United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1054 **September Term, 2017**

FILED ON: JUNE 12, 2018

NATIONAL BUSINESS AVIATION ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

MICHAEL P. HUERTA, ADMINISTRATOR AND FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS

CITY OF SANTA MONICA,
INTERVENOR

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

Before: TATEL, WILKINS and KATSAS, *Circuit Judges*.

J U D G M E N T

The court considered this petition for review on the record and on the briefs and oral arguments of the parties. The court has given the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied.

This case arises from longstanding disputes between the Federal Aviation Administration and the City of Santa Monica, California regarding the Santa Monica Municipal Airport. The City owns and operates the airport, but has long wished to close it. In these disputes, the FAA at times has maintained that deed restrictions require the City to operate the airport in perpetuity, and that grant conditions require the City to operate the airport through 2023. According to the City, the deed restrictions expired decades ago, and the grant conditions expired in 2014. To adjudicate the deed issue, the City brought a quiet-title action against the United States in the District Court for the Central District of California. To adjudicate the scope of the grant conditions, the City filed a petition for review of an adverse FAA decision in the Court of Appeals for the Ninth Circuit.

While both actions remained pending, the FAA and the City undertook to settle their differences. On January 30, 2017, the parties signed a document styled "Settlement Agreement/Consent Decree." Under the terms of that document, the City would operate the airport through 2028, but could close the airport in 2029. Moreover, the City could immediately shorten the airport's sole runway.

By its terms, the January 30 agreement was conditioned upon further judicial action in the quiet-title case. Specifically, the parties promised to present the agreement to the district court "for entry as a Consent Decree" (JA 792), and the agreement would become effective only "upon the date the [district court] enter[ed] an order approving" it (JA 800). Critically, without such a court order, the agreement would be "of no force and effect and [could] not be used by either Party for any purpose whatsoever." JA 795. On February 1, 2017, the district court found the proposed agreement to be "fair, reasonable and adequate to all concerned." JA 818 (quotation marks omitted). It therefore "sign[ed] and approv[ed] the Order/Consent Decree." *Id.*; *see also* JA 822 (signing stipulation as order); JA 833 (signing "Settlement Agreement/Consent Decree" as order).

Petitioners are businesses and trade groups who want the airport to continue operating indefinitely and without a shortened runway. They contend that the arrangement summarized above violated various federal laws, including the Surplus Property Act, the Airport Noise and Capacity Act, and the National Environmental Policy Act. Petitioners do not dispute that the February 1 consent decree—a judicial order entered by the Central District of California—is reviewable only in the Ninth Circuit. Yet petitioners seek to disentangle that decree from the preliminary agreement that the parties reached on January 30, which they contend is final agency action reviewable in this Court under 49 U.S.C. § 46110(a). That statute provides for judicial review in the courts of appeals of "an order issued by . . . the [FAA] Administrator." In a line of settled decisions, this Court has held that only final orders are reviewable under § 46110(a). *See, e.g.*, *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015).

The FAA argues that the petition should be dismissed for two reasons. First, it contends that petitioners lack Article III standing because a decision invalidating the agreement, but leaving the consent decree undisturbed, would not redress petitioners' alleged injuries. Second, the FAA contends that the agreement does not constitute final agency action reviewable under § 46110(a). We disagree with the first contention, but agree with the second.

The redressability prong of Article III standing requires "a likelihood that the requested relief will redress the alleged injury" of the party invoking federal-court jurisdiction. *Steel Co.*, 523 U.S. at 103. The plaintiff or petitioner must show that a favorable decision would result in a "significant increase in the likelihood that [it] would obtain relief." *Utah v. Evans*, 536 U.S. 452, 464 (2002). It "need not show to a certainty that a favorable decision will redress its injury." *Teton Historic Aviation Found. v. U.S. Dep't of Defense*, 785 F.3d 719, 726 (D.C. Cir. 2015) (quotation marks and brackets omitted).

There is at least a significant possibility that a decision by this Court invalidating the January 30 agreement also would unravel the February 1 consent decree, thus redressing any harms flowing from both. To be sure, the Central District of California is not bound by this Court's decisions as a matter of precedent. However, if the settlement agreement were final agency action (which we address below), then this Court would have "exclusive jurisdiction" to determine its

lawfulness. *See* 49 U.S.C. § 46110(c). Moreover, if the settlement agreement did violate federal law (which we assume for purposes of determining redressability), then so too would a consent decree incorporating its terms. And under Ninth Circuit precedent binding on the Central District, courts cannot immunize agency actions from judicial review by incorporating them into consent decrees. *See, e.g.*, *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1187 (9th Cir. 2013). Finally, even if the Central District found unpersuasive a ruling by this Court that the settlement agreement was final agency action reviewable only by this Court, it still might well find persuasive this Court's analysis of the merits. After all, the objections pressed here by petitioners were not before the Central District when it entered the consent decree. For these reasons, we conclude that petitioners' alleged injuries are redressable, and petitioners thus have Article III standing.

However, the settlement agreement is not a final order of the FAA, and therefore is not reviewable under 49 U.S.C. § 46110(a). "[I]n order for us to entertain a petition under this section, the challenged order must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality." *Ass'n of Flight Attendants*, 785 F.3d at 716 (quotation marks omitted). An order is final if it both ends the agency's decisionmaking process and produces "direct and appreciable legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted). Here, the preliminary agreement that the parties reached on January 30, as distinct from the consent decree that the district court entered on February 1, produced no legal consequences at all. To the contrary, the agreement did not become effective until the decree was entered (JA 800) and, absent that decree, the agreement would have been "of no force and effect" whatsoever (JA 795). At most, the agreement reflected the FAA's intent to be bound by subsequent judicial action that the agency was inviting. In that respect, it resembles the non-binding letter of intent that we held not to constitute final FAA action in *Village of Bensenville v. FAA*, 457 F.3d 52, 68-70 (D.C. Cir. 2006).

Petitioners invite us nonetheless to deem final the January 30 agreement, lest the FAA escape judicial review through what petitioners describe as "procedural trickery." Pet. Br. 48-49. However, there is nothing unusual or untoward about parties seeking to settle litigation through a consent decree. Moreover, the consent decree was itself reviewable in the Ninth Circuit. We recognize that two of the petitioners had previously been denied intervention in the quiet-title action on the ground that the FAA adequately protected their interests. However, none of the petitioners sought intervention after the "Settlement Agreement/Consent Decree" created fissures between the FAA, which now wants to compromise, and petitioners, who want to press for the airport to remain open in perpetuity. Moreover, another petitioner was seeking intervention in the Ninth Circuit appeal regarding the grant conditions, yet it raised no objection when the appeal was dismissed as provided for in the decree. Petitioners further object that because the quiet-title action was limited to a dispute about certain deed restrictions, they could not have raised their current arguments in that case. Petitioners are mistaken; the Ninth Circuit repeatedly has held that intervenors may challenge consent decrees entered into by federal agencies as violating any applicable statutes or regulations. *See, e.g.*, *Conservation Nw.*, 715 F.3d at 1185-87; *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165-66 (9th Cir. 2012).

Petitioners further contend that the "Settlement Agreement/Consent Decree," by its terms, makes the January 30 agreement stand on its own bottom, separate and apart from the February 1 consent decree. For example, petitioners note that only some provisions of the decree are enforceable by injunction, whereas the parties expressly reserved the right "to judicially enforce

any terms or provisions of this Agreement." JA 799. But that provision cannot be read to exclude certain provisions of the agreement from the consent decree, for the very next provision says that *all* of the "terms of this Agreement shall be memorialized and embodied in a consent decree." *Id.* Moreover, the "Settlement Agreement/Consent Decree" channels all enforcement disputes under the "Agreement" into the Central District, as "the court having jurisdiction over the Consent Decree," thus confirming that the two operate as a unified whole. JA 795. The sole exception involves terms related to airport curfews, which the parties specified would "not be affected by this Agreement," and for which final FAA decisions thus would remain "within the exclusive jurisdiction of the applicable U.S. Court of Appeals." JA 797. No similar exception governs the terms that petitioners seek to challenge—those involving runway length (JA 795-96) and the contested deed restrictions and grant conditions (JA 798).

Along similar lines, petitioners highlight a provision of the "Settlement Agreement/Consent Decree" stating that "the Consent Decree . . . shall expire on December 31, 2028," but "expiration of the Decree shall have no effect on the terms or condition[s] of this Agreement, which terms or conditions shall survive the expiration of the Decree." JA 795. We interpret this language to mean simply that the terms of the agreement, as embodied in the consent decree, will retain their force after 2028. Given the terms of the deal, it made perfect sense for active judicial supervision to end after 2028, when the City will no longer have any obligation to operate the airport. And it likewise made perfect sense to confirm that, after 2028, the FAA could no longer press Santa Monica to keep the airport open. Unlike the petitioners, we see all of this as flowing most proximately from the terms of the consent decree, without which none of these terms would ever have come into effect.

For these reasons, we deny the petition.

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Pursuant to D.C. Circuit Rule 36(d), this disposition will not be published. The clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk