ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1128

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE,
THE CONSUMER ADVOCATES FOR SMOKE-FREE ALTERNATIVES ASSOCIATION, and GORDON CUMMINGS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, and ANTHONY FOXX, in his official capacity as Secretary of the U.S. Department of Transportation,

Respondents.

On Petition for Review of an
Order of the Department of Transportation

REPLY BRIEF OF PETITIONERS

Hans Bader, D.C. Bar No. 466545
Sam Kazman, D.C. Bar No. 946376
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, D.C. 20036
Telephone: (202) 331-2278
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks

Statutes

* Authorities upon which we chiefly rely are marked with asterisks

Regulations

Other Authorities

* Authorities upon which we chiefly rely are marked with asterisks

* Authorities upon which we chiefly rely are marked with asterisks

GLOSSARY

ADA	Airline Deregulation Act
APA	Administrative Procedure Act
CASAA	Consumer Advocates for Smoke-Free Alternatives Association
CEI	Competitive Enterprise Institute
DOT	United States Department of Transportation
FAA	Federal Aviation Administration
JA	Joint Appendix
NPRM	Notice of Proposed Rulemaking
OB	Opening Brief of the Petitioners
ppb	Parts per billion
ppm	Parts per million
RB	Respondents' Brief

SUMMARY OF ARGUMENT

Thirty years ago this Court noted that "some will find ambiguity in a 'No Smoking' sign."[1] DOT has done exactly that, claiming that Congress's 1989 smoking ban on airlines is so ambiguous that the agency is entitled, under *Chevron*, to redefine it to encompass e-cigarettes. DOT's claim runs directly counter to established canons of statutory construction regarding the ordinary and contemporary meaning of everyday words. When Congress leaves a statutory term undefined because its meaning is plain, that is not an invitation for agency to expand its mission via redefinition.

DOT originally claimed that two other statutes authorized its rule; 49 USC 41702, dealing with "safe and adequate interstate air transportation," and 49 USC 41712, dealing with "unfair and deceptive practices." In its brief DOT now disclaims the latter. RB 3 n.1. But DOT's claim that e-cigarettes pose a safety threat to airline passengers rests on sheer speculation—studies that state only that more research is needed. DOT attempts to sidestep this issue by expressly resting its authority on "passenger discomfort, which does not turn on definitive evidence of harm." RB 36. But even this claim is speculative, because DOT has failed to

[1] *International Union v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir.1987).

point to a single instance of *reported*, rather than hypothesized, passenger discomfort.

ARGUMENT

I. The Secretary's Definition of E-Cigarette Vaping As Smoking Was Unauthorized

A. Congress Did Not Delegate the Authority to Redefine Smoking

DOT argues that because "Congress did not define 'smoking,'" "the Secretary reasonably filled this statutory gap by defining 'smoking' to include . . . electronic cigarettes whether or not they are a tobacco product." Brief for Respondents ("RB") at 15. But there was no gap to fill, since smoking bans are the classic example of clear statutory language that agencies cannot redefine. *International Union*, 815 F.2d at 1575 (noting that no language is perfectly free of ambiguity, since "some will find ambiguity even in a 'No Smoking' sign.").

The word "smoking" has a clear meaning and is not a technical term. "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). The Court is required to rely on "the ordinary meaning of the words used," rather than deferring to an agency's contrary position. *INS v. Cardoza–Fonseca*, 480 U.S. 421, 431–32 (1987). The fact that Congress did not supply a specific definition does not mean that the agency can adopt a definition at variance with "the ordinary meaning of

the words used." *Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 137, 149 (1984) (rejecting agency's interpretation; since "[n]either the term 'notes' nor the term 'other securities' is defined by the statute," court applies their "ordinary meaning'"); *accord Burlington Northern v. U.S.*, 556 U.S. 599, 610-11 (2009) (phrase "arrange for" has its "ordinary meaning" where statute did not define it).

Congress's intent was even clearer when it enacted the anti-smoking ban in 1989. *See* Pub. L. No. 101–164, § 335, 103 Stat. 1069 (1989). At that time, e-cigarettes did not exist. All cigarettes (and all smoking) involved combustion, and the only "fumes" (RB 21-22) a person could inhale came from those produced by burning tobacco. (The ban's legislative history confirms that, showing that it was motivated by concern about the health effects to non-smoking passengers of "environmental tobacco smoke," primarily "sidestream smoke."[2] By contrast, e-cigarettes neither contain tobacco, nor emit sidestream vapor, let alone "sidestream smoke."[3]).

That is the end of the matter, since a court must find that the statute was ambiguous at the time of its enactment, before Congress can be said to have

---

[2] *See* H.R. Rep. No. 101-212, at 3 (1989) (citing "health findings" about "exposure of nonsmokers" to "environmental tobacco smoke"; "the same carcinogens are present in sidestream smoke and mainstream smoke, and…many chemicals are found at higher concentrations in the sidestream smoke, which is the major component of environmental tobacco smoke.")

[3] As noted in our opening brief at 24, the Czogala study DOT relied on concedes that "no sidestream vapor is generated from e-cigarettes."

delegated to the agency the authority to resolve its meaning. *Terrell v. United States*, 564 F.3d 442, 449-50 (6th Cir. 2009) ("statutory ambiguity must be determined at the time language was enacted into law"), *citing Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (Court applies the "ordinary meaning of the" statute's words "as understood when [it] was enacted").

The absence of a statutory definition of 'smoking' does not make the term vague, since courts are to apply the dictionary definition of the term, unless Congress provided a specific definition. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988). As our opening brief noted, the commonplace dictionary definition of "smoking" does not reach e-cigarettes, but rather involves the burning of tobacco. *See* OB 12 (smoking means to "breathe smoke into the mouth or lungs from burning tobacco," quoting Cambridge English Dictionary).

As DOT concedes, "As a verb, to 'smoke' means to 'draw in and exhale smoke from a cigarette, cigar, or pipe,' *Webster's II New Riverside University Dictionary* 1098 (1994)." RB 20. Other dictionaries likewise require the inhalation and exhalation of smoke, or of fumes from burning tobacco. To smoke means "to inhale and exhale the fumes of burning plant material and esp. tobacco." *Merriam-Webster's Collegiate Dictionary* (Tenth ed., 1993 and 1995) at 1109; Merriam-Webster, *Webster's Ninth New Collegiate Dictionary* (1987) at 1113. Similarly, *Encyclopedia Britannica* (1988) defined smoking as "To inhale and exhale the

fumes of burning plant material (as tobacco)." *Id.* at 872.[4] And *Webster's Comprehensive Dictionary* (1987) defined it as "To inhale and exhale the smoke (tobacco, opium, etc.); also, to use a pipe, for this purpose." *Id.* at 1187. None of these definitions refer to vapors or aerosols, and all require burning or smoke.

DOT claims that fumes can involve vapor rather than smoke. RB 21-22. But that is irrelevant even if true, since most definitions that refer to fumes also typically require "burning," not just "fumes" (*See, e.g., Merriam-Webster's*, *supra; Encyclopedia Britannica, supra.*). Other definitions do not refer to fumes at all, clearly requiring "smoke," *see, e.g., Webster's Comprehensive, supra; Webster's II New Riverside University Dictionary*, *supra*, or refer to fumes from substances such as "tobacco" that are only produced by combustion. RB 21, citing *Oxford English Dictionary* 802 (2d ed. 1989).[5] That smoking bans do not reach vapor was even more obviously true a quarter century ago, when Congress enacted the

---

[4] This definition reads in full: "**smoke** *vb* 1 **a :** to emit or exhale smoke **b:** to emit excessive smoke **2** : to inhale and exhale the fumes of burning plant material (as tobacco); *also* : to use in smoking (*smoke* a cigar) **3** : to act on with smoke: as **a** : to drive away by smoke **b :** to blacken or discolor with smoke." *Id.* at 872.

[5] Other Oxford dictionaries don't refer to "fumes" in the relevant definition. *See, e.g., Little Oxford English Dictionary* (1994) at 617 (defining "*verb*" form of smoking as "inhale and exhale smoke of (cigarette, etc.)," and also listing smoking in less relevant senses such as "do this habitually; emit smoke or visible vapour; darken or preserve with smoke"). That dictionary also references vapor in terms of "burning," not aerosols like e-cigarettes, defining the noun "smoke" as "visible vapour from *burning* substance; act of smoking tobacco etc." *Id.* at 617 (italics added).

smoking ban, and the only "fume" one could possible inhale was that of a traditional cigarette or other plant material that burns, not an e-cigarette that produces aerosol.

DOT claims it can rewrite the statute as long as different dictionaries define smoking in slightly different ways. RB 21 (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions . . . each making some sense under the statute, itself indicates that the statute is open to interpretation.")). But the Supreme Court has rejected that claim. *MCI v. AT&T*, 512 U.S. 218, 225–27 (1994) (rejecting claim that "courts must defer to the agency's choice among available dictionary definitions," and holding that such deference applied in *Boston & Maine* only because there were "alternative definitions *within the dictionary cited*," which not only reflected "alternative interpretations are as old as the jurisprudence of this Court,'" but were found in other dictionaries as well).

Instead, courts apply the typical dictionary definition, disregarding outliers. *MCI*, 512 U.S. at 227 (1994) (courts should not follow "out-of-step" dictionary definitions). Here, the typical dictionary definition clearly requires burning smoke, not aerosols or vapors. Under DOT's idiosyncratic definition, even devices that obviously are not smoked would fall within Section 41706's language, such as a nicotine mouth spray, which no ordinary person would think of as "smoking" even

though it involves inhaling an aerosol.[6] To remedy its overbroad definition (which was so broad that it could "unintentionally include otherwise permissible medical devices that produce a vapor," 81 Fed. Reg. at 11416), DOT's final rule had to specifically exempt "products (other than electronic cigarettes) which meet the definition of a medical device . . . such as nebulizers." *Id.* at 11427.

Because Congress didn't delegate authority to regulate new technologies, it was wrong for the Agency's definition to "evolve[]" (RB 17) beyond smoking as it was known to the 101st Congress. Congress knows how to delegate such authority when it wants to. *Contrast* 47 U.S.C § 157 (bestowing authority on FCC to regulate new technologies). The reason that there is no definition of smoking in the statute is not because it was delegated to the agency; it's because it was so obvious it did not need stated.

Even if some possible boundaries of the smoking ban were not perfectly marked, the agency still could not fundamentally redefine it. The fact that it "may be impossible to eliminate all vagueness when interpreting a word" does not mean that word's clear meaning or "historical context" should be ignored. *Sandifer*, 134 at 878.

---

[6] *See Using Nicotine Mouth Spray to Help You Quit Smoking*, goo.gl/Essw6p.

DOT cites this courts' decisions in *Cablevision* and *Sabre* as examples of upholding a regulation of technology that Congress may not have foreseen. RB 18 (*citing Cablevision Sys. Corp. v. FCC,* 649 F.3d 695, 707 (D.C. Cir. 2011); *Sabre, Inc. v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005)). Both are inapposite. In *Cablevision,* the FCC statute at issue contained "expansive language" "intended to give the Commission sufficient flexibility to maintain a grip on the dynamic aspects of video programming so that it could pursue the statute's objectives as industry technology evolves." 649 F.3d at 707 (internal quotations and alterations omitted).

But Congress did not write broad language embodying such "flexibility" in § 41706. Instead, it used the word "smoking," which has a clear meaning and is not a technical term. *See Cardoza–Fonseca*, 480 U.S. at 431–32. In *Sabre*, the technology being regulated did not postdate the statute, it was simply a variation in the ownership structure of the industry. 429 F.3d at 1124. Moreover "ticket agent" in that statute had an express definition—"broad[ly]" worded—that applied to cover computer reservation systems whether directly owned by the airline or not. *Id.* at 1122, 1125.

B. The State Laws Against E-Cigarettes Cited by DOT Do Not Support Its Position

DOT cites state laws that include "e-cigarettes" as part of smoking. RB 23. But those laws all came about well after § 41706 became law. More importantly,

these laws had to be specifically amended to include e-cigarettes, precisely because the common, ordinary meaning of smoking does *not* encompass inhaling vapor from e-cigarettes. Congress did not so amend § 41706.[7]

Since e-cigarettes involve vaping, not the combustion of tobacco, in the absence of language specifically adding electronic cigarettes, even an expansive statutory definition of smoking does not reach e-cigarettes. *See* Va. Op. Att'y Gen. No. 10-029 (Apr. 27, 2010) (concluding that e-cigarette use does not fall within the definition of "smoke" or smoking" where statute defines "smoking" as "the carrying or holding of any lighted pipe, cigar, or *cigarette of any kind* . . . or the lighting, inhaling, or exhaling of smoke from a pipe, cigar, or *cigarette of any kind*") (italics added).

For example, the California law DOT cites was enacted in 2007, and it was only amended to ban e-cigarettes in 2016.[8] As the California 2016 Legislative Service notes, Section 1 of the 2016 amendment added a new subsection, (c), declaring that "'Smoking' includes the use of an electronic smoking device," and the Legislative Counsel's Digest noted that the amendment was to "change the

---

[7] *See infra* at 11-12.

[8] *See* Cal. Bus. & Prof. Code § 22950.5, added by Stats.2007, c. 653 (S.B.624), § 1, amended by Stats. 2015-2016, 2nd Ex. Sess., c. 7 (S.B.5), § 1 eff. June 9, 2016.

STAKE Act's definition of 'tobacco products' to include electronic devices, such as electronic cigarettes."[9]

Similarly, the 2005 New Jersey law[10] DOT cites was only amended in 2009 to ban e-cigarettes. *See* 2009 NJ Sess. Law Serv. Ch. 182 (Assembly 4227 & 4228), amending the definition of "Smoking" to include "or the inhaling or exhaling of smoke or vapor from an electronic smoking device." That law did not rely on electronic cigarettes constituting smoking or even cigarettes in any ordinary sense, but rather on them being a "device" from which "inhaling" of "vapor" can occur. *See also id.* ("'Electronic smoking device' means an electronic device that can be used to deliver nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette.")

Similarly, the Delaware statute it cites was specifically amended to ban e-cigarettes in 2015. *See* 80 Laws 2015, ch. 81, § 2, eff. Oct. 5, 2015, adding Del.

---

[9] *See* 2016 Cal. Legis. Serv. 2nd Ex. Sess. Ch. 7 (S.B. 5).

[10] N.J. Stat. Ann. § 26:3D-57, added by L.2005, c. 383, § 3.

Code Ann. tit. 16, § 2902(12).[11] The anti-smoking law to which this provision had been added had been originally enacted in 1994, then amended in 2002 and 2015.[12]

Similarly, the Hawaii law DOT cites, which was enacted in 2006, had to be specifically amended in 2015 to cover e-cigarettes.[13] Section 3 of the 2015 amendment altered the statutory definition to provide that "'Smoking' includes the use of an electronic smoking device."[14]

C. Congress Specifically Declined to Ban E-Cigarettes

DOT's interpretation is also at odds with Congress's rejection of proposals to give the FAA power to regulate e-cigarette use on aircraft. President Obama recently signed into law a 14-month reauthorization of the FAA that made many changes to its enabling statute. *See* Pub. L. No. 114-190, 130 Stat. 615 (2016). As this legislation worked its way through Congress, some members wished to ban e-cigarette use on flights. The Senate passed a version of the bill that would have

---

[11] 2015 Delaware Laws Ch. 81 (H.B. 5), § 2 (adding passage in bold, deleted text crossed out ("'Smoking' means: **a.** The ~~the~~ burning of a lighted cigarette, cigar, pipe or any other matter or substance that contains tobacco**; or b. The use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form.**'").

[12] Del. Code Ann. tit. 16, § 2902 (69 Laws 1994, ch. 287, § 1; Amended, 73 Laws 2002, ch. 275, §§ 1 to 6; Amended, 80 Laws 2015, ch. 81, § 2, eff. Oct. 5, 2015).

[13] Haw. Rev. Stat. § 328J-1, Laws 2006, ch. 295, § 2; Amended, Laws 2015, ch. 19, §§ 2, 3, eff. Jan. 1, 2016.

[14] 2015 Hawaii Laws Act 19 (H.B. 940), §3, eff. Jan. 1, 2016, amending Haw. Rev. Stat. § 328J-1.

amended 49 U.S.C. § 41706 to state that "[t]he use of an electronic cigarette shall be treated as smoking for purposes of this section." H.R. 636, 114th Cong. § 5030 (as passed by Senate, Apr. 19, 2016). Similar proposals in the House also sought to ban e-cigarette use. *See, e.g.*, H.R. 3840, 114th Cong. § 2 (2015). Ultimately, however, the legislation passed by Congress did *not* impose any restrictions on e-cigarettes. *See* Pub. L. No. 114-190. Thus, Congress "considered and rejected several proposals to give" the FAA power to regulate e-cigarette use on aircraft, just as Congress expressly declined to empower the FDA to regulate tobacco. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). As in *Brown & Williamson*, Congress's decision not to give the government the power it now asserts shows its action is *ultra vires*. *Cf. id.* at 147–149.

DOT cites this court's decision in *Sottera v. FDA*, 627 F.3d 891 (D.C. Cir. 2010), which held that e-cigarettes are "tobacco products" for purposes of the FDA's statutory authority. But smoking requires combustion or burning, not just the presence of a tobacco product. Moreover, *Sottera* did not say e-cigarettes are "tobacco products" in any ordinary sense, only that they fell within the FDA statute's peculiarly-broad definition, which "broadly defines tobacco products as extending to '*any* product made *or derived from* tobacco,'" *Sottera*, 627 F.3d at 897 (*quoting* 21 U.S.C. § 321(rr)(1) (emphasis added by *Sottera*)). In this case, by contrast, Congress has not defined "tobacco products" at all in its smoking ban, or

equated tobacco products with cigarettes. So the word "smoking" retains its ordinary, common meaning.

II. The E-Cigarette Ban Does Nothing to Ensure "Safe and Adequate Interstate Air Transportation"

DOT claims the authority to tightly regulate the "quality of service and ensure passenger comfort" under 49 U.S.C. § 41702. RB 27. But DOT does not have unlimited power to regulate quality of service or ensure passenger comfort. While the statute expressly addresses safety (by including the word "safe"), it does not mention passenger comfort (or even the quality of service as long as the transportation is adequate).[15] It reads, "An air carrier shall provide safe and adequate interstate air transportation." 49 U.S.C. § 41702. Any impact on passenger comfort would have to be severe to affect the safety or adequacy of transportation.

A. Contrary to DOT's Claims, Minor or Hypothetical Passenger Discomfort Does Not Make Transportation Inadequate

DOT claims it need not show "'significant' . . . interferences with passenger comfort" to regulate, and that "the statute does not contain such a requirement."

---

[15] On page 14 of our opening brief, we mistakenly quoted the statute as requiring "safe and adequate service." But we still argued this "safe and adequate" language would not let DOT ban all "impediments to passenger comfort," much less regulate absent "significant," *demonstrated* discomfort. OB 16.

RB 39. But it does, by using the word "adequate" rather than "comfortable." Not everything that detracts from passenger comfort interferes with "adequate interstate air transportation." "Adequate" is, by its plain terms, a minimal threshold[16], not a delegation of sweeping authority to mandate optimal or ideal service (such as regulating flight attendants' attire to prevent eyesores). It merely requires the provision of "reasonable" quality service, and does not even preclude occasional instances of "poor service," *see Nebraska v. C. A. B.*, 298 F.2d 286, 296 (8th Cir. 1962), much less require airlines to ban all *passenger* conduct that could hypothetically cause discomfort. Thus, the "government exerted only minimal regulatory authority over commercial airlines under § 404(a)(1)'s 'safe and adequate service' clause," *Shinault v. American Airlines*, 936 F.2d 796, 802 (5th Cir. 1991), the precursor of today's "safe and adequate interstate air transportation" statute. *See Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1213 (D.C. Cir. 1983) (commission involved in drafting the precursor provision intended that it specify "a minimum quality of service," and rely on "competition" to "improve the service offered" beyond that basic level).

---

[16] *Lamon v. Boatright*, 467 F.3d 1097, 1102 (7th Cir. 2006) ("adequate, although minimal" inquiry satisfied *Batson*); *Camden v. Circuit Court*, 892 F.2d 610, 615 (7th Cir.1989) (consent inferred from "minimal but adequate opportunity to object"); *Fisher v. Hargett*, 997 F.2d 1095, 1099 (5th Cir. 1993) ("adequate alternative" requires only "a bare minimum").

Nothing in the statute suggests that a purely theoretical risk would warrant regulation. *See Chemical Mfrs. Ass'n v. EPA*, 859 F.2d 977, 983-84 (D.C. Cir. 1988) (even when statute required agency to regulate substances that "*may* present an unreasonable risk of injury to health or the environment," regulation required "more-than-theoretical basis" for suspecting exposure).

This provision must also be read in harmony the Airline Deregulation Act's goal[17] to leave most aspects of the airline business to the free market.[18] As DOT once noted, its authority must not be interpreted so expansively as to "frustrate Congress' decision [in the ADA] that the public will benefit if airline fares and services are determined by market forces rather than government regulation." *Association of Discount Travel Brokers v. Continental/Eastern Tariff*, Order 92-5-60, 1992 WL 133179, at *12 (D.O.T. May 29, 1992).

One of the Act's goals was to place "maximum reliance on competition in providing air transportation services." 49 U.S.C.A. § 40101(a)(6).[19] Passengers

---

[17] *See* 49 U.S.C. § 40101(a)(6).

[18] *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (provision should not be interpreted in a way inconsistent with the policy of another provision of the statute); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990) (provision should not be interpreted in a way that is inconsistent with statute's structure); *see also Brown & Williamson*, 529 U. S. at 132 ("'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'")

[19] *See also* 49 U.S.C. § 40101(a)(4) (policy of "availability" of variety of "low-priced services").

could then choose the quality of service they wanted, or were willing to pay for, subject to minimal regulatory safeguards.

An unbounded power to regulate the accommodations provided by airlines to passengers in the name of passenger comfort would emasculate the provision in the Act that DOT "may not prescribe a term preventing an air carrier from adding or changing . . . accommodations. . ." 49 U.S.C. § 41109 (italics added). This language "prohibits the Board from directly regulating carrier accommodations and conditions," *Continental Airlines v. C.A.B.*, 522 F.2d 107, 115 (D.C. Cir. 1974). Other provisions must be read "in harmony" with this provision, and DOT cannot "emasculate any part of the Act, including the underlying purpose of [this section] to give the carriers flexibility to engage in service competition." *Id.* at 116.

B. DOT's Rule Is Not Valid Under this Court's *Action on Smoking & Health* Decision

DOT seeks to radically extend a decision of this Court interpreting statutory language that has since been narrowed. As it notes (RB 28),

> In *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209 (D.C. Cir. 1983), this Court upheld the . . . authority to regulate aircraft smoking under an earlier version of the statute, which required air carriers to "provide safe and adequate service." *Id.* at 1211. This Court held that the "adequate" service requirement grants the Board "authority to regulate [the] *quality* of service". . .

But this "adequate service" language no longer appears in the statute. The statute now mandates instead that "[a]n air carrier shall provide safe and adequate *interstate air transportation*." 49 U.S.C. § 41702 (emphasis added). To violate the current statute, "transportation" must be inadequate or unsafe, not just the "service" on the flight. Bad coffee on a flight may constitute inadequate "service," but it does not prevent the transportation the passenger is receiving from being "safe and adequate."

Even if the statute had remained the same, the *Action on Smoking & Health* decision would not control here, because e-cigarettes simply do not cause the same degree of passenger irritation as the tobacco cigarettes at issue in that case, let alone affect quality of service. E-cigarettes do not produce sidestream, "secondhand" smoke that interferes with passenger comfort.[20] The very studies that DOT relied upon note that unlike cigarettes, "no sidestream vapor is generated from e-cigarettes between puffs"; also, "[i]n contrast to the conventional cigarette, which continuously emits particles from the combustion process itself, the e-cigarette aerosol is solely released during exhalation." OB 23-24, citing the Schripp and Czogala studies. Moreover, e-cigarette mist is "odorless," unlike

[20] *See* footnote 2, above (Congress cited "sidestream smoke" to ban smoking).

tobacco smoke. OB 43, 45. E-cigarettes have less impact on passengers than other routine stimuli on airplanes, like crying babies, heavy perfume, and body odor.

As DOT concedes, even in the early 1970's "a significant portion of the nonsmokers stated that they were bothered by tobacco smoke." 81 Fed. Reg. at 11420. By contrast, DOT does not cite a single example of passenger irritation during the actual use of an e-cigarette," much less show a significant problem from e-cigarettes. (DOT cites the Wieslander study finding "that propylene glycol mist" may cause irritation, RB 29-30, but it did not involve e-cigarettes, which produce "over a *thousand times less* [propylene glycol] than the concentration that could cause irritation in the Wieslander study." OB 26.)

By contrast, this court noted that "proximity to [tobacco] smoke is a significant health hazard" to "persons with respiratory, cardiovascular and other health conditions," raising "serious health concerns." *Action on Smoking & Health*, 699 F.3d at 1218. DOT's claim that it need not show any "significant" health risk or even interference with passenger comfort" (RB 39) contradicts past agency interpretations of the statute. *See, e.g., Smoking Aboard Aircraft*, 49 Fed. Reg. 25408, 25410 (June 20, 1984) (final rule) ("The only finding that would . . . justify a total ban would be that smoking aboard aircraft . . . is significantly damaging the health of nonsmokers.")

C. DOT Has Not Shown Any Actual, Let Alone Significant, Passenger Discomfort from E-Cigarettes

DOT has not contested our observation in our opening brief (OB 49) that no actual passenger has experienced discomfort on a flight due to e-cigarettes.[21] *Compare* OB 49. DOT complains that "Petitioners cannot reasonably expect the Department to 'cite any actual incident of a passenger experiencing discomfort due to e-cigarettes,'… given that airlines currently prohibit the use of e-cigarettes." RB 32 n.14. But "many people" discreetly vaped before DOT banned it. *See* OB, Addendum on Standing, Woessner Decl. ¶¶5-6); *see also* 81 Fed. Reg. at 11417, 11142 (noting "in-flight passenger use"). So if e-cigarettes actually caused passenger discomfort, there should be evidence of that.

Instead, DOT merely speculates that "passengers '*may* feel the direct effects of inhaling the aerosol,'" or "*may* reasonably be concerned that they are inhaling unknown quantities of harmful chemicals" (RB 29) (emphasis added).

---

[21] DOT does cite comments opposing e-cigarettes on airplanes. RB at 31-32 n.13. But they did not complain of actual exposure on an airplane. For example, one expresses opposition based on what he "read" about e-cigarettes. Cmt. of Tyler C. Haskell [JA__]. Another describes how someone deliberately "blew in" her "face" at a "trade show," a confrontational act not typical of e-cigarette use. Cmt. of Esther Schiller [JA__].

D. DOT's Interpretation Would Give It Unbounded Power to Regulate

An agency cannot fill even a genuine gap in the statute in a way that gives it unbounded power to regulate. *Business Roundtable v. SEC*, 905 F.2d 406, 414 (D.C. Cir. 1990) (remarking that a "vague 'public interest' standard cannot be interpreted without some confining principle"); *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (concluding that allowing agencies to "enjoy virtually limitless hegemony [is] a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."). Since everything can make **someone** uncomfortable, getting rid of the "significant" limitation would allow DOT to ban conduct that would engender discomfort in only a hypersensitive passenger, which would give it such an "open-ended grant" of authority as to raise constitutional delegation and separation of powers issues. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 642, 646 (1980) (plurality) (interpreting §3(8) of OHSA to require "a threshold finding ... that significant risks are present," thereby finding in the statute an intelligible principle; neither "safe" nor "adequately safe" allow ban on minor risks like "breathing [smog-filled] city air" or "driving a car"; research indicating two deaths every six years was insufficient to justify regulation, and giving agency a more "open-ended grant" of authority would raise constitutional questions). Such a broad interpretation of DOT authority must be rejected, under the canon of constitutional

doubts. If there is a serious constitutional issue, the agency's interpretation receives no *Chevron* deference. *See, e.g., Miller v. Johnson*, 515 U. S. 900, 923 (1995).

If DOT actually had the power to regulate aspects of passenger comfort regardless of their significance, and even in the absence of *demonstrated* discomfort (as it now claims), its power over airlines would be virtually unlimited, defeating the entire point of airline deregulation. It could regulate such issues as perfume use, flight attendant ratios,[22] and arm rest softness, to give a few minor examples. Its authority under this statute would be so broad as to subsume its other grants of authority. That is not how statutory provisions are construed by courts. *Whitman v. American Trucking Assns*, 531 U.S. 457, 468 (2001) ("does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."); *Brown & Williamson*, 529 U.S. at 160 (rejecting "cryptic" delegation of broad authority even though it was not foreclosed by the language of the statute).

Airline deregulation inherently involved trade-offs and, in some cases, a sacrifice of passenger comfort, as Justice Breyer, who helped bring about airline deregulation as a Senate staffer, has noted. By lowering "prices," deregulation caused "spectacular growth" in air travel, causing "bottlenecks," "crowded

---

[22] *Cf. 2007-2008 ABA Standards for Approval of Law Schools* at 30, 32 (faculty-student "ratio of 30:1 or more" violates quality standards) (goo.gl/EKxNBu).

planes," and "a flight-choked Northeast corridor, overcrowded airports, [and] delays," yet few would want to "go back to the old days." Stephen Breyer, *Airline Deregulation, Revisited*, Business Week, Jan. 20, 2011, goo.gl/NIMuQP.

E. DOT Impermissibly Relies on Speculation Rather Than Evidence

The agency's regulation "is based on passenger discomfort" rather than harm. RB 36. But it points to no actual passenger discomfort ever experienced due to e-cigarettes. And the studies DOT cites didn't conclude anything about whether the concentration levels of the potential irritants in e-cigarette vapor are high enough on airplanes to actually irritate passengers.

Moreover, these is no evidence of harm or health risks, either. By the government's own description, the studies it cites only raised questions about potential health effects, rather than finding any harm. RB at 42 ("new studies cited by the Department" in the final rule "reiterated" the NPRM's "theme" that there is a "'lack of scientific data and knowledge with respect to the ingredients in electronic cigarettes,'" whose concentrations in "'exhaled vapors have not been studied.'").

It is the agency's burden to point to sufficient evidence to warrant its regulation – not the challengers' burden to provide the missing scientific data, or to show definitively that e-cigarettes are safe. "[A]n agency remains obliged to produce substantial evidence for its major assumptions in a rulemaking even in

absence of critical comments." *NRDC v. Herrington*, 768 F.2d 1355, 1421 n.63 (D.C. Cir. 1985). The "absence of contrary evidence" against the agency's position is insufficient to support its action. *Intercollegiate Broadcast System v. Copyright Royalty Bd.*, 574 F.3d 748, 767 (D.C. Cir. 2009).

Yet, time and again, the agency relies on the absence of evidence to justify its rule, rather than evidence. *See, e.g.,* RB 30-31 ("The American Academy of Pediatrics warned that there is no data demonstrating that it is safe for children in aircraft to be in close proximity to exhaled vapors"); RB 35 ("professional health organizations" "'cit[ed] public health concerns' based on 'unknown' ingredients and health effects of e-cigarettes."); RB 34 ("three medical associations" "concluded that 'the unknown health risks of exposure to e-cigarette aerosol'" provided "reason for concern"); RB 42-43 ("The critical point of the studies in the proposed rule" is that "further research is necessary to assess their health impact on passengers and crewmembers"; "the Department relied on a study . . . noting that 'the safety of inhaling propylene glycol has not been studied in humans.'").

But "this approach is inconsistent with rational decisionmaking, which requires more than an absence of contrary evidence; it requires substantial evidence to support a decision." *Intercollegiate Broadcast Sys.*, 574 F.3d at 767 (internal citation omitted). Requiring opponents of an e-cigarette ban to prove them safe puts the burden on the wrong party.

Speculation that e-cigarettes might somehow cause harm or discomfort is not enough reason to ban them. "We may not uphold agency action based on speculation." *National Shooting Sports Foundation v. Jones*, 716 F.3d 200, 213 (D.C. Cir. 2013); *accord Delaware Dept. of Natural Resources v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015). That is especially true given the obvious weakness of the argument for banning them: e-cigarettes do not even emit sidestream "smoke" or vapor, unlike tobacco cigarettes, whose emission of "sidestream," second-hand smoke was the reason they were banned on airplanes.[23]

While the government claims "one of Petitioners' leading studies recognizes the potential harm of e-cigarettes," RB 37, it was talking about risks to e-cigarette users themselves, not other passengers, and that study noted that "they are undoubtedly safer than tobacco cigarettes" and "[n]o one has reported adverse effects" from them.[24]

---

[23] *See* footnote 2, above.

[24] RB 37, *quoting* Cahn & Siegel, *Electronic Cigarettes as a Harm Reduction Strategy for Tobacco Control*, 32 J. Pub. Health Pol'y 16, 26 (2011) (goo.gl/eWRkXL), JA_; *see id.* at 26 ("*Whereas* electronic cigarettes cannot be considered safe, as there is no threshold for carcinogenesis, *they are undoubtedly safer than tobacco cigarettes*.") (words in italics omitted by respondents) (discussing FDA July 2009 press release, which discussed the "vapor that is inhaled by the user") (goo.gl/dK3VG).

F. The Additional Studies Cited By the Final Rule Do Not Support It

The additional studies cited by the Final Rule (OB 17-18) provide no real support for it, since they didn't conclude anything about whether the concentration levels of chemicals in e-cigarette vapor are sufficient to actually irritate passengers. They just amounted to additional claims that more study of the effects of e-cigarettes is needed. *See* RB 42 ("new studies cited by the Department" in the final rule "reiterated" the NPRM's "theme" that there is a "'lack of scientific data and knowledge with respect to the ingredients in electronic cigarettes,'" whose concentrations in "'exhaled vapors have not been studied.'"); RB 43 (the additional studies "expanded on and confirmed" the "need for further research"). The fact that extremely tiny quantities of chemicals like "formaldehyde, acetaldehyde, and acrolein" may be found "in e-cigarette aerosol," RB 30, is irrelevant, given that these "chemicals are not dangerous in small doses, and indeed, are found in commonly consumed foods and household items." OB 28.

G. DOT Cannot Rely On The New Studies, Since They Were Not Just "Supplementary," Contrary to Its Claims

To the extent that the additional studies cited in the Final Rule actually do buttress its passenger comfort rationale, the agency's reliance on them is not excused by *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991), as it claims

(RB 41).[25] *Solite* does not just require that the additional studies not cited in the NPRM be "supplementary" to pre-existing studies before they can be considered; it also requires, as a precondition for their consideration, that "no prejudice is shown," which essentially means that the supplemental studies are irrefutable and unchallenged by petitioners. *See id.* at 484 (petitioners did "not point to inaccuracies in the data").

By contrast, we took issue with these studies (OB 19-38), noting that they contained flaws and unrealistic assumptions that made it unreasonable to draw any adverse inference about e-cigarettes from them (such as measuring "the content of the vapor that users inhale, rather than what they exhale," even though "e-cigarettes, unlike tobacco cigarettes, do not produce 'sidestream' smoke," OB 19; *see also* OB 26-27, 31-32). The inability to make these points in the comment period, when doing so might conceivably have persuaded the agency, qualifies as prejudice. A petitioner need not prove the agency would have made a different

---

[25] Under DOT's approach, it should similarly consider new articles and studies that contradict its position. *See, e.g.,* J.E. Teasdale et al., *Cigarette smoke but not electronic cigarette aerosol activates a stress response in human coronary artery endothelial cells in culture,* Drug Alcohol Depend. (2016), http://dx/doi.org/j.drugalcdep.2016.04.020; J.C. Maloney et al., *Insights from two industrial hygiene pilot e-cigarette passive vaping studies*, 13 Journal of Occupational & Environmental Hygiene 275 (2015)("indoor vaping of Markten prototype e-cigarette does not produce chemical constituents at quantifiable levels"), goo.gl/e46bB6.

decision if it had commented on a study, *Chamber of Commerce v. SEC*, 443 F.3d 890, 904-05 (D.C. Cir. 2006); *see also Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) ("colorable claim that [challenger] would have more thoroughly presented its arguments had it known" suffices). "Neither a showing of actual prejudice nor proof that the agency would have reached a different result is required to establish prejudicial error." *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 89 (D.D.C. 2006).

DOT argues that no comment really raised the point we made in our opening brief about how existing levels of air contaminants dwarf the trace amounts from e-cigarettes. RB 48. But commenters did point out how components of e-cigarette mist such as propylene glycol are already found on airplanes and in other enclosed spaces, *see* OB 27 & nn. 41-42, and how chemicals found in such mist are also found in commonly consumed items one might find on an airplane. OB 27 n.24.[26]

More importantly, DOT failed to discuss until the final rule the corresponding studies dealing with air concentration levels from the release of e-cigarette vapor. The triviality of such levels compared to existing levels of air

[26] *See also* Comment ID: DOT-OST-2011-0044-0258 [JA__] (comparing e-cigs to "people who breath alcohol vapor on you[] after drinking a vodka tonic in a plane"; " the parts per million of water vapor/alcohol/and propylene glycol (the ingredients in a solution of an electronic cigarette, all of which the FDA regulates and are safe for consumption) would not nearly compete with the breathe of someone who just drank").

contaminants is a point we would have raised in our comments if we had known of the studies cited for the first time in DOT's final rule about concentrations of chemicals due to e-cigarette mist (from e-cigarette vapor emitted directly into the air – never mind that e-cigarettes do not emit sidestream "smoke"). *See* RB 43-44 (citing such studies). DOT's failure to cite such studies[27] in its NPRM (which cited only studies that did not measure such concentrations) thus prejudiced petitioners, and left them inadequate opportunity to criticize the agency's approach.

The methodology and approach of the newly-cited studies was very different from those cited in the NPRM. For example, the NPRM cited research relating to potential *firsthand* exposure to e-cigarette chemicals.[28] In contrast, the new studies raised questions about secondhand[29] or even "thirdhand"[30] exposure.

---

[27] *See* OB 23-34 (discussing the Czogala, Schober, Schripp & Williams studies, dealing with air concentrations).

[28] The NPRM cited studies involving (1) short-term exposure to large quantities of propylene glycol in aviation emergency training (not from e-cigarettes), and (2) potential leakage of e-cigarette liquid (not e-cigarette aerosol), which would impact the user, but not spread through the cabin. *See* 76 Fed. Reg. at 57010, *citing* the Wieslander et al., study, and the Trtchounian & Talbot study, as well as two articles describing those studies.

[29] *See* OB 23-34 (discussing the Czogala, Schober, Schripp & Williams studies, dealing with air concentrations). Never mind that e-cigarettes do not emit sidestream "smoke," which causes secondhand "smoke" to accumulate.

[30] *See* Goniewicz (2014) and Kuschner, the "thirdhand" studies cited at OB 17 n.10 (the studies with "thirdhand" in their titles), which are discussed at OB 22, 25.

Since the studies cited in DOT's final rule involved a different approach and methodology than those cited in the NPRM, they were not "supplementary" to begin with, and could not be relied on even if the failure to notice them did not prejudice petitioners. *Chamber of Commerce*, 443 F.3d at 903 (study only "supplementary" if it is "based upon a 'methodology ... that did not change significantly from the [NPRM],'" and petitioners had "'ample opportunity to criticize the [agency's] approach.'").

DOT also claims that the "comments cited by Petitioners provide no basis for the Department to meaningfully evaluate their claim that alcohol 'poses greater risks' than e-cigarettes." RB 48. But this would be irrelevant even if true, since its Final Rule is based on speculation about "passenger discomfort" rather than health risks. RB 36 ("the Department's authority to regulate under section 41702 is based on passenger discomfort," rather than "definitive evidence of harm"). The comments illustrate that many passengers have in fact experienced discomfort due to alcohol being served on planes (OB 30 & n.50) in stark contrast to the absence of any actual discomfort experienced due to exposure to e-cigarettes. Moreover, the unruly, potentially "violent behavior" of drunk passengers cited by the commenters, *see id.* at 29-31 & nn. 49-51, which posed such risks to passengers that "flights had to be diverted." *Id.* at 31 & n.51, obviously posed greater risks to passengers than e-cigarettes. (E-cigarettes manifestly do not produce such violent

behavior, although banning them might, by triggering nicotine withdrawal symptoms.[31])

CONCLUSION

For the foregoing reasons, DOT's rule should be vacated.

Respectfully submitted,

/s/ Hans Bader

HANS BADER
SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St., NW, 7th Floor
Washington, DC 20005
(202) 331-2278
hans.bader@cei.org

Counsel for Petitioners

[31] *See U.S. v. Tabacca*, 924 F.2d 906, 909 (9th Cir. 1991).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, because this brief contain 6,993 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

/s/ Hans Bader

HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street, NW, 7th Floor
Washington, D.C. 20005
Telephone: (202) 331-2278

CERTIFICATE OF SERVICE

I certify that on this 4th day of November 2016, I filed the foregoing brief with the Court. I further certify that on this 4th day of November 2016, I served the foregoing brief on all counsel of record through the Court's CM/ECF system.

Respondent's counsel, who have appeared, will be automatically served by the CM/ECF system, including:

Tara Morrissey: tara.s.morrissey@usdoj.gov
Matthew M. Collette: matthew.collette@usdoj.gov

/s/ Hans Bader

HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street, NW, 7th Floor
Washington, D.C. 20005
Telephone: (202) 331-2278