ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1101

FLYERS RIGHTS EDUCATION FUND, INC, *et. al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et. al.*,
Respondents.

Petition for Review of Final Agency Action by the Federal Aviation Administration

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INITIAL REPLY BRIEF FOR PETITIONERS

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* Petitioners chiefly rely on these authorities in this brief.

GLOSSARY

APA	Administrative Procedure Act
CFR	Code of Federal Regulations
FAA	Federal Aviation Administration
FlyersRights	Flyers Rights Education Fund d/b/a FlyersRights.org
JA	Joint Appendix (deferred)
Petition	Petition for Rulemaking: Limitation of Seat Size Reductions, Submitted by FlyersRights (August 26, 2015)

SUMMARY OF THE ARGUMENT

Respondent Federal Aviation Administration ("FAA") concedes that Petitioners have raised a safety concern—the effect of shrinking seat size and pitch on the ability of passengers to evacuate an aircraft quickly and safely. Respondents contend that aircraft manufacturers have conducted tests with the smaller seat sizes and pitch. The results of those tests, however—though constituting the principal facts relied on by the agency—are not in the administrative record because Respondents claim they are proprietary and cannot be disclosed. It is well established that the Court must be able to review the same record that was before the agency. FAA's refusal to include the key studies in the administrative record makes that review impossible here. The other studies the FAA did include in no way support its refusal to institute a rulemaking on seat size and pitch. The FAA's decision to initiate rulemaking should either be set aside or remanded to the agency to supplement the record.

An additional ground for setting aside the FAA's decision is that the agency incorrectly interpreted the scope of its statutory authority, by refusing to consider any concerns relating to passenger health on the grounds that its authority is limited to safety-related matters. The distinction the agency attempts to draw between safety and health is not well-founded and has been rejected by this Court. For that reason also the agency's refusal to institute rulemaking should be set aside.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT THE FAA'S CONTENTION THAT EVACUATION DEMONSTRATIONS HAVE BEEN CONDUCTED ON AIRPLANES WITH DECREASED SEAT WIDTHS AND PITCHES.

Respondent Federal Aviation Administration ("FAA") concluded that the issues presented in the subject rulemaking petition, asking for regulation of aircraft seat size, "do not raise an immediate safety or security concern." Letter Denying Rulemaking Petition ("Denial Letter") 2 (JA __). The FAA concedes that Petitioners have indeed identified a safety issue: the ability of passengers to move out of their seats quickly in case of an emergency. Brief for Respondents ("Resp. Br.") at 10-11. The principal fact on which FAA relied in rejecting this safety concern, according to Respondents, is that "full scale evacuation demonstrations" have been conducted by the airlines with "'interior configurations that are more critical (less seat pitch and higher number of passenger) than most configurations operated by the airlines.'" Resp. Br. at 7 (quoting Denial Letter 2, JA ___). According to the FAA, "multiple manufacturers" have performed such evacuation demonstrations. Resp. Br. at 11 (quoting Letter from FAA to Paul Hudson 1 (March 14, 2016), (JA ___)).

The problem is that no information about any of these evacuation demonstrations appears in the administrative record certified by the FAA. JA ____. Respondents contend that the "details and results of specific evacuation demonstrations are proprietary to the airplane manufacturers…and could not be

released by the FAA." Resp. Br. at 13. The agency's failure to include in the record the key information on which it relied, however, makes it impossible for the Court to determine whether the agency "'has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that *those facts have some basis in the record*.'" *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008)(quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981)(internal citations omitted; emphasis added).

"[T]he court's review is limited to the administrative record before the agency at the time of its decision." *Earth Reports, Inc. v. Federal Energy Regulatory Comm'n*, 828 F.3d 949, 959 (D.C. Cir. 2016). What the Court reviews must be the same record the agency considered. "[I]t is a widely accepted principle of administrative law the courts base their review of an agency's decision on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 6223 (D.C. Cir. 1997). Thus, "it is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. Food & Drug Administration*, 709 F.3d 44, 47 (D.C. Cir. 2013)(quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)).

It is no answer to contend, as do the Respondents, that the test results critical to the agency's decision were "proprietary to the airplane manufacturers" and "could not be released by the FAA." Resp. Br. at 13. In this case, the FAA did not follow its own procedures regarding treatment of proprietary information in rulemaking proceedings. Under 14 C.F.R. § 11.35(b), when the FAA is aware of proprietary information filed with a comment to a rulemaking, it holds the comment in a separate file and places a note in the docket that it has been received. Under 49 C.F.R. § 7.14, proprietary information is redacted and a full explanation of the justification for the redaction accompanies the record published or made available. When a Department of Transportation component receives a request for a record that includes information designated by the submitter as confidential commercial information, it notifies the submitter and asks the submitter to submit any written objections to release. 49 C.F.R. § 7.29. At the same time, it notifies the requester that notice and opportunity to comment are being provided to the submitter. Id. None of these procedures were followed when Petitioner FlyersRights submitted its Petition, its response to the denial letter or when the certified record was filed with this Court.

In any event, proprietary or not, "an agency may not keep secret evidence on which it intends to rely to support its decision." *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 88 n.82 (D.C. Cir. 1976). Indeed, when an agency does issue a proposed rule, it must disclose to the public the materials on which the

agency relied in developing the rule so that the public can evaluate those materials during the notice and comment process. *See e.g. Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 899 (D.C. Cir. 2006) ("Among information that must be revealed for public evaluation are the technical studies and data upon which the agency relies [in its rulemaking]."); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.").

"To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'" *Walter O. Boswell*, 749 F.2d at 792 (quoting 5 U.S.C. § 706). Specifically, studies relied upon by the agency may be deficient in whole or in part, or contain flawed methodologies. *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008).

For these same reasons, the Court evaluating a refusal to engage in rulemaking must be able to evaluate all of the materials before the agency, on which the agency based its decision. In this case, the results of the evacuation demonstrations conducted by airlines are the critical facts on which the FAA relied in rejecting the

key safety concerned raised in the rulemaking petition. Yet it is undisputed that those results are not included anywhere in the record before this Court.

Respondents contend that the studies that were included in the record by the FAA discuss factors that have been shown to affect evacuation times, Resp. Br. at 13, and that the "absence of any discussion of seat width or pitch reflects the fact that those factors have not affected passengers' ability to quickly evacuate an airplane in an emergency." *Id*. These studies, however, examined the effects of selected factors on the ability to evacuate quickly—and none of the factors selected for study related to seat size or pitch. As explained in the FAA's largest "study of studies," *Access to Egress: A Meta-Analysis of the Factors That Control Emergency Evacuation Through the Transport Airplane Type-III Overwing Exit* (Jan. 2001), "factorial studies implemented to illuminate the contributions to system function of an individual factor(s) and interactions it produces with another factor(s) provide a basis for understanding the total system and its functions…Selection of appropriate factors to be addressed becomes the issue." *Id*. at 2, JA ___. Thus, for example, in the study *Access-to-Egress II: Subject Management and Injuries in a Study of Emergency Evacuation Through the Type-III Exit* (Oct. 2003), JA ___, only four specific independent variables were included in the study: exit hatch disposal location, configuration of the passageway from the center aisle to exit, different

subject group sizes and group motivation level. *Id*. at 1, JA ___. Seat size and pitch was not selected as a factor to be studied.

None of the studies included in the Certified Administrative Record concludes or implies that the factors that have been selected for study are the *only* factors that could affect the ability of passengers to evacuate quickly and safely, and none of those studies even addresses, let alone resolves, the issue of whether seat size and pitch affects evacuation time and safety. The only evidence addressing that safety concern raised by Petitioners is the secret evidence crucially relied upon, but withheld from the certified administrative record by the FAA: the test results of evacuation demonstrations of airplanes with specified seat pitches and widths.

In these circumstances, the Court should either find that the FAA's rejection of the rulemaking petition is arbitrary and capricious because the Court cannot find that the facts relied upon by the agency have any basis in the record, Defenders of Wildlife, 532 F.3d at 913; or else remand to the agency to supplement the record. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Walter O. Boswell*, 749 F.2d at 792.

II. THE FAA IS REQUIRED TO CONSIDER PASSENGER HEALTH.

The FAA rejected the rulemaking petition, in part, because it viewed the issues raised as related to passenger health and comfort as distinct from safety or security. FAA Denial Letter at 2, JA ___. Although the FAA responded to the petition's

assertions about the effect of seat size and pitch on deep vein thrombosis, the agency did not acknowledge the other health-related concerns raised, including soreness, stiffness, joint and muscle problem and lack of mobility for older and disabled passengers. *Id.* at 6, JA __.

Respondents contend that the FAA is charged with carrying out the duties and powers of the Secretary of Transportation only insofar as they are "related to aviation safety and security." Resp. Br. at 18 (citing 49 U.S.C. § 106(g)). As Respondents note, the FAA is charged with carrying out Subpart III of Part A, Title 49. *Id.* at 19. Subpart III requires, among other things, that the FAA prescribe regulations and standards to promote safe flight of civ**il aircraft, 49** U.S.C. § 44701(a) and, in so doing, that the FAA consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." *Id.* § 44701(d)(1)(A).

"Safety in the public interest" inherently includes and is intertwined with the health of passengers. The term "safety" is not defined in the statute. The Court can therefore look to the term's "ordinary or natural meaning." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). Black's Law Dictionary defines "safety" to mean "freedom from injury, harm, danger or loss…" http://thelawdctionary.org/safety/ (last visited Oct. 26, 2016). Google's online dictionary defines "health" as "the state of being free from illness or injury." https://www.google.com/webhp?sourceid=chrome-

instant&ion=1&espv=2&ie=UTF-8#q=definition%20of%20%22health%22 (last visited Oct. 27, 2016). Thus, the distinction Respondents attempt to draw between "safety" and "health" is one without a difference.

Indeed, an attempt by the FAA narrowly to interpret its "safety" mandate as excluding health problems occurring in flight was rejected in *Bargmann v. Helms*, 715 F.2d 638 (D.C. Cir. 1983). In that case, the FAA claimed it lacked statutory authority to institute a rulemaking to upgrade first aid kits carried on commercial aircraft to include medical equipment to treat health problems that occur in flight, but were not actually "caused" by flight. The FAA took the position that medical problems merely occurring during flight are not sufficiently related to aviation "safety." The Court disagreed: "Although we do not interpret the 1958 Act's safety provisions to constitute a general welfare clause, giving the FAA authority over virtually all aspects of life on board commercial aircraft, the proper scope to be given these provisions must comport with the broad language in which Congress couched its delegation of authority." 715 F.2d at 642. That broad language, the Court explained, necessarily reaches in-flight health problems: "Not only are the inflight medical emergencies of immediate concern to the personal safety of the stri**cken passenger…**but they may also be of concern to the safety of others." *Id.* at 643. The Court noted that a similar petition for rulemaking had been rejected by the Civil Aeronautics Board on the grounds that the FAA, rather than the CAB, "'has primary

responsibility for safety *and health matters*….'" *Id*. (quoting Reply Brief of Petitioners, Appendix A).

For these reasons, the FAA was clearly required to consider passenger health in determining whether the concerns raised by the rulemaking petition "raise an immediate safety or security concern." Denial Letter at 2, JA ____. The FAA failed to do so. That failure was based on an incorrect interpretation of its statutory authority-- a principal ground for setting aside refusal to initiate rulemaking proceedings. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). For that reason also, the agency's refusal to initiate a rulemaking on seat size and pitch should be overturned.

CONCLUSION

For the reasons set forth above, the Petition for Review should be granted and the FAA's decision not to institute a rulemaking should be reversed and remanded with instructions to institute a new rulemaking.

Respectfully Submitted,

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Dated: October 28, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that the foregoing brief complies with the length limitation of Fed. R. App. P. 32(a)(7)(A) because the initial reply brief contains 11 pages.

/s/ Joseph E. Sandler
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Dated: October 28, 2016

CERTIFICATE OF SERVICE

I, Joseph E. Sandler, hereby certify that on this 28th day of October 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in this case who are registered CM/ECF users will be served by the CM/ECF system:

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ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

STATUTES

REGULATIONS

STATUTES

49 U.S.C. § 106(g)
§ 106. Federal Aviation Administration

(g) Duties and powers of Administrator.--
(1) Except as provided in paragraph (2) of this subsection, the Administrator shall carry out--
(A) duties and powers of the Secretary of Transportation under subsection (f) of this section related to aviation safety (except those related to transportation, packaging, marking, or description of hazardous material) and stated in sections 308(b), 1132(c) and (d),40101(c), 40103(b), 40106(a), 40108, 40109(b), 40113(a), 40113(c), 40113(d), 40113(e), 40114(a), and 40119, chapter 445 (exceptsections 44501(b), 44502(a)(2), 44502(a)(3), 44502(a)(4), 44503, 44506, 44509, 44510, 44514, and 44515), chapter 447 (except sections 44717, 44718(a), 44718(b), 44719, 44720, 44721(b), 44722, and 44723), chapter 449 (except sections 44903(d), 44904,44905, 44907-44911, 44913, 44915, and 44931-44934), chapter 451, chapter 453, sections 46104, 46301(d) and (h)(2), 46303(c), 46304-46308, 46310, 46311, and 46313-46316, chapter 465, and sections 47504(b) (related to flight procedures), 47508(a), and 48107 of this title; and
(B) additional duties and powers prescribed by the Secretary of Transportation.
(2) In carrying out sections 40119, 44901, 44903(a)-(c) and (e), 44906, 44912, 44935-44937, 44938(a) and (b), and 48107 of this title, paragraph (1)(A) of this subsection does not apply to duties and powers vested in the Director of Intelligence and Security by section 44931 of this title.

49 U.S.C. § 44701
§ 44701. General requirements

(a) Promoting safety.--The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing--
(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;
(2) regulations and minimum standards in the interest of safety for--

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;
(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and
(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;
(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;
(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and
(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.
(b) Prescribing minimum safety standards.--The Administrator may prescribe minimum safety standards for--
(1) an air carrier to whom a certificate is issued under section 44705 of this title; and
(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.
(c) Reducing and eliminating accidents.--The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.
(d) Considerations and classification of regulations and standards.--When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall--
(1) consider--
(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and
(B) differences between air transportation and other air commerce; and
(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.
(e) Bilateral exchanges of safety oversight responsibilities.--
(1) In general.--Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article

12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility.--The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions.--The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined.--In this subsection, the term "registered aircraft" means--

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f) Exemptions.--The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

5 U.S.C. § 706
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

REGULATIONS

14 C.F.R. § 11.35
§ 11.35 Does FAA include sensitive security information and proprietary information in the Federal Docket Management System (FDMS)?

(a) Sensitive security information. You should not submit sensitive security information to the rulemaking docket, unless you are invited to do so in our request for comments. If we ask for this information, we will tell you in the specific document how to submit this information, and we will provide a separate non-public docket for it. For all proposed rule changes involving civil aviation security, we review comments as we receive them, before they are placed in the docket. If we find that a comment contains sensitive security information, we remove that information before placing the comment in the general docket.
(b) Proprietary information. When we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

49 C.F.R. § 7.14
§ 7.14 Redaction of information that is exempt from disclosure..

Whenever DOT determines it to be necessary to prevent the disclosure of information required or authorized to be withheld by FOIA or another Federal statute (such as, to prevent a clearly unwarranted invasion of personal privacy), DOT redacts such information from any record covered by this subpart that is published or made available. A full explanation of the justification for the deletion accompanies the record published or made available.

49 C.F.R. § 7.29
§ 7.29 When and how does DOT consult with submitters of commercial information

(a) If DOT receives a request for a record that includes information designated by the submitter of the information as confidential commercial information, or that DOT has some other reason to believe may contain information of that type (see § 7.23(c)(4)), DOT notifies the submitter expeditiously and asks the submitter to

submit any written objections to release (unless paragraphs (c) and (d) of this section apply). At the same time, DOT notifies the requester that notice and an opportunity to comment are being provided to the submitter. To the extent permitted by law, DOT affords the submitter a reasonable period of time to provide a detailed statement of any such objections. The submitter's statement must specify all grounds for withholding any of the information. The burden is on the submitter to identify with specificity all information for which exempt treatment is sought and to persuade the agency that the information should not be disclosed.

(b) The responsible DOT component, to the extent permitted by law, considers carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose commercial information. Whenever DOT decides to disclose such information over the objection of a submitter, the office responsible for the decision provides the submitter with a written notice of intent to disclose, which is sent to the submitter a reasonable number of days prior to the specified date upon which disclosure is intended. The written notice to the submitter includes:

(1) A statement of the reasons for which the submitter's disclosure objections were not accepted;
(2) A description of the commercial information to be disclosed; and
(3) A specific disclosure date.

(c) The notice requirements of this section do not apply if:
(1) DOT determines that the information should not be disclosed;
(2) The information lawfully has been published or otherwise made available to the public; or
(3) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(d) The procedures established in this section do not apply in the case of:
(1) Information submitted to the National Highway Traffic Safety Administration and addressed in 49 CFR part 512.
(2) Information contained in a document to be filed or in oral testimony that is sought to be withheld pursuant to Rule 12 of the Rules of Practice in Aviation Economic Proceedings (14 CFR 302.12).

(e) Whenever a requester brings suit seeking to compel disclosure of confidential commercial information, the responsible DOT component promptly notifies the submitter. The submitter may be joined as a necessary party in any suit brought against DOT or a DOT component for nondisclosure.