D. (Part 121 and 135 certificate holders are commercial air carriers; part 135 certificate holders are air carriers providing commuter service in smaller planes or providing charter service.) The drug- and alcohol-testing requirements directly operate on covered employers but operate only indirectly on contractors, whose employees are subject to testing if they engage in safety-sensitive functions under contract with an employer.

The regulations define "safety-sensitive functions" as including "[a]ircraft maintenance and preventive maintenance duties." Appendix *I*, § III.E.; Appendix J, § II.A.5. The FAA's definitions of "maintenance" and "preventive maintenance" have been in effect for about 45 years and were not changed in the present rulemaking. "Maintenance" means "inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance," and "preventative maintenance" means "simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." 14 C.F.R. 1.1. Both maintenance and preventative maintenance can be broken

down into smaller tasks or duties that may be contracted out to a business or individual that does not assume airworthiness responsibility.

B. Facts and Prior Proceedings.

1. In 1988, noting that its "comprehensive anti-drug program is one action in a long history of actions to combat the use of drugs and alcohol in the aviation industry," 53 Fed. Reg. 47,024 (Nov. 21, 1988), the FAA issued a final rule requiring air carriers to establish drug-testing programs for "employees." Id. at 47,057. The regulations defined "[e]mployee" as "a person who performs, either directly or by contract," certain specified functions for the air carriers, including "[a]ircraft maintenance and preventive maintenance duties." Id. at 47,057, 47,058. The regulations in the 1988 final rule prohibited certificate holders from using "any contractor to perform a [specified] function * * * unless that contractor tests each employee performing such a function" for the use of illegal drugs. Id. at 47,057 (14 C.F.R. 121.457(b)).

The 1988 drug-testing regulations were based on the FAA's authority to issue regulations for aviation safety. See 53 Fed. Reg. at 47,056. In 1991, Congress enacted the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, tit. V, 105 Stat. 917 (Omnibus Act), to provide additional statutory authority for the FAA's drug-testing program and to require the FAA to establish a parallel alcohol-testing program. In section 2 of the Omnibus Act, Congress made several findings about the need for drug- and alcohol-testing, including that:

- "(1) alcohol abuse and illegal drug use pose significant dangers to the safety

and welfare of the Nation;"

- "(3) the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses;"
- "(4) the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents;" and
- "(5) the testing of uniformed personnel of the Armed Forces has shown that the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing."

105 Stat. at 952-53.

Section 3(a) of the Omnibus Act added a provision requiring drug- and alcohol-testing of a list of air carrier and contractor employees, including "airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator)." 105 Stat. at 953 (current version at 49 U.S.C. 45102). Another provision confirmed the FAA's right to "continue in force, amend, or further supplement any [drug- and alcohol-testing] regulations issued before the date of enactment of this section," meaning the regulations the FAA established in 1988. 105 Stat. at 956 (current version at 49 U.S.C. 45106(c)).

In 1994, in response to the Omnibus Act, the FAA revised its drug-testing regulations, 59 Fed. Reg. 42,922, 42,928 (Aug. 19, 1994), and established regulations governing alcohol-

testing of employees who perform, "either directly or by contract," certain safety-sensitive activities. 59 Fed. Reg. 7380, 7390 (Feb. 15, 1994).

2. During the period in which these drug- and alcohol-testing programs were in effect, the FAA gave conflicting guidance about coverage of employees of subcontractors performing maintenance duties. Some of its "early guidance only required subcontractors who took airworthiness responsibility to be subject to drug and alcohol testing," but by "the mid 1990s, the guidance we developed eliminated the airworthiness responsibility component and followed the rule language explicitly." J.A. 6. See J.A. 18-19. In 2002, the FAA issued a notice of proposed rulemaking (NPRM) covering numerous changes and clarifications to the drug- and alcohol-testing regulations, which are not pertinent here, and, in addition, proposed language clarifying that employees are covered by the testing programs if they perform specified functions directly for an employer or by contract "(including by subcontract at any tier)." J.A. 29. In response, "[s]everal commenters stated that this was more than a clarifying change" and argued that "because more people would have to be tested, there would be an economic impact from this proposed change." J.A. 36. In light of these comments, the FAA issued a final rule in January 2004 covering the other changes but, instead of adopting the clarification about subcontractors, agreed to gather more information and address the clarification separately. J.A. 36.

In May 2004, the FAA issued a supplemental NPRM (SNPRM), proposing to add the phrase "(including by subcontract at any tier)" to the description of employees who must be tested. J.A. 65-66. It explained that at one time, "many of the individuals who performed

safety-sensitive functions were direct employees of the air carriers themselves," but that "the trend in aviation has been to contract out many functions, including the maintenance and preventive maintenance of aircraft." J.A. 60-61. The FAA noted that the Inspector General of the Department of Transportation had reported on the increase in outsourcing aircraft maintenance and had warned the FAA "'to pay close attention to the level of oversight it provides for repair stations.'" J.A. 61.

The FAA accompanied the SNPRM with a regulatory evaluation. J.A. 63-65 (summary); see http://dmses.dot.gov/docimages/pdf89/281180_web.pdf. (full text).

Following a comment period, the FAA issued its final rule on January 10, 2006. The final rule adopted the proposed phrase "(including by subcontract at any tier)," J.A. 13, in order to "eliminate[] any confusion that might have existed regarding drug and alcohol testing of subcontractors who are connected to the regulated employer through the outsourcing process." J.A. 4. The FAA noted that the informal guidance it gave after the drug-testing program was first established in 1988 had stated that maintenance subcontractors would not be subject to testing unless they took airworthiness responsibility. J.A. 3. The FAA stated that this guidance "constricted the potential reach of the regulation, which offered no exceptions for subcontractors who did not take airworthiness responsibility but performed safety-sensitive activities." J.A. 3. It also declared that "[i]t would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to drug and alcohol testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing." J.A. 6.

Thus, in the mid-1990s, the FAA began issuing guidance that all subcontractors were included. Consistent with this guidance, many regulated employers already understood at the time of the SNPRM that all contractors and subcontractors who performed safety-sensitive functions were subject to testing under the regulations and that it would not be consistent with aviation safety to eliminate the requirement of testing of such individuals "by contract." J.A. 4. The final rule stated that contractors have the option of conducting their own drug- and alcohol-testing, for which they will be held responsible, J.A. 7, but that the requirement to ensure that contractor employees performing safety-sensitive functions are tested "ultimately rests with the regulated employer." J.A. 4.

The FAA cited statistics to illustrate its concerns: "in the first 11 years of drug testing, almost half of the 30,192 positive drug test results were attributable to maintenance workers" and "in the first 6 years of alcohol testing, almost half of the 876 alcohol violations were attributable to maintenance workers." J.A. 4-5. Given these statistics, the FAA stated that it should not have to "wait until there is an actual loss of human life * * *. Only one link in the safety chain would have to fail for an accident to occur." J.A. 4.

Some commenters, including ARSA, objected to testing employees of non-certificated subcontractors. The FAA responded that subcontractors that choose to perform safety-sensitive functions for regulated employers are choosing to perform regulated work that requires them to be subject to the FAA's drug- and alcohol-testing regulations. The FAA pointed out that the impact that subcontractors have on aviation safety is related to their performance of safety-sensitive functions, not to their repair station certificate. J.A. 9.

The final rule reiterated that the performance of maintenance or preventive maintenance was a safety-sensitive function, requiring that the employees involved be subject to drug- and alcohol-testing. The FAA cited the longstanding definitions of "maintenance" and "preventive maintenance" in its regulations, found at 14 C.F.R. 1.1 and 14 C.F.R. Part 43. J.A. 9.

The FAA Administrator certified under the Regulatory Flexibility Act (RFA) that the final rule would not have a significant economic effect on a substantial number of small entities. J.A. 12. Nevertheless, the FAA accompanied the final rule with a final regulatory evaluation, J.A. 97-174, which it summarized at J.A. 11-12. The regulatory evaluation stated that the final rule was simply a clarification and did not change anything, and thus that the costs of the rule were zero; yet, the FAA understood that, because of its conflicting guidance, some contractors might have to modify their drug- and alcohol-testing programs or implement them in the first instance. J.A. 99. Accordingly, it estimated the costs of compliance and the benefits of the final rule. J.A. 130-59.

The final regulatory evaluation specifically addressed the objections raised in the Joint Industry Comments to the analysis used in the initial regulatory evaluation. The final regulatory evaluation disagreed with the analysis of ARSA's expert, Dr. Darryl Jenkins, J.A. 113-14, and responded to ARSA's conclusions that it had reached on the basis of a survey it took. J.A. 116-17.

3. On April 5, 2006, the FAA announced that it would extend the compliance date from April 10, 2006, until October 10, 2006, explaining that the extra time would provide

entities that did not realize they were performing maintenance "an opportunity to decide whether to conduct their own testing programs or to make arrangements to have their employees covered under the testing programs of the employers with whom they contract." J.A. 94. The FAA agreed to provide additional guidance about maintenance and preventive maintenance on a range of subjects. J.A. 94.

On September 22, 2006, ARSA sought a nine-month extension or, alternatively, a stay from the FAA, citing confusion in the industry in interpreting the final rule. The FAA denied the extension and stay on September 28, noting that the interpretive issues raised by ARSA related not to the final rule but to the 1962 regulations defining maintenance and preventive maintenance, which were not changed by the final rule. J.A. 189.

ARSA then moved for a stay pending review. This Court denied the motion on October 19, 2006.

SUMMARY OF ARGUMENT

Since 1988, the FAA has required air carriers to ensure that employees are being drug-tested if they performing safety-sensitive functions, such as maintenance or preventive maintenance, for the air carriers either directly or "by contract." Because the FAA has given conflicting guidance on this subject over the years, it has now issued a final rule, following notice and comment, in which it has clarified that this obligation on air carriers extends to employees performing safety-sensitive functions for them by contract, "including by subcontract at any tier."

ARSA accepts that the FAA may require air carriers to ensure that employees of

contractors are being tested. It even accepts that the FAA may require air carriers to ensure that employees of subcontractors are being tested. But ARSA claims here that the FAA may not require such testing of employees of non-certificated subcontractors. As we will show, there is no basis for such a distinction.

This is a facial challenge to a final rule, which must fail unless ARSA demonstrates that the rule could not be validly applied in any circumstance. It has not done so. ARSA's arguments are insufficient for the following reasons:

I. The final rule's mandate that employees of subcontractors at any tier who perform safety-sensitive functions be included in drug- and alcohol-testing programs is authorized by statute. In particular, section 45102 requires testing of a list of specific persons "and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator)." The FAA interprets this language to include not only direct employees of air carriers but also persons employed by contractors, including subcontractors, who are responsible for an air carrier's safety-sensitive functions. Under Chevron, this interpretation is reasonable.

The specific persons listed in section 45102(a)(1) include both direct employees and non-employees of air carriers; thus, the "and other" language is not restricted to direct employees. Moreover, the FAA initially established its testing regulations in 1988, and those regulations covered both employees and contractors. The 1991 Omnibus Act contained a provision that expressly kept existing regulations in place. The FAA is entitled to Chevron deference, because several statutes, including section 45102, expressly delegate authority to

issue rules related to aviation safety, including drug- and alcohol-testing regulations.

ARSA argues that the FAA's interpretation is barred under "Chevron I," because the "and other" clause in section 45102(a)(1) speaks only of "air carrier employees." But ARSA itself freely concedes that employees of direct contractors are included in "air carrier employees"; indeed, it concedes that subcontractor employees are included, so long as the subcontractor is a certificated repair station. ARSA's ad hoc distinction bears no relation to the statutory text, and the "Chevron I" argument fails.

ARSA also contends that non-certificated subcontractor employees cannot be tested, because they are not "responsible for" maintenance; only certificated repair stations have airworthiness responsibility. But "responsible for" does not mean "legally responsible for" in the airworthiness context. It means being the agent or cause of, and those employees performing maintenance duties are plainly the agents of the maintenance that they are performing, regardless whether they are authorized to verify that an item is suitable for return to service.

II. The FAA correctly certified that the final rule will not have a significant economic impact on a substantial number of small entities. That takes the rule out of the RFA.

The RFA applies only when the small entities are directly regulated, not when the economic effects are indirect. As the FAA explained, the final rule directly regulates air carriers, which have the responsibility to ensure that contractor employees performing safety-sensitive functions are subject to drug- and alcohol-testing. Although this testing naturally has an effect on the contractors and subcontractors, those companies are not directly regu-

lated under the final rule unless they choose to establish their own drug- and alcohol-testing programs.

Even if the RFA applied here, the FAA's initial and final regulatory evaluations substantially complied with the RFA's requirement of initial and final regulatory flexibility analyses. The FAA's final regulatory evaluation specifically addressed ARSA's objections to the initial regulatory evaluation's economic analysis. Any failure to comply with the RFA was, therefore, harmless error.

Last, even if it was not harmless error, the remedy should be limited to remand for further economic analysis. Enforcement of the rule, which is already in effect, should not be deferred, because the public interest in aviation safety is compelling.

III. The final rule is completely consistent with due process. Especially in a facial challenge, courts deferentially review economic regulations that have no criminal penalty and do not implicate First Amendment rights. If affected parties perceive those regulations to be vague, they may clarify the meaning of the regulation administratively. The confusion that ARSA alleges here involves decades-old definitions that were not changed by the final rule.

IV. ARSA's Administrative Procedure Act (APA) arguments are meritless. Although ARSA disagrees with the FAA's characterization of the language as a clarification, there was nothing misleading about describing it as such in the NPRM and again in the SNPRM. The FAA held this proposed change back from an earlier rulemaking precisely to allow commenters who felt it was a change and not a clarification to produce data on its economic impact. The final rule responded to those data and the opposing views. ARSA also

objects that there is no conclusive proof that the final rule will have a positive impact on aviation safety, but the FAA's safety-related predictive judgments are due great deference. ARSA errs in asserting that the final rule fails to respond to important objections; its real complaint is that the FAA did not agree with those objections. In sum, the APA arguments simply reflect ARSA's policy dispute with the rule.

V. Finally, ARSA seeks to relitigate this Circuit's precedent on the constitutionality of drug-testing programs covering aircraft mechanics. The final rule fits well within that precedent.

ARGUMENT

Standard of Review. Given Congress's delegation of rulemaking authority in the area of aviation safety, this Court applies Chevron deference in reviewing whether the FAA's interpretation of section 45102 is permissible. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The Court reviews de novo whether the Regulatory Flexibility Act applies, whether the final rule is unconstitutionally vague, and whether it violates the Fourth Amendment, all issues of law. The Court must uphold the final rule under the APA unless it is arbitrary or capricious, unsupported by substantial evidence, or contrary to law. "A party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed." Wisconsin Valley Improvement v. FERC, 236 F.3d 738, 745 (D.C. Cir. 2001) (internal quotation marks omitted). The FAA's predictive judgments about aviation safety are to be reviewed with "utmost deference." Public Citizen, Inc. v. FAA, 988 F.2d 186, 196 (D.C. Cir. 1993).

I. THE FAA ACTED WITHIN ITS STATUTORY AUTHORITY.

The FAA's drug- and alcohol-testing programs are well within the statutory authority conferred by Congress.

A. The FAA Reasonably Interpreted Section 45102 To Authorize It To Require That Employees Of Contractors, Including Subcontractors, To Air Carriers Be Tested For Drugs and Alcohol.

The FAA's final rule is based in part on its interpretation of section 45102(a)(1), in which the phrase "and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator)" includes not only direct employees – those covered by a master-servant relationship with the air carrier – but also persons employed by contractors, including subcontractors, who are responsible for the air carrier's safety-sensitive functions. See J.A. 2 (FAA interprets section 45102 to require it to mandate testing of "employees performing safety-sensitive functions for air carriers"). This interpretation is consistent with the statutory text, Congress's broad delegation of authority, and the history of the FAA's drug-testing program predating the statute.

1. The term "employee" in a statutory text takes its meaning from context. See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). In section 45102, the context indicates that Congress did not mean to limit "employees" to persons formally employed by air carriers.

Spelling out who is subject to drug- and alcohol-testing, section 45102, as originally enacted, named both direct employees (airmen and crewmembers) and non-employees who provide security functions (airport security screening contract personnel). Even after Con-

gress removed the word "contract" when it transferred transportation security responsibilities to the new federal Transportation Security Administration in 2001, Aviation and Transportation Security Act, Pub. L. No. 107-71, § 139(1), 115 Stat. 597, 640 (2001), section 45102 continued to cover both direct employees of air carriers and non-employees, with the latter category now consisting of federal employees. The common element is the performance of functions that closely affect the safety of air commerce.

That section 45102 continues to include non-employees of air carriers is critical, because the language relevant here – "and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator)" – immediately follows the listing of direct employees and non-employees of air carriers. A catchall statutory phrase taking the form "and other X" ordinarily takes its meaning from the list that precedes it. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) ("the interpretive canon of ejusdem generis would attribute to the last item * * * the same characteristic * * * shared by all the preceding items").

It follows that the phrase "and other air carrier employees" is not limited to direct employees. The context suggests a broader scope, albeit with some ambiguity. See Robinson, 519 U.S. at 341 (context indicates ambiguity in scope of term "employees").

2. It is appropriate to give Chevron deference to the FAA's interpretation of that phrase to mean persons who perform safety-sensitive functions for air carriers, whether employed directly or acting under contract, because (a) "the statute [does not] unambiguously control[] the 'precise question at issue'"; (b) the FAA has "exercise[d] delegated authority to

resolve statutory ambiguity," EarthLink, Inc. v. FCC, 462 F.3d 1, 7 (D.C. Cir. 2006); and (c) the FAA's "action has the 'force of law,'" AT&T Corp. v. FCC, 349 F.3d 692, 698-99 (D.C. Cir. 2003) (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)); see United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

Congress expressly delegated authority to the FAA to issue regulations of this nature. The FAA's general delegation is in 49 U.S.C. 106(g)(1)(A), which provides that the FAA "shall carry out – (A) duties and powers of the Secretary of Transportation under subsection (f) [regulations] of this section related to aviation safety * * * and stated in * * * chapter 451 [alcohol and controlled substances testing] * * *." Chapter 451 directs the FAA to "prescribe regulations that establish a program requiring" drug- and alcohol-testing of "airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator)." 49 U.S.C. 45102(a)(1). The "as decided by the Administrator" language in itself provides a delegation to determine those employees responsible for safety-sensitive functions. See Transitional Hosps. Corp. of Louisiana, Inc. v. Shalala, 222 F.3d 1019, 1025 (D.C. Cir. 2000) ("'as determined by the Secretary'" is language expressly delegating authority to Secretary for Chevron purposes). The final rule in dispute here was predicated upon this legal authority. J.A. 2. See also 49 U.S.C. 44701(a)(5) (FAA to prescribe "regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security").

In addition, the FAA's regulations governing the drug- and alcohol-testing programs

have the "force of law" within the meaning of Christensen. For example, all certificate holders or operators are required to test each covered employee and may not use a contractor to perform safety-sensitive functions unless the contractor's employees are tested. 14 C.F.R. 121.457. Air carriers violating the program regulations are subject to civil penalties.

Interpreting the statute to apply to contractor employees performing safety-sensitive functions is reasonable. The goal of section 45102 is to address a risk to aviation safety by requiring all employees performing safety-sensitive functions for an air carrier to be tested. As the FAA explained in the final rule: "It would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to drug and alcohol testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing." J.A. 6. Similarly, exempting subcontractor employees would allow air carriers to avoid testing by outsourcing or even by setting up subsidiaries as subcontractors. J.A. 4, 6. This Court reviews the FAA's predictions of risks to aviation safety, of the sort involved here, with "utmost deference." Public Citizen, 988 F.2d at 196.

3. The history of section 45102 demonstrates that the FAA's interpretation is consistent with the congressional scheme.

The FAA originally established its drug-testing program in 1988, pursuant to former 49 U.S.C. App. 1421(a)(6), which empowered the FAA to issue regulations necessary "to

provide adequately for national security and safety in air commerce."[3] That program imposed drug-testing obligations on employers – including air carriers – but it required employers to ensure that persons performing safety-sensitive functions by contract also be tested. 53 Fed. Reg. at 47,057 (14 C.F.R. 121.457(b)). See Appendix *I*, § II (quoted at id.) ("Employee" means a "person who performs, either directly or by contract, a function listed in section III of this appendix" for an employer) (emphasis added).

In 1991, Congress provided additional statutory authority to the FAA when it enacted the Omnibus Act. In section 2, Congress found that "alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the Nation"; that "the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents"; and that experience had shown that "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing." 105 Stat. at 952-53. Section 3(a) added what is now 49 U.S.C. 45102, requiring drug- and alcohol-testing of a list of air carrier and contractor employees, including "airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator)." 105 Stat. at 953.

Also in section 3(a), Congress enacted a provision that kept in place all of the FAA's existing regulations on drug-testing:

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[3] The current version is slightly reworded, without change in meaning. 49 U.S.C. 44701(a)(5) (FAA may prescribe regulations it "finds necessary for safety in air commerce and national security").

> Nothing in this section shall be construed to restrict the discretion of the Administrator to continue in force, amend, or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol and controlled substances by airmen, crewmembers, airport security screening contract personnel, air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), or employees of the [FAA] with responsibility for safety-sensitive functions.

105 Stat. at 956 (current version at 49 U.S.C. 45106(c)). In this language, Congress expressly declared that all regulations under the existing drug-testing program could "continue in force." That would include the extension of the program to contractor employees, which had been in place since the program began in 1988.

When Congress enacts a statute that refers to existing regulations and permits the agency to continue those regulations in effect, it gives its blessing to the interpretations implicit in those regulations. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193-94 (2002). That is precisely what happened in this matter. In the same statute that lists the employees who are subject to testing, Congress accepted the FAA's understanding that "air carrier employees" includes contractor employees performing safety-sensitive functions for the air carriers. As a consequence, the final rule is well within the authority conferred by Congress.[4]

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[4] If there were any remaining doubt about the effect of the 1991 statute, it would be answered by floor statements of Senator Hollings, one of the sponsors, which confirm this understanding. See 137 Cong. Rec. 26,434 (Oct. 16, 1991) (provision "would reaffirm the validity and scope of current regulations governing the use of alcohol and controlled substances by aviation personnel in safety-sensitive positions"); cf. id. at 26,435 (referring to parallel transit provision) (bill will ensure effective testing programs for "all providers of (continued...)

4. ARSA's arguments that the statute bars the FAA's interpretation are meritless.

a. First, ARSA argues under "Chevron I" that the statute precludes the FAA's interpretation. But ARSA concedes that the statutory language permits employees of contractors to be tested; indeed, it concedes that the statutory language permits employees of subcontractors to be tested. Br. 15 (industry understood the FAA's "by contract" language, which section 45106(c) continued in effect, to allow testing for "(1) employees of certificated repair station employees (whether operating as direct contractors or as subcontractors) and (2) employees of firms that contract directly with air carriers"); see Br. 9 (industry has "long accepted" that employees of certificated repair stations may be "air carrier employees").

ARSA's only argument is that employees of subcontractors may not be tested unless they work for a certificated repair station. How this distinction between categories of subcontractor employees can be derived from "and other air carrier employees" is a mystery. That "[t]he industry * * * has long accepted" it, Br. 9, is not an argument based on statutory text. If ARSA suddenly came to the conclusion that no contractor employees should ever have been tested once section 45102 was enacted, this would be mistaken, in our view, but at least it would be arguably justified by the statutory language. ARSA, however, rejects that argument and invents a dividing line that bears no relation to the text.

b. ARSA next argues that four principles of statutory interpretation compel such a dividing line. Br. 11-14. The first is that the final rule conflicts with a general congres-

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[4](...continued)
mass transportation services, whether they are employed by the transit authority directly, or under contract to them").

sional policy to aid small business. But no authority supports the notion that such a policy, directed at the Small Business Administration, is so strong as to create a "Chevron I" bar to the FAA's interpretation of an aviation statute directing it to protect aviation safety. See Professional Pilots Federation v. FAA, 118 F.3d 758, 763 (D.C. Cir. 1997), cert. denied, 523 U.S. 1117 (1998) ("If the Congress intends to limit the means available to the FAA in its pursuit of air safety, we trust it will say so rather than leave the matter to the courts to infer.").

The second principle cited by ARSA is to avoid interfering with state powers. Contrary to ARSA's suggestion, however, Br. 11, the states have no interest in protecting local individuals or businesses at the expense of the FAA's drug- and alcohol-testing programs. To the contrary, the Omnibus Act expressly preempts state law: "A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this chapter." 49 U.S.C. 45106(a).

Third, the rule against "constitutional doubt" has no application here, because the constitutionality of the FAA's drug- and alcohol-testing programs is supported by clear precedent. See Point V, infra. As the Supreme Court has explained: "The 'constitutional doubts' argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid serious constitutional doubts, not to eliminate all possible contentions that the statute might be unconstitutional." Reno v. Flores, 507 U.S. 292, 314 n.9 (1993) (citation omitted).

Fourth, ARSA argues that Congress meant the FAA's programs to be narrow in light of litigation at the time over the constitutionality of drug-testing programs. Br. 13-14.

ARSA cites a Senate report stating that the FAA should not test "all aviation industry employees." Br. 13 (quoting S. Rep. No. 102-54, at 18 (1991)). But even assuming general language in a Senate report could bar a reasonable agency interpretation, ARSA's inference is unjustified. The final rule does not require testing of all aviation industry employees but only a discrete group of employees of subcontractors performing safety-sensitive maintenance functions for the air carriers. In fact, the statutory language, as it existed when the Senate Report was written, expressly included mechanics in what later became section 45102(a)(1). S. Rep. No. 102-54, at 10. Thus, when the report opposed testing of "all aviation industry employees," it certainly was not urging that persons performing maintenance duties not be tested. As the report stated, "The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions mandates that every effort be made to eliminate the cause of that threat." Id. at 2.

c. ARSA then argues 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." Br. 16, 17. But the final rule does not expand the FAA's jurisdiction at all. The FAA regulates air carriers; it is the carriers' responsibility, not the FAA's directly, to ensure that subcontractor employees are being tested. J.A. 7 (the "regulated employer" is responsible). Nor is the final rule any more a political outgrowth of the "war on drugs" than the Omnibus Act itself or the drug- and alcohol-testing programs already in effect. In any event, the cry of "war on drugs" is political rhetoric, not a legal argument.

d. Finally, ARSA justifies testing employees of certificated repair stations on the

ground that their employers are highly regulated and make airworthiness determinations. Br. 15-16. Again, this is a policy argument, not one based on statutory text. Indeed, ARSA takes this policy distinction between certificated and non-certificated subcontractors to an extreme when it goes on to argue that "the certificated firm – precisely because it chooses to be certificated – can be seen as acting as an alter ego of the air carrier, so that its workers can be fairly characterized as 'air carrier employees.'" Br. 15. This "alter ego" rationale goes way beyond anything the FAA asserts as a statutory justification for testing employees of certificated repair stations, and we think it is wrong as both a factual and legal matter. The reason for testing these employees is simply that they are performing the same safety-sensitive functions as the direct employees of an air carrier. J.A. 6. The impact they have on aviation safety is the same. J.A. 9. It has nothing to do with being an alter ego.

5. In short, nothing in the statutory language precludes the FAA from including employees of subcontractors performing safety-sensitive functions within its drug- and alcohol-testing programs. Its interpretation, which is entitled to deference, is reasonable.

B. The Statutory Phrase "Responsible For" Does Not Mean "Legally Responsible For."

ARSA's separate statutory argument turns on the phrase "responsible for." ARSA argues that employees of non-certificated repair stations may not be tested because they are not "responsible for" the safety-sensitive function of maintenance; only a certificated repair station has the legal authority to certify airworthiness. Br. 18.

This argument is baseless. ARSA reinterprets "responsible for" as "legally responsible for," although the word "legally" is found nowhere in the statute. When Congress intends

the meaning "legally responsible for," it knows how to write that in the statutory language. See, e.g., 38 U.S.C. 1506(1) (requiring information about income of any "person with whom such child is residing who is legally responsible for such child's support"); 42 U.S.C. 2000c-2 (technical assistance to "governmental unit legally responsible for operating a public school or schools"). "Responsible for" is a commonly used phrase that simply means to be the agent or cause of something. See, e.g., Webster's Ninth New Collegiate Dictionary, at 1005 (1990) ("being the cause or explanation"); Random House Dictionary of the English Language, at 1641 (2d ed. 1987) ("chargeable with being the author, cause, or occasion of something (usually fol. by *for*)"). In section 45102(a)(1), persons who are "responsible for" safety-sensitive functions are simply those who carry out such functions as part of their jobs.

Unless the context clearly requires it, and it does not here, the phrase "responsible for" does not have to mean legally responsible for. Rather, the preferred meaning, and certainly a permissible meaning, is its ordinary meaning of agent or cause, as in: "[T]ermites were responsible for the damage." Random House Dictionary, supra, at 1641. Cf. Hines v. Blue Cross Blue Shield, 788 F.2d 1016, 1018 (4th Cir. 1986) ("ordinary meaning of a 'person responsible for such injuries' is the person who caused the injuries, who did the damage," rather than person financially responsible).

ARSA's argument that the "responsible for" language in section 45102(a)(1) has to mean "legally responsible for" for purposes of a "Chevron I" analysis is entirely misplaced.

II. THE REGULATORY FLEXIBILITY ACT DOES NOT APPLY TO THE FINAL RULE, AND THE FAA IN ANY EVENT SUBSTANTIALLY COMPLIED.

The RFA does not require an agency to do a regulatory flexibility analysis regarding the effects of a regulation on small entities that are not directly regulated. Only air carriers are directly regulated by the final rule, and the rule's effect on other businesses does not come within the RFA. Even if it did, the FAA performed regulatory analyses for this rule that substantially complied with the RFA. To the extent they did not, the remedy is a remand for further economic analysis, and the rule should remain in effect.

A. The Final Rule Is Not Covered By The RFA, Because The Rule Does Not Directly Regulate The Small Entities Cited By ARSA.

The final rule directly regulates only air carriers. Therefore, the RFA does not apply to economic effects on certificated or non-certificated repair stations or other subcontractors performing maintenance functions for air carriers.

1. The RFA provides that, whenever an agency is required under 5 U.S.C. 553 to publish notice of proposed rulemaking, the agency must "make available for public comment an initial regulatory flexibility analysis." 5 U.S.C. 603(a). Similarly, when an agency publishes a final rule in such circumstances, the agency must prepare a final regulatory analysis, containing, among other things, a "summary of the significant issues raised by the public comments" and the agency's response; an estimate of the number of small entities to which the rule will apply; and a description of the steps that the agency has taken to minimize the "significant economic impact" of the rule on small entities. 5 U.S.C. 604(a).

The RFA, however, does not apply to a proposed or final rule if "the head of the

agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The small entities the RFA is concerned about are those entities "to which the proposed rule will apply." 5 U.S.C. 603(b)(3). In other words, the statutory requirements are "limited to small entities subject to the proposed regulation," and the "economic impact" about which the RFA was concerned was "the impact of compliance * * * on regulated small entities." Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added). See Motor & Equip. Mfrs Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998) ("An agency is under 'no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate.'") (quoting United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996)); American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999), reh'g denied, 195 F.3d 4, aff'd in part, rev'd in part on other grounds sub nom. Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) ("We have consistently interpreted the RFA, * * * to impose no obligation upon an agency 'to conduct a small entity impact analysis of effects on entities which it does not regulate.'").

This Court "has consistently rejected the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities." Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001). Thus, in American Trucking Ass'ns, it held that EPA's air-quality standards regulated small entities only indirectly, through the state implementation plans that the Clean Air Act required states to develop. Because the standards did not impose obligations directly on the small entities, the Court concluded that

the RFA did not apply. 175 F.3d at 1044. Similarly, in Michigan v. EPA, 213 F.3d 663, 689 (D.C. Cir. 2000), cert. denied, 532 U.S. 904 (2001), the Court held that the RFA did not apply, because the small entities were regulated by the state implementation plan, and not directly by EPA. As this Court later explained, even if those small businesses were "targets" of the regulation, in the sense that the agency "actually intended to affect [their] conduct," the RFA would apply only to those entities that actually were subject to the regulation. Cement Kiln, 255 F.3d at 869.

The question whether the RFA applies is one for the Court, which owes no deference to the views of the Small Business Administration. See American Trucking Ass'ns, 175 F.3d at 1044 ("The SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory. Therefore, we do not defer to the SBA's interpretation of the RFA.") (citations omitted). See J.A. 67-70.

2. In this case, the FAA certified in the final rule that an RFA analysis was not required. J.A. 11-12. Although the final rule expressly refers to contractors and subcontractors, it actually applies only to the air carriers that the FAA directly regulates: "Air carriers operating under 14 CFR parts 121 and 135; § 135.1(c) operators; and air traffic control facilities not operated by the FAA or by or under contract to the U.S. military." J.A. 9. The drug- and alcohol-testing regulations impose testing obligations on those directly regulated employers. It 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 carrier directly or for contractors at any tier. The final

rule simply clarifies that the term "by contract" in the existing testing regulations includes all subcontractors.

In contrast, for purposes of the drug- and alcohol-testing regulations, "certificated repair stations are contractors, and contractors are not regulated employers." J.A. 9. The final rule does not require contractors, including certificated repair stations, to establish and operate their own drug- and alcohol-testing programs; if they choose not to do so, the air carrier must ensure that the contractors' employees are tested under the air carrier's drug- and alcohol-testing programs. The final rule permits contractors to choose to establish such programs on their own. As the final rule warns, "the FAA will take enforcement action against those employers directly covered by the drug and alcohol regulations by virtue of their part 121 or part 135 operations, as well as those contractors who have voluntarily submitted to our jurisdiction by obtaining their own drug and alcohol programs." J.A. 6.

The FAA's certification that the effects of the final rule on air carrier contractors are not within the RFA may at first appear paradoxical in light of our argument in Point I that section 45102 permits the FAA to include employees of contractors of air carriers within its drug- and alcohol-testing program. But it is not paradoxical at all, because the programs' focus on the duties of air carriers, as opposed to contractors and subcontractors, is fully consistent with section 45102. Section 45102(a)(1) describes the categories of employees who are subject to testing if they perform safety-sensitive functions for a regulated air carrier. While those categories are broad enough to permit the FAA to require air carriers to ensure the testing of contractor employees, the statute expressly focuses on the duties of air carriers.

It provides that the FAA may require "air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing" of such persons. In other words, the statute instructs the FAA to regulate air carriers, by requiring them to conduct drug- and alcohol-testing of specified employees.

The effect of such regulation is to force contractors and subcontractors (1) to allow their employees who are performing maintenance under contract with air carriers or with other contractors for air carriers to be tested for drugs and alcohol; (2) correspondingly, to consider the direct and indirect costs of such testing on the company when deciding whether to enter a contract; and (3) to consider the possibility of establishing the contractor's own testing programs. But all of those actions are indirect effects of the FAA's regulation of air carriers, and only if the subcontractors choose to establish their own drug- and alcohol-testing programs are they subject to any direct regulation. In short, subcontractors can choose not to take on this business and avoid any indirect effects, and they can choose to continue taking on the business but have their relevant employees tested under the contractor's or the air carrier's programs and avoid any direct regulation by the FAA.

Not surprisingly, the FAA's understanding that contractors and subcontractors are not directly regulated is fully consistent with the case law we have set forth above. See American Trucking Ass'ns, 175 F.3d at 1044 (air-quality standards imposed on states, which in turn regulated small entities; Court held that this was not direct regulation, and that compliance with the RFA was not required); accord, Michigan v. EPA, 213 F.3d at 689 ("the revised [EPA standards] at issue 'regulate small entities only indirectly – that is, insofar as they affect

the planning decision of the States'") (quoting American Trucking Assn's). See also Cement Kiln, 255 F.3d at 869 (although one goal of EPA's emission standards was to affect conduct of waste generators by increasing costs of waste combustors, the rule regulated waste combustors, not waste generators, and was exempt from RFA).

3. ARSA objects to this analysis, arguing that the final rule directly regulates contractors. Br. 18-23. But it confuses direct regulation with the indirect effects of the regulation of others.

First, ARSA says that "the essential effects" of the rule will fall on subcontractors, Br. 21, but ARSA incorrectly equates being affected by a regulation with being directly regulated. Subcontractors are in a position analogous to that of the entities in the EPA cases, American Trucking Ass'ns and Michigan v. EPA. Here, the FAA enforces the drug- and alcohol-testing regulations only against the air carriers, except to the extent a contractor has chosen to set up its own drug- and alcohol-testing programs subject to the FAA's oversight. J.A. 6. Imposing an obligation on air carriers to ensure that subcontractor employees are being tested will naturally have an effect on the subcontractors. That effect is not, however, equivalent to direct regulation.

Second, ARSA complains that the final rule has "direct regulatory reach" on contractors and that the rule "obviously affects the business operations of the subcontractor." Br. 22. There is no doubt that subcontractors will have to take certain actions under the rule if they wish to do business with the regulated air carriers, but if they do not wish to work with air carriers, the rule does not require action on their part. ARSA quotes the SNPRM out of

context; when the SNPRM says that subcontractors would "need to put together," and to implement, testing programs, J.A. 63, it is assuming that they not only choose to take contracts with companies working for air carriers to perform safety-sensitive functions, but choose to establish their own testing program. Likewise, when ARSA says that an employer "must immediately remove" an employee from the performance of safety-sensitive functions if the employee refuses to submit to a test or tests positive, J.A. 63, that is done in order to satisfy the air carrier's obligation or the obligation of the primary contractor if that contractor has its own testing program. The FAA's enforcement action would be against the air carrier or the contractor that has the drug- and alcohol-testing program, not against the subcontractor, unless it has its own program.

Third, ARSA contends that certificated repair stations are directly regulated because the FAA "'will hold the contractor company responsible' for violations" of the testing rules. Br. 23 (quoting J.A. 7). But the first half of the same sentence in the final rule states clearly that this responsibility exists when "a contractor company obtains its FAA-regulated testing programs." J.A. 7. In other words, the certificated repair station is subject to enforcement if it chooses to set up a testing program of its own.

None of these arguments shows that the final rule directly regulates air carrier subcontractors. Accordingly, the FAA was correct in certifying that the RFA did not apply.

B. The FAA's Regulatory Analysis Substantially Complied With The RFA.

Even if the RFA applies here, the FAA's regulatory evaluation satisfies the spirit of the RFA. See J.A. 10 (citing Cement Kiln, 255 F.3d at 868).

1. The RFA requires that an initial regulatory flexibility analysis be prepared along with a notice of proposed rulemaking and made public for comment. The initial regulatory flexibility analysis is required to "describe the impact of the proposed rule on small entities," 5 U.S.C. 603(a), and it must contain, among other things, "a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply," 5 U.S.C. 603(b)(3), and a discussion of "significant alternatives to the proposed rule which accomplish the stated objectives" of the statute and "minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603(c). The final regulatory flexibility analysis, prepared along with the final rule, must contain, among other things, a summary of the significant issues raised by public comments and any changes made in response, a "description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available," and a "description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes." 5 U.S.C. 604(a)(2), (3), (5).

As we will explain, the FAA's initial regulatory evaluation and final regulatory evaluation substantially complied with these requirements, even though the FAA certified under section 605 that the rule would not have a significant economic impact on a substantial number of small entities. This Court has repeatedly upheld rules when an agency has undertaken assessments similar to those called for under the RFA: "Failure to comply with the RFA 'may be, but does not have to be, grounds for overturning a rule.'" Cement Kiln, 255 F.3d at 868 (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538

(D.C. Cir. 1983)). See Environmental Def. Ctr., Inc. v. EPA, 344 F.3d 832, 879 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004) ("even if EPA had failed to properly comply with the procedural requirements of the RFA, its actual assessment of the Rule's economic impacts renders any defective compliance harmless error").

2. The FAA accompanied its SNPRM with a regulatory evaluation that served the function of an initial regulatory flexibility analysis. Although the FAA reiterated its view that it was "merely clarifying the regulations," so that the rule would have no economic impact, it recognized that some contractors might have to modify their programs or use another company's program. J.A. 64. The FAA summarized the assumptions it made in its regulatory evaluation, including the number of non-certificated maintenance contractors that have drug- and alcohol-testing programs, the number of additional contractors expected to have such programs, and the number of additional employees to be tested. J.A. 64. The FAA also detailed its cost estimates and the assumptions it made about crashes and fatalities avoided. It stated as well that it was not considering any alternatives, because "this proposal would simply emphasize sections of existing regulations." J.A. 64.

In response to this regulatory evaluation, ARSA submitted an analysis performed by Dr. Darryl Jenkins, who argued that the FAA should use a far higher figure of 12,000 to 22,000 additional non-certificated maintenance contractors affected by the rule. J.A. 89. ARSA also took a survey of non-certificated maintenance contractors and asserted that 55% of them with annual revenues under $750,000 would stop performing aviation maintenance if required to participate in a drug- and alcohol-testing program and that over 10% of those

with 90% aviation business would leave. J.A. 81.

The FAA's final rule was accompanied by a final regulatory evaluation. J.A. 97-174. In it, the FAA altered some of its earlier assumptions about the numbers of contractors involved. J.A. 173-74. The evaluation specifically disagreed with Dr. Jenkins's analysis, J.A. 113-14, for a variety of reasons, including the fact that Dr. Jenkins obtained his number by multiplying the number of certificated repair stations by 4.53 non-certificated maintenance contractors. The FAA pointed out that this figure assumed that each contractor worked for only one repair station, when in fact many repair stations use the same contractors. J.A. 114.

The regulatory evaluation also responded to ARSA's contentions based on its survey. J.A. 116-17. Among other things, the FAA noted that ARSA's own survey results showed that 71% of the non-certificated maintenance contractors would implement testing programs and continue providing maintenance services to the aviation industry. J.A. 117. The evaluation reiterated that no alternatives were considered, because the rule simply emphasized sections of existing regulations. J.A. 100. However, the FAA's final rule did consider alternatives to the proposed subcontractor language. ARSA and other commenters suggested it would be safe to rely on the airworthiness signoff to ensure that the maintenance performed by non-certificated subcontractors was unaffected by any drug or alcohol abuse. J.A. 5. The FAA responded that this signoff process was not designed to remove persons who use illegal drugs or abuse alcohol. J.A. 6 (final rule). See J.A. 62-63 (SNPRM considered ARSA's two alternative limits on testing).

The FAA's initial and final regulatory evaluations – while not undertaken pursuant to

the RFA, which the FAA certified as inapplicable – substantially fulfilled the requirements of the RFA. Accordingly, even if the RFA applied, the FAA's failure to comply was harmless.

3. ARSA contends that a failure to satisfy the RFA was not harmless error, but the two cases ARSA relies on, Br. 24, are inapt. First, Northwest Mining Ass'n v. Babbitt, 5 F. Supp.2d 9, 15 (D.D.C. 1998), states that RFA compliance is not optional, but it does not overrule this Court's case law holding that failure to comply with the RFA is not necessarily fatal. Second, United States Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005), is not in point, because there, the agency "utterly failed to follow the RFA." Id. at 42.

Here, the FAA considered the potential costs of the rule; it considered the comments submitted in response to the initial regulatory evaluation; it concluded that the costs on small entities were not significant; and it considered alternatives. Even if this did not strictly comply with the RFA, that noncompliance was harmless.

C. If The RFA Was Violated, The Appropriate Remedy Is A Simple Remand For Further Economic Analysis, Without Deferring Enforcement Of A Rule Issued To Protect Aviation Safety.

Even if the FAA did not substantially comply with the RFA, the appropriate remedy is simply a remand for further economic analysis, without deferring enforcement of the rule.

The RFA provides that judicial relief includes the possibility of a remand and deferral of enforcement of the rule against small entities, unless continued enforcement is in the public interest. 5 U.S.C. 611(a)(4). Thus, contrary to ARSA's suggestion that the final rule be vacated, Br. 24, the proper remedy for a violation would be a remand to the FAA to

comply with the requirements of the RFA. United States Telecom Ass'n, 400 F.3d at 42.

While the Court has the authority under section 611(a)(4) to defer enforcement, such a remedy would not be in the public interest here. The purpose of the rule, which is already in effect, is to enhance aviation safety by keeping mechanics who use drugs or abuse alcohol from repairing aircraft parts. All three branches of government concur that furthering aviation safety is in the public interest.

First, Congress has declared the important interest in aviation safety by statute. Section 44701(a)(5) authorizes the FAA to issue regulations in the interest of aviation safety, and section 45102(a)(1) authorizes it to issue regulations governing drug- and alcohol-testing for employees engaged in "safety-sensitive functions." In section 2 of the Omnibus Act, Congress also found that drug and alcohol abuse pose "significant dangers to the safety and welfare of the Nation." 105 Stat. at 952.

Second, the SNPRM in this case made clear that aviation safety was the FAA's concern in clarifying that all levels of subcontractors were covered by the drug- and alcohol-testing programs. See, e.g., J.A. 59 ("each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to drug and alcohol testing."). The regulatory language included in the final rule also referred to safety-sensitive functions. J.A. 13; see J.A. 11 ("The major benefit from this rulemaking will be the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to neglect or error on the part of individuals whose judgment or motor skills may be impaired by the presence of drugs and/or alcohol."); J.A. 3 ("Employees affect

aviation safety whenever they perform a safety-sensitive function listed in appendices I and J."). In reviewing a final rule of the FAA, the Court grants "utmost deference" to the safety judgments of the agency. Public Citizen, 988 F.2d at 196.

Finally, this Court has found a "compelling safety interest" in ensuring that employees who fly and service aircraft, including aviation mechanics – who "perform tasks that are fr[a]ught with extraordinary peril" – are not impaired by drugs, because a "single drug-related lapse by any covered employee could have irreversible and calamitous consequence." NFFE v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990) (Army civilian aviation employees); see AFGE v. Skinner, 885 F.2d 884, 892 (D.C. Cir. 1989), cert. denied, 495 U.S. 923 (1990) (FAA aircraft mechanics who maintain FAA aircraft).

Deferring enforcement of this rule would therefore gravely harm the public interest. "Congress emphasized that the RFA should not be construed to undermine other legislatively mandated goals." Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 114 (1st Cir. 1997). Even if the Court finds a failure to comply with the RFA, it should limit its remedy to a remand.

III. THE FINAL RULE IS CONSISTENT WITH DUE PROCESS.

ARSA argues that the final rule violates due process. Br. 25-29. The argument is utterly without basis.

When a statute or regulation prescribes a criminal penalty, or when First Amendment rights are implicated, due process protects individuals against enactments that are excessively vague. In the non-First Amendment civil context, however, due process imposes minimal

standards:

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (footnotes omitted). See also Throckmorton v. NTSB, 963 F.2d 441, 445 (D.C. Cir. 1992) (courts allow "'greater leeway' for regulations and statutes governing business activities than those implicating the first amendment"). ARSA mistakenly relies on a case involving a criminal law that implicated First Amendment rights. City of Chicago v. Morales, 527 U.S. 41, 55 (1999) (Br. 29).

In this case, not only is there no criminal penalty or First Amendment concern but as the history of this case shows, the regulated businesses are able to "clarify the meaning of the regulation by [their] own inquiry." Village of Hoffman Estates, 455 U.S. at 499. The FAA provides interpretive guidance at the request of private parties. See, e.g., J.A. 175, 180.

ARSA complains that the final rule conflicts with other FAA regulations, which state non-certificated repair stations may not perform maintenance but may only perform maintenance functions. Br. 25. ARSA says that the final rule "is irreconcilable with this overarching framework because it extends testing obligations to noncertificated subcontractors on the theory that they 'perform maintenance' * * * even though – precisely because they are ***non***certificated – they ***cannot*** 'perform maintenance' under FAA regulations." Br. 26. But

ARSA's theory is mistaken. The final rule calls for testing of subcontractor employees who "perform[] a safety-sensitive function." J.A. 12-13. The program regulations provide that such safety-sensitive functions include "[a]ircraft maintenance and preventive maintenance duties." Appendix *I*, § III.E (emphasis added). Nothing in the FAA's regulations prevents a non-certificated source from performing maintenance duties, so long as a certificated entity remains directly in charge of the work and takes airworthiness responsibility. Any employee of such a non-certificated source performing maintenance duties would be subject to testing under the final rule.

ARSA's remaining objection is that it is confusing to apply the definitions of maintenance and preventive maintenance. Br. 27-29. But the definitions of maintenance and preventive maintenance have been part of the FAA's regulations since 1962. 14 C.F.R. 1.1. ARSA thus fails to raise due-process issues, because it retains the "ability to clarify the meaning of the regulation by its own inquiry." Village of Hoffman Estates, 455 U.S. at 499.

This is, after all, a facial challenge to the FAA's final rule. "To prevail in such a facial challenge, [ARSA] 'must establish that no set of circumstances exists under which the [regulation] would be valid.'" Reno v. Flores, 507 U.S. at 301 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). It has not come close to doing so.

IV. THE FINAL RULE COMPLIES WITH THE APA IN ALL RESPECTS.

The FAA issued its final rule after engaging in a thorough notice-and-comment rulemaking process. In spite of this, ARSA argues that the final rule violates the APA, because it supposedly mischaracterizes the language as a clarification rather than a change,

fails to prove that it will improve aviation safety, and fails to respond to the objections ARSA raised. Br. 29-42. None of these arguments has any merit.

ARSA's challenge simply represents a policy disagreement with the choices the FAA has made to fulfill its statutory mission to enhance aviation safety. If there were any doubt about this, it would be dispelled by ARSA's statement that while the "form" of the final rule was proper, the "substance" of the final rule shows that the FAA "ignored the core objections" raised by commenters. Br. 38. In other words, ARSA is complaining that the FAA disagreed with the commenters and did not incorporate their views in the final rule.

The FAA's final rule is based on the FAA's judgment about aviation safety, as to which the Court gives "utmost deference in view of administrative expertise." Public Citizen, 988 F.2d at 196-97.

A. ARSA argues that the FAA's view that its rule was a clarification of existing regulations made the rulemaking "misleading" and "infected all phases of the decisionmaking process." Br. 32. This argument completely overlooks the fact that 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.

The FAA has repeatedly stated its view that the subcontractor language is merely a clarification of its earlier regulation regarding drug- and alcohol-testing of contractor employees. J.A. 18 (NPRM) ("The FAA is proposing to clarify that each person who performs a safety-sensitive function directly or by any tier of a contract for an employer is subject to testing. This is not a substantive change * * *."); J.A. 36 (2004 rule) (proposed

language will be dropped; FAA will publish an SNPRM "[i]n order to gather more information on the concerns expressed by the commenters" – that "this was more than a clarifying change"). In the SNPRM, the FAA reiterated that this was a clarifying change but noted that, because some commenters had a contrary view, the FAA was reopening the matter for comment. J.A. 59. The FAA even offered its own initial regulatory evaluation, given the commenters' assumption that there would be an economic cost. J.A. 63-65.

An NPRM can be misleading only if the agency fails to disclose material information. When everything is laid on the table, including both the agency's view and contrary views, the statement of the agency's view cannot mislead. "If [ARSA] was truly misled by the Notice, it has not explained why." Freeman Engineering Assocs., Inc. v. FCC, 103 F.3d 169, 183 (D.C. Cir. 1997).

This is not a case in which an agency tried to clarify its guidance simply by publishing the clarification; here, the FAA engaged in notice-and-comment rulemaking, giving interested persons the ability to weigh in before the final rule was promulgated.

B. ARSA also contends that the final rule is unnecessary. Br. 33-37. This contention, again, simply represents a policy disagreement.

First, ARSA says the rule is not needed for consistency, because certificated and non-certificated entities are fundamentally different, in that only the former have airworthiness responsibility. Br. 33, 35-36. The FAA responded to this argument in its final rule, where it explained that "[t]he airworthiness signoff process is not designed to address the safety risk arising from safety-sensitive functions performed by individuals who use illegal drugs or

misuse alcohol." J.A. 6. That process, while important, is not designed to "remove individuals who use illegal drugs or misuse alcohol," whereas the drug- and alcohol-testing regulations "are designed to address exactly this safety risk by deterring drug and alcohol use, and through removing from safety-sensitive functions, individuals who engage in such prohibited practices." J.A. 6. In any event, the FAA is well within its power to choose to build "redundancies" into its safety programs. J.A. 5.

Second, ARSA concedes that drug- and alcohol-testing works, Br. 34 ("testing has revealed drug and alcohol use in the past, and expanded testing will sometimes turn up such use among workers at the noncertificated subcontractor level"), but it then asks the Court to ignore precedent and impose a heavy burden on the FAA to justify its safety predictions: "Simply catching more drug and alcohol users * * * does not support the FAA's new testing rule. Rather, the FAA must demonstrate that this consequence will contribute to air travel safety in a meaningful way." Id. Although ARSA is correct that no aviation accidents are known to have been directly caused by misuse of alcohol or drugs, J.A. 64, the FAA determined that it would not "wait until there is an actual loss of human life before we take action to ensure the remaining subcontractors who are not already subjected to testing are brought into compliance with the regulations. Only one link in the safety chain would have to fail for an accident to occur." J.A. 4. See NFFE v. Cheney, 884 F.2d at 610 (a "single drug-related lapse by any covered employee could have irreversible and calamitous consequences"); S. Rep. 102-54, at 3 ("The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions

mandates that every effort be made to eliminate the cause of that threat.").

Third, ARSA insists that the FAA failed to consider relevant alternatives, such as distinguishing between major and minor repairs, with only persons performing major repairs subject to the drug- and alcohol-testing regulations. Br. 36. But the FAA considered the equivalent alternative of distinguishing between safety-critical and non-safety-critical maintenance, an alternative suggested by commenters, J.A. 4-5, and it rejected that alternative, because "[t]here is no 'non-safety maintenance' recognized in our regulations." J.A. 5. In any event, drug-testing precedent makes clear that reasonableness does not depend on the existence of "less intrusive alternatives." NFFE v. Cheney, 884 F.2d at 610; see Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989).

Last, ARSA posits, Br. 36-37, that if subcontractor employees are tested, the FAA will have to "steal[] away agency inspector resources" from monitoring persons who undertake airworthiness determinations, resulting in a net safety loss. Br. 37. ARSA gives no evidence to support this remarkable assertion.

C. ARSA's third APA argument is that the FAA "ignored [ARSA's] core objections." Br. 38. There is no basis for that argument; the FAA responded to all of the core objections and simply reached a different conclusion from what ARSA desired.

1. ARSA begins by focusing on the question of the rule's costs, and it accuses the FAA of responding in a way that "'flatly contradict[s]' * * * the record." Br. 38 (quoting Advocates for Highway & Auto Safety v. FMCSA, 429 F.3d 1136, 1146 (D.C. Cir. 2005)). But it is ARSA that misstates the record. ARSA relies heavily on a sentence in the final rule

but fails to add the immediately following sentence, which makes clear what the FAA meant.

Thus, ARSA says that the "FAA responded to this core objection [about costs] by observing that 'none of the commenters opposing the proposal provided specific data challenging the FAA's fundamental economic assumptions.'" Br. 38 (quoting J.A. 3). The very next sentence states: "The regulatory evaluation accompanying this final rule specifically addresses the comments about costs and benefits." J.A. 3. That is, the FAA was stating that it did address the comments about costs, but that it disagreed with those comments. A glance at the final regulatory evaluation itself, which we discussed in Point II, supra, confirms this point. The final regulatory evaluation spent over 12 pages responding to and disputing the economic and survey data produced by ARSA in the Joint Industry Comments. J.A. 108-21.

ARSA may continue to disagree with the FAA's economic analysis, but it is totally inaccurate to suggest that the FAA ignored the data ARSA offered.

2. ARSA's final argument is that the FAA ignored the "privacy costs" attributable to increasing the number of people subject to the drug- and alcohol-testing program. Br. 41-42. In fact, the FAA said in the final rule that this issue was "resolved more than 15 years ago," when the original regulations balanced individual privacy with the FAA's duty to ensure aviation safety, and did not need to be reopened. J.A. 4. ARSA characterizes this response as a non-response, but its argument is nothing more than an effort to relitigate the constitutionality of drug-testing, a matter we take up next, in Point V, infra. The APA does not require the FAA to respond in detail to comments more appropriately raised 15 years earlier.

V. DRUG-TESTING OF PERSONS PERFORMING SAFETY-SENSITIVE MECHANICAL WORK ON AIRCRAFT IS CONSISTENT WITH THE FOURTH AMENDMENT.

It is well established that drug-testing of persons responsible for safety-sensitive transportation functions is consistent with the Fourth Amendment. ARSA's efforts to relitigate over 15 years' worth of jurisprudence are without basis.

A. This Court has upheld the drug-testing of aircraft mechanics against a Fourth Amendment challenge. As we have previously discussed, the Court has found that there is a "compelling safety interest" in ensuring that employees who fly and service aircraft, including aviation mechanics – who "perform tasks that are fr[a]ught with extraordinary peril" – are not impaired by drugs, given that a "single drug-related lapse by any covered employee could have irreversible and calamitous consequences." NFFE v. Cheney, 884 F.2d at 610; accord, AFGE v. Skinner, 885 F.2d at 892. See also Bluestein v. Skinner, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083 (1991) (upholding 1988 FAA drug-testing program) ("government interest in preventing drug use by persons holding safety-sensitive positions in the aviation industry is at least as compelling as the interest in preventing drug use by Customs officers").

The FAA's decision to require employees of subcontractors performing safety-sensitive functions to be tested for illegal drugs was based on the agency's judgment about aviation safety. J.A. 4 ("We believe the safety data showing the number of current positive test results offer strong support for this rulemaking. We do not believe we should wait until there is an actual loss of human life before we take action * * *."). As the FAA noted, maintenance workers were responsible for a large percentage of positive drug- and alcohol-

testing results. J.A. 4-5.

This Court has stated that it grants "utmost deference" to the safety judgments of the FAA that are based on the agency's predictions of the likely future effects of the policies it has mandated. Public Citizen, 988 F.2d at 196. In this facial challenge, ARSA has not shown that "'no set of circumstances exists under which the [regulation] would be valid.'" Reno v. Flores, 507 U.S. at 301 (quoting United States v. Salerno, 481 U.S. at 745).

B. ARSA raises several constitutional objections to testing employees of subcontractors who perform safety-sensitive functions for air carriers. Each is meritless.

First, ARSA claims that persons who work on maintenance for aircraft are nothing but "ordinary citizens" who have chosen not to work for the government. Br. 44. But that is mere rhetorical flourish; neither air carriers nor certificated repair stations actually work for the government. Rather, subcontractor employees are tested because their employers have chosen to perform safety-sensitive aircraft maintenance functions in a highly regulated industry. J.A. 81 (ARSA argued that it is a "major cost" to force them "to forsake work from an entire industry"); see Br. 20. Roughly 60% of the entities survey by ARSA (80 out of 134) reported that more than half of their business was related to aviation. Joint Industry Comments, Appendix B, at B10, Question 9, FAA-2002-11301-80.[5] These subcontractors have voluntarily chosen to get into the field, and because they have, their employees are subject to being tested.[6]

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[5] This portion of the document is available at the FAA's online docket but is not included in the joint appendix.

[6] To the extent ARSA focuses on seemingly trivial examples – "an aircraft seat belt (continued...)

Second, ARSA complains that employees who are already on board are subject to pre-employment testing. Br. 45. This a far narrower issue than ARSA implies; the final rule clarifies "an existing requirement that we have estimated at least 60 percent of the industry already follows." J.A. 10. Whatever the actual number of employees affected, the reason for the requirement is that persons performing maintenance functions have historically had high levels of positive drug tests. J.A. 4-5, 62. To address the matter, the FAA extended the effective date from 30 days to 90 days after publication in order to allow more time for compliance. J.A. 10. Nothing more is required by the cases cited by ARSA.

Third, ARSA repeats its earlier argument that there are less intrusive alternatives, Br. 46-47, and we now repeat our response: Both the Supreme Court and this Court have flatly rejected a "less intrusive alternative" argument of the sort offered by ARSA. Skinner v. RLEA, 489 U.S. at 629 n.9; NFFE v. Cheney, 884 F.2d at 610; AFGE v. Skinner, 885 F.2d at 892 n.10. ARSA also repeats its complaint about duplicativeness, Br. 46, and we repeat the FAA's response that "[t]he airworthiness signoff process is not designed to address the safety risk arising from safety-sensitive functions performed by individuals who use illegal drugs or misuse alcohol." J.A. 6. That signoff process does not deter drug and alcohol use, nor does it catch and remove persons who perform safety-sensitive functions while using drugs or alcohol. J.A. 6.

Fourth, ARSA repeatedly cites Chandler v. Miller, 520 U.S. 305 (1997) (Br. 42, 43,

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[6](...continued)
buckle [that] is sent to a family-owned sub-sub-contractor machine shop that primarily services car parts," Br. 44 – we note that this is a facial challenge to the final rule. Any individual who believes his personal circumstances do not warrant drug-testing may raise those circumstances in a separate proceeding.

46, 48), but Chandler involved candidates for state political office, who "typically do not perform high-risk, safety-sensitive tasks." Id. at 321-22. The FAA's drug- and alcohol-testing program is limited to those performing safety-sensitive tasks.

Finally, ARSA raises a point that is true in every drug-testing case (and has been raised in pretty much every case) – that these tests are "highly invasive" and involve "forced urinalysis" and a "government-ordered intrusion into the body," using a "demeaning process of mandated and monitored urination," with the potential to disclose personal information. Br. 43. But in mandating this testing, section 3(a) of the Omnibus Act required a wealth of safeguards to protect the privacy, dignity, and confidentiality of the testing process, 105 Stat. 955-56, and the FAA requires, Appendix *I*, § V, that testing be conducted in accordance with the Department of Transportation's Procedures for Transportation Workplace Drug Testing Programs (49 C.F.R. Part 40), which track the well respected guidelines established by the Department of Health and Human Services.

In short, ARSA's Fourth Amendment arguments have been previously rejected by the courts. They should be rejected here.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

ROSALIND A. KNAPP
Acting General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

REBECCA B. MACPHERSON
Assistant Chief Counsel for Regulations
Federal Aviation Administration

Department of Transportation
Washington, D.C. 20590

PETER D. KEISLER
Assistant Attorney General

LEONARD SCHAITMAN
(202) 514-3441
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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EDWARD HIMMELFARB
Attorney for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2007, I served the foregoing Brief for the Respondent on the following by causing two copies to be hand-delivered, with a courtesy copy by electronic mail, to:

Marshall S. Filler, Esq.
Obadal, Filler, MacLeod & Klein, P.L.C.
117 North Henry Street
Alexandria, VA 22314-2903

Jere W. Glover, Esq.
Andrew Heyman, Esq.
Brand Law Group, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005-2301

and by causing a copy to be sent by Federal Express, for overnight delivery, with a courtesy copy by electronic mail, to:

Albert J. Givray, Esq.
Jacobs Chase Frick Kleinkopf & Kelley, LLC
1050 Seventeenth Street, Suite 1500
Denver, CO 80265

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

I also certify that I filed the brief by causing an original and fourteen copies to be hand-delivered to the Clerk, U.S. Court of Appeals for the District of Columbia Circuit.

_____
EDWARD HIMMELFARB
Attorney for the Respondent

STATUTORY AND REGULATORY ADDENDUM

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5 U.S.C. 611(a)

§ 611. Judicial review

(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of this chapter, an action for judicial review under this section shall be filed not later than –

(i) one year after the date the analysis is made available to the public, or

(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to –

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court

to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

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49 U.S.C. 106(g)(1)

§ 106. Federal Aviation Administration

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(g) Duties and powers of Administrator.–(1) Except as provided in paragraph (2) of this subsection, the Administrator shall carry out –

(A) duties and powers of the Secretary of Transportation under subsection (f) of this section related to aviation safety (except those related to transportation, packaging, marking, or description of hazardous material) and stated in sections 308(b), 1132(c) and (d), 40101(c), 40103(b), 40106(a), 40108, 40109(b), 40113(a), 40113(c), 40113(d), 40113(e), 40114(a), and 40119, chapter 445 (except sections 44501(b), 44502(a)(2), 44502(a)(3), 44502(a)(4), 44503, 44506, 44509, 44510, 44514, and 44515), chapter 447 (except sections 44717, 44718(a), 44718(b), 44719, 44720, 44721(b), 44722, and 44723), chapter 449 (except sections 44903(d), 44904, 44905, 44907-44911, 44913, 44915, and 44931-44934), chapter 451, chapter 453, sections 46104, 46301(d) and (h)(2), 46303(c), 46304-46308, 46310, 46311, and 46313-46316, chapter 465, and sections 47504(b) (related to flight procedures), 47508(a), and 48107 of this title; and

(B) additional duties and powers prescribed by the Secretary of Transportation.

49 U.S.C. 44701(a)

§ 44701. General requirements

(a) Promoting safety.–The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing –

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for –

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.