DECIDED ON MARCH 27, 2018

No. 15-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS ASSOCIATION OF GEORGETOWN, *et al.*,
PETITIONERS,
v.
FEDERAL AVIATION ADMINISTRATION AND MICHEAL F. HUERTA, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS.

On Petition for Review of an Order
of the Federal Aviation Administration

PETITIONERS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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District of Columbia residents, students, and homeowners, on the east side of the Potomac River, through their neighborhood associations, seek rehearing or rehearing en banc of the panel's dismissal of their appeal and its opinion holding that petitioners had no "reasonable grounds" for having not appealed within 60 days from the Federal Aviation Administration's (FAA) finding of no significant impact (FONSI) and Record of Decision (ROD) issued on December 12, 2013. For all practical purposes, that procedural decision would ratify the FAA's patently unlawful movement of National Airport's historic 75-year-old northern flight path over commercial Rosslyn, Virginia, more than a half mile east to the previously quiet areas of Historic Georgetown and neighboring residential D.C. neighborhoods–the very type of harsh and inequitable result that the "equitable tolling" provision of 49 U.S.C. § 46110(a) was designed to prevent.

Rehearing is warranted to correct the inequitable result and because the panel's opinion is based on a misreading of the facts in the record and directly conflicts with this Court's recent decision in *City of Phoenix v. Huerta,* 869 F.3d 968 (D.C. Cir. 2017), *opinion amended on reh'g,* 881 F.3d 932 (D.C. Cir. 2018), in three critical respects:

(1) *Phoenix* and *City of Dania Beach v. FAA,* 485 F.3d 1181 (D.C. Cir. 2007), both involved the FAA's attempt to move a flight-path over a previously

unaffected community. Both decisions held that the "relevant final orders" are those published at the time the new routes are "implemented" and that the adverse "impacts" on the community are felt. The panel's opinion, however, concludes that a preliminary FONSI/ROD, which had no impact whatsoever on the community, was the "relevant final order."

(2) In *Phoenix,* this court held:

> [T]he agency must ask local governments who their authorized representatives are and . . .the FAA's failure to notify and provide documentation to the City of the agency's finding of no adverse impact violated regulations under the Preservation Act and denied the City its right to participate in the process and object to the FAA's findings.

869 F.3d at 971. This court further held in *Phoenix* that the FAA's failure to involve city leaders and officials was arbitrary and capricious, and required vacature of the new routes. On this appeal, however, the panel adopted the FAA's unsupported argument that the only "involvement" the FAA was required to undertake to engage D. C. government officials, was to place two legal notices in local newspapers.

(3) In *Phoenix,* this court held that the FAA's "serial promises" to City officials that it was open to "fixing" the noise problem, constituted "reasonable grounds" for late filing. Here, the FAA excluded the D.C. Mayor and D.C. City Council from its notice mailing lists and failed to "involve" them in its plan to transfer the vast majority of northern departures from Rosslyn, Virginia, to D.C.

Instead, the FAA kept them in the dark for 18 months until that transfer was a *fait accompli*. The panel's conclusion that those facts did not constitute "reasonable grounds" for petitioners' failure to appeal from a FONSI/ROD of which they had no knowledge, essentially writes the "equitable tolling" provision of § 46110(a) out of the statute.

The question of whether actual community involvement, not merely a legal notice of a study in a newspaper is required, before the FAA may move a major flight-path, is of exceptional importance. Failure to follow *Phoenix* and *Dania Beach* not only impacts these petitioners—but every community that may be adversely affected by the FAA's numerous disruptive flight path movements in its ongoing nationwide implementation of the FAA Modernization and Reform Act of 2012.

BACKGROUND

Since National Airport opened in 1941, its sole northern departure flight-path called "NATIONAL" followed a compass azimuth of 328 degrees over the Pentagon, Arlington National Cemetery, and commercial Rosslyn, Virginia, before intersecting the Potomac River northwest of the Georgetown Reservoir. Consequently, every purchase and sale of real property in Rosslyn and vicinity over the last 75 years, presumptively was made with full knowledge that the property was under the only northern departure flight path from National Airport.

Correspondingly since 1941, National Airport's northern flight path has not been a consideration for real estate transactions in Georgetown.

On March 12, 2011, however, the FAA surreptitiously established a new area navigation (RNAV) northern flight path called LAZIR, with "zero" public notice, opportunity for comment, or environmental review. That new flight path went from the runway directly to the middle of the Potomac River then over Georgetown University and MacArthur Boulevard in Northwest DC. JA 1805-08.

In the summer of 2013, many Georgetown residents noticed planes flying over their homes instead of over Rosslyn. In response to their aircraft-noise complaints, D.C. Council Member Jack Evans wrote a letter in October 2013, to the Chairman of the Metropolitan Washington Airport Authority (MWAA) complaining of an apparent new flight path. JA 1482. The Chairman, however, responded that, after conferring with the FAA, there had been no changes in the northern flight paths since 2008. JA 1483. Because the FAA had created LAZIR in 2011, and was still using it, that statement was untrue and designed to deceive Council Member Evans and the community. JA 584-5.

At that very time, and unbeknownst to the D.C. Mayor, the D.C. City Council, or the community at large, the FAA was completing an Environmental Assessment (EA) for the Washington D.C. Optimization of the Airspace and Procedures in the Metroplex (D.C. Metroplex). Had a qualified aviation expert,

retained by the D.C. government, reviewed that Draft EA, his report would have disclosed the FAA's drastic proposal to establish nine new RNAV routes that would use the existing LAZIR flight path as the initial segment, thereby shifting the vast majority of all northern departures from the 75-year-old NATIONAL directly over Georgetown and neighboring D.C. residential communities.

The FAA mailed actual notices of its EA proceeding in January 2013, and its Draft EA in June 2013, to more than 450 elected state and local officials and libraries in the five-state area. JA 892-907. Not a single notice or draft EA however, was sent to any elected official in the District of Columbia government[1] or any D.C. Library.

On December 12, 2013, the FAA published a finding of no significant impact (FONSI/ROD) for the entire Metroplex and, despite Council Member Evan's formal inquiry, no representative of MWAA or FAA informed him or any elected D.C. official, of the Metroplex proceeding, the draft EA, or the

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[1] D.C's congresswoman, Eleanor Holmes Norton, received a notice because she was on the FAA's separate mailing list for members of Congress. She, of course, is not an elected official of the District of Columbia government. The FAA also provided a copy of the Draft EA to a low-level employee of the D.C. State Historic Preservation Office, whose approval of the Draft EA is specifically required by law. JA. 1519. That person, as in *Phoenix,* uncritically accepted the FAA's representations that the proposed adjustments of the flight paths would not cause any significant increase in aircraft noise in the District of Columbia. *Phoenix* held that notice to a low-level city employee and to the SHPO was insufficient to meet the FAA's obligation to "involve" elected city officials. 869 F.3d at 972.

FONSI/ROD. JA 1801-12, 1823-24. In April 2014, after the 60-day period for appealing the FONSI/ROD had expired, the FAA and MWAA began a series of meetings with D.C. community representatives to discuss community aircraft noise complaints. *Id.* In the course of those meetings with community representatives, between April 2104 and July 2015, neither FAA nor MWAA ever disclosed the fact that: (1) an EA had been conducted, (2) a FONSI/ROD had been issued, or (3) that FAA planned to launch nine new RNAV flight paths over Georgetown and vicinity[2]. JA 1780-91. On this appeal, the FAA did not challenge petitioners' undisputed evidence that they were wholly unaware of either the EA or the FONSI/ROD. Community representatives first learned of the FAA's deception at a meeting on July 8, 2015, when the FAA informed them that nine new routes had been approved and were being implemented. JA 1837. Petitioners then conferred with legal counsel and appealed to this Court from the nine final orders that actually implemented the new flight paths—within the 60-day limit of § 46110(a).

DISCUSSION

1. *The Panel's decision conflicts with this court's holding in Phoenix that the orders actually "implementing" the new routes—not the FAA's NEPA orders—*

[2] The FAA also undertook an extensive internal evaluation of flight patterns prior to 2014, showing the actual flight tracks for the new LAZIR route, which it also withheld from elected D.C. officials and community representatives with whom it was meeting and was obviously relevant to those meetings . JA 1602-1735.

are the "relevant final orders" from which an appeal may be taken. The panel's opinion is based upon an incomplete understanding of the "pre" and "post" implementation activities that took place in *Phoenix* and D.C. In *Phoenix,* as here, the orders actually "implementing" the new flight paths were those published on the first day that each new flight path was actually flown. 869 F.3d at 969. *See, e.g.,* JA 1780-91. In its opinion, however, the panel incorrectly concluded that the FONSI/ROD itself immediately implemented all nine new flight paths and that "pilots began departing according to these procedures, though infrequently, immediately after publication." Opinion at 12. The pilots making those infrequent flights from 2013 to 2015, *see* JA 1613, however, were merely using the existing 2011 LAZIR flight path— not the *nine new and much longer flight paths* that were not authorized or implemented until 2015[3]. *See, e.g.,* JA 1602-1735, 1780-17 91.

Had the FONSI/ROD, in fact, implemented all nine new routes, as the opinion assumes, all pre-implementation flight and safety requirements would have necessarily been completed and FAA Order 7100.41 (a supplemental order for new PBN routes) would have applied only prospectively to post-implementation

[3] Illustrative of the panel's misapprehension of the facts in these two cases, the panel opinion also misreads *Phoenix* by concluding that after residents and city officials complained about the noise from the new routes, the FAA "suspended" those routes and entered into negotiations. The FAA, however, refused to reinstate the old routes and did not suspend the new routes. 869 F.3d at 967. The Opinion also refers to "FAA's 2011 working group" which in fact was a 2004 working group sponsored by MWAA.

evaluation and review similar to that which occurred post-implementation in *Phoenix*. That, however, is not what occurred. The "final order" language of the ROD notwithstanding, extensive flight and safety tests and evaluations, identical to those in *Phoenix*, including the Secret Service Test, did in fact take place at National Airport during the 18-month period between December 2013 and June 2015. They were initially conducted pursuant to the numerous existing orders for implementing new flight-paths. On April 3, 2014, however, the FAA issued Order 7100.41 regarding its new Performance Based Navigation (PBN) procedures that merely supplemented the existing regulations. Accordingly, on April 3, 2014, the FAA employees at both National Airport and Phoenix began following the supplemented PBN regulations in exactly the same manner. Thus, the issuance of Order 7100.41 had no relevance to this case and the panel's comparison of the sequence of events in *Phoenix* and at National Airport is factually flawed.

Indeed, the sequence of events at Phoenix Sky Harbor Airport and National Airport were essentially identical in all respects except one. In *Phoenix*, the FAA issued a CATEX as opposed to a FONSI at National Airport as its final NEPA document. Neither the CATEX nor the FONSI/ROD actually "implemented" the new routes at either location. The FAA described the process in great detail in its brief in *Phoenix*. *See,* FAA Brief (No 15-1158) July 17, 2015, pp. 46-47. This Court then adopted the FAA's position in *Phoenix*, 859 F.3d at 969:

> First, the September publication marked "the consummation of the agency's decisionmaking process," *id.* because it put the new routes into effect following extensive testing and evaluation intended to ensure that those routes would be safe and consistent with air traffic requirements.
>
> * * * * *
>
> And it was the September publication that led to the effects petitioners now seek to reverse: increased noise in certain area of Phoenix. We also note that the relief requested by petitioners is "vacat[ur] and remand [of the] FAA's decision to implement the [new flight] routes" – that is, of the September order. . . . We therefore conclude that the September 18, 2014 publication of the new flight routes was the relevant final "order."

On this appeal from identical implementing orders at National Airport, the FAA reversed course and argued that the "final order," which "represented the consummation of the agency's decisionmaking process," was its December 2013 FONSI/ROD. FAA Ans. Brief pp 37-38. The FAA then necessarily argued, that the final orders actually implementing the new flight paths in D.C., identical to those published in Phoenix on FAA's U.S. *Terminal Procedures Publication*, were merely "navigational charts." *Id.* at 38. As shown above, however, the identical documents that were final orders implementing the new routes in *Phoenix*, are, under the holding in *Phoenix,* the "final orders" implementing the new routes at National Airport[4].

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[4] As this court observed in *Phoenix*, the FAA cannot deviate from its usual practices "without giving a 'reasoned explanation for . . . treating similar situations differently.' *W. Deptford Energy, LLC v. FERC,* 766 F.3d 10, 20 (D.C. Cir. 2014)."

The FAA attempted to finesse its contradictory position by claiming that only one "final order" may be issued in the course of a proceeding and that FAA Order 7100.41, did not apply in the D.C. Metroplex proceeding because the "final Record of Decision in that matter was published several months before Order 7100.41 took effect." FAA Brief at 39. Both arguments were without factual basis, without logic, and are contrary to law.

Before taking any major action, NEPA requires that the FAA first issue one of the three required NEPA documents: a categorical exclusion (CATEX), an EA, or an EIS. FAA Order 1050.1E § 201b provides that the issuance of a formal record of decision (ROD) with any of the three documents "is *optional* because the agency's *decision to act may be evidenced by other documents such as rules licenses or approvals.*" (emphasis added). Accordingly, the "decision to act" or the "action" itself, is the ultimate "final order" that may be appealed pursuant to § 46110(a), regardless of the preliminary issuance of a CATEX, EA, or EIS, with or without a ROD[5]. Section 408 of Order 1050.1E provides that if

> the FAA decides to proceed with the proposed Federal action, then the decision may be included with the FONSI or in a separate decision document that accompanies the FONSI, call a FONSI/ROD. . .Preparation of

[5] Section 10(c) of the APA provides that "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." 5 U.S.C. § 1009(c).

> a record of decision to proceed with an action for which a FONSI has been approved is optional . . . If the responsible FAA official prepares a record of decision, it should include a description of the action, the location *and timing of the action.* (Emphasis added).

As to the "timing," the FONSI/ROD merely said that [T]he target date for starting implementation of the DC OAMP procedures is on or after December 12, 2013." The nine proposed new flight paths at National Airport, however, were not implemented in December 2103. Indeed, the FAA was not able to complete all of the required post-environmental flight and safety testing, such as the Secret Service test, for the nine new flight paths at issue on this appeal until 18 months later in 2015. JA 1780-91. It was only in the summer of 2015 that the FAA was in a position to legally "implement" those new routes and publish them in its *Terminal Procedures Publication*, which authorized the airlines to actually begin flying the nine new routes.

Accordingly, the panel's conclusion that the FONSI/ROD, which had no "impact" on the community, actually "implemented" the nine new routes, is in direct conflict with *Phoenix,* which held that the "relevant final order" is the one that (1) issues "marching orders" to the airlines, (2) adversely "impacts" the community, and (3) causes the noise complaints. *Id.* at 968-9. As the First Circuit explained in *Save Our Heritage Inc. v. FAA,* 269 F. 3d 49 (1st Cir. 2001), the FAA issues many "final orders" and parties may appeal those subsequent final orders when they result in "increased noise impacts" on communities. *Id.* at 56-57.

Therefore, even though the FONSI/ROD was a final environmental order, it was not the "relevant final order" because it had no impact whatsoever on the community. The only impact occurred when the marching orders for the nine new flight paths were issued to the airlines and the massive aircraft noise impacts took place in the summer of 2015. Those are the nine "final orders" from which Petitioners appealed, and from which they were entitled to appeal, pursuant to § 46110(a) and the decisions in *Phoenix, Dania Beach,* and *Save our Heritage.* Only by misreading the facts and controlling regulations, was the panel able to reach its erroneous conclusion that the sequence of events at National Airport was different from the sequence of events in *Phoenix.* Because the sequence was the same, the result must be the same.

3. *Even assuming that the FONSI/ROD was the "relevant final order," the FAA's failure to involve petitioners and its subsequent deception constituted "reasonable grounds" for their failure to appeal the FONSI/ROD.* Petitioners presented uncontested evidence that the FAA never gave them, or any elected D.C. government official, notice of the EA, as it did 450 other state and local elected officials in the five-state area of the Metroplex. Thus, the FAA failed its mandatory duty to "ascertain" "notify" and "involve" elected D.C. officials and community leaders before implementing its proposed nine new routes. *Phoenix,* 869 F.3d at 971. *See also* CEQ §1506.6 requiring the FAA to "make diligent efforts to involve

the public in implementing the NEPA procedures;" FAA Order 5050.4B §401 requiring "active early, and continuous public involvement; and Order 1050.1E § 208, requiring the FAA to "obtain information from the public regarding environmental concerns surrounding an agency's proposed action."

The Administrative Record filed by the FAA herein does not reveal why the FAA excluded all elected officials of the D.C. government and libraries from its mailing lists – only that they were specifically and surgically excluded. JA 892-907. At oral argument, the FAA laid blame for the failure of notification on its private contractor. But, even if true, the panel compounded the FAA's failure (as the owner of the responsibility) by passing it off as having no impact on petitioners' right to actual notice and actual involvement in the EA proceeding. Opinion 17-18.

Disregarding this court's clear holding in *Phoenix,* and relying solely on an inapposite decision by the Supreme Court in *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), the panel adopted the FAA's specious argument that because FAA had placed a legal notice of its Metroplex EA and its FONSI/ROD in the back pages of the *Washington Post* and *Baltimore Sun,* JA 1599-1601, it had discharged its regulatory duty to "actively involve" District of Columbia officials and community leaders. Opinion at 18.

The fact-specific holding in *Costle,* however, is not on point and in any event, the panel miscites it. First, *Costle* involved Section 402 (a) (1) of the Federal Water Pollution Control Act of 1948 (FWPA), which authorized the EPA Administrator, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant. 445 U.S. at 202. Second, the old EPA regulation itself has no relevance to the instant appeal, which is controlled exclusively by modern CEQ and FAA regulations that require actual public "engagement" and "involvement" and not mere "notice" to the public.

The most serious problem with the panel's reliance on *Costle,* however, is that the old EPA regulation did not actually permit mere newspaper notice to the D.C. Mayor and City Council, as the panel erroneously concluded. Opinion at 18. Instead, it required both newspaper notice and the "mailing of notice to the permit applicant and appropriate federal and state (D.C.) authorities." *Costle* at 203. Similarly, the most recent FAA Order 1050.1E § 208b (40 CFR 1501.2) itself expressly directs that:

> At the earliest appropriate stage of the action . . .the responsible FAA official . . .must provide pertinent information to the affected community and agencies and consider the affected communities' opinions.

To summarize, petitioners did not appeal within 60 days of the FONSI/ROD solely because of the FAA's own inexcusable failure: (1) to ascertain who the District's authorized representatives were, (2) to provide them with information

and, (3) to "actively involve" them in the proceeding. Instead, it failed to respond to Council Member Evan's legitimate inquiries when its EA process was in progress and then kept the community and its elected officials completely in the dark until July 2015. JA 1780—91. As this court aptly noted in *Phoenix*:

> [B]y keeping the public in the dark, the agency made it impossible for the public to submit views on the project's potential effects – view that the FAA is required to consider. *See* 36 C.F.R. § 800.5(a); *see also Am. Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1035 (D.C. Cir.2008) ("interested persons cannot request an EA for actions they do not know about, much less for actions already completed.")

859 F.3d at 972. Therefore, although petitioners contend that the FONSI/ROD was not the "relevant final order" in the Metroplex proceeding, they alternatively submit that the FAA's failure to notify and involve any elected D.C. government official or the community in the EA constituted "reasonable grounds" for not appealing within 60 days from the FAA's FONSI/ROD.

CONCLUSION

For the foregoing reasons, the panel should rehear this appeal, correct factual errors, assess the impact of those errors on its decision, hold that the petition for review of the "relevant final orders" was timely, and decide the appeal on the merits; or the appeal should be reheard *en banc* because of the factual errors inherent in the opinion and the panel's misapplication of this court's decision in *Phoenix*.

Respectfully Submitted,

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ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici* – Petitioners are Citizens Association of Georgetown; Burleith Citizens Association; Foxhall Citizens Association; Hillandale Citizens Association; Colony Hill Neighborhood Association; Palisades Citizens Association; Foggy Bottom Citizens Association; and Georgetown University. Respondents are the Federal Aviation Administration and Michael F. Heurta, Administrator, Federal Aviation Administration. There were no *amici curiae.*

B. *Rulings under review* – Petitioners appealed on August 24, 2015 from nine FAA orders that implemented nine new RNAV flight paths from Ronald Reagan National Airport in April, June, and August, 2015.

C. *Related cases.* Counsel is unaware of any related cases currently pending in this court or any other court.

D. *Corporate Disclosure Statement.* Petitioners certify that none of them has a parent corporation and that none of them has issued stock of which 10% of more is owned by a publicly held corporation.

/s/ Don W. Crockett
DON W. CROCKETT

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 40(b), that the attached Petition for Panel Rehearing or Rehearing en Banc:

(1) Contains 3,770 words: and
(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32 (a)(6) because it has been prepared in a proportionally spaced typeface suing Word 2016, in 14-point Times New Roman font.

/s/ Don W. Crockett
DON W. CROCKETT

CERTIFICATE OF SERVICE

I certify that on May 9, 2018, electronic copies of this rehearing petition were served on all parties registered throughout the CM/ECF system.

/s/ Don W. Crockett
DON W. CROCKETT