UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED FEB 17 2011
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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FEB 17 2011
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

11-1050

In re AERONAUTICAL REPAIR STATION ASSOCIATION, Inc. Petitioner.	)	*Aeronautical Repair Station Association, et al. v. Federal Aviation Administration*
	)	Case No: 06-1091
	)	Argued March 28, 2007 Decided July 17, 2007

PETITION FOR WRIT OF MANDAMUS
TO COMPEL COMPLIANCE WITH MANDATE

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Date: February 17, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici:

Petitioner is the Aeronautical Repair Station Association (ARSA).

Respondent is the Federal Aviation Administration (FAA).

Amicus curia is the Aircraft Mechanics Fraternal Association (AMFA).

(B) Ruling Under Review

This Court's decision and mandate in Case No: 06-1091, Aeronautical Repair Station Association, Inc. et al. v. Federal Aviation Administration, (opinion at 494 F.3d 161 (2007)). This Court's opinion, and mandate, is attached to this request as Exhibit "A".

(C) Related Cases

None.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner, Aeronautical Repair Station Association (ARSA), hereby files its Corporate Disclosure Statement. ARSA is a non-profit, non-stock membership trade association incorporated under the laws of the Commonwealth of Virginia. ARSA has more than 400 member companies comprised of independent repair stations, aircraft operators, manufacturers and other companies related to, or having an interest in, the maintenance, preventive maintenance or alteration of aircraft. ARSA represents the interests of its members before regulatory agencies, legislative bodies and the courts. There are no parent companies or any publicly-held companies that have an ownership interest in ARSA. The association does not issue stock and its members do not have any financial equity or ownership interest in ARSA.

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GLOSSARY

ARSA - Aeronautical Repair Station Association

FAA - Federal Aviation Administration

FRFA - Final regulatory flexibility analysis

IRFA - Initial regulatory flexibility analysis

NPRM - Notice of proposed rulemaking

RFA - Regulatory Flexibility Act

SNPRM - Supplemental notice of proposed rulemaking

PETITION FOR WRIT OF MANDAMUS TO COMPEL COMPLIANCE WITH MANDATE

Pursuant to Federal Rule of Appellate Procedure 21 and D.C. Circuit Rule 21, Petitioner respectfully moves this Court for a writ of mandamus to compel compliance with its mandate, issued October 11, 2007. That mandate required the Federal Aviation Administration (FAA) to conduct an analysis of its drug and alcohol testing rules under the Regulatory Flexibility Act (RFA).

Over three years have passed, and the FAA is yet to comply with the Court's order. No evidence suggests the FAA has begun, or has any intention to accomplish the required RFA analysis. There is no basis for the FAA's unreasonable delay.

RELIEF SOUGHT

Petitioner respectfully asks this Court to order compliance with the terms of its mandate, and require that the FAA issue, for public comment, an initial RFA analysis[1] of its drug and alcohol testing rules within 90 days of granting this writ and release a final RFA analysis no later than one year following the writ issued by this Court. Further, if the FAA fails to meet either deadline, the writ issued by this Court should provide for automatic vacatur of those drug and alcohol testing rules.

In the interim, Petitioner requests this Court stay the FAA drug and alcohol testing rules until such RFA analysis is completed.

ISSUES PRESENTED

Is a period of complete inaction, lasting over three years, reasonable compliance with an order of this Court?

Can the FAA disregard this Court's mandate, and its obligations under the Regulatory Flexibility Act, with impunity?

Is there a heightened sense of urgency when the interests of small businesses, less able to absorb negative impacts of delayed agency action, are adversely affected?

[1] Complete initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) considering the impact of its rule at the time it was first proposed (February 28, 2002).

FACTS NECESSARY TO UNDERSTAND THE ISSUE PRESENTED

The underlying case challenged the FAA's January 10, 2006 final rule that revised its drug and alcohol testing requirements applicable to air carrier employees responsible for safety sensitive functions.[2] *See* 49 U.S.C. § 45102(a). The changed rule greatly expanded applicability of drug and alcohol testing requirements to include the employees of contractors, at any tier, that performed safety-related functions, such as aircraft maintenance, for an air carrier. Those rules are presently contained in Title 14, Code of Federal Regulations (14 C.F.R.) part 120.

One of the main issues raised by Petitioners was the FAA's violation of the Regulatory Flexibility Act (RFA) by concluding that its new rule "directly regulated" only air carriers when that rule in fact required implementation of drug and alcohol testing by many small-businesses. It also subjected countless small-businesses to FAA-imposed penalties if their contractors did not obey the agency's testing requirements. That issue was not unfamiliar to the FAA. In fact, during the rulemaking process that led to the revised drug and alcohol rules, a major point of contention was the FAA's treatment of its obligations under the RFA, which imposes specific requirements on agencies when their actions will have a "significant economic impact" on small businesses. 5 U.S.C. § 605(b). In these circumstances an agency must provide special notices for small businesses and supply an initial

[2] That case invoked 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. ARSA has associational standing to raise issues related to compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 501-611.

regulatory flexibility analysis (IRFA) which includes regulatory alternatives that might minimize burdens on small businesses. After reviewing public comment on the IRFA, the agency must prepare a final regulatory flexibility analysis (FRFA). *See* 5 U.S.C. §§ 609(a), 603 and 604(a), respectively.

The FAA began the path of compliance with the RFA, but abruptly changed course. In its February 28, 2002 notice of proposed rulemaking (NPRM), the agency *did* perform a tentative RFA analysis; that examination included both air carriers and repair stations. The agency then released a supplemental notice of proposed rulemaking (SNPRM) on January 12, 2004 which reasoned that most if not all repair stations and their contractors fit the definition of "small entity". *See* 69 Fed. Reg. 27986. The FAA received detailed comments to the NPRM and the SNPRM, including information from the Small Business Administration's Office of Advocacy and substantial remarks from ARSA. These comments raised concerns about the FAA's assumptions and initial RFA analysis. However, in the 2006 final rule, the FAA decided that repair stations and their contractors were *not* entities directly covered under the amended regulation and, therefore, no RFA analysis was required. The agency reasoned that directly regulated employers are air carriers operating under 14 C.F.R. parts 121 and 135, and air traffic control facilities not operated by the FAA or the U.S. military. 71 Fed. Reg. 1673.

On July 17, 2007, this Court disagreed with the FAA, ruling that repair stations and their contractors *are* regulated employers. The Court accurately stated that:

> In fact, the FAA had it right in the NPRM and SNPRM when it determined that for the purpose of its RFA analysis the affected small entities should be considered to be Part 145 repair stations and their subcontractors. *See* 69 Fed. Reg. at 27,986[sic]. When the FAA abruptly changed course in the 2006 Final Rule, it went off course. Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F. 3d 161 at 177.

The Court then remanded the final rule "for the limited purpose of conducting the analysis required under the Regulatory Flexibility Act, treating the contractors and subcontractors as regulated entities." Aeronautical Repair Station Ass'n, Inc. v. FAA at 178. That mandate took effect October 11, 2007.[3]

Since that date, the FAA has not in any way suggested that it intends to comply with this Court's mandate. In fact, the agency has produced four subsequent Semiannual Regulatory Agendas that have not even mentioned *planning* for the required RFA analysis. *See* 72 Fed. Reg. 70095; 73 Fed. Reg. 24727; 73 Fed. Reg. 71401; 74 Fed. Reg. 21970. Likewise, the FAA has issued no Federal Register notice calling for public comments on developing an initial analysis. Indeed, despite the existing mandate, the FAA amended its drug and alcohol testing program regulations

[3] The Opinion and Mandate are attached to this petition as Exhibit "A".

in 2009 to place them in a new part of Title 14, Code of Federal Regulations[4] and astonishingly decided that RFA analysis was unnecessary. The agency stated that:

> This rule imposes no costs and provides no accrual of benefits; and therefore, this rule will have no economic impact. This action amends the FAA's drug and alcohol regulations to place them in a new part. The FAA is not making any substantive changes to the drug and alcohol regulations in this rulemaking. Therefore, as the Acting FAA Administrator, I certify that this rule will not have a significant economic impact on a substantial number of small entities. 74 Fed. Reg. 22651.

The agency's obvious indifference to this Court's mandate necessitates Petitioner's request.

[4] The regulations were consolidated in 14 CFR part 120.

REASONS WHY THE WRIT SHOULD ISSUE

This Court Has Jurisdiction to Enforce Its Mandate

Congress empowered the federal courts to issue a writ, such as mandamus, if necessary to effectuate or prevent the frustration of previous orders, 28 U.S.C. § 1651(a) (All Writs Act). This Court also has power to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) (Administrative Procedure Act). Relief can be granted to enforce the terms of this Court's mandate in cases that have been remanded directly to an administrative agency that has unreasonably delayed taking action. *See* Potomac Elec. Power Co. v. Interstate Commerce Comm'n, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (stating that when a Court's mandate compels an agency to act and it fails to do so in a timely manner, the court may correct the agency by issuing a writ of mandamus). In fact, this Court not only has the power, but the duty to enforce its prior mandate to prevent evasion. Failure to direct FAA compliance in this instance would "reward bureaucratic misconduct and encourage judicial anarchy." Dep't of the Navy v. Fed. Labor Relations Auth., 835 F.2d 921, 923 (1st Cir. 1987).

The FAA's Unreasonable Delay Warrants Action from this Court

Although the Petitioner recognizes the unique and unusual nature of the writ of mandamus, it is necessary in this instance. As this Court has previously noted:

> Mandamus is an extraordinary remedy reserved for extraordinary circumstances. An administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.' In re American Rivers, 372 F.3d 413, 418 (D.C. Cir. 2004), citing In re United Mine Workers, 190 F.3d 545, 549 (D.C.Cir.1999) and Cutler v. Hayes, 818 F.2d 879, 897.

The procedural process in this instance, as it relates to the FAA's non-compliance, is the same as that faced by this Court in In re Core Communications, 531 F.3d 849 (D.C. Cir. 2008) (hereafter "Core"). By failing to respond to the Court's remand, "the agency has effectively nullified [the Court's] determination that its interim rules are invalid, because [the Court's] remand without vacatur left those rules in place." Core at 856. Unlike Core, this instance involves multiple small businesses that were negatively impacted by the FAA's rule. For this reason, Petitioner submits that this Court's evaluation of whether mandamus is warranted should account for the additional negative impacts to smaller entities. Such businesses are less able to absorb unjustified regulatory expense for an extended period. In particular, and in line with the factors normally considered by this Court, the FAA has not acted within a "rule of

reason." Over three years have passed without the agency even attempting to justify under the RFA the onerous regulation imposed upon small business.

In Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (hereafter "TRAC"), this Court laid out a six-part approach to determine whether agency delay warrants mandamus relief; it provides:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" (TRAC, 750 F.2d at 80).

While these factors are "not ironclad", they provide "useful guidance in assessing claims of agency delay." Core at 855, citing TRAC.

In light of that approach, the first and most important factor is that the time an agency takes to make decisions must be governed by a "rule of reason". Core at 855. In this instance, there is no legitimate reason to justify the agency's failure to take action toward developing an initial RFA analysis. Indeed, the agency *already* took steps under its initial rulemaking effort to determine the costs on affected small businesses. 67 Fed. Reg. 9366, 9376 (Feb. 28, 2002) and 69 Fed. Reg. 27980, 27,986 (May 17, 2004). Considering the fact that preliminary data exists from the early

rulemaking process, combined with the amount of time since this Court issued its ruling, the agency has clearly not acted within a "rule of reason". See In re American Rivers, 372 F.3d at 419 (stating that a reasonable time for agency action is typically counted in weeks or months, not years.)

In assessing the reasonableness of the FAA's ongoing delay, TRAC directs the Court to review any statutory deadlines provided by Congress. TRAC, 750 F.2d at 80. In this case, the RFA provides a useful timetable for agencies to produce a full regulatory analysis. It states that:

> Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title....If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. 5 U.S.C. § 608(b).

Under that provision, since this Court's mandate (which took effect on October 11, 2007) allowed the FAA final rule to stand while remanding for RFA analysis, the Respondent should have produced a full RFA analysis by April 11, 2008 (180 days later).

Congress imposed the 180 day deadline for producing a full RFA analysis to ensure agencies took the task seriously and moved quickly. That is evidenced by the stiff penalty for not heeding the requirement -- vacatur of the final rule. 5 U.S.C. § 608(b). The FAA clearly is beyond the rule of reason in delaying the analysis for over three years.

While an RFA analysis is at first blush an economic exercise, the definition of activity that affects human welfare includes impact on economic values. *See, for example,* 42 U.S.C. § 7602(h). The added cost of implementing and running an FAA drug and alcohol program for a small business affects human welfare; it is a determining factor in the salaries the company is able to pay, the number of jobs its revenue can support and whether it has to furlough employees to keep up with the costs of additional regulation. Especially in the current economic climate, any rule that eliminates jobs or reduces salaries negatively impacts human welfare.

Performing the required RFA analysis does not hamper agency activities of higher or competing priority. Pursuant to § 610 of the RFA, Respondent is *already* obligated to periodically review its rules that have or will have a significant economic impact upon a substantial number of small entities. Therefore, the agency must possess both the resources and the expertise to produce the analysis mandated by this Court. Though the FAA may deem other activities more worthy of its time, given the resources and expertise at the agency's disposal, it cannot truthfully contend that producing the court ordered RFA analysis will hamper any competing interests.

The interests of small businesses afforded protection under the RFA are clearly prejudiced by the FAA's delay. Air carrier contractors at all tiers are forced to either establish a drug and alcohol testing program or forgo work involving air carriers, without the FAA having ever properly considered the costs of its rules and how those

rules affect these entities. Small businesses have waited over four years since the final rule, and over three years since this Court ordered the FAA to produce a full RFA analysis. The additional costs of running a drug and alcohol program or relinquishing air carrier business opportunities continue to mount; added costs or lost revenue have caused small businesses to reduce workforces or close doors. That unfortunate result is the very reason the RFA protections were created.

Although "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed", TRAC, 750 F.2d at 80, Petitioner submits that the FAA's complete inaction defies this Court's clear and direct mandate.

The Petitioner has no other adequate remedy in this case. Mandamus is only warranted when "there is no other adequate remedy available…". *See* Northern States Power Co. v. DOE, 128 F.3d 754, 758 (D.C. Cir. 1997). The FAA's error is in its failure to take any action toward complying with this Court's order. As a result, Petitioner cannot mount a challenge to an analysis that does not yet exist. For over three years, the agency's failure to act has insulated it from both the Court's mandate and any scrutiny that would typically arise during public comments to a proposed RFA analysis. Therefore, no means of relief exists, other than a writ of mandamus compelling the FAA to issue an initial and subsequent final regulatory flexibility analysis.

Given that the FAA has failed to produce the court ordered analysis after three years, it is appropriate to stay the existing rule and set a strict deadline with penalty for non-compliance. Thus far, the FAA has failed to act without a hard deadline from this Court. As a result, there is an overwhelming need for consequences tied to the agency's inaction.

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By: Marshall S. Filler

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 17th day of February 2011, a copy of the foregoing Petition for Writ of Mandamus to Compel Compliance with Mandate and Corporate Disclosure Statement by first class mail postage prepaid upon the following:

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Date: February 17, 2011

Exhibit

A

REC'D OCT 16 2007

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1091 **September Term, 2006**

AERONAUTICAL REPAIR STATION ASSOCIATION, INCORPORATED ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION,
INTERVENORS

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUL 17 2007
CLERK

Consolidated with 06-1092

On Petitions for Review of Final Rule of the
Federal Aviation Administration

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the petitions for review of a final rule of the Federal Aviation Administration and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petitions for review be granted in part and the cases be remanded, in accordance with the opinion of the court filed herein this date.

MANDATE
Pursuant to the provisions of Fed. R. App.Pro.41(a)
ISSUED: 10/11/07
BY: Deputy Clerk
ATTACHED: ___ Amending Order
___ Opinion
___ Order on Costs

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

Date: July 17, 2007

Opinion for the court filed by Circuit Judge Henderson.
Dissenting opinion filed by Circuit Judge Sentelle.

United States Court of Appeals,
District of Columbia Circuit.
AERONAUTICAL REPAIR STATION ASSOCIATION, INC. et al., Petitioners
v.
FEDERAL AVIATION ADMINISTRATION, Respondent
Aircraft Mechanics Fraternal Association, Intervenors.

Nos. 06-1091, 06-1092.
Argued March 28, 2007.
Decided July 17, 2007.
Rehearing En Banc Denied Sept. 21, 2007.

Background: Aircraft maintenance employers filed suit, challenging final rule of Federal Aviation Administration (FAA) that mandated drug and alcohol testing, under Omnibus Transportation Employee Testing Act, for all employees of contractors and subcontractors at any tier who performed safety-related functions for air carriers.

Holdings: The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that:
(1) mandatory testing was reasonably extended to aircraft maintenance employees of noncertificated subcontractors;
(2) FAA provided adequate notice of proposed rule;
(3) FAA adequately responded to employers' comments during rulemaking;
(4) terms of rule were not vague in violation of Due Process Clause;
(5) mandatory testing did not violate Fourth Amendment; and
(6) regulatory flexibility analysis was required.

Affirmed in part and remanded in part.

Sentelle, Circuit Judge, filed opinion, dissenting.

West Headnotes

[1] **Statutes 361 ⚷219(5)**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(5) k. Particular Officers, Construction By. Most Cited Cases

Under *Chevron*, the Court of Appeals reviews an interpretation of statutory language by the Federal Aviation Administration (FAA), by first asking whether Congress has directly spoken to the precise question at issue, and if it has, that is the end of the matter, and the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress; if, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

[2] **Aviation 48B ⚷121**

48B Aviation
48BIII Airmen
48Bk121 k. Regulation in General. Most Cited Cases

Federal Aviation Administration (FAA) reasonably included in final rule noncertificated aircraft maintenance subcontractors of any tier among air carriers' contractors whose employees were "other air carrier employees" subject to mandatory drug and alcohol testing, under Omnibus Transportation Employee Testing Act, along with carriers' direct employees, since such subcontractors performed safety-sensitive function; FAA was not required to wait to extend testing to such subcontractors until an accident occurred due to substance abuse, and testing all subcontractors as second line of defense in addition to airworthiness review by certificated contractors was reasonable. 49 U.S.C.A. § 45102(a)(1); 14 C.F.R. §§ 145.201(a)(1),

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145.217(b)(2, 3).

[3] Aviation 48B ⚷121

48B Aviation
48BIII Airmen
48Bk121 k. Regulation in General. Most Cited Cases

Any error by Federal Aviation Administration (FAA), in notice of proposed rulemaking, characterizing as "clarification" new regulatory language extending mandatory drug and alcohol testing to all aircraft maintenance subcontractors, despite FAA's prior informal position that such testing was not required for noncertificated subcontractors, was harmless, where interested parties had opportunity to participate and comment in rulemaking, including additional opportunity to comment precisely due to FAA's conflicting guidance. 49 U.S.C.A. § 45102(a)(1); 14 C.F.R. §§ 145.201(a)(1), 145.217(b)(2, 3).

[4] Aviation 48B ⚷121

48B Aviation
48BIII Airmen
48Bk121 k. Regulation in General. Most Cited Cases

Federal Aviation Administration (FAA) adequately responded to aircraft maintenance employers' comments regarding economic impact of final rule extending mandatory drug and alcohol testing to aircraft maintenance employees of noncertificated subcontractors, since FAA specifically addressed comments about costs and benefits, found industry survey submitted by employers was not useful or credible, and rebutted expert's opinions analyzing survey results. 49 U.S.C.A. § 45102(a)(1) ; 14 C.F.R. §§ 145.201(a)(1), 145.217(b)(2, 3).

[5] Aviation 48B ⚷121

48B Aviation
48BIII Airmen
48Bk121 k. Regulation in General. Most Cited Cases

Constitutional Law 92 ⚷4274

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4274 k. Aviation and Airspace. Most Cited Cases

Any uncertainty regarding meaning of "maintenance," in final rule of Federal Aviation Administration (FAA), extending mandatory drug and alcohol testing to noncertificated subcontractors' employees performing aircraft maintenance, did not violate Due Process Clause, since uncertainty existed before FAA issued final rule so was not attributable to rule, and employers could clarify term's meaning, as they always could have, by recourse to FAA's written guidance routinely provided on testing issues raised by interested parties. U.S.C.A. Const.Amend. 5; 49 U.S.C.A. § 45102(a)(1); 14 C.F.R. §§ 145.201(a)(1), 145.217(b)(2, 3).

[6] Constitutional Law 92 ⚷4260

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4260 k. In General. Most Cited Cases

Courts reviewing vagueness challenges, under the Due Process Clause, allow greater leeway for regulations and statutes governing business activities than those implicating the First Amendment, in that no more than a reasonable degree of certainty in their terms can be demanded. U.S.C.A. Const.Amends. 1, 5.

[7] Searches and Seizures 349 ⚷78

349 Searches and Seizures

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349I In General

349k78 k. Samples and Tests; Identification Procedures. Most Cited Cases

Aircraft maintenance employees of noncertificated subcontractors were not subjected to unreasonable searches in violation of Fourth Amendment by mandatory drug and alcohol testing required under final rule of Federal Aviation Administration (FAA), given FAA's compelling interest in ensuring air safety and quintessential risk of destruction to life and property posed by substance-impaired lapses of maintenance workers at any tier. U.S.C.A. Const.Amend. 4; 49 U.S.C.A. § 45102(a)(1); 14 C.F.R. §§ 145.201(a)(1), 145.217(b)(2, 3).

[8] **Aviation 48B ⚷121**

48B Aviation

48BIII Airmen

48Bk121 k. Regulation in General. Most Cited Cases

Aircraft maintenance contractors and subcontractors were "regulated employers," requiring Federal Aviation Administration (FAA) to conduct regulatory flexibility analysis of economic impact on employers by final rule requiring mandatory drug and alcohol testing for their employees; although rule was immediately addressed to air carriers, their aircraft maintenance contractors and subcontractors were directly affected and therefore regulated by final rule which expressly required their employees to be tested, and FAA's final economic evaluation of impact on industry was not final regulatory flexibility analysis explaining why FAA rejected alternatives to final rule. 5 U.S.C.A. § 603(a); 49 U.S.C.A. § 45102(a)(1); 14 C.F.R. §§ 145.201(a)(1), 145.217(b)(2, 3).

***163** On Petitions for Review of a Final Rule of the Federal Aviation Administration.Albert J. Givray and Andrew D. Herman argued the cause for the petitioners. Jere W. Glover and Marshall S. Filler were on brief.

Edward Himmelfarb, Attorney, United States Department of Justice, argued the cause for the respondent. Peter D. Keisler, Assistant Attorney General, Leonard Schaitman, Attorney, United States Department of Justice, and Paul M. Geier, Assistant General Counsel, Federal Motor Carrier Safety Administration, were on brief. Mark W. Pennak, Attorney, United States. Department of Justice, entered an appearance.

Lee Seham and James R. Klimaski were on brief for amicus curiae Aircraft Mechanics Fraternal Association in support of the respondent.

Before: SENTELLE, HENDERSON and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

Dissenting opinion filed by Circuit Judge SENTELLE.

KAREN LeCRAFT HENDERSON, Circuit Judge:

The petitioners [FN1] challenge a final rule (2006 Final Rule or Rule) of the Federal Aviation Administration (FAA) which amends its drug and alcohol testing regulations, promulgated pursuant to 49 U.S.C. § 45102(a)(1), to expressly mandate that air carriers require drug and alcohol tests of all employees of its contractors-including employees of subcontractors at any tier-who perform safety-related functions such as aircraft maintenance. Anti-drug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 71 Fed.Reg. 1666 (Jan. 10, 2006). The petitioners challenge the Rule on the grounds that it impermissibly expands the scope of employees tested in violation of the unambiguous statutory language of section 45102(a)(1), the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and the Fourth and Fifth Amendments to the United States Constitution. In addition, they challenge the FAA's conclusion that

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it was not required to conduct a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA) because the Rule does not have a significant adverse effect on small entities. For the reasons set forth below, we uphold the substance of the Rule but reject the FAA's RFA determination.

FN1. The petitioners are: Aeronautical Repair Station Association, Inc., Premier Metal Finishing, Inc., Pacific Propeller International LLC, Texas Pneumatics Sys., Inc., Solutions Mfg., Inc. and Randall C. Highsmith. Fortner Eng'g & Mfg., Inc. and Minas Serop Jilizian intervened as petitioners.

I.

The FAA first promulgated drug testing regulations in 1988 pursuant to the Congress's general directive in 49 U.S.C. app. § 1421(a)(6) (1988) that the Secretary of Transportation "promote safety of flight of civil aircraft in air commerce" by prescribing "reasonable rules and regulations, or ***164** minimum standards." *See* Anti-Drug Program for Personnel Engaged in Specified Aviation Activities, 53 Fed.Reg. 47,024 (Nov. 21, 1988) (1988 Rule).[FN2] The 1988 Rule required that each employer test "each of its employees who performs" one of eight enumerated "sensitive safety- or security-related" functions, 14 C.F.R. § 21.457 (1992),[FN3] and defined "employee" as "a person who performs, either directly or by contract" any of the enumerated functions, 14 C.F.R. pt. 121, app. I § II (1992).

FN2. In its advance notice of proposed rulemaking, the FAA had invited comments on both drug and alcohol abuse and regulation, *see* 1988 Rule, 53 Fed.Reg. at 47,024, but ultimately "excluded the issue of alcohol testing from th[e] rulemaking for a variety of reasons." 1988 Rule, 53 Fed.Reg. at 47,048.

FN3. The eight functions listed were:

a. Flight crewmember duties.

b. Flight attendant duties.

c. Flight instruction or ground instruction duties.

d. Flight testing duties.

e. Aircraft dispatcher or ground dispatcher duties.

f. Aircraft maintenance or preventive maintenance duties.

g. Aviation security or screening duties.

h. Air traffic control duties.

53 Fed.Reg. at 47,058 (codified at 14 C.F.R. pt. 121, app. I § II).

In 1991 the Congress enacted the Omnibus Transportation Employee Testing Act (Omnibus Act), which for the first time expressly directed the FAA to promulgate alcohol and drug testing regulations:

> The Administrator shall, in the interest of aviation safety, prescribe regulations within 12 months after [October 28, 1991]. Such regulations shall establish a program which requires air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator) for use, in violation of law or Federal regulation, of alcohol or a controlled substance. The Administrator may also prescribe regulations, as the Administrator considers appropriate in the interest of safety, for the conduct of periodic recurring testing of such employees for such use in violation of law or Federal regulation.

Pub.L. No. 102-143, tit. v, § 3, 105 Stat. 917, 953 (Oct. 28, 1991) (codified at 49 U.S.C. app. § 1434; recodified, as amended, at 49 U.S.C. §

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45102(a)(1)).

Pursuant to the Omnibus Act, in 1994 the FAA revised its drug testing regulations, Antidrug Program for Personnel Engaged in Specified Aviation Activities, 59 Fed.Reg. 42,922 (Aug. 19, 1994) (1994 Drug Rule), and promulgated regulations for the first time for alcohol testing, Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation, 59 Fed.Reg. 7380 (Feb. 15, 1994) (1994 Alcohol Rule). Both the 1994 Drug Rule and the 1994 Alcohol Rule required that an "employer" test each covered "employee," again defined as "a person who performs, either directly or by contract" any of eight listed "safety-sensitive" functions, 59 Fed.Reg. at 7390 (alcohol), at 42,928 (drugs). Both rules also listed the same eight functions, which were substantially the same as those in the 1988 Rule, *see supra* note 3:

1. Flight crewmember duties.

2. Flight attendant duties.

3. Flight instruction duties.

4. Aircraft dispatcher duties.

5. Aircraft maintenance or preventive maintenance duties.

6. Ground security coordinator duties.

7. Aviation screening duties.

***165** 8. Air traffic control duties.

59 Fed.Reg. at 7391, 42,928.

On February 28, 2002, the FAA issued a notice of proposed rulemaking seeking to revise its drug and its alcohol testing regulations. Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 67 Fed.Reg. 9366 (Feb. 28, 2002) (NPRM). Significantly, the NPRM proposed to amend the definition of a covered "employee" subject to testing as "[e]ach employee who performs a function listed in this section directly or by contract (*including by subcontract at any tier*) for an employer." 67 Fed.Reg. at 9377 (drugs) (proposed to be codified at 14 C.F.R. pt. 121, app. I § III), 9380 (alcohol) (proposed to be codified at 14 C.F.R. pt. 121, app. J § II) (emphasis added). The FAA explained that it proposed including the italicized language "to clarify that each person who performs a safety-sensitive function directly or by *any tier* of a contract for an employer is subject to testing." 67 Fed.Reg. at 9368 (emphasis added). The FAA maintained that the added language did not work "a substantive change because the current rule language states that anyone who performs a safety-sensitive function 'directly or by contract' must be tested" and "[t]he regulations have always required that any person actually performing a safety-sensitive function be tested, and we are proposing to clarify that performance 'by contract' means performance under any tier of a contract." *Id.* at 9369. The FAA further explained that it believed the clarification necessary because of "conflicting guidance provided by the FAA." *Id.* FN4 The NPRM requested "comment on [its] proposal to clarify this subject." *Id.* at 9370.

FN4. On the "conflicting guidance," *see infra* Part IV.B.1.

In early 2004, after receiving a substantial number of critical comments, the FAA issued a final rule in which it announced that, "[i]n order to gather more information on the concerns expressed by the commenters," it was "not adopting the proposed revision in th[e] final rule" but would be "publishing a Supplemental Notice of Proposed Rulemaking (SNPRM) in the near future." Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 69 Fed.Reg. 1840, 1841 (Jan. 12, 2004).

On May 17, 2004, the FAA published the SNPRM, addressing the subcontractor issue at length and responding to comments it had received. Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 69 Fed.Reg. 27,980 (May 17, 2004). The SN-

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PRM again proposed adding the "subcontract at any tier" language and reopened the subject for public comment.

The 2006 Final Rule, issued January 10, 2006, amended the testing regulations, as proposed in the NPRM and the SNPRM, to require testing employees who perform the listed functions "directly or by contract (including by subcontract at any tier)." Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 71 Fed.Reg. 1666, 1676, 1677 (Jan. 10, 2006). In addition, the FAA certified that the 2006 Final Rule "will not have a significant economic impact on a substantial number of small entities" and that it was therefore "not required to conduct an RFA analysis." 71 Fed.Reg. at 1674.

The petitioners filed petitions for review on March 10 and March 13, 2006.

II.

The petitioners challenge the 2006 Final Rule on four grounds. We address each ground separately.

166 *A. Statutory Authority

[1] First, the petitioners assert that the scope of employee testing expressly required under the 2006 Final Rule-including employees of subcontractors "at any tier"-exceeds the FAA's statutory authority under the Omnibus Act. We review the FAA's interpretation of the statutory language under the familiar two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, we ask first "whether Congress has directly spoken to the precise question at issue"; if it has, "that is the end of the matter" and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. The Omnibus Act directed the FAA to establish regulations requiring testing of "airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator)." 105 Stat. at 953. We conclude that the statutory language is ambiguous as to whether the testing requirement applies to employees of all subcontractors, at whatever tier, and that the FAA reasonably construed the statute under the second step of *Chevron* to determine that it does.

1. "Other air carrier employees"

[2] First, the FAA reasonably concluded that the phrase "other air carrier employees" can include employees of an air carrier's contractors as well as its direct employees. Although not perhaps its most common meaning, "employee" can be used to refer to an employee of a contractor as well as to an employer's direct employee. *See Wash. Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 933, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984) (while "word 'employee' denotes a contractual relationship and a contractor never is contractually bound to the employees of a subcontractor," general contractor and its subcontractor's employees were held to be "employer" and "employees" under section 5(a) of Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), based on statute's language and history (internal quotation omitted)). Indeed, the language of the Omnibus Act indicates the Congress may have intended that "employee" have just such an expansive meaning. On its face, the Omnibus Act as initially enacted expressly required testing employees of certain contractors (in addition to direct employees), namely, "airport security screening *contract* personnel." 105 Stat. at 953 (emphasis added). Further, the phrase "and *other* air carrier employees," immediately following the list of the three specifically enumerated testing categories, suggests that the Congress considered "airport security screening contract personnel" to be employees just as it did the other two listed classes ("airmen" and "crewmembers").[FN5] *Id.* (emphasis added).***167** Else the word "other," used

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in the sense of "more" or "additional," *see* Webster's Third New Int'l Dictionary 1598 (1993), would have been entirely inappropriate. *See also* S.Rep. No. 102-54, at 18 (May 2, 1991) ("*groups of employees* required to be covered by the new testing programs *include* airmen, crew members, and *airport security screening contract personnel* ") (emphases added). The juxtaposition of the statutory terms likewise suggests that the class of "other air carrier employees" subject to testing can be read to include other contractors' employees-a point the petitioners do not dispute. *See* Pet'rs Br. at 9 ("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...."). They do, however, vigorously contest that the phrase includes employees of *all* subcontractors (at whatever tier, whether or not "certificated"), contending instead that the phrase cannot reasonably embrace employees of "noncertificated" subcontractors. Before addressing their argument, we provide some background on the FAA's certificated maintenance program.

FN5. In 2001, the Congress enacted the Aviation and Transportation Security Act (ATSA), Pub.L. No. 107-71, 115 Stat. 597 (2001), which "creat[ed] a federal workforce to screen passengers and cargo at commercial airports," *Am. Fed'n of Gov't Employees v. Loy* 367 F.3d 932, 934 (D.C.Cir.2004). Accordingly, it amended the alcohol and drug testing statutes by striking "contract personnel," "contract employee" and "contract employees" throughout Chapter 451 of title 49 of the U.S.Code (including section 45102(a)(1)'s reference to "airport security screening contract personnel") and replacing the terms, respectively, with "personnel," "employee" and "employees." ATSA § 139, 115 Stat. at 640. There is no indication the Congress intended the amendments to preclude continued treatment of contractors' employees as air carriers' employees subject to testing, as they were treated under the 1988 Rule and the 1994 Rule, both of which defined a covered "employee" as "a person who performs, either directly or by contract," one of the eight listed functions.

As the petitioners explain, air carriers "routinely" contract with repair stations that are "certificated" under 14 C.F.R. ch. I, subch. H, pt. 145. Pet'rs Br. at 7. A Part 145 repair station is authorized to "[p]erform maintenance, preventive maintenance, or alterations" on aviation components or to "[a]rrange for another person," that is, a subcontractor, whether certificated or not, "to perform the maintenance." 14 C.F.R. § 145.201(a)(1)(2).[FN6] If the subcontractor is not certificated, the certificated repair station "must ensure that the noncertificated person follows a quality control system equivalent to the system followed by the certificated repair station," *id.* § 145.202(a)(2), and must approve the aviation component for return to service, *see id.* §§ 43.7, 145.217(b) ("A certificated repair station may contract a maintenance function pertaining to an article to a noncertificated person provided-(1) The noncertificated person follows a quality control system equivalent to the system followed by the certificated repair station; (2) The certificated repair station remains directly in charge of the work performed by the noncertificated person; and (3) The certificated repair station verifies, by test and/or inspection, that the work has been performed satisfactorily by the noncertificated ***168** person and that the article is airworthy before approving it for return to service."). With this background, we first address the FAA's interpretation of the statutory language as extending to employees of subcontractors generally, then consider the petitioners' objection to employees of noncertificated subcontractors in particular.

FN6. Section 145.201(a) provides:

(a) A certificated repair station may-

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> (1) Perform maintenance, preventive maintenance, or alterations in accordance with part 43 on any article for which it is rated and within the limitations in its operations specifications.
>
> (2) Arrange for another person to perform the maintenance, preventive maintenance, or alterations of any article for which the certificated repair station is rated. If that person is not certificated under part 145, the certificated repair station must ensure that the noncertificated person follows a quality control system equivalent to the system followed by the certificated repair station.
>
> (3) Approve for return to service any article for which it is rated after it has performed maintenance, preventive maintenance, or an alteration in accordance with part 43.
>
> 45 C.F.R. § 145.201(a)(1-3).

First, as to employees of subcontractors generally, having concluded that the statute itself expressly contemplates testing certain contractors' employees ("airport security screening contract personnel") and that the statutory phrase "other air carrier employees" may include contractors' employees, we see nothing in the statutory language that prevents the FAA from also treating a *sub* contractor's employees as statutory "employees" of air carriers. The Omnibus Act itself does not mention subcontractors and we believe the FAA, under *Chevron* step 2, reasonably included subcontractors among the contractors whose employees are "other air carrier employees" subject to testing. The FAA soundly reasoned that "it is important that individuals who perform any safety-sensitive function be subject to drug and alcohol testing under the FAA regulations" and that to conclude otherwise "would be inconsistent with aviation safety." 2006 Final Rule, 71 Fed.Reg. at 1667.

As for employees of "noncertificated" subcontractors in particular, we believe that they too may be reasonably treated as "other air carrier employees" and thus subject to mandatory testing under the Omnibus Act. The petitioners do not object to the FAA's requiring drug and alcohol testing of certificated subcontractors' employees, noting that the aviation industry "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," Pet'rs Br. at 9. They insist, however, that employees of "noncertificated" subcontractors may not be considered air carrier "employees" subject to mandatory testing and they offer what may well be a valid ground for treating certificated and non-certificated subcontractors differently, namely, that "[f]or certificated entities, ... drug and alcohol testing logically operates as part and parcel of an already-comprehensive program of government supervision" so that "the certificated firm-precisely because it chooses to be certificated-can be seen as acting as an alter ego of the air carrier, so that its workers can be fairly characterized as 'air carrier employees.' " *Id.* at 15. This distinction, however, is not mandated by the language of section 45102(a)(1) which says nothing about certification *vel non*. What section 45102(a)(1) does require is that the FAA Administrator determine those "safety-sensitive functions"-performed by other than "airmen, crewmembers, [and] airport security screening contract personnel"-subject to drug and alcohol testing and the FAA has consistently and reasonably included aircraft maintenance work among such functions. *See* 1994 Alcohol Rule, 59 Fed.Reg. at 7391 (including aircraft maintenance or preventive maintenance duties among "safety-sensitive" duties); 1994 Drug Rule, 59 Fed.Reg. at 42,928 (same); *cf.* 1998 Rule, 53 Fed.Reg. at 47,058 (including "maintenance or preventive maintenance" among "sensitive safety- or security-related" duties subject to drug testing). It is

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not unreasonable, then, to construe the statute, as the FAA does, to require testing of maintenance employees, certificated or not, in order to ensure that all maintenance work, by whomever performed, is done properly and that each aviation component***169** is safe for aviation use. In the FAA's view, it "would be inconsistent with aviation safety for individuals performing maintenance work within the certificated repair station to be subject to drug and alcohol testing, while individuals performing the same maintenance work under a subcontract would not be subject to drug and alcohol testing." 71 Fed.Reg. at 1670. The petitioners nonetheless cite four "principles of statutory interpretation," Pet'rs Br. at 11, which, they contend, undermine the FAA's interpretation. We find none of them compelling.

The petitioners first assert the FAA's interpretation "would offend the basic principle that statutes 'must be harmonized' " because it "runs headlong into a robust congressional policy of promoting the nation's small businesses." Pet'rs Br. at 11 (quoting 82 CJS Statutes § 352; citing 15 U.S.C. § 631(a) ("It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns....")). We note no disharmony in the FAA's regulation. The Congress has provided a specific statutory procedure under the RFA to ensure that "agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." RFA, Pub.L. No. 96-354, § 2(b), 94 Stat. 1164, 1165 (1980). This is the procedure which the Congress mandated to harmonize the express interest advanced in the Omnibus Act's testing provisions-"the interest of aviation safety," 49 U.S.C. § 45102(a)(1) -with the concerns of small businesses. If the FAA properly follows the procedure in its rulemaking-a matter we address *infra* Part II.D-it discharges its responsibility in this regard.

The petitioners next assert the FAA's interpretation will impermissibly " 'imping[e] upon important state interests,' " Pet'rs Br. at 11 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994)), 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," *id.* (state statutory citations omitted). This argument fails, however, because the Omnibus Act expressly preempts state drug testing laws. *See* 49 U.S.C. § 45106(a) ("A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this chapter.").

Third, the petitioners contend that the FAA's interpretation "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,' " relying on its contention that the 2006 Final Rule violates the Fourth Amendment. Pet'rs Br. at 12 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)). As our discussion below reveals, however, the petitioners' Fourth Amendment challenge offers no "grave concerns" about the 2006 Final Rule's constitutionality. *See infra* Part II.C.

Finally, the petitioners assert the FAA's interpretation ignores the "context" of the legislation-namely, the "major legal and political concerns" that widespread drug testing of employees might raise, Pet'rs Br. at 13-and the Congress's own admonition that "the Administrator be very selective in extending the coverage of this provision to other categories of air carrier ***170** and FAA employees" and that "[the statute] should not be treated as an open authorization to test all aviation industry employees." S.Rep. No. 102-54, at 18 (May 2, 1991). In the quoted report, however, the Congress singled

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out "mechanics" as among the employees required to be tested "[a]s defined in statute and regulation." *Id.* at 17. And nowhere does the legislative history distinguish between mechanics employed by certificated subcontractors and those employed by noncertificated subcontractors.

2. "Employees Responsible for Safety-Sensitive Functions"

Second, the petitioners assert that the FAA exceeded its statutory authority because noncertificated subcontractors' employees are not "employees responsible for safety-sensitive functions" as required under section 45102(a)(1). They argue that under FAA regulations, if "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." Pet'rs Br. at 18 (citing 14 C.F.R. § 145.217(b)(2), (3) (requiring certificated repair station to verify satisfactory performance of subcontracted noncertificated work and airworthiness of aviation component before return to service)). The FAA responds that "responsible for" as used in section 45102(a)(1) does not mean "legally responsible for," as the petitioners argue, but simply the "agent" or "cause," in this case denoting the person performing the maintenance work. FAA Br. at 26-27. The FAA's interpretation of the phrase "responsible for" is a permissible one. *See* Webster's Third New Int'l Dictionary 1935 (1993) (defining "responsible" as "answerable as the primary cause, motive, or agent"); *Hines v. Blue Cross Blue Shield of Va.*, 788 F.2d 1016, 1018 (4th Cir.1986) ("The ordinary meaning of a 'person responsible for such injuries' is the person who caused the injuries, who did the damage."). Because the Congress expressly directed the FAA Administrator to determine by regulation those "other air carrier employees responsible for safety-sensitive functions," we defer to the FAA's interpretation. *See Envtl. Def. v. EPA*, 489 F.3d 1320, 1328-29 (D.C.Cir.2007) (if Congress " 'has explicitly left a gap for the agency to fill,' " we uphold agency's "reasonable statutory interpretation") (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778).

B. Administrative Procedure Act

Next, the petitioners contend that requiring testing of maintenance employees of all subcontractors violates the APA in three respects. We disagree on all counts.

1. Notice

[3] The petitioners contend the FAA's "mischaracterization" of the new regulatory language as a "clarification" "tainted all aspects of the rulemaking process with error," Pet'rs Br. at 29, and, in particular, "rendered the agency's notice of proposed rulemaking misleading and thus procedurally improper," *id.* at 32. There is some substance to the petitioners' claim that the inclusion in the 2006 Final Rule of the "subcontract at any tier" language is more than simply a "clarification," as the FAA repeatedly dubbed it. *See, e.g.,* 2006 Final Rule, 71 Fed.Reg. at 1666, 1667, 1668, 1669, 1670. The FAA concedes that its own informal guidance, to which it adhered until the mid-1990s, took the position that employees of noncertificated subcontractors did not have to be tested. *See* NPRM, 67 Fed.Reg. at 9369-70; 2006 Final Rule, 71 Fed.Reg. at 1670.[FN7] And it ***171** appears that any subsequent guidance to the contrary may not have been effectively disseminated. *See, e.g.,* SNPRM, 67 Fed.Reg. at 27,985 ("Although we believe that we are merely clarifying the regulations, we recognize that, due to the previous conflicting guidance, some companies with existing programs and some noncertificated contractors may have to modify their current alcohol misuse prevention and antidrug programs."). Thus, the additional language may more accurately be viewed as a choice between two conflicting positions than as a clarification. Nonetheless, the alleged "mischaracterization" does not warrant overturning the 2006 Final Rule. The FAA went out of its way to ensure that interested parties had the opportunity to participate and comment in the rulemaking-to the point of issuing the SNPRM seeking additional comment, and thereby delaying issuance of a final rule, precisely because of the

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conflicting guidance and possible consequent confusion. *See* SNPRM, 69 Fed.Reg. at 27,980-81. As a result, the entire air carrier industry, of which the petitioners are part, was well aware of the rulemaking and its substance and cannot reasonably claim ignorance of the proceeding or inadequate opportunity to comment. "If anything, [the FAA proceedings] provided Industry with a far greater opportunity to participate in the rulemaking than a plain vanilla notice-and-comment proceeding." *Natural Res. Def. Council, Inc. v. EPA,* 822 F.2d 104, 121 (D.C.Cir.1987). Thus, "the parties had abundant opportunity to comment on the proposed rule" and "any error was harmless." *Id.* FN8

FN7. The 2006 Final Rule states: "As we acknowledged in the NPRM and SNPRM preambles, some of our early guidance only required subcontractors who took airworthiness responsibility to be subject to drug and alcohol testing. By the mid 1990s, the guidance we developed eliminated the airworthiness responsibility component and followed the rule language explicitly." 71 Fed.Reg. at 1670.

FN8. The petitioners also contend the alleged mischaracterization resulted in "substantive analytical error," Pet'rs Br. at 32, asserting it affected the FAA's estimate of the Rule's costs to the industry. This issue can be resolved on remand when the FAA reexamines the economic impact of the Rule on small business entities under the RFA. *See infra* Part II.D.

2. Arbitrary and Capricious Standard

The petitioners assert the 2006 Final Rule violates the APA's proscription against arbitrary and capricious rulemaking in two respects. First, they claim the 2006 Final Rule is arbitrary because it is inconsistent with the FAA's "overarching regulatory scheme" for maintenance and certification. Pet'rs Br. at 25. The petitioners maintain that because only certificated persons can perform maintenance under 14 C.F.R. § 43.3, employees of noncertificated subcontractors cannot perform "maintenance" but only "maintenance functions." But the FAA's regulations permit a certificated repair station to contract out maintenance work it would otherwise have performed provided the certificated entity performs an airworthiness "sign-off" on the work before the component is returned to service. *See* 14 C.F.R. § 145.217. The task performed by subcontractors is no less safety-sensitive for being contracted out to another entity.

Second, the petitioners contend the FAA did not adequately explain the need to test all subcontractors' employees. We disagree. As noted above, the FAA reasonably determined it "would be inconsistent with aviation safety" to treat employees of certificated and noncertificated contractors differently given that they all perform the safety-sensitive function of maintenance. 71 Fed.Reg. at 1670. Ensuring that front-line maintenance workers do not make errors on account of drug or alcohol use ***172** makes it less likely that such errors will compromise air safety.

The petitioners reply with four reasons they claim testing is not necessary. They first contend there is "no evidence that any accident has resulted from drug or alcohol use by any worker employed by any noncertificated subcontractor." Pet'rs Br. at 34-35. Nonetheless, they acknowledge that "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." Pet'rs Br. at 34. Thus, it may be only a matter of time before an accident attributable to substance abuse occurs. We do not believe the FAA must-or should-wait until then. *Cf. Nat'l Fed'n of Fed. Employees v. Cheney,* 884 F.2d 603, 610 (D.C.Cir.1989) ("It is readily apparent that the Army has a compelling safety interest in ensuring that the approximately 2,800 civilians who fly and service its airplanes and helicopters are not impaired by drugs. Employees in each of the covered positions-air traffic controllers, pilots, aviation mechanics and aircraft attendants-perform tasks

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that are frought with extraordinary peril: A single lapse by any covered employee could have irreversible and calamitous consequences.").

The petitioners' second reason relates to their contention that the subcontractor testing requirement is redundant given the airworthiness review required to be performed by a certificated repair station that subcontracts a maintenance task. We do not believe, however, it is arbitrary to impose a second line of defense, involving the very employees performing the repairs, to further promote air carrier safety. *See* 2006 Final Rule, 71 Fed.Reg. at 1669 ("While there might be redundancies built into the maintenance system, the supervisory and other quality assurance processes involved in aviation maintenance do not constitute a substitute for the protections afforded by drug and alcohol testing. Therefore, we will continue to require subcontractors be subject to drug and alcohol testing.").[FN9]

FN9. Further, the claimed redundancy has always been present for noncertificated employees of a certificated contractor (or of an air carrier itself) who are subject to testing notwithstanding their work is checked by certificated employees. *See* 2006 Final Rule, 71 Fed.Reg. at 1669-70 ("Within certificated repair stations, there are non-certificated individuals such as mechanic's helpers, who have been subject to testing for more than 15 years.")

The petitioners next reason that the FAA should have considered alternative "less restrictive forms of regulation." Pet'rs Br. at 36. The Supreme Court, however, has "made clear that the reasonableness of a particular technique does not 'necessarily or invariably turn' on the existence of less intrusive alternatives," *Nat'l Fed'n of Fed. Employees,* 884 F.2d at 610 (quoting *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 629 n. 9, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)).

Finally, the petitioners contend the 2006 Final Rule will have a "net *negative* safety impact," Pet'rs Br. at 37 (emphasis in original), because it will divert inspection resources from employees of certificated contractors and subcontractors and drive away both qualified, experienced noncertificated subcontractors and their skilled employees. The petitioners, however, offer no evidentiary support for this claim (nor did so before the FAA) and we therefore reject it.

3. Comments

[4] The petitioners also contend the FAA failed to respond adequately to comments on the 2006 Final Rule's impact on ***173** industry business costs and employees' privacy costs. We conclude the FAA's response was adequate.

With regard to the industry costs, the petitioners rely in particular on an industry survey they submitted to the FAA, along with an analysis of it by "a distinguished aviation industry economist," Pet'rs Br. at 39, which they claim contradicts the FAA's assessment that "none of the commenters opposing the proposal provided specific data challenging the FAA's fundamental economic assumptions," 2006 Final Rule, 71 Fed.Reg. at 1667. Yet immediately following the quoted statement, the 2006 Final Rule went on to note that "[t]he regulatory evaluation accompanying this final rule specifically addresses the comments about costs and benefits." *Id.* In the cited evaluation, the FAA responded at length to the information the commenters submitted, finding, inter alia, that "most of the survey information" was not "useful or credible," JA 112, and rebutting the expert's opinions, JA 113-15.

With regard to employees' privacy interests, the petitioners assert the FAA ignored comments complaining that subjecting employees of all subcontractors to the testing requirements will "trigger[ ] countless invasions of privacy through the administration of preemployment, reasonable-suspicion, incident-based, and ongoing random testing, including for employees with flawless past work records and no hint of prior substance abuse." Pet'rs Br. at 41. Again, the FAA responded, albeit succinctly:

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"[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. The purpose of this rulemaking is not to reopen the long-settled issue of invasion of privacy." 71 Fed.Reg. at 1668. The petitioners respond that the 2006 Final Rule "presents much-heightened privacy concerns," Pet'rs Br. at 22, but do not explain precisely what the heightened concerns are or point to comments that do so. To the extent the purported expansion of the testing class affects privacy rights, we address this issue in our Fourth Amendment discussion. *See infra* Part II.C.

C. Constitutional Challenges

The petitioners raise two constitutional challenges to the 2006 Final Rule, alleging the FAA violated the Due Process Clause of the Fifth Amendment and the Fourth Amendment's guarantee against unreasonable search and seizure. We reject each challenge in turn.

[5][6] The petitioners first claim the 2006 Final Rule, insofar as it extends the testing to employees of noncertificated subcontractors, is so vague as to violate due process because it is unclear what constitutes "maintenance" for which testing is required-and, in particular, where the FAA draws the line between "maintenance" and "preventive maintenance," for which testing is not required. *See* 14 C.F.R. § 1.1 (defining "maintenance" as "inspection, overhaul, repair, preservation, and the replacement of parts, but exclud[ing] preventive maintenance"). Whatever uncertainty exists regarding the meaning of "maintenance," however, existed before-and, according to the petitioners, was enhanced by guidance disseminated after-the 2006 Final Rule issued and is therefore not attributable to it. In any event, the court "allow[s] greater leeway for regulations and statutes governing business activities than those implicating the first amendment"-"no more than a reasonable degree of certainty can be demanded." *Throckmorton v. NTSB*, 963 F.2d 441, 445 (D.C.Cir.1992) (internal quotations***174** & citations omitted). In this case, employers can clarify the term's meaning as they always have-by recourse to the written guidance which the FAA routinely provides on testing issues raised by interested parties. *See, e.g.,* JA 175, 180; Pet'rs Br. at 27-28 (noting guidance on meaning of "maintenance" issued since 2006 Final Rule). Thus, "the regulated enterprise" has "the ability to clarify the meaning of the regulation by its own inquiry, or by resort to the administrative process." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

[7] The petitioners next contend the 2006 Final Rule's drug testing requirement subjects employees of noncertificated subcontractors to unreasonable searches in violation of the Fourth Amendment. Again we disagree.

In *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C.Cir.1989), the court upheld against a Fourth Amendment challenge the U.S. Army's practice of subjecting civilian aviation maintenance personnel to compulsory, random toxicological urine testing because the Army had a compelling interest in ensuring air safety given "the quintessential risk of destruction to life and property posed by aviation." 884 F.2d at 610. The same justification exists here. Nonetheless, the petitioners offer three grounds for finding the testing program unconstitutional.

First, the petitioners assert that the employees subject to testing are "ordinary citizens." The same is true, however, of the employees of certificated air carrier contractors and subcontractors and was true of the civilian employees in *National Federation*. Yet the petitioners do not suggest these groups may not constitutionally be tested.

Second, the petitioners object to the expansive scope of the testing insofar as it applies to all maintenance work, all employees who "participate" in the work and, especially, to current employees of

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noncertificated subcontractors. These objections applied as well to employees of a certificated contractor or subcontractor when they first became subject to testing in the late 1980s. Further, as to the first objection specifically, as indicated previously, the FAA can work out through guidance and consultation with subcontractors (as it has with certificated contractors and subcontractors) what is and is not test-triggering "maintenance" work. Further, as to the third objection, while testing of incumbents may as a general matter require a closer relationship between the employee's job and the government interest served than does testing of new applicants, *see Stigile v. Clinton*, 110 F.3d 801, 805-06 (D.C.Cir.1997); *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C.Cir.1991), the nexus between aircraft mechanical work and aviation safety is sufficient, as our decision in *National Federation* made clear.

Third, the petitioners argue, as earlier, that the additional testing "simply 'is not needed' " in light of the airworthiness testing all aviation components undergo before being placed in service. Pet'rs Br. at 46 (quoting *Chandler v. Miller*, 520 U.S. 305, 320, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997)). We reject this argument here for the same reasons given earlier. *See supra* Part II.B.2. Because of "the quintessential risk of destruction to life and property" posed by substance impaired lapses by maintenance workers at any tier, the testing is justified under *National Federation*.

D. Regulatory Flexibility Act

Last, we address the petitioners' RFA challenge. Under the RFA an agency required to file a notice of proposed rulemaking***175** "shall prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a). Along with the final rule, "the agency shall prepare a final regulatory flexibility analysis" which "shall contain," inter alia,

> **(2)** a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; [and]
>
> ...
>
> **(5)** a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Id. § 604(a). These requirements, however, "shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b).

In the NPRM, the FAA performed a tentative RFA analysis and counted among RFA small entities both air carriers and Part 145 repair stations but, because it was "unable to determine how many of the 2,412 part 145 repair stations are considered small entities," it "call[ed] for comments and request [ed] that all comments be accompanied by clear documentation." 67 Fed.Reg. at 9376.

In the SNPRM, the FAA determined that "the small entity group is considered to be part 145 repair stations," 69 Fed.Reg. at 27,986, but still "unable to determine how many of the part 145 repair stations and their subcontractors are considered small entities," concluded that "[m]ost, if not all [non-certificated maintenance contractors] would be considered small entities," *id.* Based on its calculation of annualized costs of less than 1% of annual median revenue, the FAA stated it "believe[d] that this proposed action would not have a significant economic impact on a substantial number of

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small entities" but "solicit[ed] comments on this determination, on these assumptions, on the annualized cost per company, and on their annual revenue." *Id.*

[8] After receiving comments, the FAA took a different tack in the 2006 Final Rule and "disagree[d]" with "commenters who raised RFA issues," asserting that contractors are not among entities regulated under the testing regulations for the purpose of the RFA. 71 Fed.Reg. at 1673. The FAA noted that "the directly regulated employers are: Air carriers operating under 14 CFR parts 121 and 135; § 135.1(c) operators; and air traffic control facilities not operated by the FAA or by or under contract to the U.S. military," who "must conduct drug and alcohol testing under the FAA regulations." *Id.* "For drug and alcohol testing purposes, certificated repair stations are contractors, and contractors are not regulated employers." *Id.* (citing 14 CFR pt. 121, app. I, § II (defining "employer"); *id.* app. J, § I(D) (same)). Accordingly, the FAA concluded it was "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." ***176** *Id.* at 1674. The petitioners contend the FAA's determination is incorrect. We agree with the petitioners that the contractors and subcontractors are regulated employers and that the RFA therefore requires that the FAA consider the economic impact of the 2006 Final Rule on them. In reviewing this conclusion, we do not defer to the FAA's interpretation of the RFA-and specifically whether contractors and subcontractors are "regulated" entities directly affected by the regulations-because the FAA does not administer the RFA. *See Am. Trucking Ass'ns v. EPA,* 175 F.3d 1027, 1044 (D.C.Cir.1997) (no deference to EPA or SBA interpretation of RFA), *modified in other respect,* 195 F.3d 4 (D.C.Cir.1999), *reversed in other respect, Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

In making its determination, the FAA relied on a line of decisions in which this court held that under the RFA the regulating agency need consider only the economic impact of agencies directly affected and regulated by the subject regulations. We find the situation here materially different from the cases the FAA cites.

Initially, in *Mid-Tex Electric Cooperative v. FERC,* 773 F.2d 327 (1985), we reviewed a challenge by wholesale customers to a rule permitting utilities to recover costs and held that "FERC correctly determined that it need not prepare a regulatory flexibility analysis" because the regulated utilities, which were subject to the rule, were not small entities, while the wholesale customers, many of whom were small entities, were not regulated by the rule. 773 F.2d at 343. We explained "it is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities," *id.* at 342. That is, the RFA is satisfied if the agency determines "the rule will not have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule.*" *Id.* (emphasis added). As the court noted, the Congress "did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." *Id.* at 343. In *Mid-Tex,* FERC was not required to consider the indirect economic effects on the wholesale customers of the utilities or on the ultimate retail consumers, neither of which was regulated by the challenged rule.

In *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 868-69 (D.C.Cir.2001), our latest iteration of *Mid-Tex,* environmental groups and industry representatives challenged emission standards for hazardous waste combustors. The court rejected a cement manufacturer's argument that EPA incorrectly confined its RFA analysis to the economic effects on the hazardous waste combustion facilities, without considering the effect on generators of hazardous waste like itself. The court ex-

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plained:

> EPA's rule regulates hazardous waste combustors, not waste generators. We explained in *Mid-Tex* that the language of the statute limits its application to the "small entities *which will be subject to the proposed regulation* "-that is, those "small entities *to which the proposed rule will apply*." *Mid-Tex Elec. Coop.*, 773 F.2d at 342 (quoting 5 U.S.C. § 603(b)) (first emphasis in *Mid-Tex*; second emphasis in original). Congress "did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." *Id.* at 343.

255 F.3d at 869. The court further rejected the cement manufacturer's attempt to ***177** distinguish its situation "on the basis that EPA actually intended to affect the conduct of hazardous waste generators by raising the cost of incineration," stating:

> [A]pplication of the RFA does turn on whether particular entities are the "targets" of a given rule. The statute requires that the agency conduct the relevant analysis or certify "no impact" for those small businesses that are "subject to" the regulation, that is, those to which the regulation "will apply."

Id. (quoting *Mid-Tex*, 773 F.2d at 342; 5 U.S.C. § 603(b)(3)).

Unlike the parties claiming economic injury in the cited cases, contractors and subcontractors are directly affected and therefore regulated by the challenged regulations. It may be true that the regulations are immediately addressed to the employer air carriers which are in fact the parties certified to operate aircraft. *See* 14 C.F.R. pt. 121, app. I §§ I(B)-(C) (making "employer" responsible party for ensuring drug program is conducted properly), II (definition of "employer"); 14 C.F.R. pt. 121, app. J §§ I(B)-(C) ("employer" responsible for alcohol testing program), I(D) (definition of employer). Nonetheless, the regulations expressly require that the employees of contractors and subcontractors be tested. *See* 14 C.F.R. pt. 121, apps. I § III, J § II. Thus, the contractors and subcontractors (at whatever tier) are entities " '*subject to the proposed regulation* '-that is, those 'small entities *to which the proposed rule will apply*.' " *Cement Kiln*, 255 F.3d at 869 (quoting *Mid-Tex*, 773 F.2d at 342 (quoting 5 U.S.C. § 603(b))) (first emphasis in *Cement Kiln*; second emphasis in original). In other words, the 2006 Final Rule imposes responsibilities directly on the contractors and subcontractors and they are therefore parties affected by and regulated by it. The FAA acknowledged as much when it advised:

> If a contractor company has FAA-regulated testing programs, *it must ensure* any individual performing a safety-sensitive function by contract (including by subcontract at any tier) below it is subject to testing. The FAA recognizes there may be multiple tiers of subcontractors in the aviation industry. *Any lower tier contractor company* with FAA-regulated testing programs *will be held responsible* for its own compliance with the FAA drug and alcohol testing regulations. Also, there may be circumstances where *the regulated employer and higher tier contractor companies share responsibility* for the lower tier contractor company's noncompliance.

2006 Final Rule, 71 Fed.Reg. at 1671-72 (emphases added). In fact, the FAA had it right in the NPRM and SNPRM when it determined that for the purpose of its RFA analysis the affected small entities should be considered to be Part 145 repair stations and their subcontractors. *See* 69 Fed.Reg. at 27,986. When the FAA abruptly changed course in the 2006 Final Rule, it went off course.

As a fall back, the FAA asserts that, in the event the court concludes contractors and subcontractors are directly regulated by the 2006 Final Rule, the FAA "substantially complied with" the RFA because it conducted initial evaluations (for the SNPRM) and a final economic evaluation of the effects on the industry, responding to comments following the SNPRM. The final evaluation,

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however, was not a "final regulatory flexibility analysis" pursuant to the RFA as the FAA determined that contractors and subcontractors are not regulated entities for the purpose of the RFA. *See* 71 Fed.Reg. at 1673; JA 155. Further, the RFA expressly requires that the final regulatory flexibility analysis explain***178** "why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5). The evaluation on which the FAA relies, however, states unequivocally: "[N]o alternatives were considered," JA 100. The RFA is a procedural statute setting out precise, specific steps an agency must take. The FAA offers no authority to support its "substantial compliance" theory and we are aware of none. Accordingly we reject this argument as well.

For the foregoing reasons, we uphold the substance of the FAA's 2006 Final Rule and remand for the limited purpose of conducting the analysis required under the Regulatory Flexibility Act, treating the contractors and subcontractors as regulated entities.[FN10]

FN10. In light of the public's manifest interest in aviation safety, we will not defer enforcement of the rule against small entities pending the FAA's Regulatory Flexibility Act analysis. *See* 5 U.S.C. § 611(a)(4)(B).

So ordered.

SENTELLE, Circuit Judge, dissenting:

I respectfully dissent from the majority's holding that the Omnibus Transportation Employee Testing Act authorizes the FAA to require drug and alcohol testing of employees who perform the enumerated functions "directly or by contract (including by subcontract at any tier)." 2006 Final Rule, 71 Fed.Reg. 1666, 1676, 1677 (Jan. 10, 2006) ; *see* Maj. Op. at 165-70. I would therefore grant the petitions and vacate the 2006 Final Rule.

As originally enacted in 1991, the Act provided that the FAA "shall" require drug and alcohol testing of "airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions ..." Pub.L. No. 102-143, tit. v, § 3, 105 Stat. 917, 953 (Oct. 28, 1991) (codified at 49 U.S.C. app. 1434; recodified, as amended, at 49 U.S.C. § 45102(a)(1)). To find statutory authority for the Rule, the FAA must argue that employees of subcontractors "at any tier" are "air carrier employees" under the Act. I think it is plain that they are not, and therefore cannot join my colleagues in holding that the Act is ambiguous under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The question is whether "Congress has directly spoken to the precise question at issue." *Id.* at 842, 104 S.Ct. 2778. To my mind, the plain language of the statute forecloses the interpretation urged by the FAA. An employee is "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." BLACK'S LAW DICTIONARY 543 (7th ed.1999). This is not the only meaning of the word, but "definitional possibilities" do not alone create ambiguity. *See California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C.Cir.2004) (" *CAISO* ") (citing *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994)). Here, we need not canvass all known uses of the word "employee" to know that an employee of a subcontractor performing work for a contractor which in turn has a contract with an air carrier is not, in an ordinary sense, an "air carrier employee." And the Final Rule does not stop at that-it applies to employees of subcontractors "at any tier."

The majority argues that because the original Act authorized testing of certain contractors' employees (namely, "airport security screening contract personnel"), ***179** the subsequent phrase "and

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other air carrier employees" may be read to include *other* contractors' and subcontractors' employees. *See* Maj. Op. at 166-67. Because "employee" is not easily defined to encompass an employee of an air carrier's contractor's subcontractor, this is not a natural reading of the statute. Where "the text and reasonable inferences from it give a clear answer against the government ... that ... is 'the end of the matter.' " *CAISO,* 372 F.3d at 401 (quoting *Brown,* 513 U.S. at 120, 115 S.Ct. 552). To the extent that statutory context may fairly illuminate the reach of "air carrier employee," the reasonable inference from the phrase "airport security screening contract personnel" is that where Congress intended the Act to reach non-air carrier employees, it said so explicitly.

The FAA supports its interpretation by asserting that Congress gave it broad authority to prescribe regulations the FAA "finds necessary for safety in air commerce" and to require drug testing "[i]n the interest of aviation safety." 49 U.S.C. §§ 44701(a)(5); 45102(a)(1). No doubt the Final Rule is intended to promote safety, but Congress's mandate does not give the FAA carte blanche to pursue that goal. *See Michigan v. EPA,* 268 F.3d 1075, 1084 (D.C.Cir.2001). The FAA's authority to require drug testing is defined by statute, and in my view the FAA has exceeded that statutory authority here.

C.A.D.C.,2007.
Aeronautical Repair Station Ass'n, Inc. v. F.A.A.
494 F.3d 161, 377 U.S.App.D.C. 329, 26 IER Cases 660, 2005 O.S.H.D. (CCH) P 32,899

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