ORAL ARGUMENT NOT YET SCHEDULED
No. 17-1054

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL BUSINESS AVIATION ASSOCIATION, INC., et al.,

Petitioners,

v.

MICHAEL P. HUERTA, ADMINISTRATOR; FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition For Review Of An Order Of
The Federal Aviation Administration

MOTION OF CITY OF SANTA MONICA FOR LEAVE TO INTERVENE

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INTRODUCTION

Until very recently, the City of Santa Monica (City) and the Federal Aviation Administration (FAA) were engaged in a decades-long battle over the City's legal authority to control the Santa Monica Municipal Airport, which is located on City property and operated by the City. Finally, less than a month ago, the FAA and the City settled their dispute. Through a court-approved consent decree, the FAA and the City agreed that the City may, among other things, close the airport within approximately 12 years and shorten the airport runway.

The petitioners in this case—the National Business Aviation Association, Inc., the Santa Monica Airport Association, Inc., Bill's Air Center, Inc., Kim Davidson Aviation, Inc., Redgate Partners, LLC, and Wonderful Citrus LLC (collectively, Petitioners)—ask this Court to undo that consent decree and deprive the City of the rights and benefits it conferred. They apparently contend that the FAA and the City could not settle their legal disputes through this court-approved decree.

To ensure that the City will continue to be able to satisfy the terms and conditions of the decree and exercise control over its airport property, the City makes this motion to intervene. *See* Fed. R. App. P. 15(d) (providing for intervention in a petition for review proceeding); 49 U.S.C. § 46109 (same with respect to petitions challenging certain FAA actions). Because Petitioners' action

threatens to deprive the City of the benefits secured by the challenged consent decree (undermining actions already taken by the City in reliance on that decree), and because the FAA—which was long adverse to the City with respect to the airport, and which retains divergent goals—may not fully and adequately represent the City's interests, the City may intervene as a matter of right. In any event, this Court should exercise its discretion to allow the City to intervene, given the extent to which this action implicates the City's interests. While the FAA does not oppose this motion, Petitioners have indicated that they will file an opposition.

BACKGROUND

The City owns and operates the Santa Monica Airport, which lies on 227 acres of land that the City purchased between 1926 and 1941. But the continued operation of the airport has caused serious adverse consequences for City residents of the densely populated surrounding neighborhood, who are subject to the airport's safety hazards, noise, and pollution. For years, the FAA and the City engaged in a series of ongoing disagreements regarding the City's control over Santa Monica Municipal Airport. *See, e.g.*, *United States v. City of Santa Monica*, 330 F. App'x 124 (9th Cir. 2009) (upholding FAA order requiring the City to allow certain categories of aircraft to use the airport). As of a little more than a month ago, these disputes were being litigated in three primary fora.

First, the City had brought suit under the Quiet Title Act, 28 U.S.C. § 2409a, in the Central District of California, seeking, among other things, a declaration that the City had unencumbered title to the airport property. Complaint, *City of Santa Monica v. United States*, No. 13-CV-8046, Dkt. No. 1 at 21-22 (C.D. Cal. Oct. 31, 2013). The City filed this suit in response to the FAA's 2008 claim that, under the terms of a 1948 "Instrument of Transfer" executed by the City and the federal government, title to the City's property would pass to the federal government should the City cease using the airport property as an airport. *Id.* at 23. In 2016, the Ninth Circuit reversed a decision by the district court dismissing that suit and remanded for further proceedings. *City of Santa Monica v. United States*, 650 F. App'x 326 (9th Cir. 2016). Trial was scheduled to begin on August 29, 2017. Stipulation and Order, *City of Santa Monica v. United States*, No. 13-CV-8046, Dkt. No. 52 at 7 (C.D. Cal. Jan. 30, 2017).

Second, the City had filed a petition for review in the Ninth Circuit challenging an FAA order respecting the City's obligations under the Airport Improvement Program ("AIP"). *City of Santa Monica v. FAA*, No. 16-72827 (9th Cir.). In 1994, the City accepted an AIP grant to fund improvements to the airport. Final Agency Decision, *Nat'l Bus. Aviation Ass'n v. City of Santa Monica*, FAA Docket No. 16-14-04 (Aug. 15, 2016). In exchange for these funds, the City agreed to be bound by certain "Grant Assurances," which governed the City's

operation of the airport. *Id.* at 4. By the terms of the grant agreement, these obligations were to expire in 20 years at the latest. *Id.* at 8. But in the challenged order, the FAA determined that the City, by agreeing to a 2003 amendment to the 1994 grant agreement, pushed the expiration date of these obligations from 2014 into 2023. *Id.* at 11.

Third, the FAA had issued a Notice of Investigation to determine whether the City was violating its Grant Assurances with respect to certain fixed-based operators on the airport. *In re Compliance with Fed. Obligations by the City of Santa Monica*, FAA Docket No. 16-16-13 (Sept. 26, 2016). The FAA issued an interim cease and desist order preventing the City from removing these fixed-based operators from the airport pending the agency's final decision. Order, *In re Compliance with Fed. Obligations by the City of Santa Monica*, FAA Docket No. 16-16-13 (Dec. 12, 2016).

On January 30, 2017, the FAA and the City entered into a settlement agreement that, if approved by the Central District of California district court, would resolve all of these ongoing disputes. Stipulation and Order/Consent Decree, *City of Santa Monica v. United States*, No. 13-CV-8046, Dkt. No. 52 (C.D. Cal. Jan. 30, 2017). The district court approved the agreement and entered a consent decree the following day. Consent Decree, *City of Santa Monica v. United States*, No. 13-CV-8046, Dkt. No. 57 (C.D. Cal. Feb. 1, 2017). Pursuant to the

consent decree, the City is obligated to continue to operate the airport through 2028; it may then permanently close the airport. *Id.* at 7. In the interim, the City is permitted to reduce the length of the runway from its current length of 4,973 feet to 3,500 feet. *Id.* at 4-5. Following entry of the consent decree, the FAA dismissed the Notice of Investigation. *Id.* at 4. The parties also jointly stipulated to dismissal of the Ninth Circuit petition for review, and the Ninth Circuit has accordingly dismissed that appeal. Order, *City of Santa Monica v. FAA*, No. 16-72827, Dkt. No. 29 (9th Cir. Feb. 13, 2017).

Although the parties have already undertaken actions in accordance with this consent decree, Petitioners now seek to set it aside. Claiming that the agreement embodied in the decree represents a "final order" of the FAA, they filed a petition for review in this Court. Pet. at 1. They contend that the FAA has improperly released "obligations incurred by the City of Santa Monica pursuant to deeds and grants issued by the federal government," and that the FAA has impermissibly modified "the terms and conditions governing the City's future operation of and the FAA's future oversight" of the airport. *Id.* at 1-2.

ARGUMENT

Intervention in this Court is "governed by the same standards as in the district court." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). A prospective intervenor generally must demonstrate that it

satisfies Article III's standing requirements. *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994); *but see Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (noting that "whether Article III standing is required for permissive intervention" is "an open question in this circuit"). If the prospective intervenor also satisfies the standard set out in Federal Rule of Civil Procedure 24(a)(2)—that is, the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"—then this Court must permit it to intervene. *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008). Even if a party is not entitled to intervention as a matter of right, moreover, this Court may still allow permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

Here, given the City's unquestionable interest in this petition involving the City's rights and obligations with respect to its own property, these standards are met. The City is entitled to intervene or, at the very least, should be permitted to do so.

I. The City Has Article III Standing

"The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability."

Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 316 (D.C. Cir. 2015). Because Petitioners seek to challenge a purported FAA action that, as they put it, governs the City's "obligations" respecting the airport, the City has standing to intervene in defense of that action. Pet. at 1.

The City would suffer "injury in fact" were the Petitioners to prevail. This Court has "generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 317. The circumstances here perfectly fit that description. The consent decree that Petitioners seek to challenge releases the City from any purported obligation to operate the airport, enables the City to shorten the airport runway significantly, and frees the City from the FAA's adverse cease and desist order regarding airport lessees. *City of Santa Monica v. United States*, No. 13-CV-8046, Dkt. No. 57 at 4-8 (C.D. Cal.). Each of these results is a cognizable benefit to the City—that is why the City was willing to enter into the consent decree, and why it was willing to agree to dismiss its pending litigation against the FAA (which has now occurred). Were the decree set aside, the City would be deprived of these benefits. It would be returned to the state of legal uncertainty in which it previously found itself: with the City contending that all of its obligations already have ended, but the FAA potentially seeking to subject the City to onerous

obligations for years—or even decades—to come. Thus, because the challenged consent decree eliminates "potential direct regulation" of the City, the City "has a significant and direct interest in the favorable action," and the "threatened loss of that favorable action constitutes a concrete and imminent injury." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 318 (internal quotation marks omitted).

The other two elements of standing, causation and redressability, are also satisfied for essentially the same reasons. The relief Petitioners request would directly cause the City injury; likewise, the defeat of Petitioners' challenge would prevent the City from suffering that injury. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (causation and redressability elements satisfied when party seeks intervention to defend favorable agency action). In other words, because Petitioners' challenge, if successful, would injure the City, it "rationally follows" that the City can establish causation and redressability. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316.

None of this is to say, of course, that Petitioners will prevail in this litigation, or even that they have any likelihood of prevailing. The City agrees fully, for example, with the FAA's motion to dismiss, which explains that the consent decree is not an agency "order" that may be challenged via petition for review in this Court. FAA Mot. to Dismiss at 6-9. But the lack of merit to Petitioners' challenge does not deprive the City of standing to defend against it: this Court has "never

required, as the cost of admission, an intervenor-defendant to prove the merits of its adversary's case." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 318. Instead, "[f]or standing purposes, it is enough that a [petitioner] seeks relief, which, if granted, would injure the prospective intervenor." *Id.* The petition here seeks to do just that.

II. The City Is Entitled To Intervene As Of Right

This Court has identified four requirements a party must satisfy to be entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2): "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner*, 532 F.3d at 885. The City's application meets each of these criteria.

First, the City's motion to intervene is timely. Federal Rule of Appellate Procedure 15(d) sets forth a default period of 30 days in which a party may seek to intervene in a proceeding challenging an agency action. The City has acted well within this presumptive deadline, filing its motion just 15 days after the Petitioners filed their petition for review on February 13. Pet. at 2.

Second, the City has a legally protected interest in the action. As this Court has held, this prong of the Rule 24(a)(2) inquiry dovetails with Article III standing

requirements. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998). Thus, that the City "has constitutional standing is alone sufficient to establish that [it] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)). Indeed, because this action concerns the City's use and possession of its own *property*—the airport—its interest is apparent. *See Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("An intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit.").

Third, for many of the same reasons, Petitioners' action also threatens to directly impair the City's interest. In the consent decree, the City definitively confirmed its ability to, among other things, close the airport and shorten the runway (and it agreed to dismiss its pending litigation in exchange for such confirmation). If this Court were to hold that somehow the United States and the FAA lacked the authority to allow the City to take these actions, then the City's "task of reestablishing the status quo" created by the consent decree "will be difficult and burdensome"—and perhaps even impossible. *Fund for Animals*, 322 F.3d at 735; *see Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (the possible creation of "unfavorable precedent" that would impair the prospective intervenor's interests in subsequent litigation "is sufficient to support intervention under our caselaw").

Fourth, the FAA cannot be expected to adequately represent the City's interests. This final requirement for intervention is "not onerous," particularly not when the only existing party that might possibly provide such representation is the federal government. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 321 (internal quotation marks omitted). This Court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors," as they are charged with representing a much broader set of interests than those advanced by any party (including another governmental body) that has particular interest in the specific dispute. *Fund for Animals*, 322 F.3d at 736-37; *see, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986) ("Since State Farm's interest cannot be subsumed within the shared interest of the citizens of the District of Columbia, no presumption exists that the District will adequately represent its interests.").

That conclusion holds true here. The consent decree represents that culmination of arm's length negotiation and compromise. Yet going forward, each party retains its own interests and perspective. The FAA does not share all of the City's interests that would be relevant to this litigation, nor should it be expected to, especially if this Court were to decline to grant the FAA's pending motion to dismiss. The FAA does not, for example, fully share the City's interest in reducing the adverse impacts experienced by the nearby residents of the airport, or the

City's unique interests as a landowner and airport proprietor. In fact, the FAA's interests are in many respects potentially *adverse* to—or at least not in full harmony with—those of the City. The challenged consent decree was the product of an agreement between the FAA and the City to resolve their competing interests and legal claims. Like any other settlement, it required give and take on the part of both parties. While the FAA no doubt agrees with the City that the consent decree is "lawful," that does not mean the agency will give the City's interests "the kind of primacy that the [City] would give them," nor will the agency's assessment of the City's preexisting legal entitlement to control the airport property "necessarily match" the City's own appraisal. *Fund for Animals*, 322 F.3d at 736. As a result, the FAA cannot "adequately represent" the City's interests, and the City is entitled to intervene. *Id.*

III. In The Alternative, This Court Should Grant The City Permissive Intervention

Even if this Court concludes the City does not satisfy the requirements for intervention as of right, it should nevertheless permit the City to intervene. Federal Rule of Civil Procedure 24(b)(1) provides that, upon a timely motion, "the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The City meets that threshold requirement, as the City's "claim or defense" is that the consent decree governing the City's airport is lawful—precisely the "question of law or fact" that Petitioners

seek to litigate. Moreover, the City's intervention here could not "unduly delay or prejudice the adjudication of the original parties' rights" when the petition has only just been filed. Fed. R. Civ. P. 24(b)(3). Given the critical City interests implicated by this litigation, this Court should therefore exercise its discretion to permit the City to intervene.

CONCLUSION

For the foregoing reasons, this Court should grant the City's motion and allow it to intervene in this proceeding.

Dated: February 28, 2017

Respectfully submitted,

/s/ Deanne E. Maynard

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,039 words.

Dated: February 28, 2017 /s/ Deanne E. Maynard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 28, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 28, 2017 /s/ Deanne E. Maynard

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