ORAL ARGUMENT NOT YET SCHEDULED

# United States Court of Appeals
**District of Columbia Circuit**

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

and

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

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**ON PETITION FOR REVIEW OF A FINAL AGENCY RULE**

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## JOINT OPENING BRIEF OF ALL PETITIONERS AND INTERVENORS


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# United States Court of Appeals

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**ON PETITION FOR REVIEW OF A FINAL AGENCY RULE**

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

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

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

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

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


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# United States Court of Appeals
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**ON PETITION FOR REVIEW OF A FINAL AGENCY RULE**

## RULE 26.1 DISCLOSURE STATEMENT
## COVERING ALL PETITIONERS AND INTERVENORS

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

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

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

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

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

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

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

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

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

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

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## TABLE OF AUTHORITIES

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### CASES



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

**STATUTES AND OTHER FEDERAL MATERIALS**

## GLOSSARY

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

## STATEMENT OF JURISDICTION AND STANDING

Petitioners and Intervenors invoke this Court's jurisdiction under 49 U.S.C. § 46110 (a), which permits review of orders issued by the FAA concerning aviation duties and powers. This appeal challenges a final rule of the FAA entered on Jan. 10, 2006, at 71 FR 1666 (Jan. 10, 2006) in the course of a rulemaking proceeding (the "Final Rule").[1] The FAA had jurisdiction for this rulemaking proceeding under 49 U.S.C. § 45102. The Final Rule extends the FAA's drug and alcohol testing regime to all persons performing safety-sensitive functions for an air carrier employer, "directly or by contract ***(including by subcontract at any tier)"*** (italics show challenged portion of Final Rule). Petitioners timely filed their petitions for review on Mar. 10 and Mar. 13, 2006, and this Court on Jun. 23, 2006 granted Intervenors leave to intervene.

Petitioner Aeronautical Repair Station Association, Inc. ("ARSA") is a continuing trade association with standing to raise the statutory and constitutional challenges of its members against the Final Rule. ARSA regular members are maintenance entities certificated by the FAA under 14 C.F.R. Part 145; many members perform maintenance or preventive maintenance for air carriers by contract or subcontract; many members have DOT/FAA anti-drug and alcohol programs which will require them to ensure that all persons (certificated or non-certificated) performing maintenance steps by contract at various tiers be tested under the Final Rule. ARSA also has associational standing to raise issues related to compliance with the RFA, 5 U.S.C. §§ 501-611.

Each of Petitioners Premier Metal Finishing, Inc. ("PMF") and Solutions Manufacturing, Inc. ("SMI"), is not certificated or approved by the FAA but performs maintenance functions for 14 C.F.R. Part 145 certificated repair stations. SMI has no direct contact with any air carrier. Until the Final Rule became effective, neither PMF nor SMI nor their respective employees were required to be tested under the anti-drug and alcohol requirements of the DOT/FAA, since the certificated repair stations for which PMF and SMI performed work were tested and took

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[1] The Final Rule is the first item set out in the Joint Appendix, which is cited as "**JA at ____**."

airworthiness responsibility for the work PMF and SMI performed. Under the Final Rule, PMF and SMI must either test their employees or cease to perform maintenance work for certificated repair stations. PMF and SMI thus have standing to challenge the Final Rule before this Court.

Each of Petitioners Pacific Propeller International LLC ("PPI") and Texas Pneumatics Systems, Inc. ("TPS"), and Intervenor Fortner Engineering & Manufacturing, Inc. ("FEM"), is a repair station certificated under 14 C.F.R. part 145 by the FAA. Each of PPI, TPS, and FEM performs maintenance and preventive maintenance by contract for air carriers. Each of PPI, TPS, and FEM has contracts with non-certificated maintenance providers that will now (by reason of the Final Rule) have to be brought under a DOT/FAA anti-drug and alcohol testing program or be discontinued as a maintenance provider by PPI, TPS, and FEM respectively. Accordingly, each of PPI, TPS, and FEM has standing to challenge the Final Rule.

Petitioner Mr. Randall C. Highsmith is a natural person employed by Petitioner SMI as a Testing Manager. Mr. Highsmith performs tests on manufactured and repaired articles on behalf of 14 C.F.R. Part 145 certificated repair stations. He performs the same test on each article, regardless of whether the article has been manufactured by SMI or repaired by SMI. Mr. Highsmith has been an employee of SMI for some time and has never been subject to FAA-mandated drug and alcohol testing as an employee of SMI, because neither he nor SMI could take airworthiness responsibility for the maintenance they performed. Under the regulations of the new Final Rule, Mr. Highsmith must submit to drug and alcohol testing, including "pre-employment" testing, or cease testing repaired articles for SMI. Accordingly, Mr. Highsmith has standing to challenge the Final Rule.

Intervenor Mr. Minas Serop Jilizian is a natural person and the owner and operator of R&V grinding, a non-certificated company that provides grinding services to aviation customers. Mr. Jilizian performs grinding work on repaired articles on behalf of 14 C.F.R. Part 145 certificated repair stations. Mr. Jilizian has never been subject to FAA-mandated drug and alcohol testing because neither he nor his company can take airworthiness responsibility for the

maintenance they performed. Under the Final Rule, Mr. Jilizian must submit to drug and alcohol testing, including "pre-employment" testing, or cease testing repaired articles for aviation customers.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**1.** Did the FAA exceed its statutory authority by deeming workers employed by small, local non-airline-industry subcontractors, who perform even the smallest amount of aircraft-maintenance-related work, "air carrier employees responsible for safety sensitive functions" subject to drug and alcohol testing under 49 U.S.C. § 45102?

**2.** Did the FAA violate the Regulatory Flexibility Act by concluding that its new rule "directly regulated" only air carriers when that rule in fact required implementation of drug and alcohol testing by small-business subcontractors and also subjected small-business repair stations to FAA-imposed penalties if their subcontractors did not obey the agency's testing requirements?

**3.** Is the Final Rule so unintelligible and incompatible with existing rules governing aviation maintenance that it violates legal prohibitions on vagueness and incoherence in agency action?

**4.** Did the FAA violate the Administrative Procedure Act (a) by wrongly insisting that its entirely new rule merely "clarified" existing practice; (b) by relying on speculative and unsubstantiated reasons for adopting the Rule; and (c) by simply ignoring key objections to that Rule raised in the notice-and-comment process?

**5.** Did the FAA violate the Fourth Amendment by subjecting countless ordinary workers, employed neither by the Government nor within the airline industry, to far-reaching drug and alcohol testing, including on a purely random basis, in a setting where such testing is unnecessary because elaborate aviation-inspection-and-approval requirements are already in place to ensure the safety of maintenance-related work?

## STANDARD OF REVIEW

The standard of review for Issues 1 and 2 (which focus on interpreting clear statutory directives) is *de novo*. *See, e.g.,* 33 C. Wright & C. Koch, FEDERAL PRACTICE & PROCEDURE § 8381 at 330

(2006). The standard of review for Issues 3 and 5 (which focus on questions of constitutional law) is also *de novo*. *See, e.g., id.* §8363 at 255-56. The standard of review for Issue 4, which focuses on APA review, requires the Court to determine whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and/or "made without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D).

## STATUTES AND REGULATIONS

Due to the number of statutes and regulations involved in this appeal, they have been set out in the Addendum which is bound separately from this brief.[2]

## STATEMENT OF THE CASE

This appeal takes aim at a new and draconian drug and alcohol testing rule put in place by the FAA. The agency's Final Rule was entered on Jan. 10, 2006. *See* **JA at 1-17**. The Final Rule exceeded legal limits by extending testing duties to mom-and-pop machine and welding shops, and similar local shops, that occasionally support the aviation maintenance industry, on the misguided theory that their workers are "air carrier employees responsible for safety sensitive functions." 49 U.S.C. § 45102(a). Other legal errors taint the Final Rule, which must be vacated.

## STATEMENT OF THE FACTS

FAA rules concern many subjects, including the "maintenance" and "preventive maintenance" of aircraft.[3] Among other things, the FAA requires that before components subjected to maintenance may be installed on an aircraft operated by a U.S. air carrier (*i.e.*, those aircraft operating under 14 C.F.R. Parts 121 and 135), the work must be approved as "airworthy" by the holder of a suitable FAA certificate. This determination requires a thorough, individualized inspection of *each* component and the making of a record certifying the airworthiness of that component before it is put back in operation. *See* 14 C.F.R. § 43.9. The

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[2] The Addendum to this brief is cited as "**A at _____**."

[3] The technical differences between "maintenance" and "preventive maintenance" are not important for this appeal, so "maintenance" will be used in this brief to refer to both activities.

taking of airworthiness responsibility for performing maintenance on aircraft components lies at the heart of this appeal.

Most maintenance-related work on aircraft components is approved as airworthy by employees of specially licensed facilities called "certificated repair stations." *See, e.g.*, 14 C.F.R. § 145.201. Air carriers routinely contract with these repair stations to perform the maintenance work. Those repair stations then often subcontract with other entities (which may then sub-subcontract with still other entities) to help carry out the contracted-for work. Each and every item of such work, when performed by noncertificated subcontractors at any tier, must be approved as airworthy by the certificated repair station, unless it is approved by the air carrier itself. 14 C.F.R. § 43.7.

Because only certificated entities are empowered to make airworthiness determinations, the FAA regulates them extensively. To become a certificated repair station, an applicant must make a rigorous showing that it possesses suitable housing, facilities, equipment, personnel and technical data to accomplish the work. 14 C.F.R. § 145.51(b). In addition, once a repair station is certificated, it must submit to frequent FAA surveillance, inspections, and mandatory reporting. Sanctions may be imposed for regulatory violations, ranging up to a $25,000 civil penalty for each violation. *See* 49 U.S.C. § 46301. The FAA, however, does not purport to regulate noncertificated subcontractors, which are often small, local businesses that work primarily for customers outside the aviation industry. *See* **JA at 2**. A certificated repair station retained by an air carrier to refurbish tray tables, for example, might hire a local metal shop that focuses on automobile work to do that part of the job that requires replating tray table brackets. This work – because it involves a "maintenance function" under FAA regulations – must be approved as airworthy by the certificated repair station. *See* **JA at 9**.

The Final Rule at issue in this case concerns drug and alcohol testing. Under the governing statute, the FAA may require such testing of *only* "air carrier employees responsible for safety sensitive functions." 49 U.S.C. § 45102(a). The FAA has long defined "safety

sensitive functions" to include *all* "maintenance" performed for U.S. air carriers,[4] and it has defined this term with extreme breadth. But whatever the definitional scope, the statute permits drug and alcohol testing of only "air carrier employees" who are "responsible for" that work.

From the inception of the drug and alcohol testing program, the FAA held that only those persons who did maintenance-related work "directly or by contract for air carriers" – not all persons who did such work – were subject to its testing regime. The agency further specified that (apart from those employees who worked as employees of air carriers themselves), testing obligations reached no farther than the maintenance-related personnel who were employees of (1) certificated repair stations at any tier; and (2) non-certificated contractors that were in a *direct* contractual relationship with an air carrier. *See* **JA at 18-19**. Although this program literally reached beyond the orbit of "air carrier employees", the maintenance industry accepted this approach because it made practical sense -- particularly (1) because virtually all prime contractors are certificated repair stations; (2) because, although certificated repair stations sometimes serve as subcontractors, they almost always serve as direct contractors in other cases; and (3) because certificated repair stations were (and still are) already subject to extensive FAA regulation by reason of their certificated status. *See* **JA at 19**.

The key effect of the FAA's traditional approach to drug and alcohol testing was clear: Employees of noncertificated subcontractors who performed only "maintenance functions" for certificated entities were *not* subject to testing. This approach comported with the statutory limitation that the agency could test only "air carrier employees." It also made good sense because each item of work done by a noncertificated subcontractor had to be – and still must be – carefully inspected and/or tested, and specifically approved as airworthy, by an employee of the *certificated* repair station who had been subjected to full-scale drug and alcohol testing. *See* **JA at 9**. As the FAA itself explained, this approach provided "a safety net" because certificated

[4] "Maintenance" is defined in 14 C.F.R. § 1.1 as "inspection, overhaul, repair, preservation, and the replacement of parts."

entities' employees who were already subject to testing operated at the "level in the system overseeing the work." *See* **JA at 19**. In addition, there is an important "triple-check" that backs up the individualized inspection and approval process undertaken by certificated repair stations. This is because substance-tested *air carrier* employees must review the safety of maintenance-related component work in the process of re-installation, as well as in use. *See, e.g.,* 14 C.F.R. § 121.363 (air carriers bear ultimate responsibility for airworthiness).

On Feb. 28, 2002, the FAA published a notice of proposed rulemaking (the "NPRM") that marked a sharp departure from its earlier and long-effective approach to substance testing. By specifying that testing requirements would henceforth apply to all employees engaged in maintenance-related work "directly or by contract *(including by subcontract at any tier),*" the proposed rule threatened to subject countless employees of noncertificated subcontractors to the FAA's testing program. An outcry from the industry resulted in the FAA's issuance, on Jan. 12, 2004, of a separate Supplemental Notice of Proposed Rulemaking (the "SNPRM") that again put forward this regulatory revision and called for further industry comment. In response, the industry submitted detailed comments that documented the proposed rule's negative effects, including uncontroverted expert submissions that showed why the revision would harm thousands more small businesses than the agency had initially posited. *See, e.g.,* **JA at 89-92**. Ignoring this evidence, the agency promulgated the Final Rule.

Throughout the rulemaking process, a key point of disagreement concerned the agency's treatment of the RFA, which imposes specific requirements on agencies when their actions will have a "significant economic impact" on small businesses. Submissions to the FAA left no doubt that the new rule would indeed impose serious burdens on both certificated repair stations and noncertificated subcontractors that qualified as "small entities" for RFA purposes. The agency, however, disregarded these submissions based on the purely legal conclusion that the new rule did not "directly regulate" either noncertificated subcontractors or certificated repair stations, so that compliance with the RFA was unnecessary. *See* **JA at 9-10**.

## SUMMARY OF ARGUMENT

This appeal takes aim at a new and draconian drug and alcohol testing rule put in place by the FAA. That rule runs afoul of a host of legal restraints, including those imposed by the (1) the Omnibus Transportation Employee Testing Act ("OTETA"), (2) the Regulatory Flexibility Act ("RFA"); (3) constitutional and statutory limitations on vague and incoherent agency rules; (4) the Administrative Procedure Act ("APA"), and (5) the Fourth Amendment of the United States Constitution. In particular, it will not wash – for either OTETA or Fourth Amendment purposes – for the FAA to characterize as "air carrier employees" ordinary workers in small, local mom-and-pop welding and machine shops. Nor can the FAA skirt the dictates of the RFA by saying that the Final Rule does not directly regulate the small businesses that it directly impacts – including certificated repair stations that the Rule subjects to new monetary penalties. And fundamentally faulty logic – shown by the FAA's repeated mischaracterization of the Final Rule as a mere "clarification" of past practice – renders the Final Rule violative of the APA. For these and other reasons, the Final Rule should be vacated by this Court.

## ARGUMENT

### I. The FAA's mandate of drug and alcohol testing for all noncertificated subcontractors exceeds its statutory authority.

The FAA first required substance-abuse testing in the airline industry in 1989. Acting under its general grant of safety-related rulemaking authority, the agency specified that:

> Each 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 must be subject to drug testing under an antidrug program implemented in accordance with this chapter.

14 C.F.R. Part 121, Appendix I(III). In 1991, Congress enacted the OTETA to deal with, endorse, and limit the FAA's authority to engage in drug testing. OTETA § 45102(a) (as amended in 1994 to authorize alcohol, as well as drug, testing) provides that:

> In the interest of aviation safety, the Administrator of the Federal Aviation Administration shall prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct preemployment, reasonable suspicion,

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

The FAA acknowledges that the Final Rule "is promulgated under the authority described in ...section 45102." *See* **JA at 2**. That Rule carries forward the prior regulatory language, but with one fundamental change: By extending the pre-existing coverage to employees who perform safety sensitive functions "by subcontract at any tier," the modified rule subjects noncertificated subcontractor employees to full-scale testing, including random testing not triggered by any demonstrated error or by any reasonable suspicion of substance abuse. For the reasons set forth below, this new rule exceeds the FAA's statutory authority.

### A. Noncertificated-maintenance-subcontractor employees--who work wholly outside the airline industry, often for small, local businesses that primarily serve non-airline customers--are not "air carrier employees."

***1. The statutory language is clear.*** The controlling statute permits FAA drug and alcohol testing of a person, other than one of the FAA's own employees, only if that person is *both:* (1) an air carrier employee (including "airmen, crew members, and airport security screening contract personnel") *and also (*2) "responsible for safety-sensitive functions," such as "maintenance." It does not suffice that a worker is responsible for safety-sensitive work. The person doing that work must *also* be an "air carrier employee."

A person need not be on an air carrier's payroll to qualify as an "air carrier employee." The industry, for example, has long accepted that employees of certificated repair stations may meet this description because they work in the aviation industry, deal directly and routinely with air carriers, are heavily regulated by the FAA, and (like an air carrier's own specially licensed employees) are involved in the critical function of making airworthiness determinations. But it makes no sense to characterize as "air carrier employees" all employees of all noncertificated subcontractors who do any amount of work on any aircraft component, including when the

employee has no idea that he or she is doing so. What reasonable person, for example, would say that a local sewing shop worker is an "air carrier employee" because a certificated repair station periodically sends airplane seat covers to the shop to be patched? What reasonable person would say that a worker in a local firm is an "air carrier employee" because a small percentage of the firm's subcontract business involves recoating plastic airplane window shades? And what reasonable person would say a worker in a local welding shop, who normally does work for local factories and farms, is an "air carrier employee" because occasionally a certificated entity sends to the firm metal devices used on aircraft? Such an interpretation is flawed on its face. Yet that is precisely the interpretation that the FAA has adopted, which should be set aside. *See Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) (noting that "statutes should be interpreted to avoid untenable distinctions, unreasonable results, or unjust or absurd consequences").

The over-reaching nature of the agency's reading of the statute is confirmed by the Final Rule itself. It speaks volumes that throughout that lengthy document the agency never once quotes the *actual language* of § 45102(a). Instead, the agency asserts that "under section 45102, the FAA is charged with prescribing regulations to establish programs for drug and alcohol testing of *employees* performing safety-sensitive functions *for* air carriers," **JA at 2** (emphasis added), so that "*any individual* who performs safety sensitive functions *for* a regulated employer must be subject to drug and alcohol testing." **JA at 6** (emphasis added). Put another way: "***Anyone*** performing maintenance or preventive maintenance *for* a regulated employer must be subject to testing," *id.*, and "***any*** *person* who performs maintenance or preventive maintenance *for* an employer must be...tested." **JA at 61**. These things, however, are precisely what the governing statute does ***not*** say. Congress could have easily specified that drug and alcohol testing obligations extend to "any individual" or "any person" or "[a]nyone" engaged in safety-related activities for an air carrier. Instead, Congress specified that testing obligations reached no further than "air carrier employees." In promulgating the Final Rule, the

FAA ignored this critical textual limitation, in derogation of the controlling principle that all terms of a statute must be given independent and meaningful significance. *See, e.g.*, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803) (endorsing basic principle that courts will not assume that enacted language "is intended to be without significant effect"). *Accord, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

***2. Rules of interpretation confirm this conclusion.*** No fewer than four principles of statutory interpretation confirm what the statute's plain text reveals – namely, that the Final Rule is *ultra vires* because workers for noncertificated subcontractors are not "air carrier employees."

***First***, the FAA's strained interpretation of its statutory authority runs headlong into a robust congressional policy of promoting the nation's small businesses. Congress has not only enacted many laws to advance this purpose; it has explicitly stated that: "it is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as possible, the interests of small-business concerns." 15 U.S.C. § 631(a) Given this goal, it makes no sense to read a statute directed at "air carrier employees" to allow costly, duplicative, and dislocating federal drug-and-alcohol regulation of small welding shops, metal-plating facilities, and other comparable localized firms. Doing so would offend the basic principle that statutes "must be harmonized because of the presumption that the legislature intended to create a harmonious body of law." *See* 82 C.J.S. Statutes § 352 (citing numerous authorities).

***Second,*** the Supreme Court has often insisted that "[f]ederal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications on our dual system of government.'" *BFP v. RTC*, 511 U.S. 531, 544 (1994). This principle applies forcefully here because extension of the federal government's drug-and-alcohol testing regime to noncertificated subcontractors necessarily will disrupt state choices about both (i) the privacy interests of local employees and (ii) the business prerogatives of local employers. *See, e.g.*, I.C.A. § 730.5(9)(a)(1) (Iowa) (setting out restrictions on drug testing); C.G.S.A. 31-51x (Conn.) (reasonable suspicion required for testing). Because each of these subjects involves "a field

which the States have traditionally occupied," this Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This clear-statement rule makes sense because: "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *U.S. v. Bass*, 404 U.S. 336, 349 (1971). Here, however, there is no way to say that Congress faced – even in the most oblique way – the critical issue whether the FAA could extend drug-and-alcohol testing to the small, local businesses that do subcontract work for certificated repair stations, because when Congress enacted and revised the OTETA, the FAA's own governing policy specifically *precluded* the testing of workers in these firms. *See* pp. 8-9 *supra*.

***Third,*** adoption of the FAA's interpretation of the OTETA would violate the rule that: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237 (1998); *accord, e.g., Solid Waste Agency v. U.S. Army Corps. of Engineers*, 531 U.S. 159, 172-73 (applying this principle in light of "our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority"). As demonstrated in Argument V below, the FAA's sweeping reading of § 45102(a) – which requires random testing of thousands of ordinary, non-airline-industry workers, despite the absence of any significant safety-based justification—violates the Fourth Amendment. For the "doctrine of 'constitutional doubt'" (*Almendarez-Torres*, 523 U.S. at 237) to take hold, however, it need only be shown that the Government's construction of the enabling statute raises a "serious" question on that score. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988). Because, at the least, that standard is met here, the Final Rule's interpretation of the term "air carrier employees" must be overturned.

***Fourth,*** the FAA's interpretation ignores the context in which the Congress enacted the OTETA. *See City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003) (interpreting statute "in light of the general environment in which [statute] was enacted"). In 1991, Congress well knew that extending testing obligations to a wide array of ordinary of workers would raise major legal and political concerns, particularly because § 45102 called for four separate forms of testing – including continuous random testing – for statutorily covered employees. At the time, the legal terrain for random drug testing of employees was particularly unsettled. The Supreme Court had recently upheld forced urinalysis tests triggered by train wrecks or by employee safety violations. But in doing so, the Court had signaled serious concern about the constitutionality of purely random drug testing. *See National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 672 n.2 (1989) (strongly distinguishing uniformly imposed pre-promotion tests, under which applicants are "notified in advance of the scheduled sample collection," from intrusions under which individuals are "taken by surprise" and face more "oppressive interference").

It is therefore not surprising that Congress was leery about broadly defining the range of testable employees, and any doubt about this is removed by the OTETA's legislative history, as reflected in a detailed Senate Report. *See* S. Rep. 102-54, 102nd Cong., 1st Sess. 1991, 1991 WL 73185. After noting the FAA's authority to test airmen, flight crews, and screening personnel, the Senate Report shifted to a discussion of the key "other air carrier employees" language. Anticipating just the sort of issue presented by this case, the Report stated:

> The Committee intends that the Administrator be very selective in extending the coverage of this provision to other categories of air carrier and FAA employees. While it is critical that, in the interest of safety, personnel responsible for the safety of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, *[the statute] should not be treated as an open authorization to test all aviation industry employees.*

*Id.* at 18 (emphasis added). Particularly telling is the Senate Report's assertion that the statute did not vest the FAA with authority to test "all aviation industry employees." *Id. A fortiori*, the

agency must lack the authority it claims here, under which it has attempted to extend drug and alcohol testing even to workers who are not part of the "aviation industry" at all.

***3. The agency's counterarguments are unavailing.*** It is telling that the FAA offered no explanation in the Final Rule why a reasonable person would view the term "air carrier employees" as embracing non-airline-industry workers employed by noncertificated subcontractors who perform even the smallest measure of maintenance-related work. Instead, the agency suggested three arguments that supposedly show why this Court should adopt the FAA's counter-textual interpretation. These arguments, however, lack persuasive force.

***First,*** the FAA notes that apart from confirming the agency's drug-testing authority in § 45102, Congress simultaneously in 1991 invited the FAA to "further supplement" its then existing regulations. 49 U.S.C. § 45106(c). From this snippet of text, the agency seems to conclude that it is now free to expand its program in whatever manner it chooses, including by extending it to noncertificated subcontractors. *See* **JA at 60**. The short answer to this argument is that whatever authority § 45106(c) gave the FAA to tinker with previous regulations, § 45106(c) did not extend Congress's basic grant of statutory authority, set forth in § 45102(a), to test only "air carrier employees."

***Second,*** the FAA argues that Congress somehow embraced the FAA's sweeping reading of "air carrier employees" when Congress permitted the agency to "continue in effect [its existing] regulation . . . governing . . . air carrier employees." 49 U.S.C. § 45106(c). The agency seems to reason that because its regulation at that time extended testing obligations to employees who performed maintenance work "directly *or by contract,*" it follows that the agency can now extend testing to noncertificated subcontractor employees ***at all tiers*** because they work for air carriers "by contract." But this argument proves too much because the "by contract" language was from its inception understood by the industry, by the agency, and by Congress ***not*** to extend testing requirements to the employees of noncertificated subcontractors. *See* **JA at 3** (acknowledging that this view prevailed at least into the mid-1990s). The "by contract"

language was understood to require testing only of (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, in a setting where almost all such firms were certificated repair stations that worked intimately with air carriers themselves. For this reason, nothing in the legislative history supports the conclusion that the employees of *noncertificated subcontractors* were or are "air carrier employees." Indeed, the regulatory context in which the statute was passed supports exactly the opposite conclusion. *Cf. GTE Service Corp. v. O.K.*, 224 F.3d 768, 772-73 (D.C. Cir. 2000) (interpreting statute in light of regulatory "backdrop").

***Third,*** the FAA argues that Congress must have viewed the testing of noncertificated subcontractor employees as permissible because, under agency practice in and after 1991, the employees of *certificated* entities could be tested. This argument fails because the employees of noncertificated subcontractors are not remotely analogous to the employees of certificated repair stations for the simple reason that certificated repair stations (unlike noncertificated repair stations) must and do make airworthiness determinations that result in maintained aircraft parts being approved for return to service. *See* 14 C.F.R. §§ 43.3, 43.7, 145.201, 145.217. Given this distinctive responsibility, certificated firms are closely evaluated, carefully regulated, and continuously monitored by the FAA. For certificated entities, then, drug and alcohol testing logically operates as part and parcel of an already-comprehensive program of government supervision. In these circumstances, 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." And even if certificated repair station workers do not fit comfortably within the "air carrier employees" designation, these firms choose to put in place a testing program for their own employees as part of an elaborate bargain to secure a certificate from the FAA. For all these reasons, it is not surprising that drug and alcohol testing obligations extend generally to the employees of certificated entities. However, not one of these

reasons supports the conclusion that workers employed by *noncertificated* subcontractors qualify as "air carrier employees."

Given the flaws in the FAA's arguments from history and analogy, it is not surprising that the agency asserts, in the end, that interests in air safety justify the strained interpretation of OTETA embodied in the Final Rule. For reasons detailed below in Argument IV(B)(2), the agency's safety justification for testing noncertificated subcontractor workers is weak, if not nonexistent. Even if a strong safety justification did exist, however, it would not entitle the FAA to pursue regulatory goals at all costs – including costs created by subjecting countless citizens who work neither for the government nor within the airline industry (and who are certainly not "air carrier employees") to mandatory random drug and alcohol testing. In case after case, this Court has held that agencies may not sidestep textual limits in enabling legislation on the ground that "a reasonable policy justification" supposedly necessitates that result. *See, e.g., Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145-46 (D.C. Cir. 2006). This basic principle controls here.

***4. Chevron does not support the agency's interpretation.*** The principle of deference to agency determinations articulated in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), lends no support to the FAA's position in this case. To begin with, an effort – such as this one – at "expanding an agency's jurisdiction can evoke a closer judicial look" than might occur under the strictest forms of *Chevron* review. A. Aman & W. Mayton, *ADMINISTRATIVE LAW* 489-90 (2001) (discussing Supreme Court's action in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). This Court has disagreed with the Seventh Circuit as to whether there is a highly generalized agency-jurisdiction exception to *Chevron*. *See Oklahoma Nat. Gas v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994) (discussing 7th Cir. *United Transport Union* decision). All agree, however, that "an agency may not bootstrap itself into an area where it has no jurisdiction." *Adams Fruit Co. V. Barrett*, 494 U.S. 638, 650 (1990). At a minimum, *Chevron* deference should be tempered when, as here, the interpretive question

concerns a foundational congressional choice, driven by transparent constitutional concerns, about what persons are subject, and are not subject, to any form of agency supervision. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

The Final Rule involves additional considerations that cut against full-scale *Chevron* deference. This is not a case, for example, where an agency has made a highly technical scientific or economic judgment. Instead, the agency has declared – in somewhat Orwellian fashion – that because its constitutionally invasive testing program is already working well, it ought to be extended to an even larger number of persons. *See* **JA at 4-5**. And the agency has not issued the Final Rule in an environment that is naturally conducive to judicial reliance on agency expertise. Instead, the Final Rule has been promulgated against a social backdrop that is pervaded by the emotionally charged "war on drugs." Yet it is precisely when impermissible political considerations may be at play in agency decisionmaking – whether at a conscious or an subconscious level – that the need for meaningful checks imposed by a politically insulated, independent judiciary is at its highest ebb. *See* THE FEDERALIST No. 78 (noting that "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard"). Given these considerations, it would be unjustified to view this case as presenting nothing more than a run-of-the-mill *Chevron* deference issue.

The *Chevron* principle can take hold only when statutory language is "ambiguous" and the agency's interpretation of that language is "reasonable," *U.S. v. Haggar Apparel Co.*, 526 U.S. 380 (1999) -- not when the "plain meaning" of the statute negates the agency's interpretive position.[5] Under any fair construction, the term "air carrier employees" does not reach the

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[5] *PDK Labs., Inc. v. United States*, 362 F.3d 768, 797 n.4 (D.C. Cir. 2004). *Accord, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (rejecting application of *Chevron* deference both because governing statute was "clear" and because Court "would not extend *Chevron* deference" where constitutional-doubt and federalism canons point the other way). *New York v. EPA*, 413 F.3d 3, 38 (D.C. Cir. 2005); *see generally Chevron*, 467 U.S. at 843, n.9 (emphasizing that courts "must reject administrative constructions which are contrary to clear congressional intent and that intent is to be determined "employing traditional tools of statutory construction"); *accord Shays v. Federal Election Comm'n*, 414 F.3d 76, 105 (D.C. Cir.

workers made subject to testing under the Final Rule. The FAA may believe that an inability to mandate the testing of these employees creates an unacceptable gap in its regulatory jurisdiction. If so, "the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found." *Federal Maritime Comm'n v. Seatrain Line, Inc.* 411 U.S. 726, 744-45 (1973).

### B. The Final Rule exceeds the FAA's authority because noncertificated-subcontractor employees are not "responsible for" safety-sensitive functions.

There is another reason why noncertificated subcontractor employees (even if they somehow are "air carrier employees") are not a proper subject of FAA drug and alcohol testing: they are not "*responsible for* safety sensitive functions." The reason why is simple: In a transaction where a certificated repair station has used a noncertificated subcontractor, only the certificated repair station is "responsible" for the safety aspects of the subcontractor's work because "[t]he certificated repair station remains directly in charge of the work performed by the noncertificated person" and alone can verify "that the work has been performed satisfactorily by the noncertificated person and that the article is airworthy before approving it for return to service." 14 C.F.R. § 145.217(b)(2), (3). For this reason the FAA routinely speaks of certificated entities – and not of noncertificated ones – taking "airworthiness *responsibility*" in the maintenance context. *See* **JA at 3**; *accord, e.g.,* 14 C.F.R. § 121.363. The agency's own pronouncements thus confirm that workers for ***non***certificated shops are ***not*** "*responsible for* safety sensitive functions."

## II. The FAA violated the RFA by refusing to consider, as part of its mandated RFA review, any costs imposed on non-air-carrier small businesses on the theory that such businesses were not "directly regulated" by the statute.

The RFA imposes procedural requirements that reach beyond those imposed by the APA whenever proposed agency action will have a "significant economic impact on a

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2005) (adding that "traditional tools of statutory construction" include "examination of the statute's text, legislative history, and structure[,] as well as its purpose").

substantial number of small entities." 5 U.S.C. § 605(b). In these circumstances an agency must (1) provide special notices for small businesses, *id.* § 609(a); (2) make available an initial regulatory flexibility analysis ("IRFA"), which identifies (among other things) regulatory alternatives that might minimize projected burdens on small entities; *id.* § 603, and (3) after receiving comments on the IRFA, prepare a Final Regulatory Flexibility Analysis ("FRFA") that (among other things) summarizes "the steps the agency has taken to minimize the significant economic impact on small entities" and offers a description of the decision making process for regulatory alternatives. *Id.* § 604(a)(2), (5).

In the NPRM published on Feb. 28, 2002, the FAA acknowledged that repair stations – and not only air carriers – qualified as a "small group entity" for purposes of RFA analysis. **JA at 19**. The FAA nonetheless concluded (even though it did not know how many repair stations qualified as small businesses) that its new rule would "not have a significant impact on a substantial number of small entities," so that further compliance with the RFA was unnecessary. When the FAA again proposed the "at any tier" rule change in the SNPRM of May 17, 2004, the FAA reiterated that "[f]or this rule, the small entity group is considered to be part 145 repair stations" and added that "[m]ost, if not all, of these companies would be considered small entities." **JA at 65**. Again, however, the agency claimed that projected costs attributable to the new rule created no need for RFA compliance, although the agency simultaneously "solicit[ed] comments on this determination, on these assumptions, on the annualized cost per company, and on their annual revenue." *Id.* (In the SNPRM, the agency indicated that repair stations alone would count for RFA purposes, while not even considering the possible impact of the rule on small-business air carriers. *See* **JA at 65**. This stance is ironic – and telling – given the agency's ultimate conclusion under review here that ***only*** small-business air carriers should count for RFA purposes. *See* **JA at 11**.)

In the wake of both the initial and supplemental notices, industry members submitted extensive comments that highlighted the substantial impact the new rule would have on large

numbers of small businesses. They observed (i) that small repair stations would be responsible for monitoring subcontractor compliance with the new drug and alcohol testing regulations, thus necessitating "investments in procedures and personnel," (ii) that "all direct maintenance contractors" would have to "take on the role of human resource auditor for all NCMS down the contract chain"); (iii) that many small subcontracting firms would not be able to meet new testing duties, forcing them "to forsake work from an entire industry," and (iv) that this loss, in turn, would "significantly increase the cost of doing business" for small business repair stations, particularly those firms that "do not have the capital to invest in the equipment and maintenance that their NCMS use." **JA at 81-82.**

The Office of Advocacy of the Small Business Administration also commented on the FAA's RFA analysis. The SBA Office pointedly recommended that "the FAA should publish an Initial Regulatory Flexibility Analysis" because the "FAA lacks a factual basis to support its decision to certify the proposed rule under the RFA." **JA at 67**. The SBA Office reasoned in part that "[t]he requirement that lower tier contractors who perform safety sensitive repairs to components have alcohol and drug testing programs reaches well beyond repair stations and their contractors" and that "[m]etal finishers, parts fabricators, interior restorers, machiners, metallurgical consultants, and rebuilders would be covered." **JA at 69**. The SBA Office also recommended "that the FAA reconsider its determination that costs of less than one percent of the assumed-median revenue [of repair stations] are not significant." *Id.*.

After receiving these comments, the FAA chose to craft its Final Rule in a way that abandoned all prior efforts to show that the new testing regime would not significantly affect certificated-repair-station or other subcontracting small businesses. Instead, the FAA concluded that only those costs imposed *on air carriers* themselves should count for RFA purposes. The FAA reasoned that its own regulations define the term "employer" to include only air carriers, so that "[f]or drug and alcohol testing purposes, certificated repair stations are contractors, and contractors are not regulated employers." **JA at 9**. Citing decisions of this Court, the FAA next

asserted that "the RFA only applies to small entities *directly regulated* by a proposed rule," which in its view included only air carriers. **JA at 11**. As stated by the FAA:

> [W]e have determined we are not required to conduct an RFA analysis including considering significant alternatives, because contractors (including subcontractors at any tier) are not the "targets" of the proposed regulation, and are instead indirectly regulated entities.

**JA at 10**.

As this procedural history demonstrates, the FAA sharply altered its approach to the RFA during the rulemaking process – first utilizing a fact-based analysis in finding no significant impact on repair-station small businesses, and then advocating a purely legal argument that wholly ignored the rule's effect on repair stations, on the ground that they were not "directly regulated." This flip-flopping by the agency itself casts doubt on the FAA's recently hatched no-direct-regulation contention. That doubt is accentuated because this Court's pronouncements suggest that RFA analysis must consider regulatory consequences for small businesses when they are directly "affected" or "directly impacted" – and not only when they are directly "regulated" – by a proposed agency rule. *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 868-69 (D.C. Cir. 2001). Even if this were not the case, however, there can be no doubt that the Final Rule does "directly regulate" numerous small business entities in addition to air carriers. At least three independent reasons establish why this is so.

***First reason:*** The Final Rule on its face extends testing obligations to employees who perform maintenance-related work "by ***subcontract*** at any tier." It is passing strange to say that such a rule directly regulates air carriers, while not directly regulating the very entities that are parties to the subcontracts that the new rule specifically references. What is more, the essential effects of the new rule will fall on those subcontractors by disrupting *their* operations and by dictating the actions of *their* supervisory personnel. *See, e.g.*, **JA at 63** (noting that new rule "would impose additional reporting and recordkeeping requirements on non-certificated maintenance contractor companies"); **JA at 64** (noting that under new rule, "the employer must

train each supervisor who would make reasonable cause determinations"). To say in these circumstances that the Final Rule does not "directly regulate" the very entities that employ the newly added universe of now-tested employees is to ignore both practical reality and the text of the Final Rule itself.

***Second reason:*** The FAA's own pronouncements reveal that the direct regulatory reach of its new rule extends beyond air carriers. In the SNPRM, for example, the FAA noted that "noncertificated maintenance contractor companies ... *would need to put together* antidrug and alcohol misuse prevention programs *and then implement* them." **JA at 63** (emphasis added). Likewise in the Final Rule, the agency acknowledged that certificated repair stations, under the new rule, "*need to ensure* their subcontractors actually implemented drug and alcohol testing programs...." **JA at 9-10.**[6] Particularly telling is the FAA's assertion that "if the employee refuses to submit to testing . . ., *the employer must* immediately remove the employee from the performance of safety-sensitive functions." **JA at 62** (emphasis added). When the testing obligation concerns a noncertificated subcontractor, this result obviously affects the business operations of the subcontractor – and not of the air carrier – since it will be the subcontractor's supervisory personnel who must reassign the worker to new job tasks. This language of new duties – which accurately depicts the actual impact of the new rule – bespeaks direct regulation on its face. *See generally* **JA at 6** (specifically referring to certificated entities that have "obtain[ed] their own drug and alcohol programs" as "regulated entities").

***Third reason:*** The new rule directly regulates certificated repair stations in the purest possible sense. A basic question is this: Just what happens if a certificated repair station generates maintenance work with the help of a subcontractor whose employees are not properly tested? The answer is that the certificated entity is subject to FAA-imposed sanctions,

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[6] *See also* **JA at 9-10** ("once a contractor chooses to obtain [testing] programs, it must follow the FAA drug and alcohol testing requirements."); **JA at 7** (explaining that certificated repair stations with a testing program "must ensure that any individual performing a safety sensitive function by contract (including by subcontract at any tier) is subject to testing").

including monetary penalties. *See, e.g.*, **JA at 7** ("the FAA will hold the contractor company responsible" for violations of the drug and alcohol testing rules.) It follows easily that the burdens imposed on certificated repair stations by the new rule must count for RFA purposes. After all, if a new agency rule ever directly regulates a business entity, it must be when that rule subjects that entity to a direct monetary penalty.

These facts readily distinguish the authorities relied on by the FAA. In *Cement Kiln*, for example, the court concluded that where a regulation imposed a duty on specified entities (there, hazardous waste processors), another entity not "subject" to the proposed regulation (there, hazardous waste producers that claimed they would be consequentially required to pay higher costs to waste processors) would not count for RFA purposes. In like fashion, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), involved an agency rule that targeted regulated utilities, and was unsuccessfully challenged by wholesale customers of such utilities on the ground that it would adversely affect them by causing a price squeeze in certain states. Here, in contrast to both of those cases, certificated repair stations and their noncertificated subcontractors do not claim they are "directly regulated" simply because they will have to endure consequential economic injuries. Rather, they are themselves "'subject to' the regulation," 255 F.3d at 869, in the determinative sense that the rule imposes real-world duties on them (for example, by forcing noncertificated subcontractors to permit drug-testing on their own premises and by forcing certificated repair stations to ensure that testing occurs under threat of monetary penalties). To say in such circumstances that only air carriers are directly regulated by the new rule is not only to glorify form over substance; it is to ignore even the form of the agency's rule.[7]

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[7] Nor will it do for the FAA to say that certificated repair stations are not directly regulated because – even though subject to penalties – they have voluntarily chosen to work with directly regulated air carriers. One obvious response to this argument is that countless certificated repair stations already existed when the new rule came into existence. For this reason, it is unavailing to say they opted to comply with the new rule; rather, the new rule was foisted upon them. *See* **JA at 9-10** (explaining that if certificated entity already has a drug and alcohol

RFA compliance is not optional; rather, it is "require[d]." *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15 (D.D.C. 1998). And in 1996, Congress made the duties imposed by RFA compliance meaningful by subjecting agency compliance with RFA requirements to judicial review. Congress took this action because "[m]any small business owners believe that agencies have given lip service at best to [the] RFA." 142 Cong. Rec. S3242, S3245 (daily ed. Mar. 29, 1996) (Small Business Regulatory Enforcement Fairness Act – Joint Managers' Statement of Legislative History and Congressional Intent). In this case, too, the FAA gave the RFA "lip service at best," by saying that the FAA would conform with only the "spirit of the RFA" based on the plainly erroneous theory that the Final Rule directly regulated only air carriers. *See* **JA at 10**. This error cannot be deemed harmless because "it is impossible to determine whether a final regulatory flexibility analysis which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities...would have affected the final order when it was never prepared in the first place." *U.S. Telecom Ass'n v. FCC,* 400 F. 3d 29, 43 (D.C. Cir. 2005). For these reasons, this Court should vacate the Final Rule and at a minimum mandate a proper RFA analysis.

More specifically, Petitioners and Intervenors seek a judicial determination that the FAA violated the RFA in promulgating the Final Rule. If the Court opts not to vacate the Final Rule, at a minimum it should order that any enforcement of the drug and alcohol testing rule be deferred until the FAA complies with the RFA. The statute specifically provides for such action unless a court concludes it would not be in the public interest. *See* 5 U.S.C. § 611(a)(4)(B); *see also U.S. Telecom Ass'n,* 400 F. 3d at 43-44 (deferring enforcement of rule).

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testing program in place, "it must follow the FAA drug and alcohol testing regulations," including by complying with the Final Rule). Another response is "So what?" Just because firms voluntarily choose to engage in behavior that subjects them to a regulatory scheme does not mean that those firms are not directly regulated by that scheme. Otherwise, the new rule would not directly regulate even air carriers because those firms voluntarily choose to go into the air transport business. Nor does it make sense to say that a person subject to sanctions because of a relationship with another is, for that reason, only indirectly regulated. It would shock an aider and abettor sent to prison for life, for example, to learn that he was only "indirectly regulated" by the criminal law.

In issuing a remand order, the Court should also direct the FAA to consider specific alternatives to the Final Rule as written. Under the RFA, the FAA must demonstrate that a § 611(a)(4)(B) deferral is not in the public interest. *See U.S. Telecom Ass'n*, 400 F. 3d at 44. Given the evidence provided in Argument IV.B below, the FAA cannot make such a showing. Vacating the illegally promulgated rule, or issuing a stay of it, would also give effect to Congress's express intent in enacting the RFA. *See Northwest Mining*, 5 F. Supp. 2d at 15-16 (imposing stay notwithstanding agency claims regarding statutory obligations).

## III. The FAA's new testing rule violates the Constitution and the APA because it is vague and incoherent when viewed in light of the agency's overarching regulatory scheme.

Basic rule-of-law values dictate that a newly promulgated agency pronouncement may not fundamentally conflict with the broader body of regulations of which it is made a part. *See Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981) (faulting agency rules that "fail to implement congressional mandate in a consistent and reasonable manner"). The Final Rule violates this principle because it is at odds with two core components of the FAA's regulatory regime. ***First,*** FAA regulations have always made it clear that testing obligations extend only to those persons who "perform safety sensitive functions," which for present purposes include only "[a]ircraft maintenance and preventive maintenance duties." 14 C.F.R. Part 121, App, I (III) (E). ***Second,*** the existing regulations specify that only certificated entities or individuals can "perform maintenance," 14 C.F.R. § 43.3, and that only a person who thus "maintains" a component can make an "approval of return to service" of that component. 14 C.F.R. §§ 43.7, 43.9(a)(4). *See also* 14 C.F.R. § 145.213(a) (speaking of need for "certificated repair station" to inspect for airworthiness "each article upon which it has performed maintenance"). The corollary of this second principle is that noncertificated subcontractors cannot "perform maintenance"; instead, when they work on behalf of certificated repair stations, they can only perform "maintenance functions." 14 C.F.R. § 145.217(b)(2) ("[a] certificated repair station may contract a maintenance function pertaining to an article to a noncertificated person").

The FAA's Final Rule is irreconcilable with this overarching framework because it extends testing obligations to noncertificated subcontractors on the theory that they "perform maintenance," *see, e.g.*, **JA at 5** (reasoning that "[s]afety-sensitive functions include all maintenance or preventive maintenance performed for a regulated employer"), even though – precisely because they are ***non***certificated – they ***cannot*** "perform maintenance" under FAA regulations. The FAA cannot have it both ways. To be sure, the agency could provide that noncertificated subcontractors *do* "perform maintenance," with the potential consequence that such entities would have to take on the added duties and privileges that come with making airworthiness determinations. But as long as the FAA does not view noncertificated subcontractors as performing "maintenance," they cannot be brought within a drug and alcohol testing program that specifically limits testing to persons who do perform "maintenance."

The incoherence of the Final Rule is confirmed by the FAA's actions. For example, in its denial of a requested stay of the Final Rule's Oct. 10, 2006 compliance date, the FAA stated:

> The spot cleaning [of a seat cover] task does not meet any of the elements in the FAA's definition of maintenance, and the agency would not consider that task to be maintenance. The fact that in a given case an FAA inspector may require the certificate holder to prepare a maintenance release [i.e., a required record to be completed after maintenance has been accomplished] for either the spot cleaning or the entire cleaning of a seat cover does not make the task maintenance as a regulatory matter.

*See* **JA at 187**. This pronouncement signals that even though an activity (here, spot cleaning of a seat cover) is not considered "maintenance," an FAA inspector may still require a "maintenance record" to be prepared for that activity. This result makes no sense, however, because a certificated repair station must prepare a "maintenance release [record]" only when "maintenance" is performed. 14 C.F.R. § 43.9. Again, the FAA cannot have it both ways. It cannot say that "maintenance" means one thing for drug and alcohol testing purposes and something else for airworthiness-record purposes, when the FAA's own controlling regulations give the term "maintenance" a single, unitary definition equally applicable in both contexts. *See*

14 C.F.R. § 1.1 (defining "maintenance" with no suggestion that the term has different meanings in different settings).

Worse yet, the FAA's recent actions have created intractable uncertainty as to whether practices long considered "maintenance" still constitute "maintenance" in the post-Final-Rule world. Difficulties began with the Final Rule itself, when the agency declared that repairs to entertainment system components performed off the aircraft did not "usually" constitute maintenance, but that removing and replacing the component on the aircraft did. **JA at 9**. The problem was that the agency never explained why entertainment-system-component repairs differed from other component repairs that do constitute "maintenance," and the agency also failed to identify those non-"usual" types of entertainment system repairs that would meet the regulatory definition. In the end, the FAA could do no better than to say that: "Determining whether a particular task fits under the definitions of 'maintenance' or 'preventive maintenance' is the responsibility of the regulated employer, working in conjunction with the regulated employer's assigned FAA principal inspector. Once the principal inspector determines that a task is maintenance or preventive maintenance, the individual performing the task for the regulated entity must be subject to drug and alcohol testing." **JA at 9**. Such "you two figure it out" guidance is not guidance at all, and it threatens precisely the sort of uneven and overinclusive enforcement that constitutes the hallmark of unconstitutional vagueness. *See Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

Later FAA pronouncements only heighten these dangers. For example, on August 15, 2006, the FAA declared that the term "maintenance" does not include the routine practice of "maintenance fabrication," which occurs when a new part is created to replace an old one during the maintenance process. *See* **JA at 176**. Maintenance fabrication, however, has always been considered an aspect of "maintenance," thus triggering the requirement of safety-ensuring airworthiness review by a certificated entity. *See* FAA Advisory Circular 145-9, pp. ii, 34 (**A at 114, 116**; FAA Order 8300.10, Volume 2, Chapter 161, pp. 161-4, 161-5 (**A at 110-111**). The

FAA's apparent departure from its past practice of requiring airworthiness reviews in this context not only heightens safety dangers; it also has engendered widespread confusion in the industry by reconceptualizing (despite the absence of any notice or comment process) what constitutes "overhaul, repair, preservation, and . . . replacement" within the regulatory definition of "maintenance." 14 C.F.R. § 1.1.

No less troubling is the agency's recent proclamation that "[c]leaning by itself is not considered maintenance." **JA at 178.** This "guidance" -- which was made in the context of assessing whether testing is required for those who clean aircraft seat covers – rested on the idea that cleaning is not "maintenance" because that action is only a portion of an "overhaul," and it is only the overhaul itself that can qualify as "maintenance." **JA at 177-178.** This analysis is mystifying: (i) because it focuses myopically on the term "overhaul" (and ignores the term "preservation") in the definition of "maintenance"; (ii) because it overlooks the fact that the term "preventive maintenance" includes even "simple or minor preservation operations"; (iii) because it logically dictates that all forms of cleaning by itself (including of critical engine parts) are not "maintenance"; and (iv) because it ignores the effects of seat-cover cleaning on compromising the flame-retarding quality of aircraft fabric, which is a regulatory requirement. 14 C.F.R. §§ 25.853(c), Part 25, Appendix F and 121.312(b).

The confusion spawned by the FAA's treatment of "maintenance" as part of its promulgation of the Final Rule would be bad enough standing alone. But problems have been greatly magnified by a distinctive feature of the FAA testing program. The difficulty is that a firm cannot err on the side of caution by engaging in testing whenever faced with conditions of uncertainty, because if the firm does so and "maintenance" is not being performed, the firm will violate the DOT mandate that its pool of covered employees not be diluted by the testing of non-covered employees. *See* 49 C.F.R. § 40.347(b)(2). This program feature puts certificated repair stations and their noncertificated subcontractors in a "Catch-22" situation – they may not perform work without a testing program because they might be doing "maintenance," yet they

cannot institute a testing program unless they are sure they are performing "maintenance." Coupled with the uncertainty that pervades the FAA's current definition of "maintenance," this aspect of the FAA program places industry members in an intolerable position.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is vague and standardless." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The profound uncertainties created by the agency's newfangled approach to defining "maintenance" – particularly when coupled with the essential incoherence of that approach in the overall regulatory setting – shows why the FAA has run afoul of this constitutional restriction, as well as analogous constraints imposed by the APA. *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).

## IV. The Final Rule violates the APA.

The APA specifies that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or made "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),(D). In promulgating the Final Rule, the FAA violated these constraints by (1) erroneously insisting that the Rule merely "clarifies pre-existing practice," (2) basing the Rule on groundless justifications, and (3) ignoring undisputed evidence that demonstrates the Rule's inefficacy and far-reaching costs.

### A. The FAA's mischaracterization of its action as a mere "clarification of preexisting practice" tainted all aspects of the rulemaking process with error.

At every step in the rulemaking process, the FAA sought to downplay the significance of its actions by claiming that it was merely "clarifying" the manner in which its drug and alcohol testing rule was already operating. In its NPRM, for example, the agency asserted that "this is not a substantive change." **JA at 18**. In the SNPRM, the FAA stated that "we are simply clarifying the regulations." **JA at 64**. And in the Final Rule, the agency again insisted that: "This final rule does not expand the scope of FAA-regulated drug and alcohol testing programs.

Rather, it clarifies ...." **JA at 4**; *accord, id.* ("[W]e have not changed the scope of who is required to conduct testing. We are merely clarifying ....").

These assertions ignore reality. From the time the FAA instituted substance-abuse testing in 1989, non-air carrier businesses involved in maintenance-related activity (other than air carriers themselves) were not required to test their employees unless (1) they contracted directly with an air carrier and/or (2) they were a certificated repair station. Thus, testing duties did *not* extend, as the Final Rule says, to all subcontractors "at any tier." The FAA itself acknowledges that its original testing rule did not extend to employees of non-certificated subcontractors. Thus, "[i]n the initial implementation phase of the drug testing rule," in 1989 and 1990, the FAA published "informal guidance . . . provided widely to persons and companies," **JA at 60**, that specified "that maintenance subcontractors would not be required to engage in drug and alcohol testing unless they took airworthiness responsibility ...." **JA at 18**. The FAA document based this on the unique set of quality control requirements contained in the regulations. The agency also acknowledges that it provided this same guidance into the mid-1990s -- including through 1991 when Congress enacted the OTETA. *See* **JA at 18**; *see also* **JA at 19**. The FAA nowhere suggests that it published – either formally or informally – any guidance requiring employees of noncertificated subcontractors to be tested at any time before the start of this rulemaking proceeding.

Instead, the agency says that, sometime during the mid-1990s, it fundamentally altered its longstanding testing rule on an industry-wide basis, without formal action, by writing "numerous letters." FAA Opposition to emergency stay at 19 n.2 (filed Oct. 13, 2006). The record does not include any information on the number or nature of letters sent out by the agency. But one thing is clear: Whatever the scope of this correspondence, few (if any) certificated repair stations or other entities received word of the FAA's supposed reversal of regulatory direction. It was for this reason that when the FAA finally did announce its intention to require testing of employees of non-certificated subcontractors in the NPRM and SNPRM, the

industry immediately responded by decrying this "drastic change." **JA at 81**. The transformational impact of the Final Rule is confirmed by the fact that the FAA has pointed to no case in which anyone, anywhere was ever sanctioned for violating its supposedly longstanding noncertificated-subcontractor testing requirement. And no such sanction was ever imposed even though workers for noncertificated subcontractors, as a matter of routine practice, went untested until the Final Rule took effect in October 2006.

The FAA's actions during the rulemaking process itself confirm that the Final Rule marks an abrupt break from, rather than a "clarified" continuation of, the FAA's preexisting regulatory regime. The agency's undertaking of a full-scale notice-and-comment process itself signals that the agency recognized its action went beyond merely clarifying preexisting practice. In addition, when the FAA published its SNPRM, it indicated that it would "rescind all conflicting informal guidance regarding subcontractors" only "*upon publication of the final rule* on this issue." **JA at 60** (emphasis added). Thereafter, the Manager of the FAA Drug Abatement Division notified industry members that "because we postponed our decision on the testing of subcontractors until the SNPRM is resolved by a final rule, *the regulation currently does not require repair stations to ensure that individuals or entities performing for them are included in their program or another program.*" *See* **JA at 57** (emphasis added). The point is clear: If the FAA was "clarifying" anything, it was clarifying a previously undisclosed approach to drug and alcohol testing directly at odds with earlier-published guidance that had shaped the industry's actions and reliance for the past 18 years. In fact, the agency never purported to withdraw its prior guidance on this subject until it promulgated the Final Rule. *See* **JA at 3**.[8]

Two fatal legal defects flow from the agency's inaccurate portrayal of the new rule as reflecting business-as-usual. ***First,*** this flawed depiction of the new rule's practical impact

[8] Notwithstanding these facts, the FAA oddly asserts that its "regulations have *always* required regulated employers to ensure they tested or their contractors tested all contractor and subcontractor employees performing safety-sensitive functions for the regulated employers." **JA at 8** (emphasis added). This plain misstatement illustrates the FAA's defective logic.

rendered the agency's notices of proposed rulemaking misleading and thus procedurally improper. *See* A. Aman & W. Mayton, *ADMINISTRATIVE LAW* 49 (2001) (noting "rule of thumb" that notice must "fairly appraise interested parties of the subjects and issues the agency was considering" and collecting cases). ***Second,*** the agency's mischaracterization of the context in which it acted infected all phases of the decisionmaking process with substantive analytical error. In declining to undertake an RFA review in its SNPRM, for example, the FAA reasoned that: "As this proposal would simply *emphasize* sections of *existing* regulations, no alternatives [to the proposed rule] were considered." **JA at 64** (emphasis added). Likewise, in promulgating its Final Rule, the FAA reasoned that it "it would be inconsistent with aviation safety to *change* the regulations so that regulated employers are *no longer* required" to ensure the testing of noncertificated subcontractor employees. **JA at 3** (emphasis added). The agency added that: "As this final rule *is not adding more regulatory requirements*, the 'reasonable government purpose' of aviation safety that has been the foundation of the drug and alcohol testing regulations since their inception *remains* valid." **JA at 4** (emphasis added). Likewise, in evaluating the new program's impacts on the maintenance industry, the agency said that: "[T]he FAA is *not changing* the current regulations, but is simply clarifying them. As such there should be *no additional costs*." **JA at 11** (emphasis added).

The bottom line is that at every turn in the rulemaking process, the FAA asserted that the legal baseline of its actions was one according to which employees of noncertificated subcontractors were *already subject* to drug and alcohol testing. A legal baseline does not come into being, however, simply "because the agency says so" pursuant to "an ipse dixit approach." *D&F Afonso Realty Trust v. Garvey,* 216 F.3d 1191, 1196 (D.C. Cir. 2000). In reality, the baseline repeatedly relied on by the FAA did not exist in law or in fact – which is precisely why a formal new rulemaking was undertaken, during the pendency of which the agency refused to require noncertificated-subcontractor testing. A final order premised on a view that so inaccurately depicts, and "self-servingly characterizes," the legal setting in which

the agency has acted offends the APA. *Advocates for Hwy. & Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d 3d 1136, 1147 (D.C. Cir. 2005).

### B. The FAA's basic reasons for adopting its greatly expanded drug and alcohol testing rule fall short of meeting minimum APA requirements.

Even if the Final Rule somehow qualifies as a mere "clarification," it is arbitrary and capricious because the FAA has not properly justified its adoption. The FAA's case for greatly widening its drug-and-alcohol-testing net rests on logic rooted in (1) consistency and (2) need. Each of these justifications, however, is "so implausible" and so lacking in "satisfactory explanation" that the Final Rule cannot stand under well-settled APA standards. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, at 43 (1983).

***(1) Consistency.*** The FAA emphasizes that employees of certificated entities have long been subject to its safety-driven testing program, and according to the FAA: "[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 persons performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing." **JA at 6**. This rationale fails because it equates apples with oranges. It makes perfect sense to distinguish between certificated and noncertificated entities, given (i) the closely regulated nature of certificated repair stations, (ii) their unmistakable operation within the aviation industry, (iii) their routine interaction with air carriers, and (iv) their distinctive responsibility for ensuring the airworthiness of maintained equipment. That is why for the past 18 years the FAA itself has drawn precisely this distinction. In short, the FAA's consistency rationale is arbitrary and capricious because it depends on analogizing two fundamentally non-analogous groups. *See, e.g., Shays v. Fed. Election Comm'n*, 414 F.3d 76, 100 (D.C. Cir. 2005) (overturning agency's 120-day safe harbor rule because justified by a faulty analogy between voter registration drives and candidate-centered advertising).

***(2) Need.*** The agency's core justification for its new rule focuses on perceived need. The agency reasons that "if drug and alcohol testing could be avoided by simply sending the maintenance work to a subcontractor, a company could form separate subsidiaries within its organization in order to create an internal subcontracting system that avoids drug and alcohol testing." **JA at 6**; *see also* **JA at 62**. This supposed danger, however, is without any support in the record – not surprisingly, because the FAA could easily respond to such sham arrangements with a targeted piercing-of-the-corporate-veil rule. In seeking to address this remote risk with a testing rule that sweeps in thousands of ordinary employers operating outside the aviation industry, the FAA has sent an army to kill an ant. Such a wildly overinclusive solution to a wholly hypothetical difficulty is arbitrary and capricious.

The FAA also has attempted to justify its extension of drug and alcohol testing to noncertificated subcontractors by relying on the intrinsic value of testing as an aid to enhanced safety. In taking this position, however, the FAA has offered no meaningful response to industry objectors' core counterargument—namely, that the FAA's already-existing requirement of "airworthiness" reviews by drug-and-alcohol-tested experts (a requirement that applies at *both* the certificated-repair-station and the air-carrier levels and that applies to each and every item of maintenance-related work) renders the FAA's extension of its testing program duplicative and unnecessary. To be sure, 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. Simply catching more drug and alcohol users, however, 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. In its Final Rule, the agency failed to make such a showing for each of the following reasons:

***Reason 1:*** The agency concedes that "there have been no documented aviation accidents directly attributed to the misuse or abuse of drugs or alcohol." **JA at 64**. Consistent with this concession, the agency cites no evidence that any accident has resulted from drug or

alcohol use by any worker employed by any noncertificated subcontractor. Nonetheless, the FAA hypothesizes that its new rule will avert "one . . . part 135 accident over the next 20 years." **JA at 64**. This wholly hypothesized prediction cannot support the Final Rule because it rests entirely on "speculative assumptions" and a "theoretical chain of events." *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1073-74 (D.C. Cir. 2003); *accord, e.g., Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1042 (D.C. Cir. 2002) (declining to accept agency rationale that "is wholly unsupported and undeveloped" or even to credit agency's attribution of future benefits based on "a single, barely relevant study").[9]

***Reason 2:*** The FAA's failure to show any meaningful risk posed by untested noncertificated subcontractor employees is not surprising given the strict requirement of individualized, dual-level airworthiness reviews conducted by persons who are themselves subject to testing. The FAA acknowledges that its new testing program builds "redundancies" into the drug and alcohol testing system **JA at 5**, but it offers no explanation why such redundancies are justified. The FAA makes no claim, for example, that its safety-protective system of airworthiness review is prone to failure or that drug-and-alcohol-induced lapses are more likely than other lapses to go undetected in the airworthiness review process. Faced with these difficulties, the FAA relies on a proclamation that "[t]he airworthiness sign-off process is not designed to address the safety risk arising from safety-sensitive functions performed by individuals who use illegal drugs or alcohol." **JA at 6**. This line of reasoning is arbitrary and capricious because it is flatly wrong. The airworthiness sign-off process is *obviously* designed to address *all* safety risks, not only those risks resulting from causes other than drug and alcohol use. *See, e.g.*, 14 C.F.R. 43.5, 145.217(b)(3). The FAA's contrary suggestion renders

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[9] This rationale fails to support the Final Rule for two other reasons as well. First, even the agency's calculation of program benefits based on the hypothesized avoidance of one accident – said to be $10.59 million over the next ten years, **JA at 1** – is far exceeded by properly calculated program costs. (*See* pp. 38 -39 *infra.*) Second, the agency's makeshift calculation misstates safety benefits because as explained below in ***Reason 4***, the agency's analysis wholly ignores offsetting *safety dangers* that the new rule creates.

its order invalid because an agency cannot reject a core challenge to a proffered rule with reasoning that "makes no apparent sense." *Verizon Tel. Co. v. F.C.C.*, 374 F.3d 1229, 1233 (D.C. Cir. 2004).

***Reason 3:*** The FAA never considered whether the sort of errors that noncertificated-subcontractor employees might commit would pose serious, limited, or essentially non-existent threats to safe aircraft operations. This omission is particularly troublesome because some commenters – consistent with the fact that the FAA's own regulations distinguish between "major repairs" and "minor repairs," 14 C.F.R. § 1.1 – specifically urged the FAA to limit noncertificated-subcontractor testing to only those maintenance functions that posed meaningful safety threats. *See* **JA at 9** (noting ATA's comments recommending no testing for "types of 'maintenance' that do not have the potential to directly impact airworthiness"). In declining to consider such an approach, the FAA woodenly declared that its "testing regulations do not differentiate between safety critical and non-safety critical forms of maintenance," and that "[t]here is no 'non-safety maintenance' recognized in our regulations." **JA at 5**. The agency went on to openly acknowledge that it had not considered any such less restrictive forms of regulation prior to promulgating the Final Rule. **JA at 10**; *see also* **JA at 64** (acknowledging that "no alternatives were considered"). This omission renders the Final Rule invalid, without more, because under the APA an agency *must* "explain why an alternative approach . . . is not preferable to the approach [the agency] approved." *Process Gas Consumers Group v. FERC*, 177 F.3d 995, 1066 (D.C. Cir. 1999); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) (must consider "prudent alternatives").

***Reason 4:*** Finally, while trumpeting a safety rationale, the FAA made no effort to evaluate the actual *net* safety effect of its Final Rule. The basic consequence of the Rule is clear: It redirects FAA enforcement resources from the certificated entities on which the preexisting testing regime focused to a much larger number of now-to-be-tested workers, including all employees of noncertificated subcontractors who perform even the most minimal

amount of maintenance-related work. To say the least, it is not clear that this revised regulatory strategy will increase air safety. By stealing away agency inspector resources previously used to monitor workers who actually make critical airworthiness determinations, the Final Rule may well have an overall negative safety effect. As comments in the rulemaking process revealed, the FAA's burdensome new testing rule will inevitably drive away many well-qualified and experienced noncertificated entities that previously served the industry as subcontractors. *See, e.g.,* **JA at 81**. In similar fashion, highly skilled individual employees – particularly those who have the greatest employment mobility due to strong aptitude and experience – may abandon their jobs with noncertificated subcontractors upon being forced to endure the demeaning intrusions posed by drug-and-alcohol testing. For all these reasons, there is every reason to conclude that the new rule will have a net *negative* safety impact. At the least, the agency's failure even to consider this possibility renders the Final Rule unlawful. *See Process Gas,* 177 F.3d at 1006 (finding agency action based on concededly "proper consideration" of revenue maximization invalid under the APA because it "[i]gnored the serious potential problems" with regard to challenged action's advancement of that goal).

Members of the aviation maintenance industry have a deep, abiding, and long-evidenced commitment to the vital goal of ensuring safe travel by air. That commitment, however, is not a commitment to symbolic gestures, bureaucratic overreaching, or needless federal-government intervention into distinctly local workplaces. Instead, it is a commitment to *genuine* air travel safety. The FAA has violated the APA because its "discussion cites no evidence that the final rule would achieve that goal" in the real world. *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.,* 429 F.3d 1136 (rejecting agency rule based on safety benefits purportedly generated by averted truck crashes on this ground). *Accord, e.g., Fox Television,* 280 F.3d at 1043 (rejecting agency action based only on a "blithe assurance" that it would advance statutorily authorized goal; reasoning that agency "did not provide an adequate basis for believing the Rule would in fact further that cause").

### C. The FAA violated the APA by failing to respond in a meaningful way to core objections to the proposed rule raised during the notice-and-comment process.

In its Final Order, the FAA purported to respond in a lengthy and studious fashion to the many objections lodged in response to the NPRM and SNPRM. The *form* of the FAA's Final Rule gives the appearance that the agency acted with the sort of procedural care mandated by the APA. The *substance* of the Final Rule, however, reveals just the opposite: the agency ignored the core objections raised during the notice-and-comment process. Those objections focused on (1) adverse financial consequences for industry employers and (2) invasions of employee privacy.

***a. Business costs.*** Industry members emphasized the added operational costs that the new rule would impose on noncertificated subcontractors, together with ripple-effect dislocations for air carriers and certificated entities. The FAA responded to this core objection by observing that "none of the commenters opposing the proposal provided specific data challenging the FAA's fundamental economic assumptions." **JA at 3**. This linchpin component of the agency's analysis is "flatly contradicted" by the record, thus rendering the Final Order flatly incompatible with the APA. *See Advocates*, 429 F.3d at 1146.

In the NPRM, the FAA estimated that its new rule would require "[a]pproximately 300 non-certificated maintenance contractors" with "about 5,500 employees in 2004" to develop new drug and alcohol testing programs, with a resulting 10-year cost to these businesses of about "$3.57 million ($2.67 million discounted)." **JA at 64**; *see also* **JA at 11** (relying in Final Rule on nearly identical numbers, as applied in 2006, to conclude that "this rule has benefits that justify its costs"). Comments submitted to the FAA demonstrated in powerful fashion why the cost-estimating methodology used to generate these numbers was deeply flawed. *See, e.g.*, **JA at 80-83**. Even more important, industry members responded to these projections by undertaking a two-stage survey of both certificated repair stations and noncertificated

subcontractors that generated hard numbers from which cost estimates could be meaningfully drawn. The data obtained in this process obliterated the FAA's economic calculations.

***First,*** the survey results identified, by actual name, 577 separate noncertificated subcontractors – almost twice the FAA's initial estimate – that (1) were then being utilized by certificated repair stations to assist in performing maintenance work and (2) did not have in place drug and alcohol testing programs. ***Second,*** a distinguished aviation industry economist – reasoning from the fact that this data was attributable to survey responses that represented 8% of certificated repair stations – concluded that the "actual population" of noncertificated subcontractors "will be significantly larger." **JA at 90**. ***Third,*** the expert noted that survey respondents reported a weighted average use of 4.53 noncertificated subcontractors per repair station, and he extrapolated from this uncontested ratio that "the true estimation of the population of [noncertificated subcontractors] lies in the range of 12,000 to 22,000." **JA at 90**. Because this 12,000-22,000 figure included only subcontractors, and not sub-subcontractors or others at lower tiers of the contracting chain, industry commenters rightly observed that "[t]he true number may be exponentially larger." **JA at 78**. Evaluating all this evidence, the expert stated categorically that the FAA's claim that only 297 subcontracting firms would be affected by the rule "should be rejected by any use of the scientific method," **JA at 89**; that the FAA's number "has no statistical or other scientific significance," **JA at 89**; and that, for these reasons, "[t]his rulemaking stands out as an exception to FAA's long standing exemplary record in using the scientific method in designing safety regulations," **JA at 92**.

To assert, as the FAA does, that industry members did not "provide substantial economic data challenging the FAA's fundamental economic assumptions" is to ignore the "relevant data" in a manner fundamentally at odds with APA requirements. *See, e.g., Am. Tel. and Tel. Co. v. F.C.C.*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (stating that an agency, under the APA, "must examine" such data); *Process Gas*, 177 F.3d at 1003 (overturning agency's action

because it "must ... explain its choice of a data set in the face of an objection," particularly where its reasoning was "unpersuasive and largely conclusory").

The FAA's head-in-the-sand analytical approach did not apply only to its calculation of the number of noncertificated contractors that would be affected by its new rule. The FAA also asserted that whatever that number might be, "the commenters have not provided any . . . information to support an assumption the proposal would alter expectations and contractual relationships with non-certificated entities," **JA at 7**, or to show that "non-certificated subcontractors would cease providing service to the aviation industry." **JA at 9**. These assertions are impermissibly "baffling in light of the evidence in the record" because they ignore the record altogether. *Advocates,* 429 F.3d at 1146. Comments submitted to the agency, for example, detailed how the new rule's requirement of much-expanded monitoring responsibilities would greatly alter relations between certificated repair stations and noncertificated subcontractors, while significantly increasing costs in the process. *See* **JA at _____** (noting resulting need for "costly overhaul of the processes and procedures involved in contracting with [noncertificated subcontractors]"). Even more telling were survey results to the effect that "more than 55% of [noncertificated subcontractors] with annual revenues under $750,000 would stop performing aviation maintenance if required to participate in a D&A program"; that "over ten percent of [noncertificated subcontractors] for whom aviation related work comprises at least 90% of their business would leave the industry if they were required to screen their employees"; and that "[n]early 45% of [noncertificated subcontractors] for whom aviation maintenance comprises less than ten percent of their business would leave the industry if the proposed rule were enacted." *See* **JA at 81**. Contrary to the FAA's dismissive assertions, these concrete numerical data revealed exactly what industry members predicted at the outset – that the new rule will "increase the costs of aviation maintenance at a time when the industry can least afford it and create an incentive for non-aviation companies to withdraw their support from the industry." *See* **JA at 32**; *See also Advocates*, 429 F.3d at 1147 (overturning order where

agency "largely ignored the evidence . . . without reasonable explanation").

***b. Privacy Costs.*** The second objection leveled against the agency's new testing rule focused on its triggering of countless invasions of privacy through the administration of pre-employment, reasonable-suspicion, incident-based, and ongoing random testing, including for employees with flawless past work records and no hint of prior substance abuse. *See* **JA at 4-5**. The agency responded to this concern by dismissively declaring that: "[T]he issues regarding invasion of privacy were resolved more than 15 years ago when the drug testing regulation carefully balanced the interests of individual privacy with the federal government's duty to ensure aviation safety." **JA at 4**.

This response was no response at all. How the privacy/safety balance was struck in the FAA's original 1989 testing rule tells us nothing about the appropriateness of the fundamentally different balance struck by the new 2006 rule, which presents much-heightened privacy concerns precisely because it greatly expands the scope of the testing program. Again, the FAA brushed aside this concern by observing that "[t]he purpose of this rulemaking is not to reopen the long-settled issue of invasion of privacy." **JA at 4**. Under the APA, however, the agency had no choice but to "reopen" its consideration of this foundational issue because a rule is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43.[10]

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[10] *Accord, e.g., Advocates,* 429 F.3d at 1147; *Sithe/Independence Power Partners v. FERC,* 285 F.3d 1, 4-5 (D.C. Cir. 2002) (finding agency action arbitrary and capricious because agency response to challenge was "perfunctory" and "a cursory response will not do"); *Shays,* 414 F.3d at 102 (overturning rule because agency failed to "carefully consider" key questions raised in the rulemaking process). The agency's wholesale failure to take account of employee privacy interests created a particularly clear error because, in 49 U.S.C. § 45104(1), Congress specifically directed the FAA to consider employee privacy concerns as it fashioned regulations under the OTETA. *See generally Mo. Pub. Serv. Com'n v. FERC,* 337 F.3d 1066, 1076 (D.C. Cir. 2003) (invalidating agency action because "[t]he orders under review do not consider . . . relevant factors and are therefore arbitrary and capricious"); *D&F Afonso Realty Trust v. Garvey,* 216 F.3d 1191, 1196 (D.C. Cir. 2000) ("the agency cannot claim to be engaging in reasoned analysis when it cavalierly brushes off specific mandates").

If ever there were a case where this Court should not hesitate to subject agency action to the "meaningful review" required by the APA, it is this one. *See Dickinson v. Zurko,* 527 U.S. 150, 162 (1999) ("[t]he APA requires meaningful review"). For almost 20 years, the FAA testing program has worked well, and the industry – in an all-out effort to promote air safety – has acquiesced in already-sweeping applications of the agency's testing authority. Now, by way of a so-called "clarification," the FAA has broken faith with this longstanding, effective, and collaborative arrangement by extending a federal drug-and-alcohol-testing program into the smallest and most local businesses, which – precisely because they are small and local -- are least able to bear resulting costs. And the FAA has taken this action in the sensitive field of drug and alcohol regulation, where obvious temptations exist for authorities to act not for genuinely permissible safety purposes but to "demonstrate the determination of the Government to eliminate this scourge of our society." *Von Raab,* 489 U.S. at 687 (Scalia, J., dissenting). Leading commentators have suggested that courts should be particularly vigilant in applying the APA when, as here, "an agency discontinues a previous policy"; as a result "serious or publicly harmful consequences are likely"; and the risk exists that "politically motivated" concerns, at least subconsciously, factored into the agency's decision. A. Aman & W. Mayton, *ADMINISTRATIVE LAW* 528-29 (2001). This principle applies here if it applies anywhere, but in the end this Court need not address the question, because the Final Rule plainly departs from even the *most minimal* APA requirements.

## V. By mandating random drug and alcohol testing of ordinary workers in the absence of justifying need, the Final Rule violates the Fourth Amendment.

Governmentally required drug and alcohol tests are searches for Fourth Amendment purposes and therefore must be "reasonable" to meet constitutional requirements. *Skinner v. Railway Labor Executives, Ass'n*, 489 U.S. 602 (1989). In applying this standard, "courts must engage in a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller,* 520 U.S. 305, 314 (1997); *Stigile v.*

*Clinton,* 110 F.3d 801, 804 (D.C. Cir. 1997) Courts must also bear firmly in mind that the "main rule" of the Fourth Amendment requires individualized suspicion for any search to proceed, *Chandler,* 520 U.S. at 319; *accord Nat'l Treasury Employees Union v. Yeutter,* 918 F.2d 968 (D.C. Cir. 1990), and that "special needs" support departures from this requirement only in a "closely guarded category" of cases, *Chandler,* 520 U.S. at 309. Of particular importance is the deep constitutional aversion – rooted in the American colonial experience – to "dragnet" searches directed at large numbers of wholly innocent persons. These principles cast a long shadow over the newly expanded FAA testing program, particularly in light of two key program features.

***First,*** drug and alcohol tests are by nature highly invasive because forced urinalysis entails a government-ordered intrusion into the body, built around the demeaning process of mandated and monitored urination, and the government's testing of body chemistry carries with it the potential to disclose "a potential gold mine of information" about the tested person.[11] ***Second,*** the FAA program involves the most dragnet-like screening program possible – a random system potentially used at any time on any employee throughout the entire post-hiring period.[12] Although the Supreme Court has never endorsed a random testing program in the employment context, this Court has upheld some random-test rules and invalidated others in a series of decisions that focus closely on the contested program's distinctive characteristics.

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[11] David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment*, 48 U.Pitt. L. Rev. 201, 209 (1986); *accord Skinner,* 489 U.S. at 617. *See also Skinner*, at 626 (emphasizing that urine testing involves "an excretory function traditionally shielded by great privacy"); *Stigile,* 110 F.3d at 803-04 (noting that, because a urine test requires the "humiliating experience" of performing "a quintessentially private act in the presence of another," it entails the invasion of a "serious and legitimate privacy interest").

[12] *See Harmon v. Thornburgh*, 878 F.2d 484 (D.C. 1989) (noting that "the random nature of the ... testing plan is a relevant consideration"); *accord Nat'l Treasury Employees Union v. U.S. Customs Serv.,* 27 F.3d 623, 629 (drawing on Supreme Court's analysis in *Von Raab* in observing that "[r]andom drug testing represents a greater threat to an employee's privacy interest than does mandatory [pre-employment] testing"); *Willner v. Thornburgh,* 928 F.2d 1185, 1189-90 (D.C. Cir. 1991) at 1189-90 (same).

Under these precedents, the testing program at issue here offends the Constitution for at least three separate reasons.

***Reason 1: ban on "ordinary citizen" testing.*** The strong presumption against dragnet searches applies with greatest force when, as here, the Government targets a broad swath of ordinary citizens who have chosen *not* to work for the Government. *See Yeutter,* 918 F.2d at *972* (distinguishing between testing for "individuals whom the government pays to transport individuals and [testing for] individuals who drive on their own time"). Where a program targets a wide range of private citizens, courts have upheld testing only when those citizens' employment within a "highly regulated industry" substantially reduces expectations of privacy. The Final Rule, however, subjects large numbers of non-airline-industry workers to mandatory random testing precisely because it reaches all the way down the chain of contractual privity to sweep in workers "at any tier." By way of example, when an aircraft seat belt buckle is sent to a family-owned sub-sub-contractor machine shop that primarily services car parts, the Final Rule requires the workers of that shop who treat the buckle to submit to full-scale testing. But it is untenable to say that the machine shop and its tested workers operate within the "heavily" or "intensely" regulated airline industry. Rather, they operate within the highly disbursed and highly local machine shop industry, which by its nature is *not* subject to "pervasive" government control. As one court has put the key point: "ordinary persons working ordinary jobs do not have the expectation that they are subject to searches without reason." *State ex rel Ohio AFL-CIO,* 780 N.E.2d 981 (2002); *see Yeutter,* 918 F.2d at 974 (echoing the need for limits on testing "ordinary employees" even by way of suspicion-based drug tests). This basic principle controls this case.

***Reason 2: restriction on sweeping non-suspicion-based testing.*** The constitutional restriction on non-suspicion-based testing of ordinary employees applies with special force because the testing rule affects the broadest possible spectrum of workers. Under the Final Rule, full testing requirements now extend to any subcontractor employee who

performs any amount of work, however small, for up-the-line use by an air carrier. Difficulties are exacerbated because the FAA's mandate extends not only to workers who themselves do test-triggering work, but also to "any assistant, helper, or individual in a training status" who participates in that task. **JA at 13.** In addition, the FAA has defined the activities that trigger testing duties in terms that are both extremely expansive (because it covers "*any* maintenance or preventive maintenance," which includes even "simple or minor preservation operations") and highly indeterminate (for reasons set forth at pp. 26-28 *supra*). For all these reasons, the Final Order offends Supreme Court precedent that insists upon "certainty and regularity" in administrative search programs, so as to create "appropriate restraints upon the discretion of the inspecting officers" and thereby provide "a constitutionally adequate substitute for a warrant." *New York v. Burger,* 482 U.S. 691, 711 (1981).

Particularly troubling is the requirement that even pre-existing subcontractor employees must now submit to a program of both initially uniform, and subsequently random, testing. It is odd on its face for the FAA to extend its program of "preemployment" testing to persons who are already employed. Even more important, strong considerations of policy and fairness cut against the propriety of testing pre-existing workers. As this court explained in *Willner,* because employers necessarily have had the chance to "monitor an incumbent's performance," the case for permitting suspicionless job-qualification substance-abuse tests is greatly reduced in this setting. *See* 928 F.2d at 1188, 1190, 1193-94 (also emphasizing that government must meet a higher degree of justification to engage in "random testing of those already employed" because there is "an important distinction" between the prospect of not getting a job and of losing a job one already has). No less important, a person who joined a now-covered company, perhaps years ago before any drug testing program was created, obviously did so without any reasonable expectation that invasive testing would be part of the job. *See Transp. Inst. v. U.S. Coast Guard,* 727 F.Supp. 648, 654-55 (D.D.C. 1989) (emphasizing that "privacy interests" of incumbents "are greater than" those of applicants).

***Reason 3: new testing program is unreasonable because it is unjustified.*** The FAA's expansion of its testing program offends the Fourth Amendment because it simply "is not needed." *Chandler,* 520 U.S. at 320. As already explained, "[n]othing in the record suggests that the hazards respondent broadly describe are real and not simply hypothetical." *Id.* at 319. Of particular importance for Fourth Amendment purposes, there is no indication that ordinary monitoring and suspicion-based testing – which are always strongly preferred in the Fourth Amendment context – would be ineffectual in dealing with drug and alcohol problems among noncertificated-subcontractor employees.[13] Most important, the testing of noncertificated subcontractor employees involves conceded "redundancies" because the persons who are legally charged with ensuring airworthiness are already being tested. **JA at 5**. Because random testing of any private employee pushes the Fourth Amendment to its limit, there should be no doubt that the FAA's *duplicative* random testing program takes the Constitution past its breaking point. The government may not – even in mandating non-random testing – define "the category of employees more broadly than is necessary." *Von Raab,* 489 U.S. at 678. *See also Nat'l Treasury Employees,* 27 F.3d at 627 (insisting that testing rule may not be "overly broad"). Yet that is exactly what the FAA has done here.

Earlier cases in which this court has upheld random testing are readily distinguishable from this one.[14] Most important, the FAA's now-much-expanded testing program differs

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[13] *E.g., Chandler,* 520 U.S. at 521 (finding there to be a "telling difference" for random drug-testing purposes between employees who are subject to "day-to-day supervision" and those who are not); *National Federation of Federal Employees* v. *Cheney,* 884 F.2d 603, 614-15 (D.C. Cir. 1989) (disallowing drug tests even for Army-employed drug-testing laboratory workers because intoxication "might...easily be detected by supervisory personnel" and "there is nothing to indicate [that these workers] possess diminished expectations of privacy").

[14] *See, e.g. Harmon,* 878 F.2d at 488 (upholding testing of government employees who had "regular access to classified information" and whose intoxication-related work problems, because occurring off the job site, were not "easily detected by means other than urine testing"); *Stigile,* 110 F.3d at 803-04, 809 (upholding testing program for persons with access to "secret information" to protect the physical safety of the President and other key leaders – an interest of "overwhelming" and "utmost" importance); *Nat'l Treasury Employees,* 27 F.3d at 623 (upholding program for government-employed drug-enforcement personnel, such as agents with "access to secret databases [used] to determine what ships to search for drugs," who had a

fundamentally from the agency's far less intrusive practice under its prior regulation, *see Blustein v. Skinner,* 908 F.2d 451, 453 (9th Cir. 1990) (upholding testing "to detect drug users in the aviation industry"), and other air-safety-related programs previously encountered by this Court. *See American Fed'n of Gov't Employees, AFL-CIO v. Skinner,* 885 F.2d 892 (D.C. Cir. 1989) (upholding testing for mechanics employed by the government itself to work on FAA aircraft, including by performing "pre-flight inspection and overhauls and install[ing] and maintain[ing] electronic instrumentation and other flight control equipment"). In particular, under the prior program – following the reasoning of *Stigile* – it was plausible to say that "there would be no opportunity for other ... employees to stop or make up for the damage done by the errant employee." 110 F.3d at 806. Here, however, the FAA's requirement of airworthiness review and approval by certificated repair stations, with follow-up review by air carriers as well, creates exactly the opposite situation.

Both this Court and other courts have emphatically insisted that suspicionless drug testing will not be permitted simply because a targeted employee's work bears some connection to safety. *See, e.g., Yeutter,* 918 F.2d at 971 (recognizing that in earlier AFGE case "[s]afety interests alone were not sufficient to validate random testing of DOT mail van operators"); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) (outlawing random tests for gun-carrying police officers "because there was no triggering event or employment pre-promotion requirement involved"); *19 Solid Waste Dep't. Mechanics v. City of Albuquerque,* 156 F.3d 1068 (10th Cir. 1998) (invoking Supreme Court's *Chandler* decision to invalidate random testing of city mechanics responsible for a "fleet of large diesel trash trucks" even though they "clearly perform job in which safety is an important concern"; reasoning in part that "the general day-to-day scrutiny that they experience in the workplace" sufficed to satisfy governmental interests); *Transp. Inst.,* 727 Fed. Supp. at 656-57 (rejecting, in context of a testing program applied to

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"lowered privacy interest" because they were already subject to "comprehensive background investigations").

merchant vessels, "the Government's broad assertion that every crewmember's safety-related responsibilities are so direct and important that random testing . . . is constitutionally permissible"). *See generally Chandler,* 520 U.S. at 323 (indicating that, even where a "substantial" concern about public safety exists, a program of suspicionless searches must be "calibrated to the risk").

Just as a "general governmental desire for secrecy does not warrant the intrusion inherent in a drug testing program" for all who might disclose confidential information, *Nat'l Treasury Employees,* 27 F.3d at 628, so too a general desire for safety does not warrant drug and alcohol testing for every person (from ticket sellers who might spot hijackers to passengers seated in exit rows) whose activities might somehow affect the safety of a plane. In the end, "the government must show that sufficient damage would flow" from a failure to impose the far-reaching drug and alcohol tests the government has ordered. *Id.* The FAA's action violates the Fourth Amendment because it has made no such showing here.

**RELIEF REQUESTED**

For nearly two decades, the aviation maintenance industry has worked collaboratively with the FAA to facilitate an effective drug and alcohol testing program. It has taken this action to ensure safety in air travel even though certain aspects of the testing program have pushed the bounds of FAA authority. In issuing the Final Rule, the FAA has broken faith with this longstanding and long-productive relationship in a way that has generated a host of legal concerns. The FAA's action has violated its statutory authority to impose testing obligations only on "air carrier employees responsible for safety sensitive functions." It also resulted from an unlawfully crabbed and formalistic application of the RFA, and it reflects a foray into intolerable vagueness. Finally, it violates prohibitions on vagueness, APA standards, and the Fourth Amendment.

For each of these reasons, this Court should invalidate the FAA's Final Rule.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2006, a true and correct copy of the above and foregoing **JOINT OPENING BRIEF OF ALL PETITIONERS AND INTERVENORS** was served on each individual shown below via personal hand delivery, except as noted below:

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