NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES, Petitioner, BENEDICT HILLS ESTATES ASSOCIATION; BENEDICT HILLS HOMEOWNERS ASSOCIATION, Petitioners-Intervenors, v. FEDERAL AVIATION ADMINISTRATION; STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration, Respondents.	No. 19-73164 MEMORANDUM*

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

Argued and Submitted September 14, 2021
Pasadena, California

Before: GOULD, BERZON, and COLLINS, Circuit Judges.

Los Angeles ("the City") seeks this court's review, under 49 U.S.C. § 46110,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

of a letter the Federal Aviation Administration ("FAA") sent the City in response to one the City sent the agency. In its letter, the City alleged the FAA had admitted to changing flight procedures—specifically, that it was now intentionally directing flights departing Hollywood Burbank Airport ("Airport") from Runway 15 to head further south before banking a turn north—and did not follow the requisite environmental and administrative procedures before making the change. The City requested that the FAA rescind the alleged change and direct air traffic controllers to follow previous protocols. The FAA's six-sentence letter in response ("FAA Letter") stated only that it did not earlier concede any changes to the air traffic control protocol for the Airport and that any southern shift in flight paths is due to factors built into the existing protocol, such as weather, pilot abilities, and air traffic volume and complexity.

49 U.S.C. § 46110(a) allows "a person disclosing a substantial interest in an *order* issued by . . . the Federal Aviation Administration" to seek review directly by a court of appeals. *Id.* (emphasis added). The term "order" in the statute has been interpreted to mean "final order," borrowing from the APA's requirement that a reviewable order be "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking." *S. Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672, 675 (9th Cir. 1989) (quoting 5 U.S.C. § 551(6)) (interpreting the statute at issue here by looking to the APA). Both parties agree that if the FAA Letter is not

a final order, we lack jurisdiction. Because we hold the FAA Letter was not a final order, we dismiss this matter for lack of jurisdiction.

When considering a purported final order, our overarching consideration is whether the document "imposes an obligation, denies a right, or fixes some legal relationship." *MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008) (quoting *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006)). We use a four-part test to make the determination, asking whether the document has all of the following features:

> (1) it is supported by a reviewable administrative record, (2) it is a definitive statement of the agency's position, (3) it has a direct and immediate effect on the day-to-day business on the party asserting wrongdoing, and (4) it envisions immediate compliance with [the order's] terms.

MacLean, 543 F.3d at 1149 (cleaned up). The FAA Letter does not meet these requirements.

Reviewable administrative record. We need not consider the first element because none of the other three elements is met.

Definitive statement of the agency's position. The FAA Letter did not express a definitive agency position. Purported final orders that comment only "briefly and tentatively" upon a subject but do not "initiate an agency process" nor "specify the exact form" that subsequent action must take do not constitute definitive statements. *See Air California v. U.S. Dep't of Transp.*, 654 F.2d 616, 620-21 (9th Cir. 1981). The FAA Letter does not make a definitive statement of

the agency's position. It comments briefly upon an earlier statement made by the City, and it does so to the effect that the agency position remains what it was.

The most the FAA Letter does is disavow the City's interpretation of earlier statements an FAA employee made in a public forum. An agency's statement disputing an interested party's interpretation of an earlier agency statement is not the type of definitive statement of policy *MacLean* requires. *See, e.g.*, *MacLean*, 543 F.3d at 1149 (finding a definitive statement in an agency document determining the protected legal status of a contested message); *Gilmore*, 435 F.3d at 1131-33 (finding a definitive statement in an agency directive laying out a detailed security policy and how it should be implemented).

Direct and immediate effect. The FAA Letter produced no direct and immediate effect. This conclusion follows from the second factor. The FAA Letter announced no new agency position that could have caused a change from the status quo. According to the FAA, air traffic controllers, before, during, and after the FAA Letter have followed the same procedure at the airport: they issue directions to pilots based on factors such as temperature and air traffic volume to keep flight paths separate. The FAA Letter had no bearing on this procedure other than to reaffirm it, so it "left the world just as it found it." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). "The Letter neither announced a new interpretation of the regulations nor effected a change in the regulations

themselves." *Id.* at 427.

Immediate compliance. Finally, from the foregoing it follows that the FAA Letter did not "envision[] immediate compliance" with its terms. *MacLean*, 543 F.3d at 1149 (citation omitted). The Letter contains no terms with which the FAA could have envisioned compliance.

In sum, we hold that the FAA Letter we are asked to review is not a final order, so we lack jurisdiction to review it. We cannot and do not decide whether the City could have raised its concerns about the current flight patterns around the Airport in a different manner that would have resulted in jurisdiction in this court or a district court to review those patterns. **PETITION DENIED.**

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

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The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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