

ORAL ARGUMENT NOT YET SCHEDULED

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,)

Case No. 16-1128

v.)

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

Respondents.)

_____)

NONBINDING STATEMENT OF ISSUES

Petitioners hereby file this Nonbinding Statement of Issues in their challenge to the final rule of the respondent United States Department of Transportation entitled *Use of Electronic Cigarettes on Aircraft*, published at 81 Fed. Reg. 11,415 (March 4, 2016). Petitioners intend to raise the following issues:

1. Whether DOT acted in accordance with law in banning the use of electronic cigarettes (e-cigarettes) on airplanes on the basis of the prohibition on smoking contained in 49 U.S.C. § 41706);
2. Whether DOT acted arbitrarily and capriciously in banning the on-board use of e-cigarettes on the basis of air carriers' duty to "provide safe and adequate interstate air transportation" under 49 U.S.C. § 41702, given, among other reasons, the lack of evidence that e-cigarettes pose a significant risk to airline passengers, DOT's failure to adequately present the evidence for its conclusion during the rulemaking, and its reliance on studies published after the close of the comment period;
3. Whether DOT acted arbitrarily and capriciously in banning the on-board use of e-cigarettes as an "unfair or deceptive practice in air transportation" under 49 U.S.C. § 41712, given, among other reasons, that such use is neither deceptive nor fraudulent.

Dated: May 31, 2016.

Respectfully submitted,

/s/ Hans Bader

Hans Bader

Sam Kazman

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2016, a copy of the foregoing Non-Binding Statement of Issues was served electronically through the court's CM/ECF system on all registered counsel. Defense counsel, who have appeared, will be automatically served by the CM/ECF system. That includes:

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/s/ Hans Bader