No. _____

In The Supreme Court of the United States

SCENIC AMERICA, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; FEDERAL HIGHWAY ADMINISTRATION; GREGORY G. NADEAU, in his official capacity as Acting Administrator of the Federal Highway Administration; and, OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether treatment under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is owed to an interpretation of language prohibiting billboards that display "flashing," "intermittent," or "moving" lights, contained in agreements between the Federal Highway Administration ("FHWA") and individual States, as announced in a guidance memorandum issued by the FHWA on September 25, 2007 ("2007 Guidance"), or whether deference, if any, is owed under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

2. Whether the opinion of the U.S. Court of Appeals for the District of Columbia, which invoked *Chevron* and approved the FHWA's interpretation, conflicts with *Chevron* itself.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

Scenic America, Inc. ("Scenic America") does not have a parent corporation and, as a non-profit corporation, it does not have any stockholders.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Scenic America, respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App., *infra*, 1-31) is reported at 836 F.3d 42 (D.C. Cir. 2016). The decision of the District Court (App., *infra*, 34-70) is reported at 49 F. Supp. 3d 53 (D.D.C. 2014).

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion and judgment on September 6, 2016. App., *infra*, 1-31; 32-33. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Highway Beautification Act, 23 U.S.C. § 131, *et seq*., and the Federal Highway Administration's regulations, 23 C.F.R. § 750.705, *et seq*., are set forth at App., *infra*, 71-73.

STATEMENT

This case concerns whether *Chevron* treatment is owed to the FHWA's interpretation of the terms contained in federal-state agreements ("FSAs"), as the Court of Appeals stated, or whether deference, if any, is owed under *Skidmore*; and, if *Chevron* treatment is owed, whether the decision of the Court of Appeals to approve the interpretation conflicts with *Chevron*.

In 1965, Congress enacted the Highway Beautification Act ("HBA") to control "the erection and maintenance of outdoor advertising signs" along interstate highways in order "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a); *see* App., *infra*, 71. To ensure "effective control" of outdoor advertising, Congress established a system in which the federal government could reduce highway funds to States that did not enter into FSAs with the federal government to regulate highway billboards, *id.* at § 131(b), and directed that the "size, lighting and spacing" of highway billboards "consistent with customary use is determined by agreement between the several States and the Secretary." *Id.* at § 131(d); *see* App., *infra*, 71-72. The FHWA's regulations require States to "[d]evelop laws, regulations, and procedures" that implement the standards contained in each State's FSA and to "[s]ubmit regulations and enforcement procedures to FHWA for approval." 23 C.F.R. § 750.705(h); (j); *see* App., *infra*, 73.

All 50 States have entered into FSAs with the FHWA, most of them having done so in the 1960s and 1970's. App., *infra*, 3-4. Although each of the FSAs was individually negotiated, nearly all of the FSAs contain a prohibition against signs which are illuminated by "flashing," "intermittent," and "moving" lights, with an express exception carved out for those signs furnishing public service or similar information. App., *infra*, 4.

In this case, the Court of Appeals considered the 2007 Guidance and approved the FHWA's interpretation of the lighting prohibition contained in the FSAs. App., *infra*, 78-85. In the 2007 Guidance, the FHWA announced that Digital/LED Display CEVMS, (CEVMS being the acronym for "commercial electronic variable message signs"), otherwise known as digital billboards, do not violate the prohibition against "flashing," "intermittent," and "moving" lights, provided that the digital billboards meet certain safe-harbor timing criteria which provide for the duration of each illuminated display message (between 4 to 10 seconds, with 8 seconds recommended), as well as transition time between messages (between 1 to 4 seconds, with 1 to 2 seconds recommended). App., *infra*, 83-84.

The 2007 Guidance marked a significant change. On January 19, 1990, the FHWA had issued a guidance memorandum ("1990 Guidance") in which it considered all types of CEVMS and affirmed that, regardless of evolving technology ("such as lights, glow cubes, rotating slats, moving reflective disks, etc."), CEVMS were illegal signs. App., *infra*, 74-75. On July 17, 1996,

the FHWA issued a guidance memorandum ("1996 Guidance") concerning the legality of off-premises signs "having panels or slats that rotate," otherwise known as "tri-vision panels." App., *infra*, 76-77. The 1996 Guidance concluded that these particular "[c]hangeable message signs are acceptable for off-premise signs, regardless of the technology used, if the interpretation of the State/Federal agreements allows such signs." App., *infra*, 77. Significantly, the 1996 Guidance stated: "In nearly all States, these signs may still not contain flashing, intermittent, or moving lights." App., *infra*, 77. To be clear, then, the change of message addressed in the 1996 Guidance was accomplished by a physical manipulation of the physical components of the sign, not by lighting which creates the impression of movement or change.

The Court of Appeals stated that it would accord *Chevron* treatment to the FHWA's interpretation of the lighting prohibition in the FSAs as expressed in the 2007 Guidance, citing *Cajun Electric Power Cooperative, Inc. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991) and *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1253, 1569-71 (D.C. Cir. 1987). App., *infra*, 29. Scenic America disagrees that *Chevron* treatment should be accorded.

The Court of Appeals, however, did not actually apply the *Chevron* analysis. Rather, it approved the 2007 Guidance by referring to the District Court's conclusion that the 2007 Guidance did not "'run[] 180 degrees counter to the plain meaning of the' FSAs" and that it therefore "'construes rather than contradicts'

the FSAs." App., *infra*, 30. However, the "180 degrees" test articulated in *National Family Planning & Reproductive Health Association v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992), does not supply a rule of interpretation nor did the District Court employ it as such. Rather, the District Court invoked *National Family* as an aid to deciding an entirely different question: whether the 2007 Guidance constitutes an interpretative rather than substantive rule. App., *infra*, 49-50.

Neither the "180 degrees" *National Family* test (which does not supply a rule of interpretation) nor *Chevron* treatment applies. Instead, if any deference is owed at all, that deference is owed by application of *Skidmore*, as expressed by the Court in *U.S. v. Mead Corp*., 533 U.S. 218 (2000).

1. In the District Court, Scenic America alleged three specific problems with the 2007 Guidance: (1) it is a legislative rule promulgated without the notice-and-comment procedure required by the Administrative Procedure Act, *see* 5 U.S.C. § 553; (2) it creates a new lighting standard for billboards without "agreement between the several States and the Secretary [of Transportation]," *see* 23 U.S.C. § 131(d); and (3) it establishes lighting standards for billboards inconsistent with "customary use." App., *infra*, 42. The District Court stated that resolution of the first issue "essentially resolve[d]" the second and third. *Id.*

2. The District Court determined that the 2007 Guidance did not require notice-and-comment, pursuant to 5 U.S.C. § 553(b) & (c), because it was an

"interpretative rule" exempt from notice-and-comment requirements, pursuant to 5 U.S.C. § 553(b)(3)(A). App., *infra*, 43. In reaching this conclusion, the District Court first applied the four-part substantive/interpretative inquiry set forth in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1998). App., *infra*, 46-67.

3. The District Court decided, under the first of the four *American Mining* inquiries, that the 2007 Guidance did not "itself carry the force and effect of law," making it substantive, but that it "spell[ed] out a duty fairly encompassed within the regulation that the interpretation purports to construe." App., *infra*, 46-47. It addressed Scenic America's counterargument, that digital billboards are banned by the plain meaning of the FSAs' lighting standards which prohibit "flashing," "intermittent," or "moving" lights. App., *infra*, 48-49. Relying on D.C. Circuit precedent, the District Court explained that "[a] statement which is interpretative does not become substantive simply because it arguably contradicts the statute it interprets." App., *infra*, 49.

4. Nevertheless, appreciating the logic of Scenic America's argument, the District Court cited *National Family*, 979 F.2d at 235, which cautioned that when an "interpretation runs 180 degrees counter to the plain meaning of the regulation[, it] gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation." App., *infr*a, 49-50. As the District Court explained: "This standard

of review is even more deferential than the one associated with *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984)." App., *infra*, 50 (citing *American Mining*, 995 F.2d at 1110 ("'[A]n agency's interpretation that spells out the scope of an agency's or regulated entity's pre-existing duty . . . will be interpretative, even if . . . it widens that duty even beyond the scope allowed to the agency under *Chevron*.").

5. Focusing on the term "intermittent" as creating a "closer call" than the words "flash" or "move," the District Court concluded that "because the LEDs are required to remain steady for at least several seconds at a time," the 2007 Guidance "does not contradict the plain language of the FSAs," and that, although the FHWA "might not have adopted the best reading of the FSA lighting standards," "its interpretation is not '180 degrees counter' to the FSAs' provision." App., *infra*, 51.

6. In the ensuing appeal, the Court of Appeals did not engage in an analysis of Scenic America's claim that the 2007 Guidance was a substantive rule rather than an interpretive rule, promulgated without the notice-and-comment procedure required by the Administrative Procedure Act. Instead, the Court of Appeals analyzed its own jurisdiction and decided that Scenic America had failed to establish standing to allege its notice-and-comment claim. App., *infra*, 8-23.

7. The Court of Appeals concluded, however, that Scenic America had established standing to assert its

claim that the 2007 Guidance failed to comport with the HBA's "customary use" requirements because it was "inconsistent" with the terms of the FSAs' prohibition against "flashing," "intermittent," or "moving" lights. App., *infra*, 23-26. In this regard, the Court of Appeals reviewed Scenic America's claim as a contention that the FHWA's promulgation of the 2007 Guidance was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation of the APA." App., *infra*, 23-24.

8. Turning to analyze this third claim, the Court of Appeals cited to *Cajun Electric* and *National Fuel*, each of which had applied *Chevron* deference to settlement agreements approved by FERC, stating: "The FSAs, as agreements between the FHWA and individual states, *see* 23 U.S.C. § 131(d), were thus approved by the FHWA as described in *Cajun Electric*." App., *infra*, 29.

9. The Court of Appeals recognized that both sides had agreed that "all FSA lighting provisions were established consistent with customary use." App., *infra*, 29-30. On this basis, the Court of Appeals concluded that "so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be 'consistent with customary use[.]'" App., *infra*, 30.

10. The Court of Appeals then stated its agreement with the District Court's conclusion that the FHWA's interpretation of the FSAs' prohibition

against "flashing," "intermittent" and "moving" lights, that it is not one that "runs 180 degrees counter to the plain meaning" of the FSAs, and that it therefore "construes rather than contradicts" the FSAs, pursuant to *National Family*. App., *infra*, 30-31.

REASONS FOR GRANTING THE PETITION

This case presents a unique opportunity for the Court to consider the application of *Chevron* and in so doing, to clarify the recurring issue of judicial deference to interpretations of administrative agencies. In stating that it would apply *Chevron* to the FHWA's interpretation of the lighting prohibition in the FSAs, the Court of Appeals relied upon precedent which accorded *Chevron* treatment to an agency interpreting contracts between private parties over which the agency has supervisory authority. In contrast, the FSAs are agreements between the FHWA and the individual States. Here, application of *Chevron* to the FHWA's interpretation of the FSAs to which it is a party raises constitutional concerns.

Congress directed that "size, lighting and spacing" of highway billboards "consistent with customary use is determined by agreement between the several States and the Secretary." 23 U.S.C. § 131(d); *see* App., *infra*, 71-72. According *Chevron* treatment to the FSAs' interpretation of the prohibition against "flashing," "intermittent," and "changing" lights is to improperly vest unilateral regulatory authority in the FHWA that

Congress did not grant. Additionally, according *Chevron* deference to the 2007 Guidance, an informal rule that was not subject to the notice-and-comment process, is at odds with the Court's view that *Chevron* deference is not appropriate in such cases. Rather, the appropriate deference, if any at all, is determined under *Skidmore.*

The petition should be granted for the additional, alternative reason that, even if *Chevron* treatment should be accorded to the FHWA's interpretation of the lighting prohibition contained in the FSAs, the Court of Appeals' decision failed to do so and its opinion, therefore, conflicts with *Chevron*. The Court of Appeals did not first employ traditional rules of interpretation to decide that the prohibition against "flashing," "intermittent," or "moving" lights was ambiguous and, second, in approving the FHWA's interpretation, it applied the even more deferential standard than *Chevron* counsels, the *National Family* "180 degrees" test.

I. *Chevron* Treatment Should Not Be Accorded To The FHWA's Interpretation Of The FSAs Because They Are Agreements To Which The FHWA Is A Party.

A. *Chevron* Deference Is Accorded To Formal Agency Interpretations Of Ambiguous Statutes.

Chevron deference is accorded to formal agency interpretations of ambiguous statutes enacted by Congress when Congress has charged the agency with

administering the statutes. *See Chevron*, 467 U.S. at 865; *see also*, *e.g.*, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.").

B. The Court of Appeals Should Not Have Relied Upon *National Fuel* And *Cajun Electric*.

In *National Fuel*, the court accorded deference to FERC's interpretation of a settlement agreement between private parties, rejecting the argument that, because the meaning of the settlement agreement turned on the language it utilized rather than on technical or factual expertise, deference was inappropriate and a *de novo* standard of review should apply. 811 F.2d at 1568-69. "By far the most important reason" it did so was the Court's *Chevron* decision. *Id*. at 1569. In this regard, *National Fuel* likened the rationale for deference in *Chevron*, that Congress had delegated administration of a congressionally created program to the agency, to Congressional delegation of adjudicatory powers to FERC, *id.*, although the *National Fuel* court also considered determinative that Congress required FERC to approve the agreement. *Id.* at 1571. *See also Cajun Electric*, 924 F.2d at 1136 (considering FERC's interpretation of a settlement agreement between private parties and determining that the agreement was ambiguous (contrary to the position taken by FERC)).

In stating that it would follow *Cajun Electric* and *National Fuel* and, thus, apply *Chevron* to the FHWA's interpretation of the lighting prohibition in the FSAs, the Court of Appeals failed to recognize the difference between the agreements in those cases – settlement agreements between private parties – and the FSAs, which are agreements between the FHWA itself and the States. As the *National Fuel* court recognized, there is a difference between according deference to an agency's interpretation of the terms of agreements between private, third parties and according deference to an agency's interpretation of an agreement to which it is a party. "[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that any agency might offer in a post hoc reinterpretation of its contract." *Nat'l Fuel*, 811 F.2d at 383.

Here, the paradox of according *Chevron* deference to an agency's interpretation of an agreement to which it is a party moves beyond the problem of self-serving, post-hoc agency views and rises to the level of constitutional concern.

C. According *Chevron* Treatment To The FHWA's Interpretation Implicates The Criticism Of *Auer* By Members Of The Court.

The FHWA is a contracting party which also acts in a regulatory capacity, since it is vested with authority to oversee the States' development of laws, regulations and procedures that implement the very

agreed-upon standards contained in the FSAs that the 2007 Guidance interpreted. *See* 23 C.F.R. § 750.705(j), (h). Courts have in the past unquestioningly applied a deferential standard to an agency's interpretation of its own regulations unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 325 U.S. 452, 461 (1997). "In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

Yet, as has been expressed, *Auer* deference is "contrary to the fundamental principles of separation of powers to permit the [agency which] promulgates law to interpret it," and "it encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) ("[T]here are weighty reasons to deny a lawmaker the power to write ambiguous laws and then be the judge of what that ambiguity means"). So, too, *Auer* deference "represents a transfer of judicial power to the Executive Branch, and it amounts to the erosion of the judicial obligation to serve as a 'check' on political branches." *Mortg. Bankers*, 135 S. Ct. at 1217 (Thomas, J., concurring).

According *Chevron* treatment to the interpretation of the FSAs' billboard lighting prohibitions as established by the 2007 Guidance raises these very

concerns. Congress did not authorize the FHWA to create "size, lighting and spacing" standards for highway billboards in the vacuum of its unilateral regulatory authority. Instead, Congress directed that the "size, lighting and spacing" of billboards consistent with "customary use" be determined by individual agreements between the FHWA and each individual State. *See* 23 U.S.C. § 131(d) (standards are "determined by agreement between the several States and the Secretary"). According judicial deference to the FSAs' interpretation of the prohibition against "flashing," "intermittent," and "changing" lights is constitutionally infirm because it vests unilateral regulatory authority in the FHWA that Congress did not grant.

D. According *Chevron* Treatment Is At Odds With The Court's Limitations On Its Applicability.

The Court of Appeals' stated intention to accord *Chevron* treatment to the FHWA's interpretation is also at odds with the Court's recognition that *Chevron* treatment is reserved for cases in which Congress has authorized "rulemaking or adjudication that produces regulations or rulings for which deference is claimed," *Mead*, 533 U.S. at 229, and that *Chevron* does not apply to an agency's interpretation that is "removed from notice-and-comment process." *Id*. at 234.

Here, the HBA did not delegate unilateral authority to determine what constitutes "customary use" to the FHWA, but rather delegated such authority jointly

to the FHWA and the individual States. *See* 23 U.S.C. § 131(d) (standards are "to be determined by agreement between the several States and the Secretary"); *see also id*. ("Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement"). Because authority to unilaterally interpret the FSAs is contrary to the authority that Congress delegated to the FHWA – to act as a party to agreements with the States and, through its regulations, to approve State regulations and procedures – FHWA's interpretation is not subject to *Chevron* deference. *See, e.g.*, *EEOC v. Arabian Am. Oil Co*., 499 U.S. 244, 257 (1991) (not affording *Chevron* deference to an agency guideline where Congress did not include the power to promulgate rules or regulations); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (where there is doubt that Congress actually intended to delegate interpretive authority, *Chevron* deference is improper).

Additionally, because the 2007 Guidance was not promulgated with notice-and-comment, the FHWA's interpretation of the FSAs' lighting prohibition is "beyond the *Chevron* pale." *Mead*, 533 U.S. at 234. *See also Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"); *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S.

144, 157 (1991) ("interpretive rules and enforcement guidelines are 'not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers'") (citation omitted).

E. The 2007 Guidance Should Have Been Reviewed Under *Skidmore* Deference, If Any Deference At All.

In light of the foregoing, the 2007 Guidance should have been reviewed under *Skidmore*. *See Mead*, 533 U.S. at 237 ("*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law"). As the Court has explained, interpretations contained in formats such as the 2007 Guidance may be entitled to respect under *Skidmore*, but only to a degree "proportional" to their "'power to persuade.'" *Mead*, 533 U.S. at 235; *see also Christensen*, 529 U.S. at 587-88 (rejecting *Chevron*-style deference in favor of *Skidmore* deference); *Skidmore*, 323 U.S. at 140 (explaining that deference to an agency interpretation is accorded in proportion to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all of those factors which give it power to persuade, if lacking power to control").

It is Scenic America's position that the FHWA's interpretation in the 2007 Guidance of the lighting prohibition in the FSAs is entitled to scant deference,

if any. FHWA's interpretation of the FSAs' lighting prohibition in the 2007 Guidance contradicts the FHWA's previous guidance memoranda which prohibited digital billboards. *See Gilbert v. Gen. Elec. Co.*, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines where they conflicted with earlier pronouncements of the agency."), *superseded by statute on other grounds*, 42 U.S.C. § 2000e(k) (1976 ed., Supp. V).

The 2007 Guidance also lacks the "power to persuade." *Skidmore*, 323 U.S. at 140. *See Christensen*, 529 U.S. at 586, 588 (deeming agency interpretation "unpersuasive" and not the "better reading" based upon the "obvious meaning" of the words utilized in the statute at issue).

The 2007 Guidance ignores the "obvious meaning" of "flashing," namely, a "sudden, brief light," *Webster's New World College Dictionary* 538-39 (4th ed. 2009), because it authorizes message transitions on illuminated signs ranging from 1 to 4 seconds. "Intermittent" is defined as "stopping and starting at intervals; pausing from time to time; periodic." *Webster's New World College Dictionary* at 745. Authorizing any illumination which goes on and off more than one time, at any interval, is contrary to the meaning of "intermittent" light, yet the 2007 Guidance authorizes the lighted messages in LED billboards to go on and off at intervals ranging between 4 to 10 seconds. In addition, the 2007 Guidance ignores that the FSAs authorize by exception signs furnishing public service or similar information and, therefore, the 2007 Guidance allows the

exception to swallow the rule, contrary to the plain meaning of the language of the FSAs. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169-70 (2012) (deeming new interpretation "neither entitled to *Auer* deference nor persuasive in its own right and, employing "traditional tools of interpretation," deciding that new interpretation was "flatly inconsistent" with statute).

II. The Opinion Conflicts With *Chevron* Because The Court Of Appeals Actually Applied A More Deferential Standard Than *Chevron*.

The Petition should be granted for the additional, alternative reason that even if *Chevron* treatment should be accorded to the FHWA's interpretation of the lighting prohibition, the Court of Appeals did not apply *Chevron* but instead applied an even more deferential standard.

The *Chevron* doctrine prescribes a two-step analysis. Under the first-step of *Chevron*, where the statutory language is clear after applying ordinary rules of statutory construction, that language governs. *See Chevron*, 467 U.S. at 843-44 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). It is Scenic America's position that employment of the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n. 9, reveals the "obvious meaning" of the words "flashing" and "intermittent," described above; that

these terms are clear; and that under *Chevron*'s first step, the 2007 Guidance is defective. *See Carcieri v. Salazar*, 555 U.S. 379, 387-88 (2009) (applying "settled principles of statutory construction" and determining that the term "now under Federal jurisdiction" is plain and unambiguous). Here, however, the Court of Appeals did not construe the terminology itself or consider the exception for public service or similar information. Nor did it announce a determination as to whether, in its view, the lighting prohibition was clear or whether it was ambiguous.

Nor did the Court of Appeals engage in *Chevron*'s second step. Where the statutory language is ambiguous, courts must defer to the agency's "permissible" and "reasonable" construction. *See Chevron*, 467 U.S. at 844 ("[I]f the statute is silent or ambiguous, the question for the court is whether the agency's answer is based upon a permissible construction of the statute. . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administration of the agency."). Here, however, the Court of Appeals did not consider whether the FHWA's interpretation of the FSAs' lighting prohibition was "reasonable" or "permissible."

Instead, the Court of Appeals approved the FHWA's interpretation by agreeing with the District Court's conclusion, that the interpretation set forth in the 2007 Guidance was not one that "runs 180 degrees counter to the plain meaning of the FSAs," citing *National Family*. App., *infra*, 30-31. In doing so, the Court

of Appeals applied an even more deferential standard than *Chevron*. An interpretation need not run "180 degrees counter" to the provision it construes in order to be less than reasonable. Furthermore, citing *National Family* for the proposition that the 2007 Guidance "construes rather than contradicts" the Court of Appeals did not engage in an interpretive analysis at all, but in effect, merely concluded that the 2007 Guidance amounts to an interpretation of the lighting prohibition contained in the FSAs, a conclusion which begs the question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 25, 2015
Decided September 6, 2016

No. 14-5195

SCENIC AMERICA, INC.,
APPELLANT

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00093)

Daniel H. Lutz argued the cause for appellant. With him on the briefs was Hope M. Babcock. Thomas M. Gremillion entered an appearance.

William D. Brinton was on the brief for *amici curiae* The American Planning Association, et al. in support of petitioner.

Jeffrey E. Sandberg, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief were Ronald C. Machen Jr., U.S. Attorney at the time the brief was filed, and Mark R. Freeman, Attorney.

Kannon K. Shanmugam argued the cause for intervenor-appellee Outdoor Advertising Association of America, Inc. With him on the brief was Allison B. Jones.

Before: PILLARD and WILKINS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: The Highway Beautification Act ("HBA"), 23 U.S.C. § 131, requires the Federal Highway Administration ("FHWA") and each state to develop and implement individual federal-state agreements ("FSAs"), detailing, among other things, "size, lighting and spacing" standards for the billboards now found towering over many of our country's interstate highways. One of those adopted standards, included in most states' FSAs, prohibits those states from erecting any billboard with "flashing, intermittent or moving" lights (the "FSA lighting standards").

Plaintiff-Appellant Scenic America is a non-profit organization which "seeks to preserve and improve the visual character of America's communities and countryside." Compl. ¶ 7, J.A. 10. It challenges a guidance memorandum issued by the FHWA in 2007, which interpreted that prohibition on "flashing, intermittent or moving" lights to permit state approval of those digital billboards that met certain timing and brightness requirements. Scenic argues that the guidance memorandum must be invalidated because it (1) was not promulgated using notice-and-comment procedures,

and (2) violates the HBA, and was therefore promulgated "contrary to law" in violation of § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.

We hold that we lack jurisdiction to hear Scenic's notice-and-comment claim because Scenic has failed to demonstrate that it has standing to bring that challenge, and deny its § 706 claim on the merits.

I.

A.

In 1965, Congress enacted the Highway Beautification Act to control "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System . . . in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a). The HBA penalizes those states that fail to maintain "effective control" over their advertising signs by permitting the Secretary of Transportation to reduce their federal highway funds by ten percent. *Id.* § 131(b).

To maintain effective control, each state is required to, among other things, negotiate an FSA with the Secretary that establishes standards for the "size, lighting and spacing" of billboards that come within 660 feet of the Interstate. *Id.* § 131(d). The HBA requires that those standards be "consistent with customary use." *Id.* All fifty states entered into such FSAs,

most of which were written in the 1960s and 1970s. *See Scenic Am., Inc. v. U.S. Dep't of Transp.* (*Scenic II*), 49 F. Supp. 3d 53, 57 (D.D.C. 2014). FHWA regulations, promulgated under the HBA, require that states "[d]evelop laws, regulations, and procedures" that implement the standards contained in each state's FSA. 23 C.F.R. § 750.705(h). States must submit these laws, regulations, and procedures to the FHWA's regional offices, known as Division Offices, for approval. *Id.* § 750.705(j). The FHWA has one Division Office located in each state.

Although each of the FSAs was individually negotiated, most contain similar terms. Nearly all of the FSAs contain a prohibition against "flashing," "intermittent," and "moving" lights. *See, e.g.*, J.A. 120 (New York FSA); J.A. 131 (Colorado FSA); J.A. 139 (North Carolina FSA).

As billboard technology changed, states began considering or passing laws that permitted digital billboards to be displayed along the Interstate. *See, e.g.*, J.A. 422-23 (letter from Indiana Department of Transportation to Indiana FHWA Division Office informing the Division Office that Indiana had passed a law permitting certain digital billboards); J.A. 424 (letter from the Indiana FHWA Division Office to the Indiana Department of Transportation acknowledging the letter and agreeing that the digital billboards discussed in Indiana's previous letter "do[] not constitute flashing, intermittent or moving lights"); J.A. 437 (letter from Arkansas Highway Commission to Arkansas FHWA

Division Office noting new regulations permitting digital billboards); J.A. 183 (United States Department of Transportation memorandum discussing digital billboard in Nebraska). These billboards, sometimes referred to as "commercial electronic variable message signs" ("CEVMS"), typically use LED lights to display a static advertisement that remains on the screen for a specified period of time before quickly transitioning to a different static advertisement. Advertisements typically remain visible for around ten seconds, and usually take approximately two seconds to transition to the next ad.

The FHWA's Division Offices differed on whether digital billboards complied with the FSA lighting standards. *Compare, e.g.*, J.A. 424 (Indiana Division Office agreeing that digital billboards "do[ ] not constitute flashing, intermittent or moving lights"), *with, e.g.*, J.A. 263 (Texas Division Office stating that "[w]hile the technology for LED displays did not exist at the time of the [FSA], the wording in the [FSA] clearly prohibits such signs"). In 2007, the national FHWA office weighed in. It issued to its Division Offices a memorandum entitled "Guidance on Off-Premise Changeable Message Signs" (the "Guidance" or "2007 Guidance"), a portion of which stated as follows:

> Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as those

> terms are used in the various FSAs that have been entered into during the 1960s and 1970s.

J.A. 535. The FHWA went on to identify those "acceptable criteria" based on "certain ranges of acceptability that have been adopted in those States that do allow CEVMS." J.A. 534, 537 (recommending, among other things, that each display generally remain static for between four and ten seconds, and transition to a new display in one to four seconds).

According to a survey the FHWA distributed to states shortly before issuing the 2007 Guidance, many states with FSAs that included a ban on intermittent, flashing, or moving lights permitted digital billboards before the FHWA issued the Guidance. J.A. 531-32. The Division Office for at least two states, Texas and Kentucky, did not permit digital billboards prior to the 2007 Guidance. *See Scenic Am., Inc. v. U.S. Dep't of Transp.* (*Scenic I*), 983 F. Supp. 2d 170, 179-80 (D.D.C. 2013). After the Guidance, Texas began to permit the use of digital billboards. Lloyd Decl. ¶ 9, J.A. 41.

B.

Scenic brought this suit against the United States Department of Transportation, the federal executive department responsible for implementation of the HBA; the FHWA, which promulgated the 2007 Guidance; Ray LaHood, the Secretary of Transportation at the time; and Victor Mendez, the Administrator of FHWA at the time. Scenic did not include any of the

FHWA's Division Offices in this suit. Outdoor Advertising Association of America, Inc. ("OAAA") intervened as a defendant shortly after Scenic brought suit.

Scenic's suit alleges two claims relevant to this appeal: (1) the 2007 Guidance constitutes a legislative, not interpretive rule, thus violating § 553 of the APA, because it was not promulgated using notice-and-comment procedures; and (2) the Guidance violates § 706 of the APA because it creates a new lighting standard that is not "consistent with customary use," as required by the HBA.[1] Compl. ¶¶ 48-53, 57-62, J.A. 17-19.

The FHWA and the OAAA (collectively "Defendants") moved to dismiss, contending that Scenic lacked standing, and that the court lacked jurisdiction over the Guidance because it did not constitute final agency action under the APA. *Scenic I*, 983 F. Supp. 2d at 172-73. The District Court denied Defendants' motion as to both claims. *Id.*

Relevant to our decision here, the District Court held, at the motion to dismiss stage, that Scenic's requested relief would redress its harm because "vacating the Guidance would return the FHWA to

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[1] Scenic abandoned a third claim on appeal – that the Guidance improperly creates new lighting standards, in contravention of the procedures for creating new standards set forth in the HBA. *See* Br. for Defendants-Appellees [hereinafter "FHWA Br."], *Scenic Am., Inc. v. U.S. Dep't of Transp.*, No. 14-5195 (D.C. Cir. Feb. 20, 2015), Doc. No. 1538780, at 16 & n.7.

agnosticism on the question [of permitting digital billboards], leaving Division Offices free to draw their own conclusions." *Id.* at 181. According to the District Court, this would prevent Scenic from "hav[ing] to police as intensively new digital-billboard construction around the country." *Id.*

Defendants later moved for summary judgment, and the District Court granted the motions, finding that the Guidance was not subject to notice-and-comment requirements because it was an interpretive, not legislative rule, and that it did not violate the "consistent with customary use" provision of the HBA. *Scenic II*, 49 F. Supp. 3d at 59-71. Defendants, in their summary judgment briefing below, did not again challenge Scenic's standing, and the District Court did not discuss Scenic's standing in its written Opinion granting Defendants' summary judgment motions.

II.

We begin, as we must, by addressing our jurisdiction to review Scenic's appeal. Because Scenic must demonstrate its standing separately as to each of the two claims it brings on appeal, *see Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994), we find that, although Scenic has standing to bring its claim concerning FHWA's alleged § 706 violation, Scenic has failed to demonstrate it has standing to bring its notice-and-comment claim.

A.

As has been expressed time and time again, "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). As Chief Justice Marshall observed, "[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision [and] if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)) (emphases omitted). Thus, without studious adherence to the metes and bounds of our jurisdiction as imposed by Article III, Chief Justice Marshall warned that "the other departments [of the government] would be swallowed up by the judiciary." *Id.* The standing requirements of Article III are therefore grounded in respect for the separation of powers tenets that are the foundation of our system of government, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-74 (1982), and they help "prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). Observing our Article III limitations is therefore always important, and particularly so in a case such as this, where we are asked to invalidate an action of the Executive branch.

The "irreducible constitutional minimum of standing" requires that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements"; "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

Thus, the plaintiff must meet this burden at the outset of *each* phase. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. . . ." *Id.* And a court's determination that a plaintiff has established standing at the motion to dismiss stage by *alleging* sufficient facts in her pleadings is only the first step, because that finding does not obviate the court's responsibility to ensure that the plaintiff can actually *prove* those allegations when one or both parties seek summary judgment. So even where the court denies a motion to dismiss based on lack of standing, "[i]n response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts [establishing standing]." *Id.* (internal quotation marks omitted).[2]

[2] Our treatment of standing in cases that come to us directly on administrative review is instructive. Because these petitions for administrative review bypass the district court and come to us

If, upon review of the evidence, the court determines that the plaintiff has not introduced sufficient evidence into the record to at least raise a disputed issue of fact as to each element of standing, the court has no power to proceed and must dismiss the case. *See, e.g.*, *Clapper*, 133 S. Ct. at 1148-49 (dismissing case where plaintiff did not raise an issue of fact as to standing at summary judgment).

In addition, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender*, 475 U.S. at 541 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). If we determine that the District Court was without jurisdiction, then "we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (quoting

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directly, we treat them as a district court would in deciding a motion for summary judgment. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). In *Sierra Club*, we held, "mindful of our independent obligation to be sure of our jurisdiction," that the petitioner there had failed to establish its burden as to standing. *Id.* at 898, 902. We explained that "[t]he petitioner's burden of production in the court of appeals is . . . the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing 'by affidavit or other evidence.'" *Id.* at 899 (quoting *Defs. of Wildlife*, 504 U.S. at 561).

Just as we must ensure our jurisdiction over petitions brought to us directly, so too must the district court assure itself of its jurisdiction before assessing a summary judgment motion on the merits.

Arizonans for Official English v. Arizona, 520 U.S. 43, 73 (1997)).

We review the District Court's decision (or lack thereof) as to standing *de novo*, *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003), and hold that Scenic has not met its burden of establishing its standing to bring its notice-and-comment claim.[3]

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[3] The FHWA challenged Scenic America's standing at the motion to dismiss stage, and though the District Court held in favor of Scenic, it noted that the issue "presents difficult and close questions." *Scenic I*, 983 F. Supp. 2d at 172. When the FHWA later moved for summary judgment, therefore, Scenic was already on notice that its standing might be questioned on appeal, at which time the record would be closed. Scenic therefore cannot claim to have been deprived of a fair and "full opportunity to make a record of [its] standing in the district court." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 241 (D.C. Cir. 2015). Scenic should have accompanied its summary judgment materials with evidence of its standing. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

Because the plaintiff has the burden to establish the evidentiary basis for its standing at the summary judgment stage *in every case*, just as it has the burden to plead sufficient facts at the motion to dismiss stage *in every case*, the District Court may wish to consider amending its local rules to provide that the plaintiff include its evidentiary basis for standing in the statement of material facts that every party is required to file either in support of, or in opposition to, a motion for summary judgment. *See* Civil Local Rule 7(h)(1). Such a rule would ensure that the plaintiff is on notice of its obligation to present such evidence, make the District Court's job much easier (as well as ours), and function similarly to our Circuit Rule 28(a)(7), which we adopted after our ruling in *Sierra Club*.

B.

1.

Scenic's notice-and-comment claim turns on the redressability prong of Article III standing. Scenic asserts that the 2007 Guidance forced certain FHWA Division Offices to reinterpret the FSA lighting standards – that billboards may not contain "flashing, intermittent or moving" lights – so that those offices would thereafter find the FSA language to permit, rather than bar, digital billboards. Scenic claims that this alleged change of position made it easier for states to erect digital billboards, because they no longer had to worry about being prevented from doing so by the Division Offices. As a result, Scenic allegedly has to work harder, and thus spend greater resources, to fight these billboards – its injury in fact. Scenic claims that vacating the Guidance will redress that injury.

In this way, Scenic asserts injuries that stem not directly from the FHWA's issuance of the 2007 Guidance, but from third parties not directly before the court – the Division Offices and the states. When "[t]he existence of one or more of the essential elements of standing" – in this case redressability – "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,'" it becomes "'substantially more difficult' to establish" standing. *Defs. of Wildlife*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *Allen v. Wright*, 468 U.S. 737, 758

(1984)); *accord Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). "[M]ere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct 'will not suffice to invoke the federal judicial power.'" *Nat'l Wrestling*, 366 F.3d at 938 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

Scenic's complaint makes only two arguments concerning the redressability of its notice-and-comment claim. First, it argues that if we vacate the 2007 Guidance, "Scenic America and its affiliate members would spend fewer resources combating new digital billboards." Compl. ¶ 21, J.A. 12. This speaks to Scenic's alleged organizational standing. *See PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (organizational standing "requires [an organizational plaintiff], like an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision" (internal quotation marks omitted)). Second, Scenic contends that if we vacate the 2007 Guidance, "digital billboards that injure Scenic America members would be subject to removal or an order to cease operating in a manner that violates the regulatory prohibition against intermittent lighting in billboard advertisements." Compl. ¶ 21, J.A. 12. This speaks to Scenic's representational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (recognizing "that an association has standing to bring suit on behalf of its members when:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

2.

a.

Scenic has failed to demonstrate that our vacatur of the Guidance would redress its alleged organizational injury – that it is forced to expend greater resources fighting digital billboards because the 2007 Guidance makes it easier for states to erect such billboards.

States are required to seek permission from the FHWA Division Offices before they permit the use of digital billboards. *See* 23 C.F.R. § 750.705(j). Prior to the FHWA's issuance of the Guidance, those Offices could, and often did, authorize that use, finding that it accorded with a given state's FSA. Scenic has introduced no evidence into the record – as it must at summary judgment – establishing that if we were to vacate the Guidance, any Division Office would respond by preventing the state it oversees from erecting digital billboards; nor has Scenic submitted evidence establishing that states would successfully erect, or even seek to erect, fewer billboards. Without providing any indication that our vacatur of the Guidance will diminish the number of billboards Scenic has to fight, Scenic

has failed to demonstrate that its requested remedy would prevent Scenic from having to expend the same amount of resources fighting these billboards.

A brief look at some of our previous decisions in this area reinforces the point. In *National Wrestling*, we assessed the standing of several associations representing men's wrestling teams, some of whom had been cut from college athletic programs. 366 F.3d at 933. Department of Education regulations, promulgated under Title IX, required college athletic programs to ensure that they provided equal athletic opportunities to both sexes, based in part on the resources that are devoted to various programs. *Id.* at 934-35. Plaintiffs did not challenge those regulations. Instead, plaintiffs challenged a Department of Education interpretation of those regulations, which they claimed caused several athletic programs to eliminate their wrestling teams. *Id.* We held that plaintiffs lacked standing because they were unable to show that a favorable decision would redress their injuries. *Id.* at 938.

We noted that the "direct causes of appellants' asserted injuries – loss of collegiate-level wrestling opportunities for male student-athletes – are the independent decisions of educational institutions." *Id.* at 936-37. Even if we vacated the Department of Education's interpretation, there was no indication that it would alter those institutions' independent decisions to eliminate their wrestling teams. *Id.* at 939. Nothing in the Department's interpretation required schools to eliminate their wrestling teams; schools did so in an attempt to ensure that they were distributing athletic

resources equally – a requirement of Title IX more generally, irrespective of the interpretation that plaintiffs challenged. *See id.* at 939-40 (asserting that "nothing but speculation suggest[ed] that schools would act any differently" if the court vacated the interpretation). We noted that plaintiffs would only meet standing requirements if they "took the position that gender-conscious elimination of men's sports teams would be illegal in the absence of the challenged" interpretation, but that plaintiffs made no such claim. *Id.* at 941. Finally, we explained that the "possibility" that wrestling teams would have "better odds" if we vacated the Department's interpretation "falls far short of the mark." *Id.* at 942 (emphasis omitted).

We held similarly in *Renal Physicians Ass'n v. United States Department of Health and Human Services*. 489 F.3d 1267 (D.C. Cir. 2007). That case involved the Stark Law, which limited the ability of a physician to refer a Medicare patient to clinical laboratories with which the physician had a "financial relationship," but permitted referrals where the physician's only financial interest was the receipt of compensation at "fair market value." *Id.* at 1269. The Department of Health and Human Services, which was authorized to promulgate regulations under the Law, created a "safe harbor" provision, describing two methods for demonstrating that a physician's hourly rate was at fair market value. *Id.* at 1270. The Department also noted, however, that the safe harbor was voluntary, and that health care providers could continue to establish fair market value through other methods. *Id.* at 1269-71.

After a physicians' association challenged the safe harbor provision under the APA, we held that plaintiff lacked standing because it failed to show that vacating the safe harbor provision would redress its members' alleged injuries – namely that the safe harbor provision caused them to be paid less for their services than would otherwise be the case. *Id.* at 1276-78. Because the safe harbor was merely one way that hospitals could determine "fair market value," we noted that "it is 'speculative,' rather than 'likely,' that invalidating the safe harbor will somehow cause these facilities to pay more," and that "[t]he effect (if any) of the safe harbor cannot be simply undone." *Id.* at 1277.

As in *Renal Physicians*, the FHWA created what is, in essence, a safe harbor provision regarding digital billboards. The 2007 Guidance made it clear that state laws and regulations regarding digital billboards meeting the specifications listed in the Guidance would not be rejected for violating the FSA lighting standards. Yet even after the Guidance, Division Offices can still approve state laws and regulations permitting billboards that fall outside those specifications, and they can still reject laws and regulations allowing billboards that meet those specifications, but that violate state FSAs for other reasons. The safe harbor created by the Guidance is voluntary in the same way as the safe harbor in *Renal Physicians*; Division Offices can rely on it to find certain billboards permissible, but those Offices can find those billboards permissible for other reasons as well. It is "speculative," rather than "likely," that invalidating the Guidance

would stop any particular billboard from being constructed. Indeed, many states with FSAs that included a ban on intermittent, flashing, or moving lights permitted digital billboards prior to the 2007 Guidance.

In sum, we cannot assume, without more, that vacating the Guidance would eliminate or lessen the construction of digital billboards.

Scenic contends that because the Texas Division Office barred Texas from constructing digital billboards prior to the Guidance, vacating the Guidance would redress Scenic's injuries, at least with respect to Texas. However, Scenic has introduced no evidence suggesting that Texas, or the Texas Division Office, would behave any differently in the absence of the 2007 Guidance. Scenic simply assumes, without any proof, that Texas will revert to its pre-Guidance position as soon as the Guidance is invalidated.

Scenic's assumption is nothing more than "unadorned speculation." *Simon*, 426 U.S. at 44. Several other possibilities seem just as likely, were we to vacate the 2007 Guidance. The Guidance may have focused the Texas Division Office on the fact that a majority of states had already determined that the FSA lighting standards permitted digital billboards. Knowing as much, Texas's Division Office might be more inclined to "jump on the bandwagon" and permit such billboards going forward, even absent the 2007 Guidance. Or the Division Office might be persuaded to continue allowing digital billboards now that Texas has already issued permits for at least 150 of them, Lloyd Decl. ¶ 9,

J.A. 41. *See Renal Physicians*, 489 F.3d at 1278 ("[T]he word is already out, and therefore it is too late to reverse course. . . . [T]he undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces.").

Scenic has introduced no evidence that would make any one of these possibilities more likely than another. Particularly given the difficulty of establishing standing based on the actions of third parties not before the Court, *see Defs. of Wildlife*, 504 U.S. at 562, Scenic's lack of any evidentiary basis for its redressability contentions requires us to reject its standing as to its notice-and-comment claim.

As a final argument, Scenic relies on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and contends that vacating the 2007 Guidance would remove one of several barriers to Scenic's anti-digital billboard efforts, and that this is sufficient for redressability purposes. However, *Arlington Heights* is inapposite here.

As an initial matter, *Arlington Heights* involved a party directly harmed by the challenged action, not one harmed by the actions of a third party not before the Court. *See id.* at 254. Moreover, *Arlington Heights* involved a developer's challenge to a zoning ordinance that prevented it from building low-income housing. *Id.* at 255-58. The Supreme Court characterized the zoning ordinance as an "absolute barrier." *Id.* at 261. Although the developer still needed to secure financing and qualify for federal subsidies, the challenged zoning

ordinance ensured that the developer could not proceed with its goal of constructing low-income housing. *Id.* at 261-62. A court decision to remove that barrier would redress the developer's injury because a major impediment to the developer's efforts would be eliminated.

Scenic has introduced no evidence showing that vacating the 2007 Guidance would remove an "absolute barrier" to its efforts. As we have already stated above, absent the 2007 Guidance, states remain free to pursue digital billboard construction, and Division Offices remain free to permit such construction. Thus, Scenic has not established that invalidating the Guidance would improve or ease Scenic's efforts in any way.[4]

b.

Scenic's representational standing claim fares no better. Scenic argues that vacating the 2007 Guidance will redress its members' injuries because it will cause the digital billboards allegedly injuring those members to be removed. Compl. ¶ 21, J.A. 12. Scenic came dangerously close to forfeiting this argument. *See Huron v. Cobert*, 809 F.3d 1274, 1279-80 (D.C. Cir. 2016).

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[4] Scenic did not argue that the FHWA's failure to undertake notice and comment before promulgating the Guidance constitutes a procedural injury, and we express no opinion on such an argument. Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction. *See Huron v. Cobert*, 809 F.3d 1274, 1279-80 (D.C. Cir. 2016).

Presumably because the District Court had upheld Scenic's standing at the motion to dismiss stage, and Defendants had not contested Scenic's standing before the District Court at the summary judgment stage, Scenic did not address its standing in its opening brief on appeal. In their responding brief, however, the FHWA challenged anew Scenic's standing. The FHWA contended that Scenic had offered "no basis for expecting that vacating the Guidance would cause any existing digital billboards to be dismantled." *See* FHWA Br. 29. In reply, Scenic appeared to abandon the allegation. It repeated the FHWA's contention and responded that "Plaintiff need only show that vacatur would reduce Plaintiff's continuing injury of diverting limited resources to counteract billboard approvals." Reply Br. for Appellant 10.

Nonetheless, Scenic appears to have preserved its representational standing argument by painting it in a somewhat different light. It argues that the alleged injuries of one of its members – Nikki Laliberte – are "traceable to the Guidance" because the Guidance prohibits the Division Office in Minnesota, where Laliberte lives, from considering whether digital billboards violate the FSA lighting standards. *See* Reply Br. for Appellant 12. Scenic's implication seems to be that vacating the Guidance might cause Minnesota's Division Office to remove some digital billboards. Although Scenic's argument is couched in terms of causation, "causation and redressability are closely related, and can be viewed as two facets of a single requirement." *Newdow v. Roberts*, 603 F.3d 1002, 1012 n.6

(D.C. Cir. 2010) (internal quotation marks omitted). Thus, Scenic's assertion is sufficient to preserve its representational standing claim.

As we noted above, however, Scenic has introduced no evidence demonstrating that our vacatur of the Guidance would cause Division Offices or states to prohibit the construction of new digital billboards. *See supra* Part II.B.2.a. It is even less plausible, given Scenic's complete lack of any evidentiary showing on the matter, that Division Offices or states would require extant billboards to be dismantled.

By neglecting to "set forth by affidavit or other evidence specific facts" establishing its representational standing, *Defs. of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted), Scenic has failed to meet its burden to demonstrate its representational standing to bring its notice-and-comment claim.

3.

Scenic does fare better, however – at least as to standing – on its claim that the Guidance violated § 706, although barely.

a.

In its complaint, Scenic alleges that FHWA's actions, in promulgating the Guidance, are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA." Compl. ¶ 62, J.A. 19. That language appears to be taken from

§ 706(2)(A) of the APA, which sets forth the well-known "arbitrary and capricious" standard, and which would likely provide an effective cause of action for Scenic to challenge the FHWA's alleged failure to comport with the HBA. Confusingly, however, Scenic does not cite § 706 as part of its second claim, but rather cites § 553, the provision that concerns notice-and-comment rulemaking. *See id.* ¶¶ 57-62, J.A. 18-19.

Construing the complaint liberally, as is sometimes appropriate, *but cf. Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1104, 1106 (D.C. Cir. 2005) (explaining that although "the complaint – particularly a complaint filed by a pro se prisoner – should be construed liberally," "the rule of liberal construction of complaints applies to factual allegations," and refusing to liberally construe a counseled plaintiff's complaint so as to include new defendants (quoting *Fletcher v. District of Columbia*, 370 F.3d 1223, 1227 n.* (D.C. Cir. 2004))), it might be possible to construe Scenic's complaint as having relied upon § 706 rather than, or in addition to, § 553. At oral argument, however, counsel for Scenic was specifically asked whether its second claim included a § 706 challenge to FHWA's promulgation of the guidance, and Scenic's counsel replied "no, we did not present that." Counsel went on to state that to the extent it brought anything resembling an arbitrary-and-capricious challenge it did it through the "back-door" of its notice-and-comment claim, specifically highlighting its argument that that [sic] the Guidance is a legislative rule because it is 180 degrees counter to the FSA text it alleged to be interpreting. Thus, it

appears that Scenic disclaimed any arbitrary-and-capricious challenge to FHWA's alleged failure to comport with the HBA.

Nonetheless, during that same colloquy at oral argument, Scenic did state, with respect to its § 706 claim, that it "focused solely on the customary use provision, finding that it was contrary to law." Giving Scenic the benefit of the doubt, Scenic's papers and statements at oral argument are sufficient for us to eke out a § 706 claim.

b.

Scenic has standing to bring such a § 706 claim. First, Scenic has offered sufficient evidence that it has suffered a representational injury in fact. The record at summary judgment demonstrates that at least one of its members, Nikki Laliberte, has suffered a concrete injury because a digital billboard near her home "generates a bright flash when its display transitions from one advertisement to another." Laliberte Decl. ¶ 4, J.A. 52. She asserts that the billboard "has marred the view from [her] home[ ]," and that she is "concerned that the billboard has negatively affected the value of [her] property." *Id.* ¶¶ 6, 9, J.A. 52-53. This sort of harm to an individual's property is sufficient to constitute a concrete injury in fact. *See Idaho, By & Through Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 591 (D.C. Cir. 1994) (noting that a private landowner "suffers concrete injury if [her] property is despoiled").

The causation and redressability prongs of our standing analysis are equally clear here. Scenic's § 706 claim is that the Guidance runs afoul of the statute's "customary use" requirement as that requirement has been interpreted in the FSAs. If we were to find for Scenic on the merits of its claim, a point we must assume for standing purposes, *see LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011), we could only do so by effectively repudiating the FHWA's interpretation of the FSAs. Repudiation would provide much more robust relief than vacatur. Not only would it prohibit the agency from relying on that interpretation in any future rulemakings, it would also require the agency to subject extant billboards to either removal or an order requiring those billboards to operate in a manner that does not violate the FSAs, for instance by keeping the image displayed by the billboard constant and unchanging. Scenic's injury, clearly caused by the Guidance, is therefore redressable. *See Renal Physicians*, 489 F.3d at 1278 (holding that "the only way to prevent" a finding that redressability is lacking in the third-party context is "for a court not only to invalidate [the contested agency action] but also to repudiate" it).

III.

FHWA argues that the Guidance is not a final agency action and is therefore not reviewable under the APA. We disagree.

An agency action will be deemed final if it "mark[s] the consummation of the agency's decisionmaking

process" and is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). "The most important factor" in determining whether an agency action is one "from which legal consequences will flow" "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

The Guidance marks the consummation of FHWA's decision-making process. It comes to a definitive conclusion: the FSA's prohibition on "flashing, intermittent or moving" lights does not prevent states from permitting digital billboards, so long as they meet certain prescribed requirements. Although the Guidance does state that the FHWA "may provide further guidance in the future as a result of additional information" FHWA might receive, J.A. 535, such a statement is fairly read as a "boilerplate" indication that the agency may issue further interpretations in the future. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). The fact that a regulation might be interpreted again at some point in the indeterminate future cannot, by itself, prevent the initial interpretation from being final.

The Guidance is also an action "from which legal consequences will flow." It creates a safe harbor such that Division Offices and states may not deny a digital billboard permit for violating the FSA lighting standards where that billboard meets the timing and other

requirements set forth in the Guidance. In this way, the Guidance withdraws some of the discretion concerning billboard permitting the Division Offices and states previously held. *See NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) (concluding that where agency action withdraws an entity's previously-held discretion, that action "alter[s] the legal regime," "binds" the entity, "and thus qualifies as final agency action"). That safe harbor has a clear legal effect on the regulated entities here – the Division Offices and the states – and the Guidance is therefore a final agency action.

IV.

Having concluded that Scenic has standing to bring its § 706 claim, and that the Guidance constitutes final agency action, we now review the merits of the claim *de novo*, *see Khan v. Parsons Glob. Servs., Ltd.*, 428 F.3d 1079, 1082 (D.C. Cir. 2005), and find them lacking.

Scenic argues that the Guidance is invalid because it fails to comport with the HBA's "customary use" provision. That provision states that "signs, displays, and devices whose size, lighting and spacing, *consistent with customary use* is to be determined by agreement between the several States and the Secretary, may be erected" within 660 feet of the Interstate. 23 U.S.C. § 131(d) (emphasis added). Scenic contends that the FHWA, in issuing the Guidance, changed the FSA lighting standards to such an extent that those standards are no longer "consistent with customary use."

According to Scenic "[a]nything outside the scope of what an FSA meant at the time it was created cannot be 'customary use.'" Opening Br. for Appellant 36.

In *Cajun Electric Power Cooperative, Inc. v. FERC*, we clarified that

> [a]ny agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. That means that when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest. And, therefore, the agency to which Congress entrusted the protection and discharge of the public interest is entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders, its regulations, or its authorizing statute.

924 F.2d 1132, 1135 (D.C. Cir. 1991) (internal citations omitted); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569-71 (D.C. Cir. 1987) (treating an agency interpretation of a settlement agreement as entitled to deference similar to that owed under *Chevron* where the settlement agreement had to be approved by the agency). The FSAs, as agreements between the FHWA and individual states, *see* 23 U.S.C. § 131(d), were thus approved by the FHWA as described in *Cajun Electric*.

Further, as the District Court explained, "[b]oth Defendants and Scenic America recognize . . . that all FSA lighting provisions were established consistent

with customary use." *Scenic II*, 49 F. Supp. 3d at 71 (quoting or citing both parties' briefing) (internal quotation marks omitted); *see also* Opening Br. for Appellant 36; FHWA Br. 51-52. Thus, so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be "consistent with customary use," whether or not it is precisely the interpretation that would have been given to the standards at the time the FHWA and states first agreed upon them. *Cf. Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 162 F.3d 101, 107 (D.C. Cir. 1998) ("Our deference to an agency's reasonable interpretation of its governing statute 'is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.'" (quoting *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979))).

We agree with the District Court's conclusion that the FHWA's interpretation of the FSA lighting standards is not one that " 'runs 180 degrees counter to the plain meaning of the' FSAs," and that it therefore "construes, rather than contradicts" the FSAs. *Scenic II*, 49 F. Supp. 3d at 62-63, 70 (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)). Although it might be possible to read the FSA lighting standards to prohibit digital billboards, those standards do not foreclose other interpretations, including the FHWA's here. Because the FHWA's interpretation of the FSA lighting provision

was reasonable, the interpretation cannot be "contrary to customary use." Accordingly, Scenic's claim that the Guidance violates § 706 must fail.

* * *

For the foregoing reasons, we affirm the District Court's grant of summary judgment as to Scenic's § 706 claim, vacate its judgment as to Scenic's notice-and-comment claim, and remand with instructions to dismiss Scenic's notice-and-comment claim.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5195 **September Term, 2016**
FILED ON: SEPTEMBER 6, 2016

SCENIC AMERICA, INC.,
APPELLANT

v.

UNITED STATES DEPARTMENT
OF TRANSPORTATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-00093)

Before: PILLARD and WILKINS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the district court's grant of summary judgment as to Scenic's § 706 claim be affirmed. The district court's judgment as to

Scenic's notice-and-comment claim be vacated, and the case be remanded with instructions to dismiss Scenic's notice-and-comment claim, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: September 6, 2016

Opinion for the court filed by Circuit Judge Wilkins.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCENIC AMERICA, INC., **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF TRANSPORTATION, RAY LAHOOD, FEDERAL HIGHWAY ADMINISTRATION, and VICTOR MENDEZ,** **Defendants,** **and** **OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.,** **Intervenor-Defendant.**	**Civil Action No. 13-93 (JEB)**

MEMORANDUM OPINION

(Filed Jun. 20, 2014)

This administrative-law dispute involves a conundrum that has long bedeviled the federal courts: How should rules written in the past apply to new and unforeseen circumstances in the present?

The question arises, surprisingly enough, in the context of Interstate-Highway regulation. Outdoor advertising on the Interstate is governed by the Highway Beautification Act of 1965, as well as a number of regulations and federal-state agreements enacted in

accordance with that statute. Many of those agreements have long banned billboards that use "flashing, intermittent, or moving" lights. Advertising science, however, has evolved since the *Mad Men* era of the 1960s; no longer content to simply mount Don Draper's slogans along the highway, advertisers now want to reach their audiences via new, digital technology. The Federal Highway Administration, after thorough consideration, issued a Guidance memorandum in 2007 explaining that digital billboards – signs that use light-emitting diodes to display their messages – are not "flashing, intermittent, or moving" lights and thus do not fall within the ban of the old lighting standards.

Plaintiff Scenic America, a group dedicated to preserving the country's visual beauty, filed this suit claiming that FHWA's issuance of the Guidance substantively *changed* the lighting standards, thereby violating both the HBA and the Administrative Procedure Act. Defendants – the Department of Transportation, the Federal Highway Administration, the Secretary of Transportation, and the Federal Highway Administrator – and an Intervenor – the Outdoor Advertising Association of America – respond that the Guidance merely *interpreted* the ban on "flashing, intermittent, or moving" lights and thus violated no law. Both sides have now moved for summary judgment.

Although the Court does not pass judgment on whether digital billboards are a boon or a blight, sightly or unsightly, safe or unsafe, it does conclude that Defendants and Intervenor have the better of the argument here. The 2007 Guidance might not have

offered the best interpretation of the lighting standards, but it did constitute an interpretation, rather than a substantive change. It was therefore issued lawfully.

I. Background

To understand the purpose and effect of the 2007 Guidance, the Court begins with its statutory backdrop – the Highway Beautification Act of 1965, 23 U.S.C. § 131 *et seq*. The HBA aims "to promote the safety and recreational value of public travel, and to preserve natural beauty" along the Interstate Highway System. *Id.*, § 131(a). The Act therefore directs each State to negotiate a federal-state agreement (FSA) with the Secretary of Transportation that sets out rules for the "size, lighting[,] and spacing" of billboards that come within 660 feet of the Interstate. *Id.*, § 131(d). All 50 States have entered such agreements, most of them written in the 1960s and 1970s. *See* AR 472-74.

The HBA next requires each State to "[d]evelop laws, regulations, and procedures" that implement the standards contained in its FSA. 23 C.F.R. § 750.705(h). All 50 States have done this as well. *See, e.g.*, Ark. Code Ann. § 27-74-101 *et seq*. (The Arkansas Highway Beautification Act); Or. Rev. Stat. § 377.700 *et seq*. (The Oregon Motorist Information Act); Ariz. Rev. Stat. § 28-7901 *et seq*. (The Arizona Highway Beautification Act). Each State must obtain FHWA approval before making any changes to its outdoor-advertising regulations so that the agency may confirm that they continue to

comply with that State's FSA. *See* 23 C.F.R. § 750.705(j). States that fail to ensure continuous compliance with their FSAs face a ten-percent cut in their annually allocated federal-highway funds. *See id.*, § 750.705(h); 23 U.S.C. § 131(b).

In the decades since the FSAs were first drafted, however, new outdoor-advertising technology has emerged. *See* AR 149, 394-96. In the old days, advertisers used to manually mount their messages onto signboards using paint, glue-printed paper, and vinyl. *See* AR 149, 394. To change advertisements, workers had to climb up the signs and physically switch them, painting over the old "Coke" logo with an updated ad for "New Coke" (and then, a little later, a throwback promotion for "Coke Classic"). These days, however, businesses want to advertise on new, digital billboards – highway signs gilded with light-emitting diodes that serve as pixels making up a much larger image. *See* AR 339-340, 351, 396. LEDs offer a digital way to display static billboard advertisements and make changing them much easier, since the diodes can be reprogrammed remotely to cycle through multiple ads in a single day. *See* AR 149, 396. States have thus sought to amend their outdoor-advertising regulations to allow for the erection of digital billboards along the Interstate Highway.

Not surprisingly, then, FHWA Division Offices began to receive State proposals to modify their regulations to permit these signs. Some proposals, however, seemed in tension with lighting provisions found in a majority of FSAs, which ban off-premise signs (signs

that do not advertise activities conducted on the property on which they are located, *see* 23 U.S.C. § 131(c)(3); AR 150) that use "flashing, intermittent, or moving" lights. *See, e.g.*, AR 519 (California FSA); AR 582 (Florida FSA); AR 620 (Illinois FSA); AR 653 (Kansas FSA); AR 709 (Massachusetts FSA); AR 811 (New Mexico FSA); AR 913 (South Carolina FSA).

The Division Offices initially took a variety of approaches to this issue. The Indiana Division, for example, saw no contradiction between digital billboards and its State's FSA, which, like many others, forbids off-premise signs with "flashing, intermittent, or moving" lights, AR 630, so long as each digital ad remained static for at least eight seconds and the transition period between ads took less than two seconds. *See* AR 325, 330-31. The New York Division, by contrast, concluded that digital billboards violated identical language found in the Empire State's FSA, *see* AR 823, unless they were limited to displaying only one message every 24 hours. *See* AR 320. The Texas Division went even further, warning that the exact same ban in the Texas FSA, *see* AR 962, "clearly prohibit[ed]" digital billboards in all circumstances. AR 128. The Mississippi Division, finally, thought the same lighting provision in the Magnolia State's FSA ambiguous, *see* AR 744, and, fearing inconsistency with the other Offices, contacted the agency's Associate Administrator in Washington, DC, in search of "an interpretation . . . at the national level." *See* AR 371. All in all, 22 FHWA Division Offices approved States' digital-billboard proposals as consistent with their FSAs. *See* AR 472-73.

Concerned by these varied readings, Congressman Brian Higgins of New York wrote the FHWA Administrator, inquiring about a uniform interpretation of the relevant FSA language as applied to digital billboards. *See* AR 292. FHWA pledged to canvass its Division Offices on the matter. *See* AR 293. The agency then mailed a survey to each Division Office, asking whether each Office's State had decided to permit digital billboards, if the State had justified that decision, if the Office had concurred with that justification, and if the State had regulations to govern the time that ads had to remain static or the transition time between ads. *See, e.g.*, AR 302-06. FHWA considered the results of this survey, *see* AR 471-74, as well as studies, AR 47-122, 134, 184, 195-284, 443-454, reports, AR 134-84, 191-94, 413-29, news articles, AR 287-89, 351, 365-66, 368-70, 409-12, 465-67, 469-70, and positions presented by outside groups, AR 338-50, 367-70, 388-400, 439-42, 458-64 – including Scenic America, *see* AR 338-350, 460-63 – in formulating the 2007 Guidance at issue here.

FHWA issued the Guidance, entitled "Guidance on Off-Premise Changeable Message Signs," to its Division Offices on September 25, 2007. AR 474. The document announces in bolded typeface: "Proposed laws, regulations, and procedures that would allow permitting [digital billboards] subject to acceptable criteria (as described below) do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s." *Id.* It

goes on to define the "acceptable criteria" that State proposals should contain, including regulations for the duration of the billboards' messages, the transition times between messages, the billboards' brightness, the spacing between the signs, and the locations of the signs. *See* AR 476-77.

The Guidance therefore instructs that Division Offices weighing State proposals to permit digital billboards within their borders should approve them so long as they (1) are otherwise consistent with the State's FSA and (2) address certain public-safety concerns. *See* AR 474. It closes by noting that it is "intended to provide information to assist the Divisions in evaluating proposals and to achieve national consistency given the variations in FSAs, State law, and State regulations, policies, and procedures," and that it is "not intended to amend applicable legal requirements." AR 477.

Scenic America subsequently filed this lawsuit alleging that the Guidance violated procedural and substantive provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the HBA. Defendants – the Department of Transportation, the Federal Highway Administration, the Secretary of Transportation, and the Federal Highway Administrator – along with an Intervenor – Outdoor Advertising Association of America – moved to dismiss Scenic America's Complaint for lack of standing and failure to state a claim. The Court, in a written Opinion, found that Scenic America had standing to challenge the Guidance and that it had successfully stated a claim for relief under

the APA. *See Scenic America v. Department of Transportation*, 2013 WL 5745268 (D.D.C. Oct. 23, 2013). It therefore denied those Motions, and the case proceeded to briefing on the merits.

As the parties have now cross-moved for summary judgment, the Court next turns to the substance of their arguments.

II. Legal Standard

Although all three parties have filed Motions for Summary Judgment, the limited role federal courts play in reviewing administrative decisions means that the typical Federal Rule 56 summary-judgment standard does not apply. *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006) (citing *Nat'l Wilderness Inst. v. United States Army Corps of Eng'rs*, 2005 WL 691775, at *7 (D.D.C. 2005)). Instead, in APA cases, "the function of the district court is to determine whether or not . . . the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *See Bloch v. Powell*, 227 F. Supp. 2d 25, 31 (D.D.C. 2002) (citing *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977)). While the typical case proceeds as an "arbitrary and capricious" inquiry into agency action, 5 U.S.C. § 706(2)(A), the Court need not articulate that standard here, as Scenic

America has not raised any challenge to the Guidance under that provision of the APA.

Scenic America has also filed a Motion to Supplement the Administrative Record, seeking to add seven documents to the materials before the Court. *See* Mot. to Supp. at 1-2. Defendants and Intervenor oppose this Motion on all but one document. *See* Opp. at 4. Because granting the Motion does not change the outcome of this case, the Court will do so and will consider the additional materials the group has offered. The Court will not consider, however, citations to materials outside the administrative record contained in any of the parties' pleadings. *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013).

III. Analysis

Scenic America alleges three specific problems with the 2007 Guidance: First, it is a legislative rule promulgated without the notice-and-comment procedure required by the APA. *See* 5 U.S.C. § 533. Second, it creates a new lighting standard for billboards without "agreement between the several States and the Secretary [of Transportation]," as required by the HBA. *See* 23 U.S.C. § 131(d). And finally, it establishes lighting standards for billboards that are inconsistent with "customary use," another supposed violation of the HBA. *See id.* Because the Court's resolution of the first point in favor of Defendants essentially resolves the second and third, it need only address Scenic America's APA argument in depth in order to decide this case.

A. Did 2007 Guidance Require Notice and Comment?

Scenic America says that FHWA issued the 2007 Guidance unlawfully because it failed to comply with the notice-and-comment procedures that agencies must follow when they promulgate new substantive rules. *See* 5 U.S.C. § 553(b) & (c). Indeed, the parties all agree that FHWA did not follow those procedures when it published the Guidance. Defendants and Intervenor contend, however, that the Guidance is not a substantive rule, but rather an "interpretative rule," which the APA expressly exempts from its notice-and-comment requirements. *Id.*, § 553(b)(3)(A). It was therefore entirely appropriate, according to this argument, for FHWA to skip that step.

The Court begins with some basic definitions. A substantive rule is one "issued by an agency pursuant to statutory authority and which implement[s] the statute. . . . Such rules have the force and effect of law." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1009 (D.C. Cir. 1993) (quoting *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). An interpretative rule, by contrast, is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* (quoting *Attorney General's Manual* 30 n.3). A substantive rule, in other words, creates new law, whereas an interpretative rule simply explains existing law.

On first impression, the 2007 Guidance seems more like an interpretative rule. The document instructs that certain FSA lighting provisions should not be read to ban digital billboards. According to the D.C. Circuit, "A statement seeking to interpret a statutory or regulatory term" – here, the terms "intermittent," "flashing," and "moving" – is "the quintessential example of an interpretative rule." *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993); *see also Sentara-Hampton General Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) ("[T]he clarification of ambiguous terms . . . is precisely the type of agency action that the 'interpretative rule' exception was designed to accommodate[.]"). No party to this case disputes that agency interpretations of FSAs would be governed by this same rubric. Game, set, match.

First impressions, however, can deceive. A rule that superficially appears to interpret existing law may, on closer inspection, be discovered to have independent, substantive effect. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). The Court of Appeals has thus devised a more refined approach to navigating the hazy boundary between substantive and interpretative rules, territory "enshrouded in considerable smog." *Am. Min. Cong.*, 995 F.2d at 1108 (quoting *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*)) (internal quotation marks omitted). This Circuit uses a four-prong test to map the character of agency action, in which the fulfillment of any of the four prongs signals a substantive, rather than

interpretative, rule. *See id.* at 1112. That test is laid out in further detail below.

The analysis does not end there, however. Even if the four-part inquiry yields an interpretative rule, practical considerations may still render the agency's interpretation subject to the APA's notice-and-comment requirements. Because substantive rulemaking, according to the APA, includes the *modification* as well as the creation of regulations, the Court of Appeals has instructed that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (1997). Under the so-called "*Alaska Hunters* doctrine," an agency must use notice-and-comment procedures to issue an interpretative rule when it "has given its regulation a definitive interpretation, and later significantly revises that interpretation," since in that circumstance it "has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

To determine whether FHWA violated the law by issuing the Guidance without using notice-and-comment rulemaking, then, the Court will first apply the four-factor test set out in *American Mining Congress* to determine whether it is a substantive or interpretative rule. Since the Court concludes under this test that the Guidance is interpretative, it will next apply the *Alaska Hunters* doctrine, asking whether the

Guidance effects a significant revision to a prior, definitive interpretation. The determination that it does not will bring this case to a close.

1. The Four-Part Substantive/Interpretative-Rule Inquiry

As mentioned a moment ago, this Circuit uses a four-factor test to determine whether a rule is substantive or interpretative. An affirmative answer to any one of these four factors renders the rule substantive. *See Am. Min. Cong.*, 995 F.2d at 1112. Those factors are: (1) If in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) If the agency has published the rule in the Code of Federal Regulations, (3) If the agency has explicitly invoked its general legislative authority, and (4) If the rule effectively amends a prior substantive rule. *See id.* The Court will examine each in turn.

a. Adequate Basis for Agency Action

To repeat, the first factor asks whether "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *Id.* at 1109, 1112. Put another way, this factor distinguishes a rule that "itself carries the force and effect of law" – making it substantive – from one that "spells out a duty fairly encompassed within the

regulation that the interpretation purports to construe" – making it interpretative. *Air Transport Assoc. of America v. FAA*, 291 F.3d 49, 55-56 (D.C. Cir. 2002).

A real-world example or two will help to make this distinction more concrete. The classic instance in which the legislative basis for agency action would be inadequate without the rule is where the relevant statute "forbids nothing except acts or omissions to be spelled out by the" agency. *Am. Min. Cong.*, 995 F.2d at 1109. Section 14(b) of the Securities Exchange Act, for example, prohibits certain persons from giving or withholding a proxy "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78n(b). In that circumstance, "clearly some agency creation of a duty is a necessary predicate to any enforcement [action]." *Am. Min. Cong.*, 995 F.2d at 1109. The creation of that duty would therefore be a substantive, not an interpretative, rule.

In the contrary case, where existing statutes or regulations themselves impose a requirement, "there is no legislative gap" for the agency to fill with an additional, freestanding rule. *Id.* at 1112. In *American Mining Congress*, for example, agency regulations already required mine operators to report "diagnosed" occupational illnesses that occurred at their mines. *See id.* at 1107. The Mine Safety and Health Administration subsequently issued three letters specifying what kinds of x-ray results qualified as "diagnoses." *See id.* at 1108, 1112. The D.C. Circuit held that these letters were interpretative, not substantive. Because the "regulations themselves require the reporting of diagnoses

of the specified diseases," MSHA already had an adequate basis for enforcement without the letters, which merely explained what precisely constituted a "diagnosis." *Id.* at 1112.

Under this rubric, the 2007 Guidance is clearly an interpretative rule. As explained earlier, the HBA and its implementing regulations themselves authorize FHWA to review States' outdoor-advertising regulations and to dock their federal-highway funding by ten percent if they fail to ensure compliance with their FSAs. The majority of FSAs prohibit signs with "flashing, intermittent, or moving" lights. That regulatory scheme, then, on its own, already empowers the agency to either accept or reject State proposals to permit digital billboards, with or without the 2007 Guidance. In fact, as already discussed, several Division Offices did just that in the run up to the issuance of that document. All the Guidance does is spell out the meaning of one particular FSA provision in slightly greater detail. "Even if the [2007 Guidance] did not exist, the [FHWA] could rely upon prior authority" – the HBA, its implementing regulations, and the FSAs – to apply the policy embedded in that document. *Truckers United for Safety v. FHWA*, 139 F.3d 934, 939 (D.C. Cir. 1998). That makes it an interpretative, not a substantive, rule.

Scenic America's main counterargument is, essentially, a backdoor attack on the accuracy of the interpretation contained in the Guidance. According to the group, "The plain meaning of the common FSA lighting

standards" – the ones prohibiting flashing, intermittent, or moving lights – "bans digital billboards. . . . The 2007 Guidance nonetheless supplies a new legislative basis for FHWA Division Offices to approve state digital billboards." Pl. Mot. at 30. The argument, in other words, is that the Guidance is substantive because the language it professed to interpret did not in fact permit digital billboards. FHWA Division Offices, accordingly, did not have the authority to approve such signs in the absence of the instruction in the Guidance. (Scenic America, it should be noted, has for some reason declined to offer this argument as a more straightforward, frontal assault on FHWA's interpretation of the FSAs via section 706(2)(A) of APA's "arbitrary and capricious" standard of review. *See, e.g.*, *New York State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 140-41 (D.D.C. 2003).)

Plaintiff's argument appears to ignore clear D.C. Circuit precedent, which has affirmed, time and again, that "[a] statement which is interpretative does not become substantive simply because it arguably contradicts the statute it interprets." *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982); *see also Am. Min. Cong.*, 995 F.2d at 1113; *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992); *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991). Still, the group's theory has a certain logic to it, since an agency that misreads a statute to give it authority that it does not actually possess would, technically, lack the legislative basis to act in the absence of that incorrect interpretation. The

Court of Appeals, moreover, has cautioned that when an "interpretation runs 180 degrees counter to the plain meaning of the regulation[, it] gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation." *National Family Planning*, 979 F.2d at 235. The Court, therefore, will examine whether the Guidance's interpretation "runs 180 degrees counter to the plain meaning of the" FSAs. *Id.* This standard of review is even more deferential than the one associated with *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *Cf. Am. Min. Cong.*, 995 F.2d at 1110 ("[A]n interpretation that spells out the scope of an agency's or regulated entity's pre-existing duty . . . will be interpretive, even if . . . it widens that duty even beyond the scope allowed to the agency under *Chevron*.").

The Court need not trace the etymology of each word in the FSA lighting provisions to conclude that the Guidance does not contradict them. FSAs, obviously, do not expressly forbid digital billboards, which did not exist when those agreements were drafted nearly half a century ago. Nor do they prohibit *all* lights. Instead, they prohibit only "flashing, intermittent, or moving" lights. That ban could be read, conceivably, to prohibit digital-billboard technology. But it does not compel such a reading. According to the 2007 Guidance, digital billboards are consistent with FSA lighting standards so long as they display each message for between four and ten seconds, transition between ads in between one and four seconds, and adjust brightness to changes in ambient light. *See* AR 476.

The billboards approved by the Guidance thus could be understood neither to "flash," since the LEDs' brightness is limited and they must remain stationary for at least four seconds at a time, nor "move," since the images are static, in contrast to FHWA's previous instruction that a digital billboard displaying full-motion video *would* violate the FSAs' prohibition. *See* AR 42.

It is a closer call as to whether these signs could be understood to use something other than "intermittent" light. "Intermittent" means something "that intermits or ceases for a time; coming at intervals; operating by fits and starts," *Oxford English Dictionary*, www.oed.com (last visited June 20, 2014), or, alternatively, "starting, stopping, and starting again: not constant or steady," *Merriam-Webster*, www.merriam-webster.com (last visited June 20, 2014). Again, because the LEDs are required to remain steady for several seconds at a time, the reading contained in the Guidance does not contradict the plain language of the FSAs. In sum, the Guidance might not have adopted the best reading of the FSA lighting standards, but its interpretation is not "180 degrees counter" to those provisions. *National Family Planning*, 979 F.2d at 235. Indeed, the Guidance is not the first time FHWA officials have adopted such a reading – prior to the issuance of the Guidance, 22 FHWA Division Offices approved States' digital-billboard proposals as consistent with their FSAs. *See* AR 472-73.

As a second counterargument, Scenic America claims that because this Court found, in its prior Opinion denying Defendants' and Intervenor's Motions to

Dismiss, that the Guidance constituted "final agency action" for purposes of APA review, *see Scenic America*, 2013 WL 5745268, at *8-11, it is also bound to conclude that the Guidance forms the legislative basis for agency action, making it a substantive rule. The group cites two cases in support of that claim, but it misunderstands both of them. In fact, courts in this circuit have repeatedly found that rules can be both "final agency action" and "interpretative." *See, e.g.*, *Hall v. Sebelius*, 689 F. Supp. 2d 10, 19-21 (D.D.C. 2009); *Arizona v. Shalala*, 121 F. Supp. 2d 40, 49, 52 (D.D.C. 2000).

First, the group invokes *National Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011). There, EPA issued a guidance document to its Regional Air Division Directors, instructing that they should allow States to propose alternatives to certain federally mandated ozone programs. *See id.* at 316-17. The Court of Appeals found that that guidance constituted final agency action because it "altered the legal regime [and] . . . b[ou]nd[] EPA regional directors." *Id.* at 320. The panel then noted that because "the Guidance document changed the law, the first merits question – whether the Guidance is a legislative rule that required notice and comment – is easy," answering in the affirmative. *Id.* Scenic America suggests that the 2007 Guidance similarly "changed the law" because, as the Court observed in its last decision, FHWA Division Offices previously retained discretion to reject digital-billboard proposals as violating the FSA lighting provisions and that the Guidance took away that

discretion. *See Scenic America*, 2013 WL 5745268, at *10. According to Scenic America, this makes the Guidance a substantive rule.

Scenic America is mistaken. *Natural Resources Defense Council* said that the guidance document at issue there "changed the law" because "nothing in the statute, prior regulations, or case law authorizes EPA to accept alternatives to" the mandated program. 643 F.3d at 321. The panel therefore concluded that "in the absence of the rule there would not be an adequate legislative basis for the agency" to do so – the first factor in the *American Mining Congress* analysis. *Id.* (quoting *Am. Min. Cong.*, 995 F.2d at 1112. Here, by contrast, the HBA, its implementing regulations, and the FSAs, as interpreted by the 2007 Guidance, *did* give FHWA Division Offices legislative authority to approve States' digital-billboard proposals. Scenic America's insistence that FHWA was barred from doing so by the language of the FSAs simply reflects the group's preferred reading of those documents as banning, rather than permitting, digital billboards, and the Court has already held that such a reading is not the only possible one. The only "change in the law" that the 2007 Guidance affected was its removal of Division Offices' discretion to categorically reject States' digital-billboard proposals. "[R]estricting discretion," however, "tells one little about whether a rule is interpretive." *Am. Min. Cong.*, 995 F.2d at 1111.

Second, Scenic America quotes *National Mining Association v. Jackson*, 880 F. Supp. 2d 119 (D.D.C. 2012), for the proposition that "the question of whether

[a guidance document] amounts to final agency action . . . also necessarily decides the question of whether the [document] constitute[s] a de facto legislative rule." *Id.* at 132 n.10. This is simply a misrepresentation of that case. Although Scenic America suggests that the quote indicates a relationship between the final-agency-action inquiry and the substantive-versus-interpretative-rule inquiry, in fact, the quote from *National Mining Association* was actually relating the final-agency-action inquiry to the question of "whether a challenged action amounts to a *rule or a mere statement of policy.*" *Id.* (emphasis added). That, obviously, is a different question from whether a rule is interpretative or substantive. *See Am. Min. Cong.*, 995 F.2d at 1110 (observing that "distinguishing policy statements, rather than interpretive rules, from legislative norms" is "a quite different context").

For its final counterargument, Scenic America cites *Cabais v. Egger*, 690 F.2d 234. There, the agency had taken a statute that was "very broad and . . . obviously intended to permit the states wide latitude," and issued an interpretation that "established detailed rules with mathematical formulae." *Id.* at 239. The panel held that the directive could not be considered an interpretative rule because it "limit[ed] state discretion . . . and impose[d] an obligation on the states not found in the statute itself." *Id.* Similarly, says Scenic America, "the 2007 Guidance introduces a detailed set of numerical parameters to govern the operation of digital billboards, completely untethered to any language in the statute or FSAs." Pl. Opp. at 11.

More recently, however, the Court of Appeals has made clear:

> While we have said that interpretive rules "cannot go beyond the text of a statute," we do not, of course, mean to imply that an interpretive statement may only paraphrase statutory or regulatory language. . . . [A]n interpretive statement may "suppl[y] crisper and more detailed lines than the authority being interpreted" without losing its exemption from notice and comment requirements.

Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993) (citations omitted). Despite Cabais, then, the Circuit has been amenable to interpretative rules that derive highly specific, numerical interpretations from seemingly vague source material. Returning to American Mining Congress, for example, where a regulation required mine operators to report when occupational illnesses had been "diagnosed," the panel labeled "interpretative" an agency rule that expanded on the meaning of that regulation as follows:

> [A] chest x-ray rating above 1/0 on the [International Labor Office] scale constitute[s] a "diagnosis" of silicosis or some other pneumoconiosis. . . . [W]hen the first reader [of the x-ray] is not a "B" reader (*i.e.*, one certified by the National Institute of Occupational Safety and Health to perform ILO ratings), and the [mine] operator seeks a reading from a "B" reader, the [agency] will stay enforcement for failure to report the first reading. If the "B" reader concurs with the initial determination

> that the x-ray should be scored a 1/0 or higher, the mine operator must report the "diagnosis." If the "B" reader scores the x-ray below 1/0, the [agency] will continue to stay enforcement if the operator gets a third reading, again from a "B" reader; the [agency] then will accept the majority opinion of the three readers.

Am. Min. Cong., 995 F.2d at 1108. All that from a single word! Clearly, interpretative rules are not limited to "parroting the [source] rule or replacing the original vagueness with another." *Id.* at 1112. The specifications in the Guidance, moreover, are tied to the language in the FSAs because the limits on timing and brightness serve to ensure that the lights on the digital billboards do not "flash," "move," or shine "intermittently." According to this factor, then, the Guidance is an interpretative rule.

b. Publication in Code of Federal Regulations

The second factor that distinguishes interpretative from substantive rules is "whether the agency has published the rule in the Code of Federal Regulations." *Id.* at 1112. As this Court noted in its last Opinion: "It is undisputed that the Guidance was not published in the Federal Register or the Code of Federal Regulations." *Scenic America*, 2013 WL 5745268, at *9. This is another signal that the Guidance is interpretative, not substantive.

c. Invocation of General Legislative Authority

The third factor asks "whether the agency has explicitly invoked its general legislative authority" in promulgating the disputed rule. *Am. Min. Cong.*, 995 F.2d at 1112.

It appears clear that FHWA did not explicitly invoke any such authority when it published the 2007 Guidance. The document states that its purpose is "to provide guidance" to Division Offices concerning digital billboards and to "clarif[y] the application" of an earlier memorandum on the subject. AR 474. It emphasizes that it "is intended to provide information to assist the Divisions in evaluating proposals and to achieve national consistency given the variations in FSAs, State law, and State regulations, policies and procedures" and that "[i]t is not intended to amend applicable legal requirements." AR 477. Nowhere in the Guidance does FHWA invoke its general legislative rulemaking authority. *See* 23 U.S.C. §§ 131 & 315. Scenic America nevertheless insists that the Guidance "does not interpret anything" but rather "decrees," in a manner "consistent only with the invocation of its general rulemaking authority," that digital billboards do not violate the FSAs. Pl. Reply at 11 (quoting *Syncor International Corporation v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997)). But the text of the Guidance speaks for itself – it interprets FSA prohibitions on "flashing," "intermittent," or "moving" lights as inapplicable to digital billboards, subject to certain criteria. According to this factor, that makes it an interpretative rule.

Scenic America also contends that the actual *effect* of the Guidance, not just what FHWA *says* it is doing, should determine whether the agency has invoked its legislative authority. In support, the group cites *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992), where the Court of Appeals held that "*post hoc* characterizations of . . . rules as interpretive by [agency] counsel are of no avail. . . . '[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.'" *Id.* at 237-38 (quoting *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972)). That sentiment, however, is in tension with the articulation of this factor in *American Mining Congress*, which asks whether the agency "*explicitly* invoked" its general legislative power. *Am. Min. Cong.*, 995 F.2d at 1112 (emphasis added). As *American Mining Congress* is the case that fully articulates the four-factor analysis, the Court will follow its version of the inquiry. Even if *National Family Planning* carried the day, moreover, the characterization of the 2007 Guidance as interpretative is not a *post hoc* justification offered by FHWA counsel, but instead is evident in the text of the document itself.

Otherwise, all Scenic America can muster is two quotes stating that an agency cannot make a rule "interpretative" simply by labeling it so. *See* Pl. Reply at 11-12 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000), and *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005)). But

neither quotation comes from a discussion of the "general legislative authority" inquiry at issue here. Instead, both refer more broadly to the substantive/interpretative-rule distinction as well as to the utility of the four-factor analysis, into the weeds of which the Court has now fully sunk. They do not change the outcome. This factor, in sum, indicates that the Guidance is an interpretative rule, not a substantive one.

d. Effective Amendment of a Prior Substantive Rule

The fourth and final factor asks whether the disputed rule "effectively amends a prior [substantive] rule." *See Am. Min. Cong.*, 995 F.2d at 1112. "Effective amendment" requires that the new rule "repudiate[]" or be "irreconcilable" with an existing substantive rule – "[a] rule does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted." *Id.* at 1112-13.

According to Scenic America, the Guidance effectively amended FSA lighting provisions that forbid "flashing, intermittent, or moving" lights by interpreting them to permit digital billboards. Defendants and Intervenor express skepticism that FSAs are properly considered "substantive rules," but the Court need not decide that question because, even if they are, the 2007 Guidance does not effectively amend them. As the Court has already explained, *see* Section III.A.1.a, *supra*, the interpretation contained in the Guidance

may not be the best reading of the FSAs, but it does not repudiate them, nor is it irreconcilable with them. According to this factor, then, the Guidance is an interpretative rule.

The two cases Scenic America cites in support of its position, ironically, instead serve to illustrate the relative compatibility between the Guidance and the FSAs. In *United States Telecom Association v. FCC*, 400 F.3d 29, the FCC had previously adopted a substantive rule requiring telephone companies to ensure that telephone users could keep their phone numbers when they switched from one company to another, but only if they remained at the same physical location. *See id.* at 35. The FCC then issued a new rule requiring telephone companies to allow users to keep their existing numbers "regardless of physical location . . . notwithstanding the [prior rule's] declaration that such location portability would not be mandated." *Id.* The D.C. Circuit held that the latter rule contradicted the first, making it substantive. *See id.* at 35-36. Similarly, in *National Family Planning and Reproductive Health Association v. Sullivan*, 979 F.2d 227, a substantive rule stated that projects receiving Title X funding "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." *Id.* at 234. The agency then issued a new rule, stating that Title X physicians "may, pursuant to the same regulations, provide counseling and referrals for abortions when their medical judgment so dictates." *Id.* at 234-35. Once again, the latter rule contradicted the first,

making it substantive. *See id.* at 235. Neither of these two scenarios comes close to the situation here, where FHWA has adopted a reading of the FSA lighting provisions that may not be perfect, but nevertheless does not stand in complete contradiction to them.

For those still counting at home, all four factors of the *American Mining Congress* indicate that the 2007 Guidance is an interpretative rule, not a substantive one. According to the text of the APA, then, it need not have been published via notice and comment.

2. Alaska Hunters Doctrine

Although the Court has found that the 2007 Guidance is an interpretative rule, it may nevertheless be subject to the APA's notice-and-comment requirements under the *Alaska Hunters* doctrine. According to that doctrine, an agency must still use notice-and-comment procedures to issue an interpretative rule when that rule "significantly revises" a prior "definitive interpretation," since that "in effect amend[s] [the agency's prior] rule, something it may not accomplish without notice and comment." *Alaska Professional Hunters*, 177 F.3d at 1034. An interpretative rule is considered to "significantly revise" a previous definitive interpretation if it cannot "reasonably be interpreted as consistent" with that prior reading. *MetWest v. Secretary of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009) (internal quotation marks and citation omitted).

The *Alaska Hunters* case provides an excellent example of this doctrine in action. There, the Federal Aviation Administration's Alaskan Region had uniformly advised for almost thirty years that, under its interpretation of the law, Alaskan hunting and fishing guides who piloted light aircraft did not need to comply with certain commercial-pilot regulations. *See Alaska Professional Hunters*, 177 F.3d at 1030, 1035. Suddenly, however, the agency changed course, publishing a notice that the Alaskan guides would in fact have to abide by those regulations. *See id.* at 1030. On appeal, the D.C. Circuit ruled against the FAA:

> "Rule making," as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule. When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.

Id. at 1034 (citation omitted). Because FAA's prior position had become "an authoritative departmental interpretation, an administrative common law," *id.* at 1035, the agency could only revise that interpretation via notice-and-comment rulemaking.

As an initial matter, Intervenor suggests that the *Alaska Hunters* doctrine does not apply to this case, questioning "whether FHWA could unilaterally issue a 'definitive' interpretation of a federal-state agreement, given that those agreements are contracts negotiated

between two parties – the federal government and the relevant State." Int. Mot. at 22. Defendants suggest an even more radical approach, arguing that the doctrine itself "is contrary to the APA's express exemption of interpretive rules from the notice-and-comment requirement . . . as well as the 'basic tenet of administrative law' that the APA 'established the maximum procedural requirements impose[d] upon agencies in conducting rulemaking procedures.'" Def. Opp. at 15 n.2 (quoting *Vermont Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524, 544 (1978)). Indeed, the Supreme Court has recently granted certiorari to consider that very question. *See Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom., Nichols v. Mortgage Bankers Ass'n*, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1052). The Court need not explore either path, however, as even assuming the applicability and the validity of the *Alaska Hunters* doctrine, FHWA need not have used notice-and-comment rulemaking to issue the 2007 Guidance.

According to Scenic America, the Guidance significantly revised FHWA's position, going back almost 40 years, that "signs displaying static messages through the use of variable lighting" violate the FSA lighting standards at issue in this case. Pl. Mot. at 36. Defendants and Intervenor, by contrast, contend that the Guidance is consistent with the most recent authoritative statement from the agency on the issue – a memorandum issued in 1996. The Court, therefore, must first determine precisely what FHWA's prior position was on the issue of digital billboards – or if such a

position existed – before it can decide whether the 2007 Guidance significantly revised that position.

As far back as 1978, it appears that, for purposes of highway regulations promulgated under the 1958 Bonus Act, *see* 23 C.F.R. § 750.108(c), FHWA "characterized as a flashing light electronic information displays which neither flash nor animate static information, but where the only movement is the periodic changing of information against a solid, colorless background." H.R. Rep. 95-1485, 17 (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 6575, 6593. More recently, in 1990, FHWA issued a memorandum to its Regional Administrators on the subject of "commercial electronic variable message signs (CEVMS) which change their advertising messages by electronic process or remote control . . . [and] use various types of evolving technology such as lights, glow cubes, rotating slats, moving reflective disks, etc." AR 1. Referring to the FSAs negotiated under the Highway Beautification Act, the 1990 memorandum made clear that "FHWA has interpreted the Federal law as implemented under individual State/Federal agreements to prohibit off-premise variable message signs, irrespective of the method used to display the changing message. The prohibited CEVMS must be considered to be illegal signs." *Id.*

FHWA's next statement on the matter came with its issuance of a 1996 memorandum, entitled "INFORMATION: Off-Premise Changeable Message Signs." AR 30. That memorandum observed that a number of States had taken the position "that certain off-premise

changeable message signs are consistent with State law and do not violate the lighting provisions of their State/Federal agreement" and that "[b]ecause of the increased use of changeable message signs, we believe it is timely to restate our position concerning these signs." AR 30. It then opined:

> In the twenty-odd years since the [FSAs] have been signed, there have been many technological changes in signs, including changes that were unforeseen at the time the agreements were executed. While most of the agreements have not changed, the changes in technology require the State and FHWA to interpret the agreements with those changes in mind.

Id. The document therefore instructed that "[c]hangeable message signs are acceptable for off-premise signs, regardless of the type of technology used, if the interpretation of the State/Federal agreement allows such signs. In nearly all States, these signs may still not contain flashing, intermittent, or moving lights." *Id.*

Two more data points are available, but neither offers much meat for purposes of this analysis. First, the various Division Office approvals and disapprovals of States' digital-billboard proposals add some flavor to FHWA's developing position on the issue, but, as both Defendants and Scenic America agree, "individual Division interpretations do not constitute authoritative or definitive interpretations for purposes of the *Alaska Hunters* doctrine[.]" Def. Mot. at 26; *see also* Pl. Mot. at 37. Second, as of 2007, FHWA's website apparently

included a subsection entitled "A History and Overview of the Federal Outdoor Advertising Control Program," which stated that "[o]ff-premise message center type signs using internal lighting are not yet approved for general off-premise application." AR 342. But, as Scenic America seems to concede, this blurb can hardly be said to offer a "definitive interpretation" that binds the agency as a whole. *Alaska Professional Hunters*, 177 F.3d at 1034; *see also* Pl. Opp. at 16.

To the extent that the Court can discern from this meager record a position on signs displaying static messages through variable lighting, then, it appears that the 1996 memorandum – which has not been challenged here – reversed the 1990 memorandum by guardedly approving such technology. Scenic America attempts to reconcile the two entries, contending that the 1996 memo discussed only "tri-vision billboards, signs that employ rotating panels, not lighting, to effect message changes." Pl. Mot. at 36-37. But the documents speak for themselves. The 1990 memo states that FSAs "*prohibit* off-premise variable message signs, *irrespective of the method used* to display the changing message." AR 1 (emphasis added). The 1996 memo, by contrast, says that "[c]hangeable message signs are *acceptable* for off-premise signs, *regardless of the type of technology* used." AR 30 (emphasis added). The 1996 memo, in short, approves changeable-message signs "regardless of the type of technology used" so long as the applicable FSA allows such signs. AR 30. This policy necessarily supersedes the contrary one articulated in the 1990 memo.

Having determined that the 1996 memo is the most recent statement of FHWA's position on the matter, the Court must now determine whether the 2007 Guidance "significantly revises" that stance. *Alaska Professional Hunters*, 177 F.3d at 1034. It is clear that it does not. The 1996 memo permits changeable message signs "regardless of the type of technology used," so long as those signs are consistent with the applicable FSAs, including provisions banning "flashing, intermittent, or moving lights." AR 30. The 2007 Guidance, in harmony with that framework, approves "[c]hangeable message signs, including Digital/LED Display CEVMS . . . if found to be consistent with the FSA," and explains that digital billboards, so long as they are subject to certain "acceptable criteria," do not constitute "flashing, intermittent, or moving lights." AR 474-75. The Guidance is therefore simpatico with the agencies' prior position on the matter.

Because the 2007 Guidance does not significantly revise FHWA's prior interpretation of the FSA lighting provisions, the *Alaska Hunters* doctrine does not apply, and the agency need not have promulgated the document via notice-and-comment rulemaking.

B. Scenic America's Remaining Two Counts

Scenic America's final two challenges to the Guidance are both resolved by the Court's conclusion that the document is an interpretative rule that construes, rather than contradicts, the existing FSA lighting standards.

1. Creation of New Lighting Standards

In its second count, Scenic America alleges that the 2007 Guidance violates the law because it "creates new lighting standards," Pl. Mot. at 38, without "agreement between the several States and the Secretary [of Transportation]," as required by the HBA. *See* 23 U.S.C. § 131(d). If FHWA wanted to approve digital billboards, says the group, it should have worked with each State to amend its FSA in order permit such signs.

Scenic America's argument on this point presumes, wrongly, that the Guidance does something more than interpret existing FSA lighting provisions: "The 2007 Guidance . . . violates the procedural requirements of the HBA. It directs FHWA Division Offices to approve digital billboards despite many FSAs' more restrictive standards banning flashing, intermittent, or moving lights. This, in turn, enables states to bypass the FSA amendment process." Pl. Mot. at 39. As the Court has already explained, however, the Guidance merely *interprets* the lighting standards already specified in the FSAs; it does not create new ones. Scenic America has declined to bring an independent challenge to the validity of that interpretation, and, moreover, the group appears not to contest that a loss on its first count also translates into a loss on its second. On this point, too, the Court rules for Defendants and Intervenor.

2. Standards Inconsistent with Customary Use

For its final challenge to the Guidance, Scenic America alleges that the document unlawfully establishes lighting standards for billboards that are inconsistent with "customary use," another purported requirement of the HBA. *See id.* at 41. The relevant statutory language reads as follows:

> In order to promote the reasonable, orderly, and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays and devices whose size, lighting, and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary [of Transportation], may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate.

23 U.S.C. § 131(d).

As both Defendants and Scenic America note, this section of the HBA is what spawned the FSAs – it instructs the States and the Department of Transportation to negotiate "agreement[s]" to govern outdoor advertising along the Interstate Highway. *Id.* Each agreement must set out outdoor-advertising rules that govern "size, lighting, and spacing, *consistent with customary use.*" *Id.* (emphasis added). The "customary use" requirement, therefore, refers to the content of the FSAs, including their lighting standards. Both Defendants and Scenic America recognize, accordingly, that "all FSA lighting provisions were established 'consistent with customary use.'" Pl. Opp. at 24 (internal

quotation marks omitted); *see also* Def. Opp. at 22. Since the Court has previously found that the 2007 Guidance merely interprets those provisions, it is inescapable that the document is similarly consistent with customary use. Scenic America's own pleading makes clear that its argument once again depends on the premise, already rejected by this Court, that the Guidance does something other than interpret the FSAs: "[A]ll FSA lighting provisions were established 'consistent with customary use.' *The 2007 Guidance does not interpret those provisions, but rather adds an exemption to them*, and thereby allows an inconsistency between some states' size, lighting, and spacing restrictions and their customary use of outdoor advertising." Pl. Opp. at 24 (emphasis added) (internal quotation marks omitted). Because the Court has already decided otherwise, Scenic America's argument on this point must fail as well.

IV. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order that will grant in full Defendants' and Intervenor's Motions for Summary Judgment and deny Scenic America's. The Court will dismiss with prejudice all three of Scenic America's challenges to the 2007 Guidance.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: June 20, 2014

23 U.S.C.A. § 131

Control of outdoor advertising

Currentness

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

* * *

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls

by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

* * *

23 C.F.R. § 750.705

Effective control.

In order to provide effective control of outdoor advertising, the State must:

* * *

(h) Develop laws, regulations, and procedures to accomplish the requirements of this subpart;

* * *

(j) Submit regulations and enforcement procedures to FHWA for approval.

[LOGO]
U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: Commercial Electronic Variable Message Signs – Off-Premise Advertising

Date: JAN 19 1990

From: Director
Office of Right-of-Way
Washington, D.C. 20590

Reply to
Attn of HRW-10

To: Regional Federal Highway Administration

We have received several inquiries concerning the off-premise advertising use of commercial electronic variable message signs (CEVMS) which change their advertising messages by electronic process or remote control. These outdoor advertising signs use various types of evolving technology such as lights, glow cubes, rotating slats, moving reflective disks, etc.

FHWA has interpreted the Federal law as implemented under individual State/Federal agreements to prohibit off-premise variable message signs, irrespective of the method used to display the changing message. The prohibited CEVMS must be considered to be illegal signs.

Signs that purport to be on-premise CEVMS, but include messages advertising activities not conducted on the premises on which they are located, and thus cannot meet the definition of permitted on-premise signs,

are also prohibited. They may be allowed to remain only if they agree to limit their messages to advertising activities located on the Premises.

/s/ Barbara K. Orski
Barbara K. Orski

[LOGO]
U.S. Department
of Transportation
**Federal Highway
Administration**

Memorandum

Subject: **INFORMATION**: Off-Premise Changeable Message Signs

Date: JUL 17 1996

From: Director
Office of Real Estate Services

Reply to
Attn of: HRE-20

To: Regional Administrators

A number of States are taking the position that certain off-premise changeable message signs are consistent with State law and do not violate the lighting provisions of their State/Federal agreement. The State of Georgia recently amended its State law to allow off-premise signs having panels or slats that rotate provided they meet State criteria for frequency of message change and spacing. The State of Oklahoma recently considered amending its State law to also allow these signs. Because of the increased use of changeable message signs, we believe it is timely to restate our position concerning these signs.

The Federal Highway Administration (FHWA) has always applied the Federal law 23 U.S.C. 131 as it is interpreted and implemented under the Federal regulations and individual State/Federal agreements. Because there is considerable variation among the States,

the importance of these agreements cannot be overstated. In the twenty-odd years since the agreements have been signed, there have been many technological changes in signs, including changes that were unforeseen at the time the agreements were executed: while most of the agreements have not changed, the changes in technology require the State and FHWA to interpret the agreements with those changes in mind. Changeable message signs are acceptable for off-premise signs, regardless of the type of technology used, if the interpretation of the State/Federal agreements allows such signs. In nearly all States, these signs may still not contain flashing, intermittent, or moving lights.

The FHWA will concur with a State that can reasonably interpret the State/Federal agreement to allow changeable message signs if such interpretation is consistent with State law. The frequency of message change and limitation in spacing for these signs should be determined by the State. This interpretation is limited to conforming sites, as applying updated technology to nonconforming signs would be considered a substantial change and inconsistent with 23 CFR 750.707(d)(5).

/s/ Barbara K. Orski
Barbara K. Orski

FHWA:HRE-20:RPHarter:gs:62026:June 24, 1996
cc: reader Chron HRE-20
G:\12\RPH\CMS.110

[LOGO] **Memorandum**
U.S. Department
of Transportation
Federal Highway
Administration

Subject: **INFORMATION**: Date: September 25, 2007
Guidance on Off-Premise
Changeable Message Signs

From: Gloria M. Shephard In Reply Refer to:
/s/ G M Shepherd HEPR-20
Associate Administrator
for Planning, Environment,
and Realty

To: Division Administrators
Attn: Division Realty Professionals

Purpose

The purpose of this memorandum is to provide guidance to Division offices concerning off-premises changeable message signs adjacent to routes subject to requirements for effective control under the Highway Beautification Act (HBA) codified at 23 U.S.C. 131. It clarifies the application of the Federal Highway Administration (FHWA) July 17, 1996 memorandum on this subject. This office may provide further guidance in the future as a result of additional information received through safety research, stakeholder input, and other sources.

Pursuant to 23 CFR 750.705, a State DOT is required to obtain FHWA Division approval of any changes to

its laws, regulations, and procedures to implement the requirements of its outdoor advertising control program. A State DOT should request and Division offices should provide a determination as to whether the State should allow off-premises changeable electronic variable message signs (CEVMS) adjacent to controlled routes, as required by our delegation of responsibilities under 23 CFR 750.705(j). Those Divisions that already have formally approved CEVMS use on HBA control routes, as well as those that have not yet issued a decision, should re-evaluate their position in light of the following considerations. The decision of the Division should be based upon a review and approval of a State's affirmation and policy that: (1) is consistent with the existing Federal/State Agreement (FSA) for the particular State, and (2) includes but is not limited to consideration of requirements associated with the duration of message, transition time, brightness, spacing, and location, submitted for FHWA approval, that evidence reasonable and safe standards to regulate such signs are in place for the protection of the motoring public. **Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s.**

This Guidance is applicable to conforming signs, as applying updated technology nonconforming, signs would

be considered a substantial change and inconsistent with the requirements of 23 CFR 750.707(d)(5). As noted below, all of the requirements in the HBA and its implementing regulations, and the specific provisions of the FSAs, continue to apply.

Background

The HBA requires States to maintain *effective control* of outdoor advertising adjacent to certain controlled routes. The reasonable, orderly and effective display of outdoor advertising is permitted in zoned or unzoned commercial or industrial areas. Signs displays and devices whose *size, lighting and spacing are consistent with customary use determined by agreement between the several States and the Secretary,* may be erected and maintained in these areas (23 U.S.C. § 131(d)). Most of these agreements between the States and the Secretary that determined the size, lighting and spacing of conforming signs were signed in the late 1960's and the early 1970's.

On July 17, 1996, this Office issued a Memorandum to Regional Administrators to provide guidance on off-premise changeable message signs and confirmed that FHWA has "always applied the Federal law 23 U.S.C. 131 as it is interpreted and implemented under the Federal regulations and individual Federal/State agreements,". It was expressly noted that "in the twenty-odd years since the agreements have been signed, there have been many technological changes in signs, including changes that were unforeseen at the

time the agreements were executed. While most of the agreements have not changed, the changes in technology require the State and FHWA to interpret the agreements with those changes in mind". The 1996 Memorandum primarily addressed tri-vision signs, which were the leading technology at the time, but it specifically noted that changeable message signs "regardless of the type of technology used" are permitted if the interpretation of the FSA allowed them. Further advances in technology and affordability of LED and other complex electronic message signs, unanticipated at the time the FSAs were entered into. require the FHWA to confirm and expand on the principles set forth in the 1996 Memorandum.

The policy espoused in the 1996 Memorandum was premised upon the concept that changeable messages that were fixed for a reasonable time period do not constitute a moving sign. If the State set a reasonable time period, the agreed-upon prohibition against moving signs is not violated. Electronic signs that have stationary messages for a reasonably fixed time merit the same considerations.

Discussion

Changeable message signs, including Digital/LED Display CEVMS, are acceptable for conforming off-premise signs, if found to be consistent with the FSA and with acceptable and approved State regulations, policies and procedures.

This Guidance does not prohibit States from adopting. more restrictive requirements for permitting CEVMS to the extent those requirements are not inconsistent with the HBA, Federal regulations, and existing FSAs. Similarly, Divisions are not required to concur with State proposed regulations, policies, and procedures if the Division review determines, based upon all relevant information, that the proposed regulations, policies and procedures are not consistent with the FSA or do not include adequate standards to address the safety of the motoring public. If the Division Office has any question that the FSA is being fully complied with, this should be discussed with the State and a process to change the FSA may be considered and completed before such CEVMS may be allowed on HBA controlled routes. The Office of Real Estate Services is available to discuss this process with the Division, if requested.

If the Division accepts the State's assertions that their FSA permits CEVMS, in reviewing State-proposed regulations, policy and procedures for acceptability, Divisions should consider all relevant information, including but not limited to duration or message, transition time, brightness, spacing, and location, to ensure that they are consistent with their FSA and that there are adequate standards to address safety for the motoring public. Divisions should also confirm that the State provided for appropriate public input, consistent with applicable State law and requirements, in its interpretation of the terms of their FSA as allowing CEVMS in accordance with their proposed regulations, policies, and procedures.

Based upon contacts with all Divisions, we have identified certain ranges of acceptability that have been adopted in those States that do allow CEVMS that will be useful in reviewing State proposals on this topic. Available information indicates that State regulations, policy and procedures that have been approved by Divisions to date, contain some or all of the following standards:

- Duration of Message
    - Duration of each display is generally between 4 and 10 seconds – 8 seconds is recommended.
- Transition Time
    - Transition between messages is generally between 1 and 4 seconds – 1-2 seconds is recommended.
- Brightness
    - Adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety or the motoring public.
- Spacing
    - Spacing between such signs not less than minimum spacing requirements for signs under the FSA, or greater if determined appropriate to ensure the safety of the motoring public.

- Locations
    - o Locations where allowed for signs under the FSA except such locations where determined inappropriate to ensure safety of the motoring public.

Other standards that States have found helpful to ensure driver safety include a default designed to freeze a display in one still position if a malfunction occurs; a process for modifying displays and lighting levels where directed by the State DOT to assure safety of the motoring public; and requirements that a display contain static messages without movement such as animation, flashing, scrolling, intermittent or full-motion video.

Conclusion

This Memorandum is intended to provide information to assist the Divisions in evaluating proposals and to achieve national consistency given the variations in FSAs, State law, and State regulations, policies and procedures. It is not intended to amend applicable legal requirements. Divisions are strongly encouraged to work with their State in its review of their existing FSAs and, if appropriate, assist in pursuing amendments to address proposed changes relating to CEVMS or other matters. In this regard, our Office is currently reviewing the process for amending FSAs, as established in 1980, to determine appropriate revisions to streamline requirements while continuing to ensure there is adequate opportunity for public involvement.

For further information, please contact your Office of Real Estate Point of Contact or Catherine O'Hara (Catherine.O'Hara@dot.gov).