SCHEDULED FOR ORAL ARGUMENT
AT 9:30 AM ON JUNE 5 IN PASADENA, CALIFORNIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE AIRPORT BOARD, Petitioner v. MICHAEL P. HUERTA, Administrator, and FEDERAL AVIATION ADMINISTRATION, Respondents.	)	**No. 13-71172**

Consolidated with **Nos.13-71133** (Flathead Municipal Airport Authority, *et al.*), **13-71175** (Renton Municipal Airport, *et al.*), **13-71177** (Bloomington-Normal Airport Authority), **13-71178** (City of Ormond Beach, *et al.*), **13-71179** (County of Cuyahoga), **13-71181** (The Ohio State University), **13-71187** (Port of Portland), **13-71202** (AAAE and USCTA), **13-71247** (Southern Illinois Airport Authority), **13-71248** (Susquehanna Area Regional Airport Authority), **13-71253** (Boca Raton Airport Authority), and **13-71259** (Martin County, Florida), **13-71348** (City of McKinney, Texas), **13-71351** (Wisconsin Airport Management Association), **13-71388** (County of Los Angeles), **13-71414** (Texas A&M University), **13-71423** (Mohave County Airport Authority), **13-71442** (City of San Diego), **13-71514** (Paskar, et al), and **13-71518** (County of Tompkins, *et al.*)

REVIEW OF FAA'S MARCH 22, 2013, DECISION
TO CLOSE 149 FEDERAL CONTRACT TOWERS

JOINT OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

A. Petitioners

1. Case No. 13-71133: *Flathead Municipal Airport Authority and Friedman Memorial Airport Authority v. Huerta*

Flathead Municipal Airport Authority, which operates Glacier Park International Airport (Glacier Park), is a political subdivision of Flathead County, Montana. Because it is not a nongovernmental corporate entity, it is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

The Friedman Memorial Airport Authority (FMAA) owns and operates the Friedman Memorial Airport (Friedman) in Hailey, Idaho. FMAA does not issue publicly traded stock; it is a political subdivision of the State of Idaho established pursuant to Idaho Code Sections 21-405 and 67-2328. As a political subdivision of the State of Idaho, FMAA is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

2. Case No. 13-71172: *Spokane Airport Board v. Huerta*

Spokane County and the City of Spokane, Washington, jointly own Spokane International Airport, Felts Field Airport (Felts Field), and the Airport Business Park. The Spokane Airport Board (Spokane) is the authority that operates the airports pursuant to joint agreement and Wash. Rev. Code § 14.08. Spokane does not issue publicly traded stock. Spokane is a municipal governmental body under the laws of the State of Washington,

Wash. Rev. Code § 14.08. As a political subdivision of the State of Washington, Spokane is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

3. **Case No. 13-71175:** ***The City of Renton, a Municipal Corporation, and Renton Municipal Airport v. Huerta***

The City of Renton, Washington, owns and operates Renton Municipal Airport (Renton). The City does not issue publicly traded stock. The City is a municipal governmental body under the laws of the State of Washington, Wash. Rev. Code 35A, as a Code City. As a political subdivision of the State of Washington, the City is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

4. **Case No. 13-71177:** ***Bloomington-Normal Airport Authority v. Huerta***

The Bloomington-Normal Airport Authority (Bloomington) owns and operates the Central Illinois Regional Airport (Central Illinois). Bloomington does not issue publicly traded stock; it is a municipal governmental body established pursuant to the Illinois Airport Authorities Act, codified at 70 Ill. Comp. Stat. 5/1-5/22.7. As a political subdivision of the State of Illinois, Bloomington is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

5. **Case No. 13-71178:** ***City of Ormond Beach, Florida; City of Naples Airport Authority; and Charlotte County Airport Authority v. Huerta***

City of Ormond Beach, Florida, which operates the Ormond Beach Airport

(Ormond Beach), is a municipal governmental body under the laws of Florida. The City of Naples Municipal Airport Authority, which operates the Naples Municipal Airport (Naples), and the Charlotte County Airport Authority, which operates the Punta Gorda Airport (Punta Gorda), are both political subdivisions of the State of Florida. None of the three Petitioners is a nongovernmental corporate entity, and therefore, none of the Petitioners is required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

6. **Case No. 13-71179:** ***County of Cuyahoga, known as /dba Cuyahoga County Airport v. Huerta***

The County of Cuyahoga known as /dba Cuyahoga County Airport (Cuyahoga) does not issue publicly traded stock. Cuyahoga is a political subdivision of the State of Ohio. As a political subdivision of the State of Ohio, Cuyahoga is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

7. **Case No. 13-71181:** ***The Ohio State University v. Huerta***

The Ohio State University (OSU) owns and operates The Ohio State University Airport (Don Scott Field). OSU does not issue publicly traded stock; it is an instrumentality of the State of Ohio established pursuant to Chapter 3335 of The Ohio Revised Code. As an instrumentality of the State of Ohio, OSU is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

8. Case No. 13-71187: *Port of Portland v. Huerta*

The Port of Portland (Portland), which operates Portland-Troutdale Airport (Troutdale), is a municipal corporation and port district of the State of Oregon. Because Portland is not a nongovernmental corporate entity, it is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

9. Case No. 13-71247: *Southern Illinois Airport Authority v. Huerta*

The Southern Illinois Airport Authority, which operates Southern Illinois Airport (Southern Illinois), is a municipal corporation established under the laws of the State of Illinois pursuant to the Airport Authorities Act, 70 Ill. Comp. Stat. 5/1 – 5/22.7. Because the Airport Authority is not a nongovernmental corporate entity, it is therefore not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

10. Case No. 13-71248: *Susquehanna Area Regional Airport Authority v. Huerta*

The Susquehanna Area Regional Airport Authority (SARAA), which operates the Capital City Airport (Capital City), is a multi-municipal authority formed under the Pennsylvania Municipality Authorities Act (53 Pa. Cons. Stat. §§ 5601 *et seq*.). As a political subdivision of the State of Pennsylvania, SARAA is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

11. Case No. 13-71253: *Boca Raton Airport Authority v. Huerta*

The Boca Raton Airport Authority (BRAA) is an independent special district

of the State of Florida, enabled pursuant to Ch. 2004-468, Laws of Florida. The BRAA operates the Boca Raton Airport (Boca Raton), which is located on land owned by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and leased to the BRAA until 2073. BRAA does not issue publicly traded stock. It is a governmental district established to operate a public airport and is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

12. Case No. 13-71259: *Martin County, Florida v. Huerta*

The Martin County Board of County Commissioners, which operates Witham Field (Witham), is a political subdivision of the State of Florida and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

13. Case No. 13-71348: *City of McKinney, Texas v. Huerta*

The City of McKinney, which operates the Collin County Regional Airport (Collin County), is a political subdivision of the State of Texas and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

14. Case No. 13-71351: *Wisconsin Airport Management Ass'n v. Huerta*

The Wisconsin Airport Management Association is a nonprofit, membership-based entity organized under the laws of Wisconsin. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

15. Case No. 13-71388: *County of Los Angeles v. Huerta*

The County of Los Angeles, which owns and operates Whiteman Airport and General William J. Fox Airfield, is a political subdivision of the State of California and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

16. Case No. 13-71414: *Texas A&M University v. Huerta*

Texas A&M University is a public institution of higher education created pursuant to Tex. Educ. Code Ann. § 86.02. It is an instrumentality of the State of Texas, and therefore, Texas A&M University is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

17. Case No. 13-71423: *Mohave County Airport Authority v. Huerta*

Mohave County is not a nongovernmental corporate entity and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1. Petitioner Mohave County Airport Authority, Inc., is a political subdivision of Mohave County, Arizona.

18. Case No. 13-71442: *City of San Diego v. Huerta*

The City of San Diego is not a nongovernmental corporate entity and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1. Petitioner City of San Diego is a charter city organized and existing under the Constitution of the State of California.

19. Case No. 13-71518: *County of Tompkins et al. v. Huerta*

The County of Tompkins (Tompkins), which operates the Ithaca Tompkins Regional Airport (Ithaca), does not issue publicly traded stock. Tompkins is a municipal governmental body under the laws of the State of New York. As a municipal entity of the State of New York, Tompkins is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

20. Case No. 13-71514: *Kenneth Paskar and Friends of LaGuardia LLC*

Pursuant to Fed. R. App. P. 26.1, Petitioner Friends of LaGuardia Airport, Inc., by and through its undersigned attorney, states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

B. <u>Intervenors</u>

1. *City of Macon, Georgia*: Petitioner-Intervenor in No. 13-71172

The City of Macon, Georgia, owns Middle Georgia Regional Airport (Macon Airport). The City of Macon employs TBI Airport Management, Inc. to provide management services for Macon Airport. The City of Macon, Georgia, does not issue publicly traded stock. Macon is a municipal corporation under the laws of the State of Georgia. As a political subdivision of the State of Georgia, Macon is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

2. *City of Battle Creek, Michigan*: Petitioner-Intervenor in Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

The City of Battle Creek, Michigan (Battle Creek) owns and operates W.K. Kellogg Airport (Kellogg). Battle Creek does not issue publicly traded stock. Battle Creek is a municipal governmental body under the laws of the State of Michigan. Mich. Comp. Laws § 124.454. As a political subdivision of the State of Michigan, Battle Creek is not a nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

3. *City of Fayetteville, Arkansas*: Petitioner-Intervenor in Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

The City of Fayetteville, which operates Drake Field (Drake), is a governmental party and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

4. *Milwaukee County, Wisconsin*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

Milwaukee County is a governmental party and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

5. *Nashua Airport Authority*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

Intervenor Nashua Airport Authority (NAA) is a political subdivision of the City of Nashua, New Hampshire, chartered with owning and operating the Nashua Municipal Airport or Boire Field (Nashua). It is a non-profit organization and has not issued stock. As such, the NAA is not a

nongovernmental corporate entity that must file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

6. *Ogden Municipal Corporation*: Petitioner-Intervenor in No. 13-71172

Ogden City Corporation is a Utah municipal corporation and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

7. *City of Concord, North Carolina*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

The City of Concord, North Carolina, is not a nongovernmental corporate entity and therefore is not required to file a corporate disclosure statement pursuant to Fed. R. App. P. 26.1.

8. *Cobb County, Georgia*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

Cobb County is a governmental unit and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App P. 26.1.

9. *Gwinnett County, Georgia*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

Gwinnett County is a governmental unit and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

10. *County of Mercer, New Jersey*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181

Mercer County is a Municipal Corporation organized under the laws of the

State of New Jersey, and it owns and operates the Trenton Mercer Airport in Ewing Township, New Jersey. Mercer County is a governmental unit and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

11. ***Ventura County, California*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181**

Ventura County is a governmental unit and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

12. ***Lancaster Airport Authority*: Petitioner-Intervenor in Case Nos. 13-71133, 13-71172, 13-71177, 13-71178, 13-71179, 13-71181**

Lancaster Airport Authority is a municipal authority organized under the laws of the Commonwealth of Pennsylvania and does not issue stock, so it is not subject to the corporate disclosure statement requirement of Fed. R. App. P. 26.1.

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GLOSSARY OF ABBREVIATIONS

Addendum	Addendum of Statutes, Regulations, and Legislative Materials, filed as a separately bound document
ANG	Air National Guard
APA	Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.
ATCT	Air Traffic Control Tower
ATO	The Federal Aviation Administration's Air Traffic Organization
BCA	Budget Control Act of 2011, Pub. L. No. 112-25, 25 Stat. 240 (2011)
CEQ	Council on Environmental Quality
CGL	Cuyahoga County Airport
CXY	Capital City Tower, New Cumberland, PA
Decision	The March 22, 2013, Decision by FAA to close 149 federal contract towers, which decision is the subject of this litigation.
DHS	United States Department of Homeland Security
DOD	United States Department of Defense
DOT	United States Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
FAA	Federal Aviation Administration

FCT	Federal Contract Tower
Fact Sheet Summaries	Summary Fact Sheets prepared by FAA for each of the 189 towers considered for closure, which appear in the FAA's Certified Index to the Record under Category 3 (Review Team Items).
March 13 Comments	Appeal Letters from Airports, in response to the March 5 Letters sent by FAA. These letters appear in the Record under Category 3, and are filed in each respective airport's folder, along with FAA's Fact Sheet Summaries
NATCA	The National Air Traffic Controllers Association
NEPA	The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*
OMB	Office of Management and Budget
PDX	Portland International Airport
PPA	Programs, Projects and Activities in an Agency's Budget Account
P.R.	Post-decisional documents in the Administrative Record
RFDA	The Reducing Flight Delays Act of 2013
Record or R.	The Administrative Record in this case
SRM	Safety Risk Management
SRMD	Safety Risk Management Decision (P.R.001121-001356)
SMS	FAA's Safety Management System Program
Summary Matrix	The FAA Operations Review Team Summary, appearing in the Record under Category 3 (Review Team Items)

	and described by FAA as "[a] spreadsheet prepared by the first level review team summarizing the types of national interest comments received for each tower"
VFR	Visual Flight Rule
WAMA	Petitioner Wisconsin Airport Management Association
WHP	Whiteman Field in Pacoima, California

STATEMENT OF JURISDICTION

Petitioners and Intervenors (collectively, Petitioners) challenge the Federal Aviation Administration (FAA) decision, issued via electronic mail on March 22, 2013, to close 149 air traffic control towers around the country, which is a final agency action reviewable under 5 U.S.C. §§ 702 and 704. The consolidated cases arise under 49 U.S.C. § 46110; the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*; the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*; and 49 U.S.C. § 47124.

Petitioners participated in the agency proceedings below. Petitioners sought waivers before FAA published its final decision. Each Petitioner timely filed a Petition for Review in this or another circuit court of appeals within the sixty days permitted by statute. 49 U.S.C. § 46110. On April 3, 2013, the United States Judicial Panel on Multidistrict Litigation issued an order consolidating the pending petitions in the Ninth Circuit. This Court therefore has jurisdiction to review FAA's decision to close the affected towers pursuant to 49 U.S.C. § 46110(a) and 5 U.S.C. §§ 702 and 704.

STATEMENT OF ISSUES FOR REVIEW

1. Whether FAA acted in an arbitrary and capricious manner, exceeded its authority, or otherwise erred when it decided to close 149 federal contract towers, by failing to uphold safety as its "highest priority" as required by 49 U.S.C. § 40101(d)(1).

2. Whether FAA acted in an arbitrary and capricious manner, exceeded its authority, or otherwise erred when it failed to adhere to its own rules, policies, and procedures, including those requiring it to conduct Safety Risk Management review, before making any change to the National Airspace System.

3. Whether FAA acted in an arbitrary and capricious manner, exceeded its authority, or otherwise erred when it failed to evaluate whether the tower closures required analysis under NEPA.

4. Whether FAA acted in an arbitrary and capricious manner, exceeded its authority, or otherwise erred when it failed to consider whether any of the tower closures might be affected by 49 U.S.C. § 47124 and because it seeks to close at least one contract tower (Cuyahoga) that was in existence on December 30, 1987, in direct violation of 49 U.S.C. § 47124.

ADDENDUM

Pursuant to Circuit Rule 28-2.7, an addendum containing pertinent statutes, legislative material, regulations, and agency materials (Addendum or A.____) appears in two separately bound volumes.

STATEMENT OF THE CASE

This case comprises consolidated petitions for review of FAA's Decision to terminate federal contract air traffic control operations and close air traffic control towers at 149 airports across the country. On March 5, 2013, FAA notified 189 airports of its intention to terminate contract tower operations, but gave affected airports until March 13 to file submissions seeking relief from tower closure only

on "national interest" grounds. By March 13, 159 airports filed submissions seeking such relief (the March 13 Comments). On March 22, FAA notified 149 airports that it would terminate contract tower operations at their locations, beginning on April 7.

On March 25, the City of Spokane filed the first Petition for Review in the D.C. Circuit Court of Appeals. Several Petitions from other affected airports quickly followed in the D.C., Second, and Ninth Circuits, *e.g.*, Case No. 13-71177 (originally filed in the D.C. Circuit); Case No. 13-71515 (originally filed in the Second Circuit); Case No. 13-7113 (originally filed in the Ninth Circuit).

On April 3, 2013, pursuant to 28 USC § 2112(a) (A.000026), the Judicial Panel on Multidistrict Litigation assigned all petitions for review of FAA's March 22 order to the Ninth Circuit. Throughout this proceeding, new petitions for review and new motions to intervene have continued to be filed, with the most recent being the Motion to Intervene by the County of Ventura, California (Case 13-7113, DktEntry 51). On April 26 and May 2, the Court consolidated all of the transferred and currently pending cases. (DktEntry 56, 67).

On April 4, 2013, the City of Ormond Beach filed an emergency motion for stay in the Ninth Circuit, because its tower was scheduled for closure on April 14. (Case 13-71178, DktEntry 9-1). The next day, FAA issued a press statement announcing that it would delay closure of all 149 towers until June 15, 2013. In response, the City withdrew its emergency motion. (Case 13-71178, DktEntry 14).

On April 15, Petitioners and Respondents filed a joint motion for expedited briefing and requesting consolidation of the related cases. (DktEntry 23-1). On

April 19, Petitioners jointly filed an urgent motion for stay pending review of the March 22 Decision, pursuant to Fed. R. App. P. 18 and 27 and Ninth Circuit Rules 27-3(b) and 27-12, to preserve the status quo and protect aviation safety in the event the Court is unable to rule on the merits by June 15. (DktEntry 31-1).

On April 24, 2013, FAA submitted its certified index of the Administrative Record. (DktEntry 39). On April 25, 2013, FAA filed a supplemental index. (DktEntry 46). On May 2, Petitioners moved to strike portions of that Record as violative of the bar on post-decision rationales. (DktEntry 68-1).

As of the date of this Brief, 30 parties have petitioned for review of the Decision, and 14 parties have sought to intervene on the side of Petitioners.

STATEMENT OF FACTS

Petitioners are primarily state or local authorities owning and operating airports within their jurisdictions, as well as one member association of airports.[1] The towers at Petitioners' airports are operated by federal contractors under the Federal Contract Tower (FCT) program pursuant to 49 U.S.C. § 47124(b) (A.000058). Claiming that action is needed to satisfy the sequestration requirements of the Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011) (A.000071–99) (BCA), FAA decided to terminate tower operations at each Petitioner's airport. FAA now plans to terminate the towers on June 15, 2013.

[1] In addition, Friends of LaGuardia and Kenneth Paskar (No. 13-71514) are pilots who use affected airports, and Douglas C. Lews, Michael C. Atwood, Scott E. Campbell, Nicholas M. Hartman, and Robert F. Erlwein (No. 13-71518) are air traffic controllers at the Ithaca Tompkins Regional Airport.

A. The Federal Contract Tower Program

The control of aircraft operations is one of FAA's most critical functions and one for which it is exclusively responsible. Air traffic control towers (ATCTs) track aircraft as they take off, land, and taxi at specific airports; they play a critical role in preventing aircraft collisions. FAA, *Establishment and Discontinuance Criteria for Air Traffic Control Towers*, FAA-APO-90-7, at 13 (1990) (A.000419). Because tower controllers are located on-site, they are able to prevent many avoidable accidents by providing direction to pilots regarding separation between aircraft, weather, runway obstructions, hazards such as bird flocks, and whether landing gear are extended. *Id*. If an airport does not have its own tower, controllers at remote towers or regional centers located dozens, or even hundreds, of miles away must assume responsibility for separating aircraft, subject to limited radar and radio coverage. *E.g.*, R.000432 (Felts Field).

Towers at major airports were traditionally operated by FAA employees. However, for more than three decades, FAA has also relied on contractors to operate towers through its FCT program; as of November 2012, the FCT program includes 250 contract towers in 46 States and 4 Territories. Department of Transportation (DOT), Office of Inspector General (OIG), Report No. AV-2013-009, Audit Report, *Contract Towers Continue to Provide Cost-Effective and Safe Air Traffic Services, but Improved Oversight of the Program Is Needed*, at 1 (2012) (A.000504) (OIG Report). The program "provides services to a wide range of users, including general aviation, commercial, cargo, and military operators." *Id*.

The FCT program also operates at less expense with comparable or greater safety benefits than comparable FAA-operated towers. *Id*. at 5–6 (A.000508–509).

In 1987, Congress directed DOT to "continue" the FCT program with respect to contract towers existing as of December 30, 1987, and to "extend" the contract tower program "as practicable." 49 U.S.C. § 47124(b)(1)(A) (A.000058). Congress' objective of keeping the towers open is clearly stated in the Conference Report:

> [T]he Federal Aviation Administration has exhibited some reluctance to continue this program. The Conferees believe that the contract tower program has provided significant benefits in terms of aviation safety, as well as economic development for participating communities, and believe that those towers currently being operated should remain in operation.

H.R. Conf. Rep. No. 100-484, *reprinted in* 1987 U.S.C.C.A.N. 2630, 2652–53 (1987) (A.000470).

This statute was amended in 2012, but the grandfathering of the pre-1987 contract towers remains. As part of the amendments, Congress added a requirement that, to establish or discontinue an FCT at other airports, FAA must rely on benefit/cost analyses to compare the benefits of funding an FCT (accidents prevented and lives saved) against the costs to operate the tower. 49 U.S.C. § 47124(b)(3)(B) (A.000059).

B. FAA's Air Safety Obligations

Congress has mandated that "assigning, maintaining, and enhancing safety and security" is the "highest priorit[y]" of FAA. 49 U.S.C. § 40101(d)(1)

(A.000032); *see id.* § 47101(a) (A.000054). To carry out its statutory safety mandate, FAA has adopted a Safety Management System (SMS) program for its Air Traffic Organization (ATO) unit. *See* FAA, Order 1100.161 CHG 1, *Air Traffic Safety Oversight* (2006) (A.000309–331); FAA, Order JO 1000.37, *Air Traffic Organization Safety Management System* (2007) (A.000286–308); and FAA, *Air Traffic Organization Safety Management System Manual – Version 2.1* (2008) (A.000113–285) (Manual). The SMS process is FAA's mandatory, formal framework to assess safety risks. The Manual requires that, before making any proposed changes to the National Airspace System, including the proposed closure of a tower, FAA must prepare a comprehensive Safety Risk Management (SRM) evaluation. Manual § 3.3.1 (A.000135–36).

C. The Budget Sequester

In August 2011, Congress enacted the BCA, which established statutory caps on federal spending and implemented a sequestration procedure if spending cuts were not accomplished by certain dates. A.000071–99. The Act specifies that in implementing the sequestration, agencies must reduce each "account"—the top-level budget category—in accordance with the procedures in 2 U.S.C. § 903(f). 2 U.S.C. § 901a(7)(A) (A.000004). Section 903(f) further provides that, for years such as the current fiscal year where agency funding was provided by a part-year appropriation at the time of the sequester (in this case, March 1, 2013), reductions should be made at the top level of "budget account," and not at lower subaccount categories. 2 U.S.C. § 903(f)(2) (A.000009). The BCA provides for "the same percentage sequestration" to apply below the "account" level if Congress set

spending priorities and "delineated" specific "programs, projects and activities" (PPAs) for that fiscal year. 2 U.S.C. § 906(k) (A.000019). Thus, under the BCA, PPAs remain broad categories within which agencies retain significant discretion for implementing cuts.

On March 1, 2013, the Office of Management and Budget (OMB) issued a report stating that sequestration must "be applied equally at the [PPA] level within each budget account." OMB, *OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013*, at 7 (2013) (A.000495). The BCA does not define the term "PPA." It does, however, instruct federal agencies to look first to the text of their most recent appropriations acts to identify PPAs. 2 U.S.C. § 906(k)(2) (A.000019). The relevant appropriations act for FAA includes four budget accounts: Operations, Facilities and Equipment, Research Engineering and Development, and Grants-in-Aid for Airports. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 106, 125 Stat. 552, 645–648 (2011) (A.000066–69). There are seven PPAs in the $9.6 billion Operations account; ATO Activities is the largest of those PPAs, representing approximately $7.4 billion. *Id.* at § 106, 125 Stat. at 645 (A.000066). The FCT program is funded from the ATO Activities PPA. *Id*.

Because the BCA's across-the-board sequestration reaches no further down than the PPA level, FAA is not required by law to cut the FCT program by any specific amount, or even to cut it at all. The BCA contains no provisions relieving FAA of its statutory safety, NEPA, or other obligations.

D. FAA's Decision to Terminate Federal Contract Towers

On February 22, 2013, the Secretary of Transportation and FAA Administrator sent a letter to the Department of Defense (DOD) and various industry officials informing them of proposed changes in anticipation of sequestration, including a proposal to "[c]lose over 100 air traffic control towers at airports with fewer than 150,000 flight operations or 10,000 commercial operations per year." Administrative Record Item (R. or Record) 000123. According to the letter, "[s]afety is [FAA's] top priority, and in the course of implementing the operational changes described . . ., we may reduce the efficiency of the national airspace in order to maintain the highest safety standards." *Id.*

On March 5, FAA sent letters to 189 airports with contract towers, notifying them that it intended to cease funding and close their towers because they fell below the 150,000 total/10,000 commercial operations threshold.[2] *E.g.*, R.000034. FAA allowed affected airports to file comments by March 13 seeking relief, but stated that "[n]egative impact on the national interest" would be "the only criterion FAA will use" for deciding whether to terminate or continue FCT operations at an airport. *Id*. On March 8, FAA clarified that "national interest" would be limited to four factors: (1) threats to national security; (2) significant economic impact; (3) impact on multi-state communications and other networks; and (4) the extent to which an airport is a critical diversion airport. R.000032. Aviation safety, including particular risk factors at each affected airport, was not on this list. *Id.*

[2] An "operation" in this context means an aircraft arrival or departure.

By March 13, 159 airports submitted comments in response to FAA's March 5 letters. R.000158-000562. Despite the March 5 letters' omission of air safety as a basis for seeking a waiver, many airports' comments stressed that the failure to consider safety was inconsistent with FAA's statutory and SMS obligations. *E.g.*, R.000423 (Felts Field), R.000164-65 (Naples). They also identified a range of safety concerns arising from untowered operations, including lack of coverage from regional radar, *e.g.*, R.000385E (Renton); airports with multiple parallel or intersecting runways and on-airport "blind spots" that pose significant collision risks, *e.g.*, R.000425 (Felts Field); Post Decisional Record (P.R.) 001244 (Texas A&M); and airports with extremely high levels of student training in congested airspace, *e.g.*, R.000344 (Ormond Beach). Airports also pointed to FAA's statutory and regulatory obligations to perform an SRM, to conduct a benefit/cost analysis, and to comply with NEPA in connection with the proposed FCT closures, as well as its apparent failure to do so. *E.g.*, R.000423-24 (Felts Field).

On March 22, FAA sent a mass e-mail (Decision) announcing in four short paragraphs that 24 FCTs would remain open, but that "a four-week phased closure of 149 [FCTs]" would begin on April 7. R.000012. The Decision included little analysis or explanation. It did not respond to Petitioners' March 13 Comments or any of the airport-specific safety considerations they had called to FAA's attention. The Decision did not respond to Petitioners' arguments concerning FAA's failure to fulfill SMS requirements, or comply with NEPA, nor did it mention 49 U.S.C. § 47124. Likewise, it failed to explain how FAA came to assign a few airports to the "remain open" list, but left the vast majority on the "closure list."

In post-decisional letters responding to requests for an administrative stay of its closure order, FAA claimed that it had conducted a safety review for each airport during the 9-day period between the March 13 comment deadline and its March 22 Decision. *E.g.*, R.000586-87. This post-decisional claim is inconsistent with FAA's pre-decisional statement that airport-specific safety concerns would not be a factor for determining whether a tower would remain open. R.000032. No safety review was mentioned in the Decision. R.000012. The post-decisional, April 19, 2013, SRM Document that FAA included in the Record also shows that FAA did not conduct a safety review until after its Decision. P.R. 001126-27.

On March 27, FAA issued instructions for FCT closure, indicating that affected airports may either close their towers or continue to operate them as non-federal towers.[3] Many Petitioners are not financially able to assume operation of the towers at their airports. *E.g.*, R.000162 (Naples).

On April 5, FAA extended the date of termination for all 149 contract towers until June 15, 2013. R.000006.

E. FAA's Review Process and the Administrative Record

The Record contains extensive post-decisional declarations and other materials, including a post-decisional declaration that asserts FAA conducted a multi-tiered review addressing every issue raised by the 159 airports that commented. *E.g.*, Skiles Decl. at ¶¶ 18-20 (P.R.000747). The post-decisional

[3] FAA, *Contract Tower Closure Information*, Available at: http://www.faa.gov/news/media/Contract_Tower_Closure_Guidance.pdf.

Record confirms that FAA did not even commence its mandatory SRM safety review until after it issued the Decision.

By contrast, the pre-decisional material in the Record is meager. In total, it consists of:

- The Secretary's February 22, 2013, letter to the industry warning of potential tower closures (R.000123);
- A March 1 list of the 189 airports proposed to be closed (R.000127);
- The March 5 letters to each potentially affected airport (R.000034);
- The March 8 e-mail defining the "national interest factors," which were the only bases upon which FAA stated it would reconsider its closure decisions (R.000032);
- A matrix entitled "FAA Ops Review Team Input" (Summary Matrix), which identifies each of the 189 airports that received a March 5 letter, and provides columns and checkmarks for each of the four "national interest" factors and also for "Comments Received" and "Ops Input" (R.000020);
- Airport-specific "Fact Sheet Summaries" prepared by the FAA review teams. These "Fact Sheet Summary" folders contain the March 13 Comments, any other comments filed, and a stock two-page checklist summarizing some (but not all) of the comments (R.000158);
- A table entitled "DOD Input" dated March 13, 2013 (R000030A-R000030CC); and
- The March 22 Decision (R.000011).

While the propriety and relevance of the post-decisional material FAA included in the Record is the subject of Petitioners' May 2 motion to strike

(DktEntry 68), a few statements in the Declaration of David Grizzle, ATO's Chief Operating Officer (P.R.001114),[4] shed light on the sequence of post-decisional events occurring within FAA:

- Mr. Grizzle did not order the commencement of a Safety Risk Management panel until March 20, two weeks after FAA's March 5 letters announcing the closures, one week after the airports' March 13 Comments were filed, and only two days before the March 22 Decision. Grizzle Decl. at ¶ 12 (P.R.001118).
- The SRM panel did not convene until April 2, eleven days after FAA's March 22 Decision. *Id.*
- The SRM panel did not finalize its Safety Risk Management Document (SRMD) until April 22, a month after FAA's March 22 Decision and only two days before the administrative record was due to be filed with this Court. *Id.*
- The mitigation measures that the SRMD determined must be undertaken have not been completed, although FAA apparently hopes "to have all mitigating measures in place before June 15, the date of tower defunding." *Id.*

One of the participants in the post-decisional safety review panel summarized its flaws succinctly: FAA's effort to assess the safety risks to 149 airports in three days was "rushed, incomplete and lacked credible data to support the findings…" P.R.001161 (SRMD at 39).

[4] Those portions of Mr. Grizzle's *post hoc* declaration that discuss matters occurring post-decision are not a proper basis to support or rationalize FAA's decision. *Tri-Valley CAREs v. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012).

F. The Reducing Flight Delays Act of 2013

On May 1, 2013, the President signed the Reducing Flight Delays Act of 2013, Pub. L. No. 113-9, 127 Stat. 443 (2013) (A.000062–63) (RFDA). The RFDA authorizes the Secretary of Transportation, notwithstanding the limitations of the BCA, to transfer up to $253 million to FAA's operations account from any other program or account. *Id*. § 2 (A.000062–63). The RFDA's purpose is "to prevent reduced operations and staffing of the [FAA] during fiscal year 2013 to ensure a safe and efficient air transportation" system. *Id*. House floor debate on the bill (there was no Senate floor debate) makes clear that Members expected the transferred funds to be used by FAA both "to prevent the closure of 149 contract air traffic control towers and halt the furloughs of [FAA-employed] air traffic controllers." 158 Cong. Rec. H2355, H2372 (daily ed. April 26, 2013) (statement of Rep. Reed) (A.000461); *accord*, *id.* at H2365 (statement of Rep. Pastor) (A.000454); H2366 (statements of Reps. Hudson and Reed) (A.000455); H2367 (statement of Rep. Cotton) (A.000456); H2369 (statement of Rep. Bachmann) (A.000458); H2372 (statements of Reps. Goodlatte, Wilson, and Costa) (A.000461); and H2373 (statement of Rep. Bishop) (A.000462). To date, FAA has not stated whether it will use this new authority to fund any of the contract towers now subject to closure on June 15.

SUMMARY OF THE ARGUMENT

On June 15, 2013, FAA will close 149 contract towers around the country, removing a critical safety tool, jeopardizing continued air carrier operations, and creating significant environmental effects. FAA announced its Decision to close

these towers in a short, mass e-mail to almost 200 airports on March 22, 2013, which provided little insight into FAA's reasoning.

Despite its clear mandate to "assign[], maintain[], and enhance[e] safety and security" as the "highest priorit[y]," 49 U.S.C. § 40101(d)(1) (A.000032), FAA expressly based its Decision only on factors such as operations thresholds and impacts on national security, and multi-state transportation, communication or banking/financial networks that have no bearing on air safety. The pre-decisional record fails to show that FAA prioritized air safety in deciding to close the contract towers. This is a textbook case of arbitrary agency action.

FAA abandoned its own established procedures and regulations for thoroughly evaluating changes to critical safety elements like the towers. It did not undertake mandatory Safety Risk Management analyses before making its decision. *See supra* at pp. 6-7. When airports and their users identified very specific, deadly hazards associated with tower closures at particular airports, FAA noted receipt of the comments, but did little more. It failed to conduct any benefit/cost analyses to determine whether a particular tower should be discontinued, as required by its own regulations to "maximize safety for the aviation system." FAA, *Establishment and Discontinuance Criteria for Airport Traffic Control Tower Facilities*, 56 Fed. Reg. 336, 338 (Jan. 3, 1991) (codified at 14 C.F.R. pt. 170) (A.000390); 14 C.F.R. § 170.15 (A.000102). It failed to heed its own directive requiring that *any* decisions to discontinue a tower should be made "on a case-by-case basis," and only after the tower at issue "is subjected to close and highly detailed scrutiny . . . ." 56 Fed. Reg. at 338 (A.000390). It failed

to follow the procedures outlined in its own Order that expressly govern the reduction of hours at air traffic control towers. FAA, Order JO 7232.5G, *Changing Operating Hours for Terminal Facilities* (2008) (A.000104–112). FAA action that is inconsistent with its procedures and regulations must be vacated, especially on an issue at the core of FAA's safety mandate.

The Decision also ignored FAA's obligations to account for environmental impacts under the National Environmental Policy Act. Despite comments showing that tower closure would affect flights, and therefore noise and air pollution, FAA took the position that the sequester absolved it of its NEPA obligations. FAA's position is untenable, because the BCA provides no exemption from NEPA compliance.

Finally, FAA failed to conduct the most basic statutory due diligence before rendering its March 22 Decision. The Record never once mentions 49 U.S.C. § 47124(b)(1) (A.000058), which expressly directs FAA to "continue" the FCT program for towers in operation on December 30, 1987, and "extend" the program to other towers "as practicable," as well as to base decisions to discontinue other towers on benefit/cost analyses. *Id*. A number of the towers scheduled for closure were in operation at the end of 1987, but FAA failed to consider the application of § 47124 to them.

FAA's failure to provide a reasoned decision, address critical issues, and comply with applicable law and procedures means its Decision cannot stand.

STANDARD OF REVIEW

FAA's decision to close the towers must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or was made "without observance of procedure required by law." 5 U.S.C. § 706(2) (A.000024). An agency's ruling is arbitrary and capricious if the agency: "(1) relied on a factor that Congress did not intend it to consider; (2) failed to consider an important factor or aspect of the problem; (3) failed to articulate a rational connection between the facts found and the conclusions made; (4) supported the decision with a rationale that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; or (5) made a clear error in judgment." *Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150-1151 (9th Cir. 2009). An agency's decision can be upheld only on a ground upon which it relied in reaching that decision. *Id*. at 1150; *see generally*, *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981) ("the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action").

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE TOWER CLOSURE DECISION.

A. Petitioners Have Standing.

Petitioners meet the "irreducible constitutional minimum of standing," because FAA's Decision will terminate the contract towers at Petitioners' respective airports; the harms that will occur upon tower closure are actual and

imminent, result directly from the challenged act, and would be redressed by judicial relief. *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 905 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).[5]

Each affected airport faces the dilemma of operating without a tower or "assum[ing] the cost of continued, on-site air traffic control services at [its] airport . . . ." R.000012 (Decision). Either is a cognizable injury. Closure of the towers will impact the safety of operations at the airports and also impose new

[5] Petitioner Wisconsin Airport Management Association (WAMA) (Case No. 13-71351) is an organization of Wisconsin airport managers and other aviation professionals, including managers of eight airports that will lose towers under FAA's Decision. WAMA has standing to sue on behalf of its members, because: (a) its members facing tower closure or a diversion of flights from airports with closed towers have standing to sue in their own right; (2) the interests it seeks are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of its individual members in the lawsuit. *Oklevueha Native Am. Church v. Holder*, 676 F.3d 829, 839 (9th Cir. 2012).

Petitioner Friends of LaGuardia, Inc., (Case No. 13-71514) is an New York Not-For-Profit corporation dedicated to preserving and promoting aviation safety, particularly amongst pilots and other aeronautical users. Friends of LaGuardia has standing to sue on behalf of its members because: (1) its members are pilots who directly affected by the tower closure or are being diverted from airports with closed towers; and (2) the interests it seeks to protect are germane to the organization's purpose. Petitioner Kenneth D. Paskar is both the President of Friends of LaGuardia, Inc. and a pilot whose safety is similarly affected by the closure of the towers at airports into which he flies.

The individual Petitioners in County of Tompkins *et al.* (Case No. 13-71518) are air traffic controllers at the Ithaca Tompkins Regional Airport. If the tower is de-funded, they would be laid-off from their jobs and lose their main source of income.

regulatory and administrative burdens on the airports. *E.g.*, FAA, Contract Tower Closure Information (*see supra*, n. 3); *see also* R.000162 (Naples), R.000464 (Friedman), P.R.000730A-730NNN (Cuyahoga), DktEntry 31-20 (Declaration of L. Krauter – Felts Field), DktEntry 31-21 (Declaration of C. Olson – Central Illinois Airport), DktEntry 31-56 (Declaration of J. Mareane – Ithaca), DktEntry 31-57 (Declaration of D. Lewis – Ithaca), DktEntry 31-52 (Declaration of B. Teeuwen – Cuyahoga), and P.R.000704-000730 (Cuyahoga Stay Request). This constitutes injury in fact. *Clark Cnty. v. FAA*, 522 F.3d 437, 440 (D.C. Cir. 2008) (effect of FAA-approved wind turbines on airport safety constituted injury in fact to airport). Closure of the towers will also reduce aircraft and other on-airport activity and, thus, the revenue that Petitioners rely upon to operate their airports. *E.g.*, R.000423 (Felts Field), R.000385A (Renton), R.000234 (Cuyahoga), R.000199 (Boca Raton), R.000262 (Fayetteville); R.000310 (Gwinnett), R.000200 (Bloomington-Normal). Even where Petitioners do opt to enter the non-federal tower program, they will suffer a significant financial burden in so doing. *Compare* OIG Report, at 4 (A.000507) (average cost to operate a contract tower in fiscal year 2012 was $537,000), *with Cent. Ariz. Water Conservation Dist. v. U.S. E.P.A.*, 990 F.2d 1531, 1538 (9th Cir. 1993) (economic injury is sufficiently concrete and imminent to confer standing).

B. FAA's Decision Is Reviewable Under the APA.

FAA's decision to terminate the federal contract towers is reviewable under 49 U.S.C. § 46110 (A.000052) and 5 U.S.C § 704 (A.000023) as a final order of the FAA. As with all of FAA's activities, the implementation of the BCA is

subject to the federal aviation statutes and NEPA, whose mandatory language constrains FAA's implementation of the sequester.

The federal aviation statutes require that, whatever FAA does, it "shall" make safety and security its "highest priorities." 49 U.S.C. § 40101(d)(1)–(4) (A.000032). FAA has bound itself to regulatory and administrative procedures like SMS, benefit/cost regulations, and orders to implement this safety mandate. *See supra* at pp. 6-7. Similarly, Congress has required FAA to continue and expand the FCT program where practicable as a specific part of the statutory mandate for safety. *See* 49 U.S.C. § 47124(b)(1) (A.000058); *supra* at p. 6. Congress also requires FAA to assess the environmental effects of its actions pursuant to NEPA. *See infra* at pp. 48-50. None of these provisions were nullified or superseded by the sequester. Accordingly, there is "law to apply" in this context that allows this court to review FAA's order.

FAA's suggestion in its post-decisional correspondence that the Decision is unreviewable under 5 U.S.C. § 701(a)(2) (A.000020), as interpreted by *Lincoln v. Vigil*, 508 U.S. 182 (1993), is inapt. *Lincoln* involved the reviewability of an agency's decision as to how to allocate money within a lump sum appropriation. However, in *Lincoln*, the agency's discretion was not constrained by another non-fiscal statute and there was no claim that it failed to follow its own rules and policies (like FAA's SMS or benefit/cost requirements here).

FAA's statutory obligations to prioritize safety and to comply with NEPA and 49 U.S.C § 47124 required it to take certain steps *before* deciding to close each tower, and it failed to take them. Nothing in the BCA exempts FAA from those

requirements. As *Lincoln* makes clear, "an agency is not free to disregard statutory responsibilities[.]" 508 U.S. at 193. FAA's obligation to make safety its highest priority, 49 U.S.C. §§ 40101(a)(1), (a)(3) (A.000031) and 47101(a) (A.000054), its obligation to consider environmental effects, 42 U.S.C. § 4332(2)(C) (A.000029), and 49 U.S.C. § 47124 (A.000058), which requires the Secretary to continue the FCT program for towers in existence as of December 30, 1987, and to extend it where "practicable," are just such statutory responsibilities. Each is exactly "the type of statute described in [*Lincoln*] in which Congress has 'circumscribe[d] agency discretion to allocate resources by putting restrictions in the operative statute[].'" *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450 (10th Cir. 1994) (quoting *Lincoln*, 508 U.S. at 193).

In contrast, under FAA's reading of *Lincoln* in its stay denial letters, *e.g.*, P.R.000591, FAA's budget allocation or cutting decisions are wholly immune from judicial review, regardless of what other statutes, or the agency's own rules, may say or require. For example, if *Lincoln* entitles the Secretary to undo the extension of the FCT program without any finding that continuing the extension is not practicable, as FAA contends in its Stay Denial Letter, then section 47124(b)(1) would be rendered meaningless. That is an untenable reading of *Lincoln*, reaching far beyond the facts and holdings of that case.

II. FAA FAILED TO CONSIDER SAFETY AND DID NOT FOLLOW ESTABLISHED PROCEDURES BEFORE CLOSING 149 TOWERS.

The most profound shortcoming of FAA's Decision is its failure to meaningfully address the FCT closures' impacts on air safety. Even though the

FCTs were built and operated to enhance safety, FAA only paid lip service to the safety effects of closure in its Decision. Apparently recognizing this shortcoming, FAA scrambled to conduct an after-the-fact SRM safety analysis. This three-day review was too little and too late to meet the FAA's exacting standards for safety review.

A. FAA Defied Its Statutory Mandate To Prioritize Safety, Relied On Criteria That Did Not Account for Safety, and Did Not Even Apply Its Criteria Rationally.

Congress made aviation safety FAA's highest priority. 49 U.S.C. §§ 40101(a) (A.000031) and 47101(a) (A.000054). Although FAA mentioned this mandate, *e.g.*, R.000123 (February 22 Letter) ("Safety is our top priority"), it set the criteria of 150,000 total aircraft operations and 10,000 commercial operations as the initial threshold for closure, which criteria have no demonstrated nexus to safety. *See* P.R.001115 (Grizzle Decl. ¶ 4) (operations threshold was relevant "because it would allow the agency to balance cost savings with the avoidance of unacceptable disruptions and delays across the National Airspace System (such as would be associated with excessive furloughs)") and *id.* ¶ 5 ("with the activity thresholds we set, we were able to assure more than 97 percent of the flying public that they would experience no change in air traffic services as a result of our defunding the lowest activity level towers.").[6] FAA's focus on reducing delays

[6] FAA never explained the change of position between February 22, when it said increases in delay and loss of efficiency may be needed to ensure safety, to its later position that it sought to reduce the burden on delay and the greatest number of commercial passengers.

and burdens for the greatest number of commercial passengers does not align with ensuring safety. In fact, towers are particularly critical for general aviation airports like many of the Petitioners here, because general aviation accounts for far more aircraft accidents and fatalities than commercial service. As the National Transportation Safety Board (NTSB) found in its most recent statistical review, "[i]n 2010, general aviation accidents accounted for 96 percent of all accidents, 97 percent of fatal accidents, and 96 percent of total fatalities of all U.S. civil aviation." *See* NTSB, NTSB/ARA-12/01, *Review of U.S. Civil Aviation Accidents, Calendar Year 2010*, §§ 1.1.5, 5.0 (2012) (A.000535, A.000537).

Similarly, the "national interest factors" first identified on March 5 as the only bases on which FAA would reconsider closure did not include safety. R.000034 (March 5 Letters); R.000032 (March 8 e-mail). FAA's focus on factors other than safety violated its statutory mandate to "assign[] and maintain[] safety as the *highest priority* in air commerce." 49 U.S.C. § 40101(a)(1) (emphasis added) (A.000031).

FAA never explained why tower closure is the safest way to meet the sequester requirements. It has never explained—and the Record does nothing to illuminate—why closing *these* 149 towers out of all 250 contract towers would be the safest way to cut costs under the sequester. FAA made a choice to close the majority of *contract* towers rather than towers staffed by FAA employees, without any analysis of whether this was the safest outcome. It also made a choice to close 149 contract towers entirely rather than cut hours or staffing at all 250 contract towers or at the FAA-staffed towers, again without safety analysis. It chose to cut

towers—at the core of its safety program and less costly to operate than FAA-staffed towers—rather than making other cuts with less direct impact on safety. R.000543 (LA County); R.000469, 000473 (McKinney County and Attachment). And, it closed towers at airports with high levels of operations and kept others open with lower operations. R.000473. This is arbitrary and capricious. *Cal. Energy Comm'n,* 585 F.3d at 1150-51 (agency must articulate a rational connection between the facts found and the conclusions made).

1. FAA's Decision Lacks Any Reasoned Explanation.

FAA's explanations of the criteria and processes it *did* use to identify towers for closure bear no relationship to the results of its Decision. *Cf. Cal. Energy Comm'n,* 585 F.3d at 1150-1151 (agency must articulate a rational connection between the facts found and the conclusions made). FAA stated that the final decision of which towers to spare from closure would be based *only* on negative impacts on the national interest, which it defined narrowly to include only: (1) significant threats to the national security; (2) significant, adverse economic impact; (3) significant impact on multi-state transportation, communication or banking/financial networks; and (4) the extent to which an airport currently served by a contract tower is a critical diversionary airport to a large hub. R.000032. [7] But, FAA appears to have given economic impact no consideration at all; not a single one of the 189 airports on FAA's Summary Matrix has a checkmark for economic impacts, despite extensive comments on this issue. R.000020. Although

[7] Diversion airports are those airports designated as having the operational capabilities of handling particular aircraft during emergency landings.

many of the parties filed comments reminding FAA that their airports served as critical diversionary hubs, this apparently had no effect in determining which airports were spared. *E.g.*, R.000315 (Macon is a critical diversionary hub to Atlanta); R.000310 (Gwinnett). FAA failed to even acknowledge this factor for Petitioners that submitted evidence of their diversionary hub status. *Compare* R.000020-27 (FAA's Summary Matrix) *with* R.000385D-385E (Renton); R.000203 (Bloomington-Normal); R.000234 (Cuyahoga County); R.000169 (Nashua); R.000236 (Texas A&M); R.000225 (W.K. Kellogg). At the same time, FAA opted to spare Smyrna Tower in Tennessee, without explanation and despite the fact that not one of the national interest factors applied and no other special reasons were identified. R.000023.

2. FAA's Analysis and Application Of National Security Implications Was Arbitrary.

FAA's "national interest" factor included "significant threats to the national security as determined by FAA in consultation with the Department of Defense or the Department of Homeland Security [DHS]." R.000012.[8] While the Record includes comments from DOD, there is no apparent correlation between DOD's comments and the airports FAA selected to remain open. For example, DOD

[8] The March 22 decision states that DOT had consulted with DOD *and DHS*. R.000012. The Record, however, only contains comments from DOD. *See* R000030A-R000030CC. It contains nothing that reflects any communication with or from DHS. A number of airports identified border-related concerns associated with tower closure. *E.g.*, R.000426-27 (Felts Field); R.000469 (McKinney is a U.S. Customs and Border Protection User Fee Airport). Like other input from the affected airports, FAA did not address this information.

identified "severe" impacts from tower closure at several airports, but FAA closed them anyway. *Compare* R000030A-R000030CC (DOD Input Table) (indicating "severe" impacts at Easton, New Bern, Glendale, Goodyear, Kinston, Lawton, Wiley Post, Stillwater, and Tupelo) with R.000020-26 (FAA Summary Matrix indicating no national security issues for these facilities). Petitioners also presented information about significant national security implications that were not considered in the Record. *E.g.*, R.000245 (Comments, noting impacts to the U.S. Army's UH-72 Lakota helicopter training program, the Air Force 193rd Special Operation Wing's C-130 aircraft operations only four miles from the Capitol City Airport (Harrisburg, PA) (CXY), and the Defense Depot located adjacent to CXY); R.000261 (Drake Field in Fayetteville, AR) is a training location for military C-130s; sequencing military and civilian air traffic requires fully trained and qualified air traffic controllers).

In a declaration signed almost a month after the Decision, FAA's Mr. Skiles states: "It is my understanding that although [DOD] raised specific concerns with respect to several other airports … further consultation with [DOD] led to the conclusion that only [24] towers had a significant impact on the national interest." P.R.000747. However, there is nothing in the pre-decisional record that reflects such consultation or the reasoned basis for the Decision. Indeed, DOD disagrees with FAA's chronology. The comments in the Record attributed to DOD are dated March 13. According to the Defense Secretary, however, DOD did not submit its final comments to DOT until March 21, just one day before FAA acted. Letter from Department of Defense Secretary Chuck Hagel to Representative Rob Bishop

(Apr. 29, 2013) (A.000501).[9] It is clear from the Secretary's letter that FAA did not heed DOD's recommendations and has decided to close towers that will, in DOD's opinion, adversely impact its operations. *Id.* In addition to disregarding DOD input, FAA acted inconsistently. An example is the FCT closure at W.K. Kellogg Airport, which is essential to supporting the Battle Creek Air National Guard (ANG) 110th Airlift Wing, *see* R.000217, while FAA spared every other airport in the country that hosts an ANG wing. FAA has no particular competence worthy of deference when determining defense needs and it ignored the recommendations of the very agency that *does*. It did so without explanation. This is arbitrary. *Cal. Energy Comm'n*, 585 F.3d at 1150-1151.

B. FAA Did Not Prepare a Safety Risk Management Document Prior To Making its Decision.

Perhaps the most serious error FAA made was not following its mandatory safety management requirements before making the closure Decision, denying it a full understanding of the safety implications of its action. The pivotal requirement of FAA's mandatory safety management program is completion of an SRM evaluation *before* making any change that affects airspace safety, including

[9] This letter, while not part of the Record, is nevertheless reviewable under the *Inland Empire* exceptions. *E.g., Tri-Valley CAREs*, 671 F.3d at 1130 (citing *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703-04 (9th Cir. 1996) (A reviewing court may consider extra-record materials only: (1) if necessary to determine whether the agency has considered all relevant factors and explained its decision; (2) when the agency has relied on documents not in the record; (3) when supplementing the record is necessary to explain technical terms or complex subject matter; or (4) when plaintiffs make a showing of bad faith.).

elimination of a tower. Manual § 3.3.1 (A.000135–36). SRM is a "systematic, explicit, and comprehensive" process. Manual § 3.2.2 (A.000130). The key steps include documenting the proposed change, identifying associated hazards, analyzing the safety risk of those hazards, mitigating any unacceptable risks, and accepting residual risks. *Id.* This process is implemented by an SRM panel that includes stakeholders from the organizations affected by the proposed change, including employees with current experience with the system or change. Manual § 3.4.2 (A.000137). The SRM panel must "thoroughly analyze[]" hazards that are suspected to have associated "initial high or medium risk." Manual § 3.7.5 (A.000147). Conditions resulting in a partial or total loss of air traffic control services are "major" or "hazardous" risks. *Id.*, Table 3.3 (A.000156). The Manual makes clear that, if the risk cannot be reduced to acceptable levels after applying mitigation measures, the proponent *must* revise or drop the change. *Id.* § 3.11.10 (A.000166).

SRM is mandatory—it applies to all aspects of air traffic control and to all ATO employees and contractors. Manual §§ 1.2.1, 1.3.1 (A.000121, A.000122). Here, however, FAA decided to close the 149 towers *before* it conducted any SRM. The pre-decisional Record contains no evidence of any SRM activity (including the SRM Document that is required for SRM). FAA's unexplained failure to comply with its SMS process and complete an SRM *before* acting is reversible error. *See W. States Petroleum Ass'n v. U.S. E.P.A.*, 87 F.3d 280, 284 (9th Cir. 1996) (agency "must clearly set forth the ground for its departure from prior norms").

C. FAA's Claim To Have Reviewed Existing Operational Procedures Does Not Substitute for Safety Risk Management or a Reasoned Response To Specific Identified Hazards.

FAA insists that its action is consistent with maintaining safety. *E.g.*, R.000123 (FAA's February 22 letter, stating: "Safety is our top priority …"); P.R.000588 (FAA letter to Ormond Beach denying stay request). Post-Decision, FAA claimed to have undertaken a pre-decisional review of operational procedures that it believes assured safety. But, FAA has failed to provide a record adequate for this Court to review that assertion. *S.E.C. v. Chenery*, 318 U.S. 80, 94 (1943). The March 5 letters mention safety only once, in passing, and the March 22 Decision not at all. *See* R.000034, R.000012. FAA's own pre-decisional materials in the Record fail to show that any meaningful safety analysis was ever completed by the agency before FAA issued its Decision. FAA's Summary Matrix (R.000020) does not mention safety. FAA's Summary Fact Sheets (*e.g.*, R.000158-59) provide only generic information and summaries of comments received. Based on the pre-decisional Record, FAA, at most, took only a cursory look at safety concerns, did not contact airports to explore airport-specific issues further, and did not refute the validity of the safety risks that airports indicated would result from FCT closures. *See Cal. Energy Comm'n*, 585 F.3d at 1150-1151.

The sole reference to any technical analysis in the actual Decision is the statement that FAA had "conducted operational assessments of each potential tower closure." R.000012 (Decision). However, other than a single column in the

Summary Matrix titled "Ops Input" (R.000020),[10] there is no evidence of these alleged "operational assessments," and whether they encompassed safety considerations, let alone what criteria were used and how such criteria were applied. *Chenery*, 318 U.S. at 94 (agency must clearly disclose the grounds upon which it based its decision).

Further, the Record is inconsistent with the Statement in the Decision that assessments were performed on "each potential tower closure." R.000012. The vast majority of airports do *not* have a check-mark in the "Ops Input" column of the Summary Matrix, indicating that FAA did *not* conduct operational assessments of "each potential tower closure." Of the approximately 40 airports represented in this case, there are "Ops Inputs" check-marks for only two towers: Lacrosse, Wisconsin, and Macon, Georgia. *See* R.000023.

In three post-decisional Stay Denial Letters and the post-decisional Skiles Declaration, FAA says it looked to see whether there were rules and procedures in place for nighttime hours when contract towers are closed at most airports. P.R.000589, 000746. To the extent that the Court considers FAA's *post hoc* discussion of its pre-decisional process, that material "must be viewed critically." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). And what FAA now claims to have done prior to March 22 is not formal SRM review or

[10] The "Operations Review Team Definitions" document defines "Ops Input" as follows: "FAA Ops Review input provided on operational considerations." R.000028. This provides no reasonable basis to conclude that specific safety concerns were addressed.

"consistent" with it. *Compare* P.R.000588 (FAA letter to Ormond Beach denying stay request and stating: "FAA also engaged in a safety analysis consistent with its Safety Management System") *with* Manual § 3.2.2 (A.000130–31). Nor is it consistent with FAA's rules and procedures requiring thorough, formal SMS review before making changes such as reducing hours at a control tower. Manual §3.3.1 (A.000135–36); Order 7232.5G (A.000104–112). FAA admits that it did not even order the implementation of SMS review until two days prior to its Decision. Grizzle Dec. ¶ 12.

FAA's consideration of whether there are procedures in place for nighttime operations when towers are closed is no substitute for detailed analysis and mitigation of the safety hazards posed by operating without a tower during much busier daytime hours. Indeed, FAA's own post-decisional Record undermines its position:

> Most [mid-air collisions] occur in day [visual] conditions – the times of best visibility. They can also be correlated to traffic levels; most occur between 10 a.m. and 5 p.m. . . . , essentially the times when the most traffic is in the air. Less than two percent of [mid air collisions] occur after sundown.

P.R.001266 (SRMD at 144) (guidance relied upon by FAA) (emphasis added). FAA cannot rationally square these facts with its unsupported conclusion that nighttime procedures will be adequate under busy daytime conditions.

FAA's premise that there will be no safety risk from closing towers during the day because the towers are already closed at night defies common sense. The

towers currently operate during daytime hours *because that is when most operations occur and the greatest safety risk exists*. It is not proper safety management to just assume that pilots can perfectly self-coordinate arrivals, departures, and practice approaches during the far more complicated daytime traffic patterns without any attendant risk. *Cf. e.g.*, P.R.000589 (Stay Denial Letter at 8) ("Student pilots will use these existing [nighttime] procedures to safely practice landings at Ormond Beach."). These assumptions openly disregard the role of human error, contradicting FAA's SMS Manual. "People make errors, which have the potential to create hazards. For this reason, system designers must design safety-critical systems to . . . lessen the negative impact of . . . potential human errors." Manual § 3.2.8 (A.000135). The towers were opened in the first place because they were justified on the basis of safety and passed benefit/cost analyses driven by safety benefits. [cite]

Agency action is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). FAA's decision to close the FCTs without having first conducted SRM analysis, and instead relying on a specious "nighttime equals daytime" rule of thumb, is arbitrary and capricious. Further, FAA's perceived need to start an SRM process

after it made its Decision[11] confirms it did not do so prior to its Decision, and that any pre-decisional safety analysis was inadequate.

D. FAA Failed Entirely To Address Specific Safety Hazards Identified in the Record.

Because FAA did not conduct any meaningful pre-decisional safety analysis, the Record contains no coherent explanation addressing or countering the range and depth of safety concerns raised in the various March 13 Comments. *See Clark Cnty.*, 522 F.3d 437 at 441-442 (failure to explain decision is particularly problematic when the record evidence supports the opposite conclusion from FAA's decision). The Comments identified specific hazards if towers were closed, including:

- Airports that lack coverage from regional radar due to mountainous terrain or other features, *e.g.*, R.000385E (Renton), R.000262 (Glacier Park), R.000464 (Sun Valley), and R.000251 (Eau Claire and Central Wisconsin);
- Airports that have multiple parallel or intersecting runways, as well as on-airport "blind spots," that pose significant collision risks, *e.g.*, R.000425 (Felts Field), R.000322 (Southern Illinois), and R.000262 (Drake Field);
- Airports that have extremely high levels of student training in congested airspace or with high levels of high-speed jet activity, *e.g.*, R.000343 (Ormond Beach), R.000365-66 (Don Scott Field), R.000321-22 (Southern Illinois), R.000219 (Kellogg), and DktEntry 31-5 and 31-52 (Cuyahoga);

[11] FAA's *post hoc* record indicates that FAA only determined the composition of the SRM panel on March 22, the day of FAA's decision, and the SRM panel did not meet until April 2. P.R.001118 (Grizzle Decl. at ¶ 12).

- Airports that would have flights interacting with departure and arrival tracks at very close civilian and military airports, *e.g.*, R.000426 (Felts Field), R.000385D-385E (Renton), R.000314 (Macon), R.000379 (Oxnard), R.000484 (Troutdale, Portland, OR), and R.000310 (Gwinnett);
- Airports with unusual mixtures of high-speed jets and student training, helicopters and low-performance aircraft, *e.g.*, R.000385E (Renton), R.000164 (Naples), R.000221 (Kellogg), R.000311 (Gwinnett), R.000195 (Boca Raton), R.000471 (McKinney), R000257-62 (Drake Field), and DktEntry 31-5 and 31-52 (Cuyahoga);
- Airports that rely on towers to coordinate emergency response and rescue, *e.g.*, R.000430 (Felts Field), R.000311 (Gwinnett), DktEntry 31-5 and 31-52 (Cuyahoga);
- Airports that support critical military and emergency services uses, *e.g.*, R.000426-27 (Felts Field), R.000385E (Renton), R.000365 (Don Scott Field), R.000245 (Capital City), R.000217 (Kellogg), and R.000310 (Gwinnett); and
- Airports that operate pursuant to FAA-approved modifications to airfield safety standards that require an air traffic control tower to maintain safety. For example, at Sun Valley, an aircraft that is larger than the airport design standards may land, but only if the tower first clears the taxiways, *e.g.*, R.000135-137 (Renton), R.000139 (Felts Field).

The following paragraphs highlight just a few examples among the many serious issues identified in the 159 Comment letters that the FAA failed to consider.

a) Felts Field, Spokane, Washington

Spokane's comments state that the multiple parallel runways at Felts Field "pose serious safety hazards without tower control and monitoring." R.000425.[12] "It is critical that pilots be given … departure assistance by the [Felts Field] [t]ower" because of the hazard of the jet traffic travelling through the surrounding "Class C" airspace of the nearby Fairchild Air Force Base and Spokane International Airport. R.000425. Because Felts Field is 400 feet lower in elevation than Spokane International, pilots on the ground taking off from the airport cannot communicate with or be seen visually by the Spokane International tower. DktEntry 31-20 at 7. In addition, pilots taking off from the land runways cannot see close-by seaplane activity on the Spokane River at Felts Field, and vice versa. *Id*. at 4.

b) Ormond Beach, Florida

Ormond Beach has a high intensity of flight operations on intersecting runways, with 80 percent of its operations being conducted by inexperienced student pilots. R.000343. Embry-Riddle Aeronautical University and other entities that provide flight training at Ormond Beach conducted an SRM analysis for the airport that showed that tower closure would cause the hazard level at the airport to move from an "improbable" risk of catastrophic accidents to a "likely" risk. R.000559.[13] Further, because trees and buildings obscure portions of one

[12] FAA has allowed the use of the narrowly spaced parallel runways at the airport, and thus narrowly spaced traffic, in substantial part based on the existence of the control tower. R.000139.

[13] This Report, authored by Embry-Riddle Aeronautical University and other

runway from the other, FAA requires tower operation at Ormond Beach to coordinate between aircraft on the intersecting runways to ensure they do not collide on arrivals or departures. *Id.; see also* R.000148 (Modifications to Standards for Ormond Beach).

c) Friedman Memorial Airport, Hailey, Idaho; Glacier Park International Airport, Kalispell, Montana

Both the Friedman Memorial Airport serving the Sun Valley, Idaho, area and the Glacier Park International Airport, serving Kalispell, Montana, are located in mountain valleys that require arriving and departing traffic to share the same airspace. R.000262; R.000464. These "head-to-head" arrival and departure operations create increased risks of mid-air collision compared to airports with less constrained airspace. R.000267 ("Without a tower to provide communications to pilots under these operations, the chances of mid-air collision increase dramatically."). Both airports rely heavily on their control towers to reduce the risks of collision.

> Making the need for a tower at [Friedman] even more vital is the fact that Salt Lake Center (which will assume the workload if the tower at [Friedman] is closed) does not have radar coverage below [14,000 feet] in the area around the airport. The opposite direction arrivals and departures coupled with the lack of radar coverage

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flight schools, evaluated the effect of closing the tower using FAA's mandatory SRM protocol. R.000559.

> around the airport make air traffic control services at [Friedman] necessary to ensure the safe operation of aircraft.

R.000464.

d) Whiteman Field, Pacoima, California

Los Angeles County, the owner of Whiteman Field (WHP), identified serious safety concerns resulting from the close proximity of WHP to airspace for the Burbank-Glendale-Pasadena Airport (Burbank):

> The ATCT facilities . . . play an integral role in the safe and efficient coordination of air traffic in unison with the flight activity at the various regional commercial service airports. At WHP, . . . ATCT personnel communicate all day every day with the ATCT personnel at commercial service [Burbank] to coordinate the numerous daily flights from WHP through [Burbank's] airspace. The end of WHP's runway is only 1.5 miles from [Burbank's] airspace. Pilots will literally have just a few seconds after takeoff to coordinate their movements with [Burbank's] tower. Additionally, due to the close proximity of the two airports, [Burbank's] airspace wraps more than half way around WHP. Without an ATCT facility at WHP, ATCT personnel at [Burbank] will not know the direction of flight for aircraft departing WHP. This is unsafe . . . .

R.000541.

e) Troutdale Airport, Portland, Oregon

Troutdale Airport is seven miles from the Portland International Airport (PDX), and is located underneath the runway approach paths for one of PDX's most heavily used runways. R.000484. Aircraft using the Troutdale Airport

approach the runways at 1,000 feet, while the commercial and other aircraft using PDX are at only 1,900 feet over Troutdale. *Id.* The "planned closure of the [Troutdale tower] greatly increases the risk that [instrument rule] operations in and out of [Troutdale] will adversely impact the arrival or departure flow at PDX. It also increases the risk that pilots at [Troutdale], operating in now uncontrolled airspace, will interfere with the PDX arrival or departure stream . . . ." *Id.* Troutdale experienced a 41 percent increase in traffic in 2012 and also has a very high concentration of student pilot training. R.000558; R.000483.

FAA did not meaningfully address any of these safety concerns. The Summary Fact Sheets in the Record do just that – they only summarize comments filed. *Compare* R.00026 (Summary Fact Sheet for Glacier Park simply states: "issues [pertaining] to safety") *with* R.000265-79 (Glacier Park comments identifying airport-specific safety concerns). While FAA's counsel asserted in its post-decisional Stay Denial Letters that FAA had factored site-specific safety concerns into its closure decisions, there is no Record evidence to back FAA's claim that it conducted a thoughtful, case-by-case review of each airport. Mr. Grizzle states in his post-decisional declaration that he directed a "first level team" to "read, review, and evaluate every comment received, categorize and summarize those comments" and then directed that first-level team to "submit that information to a small group of senior agency and DOT executives for their review." Grizzle Decl. ¶ 10 (P.R.001117). Grizzle states that the second group "used the review and summary analyses of the team to again evaluate the comments and determine which of the 189 identified towers should be removed from the original proposed

defunding list." *Id.* ¶ 10 (P.R.001117). But, nothing in the Record reflects any summary safety analysis of any sort, let alone any such analysis having been provided up the decisional chain of command. *See supra* at pp. 29-33.

At most, FAA can show that it compiled limited summaries of many of the Comments. This falls far short of satisfying its duty to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43. FAA must "account for evidence in the record that may dispute [its] findings," *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951), and must follow its own established procedures. *Clemente v. United States*, 766 F.2d 1358, 1365, n.10 (9th Cir. 1985). FAA did neither.

E. FAA Failed To Follow Other Established Procedures Related To Safety.

1. FAA Did Not Conduct Benefit/Cost Analyses, As Its Own Rules Require.

FAA failed to comply with its regulations, which require a benefit/cost analysis to determine whether a particular ATCT should be discontinued. 14 C.F.R. § 170.15 (A.000102) ("An ATCT will be subject to discontinuance when the continued operation and maintenance costs less termination costs . . . of the ATCT exceed the present value of its remaining life-cycle benefits . . . ."). The purpose for this benefit/cost analysis is to "maximize safety for the aviation system as a whole, consistent with the finite resources available to provide air traffic control services." 56 Fed. Reg. at 338 (A.000390). FAA inexplicably failed to follow its own regulations when determining which towers to close. *See*

Clemente, 766 F.2d at 1365 n.10 ("'[a]n executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.'").

2. FAA Failed To Comply With Its Order 7232.5G.

FAA Order 7232.5G, *Changing Operating Hours for Terminal Facilities*, is specifically applicable to the facts at hand; it establishes criteria FAA must follow prior to reducing or increasing hours of operation at air-traffic control towers. (A.000104–112).[14] Prior to decreasing hours at a tower, FAA must prepare a "detailed staff study addressing the factors necessary for effective evaluation, analysis, and decisionmaking . . . ." *Id*. at § 8(A.000107). That document *must* include a completed SRMD. *Id*. It must also include a full benefit/cost analysis; the results of a 90-day traffic survey; a completed checklist for changing operating hours for terminal facilities; and the "[d]iscussion, results, and arrangements made in consideration" of various relevant factors, including: (1) the types of operations and types of aircraft being affected; (2) a determination as to whether radar/radio coverage is available; (3) how notification of emergency units will occur where such notification has been the responsibility of the tower; (4) how to address weather operations that would otherwise be provided by the tower; (5)

[14] FAA Order 7232.5G is incorporated by reference into the Federal Contract Tower program. *See* FAA Order 7210.54B, Appendix 1, p.1-2, available at: http://www.faa.gov/documentLibrary/media/Order/ND/7210.54B.pdf.

consideration of the airport facilities, including the runway configurations and navigation aids at the relevant airport; and (6) a cost/benefit analysis. Order 7232.5G, §§ 6, 8, App A. (A.000104–106, A.000107, A.000110–112). This scope of work, required by FAA's own Order, is exactly the sort of thoughtful, site-specific safety analysis that airports asked the agency to conduct prior to the Decision. FAA did none of this prior to its Decision. There is no indication in the Record that FAA even considered Order 7232.5G before issuing the Decision. There is no benefit/cost analysis. There is no checklist. There is no "detailed staff study addressing factors necessary for effective evaluation, analysis, and decisionmaking." (A.000107). FAA's disregard of its own Order is clear error. *Clemente*, 766 F.2d at 1365 n.10 (agency must follow its established procedures).

F. FAA's *Post Hoc* SRM Document Does Not Compensate for Its Failure To Address Safety Prior To Making a Decision.

The April 19 SRMD is post-decisional information that should be stricken from the Record pursuant to the Petitioners' motion to strike. This Court has repeatedly held that "post-decision information 'may not be advanced as a new rationalization either for sustaining or attacking an agency's decision.'" *Tri-Valley CAREs v. Dep't of Energy*, 671 F.3d 1113, 1130-31 (9th Cir. 2012) (quoting *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006)). Yet, this appears to be exactly what FAA seeks to do. By including the April 19 SRMD in its designated record, FAA hopes to back-fill the record with an after-the-fact analysis that seeks to justify a pre-determined result – to close the towers. This is plainly impermissible.

However, even if the Court were to consider the April 19 SRMD for purposes of judicial review, it fails to comply with FAA's own orders and safety management requirements and cannot rescue its Decision.

1. The SRMD Failed To Consider the Core Question of *Whether* the Towers Should Be Closed.

A critical flaw in FAA's post-decisional safety review process and SRMD is that they take the 149 tower closures as a given. The SRMD only considers system-wide-scale hazards and possible mitigation. *See* P.R.001126 (SRMD at 4). Revisiting closure at individual airports for which particular safety hazards were identified was *not* an option for the SRM panel. *Id.* Thus, the SRMD cannot provide any basis to support the agency's prior Decision to close the towers; at most, it is an after-the-fact search for ways to try to mitigate the safety risks of FAA's pre-determined result.

2. The SRMD Did Not Comply With Mandatory Requirements.

The post-decisional SRMD is the product of a safety review that violated FAA's mandatory SRM requirements and cannot suffice as retroactive compliance. FAA's after-the-fact exercise was limited and perfunctory. The SRM Panel had only three days to meet and consider the safety implications of tower closures at 149 airports and the spillover risks to hundreds of other airports. P.R.001144 (SRMD at 22).

a) The SRM Failed To Include Airport Stakeholders.

A safety analysis is only as good and complete as the people conducting it. Accordingly, FAA requires that SRM should be conducted by a panel that includes all affected stakeholders and persons with experience and knowledge regarding the subject of the change. Manual § 3.4.2 (A.000137). FAA defines a "stakeholder" as "a group or individual that is affected by or is in some way accountable for the outcome of an undertaking; an interested party having a right, share or claim in a product or service . . . ." *Id.* at § 3.4.2, A-5 (A.000137, A.000204). The April SRM panel did not include a single representative of any affected airport or tower (let alone all of them), or anyone identified as having particular knowledge or expertise requiring the particular towers being closed. P.R.001144-45 (SRMD at 22-23). This is particularly egregious when FAA never asked the airports for safety information (and, in fact steered airports away from providing such comments in its March 5 Letters). Instead, the panel was dominated by FAA Headquarters officials, Washington-area trade associations, and contractors. *Id.* While system-level perspectives are useful, it is essential to have local understanding of unique hazards faced in specific airport contexts with particular airport layouts, terrain, neighboring airports, aircraft mix, weather, and other factors. By excluding affected airports, tower employees, flight schools, airport tenants, and other persons with knowledge of the conditions at each affected airport, FAA failed to comply with its safety mandate.

b) The SRMD Failed To Consider Site-Specific Risks Identified by Airports.

The SRMD contains no review of the site-specific safety hazards faced at each of the affected airports. This, too, is at odds with FAA's SMS Manual and other mandatory provisions. FAA explicitly requires a detailed SRM review for *each* individual change to existing procedures, Manual § 3.3 (A.000135), and provides express procedures for considering site-specific concerns (including detailed factors such as weather, type of operations, and impacts on other terminal facilities) before making changes to the control tower hours. *See* Order 7232.5G at §§ 6, 8 (A.000104–106, 107).

Instead, FAA attempted to cram a generic review of all 149 towers through a generalist SRM panel that had only three days to meet. *E.g.*, P.R.001126 (SRMD at 4). The National Air Traffic Controllers Association (NATCA), one of the participants on the panel, identified this serious shortcoming:

> To appropriately determine the hazards and mitigations that would effectively lower the risk from "high" to an acceptable level of "medium", an SRM panel would need to be conducted on each individual tower that would include local [subject matter experts] and operators so the full impact of the closure could be assessed.

P.R.001311 (SRMD at 189).

The bulk of the SRMD analysis compared towered versus untowered airports generally. *See* P.R.001147-56 (SRMD at 25-34). No specific airports or their unique contexts were analyzed or considered in assessing system hazards. *Id.* FAA listed the airports affected, P.R.001136-40 (*id.* at 14-18); provided diagrams

and some operations information (but less than the information required by Order 7232.5G) for the affected airports (*id.* at 63-136); and considered whether procedures were in place for aircraft operations without towers, P.R.001302-06 (*id.* at 180-184). The SRMD also identified fourteen airports that used contract towers as mitigation for waivers or modification of airport safety standards. P.R.001295-97 (*id.* at 173-75). But, the SRMD gave no consideration to what these modifications might be, what hazards the tower closures would cause, or whether feasible mitigation was possible. This is an admission that the SRM Panel did not, and thus could not have considered, the potential risks when it issued its SRMD.

Three limited exceptions to the lack of site-specific consideration highlight FAA's overall failure to grapple with the safety consequences of its action. First, for Spokane's Felts Field, FAA acknowledged problems associated with the fact that, without the tower, FAA has radar but not radio coverage at and near the airport. P.R.001303-04 (*id.* at 181-82). The SRMD admits that: "Currently controllers allow for more spacing if missed approaches are possible when [Felts Field] is closed at night. But we have no established procedures (SOP) for this situation as it does not preclude simultaneous operations." *Id.*

Second, the SRMD recognizes that at Friedman Memorial Airport in Hailey, Idaho, radar coverage does not exist below 14,000 feet, leaving regional controllers in Salt Lake City blind without an airport control tower. P.R.001304 (*id.* at 182). The SRMD acknowledges that the surrounding airspace is at times "saturated," that Salt Lake City air traffic controller workload and traffic delays would increase, and that there would be additional effects on "outlying sectors." P.R.001304. The

SRMD offers no additional analysis of, or mitigation for, any potential risks and issues this may pose. *Id.*

Third, the SRMD mentions the effects that tower closure at Renton Airport would have on Seattle Tacoma International Airport and Boeing Field Airport airspace in Seattle. P.R.001304 (SRMD at 182). The SRMD concedes that the loss of Renton's tower – along with the required changes to modifications to standards due to the loss of the towers – will increase risks by making the shared airspace interaction much more complex. *Id.*

c) The SRMD Fails To Demonstrate That Mitigation Measures Would Be Successful.

Under SMS requirements, FAA cannot implement a change with a "high" risk level unless it can provide mitigation or other measures to reduce the level of risk to a "medium" or "low" level. Manual § 3.10.2 (A.000160). Even in its post-decisional, generalized SRMD, FAA identified two hazards associated with tower closure that it found would pose "high" levels of risk based on the potential for catastrophic, fatal accidents: (1) "pilots' lack of ability to separate themselves from another aircraft while airborne"; and (2) "two or more aircraft operating at a non-towered airport don't immediately identify each other." P.R.001127 (SRMD at 5). Yet, the SRMD offers little more than notice and public relations efforts to mitigate these "high" risk hazards. P.R.001150-54, 001163-64 (*id.* at 28-32, 41-42).

The SRMD also blithely announces *as a mitigation measure* that "69 FCTs will remain open and function as a [Non-Federal Contract Tower.[15]]" P.R.001163-65 (*id*. at 41-43). This is a convenient assertion, in that it "mitigates" almost half of the safety risk associated with the closure of the 149 towers. But the Record provides no support for this oddly precise assumption. There is no indication which airports FAA assumes will undertake this "mitigation," nor indeed, is there any evidence that any such airports have committed to do so. Indeed, the SRMD indicated that FAA will only know how many towers would be funded by non-federal entities by June 1—more than a month *after* the FAA signed the SRMD. P.R.001166 (*id.* at 44). FAA's SMS guidance requires an acceptance of risk and a "certification by the appropriate management official that he/she understands the safety risk associated with the change, the mitigations are feasible and will be implemented, and he/she accepts that safety risk into the NAS." Manual § 3.14.2 (A.000163). There is no indication that the airports have agreed to implement this "mitigation." To do so now is arbitrary. *Cal. Energy Comm'n*, 585 F.3d at 1150-1151 (agency action is arbitrary if agency failed to consider an important factor or aspect of the problem or made a clear error in judgment).

Based on these mitigation measures, FAA concluded that the likelihood of a catastrophic accident would drop from "extremely remote" to "extremely improbable." P.R.001160 (SRMD at 38), ostensibly enabling it to move forward

[15] Non-Federal Contract Towers are those operated and funded solely by the airport owner or another entity.

under the SMS requirements. Several SRM participants objected to this attempt to paper over clear risks. As NATCA stated:

> NATCA believes that the FCT Closure SRM process was rushed, incomplete, and lacked credible data to support the findings that mitigated the initial "high" risk [] to a "medium" [] predicted residual risk . . . . NATCA was not the only stakeholder to disagree with these findings, in fact there were members of FAA management that were in full agreement with NATCA's position as indicated by the recorded "vote" during the process. . . . [O]ther stakeholders stated that there was not enough information to make a determination, which supports NATCA's position that the process lacked credible data to support the findings.

P.R.001311 (SRMD at 189). NATCA also found FAA's underlying data to be inadequate and erroneous, thereby underestimating impacts, and that the rushed SMS process left no time to address the issue. *Id.* Even FAA acknowledged the lack of consensus. P.R.001154 (*id.* at 32) ("The panel did not agree on the predicted residual risk of this hazard. Opinions varied widely.") NATCA was right; FAA provided no data or analysis to justify its conclusions regarding the adequacy of mitigation. The post-decisional SRMD provides no reasonable justification for FAA's decision.

III. FAA FAILED TO SATISFY ITS OBLIGATIONS UNDER NEPA.

FAA refused to conduct any analysis under NEPA, arguing that NEPA does not apply to any cuts made under the BCA. Under the FAA's interpretation of the sequester, agencies can use it to repeal environmental protections and policies that

have been in place for decades. It can do this without even an accounting to the public of the consequences that will result. FAA would infer this sweeping result merely from Congress' silence in the BCA, even though Congress could have explicitly exempted sequester decisions from NEPA—as it has done with many other pieces of legislation—but chose not to do so. Such a conclusion is wrong as a matter of law.

NEPA applies to all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (A.000029). The phrase "actions significantly affecting the quality of the environment" is "intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). Agencies must satisfy their NEPA obligations "to the fullest extent possible." 42 U.S.C. § 4332 (A.000029). That proviso does "not provide an escape hatch for footdragging agencies" nor does it "make NEPA's procedural requirements somehow 'discretionary.'" *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

To implement NEPA's mandates, FAA adopted Order 1050.1E CHG 1, *Environmental Impacts: Policies and Procedures* (2006) (A.000332–384), which follows and implements the Council on Environmental Quality's (CEQ) NEPA regulations. Together, these provisions establish a clear framework for FAA's compliance with NEPA, emphasizing the agency's intention of "integrat[ing]

NEPA and other environmental reviews and consultations into agency planning processes as early as possible." *Id.* ¶ 6a (A.000336). The Order provides that "all formal actions taken by FAA officials are subject to NEPA review" unless excepted by CEQ regulations or statutory law applicable to the FAA's operations. *Id.* ¶ 200e(3) (A.000343). When FAA takes an action that does not fall within one of those exceptions, it must: (a) determine that the proposed action is categorically exempt from NEPA (*id.* ¶ 400a) (A.000364); (b) prepare an Environmental Assessment analyzing whether the action has a significant environmental effect (*id.* ¶ 404) (A.000368); or (c) prepare an Environmental Impact Statement (EIS) (*id.* ¶ 500) (A.000372). The agency must prepare a full EIS "[i]f substantial questions are raised whether a project may have a significant effect upon the human environment." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982). Here, FAA's March 22 Decision and prior March 5 preliminary closure notification evince no consideration of NEPA in FAA's decisional process whatsoever.

This was error. FAA's simultaneous closure of 149 air traffic control towers is a major federal action that will significantly affect the quality of the human environment. FAA failed to solicit comments from affected airports or the community at large regarding environmental harm. Nevertheless, several airports apprised FAA of environmental impact issues associated with the tower closures that warrant consideration under NEPA. Many of these involved a change in aircraft traffic patterns resulting from closure, which in turn would alter associated noise contours over noise-sensitive communities. Spokane described changes in

traffic patterns that could increase noise pollution for surrounding residential areas, and noted that closing the tower would degrade the human environment by increasing the risks of wildlife strikes. R.000424, 000432-33. Martin County informed FAA that closing its tower would require a new Noise Exposure Map due to a "drastic change of the airport traffic patterns." R.000457.

In marked contrast with its Decision here, FAA regularly performs NEPA review of aircraft noise impacts, and has extensive guidelines for doing so. *See* Order 1050.1E, Appendix § 14 (Noise), ¶ 14.2a (A.000377) ("[i]f significant noise impacts are expected, the FAA official must prepare a detailed noise analysis as part of an EIS . . . ."). FAA often prepares either an EA or an EIS when its actions have altered aircraft flight paths. *See, e.g.*, *Seattle Cmty. Council Fed'n v. FAA*, 961 F.2d 829, 833 (9th Cir. 1992). Where FAA has failed to prepare an adequate environmental review and there was potential for environmental harm, courts have remanded FAA's decision back to the agency. For instance, in a case where FAA issued a letter order changing the runway use procedures at an airport, "thus increasing noise, soot, and exhaust fumes over residential areas," the D.C. Circuit held that FAA was "required—at a minimum—to prepare an environmental assessment to determine whether the new runway use procedures" would "cause a 'significant' impact on the environment." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007). Although FAA claimed that the proposed action would not change the "noise contour" of the airport in question, *id.* at 1190, the court held that FAA could not "entirely discharge its environmental review

obligations simply by pointing to one study that found no significant environmental impact." *Id.*

In this case, FAA first addressed the NEPA implications of its closure order in letters denying administrative stay requests pending judicial review. These post-decisional documents are irrelevant for purposes of judicial review. *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008). In any event, FAA's *post hoc* rationalizations are without merit. FAA admits it did no review, but claims that it did not have to conduct NEPA review of the tower closures because its Decision: (a) was not a major federal "action"; (b) was not discretionary and thus not subject to NEPA; and (c) falls within the categorical exclusion for administrative and agency operating procedures, one of the limited exceptions to NEPA review referenced in Order 1050.1E. R.000627-31 (Order Denying Stay). None of these *post hoc* rationalizations are valid.

A. The Tower Closures Are Major Federal Action.

An agency decision to terminate an established federal program or contract is subject to NEPA review. *Andrus v. Sierra Club*, 442 U.S. 347, 363 n.22 (1979). *See also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729-730 (9th Cir. 1995) (cancellation of a timber sales contract merited NEPA review). In its letters denying stay requests in this case, FAA relied upon *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979), and *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), to suggest that its decision to defund contract towers was not an action subject to NEPA. Those cases are inapposite; in both, the agency merely declined to take one action from among an array of alternatives.

Here, FAA took deliberate affirmative action to alter the status quo by closing 149 towers, most of which have been in operation for decades. In fact, the Sixth Circuit has found the decisions cited by FAA inapplicable in cases where, as here, the abdication of federal responsibility constitutes "a substantial change in an ongoing federal project." *Bunch v. Hodel*, 793 F.2d 129, 136 (6th Cir. 1986).

B. The Tower Closures Are Discretionary.

FAA argues that the "sequestration statute prevents the FAA from acting on any information that might be developed in a NEPA analysis." R.000628 (Order Denying Stay at 14)]. FAA is wrong. The BCA gives the FAA discretion as to how to allocate budget cuts below the PPA level, and the FCT program is only a very small part of the "ATO activities" PPA. *See supra* at pp. 7-8 . Moreover, FAA has shown that it has, and has used, its discretion to choose how sequestration mandates are fulfilled: it chose to continue funding 24 towers that were originally scheduled for closure based on its judgment of how those towers affected the "national interest," a standard found nowhere in the BCA. This is precisely the type of inquiry into which NEPA's mandates are intended to infuse environmental considerations.

C. The Tower Closures Are Not Categorically Excluded from NEPA Review.

FAA claims that its tower closure Decision is "categorically excluded" from NEPA review pursuant to the exclusion for "[a]dministrative and agency operating actions, such as procurement documentation, organizational changes, personnel actions, and legislative proposals not originating in the FAA." Order 1050.1E,

¶ 307j (A.000362). FAA Order 1050.1E expressly provides that an action cannot be categorically excluded if it will cause "an impact on noise levels of noise-sensitive areas," "disruption of an established community," or "[e]ffects on the quality of the human environment that are likely to be highly controversial on environmental grounds." *Id.* ¶¶ 304f, 304d, 304i (A.000359, A.000360). FAA was told that the tower closures—and attendant alteration of air traffic around various airports—will have significant adverse effects on noise-sensitive residential areas. *See supra* at pp. 50-51. FAA has done nothing more than state in conclusory fashion (and only in its post-decisional letters denying a stay) that, despite all evidence in the record to the contrary, it "expect[s] pilots to continue to use their customary flight patterns and procedures." R.000631 (Stay Denial Letter at 17).

FAA attempts to excuse this omission by arguing that its FCT defunding decision is not a proximate cause of tower closure, because airports could choose to pick up funding for their towers themselves. However, FAA cannot absolve itself of its obligations under NEPA by assuming that a third party will act to cure any environmental consequences resulting from its decision. An agency *may* consider the extent to which "*firm commitments* by other parties to take mitigating actions" may "eliminate or mitigate" an action's environmental effects. *Pres. Coal. Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982) (emphasis added). But when "the compensatory action is to be undertaken by third parties, their commitments, while they need not be contractual, must be more than mere vague statements of good intentions." *Id.; see also Robertson v. Methow Valley Citizens*

Council, 490 U.S. 332, 351-53 (1989). Here, FAA did not even have vague statements of intention from the affected airports at the time it made its decision, much less firm commitments that all or any affected airports could and would assume tower funding obligations. And, even if some airports do choose to fund their towers, there is no assurance when or if that would be accomplished.

FAA had an obligation to consider whether the tower closures would have a significant effect on the human environment and to study what that effect would be. It failed to do so. NEPA was enacted to ensure that "environmental issues be considered at every . . . stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." *Calvert Cliffs'*, 449 F.2d at 1112, 1118. A decision to implement a federal action that falls within NEPA when no such review has taken place "makes a mockery of the Act," *(id.* at 1117) and frustrates the national policy of considering environmental factors in agency decisionmaking.

IV. FAA FAILED TO CONSIDER 49 U.S.C. § 47124, WHICH BARS CLOSURE OF CONTRACT TOWERS IN EXISTENCE ON DECEMBER 30, 1987, AND ARBITRARILY PLACED CONTRACT TOWERS THAT WERE IN EXISTENCE ON DECEMBER 30, 1987, ON THE CLOSURE LIST.

Congress has mandated that FAA "shall continue the . . . air traffic control tower contract program established for towers existing on December 30, 1987" without any qualifications. 49 U.S.C. § 47124(b)(1) (A.000058). For contract tower programs that came into existence thereafter, the statute requires FAA to "extend the program to [those] towers as practicable." *Id.* Remarkably, FAA did

not give any consideration to the potential impact of this statutory command on its tower closure decision. There is nothing in the administrative record to suggest that FAA made any effort to determine (from its own agency records) whether any of the 149 contract towers that it has ordered be closed were in existence on December 30, 1987—or to explain why FAA could order them closed if they were. This, too, was arbitrary and capricious, and not in accordance with law.

For Cuyahoga County, alone among the Petitioners, this issue takes on special importance because the contract tower at Cuyahoga County Airport has been in existence since 1983 and is undeniably covered by § 47124(b)(1)(A). P.R.000730A-000730NNN (Declaration demonstrating Cuyahoga had a contract tower on December 30, 1987); *see also* R.000704 (Cuyahoga comments).[16] Cuyahoga County requests the Court to determine that under this special statutory provision, FAA does not have any discretion to close the contract tower program still in effect at Cuyahoga County Airport. See *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1072-74 (6th Cir. 2008) (interpreting the term "shall be continued" as mandating lifetime benefits).

It is well established that when interpreting a statute the Court looks to "the plain language of the statute" and that meaning controls unless it would lead to "unreasonable or impractical results." *San Luis Unit Food Producers v. U.S.*, 798, 803 (9th Cir. 2013). The legislative history makes clear that Congress intended

[16] Because FAA made no effort to distinguish pre-1987 contract towers on its closure list, Petitioners do not know how many other contract towers slated for closure were in existence on December 30, 1987.

that contract tower programs for towers in existence on December 30, 1987, be continued without any conditions. The Conferees explicitly acknowledged that FAA was reluctant to continue the contract tower program. H.R. Conf. Rep. No. 100-484, *reprinted in* 1987 U.S.C.C.A.N. at 2652–53 (A.000470). But Congress recognized the positive economic development impact of the programs that were in existence as of December 30, 1987, in addition to safety considerations, and mandated FAA to continue the contract tower program for those airports. *See id*. (the statute was "modified to clarify that the program is to be continued at existing towers . . . [because Congress] believe[d] that those towers currently being operated should remain in operation."); *See* 133 Cong. Rec. S00000-19 (1987) (A.000468) (Congress "[d]irect[ed] DOT to keep open those existing low level air traffic control towers operated under the Contract Tower Program . . . ."); *See* 133 Cong. Rec. S29538-01 (1987) (A.000476, A.000485) (Congress "ma[de] permanent the low level activity (VFR) Level I air traffic control tower program . . . .").

The aviation statutes have been amended several times (as recently as 2012), but Congress never amended the language which protects contract towers that were in existence on December 30, 1987. Neither the BCA nor the RFDA amended or revised 49 U.S.C. § 47124 in any way. Therefore, FAA is prohibited from closing these contract towers, including the contract tower at Cuyahoga County Airport, today.

CONCLUSION AND RELIEF SOUGHT

For the reasons above, the undersigned Petitioners respectfully request the Court to grant the petitions and vacate FAA's decision to close 149 Federal Contract Towers.

Respectfully submitted this 6th day of May, 2013.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Petitioners are aware of no related cases, other than the above-referenced consolidated cases in the Ninth Circuit.

Dated: May 6, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 28-4 and 32-2, I hereby certify on this 6th day of May, 2013, that this brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 14,719 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/_Catherine M. van Heuven_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2013, I electronically filed the foregoing JOINT OPENING BRIEF and the ADDENDUM thereto with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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