[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 14-5195

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

SCENIC AMERICA, INC.,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, Secretary of Transportation; FEDERAL HIGHWAY ADMINISTRATION; and GREGORY G. NADEAU, Acting Administrator of the Federal Highway Administration,

Defendants-Appellees,

OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC.,

Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The plaintiff-appellant is Scenic America, Inc.

The defendants-appellees are the United States Department of Transportation; Anthony Foxx, in his official capacity as Secretary of Transportation; the Federal Highway Administration; and Gregory G. Nadeau, in his official capacity as Acting Administrator of the Federal Highway Administration.*

Outdoor Advertising Association of America, Inc. intervened as a defendant in the district court, and is an appellee in this Court.

The American Planning Association; the Garden Club of America; Sierra Club, Inc.; and the International Dark-Sky Association, Inc., are *amici curiae* in this Court.

B. Rulings Under Review.

Plaintiff seeks review of the district court's order and memorandum opinion granting the government's and intervenor's motions for summary judgment, denying plaintiff's cross-motion for summary judgment, and dismissing the complaint with prejudice. *See Scenic Am., Inc. v. U.S. Dep't of Transp.*, No. 1:13-cv-93 (D.D.C. June 20, 2014) (Boasberg, J.) (ECF Docs. 40 & 41). The memorandum opinion is not yet

* By operation of Fed. R. App. P. 43(c)(2), Secretary Foxx was substituted for former Secretary of Transportation Ray LaHood, and Acting Administrator Nadeau was substituted for former Administrator Victor Mendez.

reported, but is available at 2014 WL 2803084.

The district court earlier had denied the government's and intervenor's motions to dismiss for lack of standing and lack of final agency action. *See Scenic Am., Inc. v. U.S. Dep't of Transp.*, No. 1:13-cv-93 (D.D.C. Oct. 23, 2013) (Boasberg, J.) (ECF Docs. 19 & 20). The memorandum opinion is reported at 983 F. Supp. 2d 170.

C. Related Cases.

This case has not previously been before this Court. Counsel for defendants-appellees are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Jeffrey E. Sandberg
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Counsel for Defendants-Appellees

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GLOSSARY

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Amici Br.	Corrected Brief of *Amici Curiae* American Planning Association et al. (filed Dec. 30, 2014)
APA	Administrative Procedure Act
DE#	Docket Entry No.
FHWA	Federal Highway Administration
FSA	Federal-state agreement
Guidance	FHWA Guidance on Off-Premise Changeable Message Signs (issued Sept. 25, 2007)
JA	Joint Appendix
LED	Light-emitting diode
Pl. Br.	Brief of Plaintiff-Appellant Scenic America, Inc. (filed Dec. 22, 2014)

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Defendants-Appellees,

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FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANTS-APPELLEES

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331 and asserted claims under 28 U.S.C. §§ 2201-2202; the Highway Beautification Act, 23 U.S.C. § 131; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *See* Joint Appendix ("JA") at 9. The district court entered summary judgment for defendants

on June 20, 2014. *See* JA 80, 81-109. Plaintiff filed a notice of appeal on August 7, 2014, within the time allowed by Fed. R. App. P. 4(a)(1)(B). *See* JA 7 (Docket Entry ("DE") #42). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff seeks review of an internal Federal Highway Administration memorandum from 2007 that provides guidance to the agency's Division Offices about how to determine whether to approve a State's proposal to allow digital billboards along federal highways consistent with the Highway Beautification Act, 23 U.S.C. § 131. *See* JA 535-38 (the "Guidance"). The questions presented are:

1. Whether plaintiff lacks standing to challenge the Guidance.

2. Whether the Guidance fails to constitute final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

3. Whether the Guidance is an interpretive rule, such that notice-and-comment rulemaking was not required by 5 U.S.C. § 553.

4. Whether plaintiff's "customary use" claim fails at the threshold, and in any event lacks merit.

STATUTES AND REGULATIONS

Pertinent authorities are reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. In 1965, Congress enacted the Highway Beautification Act to "protect the public investment in [federally funded] highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a). The Act is administered by the Federal Highway Administration ("FHWA"), the agency within the Department of Transportation also responsible for administering federal grant-in-aid highway funding to States. *See* 49 U.S.C. § 104; 49 C.F.R. § 1.85. In order for a State to receive its full allotment of federal highway funding, the Act requires States to maintain "effective control of the erection and maintenance . . . of outdoor advertising signs, displays, and devices" in areas adjacent to federal interstate and primary highways.[1] 23 U.S.C. § 131(b).

In order to maintain such "effective control," a State must take several actions. As relevant here, the State must enter into a federal-state agreement ("FSA") that establishes standards for the "size, lighting and spacing" of "off-premise" signs

[1] The Highway Beautification Act evolved from the Bonus Act of 1958, under which States that voluntarily controlled outdoor advertising along interstate highways could obtain a 0.5% bonus in federal interstate highway funding. *See* Pub. L. No. 85-381, § 12, 72 Stat. 89, 95-96 (1958). The Bonus Act continues in effect today for States that entered the program prior to June 30, 1965. *See* 23 U.S.C. § 131(j). States that participate in the Bonus Act are required to comply with federal regulatory standards, *see* 23 C.F.R. §§ 750.101 *et seq.*, and the terms of a negotiated federal-state agreement.

adjoining federal interstate and primary highways in the State.[2] 23 U.S.C. § 131(d); 23 C.F.R. § 750.705(b). The standards set forth in these agreements must be "consistent with customary use," as determined "by agreement between the several States and the Secretary." 23 U.S.C. § 131(d).

Each State must also devise laws, regulations, and procedures that will implement its federal-state agreement. *See* 23 C.F.R. § 750.705(h)-(i). The State then submits these proposed laws, regulations, and procedures, including any subsequent revisions, to FHWA for review and approval. *Id.* § 750.705(j).

Within FHWA, the primary responsibility for reviewing State proposals rests with the agency's fifty-two Division Offices.[3] These Divisions review the State's proposals and determine whether they are consistent with the Act and the State's respective FSA. *See, e.g.*, JA 424. If the Division does not concur in the proposal, the State may nonetheless elect to implement it. If the State does so, however, it may be deemed to have failed to maintain "effective control" under the Act, and the Secretary of Transportation may withhold ten percent of the State's federal highway funding.

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[2] The Act distinguishes between on-premise and off-premise signs. An on-premise sign is one that advertises the lease or sale of, or other "activities conducted" on, "the property on which [the sign is] located." 23 U.S.C. § 131(c)(2)-(3). Off-premise signs advertise for activities located elsewhere. *Id.* § 131(d). On-premise advertising signs are exempt from regulation, while off-premise advertising signs are regulated and are permitted only in commercial or industrial areas, among other restrictions. *Id.*; *see generally* 23 C.F.R. §§ 750.701 *et seq.*

[3] There is one Division for each State, plus the District of Columbia and Puerto Rico.

See 23 U.S.C. § 131(b) (providing for "reduc[tion] by amounts equal to 10 per centum of the amounts [of Federal-aid highway funds] which would otherwise be apportioned" to a State that fails to maintain "effective control" under the Act); *id.* § 131(*l*) (establishing procedure for withholding funds).

2. During the 1960s and 1970s, all fifty States, the District of Columbia, and Puerto Rico entered into federal-state agreements with the Secretary. *See, e.g.*, JA 123-33 (Colorado FSA). Each of these fifty-two FSAs remains in effect today, generally in the same form as originally executed.

Although the federal-state agreements were individually negotiated, many of the agreements contain similar terms. As relevant here, most FSAs contain, in some form, a prohibition against "flashing," "intermittent," or "moving" lights. *See, e.g.*, JA 139 (North Carolina FSA) (generally prohibiting "[s]igns which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights"); *see also* JA 120, 131, 148 (same provision in other FSAs).

B. Prior Guidance on Changeable Message Signs

The outdoor advertising industry has undergone significant change in the past five decades. At the time the Highway Beautification Act was enacted, some billboards were directly painted by hand; on others, paper posters were arranged and glued to the face of the billboard. JA 280, 471. Later, larger ads were printed on vinyl

and then affixed to billboards. *Id.* In each of those instances, the content of a sign could be changed only through manual effort.

In time, innovations in electronics yielded other possibilities, including signs that change content by remote control or automated process. Among the early displays incorporating such technology were so-called "tri-vision" signs—signs consisting of rotating, three-sided slats displaying a series of three advertisements in succession. JA 165, 179. Initially, FHWA took the view that such signs were inconsistent with the prohibitions on "flashing, intermittent, or moving" lights contained in certain federal-state agreements, and in 1990, the agency issued a brief memorandum reflecting that position. JA 163 (interpreting FSAs "to prohibit off-premise variable message signs, irrespective of the method used to display the changing message"); *see also* JA 164 (similar). Soon thereafter, however, the agency began to reconsider its position. *See* JA 165-67, 168-75, 176-77.

In 1996, FWHA issued a memorandum to its regional offices (the "1996 Memorandum") explaining its views on how to determine whether changeable message signs were consistent with the Act. The agency observed that "there have been many technological changes in signs, including changes that were unforeseen at the time the [federal-state] agreements were executed." JA 182. The agency explained that "the[se] changes in technology require the State and FHWA to interpret the agreements with those changes in mind." *Id.* The agency concluded that

"[c]hangeable message signs are acceptable for off-premise signs, *regardless of the type of technology used*, if the interpretation of the [FSA] allows such signs." *Id.* (emphasis added). It cautioned that "[i]n nearly all States, these signs may still not contain flashing, intermittent, or moving lights," but it explained that "[t]he FHWA will concur with a State that can reasonably interpret [its FSA] to allow changeable message signs" if the interpretation would also be consistent with state law. *Id.* Thus, the 1996 Memorandum clarified that new technologies were not *per se* impermissible, but could be allowed if the Division determined that both the FSA and state law could reasonably be interpreted not to prohibit such signs.

C. Digital Billboards and the 2007 Guidance

1. Further advances in technology soon led to the development of "digital billboards." These billboards, also known as "commercial electronic variable message signs," are electronic screens composed of thousands of light-emitting diodes ("LEDs") that may be selectively illuminated to create a desired image. JA 83, 280, 473, 535. "LEDs offer a digital way to display static billboard advertisements and make changing them much easier, since the diodes can be reprogrammed remotely" and can "cycle through multiple ads in a single day." JA 83.

In the past two decades, digital billboards have become more commonplace. Many advertisers favor these billboards because they allow messages to be displayed at lower cost and without the cumbersome necessity of physically replacing the signage.

Some States and local governments have also welcomed such signs, as they may be programmed to include public-service messages, including missing-child notices ("Amber Alerts") or other emergency information. JA 471, 526, 529.

As States began to develop regulations and procedures that would permit digital billboards, many States submitted them to FHWA for review. *See, e.g.*, JA 422-23. Several other States interpreted the 1996 Memorandum as conveying the agency's approval of digital billboards, provided that the State's proposal was otherwise consistent with the FSAs and state law. JA 501, 531-32. In almost all States that opted to permit digital billboards, such billboards remained subject to important restrictions, such as a requirement that advertisements be static (i.e., no motion or video) and that they not change more frequently than a certain period of time (e.g., eight seconds).[4] JA 531-32. By 2007, FHWA Divisions had approved State proposals to permit digital billboards in 22 States. *Id.*; *see, e.g.*, JA 424 (FHWA letter concurring in Indiana's interpretation that digital billboards, subject to specified restrictions, "d[id] not constitute flashing, intermittent or moving lights").

Although almost all FHWA Divisions that considered the question concluded that digital billboards could be permitted, subject to appropriate restrictions, at least two offices adopted a different approach. FHWA's Texas Division decided that

[4] In at least some States, duration requirements were based on a calculation of the length of time that a driver would ordinarily be within reading distance of a billboard. *See, e.g.*, JA 415.

digital billboards were categorically inconsistent with both the existing federal-state agreement and with Texas law. *See* JA 263-64; *cf.* 43 Tex. Admin. Code § 21.154(a)(1) (2006) (prohibiting "LED . . . screen[s]"). The New York Division also concluded that digital billboards were, in almost all circumstances, inconsistent with the relevant FSA's prohibition of signs that "'contain, include, or are illuminated by any flashing, intermittent, or moving light or lights.'" JA 260, 261-62 (quoting JA 120).

2. As a result of these diverging interpretations, FHWA headquarters staff received several requests for guidance about how Division Offices should assess the circumstances under which digital billboards could be permitted consistent with existing laws and agreements. *See* JA 448 (letter from Mississippi Division Office); JA 410-11 (FHWA letter acknowledging other inquiry). The agency then undertook a review process to consider whether such guidance would be appropriate.

First, FHWA distributed a survey to each of its Divisions. *See, e.g.*, JA 413-14, 417-18. The survey asked, *inter alia*, whether each Division's corresponding State had decided to permitted digital billboards; whether the State had provided the Division with a written opinion interpreting its FSA as permitting such billboards; whether the Division had concurred in the State's interpretation; and whether the State had imposed any regulatory requirements specifying the minimum length of time per message or the transition time between messages. *Id.* The agency then aggregated the results of this survey. JA 531-32.

In addition, FHWA considered a variety of other materials. The agency reviewed several professional studies and reports relating to the potential safety ramifications of digital billboards, *see, e.g.*, JA 184-230, 231-59, 280-82, 320-409, 506-17; media reports advancing various perspectives on digital billboards, *see, e.g.*, JA 436, 442-43, 445-47, 479-81, 524-26, 528, 529; and position papers submitted by outside interest groups, *see, e.g.*, JA 427-32, 465-77, 519-22. The agency also published a Federal Register notice inviting comment on a recent report that surveyed various issues concerning outdoor advertising, including digital billboards. *See* 72 Fed. Reg. 9592, 9593 (Mar. 2, 2007) (announcing report and inviting comments on, *inter alia*, "regulatory approaches to new billboard technology"); JA 265-315 (copy of report).

The agency also consulted with Scenic America, the plaintiff in this litigation. Plaintiff submitted a position paper to the agency, in which it argued that every FSA prohibiting flashing, intermittent, or moving lights should be interpreted to impose a "per se" ban on "electronic signs" in all circumstances. JA 427; *see* JA 426-32. FHWA circulated plaintiff's paper within the agency, held a meeting with plaintiff's representatives, and exchanged correspondence with the organization. *See* JA 426, 433-35, 444-45, 502-03. Plaintiff repeatedly urged FHWA to "issue definitive guidance on the propriety of digital signs . . . *as soon as possible*." JA 445; *see also* JA 519-522 (similar).

3. After undertaking this internal review, in September 2007, FHWA issued an internal memorandum to "provide guidance to Division offices concerning off-premise changeable message signs," including digital billboards. JA 535-538 ("Guidance" or "2007 Guidance"). The Guidance "confirm[ed] and expand[ed] on the principles set forth in" the agency's prior 1996 Memorandum, which (as noted) had advised that new technologies were permissible to the extent that the FSAs and state law could be interpreted to allow them. JA 536; *cf.* JA 182. The Guidance explained that, just as tri-vision signs were not necessarily inconsistent with FSA requirements, "[e]lectronic signs that have stationary messages for a reasonably fixed time" could also be understood to comport with the FSAs. JA 536. Thus, the agency concluded that "[p]roposed laws . . . that would allow" digital billboards "do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs that [were] entered into during the 1960s and 1970s," so long as the Divisions conclude that the proposals employ "acceptable criteria." JA 535 (emphasis added); *see also* JA 536 ("Changeable message signs, including Digital/LED Display CEVMS, are acceptable . . . *if found to be consistent* with the FSA and with acceptable and approved State regulations, policies and procedures.") (emphasis added).

To assist the Division Offices with undertaking this analysis, the Guidance suggested several factors to consider. Drawing from the agency's nationwide survey,

the Guidance "identified certain ranges of acceptability that have been adopted in those States that do allow [digital billboards] that will be useful in reviewing State proposals on this topic." JA 537; *see also id.* (noting that these "standards" were included in "some or all" state regulations previously approved by FHWA). For instance, the Guidance observed that the "[d]uration of each display [of an advertisement] is generally between 4 and 10 seconds—8 seconds is recommended," and the "[t]ransition between messages is generally between 1 and 4 seconds—1-2 seconds is recommended." *Id.* It also noted that some Divisions or States required digital billboards to "[a]djust brightness in response to changes in light levels"; to be spaced further apart than traditional billboards; or to be prohibited from certain highway locations. *Id.* The Guidance also identified certain "[o]ther standards that States have found helpful to ensure driver safety," such as required procedures in the event of a screen malfunction. JA 538.

The Guidance emphasized that these considerations were "not intended to amend applicable legal requirements," but instead merely "to provide information to assist the Divisions." JA 538. The Guidance also explained that "Divisions are not required to concur with State proposed regulations . . . if the Division review determines, based upon all relevant information, that the proposed regulations . . . are not consistent with the FSA or do not include adequate standards to address the safety of the motoring public." JA 537. The agency also advised that it "may provide

further guidance in the future" based upon "additional information received through safety research, stakeholder input, and other sources." JA 535.

4. Since the Guidance was issued in 2007, FHWA Divisions have approved digital-billboard proposals in several additional States. States that have obtained such approval generally have adopted regulations or procedures addressing various aspects of digital-billboard operation.[5] Plaintiff has not sought to challenge any of the decisions by FHWA to approve any particular State's proposal.

D. Procedural History

1. Plaintiff Scenic America, Inc., is a membership advocacy organization that seeks to "improve the visual character of America's communities and countryside." JA 10. In 2013, more than five years after the Guidance issued, plaintiff brought suit against the Department of Transportation, FHWA, and several federal officials seeking to set aside the Guidance. Plaintiff claimed that the Guidance (1) constituted a *de facto* legislative rule that should have been promulgated through notice-and-comment rulemaking; (2) impermissibly imposed "new lighting standards for billboards" without "agreement between the several States and the Secretary"; and (3) "create[d] a new lighting standard" that was "not consistent with customary use." JA

[5] *E.g.*, N.Y. State Dep't of Transp., *Criteria for Regulating Off-Premises Commercial Message Signs (CEVMS) in New York State* (Jan. 5, 2015), http://tinyurl.com/NYDOTcriteria (requiring a minimum duration of 8 seconds per message; instantaneous transitions between messages; spacing of billboards at least 2,500 feet apart; specified maximum daytime and nighttime brightness levels; a prohibition against billboards near toll plazas; and ongoing traffic-safety monitoring).

8-9, 17-19. The Outdoor Advertising Association of America intervened as a defendant. *See* JA 3 (DE#4, 6).

2. The federal defendants and intervenor each moved to dismiss the complaint for lack of standing and lack of final agency action. Acknowledging that "both arguments present difficult and close questions," the district court denied the motion. JA 57; *see* JA 56-79. With respect to standing, the court ultimately concluded that the Guidance injured plaintiff by leading it to rebalance its organizational efforts toward advocacy against digital billboards. *See* JA 66 (stating that plaintiff was "force[d] . . . to combat an increased number of digital billboards with a concomitant drain on the resources dedicated to other conservation programs"). The district court acknowledged that "it is the *States'* decisions to amend their regulations to permit the construction of digital billboards that causes Scenic America's harm, not the 2007 Guidance." JA 69. Nonetheless, the court concluded that the Guidance had at least contributed to plaintiff's injury by "eas[ing] the path to approval for States' digital-billboard proposals." JA 70.

The district court also concluded that the Guidance was final agency action under 5 U.S.C. § 704. The court acknowledged that the Guidance did not itself authorize or require the use of digital billboards in any State, but rather "le[ft] to Division Offices the final decisions on particular State digital-billboard proposals." JA 74. Nonetheless, the court reasoned that the Guidance qualified as final agency

action because it was "intended to have a coordinating effect" on the agency's decisionmaking and, in the court's view, it prevented Divisions from "reject[ing] a State's digital billboard proposal" on the basis of FSA prohibitions against flashing, intermittent, or moving lights. JA 75-76 (quotation marks omitted).

3. The parties filed cross-motions for summary judgment. The district court granted summary judgment for defendants on all claims. *See* JA 81-109.

First, the district court held that the Guidance was an interpretive, not legislative, rule and thus was not required to pass through notice-and-comment rulemaking. Applying this Court's test for distinguishing interpretive and legislative rules, *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the district court determined that (1) there would be an adequate basis for agency regulation in the absence of the Guidance; (2) the Guidance was not published in the Code of Federal Regulations; (3) the agency had not expressly invoked its legislative rulemaking authority; and (4) the Guidance did not effectively amend a prior legislative rule. JA 90-102. The court also held that the Guidance did not significantly revise a prior authoritative interpretation of the FSAs, and thus did not run afoul of this Circuit's *Paralyzed Veterans* doctrine.[6] JA 102-07; *see Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

[6] The district court referred to this as the "*Alaska Hunters* doctrine," based on the first case in which the *Paralyzed Veterans* principle was held to be dispositive. *See Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

The district court also granted summary judgment to defendants on the two remaining claims, each of which was "resolved by the Court's conclusion that the document is an interpretative rule." JA 107. First, because the Guidance did not create or amend any laws or regulations, but rather interpreted existing FSA provisions, it did not "'create[] new lighting standards'" that bypassed the Act's procedural requirements.[7] *Id.* Second, because the Act's "customary use" requirement was effectuated through the negotiation and implementation of each State's FSA, the fact that the Guidance merely interpreted the existing agreements, rather than amending them, also made it "inescapable that the [Guidance] is similarly consistent with customary use." JA 107-09.

SUMMARY OF ARGUMENT

The Highway Beautification Act requires each State, as a condition of receiving its full allotment of federal highway funding, to regulate outdoor advertising signs in accordance with the terms of an agreement negotiated between the State and the Federal Highway Administration. While each such agreement is unique, many agreements contain similar lighting standards for outdoor advertising signs. Prior to 2007, nearly half of FHWA Division Offices had already interpreted those standards as affording States the discretion to approve the use of digital billboards under specified circumstances, while at least two others concluded that digital billboards

[7] Plaintiff has not challenged the dismissal of this claim on appeal.

were categorically barred. In response, in 2007, the FHWA issued an internal Guidance to its Divisions providing advice about how they should approach the task of interpreting the federal-state agreements, and suggesting factors for those Divisions to consider in undertaking any review of digital-billboard proposals. *See* JA 535-38. Plaintiff now seeks to set aside the Guidance on the theory that it constitutes a *de facto* legislative rule.

1. Plaintiff lacks standing to challenge the Guidance. All of plaintiff's asserted injuries are founded on its perceived need to increase its advocacy against digital billboards—a type of harm that this Court has held does not satisfy constitutional standing requirements. *See Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005). But even assuming the existence of an injury-in-fact cognizable under Article III, plaintiff cannot show that any of its asserted harms were caused by the Guidance. As the Guidance itself makes clear, the decision whether to allow digital billboards rests squarely with the States, subject to review and approval by FHWA Division Offices. For essentially the same reasons, the relief requested by plaintiff—vacatur of the Guidance—would not redress its injuries. Even in the absence of the Guidance, States could continue to propose allowing digital billboards, and FHWA Division Offices could continue to approve those proposals.

2. The Guidance also does not constitute reviewable final agency action. It does not represent the "'consummation' of the agency's decisionmaking process,"

Bennett v. Spear, 520 U.S. 154, 178 (1997); it instead makes clear that a decisionmaking process is necessary. The very point of the Guidance is that there is no categorical answer to the question whether digital billboards comply with FSA provisions prohibiting "flashing, intermittent, or moving" lights. The agency's final determination on that question rests with each FHWA Division in the context of a specific state proposal. Moreover, the Guidance does not alter the "'rights or obligations'" of any party. *Id.* States remain entirely free to prohibit digital billboards if they wish to do so, and FHWA Divisions retain the discretion to grant or deny the States' specific proposals in turn.

3. In any event, the Guidance is not a legislative rule and thus not subject to APA notice-and-comment requirements. The Guidance simply interprets a provision of existing federal-state agreements concerning "flashing, intermittent, or moving" lights. As the district court properly concluded, all four factors of this Court's established test for distinguishing interpretive and legislative rules support this conclusion. *See* JA 90-102. Plaintiff's attempts to interject other factors into the analysis are both belated and meritless: The APA neither prohibits interpretations involving numerical factors, nor requires notice and comment every time that the agency attempts to coordinate its internal decisionmaking. In addition, plaintiff's assertion that the Guidance significantly revises a prior definitive agency interpretation is both irrelevant to a proper legal analysis and, as the district court determined, is

contradicted by the record. In any event, any procedural error was harmless given plaintiff's extensive involvement in the agency's decisionmaking process.

4. Finally, plaintiff's "customary use" argument fails at multiple levels. Plaintiff itself agrees that customary use is a matter to be determined by agreement between the state and federal governments, *see* 23 U.S.C. § 131(d), and that the existing FSAs are consistent with customary use. Plaintiff further acknowledged below that if the Guidance is held to be interpretive, its customary-use claim necessarily fails. To the extent that plaintiff now seeks to elaborate a distinct statutory argument on appeal, that argument is both forfeited and meritless.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment in actions brought under the Administrative Procedure Act.[8] *See Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 440-41 (D.C. Cir. 2012). The Court also reviews *de novo* the district court's legal determinations as to standing, finality, and whether notice-and-comment rulemaking is required. *See, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 248 (D.C. Cir. 2014); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 937-38 (D.C. Cir. 2004).

[8] Plaintiff mistakenly asserts that this Court must "accept[] all factual allegations as true." Pl. Br. 12. On summary judgment, a plaintiff's unsubstantiated allegations are given no weight. *See, e.g.*, *Veitch v. England*, 471 F.3d 124, 134 (D.C. Cir. 2006).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO CHALLENGE THE GUIDANCE.

To establish Article III standing, plaintiff must demonstrate: (1) that it has suffered a concrete and particularized injury-in-fact that is actual or imminent, not conjectural or hypothetical; (2) that this injury was caused by the defendant's actions; and (3) that the injury is likely to be redressed by favorable judicial action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). On summary judgment, a plaintiff "can no longer rest on . . . 'mere allegations'" of injury, but "must 'set forth' by affidavit or other evidence 'specific facts.'" *Id.* at 561.

A. Plaintiff Cannot Demonstrate A Cognizable Injury To Itself Or Its Members.

1. Scenic America cannot demonstrate any injury that is cognizable under Article III. This Court has explained that where a plaintiff organization sues on its own behalf, the injury-in-fact element requires proof of a "concrete and demonstrable injury to the organization's activities," not merely a "setback to the organization's abstract social interests." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (quotation marks omitted). Because "[f]rustration of an organization's objectives is the type of abstract concern that does not impart standing," a plaintiff cannot proceed where its only injury is from the "effect of the [defendants' conduct] on the organizations' lobbying activities (as opposed to the effect on non-lobbying activities)." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir.

2005) (quotation marks omitted). Indeed, as the Supreme Court has emphasized, Article III does not authorize judicial review of agency action "at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

The purported injuries invoked by plaintiff do not suffice. Plaintiff principally avers that, following issuance of the Guidance, it has felt "forced to redirect a majority of its resources to the digital billboard issue." JA 47; *see also* Pl. Br. 9.[9] But the fact that plaintiff has chosen to devote more resources to opposing digital billboards—as opposed to advocating about other issues—cannot in itself suffice to establish standing. *See Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994) (a "diversion of resources from one program to another" does not suffice, absent direct injury to the "organization's programs" themselves).

The district court correctly concluded that many of the "activities" that were allegedly burdened by the Guidance "can fairly be categorized as the kind of 'pure issue-advocacy' that would not suffice to confer organizational standing." JA 67

[9] Plaintiff also asserts that "it suffered an injury-in-fact because it was deprived of the opportunity to provide public comment." Pl. Br. 9. But the Supreme Court has squarely held that "be[ing] denied the ability to file comments" is not an injury-in-fact: "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2006). The district court rightly rejected plaintiff's attempt to rely on this asserted injury. *See* JA 63-64.

(quoting *Ctr. for Law & Educ.*, 396 F.3d at 1162). The court appeared to agree, for example, that expenses incurred by plaintiff on "[e]ducation of local officials," "[l]obbying for . . . local ordinances," and "[c]oordination of letter-writing and petition campaigns" were advocacy costs that are insufficient to establish standing. JA 67. The district court also emphasized that if an organization were "able to gain standing merely by choosing to fight a policy" with which it disagrees, "the courthouse door would be open to all associations." JA 68 (quotation marks omitted).

The same reasoning applies to all of plaintiff's claimed harms. Plaintiff avers, for example, that it has incurred additional costs in "working with the media"; responding to members' requests for assistance; and maintaining "websites and email alert systems . . . for communities organizing on a local level." JA 48. These are nothing more than further examples of Scenic America's issue-advocacy efforts. Even if some of these activities involved "counseling" others about how to advocate against billboards, *cf.* JA 67, this Court has never suggested that an organization that otherwise lacks standing may bootstrap itself into federal court by expending resources to educate or represent others who care about the same policy issue. Indeed, "to hold that a lobbyist/advocacy group ha[s] standing to challenge government policy with no injury other than injury to its advocacy would eviscerate

standing doctrine's actual injury requirement." *Ctr. for Law & Educ.*, 396 F.3d at 1162 n.4 (citing *Sierra Club*, 405 U.S. at 739-40).

Even if harm to an organization's advocacy activities sufficed in some circumstances, *cf. Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011) (declining to decide whether injury to advocacy efforts may never establish standing), it is not a viable theory here. That is because plaintiff has failed to tender any evidence that issuance of the Guidance, in itself, has in any way impeded plaintiff's ability to conduct its advocacy activities. Plaintiff has not demonstrated, for example, that the Guidance makes it more difficult for Scenic America to communicate with its members, to prepare its white papers, or to lobby local officials. To the contrary, plaintiff retains its preexisting capacity to engage in advocacy in whatever form, and about whatever topic, that it finds most compelling. Plaintiff states that the Guidance has inspired it to undertake more advocacy about digital billboards than it otherwise would have done. But this is not an impediment to plaintiff's ability to advocate; it simply reflects the degree to which plaintiff cares about opposing digital billboards. And "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing." *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996); *see also, e.g.*, *Sierra Club*, 405 U.S. at 739 ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating

the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.").

2. Plaintiff has also sought to sue on behalf of its member affiliates and individuals. *See Nat'l Ass'n of Home Builders*, 667 F.3d at 12 (articulating requirements for representational standing). The district court, having held that plaintiff had standing to sue in its own right, did not reach this question.

Plaintiff lacks standing to sue on behalf of its members. The declarations filed by plaintiff's affiliates recite the same advocacy-related harms invoked by plaintiff itself. *See, e.g.*, JA 24 ("Scenic Philadelphia has spent a disproportionate amount of the organization's resources and volunteer time opposing newly permitted digital billboards" through lobbying, litigation, and other advocacy); JA 31-32, 41-43 (similar). Each of these asserted harms is insufficient for the reasons already stated above.

Plaintiff has also sought to premise representational standing on injuries to certain individuals living near digital billboards. For instance, Scenic Minnesota member Nikki Laliberte averred that a billboard near her home has marred the enjoyment of her property and distracted her while driving. *See* JA 52-53; *see also* DE#15-17 (Kirk Pristas decl.) (similar); DE#15-18 (Barbara Capozzi decl.) (similar). Even assuming that these harms constituted an injury-in-fact, each individual resides in a State that already permitted digital billboards before the Guidance was issued. The Guidance thus necessarily could not have caused the introduction of digital

billboards into their communities. *See, e.g.*, *Transp. Workers Union of Am., AFL-CIO v. TSA*, 492 F.3d 471, 474-77 (D.C. Cir. 2007) (dismissing challenge to agency guidance document for lack of causation; even without the guidance, the preexisting regime already authorized the conduct that harmed plaintiff).

B. Plaintiff's Alleged Injuries Were Not Caused By The Guidance.

Plaintiff also fails to demonstrate that its alleged injuries are "fairly traceable" to the Guidance rather than "the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61 (brackets, ellipsis, and quotation marks omitted).

The decision whether and how to allow digital billboards resides with the States in the first instance. The Guidance does not require States to permit them. To the contrary, the Guidance affirms that it "does not prohibit States from adopting more restrictive requirements . . . to the extent those requirements are not inconsistent" with federal law or the governing FSA. JA 537; *accord* 23 U.S.C. § 131(k) (States may "impos[e] stricter limitations" at their discretion); 23 C.F.R. §§ 750.701, 750.706(a) (same). Indeed, the district court itself observed that "it is the *States'* decisions to amend their regulations to permit the construction of digital billboards that causes Scenic America's harm, not the 2007 Guidance." JA 69. Where, as here, a plaintiff seeks to establish standing based on the actions of third parties, "formidable evidence

of causation" is required. *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 942 (emphasis and quotation marks omitted).

Plaintiff has failed to satisfy this burden. Although it asserts that the number of digital billboards increased after issuance of the 2007 Guidance, *see* JA 16, it has not demonstrated that this increase is actually attributable to the Guidance (as opposed, for example, to the increased affordability of LED technology). First, any digital billboards erected within a State that had already permitted them prior to 2007 would not be traceable to the Guidance. *See* JA 531-32 (listing 31 States that had permitted digital billboards prior to Guidance); *cf. Transp. Workers Union of Am.*, 492 F.3d at 474-77. Second, as to States that had not previously permitted digital billboards, but that chose to do so after 2007, plaintiff has failed to tender any evidence that those States did so only because of the Guidance.[10] Nor has plaintiff accounted for the role of technological or economic factors, such as lower-cost manufacturing or increased demand for digital advertising, in explaining the increase in digital billboards. Absent any such evidence, plaintiff's bare assertions of causation are insufficient to establish standing. *Cf. Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 941.

[10] Indeed, given that more than half of States had already permitted digital billboards before 2007, and that the vast majority of FHWA Divisions that had considered the question to date had approved those States' proposals, it would be implausible to suggest that the Guidance was a necessary prerequisite to permitting digital billboards in other States.

The district court nonetheless concluded that plaintiff's alleged injuries were "attributable to" the Guidance on the theory that it "ease[d] the path to approval for States' digital-billboard proposals." JA 70. But a belief that the Guidance made it easier for States to permit the use of digital billboards is not proof that the Guidance caused those States to adopt that course of action. The decision whether to permit or prohibit digital billboards remains principally a matter for the States themselves, and the Guidance has not changed the options available to them.

The district court also credited plaintiff's argument that the Guidance had "caused" digital billboards to be erected in Texas and Kentucky because the FHWA Divisions in those States had previously disapproved the States' requests to permit digital billboards. *See* JA 69, 70. But this reasoning simply reflects plaintiff's mistaken belief that the Guidance had mandated those Divisions to approve the proposals. To the contrary, the Guidance affirmed that the Divisions retained the discretion to forbid digital billboards if they concluded that the respective FSAs did not permit them, including on the basis that the States' specific proposals were inconsistent with FSA prohibitions against "flashing, intermittent, or moving" lights. *See* JA 537 (emphasizing that "Divisions are not required to concur with" States' proposals if they were determined to be inconsistent with the FSA or failed to "include adequate standards to address the safety of the motoring public").

C. Vacating The Guidance Would Not Redress Plaintiff's Alleged Injuries.

Finally, plaintiff also cannot show any likelihood that its asserted injuries "will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. In the district court, plaintiff principally argued that vacatur of the Guidance would "force the FHWA to resurrect its pre-Guidance policy that digital billboards violate FSA prohibitions on flashing, intermittent, and moving lights." JA 71. But there was no such pre-Guidance policy against digital billboards. To the contrary, as the court later noted, virtually all of the FHWA Divisions that had addressed the question had concluded that digital billboards were permissible in at least certain circumstances. *See* JA 84 ("22 FHWA Division Offices [had] approved States' digital-billboard proposals as consistent with their FSAs").

The district court appeared to conclude that plaintiff's harms were redressable because "[a]t the very least, vacating the Guidance would return the FHWA to agnosticism on the question" of digital billboards. JA 71. But such "agnosticism" would do nothing to redress plaintiff's injuries. Plaintiff has offered no basis for believing that States that have already been authorized by FHWA to allow digital billboards would have those approvals rescinded.[11] *Cf. Clapper v. Amnesty Int'l USA*,

[11] Moreover, even assuming that an FHWA Division exercised its discretion to rescind a particular State's approval, the State could nonetheless continue to permit digital billboards. The only possible consequence would be an action by the Secretary to withhold ten percent of the State's funding. *See* 23 U.S.C. § 131(*l*).

133 S. Ct. 1138, 1150 (2013) (disapproving of "standing theories that rest on speculation about the decisions of independent actors"). Similarly, plaintiff has offered no basis for expecting that vacating the Guidance would cause any existing digital billboards to be dismantled. *See Renal Physicians Ass'n v. U.S. Dept. of Health and Human Servs.*, 489 F.3d 1267, 1277 (D.C. Cir. 2007) (no redressability where real-world harms are not demonstrably "linked to the continuing existence of" the challenged agency rule). And even if the Guidance were vacated, States that have not yet allowed digital billboards could still seek FHWA approval to do so. The district court mistakenly assumed that if plaintiff succeeded on its claims, it "would not have to fight against the erection of new billboards" in "States that have not yet approved their construction," JA 72, but vacatur of the Guidance would not prevent FHWA from reviewing and accepting those States' proposals. In light of these circumstances, plaintiff's assertions of redressability are "merely 'speculative.'" *Lujan*, 504 U.S. at 561; *see also, e.g.*, *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 933 (no redressability where plaintiffs "offer[ed] nothing but speculation to substantiate their assertion that a favorable judicial decision would result in [third parties] altering their independent choices"); *Renal Physicians Ass'n*, 489 F.3d at 1277 (no redressability where it was "at least as plausible that" if challenged regulation were invalidated, third parties would not alter their conduct).

II. THE GUIDANCE DOES NOT CONSTITUTE FINAL AGENCY ACTION.

Plaintiff's claims are also subject to dismissal because the Guidance does not constitute "final agency action" under the APA. 5 U.S.C. § 704. An agency action is "final" only if it both (1) "mark[s] the consummation of the agency's decisionmaking process" and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks omitted). Neither criterion is met here.

1. First, the Guidance does not represent the "consummation" of the agency's decisionmaking process. As the district court explained, the Guidance "leaves to Division Offices the final decisions on particular digital-billboard proposals." JA 74. Indeed, the very point of the Guidance is to make clear that a decisionmaking process should take place. The Guidance explains that the agency's determination about whether to permit digital billboards in a particular State—and about whether the existing FSA can be interpreted to allow it—is to occur on a State-by-State, proposal-by-proposal basis. *See, e.g.*, JA 535 (stating that FHWA's decision about digital billboards should be made by the "Division . . . based upon a review and approval" of a State's proposal); JA 536 (noting that digital billboards are permissible "*if found to be consistent* with the FSA and with acceptable and approved State regulations, policies and procedures") (emphasis added); JA 537 (explaining that "Divisions are not required to concur with State proposed regulations" if the Division determines that

they are "not consistent with the FSA"). Yet plaintiff has forsworn any challenge to the agency's decisionmaking in these concrete settings. *See, e.g.*, DE#15, at 18 ("Scenic America is not challenging an individual FHWA Division Office's decision . . . .").

The court nonetheless concluded that the 2007 Guidance reflected the consummation of FHWA's decisionmaking on the specific issue "whether digital billboards violate FSA prohibitions on 'flashing,' 'intermittent,' or 'moving' lights," reasoning that the Divisions could no longer reject proposals on that basis. JA 73-74. This conclusion misreads the Guidance. The Guidance suggests that a Division could reasonably conclude that a digital-billboard proposal violates these very same FSA prohibitions if the proposal does not limit such advertising to "stationary messages" displayed "for a reasonably fixed time." JA 536. Indeed, the Guidance's discussion of "certain ranges of acceptability" for digital billboards necessarily implies that proposals outside those ranges could reasonably be determined to violate the FSA's lighting standards. JA 537. In any event, the Guidance does not definitively resolve these questions, but merely "provide[s] information to assist the Divisions" in undertaking their future review. JA 538. The Guidance thus represents the start, not the end, of the agency's legal analysis.

2. The Guidance also does not determine "'rights or obligations'" or give rise to "'legal consequences.'" *Bennett*, 520 U.S. at 177-78. The Guidance expressly

disclaims any "intent[] to amend applicable legal requirements." JA 538. Moreover, none of the other considerations that this Court has regarded as relevant are present here: the Guidance was not published in the Federal Register; it has no legally binding effects on the agency or its decisionmakers; and it does not impose any rights or obligations on regulated parties. *See Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 806-07 (D.C. Cir. 2006). Indeed, as plaintiff itself acknowledges, the Guidance "lacks the force of law." Pl. Br. 44, 45.

This Court's recent decision in *National Mining Association v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014), presents an instructive analogy. There, the agency had circulated a memorandum to its regional offices advising them to request their state regulatory counterparts to evaluate an additional factor in adjudicating discharge permits under the Clean Water Act. *Id.* at 248. The district court concluded that the guidance document was final agency action, but this Court reversed. The Court explained that "[t]he most important factor" in the analysis "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Id.* at 252. The guidance there at issue had "disclaim[ed] any intent to require anyone to do anything or to prohibit anyone from doing anything," and "[a]s a matter of law, state permitting authorities and permit applicants [could] ignore [the agency's] Guidance without facing any legal consequences." *Id.* The Court explained that judicial review of the

Guidance "must wait until a permit applicant has had a permit denied and seeks review of that permit denial." *Id.* at 251; *see also id.* at 247 (similar).[12]

The same principles apply here. The Guidance is an instruction from FHWA's headquarters staff to its regional Divisions, providing advice on how to manage future regulatory requests by States. The Guidance does not in itself mandate that anyone do or refrain from doing anything, and both States and FHWA Divisions "may ignore" the Guidance "without facing any legal consequences." *Id.* at 252. Moreover, even if the Guidance could be predicted to "signal likely future [digital-billboard approvals] by [FHWA Division Offices]," final agency action does not exist until the agency has actually adjudicated a specific State proposal. *Id.* at 247, 252; *see also, e.g.*, *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (no final action until the agency has "taken the steps required under the statutory and regulatory scheme for its actions to have any *legal* consequences," not merely "*practical* consequences") (emphasis added).

The district court ultimately concluded that the Guidance creates legal rights and obligations, but its reasoning is unpersuasive. First, the court discounted the Guidance's express statement that it did not "amend applicable legal requirements," JA 538, characterizing this clarification as mere "boilerplate." JA 74 (quoting

[12] *National Mining Association* concerned a general statement of policy rather than an interpretive rule, but this distinction is not material. The test for final agency action is the same as to both types of documents.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000)). But an agency's concession that its actions lack binding legal effect is, at a minimum, of significant relevance to the analysis. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005) (agency's "characterization of its own action" is "entitled to respect in a finality analysis"). In any event, this disclaimer was fully consistent with the remainder of the Guidance. The Guidance does not "command[]," "require[]," "order[]," or "dictate[]" anything; instead, its "caveats run throughout the document." *Nat'l Mining Ass'n*, 758 F.3d at 252-53 (quotation marks omitted); *see also Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227-28 (D.C. Cir. 2007) (rejecting reliance on *Appalachian Power Co.* for similar reasons).

The district court also concluded that the Guidance "ha[d] a binding effect" by "'withdr[awing]'" the ability of FHWA Divisions to reject digital-billboard proposals "'solely'" for violating FSA prohibitions against flashing, intermittent, or moving lights. JA 76 (quoting *Natural Resources Defense Council v. EPA*, 643 F.3d 311, 319 (D.C. Cir. 2011)). This conclusion is flawed in multiple respects.

First, as already discussed, the Guidance does *not* prevent Divisions from concluding that digital-billboard proposals violate FSA prohibitions on flashing, intermittent, or moving lights. The Guidance does not even purport to limit the factors that Divisions may consider in addressing that question. Instead, the Guidance lists some common characteristics of state proposals "that have been

approved by Divisions to date," and suggests that other Divisions would act appropriately if they addressed the same considerations. JA 537. Plaintiff's analogy to *Natural Resources Defense Council* is inapt; in that case, the document had "changed the law" governing agency decisionmaking, 643 F.3d at 320, whereas here, the Guidance articulates factors for the Divisions to consider while leaving the ultimate determination to their discretion, "based upon all relevant information." JA 537. *Cf. Ctr. for Auto Safety*, 452 F.3d at 809 (no final agency action where the agency's letter "emphasize[d] that the agency's position . . . remain[ed] flexible" and thus agency decisionmakers "remain[ed] free to exercise discretion") (brackets and quotation marks omitted).

The district court's reasoning also reflects a fundamental misunderstanding about the relevance of an agency's efforts to inform the discretion of its personnel in the field. An agency's effort to "coordinat[e]" its decisionmaking (JA 75), without more, does not make the coordinating action immediately reviewable in court. Of course, an internal agency directive can rise to the level of final agency action if, for example, it has a definitive effect on the legal rights and obligations of persons outside the agency. *See Nat'l Mining Ass'n*, 758 F.3d at 252 (inquiring into "the actual legal effect (or lack thereof)" on regulated entities). But if the mere presence of some arguable limitation on agency discretion were itself sufficient to establish final agency action, many of this Court's past decisions would have come out the other way. *Cf.,*

e.g., *Ctr. for Auto Safety*, 452 F.3d at 809 (no finality based on agency's letter to auto manufacturers, even though letter indicated that the agency "will approve a recall" if the manufacturers satisfied a certain standard); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2002) (no finality based on FDA warning letter to regulated party, even though letter "'communicat[ed] the agency's position'").

III. THE GUIDANCE IS NOT SUBJECT TO NOTICE-AND-COMMENT REQUIREMENTS.

In any event, the district court correctly concluded that notice-and-comment rulemaking was not required.

A. The Guidance Constitutes An Interpretive Rule.

The APA distinguishes between legislative rules (also known as "substantive rules"), interpretive rules, and general statements of policy. *See* 5 U.S.C. § 553. Legislative rules include those that "impose legally binding obligations or prohibitions on regulated parties" or that "set[] forth legally binding requirements for a [regulated] party to obtain a permit or license." *Nat'l Mining Ass'n*, 758 F.3d at 251-52. An interpretive rule, by contrast, "merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties." *Id.* at 252. An agency ordinarily must proceed through rulemaking

before promulgating a legislative rule, while interpretive rules and policy statements are exempt from these procedural requirements. *See* 5 U.S.C. § 553(b)(A), (d)(2).[13]

The Guidance is plainly an interpretive rule. It does not purport to establish new legal rights or obligations, but instead addresses the interpretation of terms in an existing regulatory requirement—namely, the prohibition on "flashing, intermittent, or moving light[s]" that is incorporated into a number of federal-state agreements under the Highway Beautification Act. Under the Guidance's interpretation, that phrase does not categorically prohibit "[e]lectronic signs that have stationary messages for a reasonably fixed time," JA 536; instead, agency decisionmakers should consider several factors in determining the contours of the FSA's limitations, "including but not limited to duration of message, transition time, brightness, spacing, and location." JA 537. Such "clarification of ambiguous terms . . . is precisely the type of agency action that the 'interpretative rule' exception was designed to accommodate." *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992); *see also Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("A statement seeking to interpret

[13] The question whether an agency document is a legislative rule, interpretive rule, or policy statement may in some circumstances overlap with the analysis whether the document constitutes final agency action. Nevertheless, the two inquiries are distinct, particularly as to interpretive rules, which may either be final (and thus facially reviewable) or non-final (and thus reviewable only when applied). *See, e.g.*, *Nat'l Mining Ass'n*, 758 F.3d at 251 (only some interpretive rules are facially reviewable). Here, as the district court correctly recognized, even if the Guidance were to qualify as final agency action, the rule nonetheless is interpretive rather than legislative in character. *See* JA 95-96.

a statutory or regulatory term is . . . the quintessential example of an interpretive rule.").

1. The *American Mining Congress* Factors Confirm That The Guidance Is Interpretive.

The foregoing conclusion is confirmed by this Court's four-part test for determining whether a rule is interpretive or legislative. First, the Guidance was not necessary to establish an "adequate legislative basis for enforcement action." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The existing regulatory scheme "already empower[ed] the agency to either accept or reject State proposals to permit digital billboards"; the Guidance simply "spell[ed] out the meaning of one particular FSA provision in slightly greater detail." JA 92. Second, it is undisputed that FHWA did not publish the Guidance in the Code of Federal Regulations. *See Am. Mining Cong.*, 995 F.2d at 1112. Third, it is undisputed that FHWA did not "explicitly invoke[] its general legislative authority" under 23 U.S.C. § 315. *Id.*; *see* Pl. Br. 46 (admitting same).

Finally, the Guidance did not "repudiate[]" or "effectively amend[] a prior legislative rule." 995 F.2d at 1112-13. Even assuming that the federal-state agreements could be regarded as legislative rules, "the 2007 Guidance does not effectively amend them." JA 100. Rather, the Guidance simply interprets the FSAs by identifying non-exclusive factors for Divisions to consider in determining whether

a particular digital-billboard proposal would violate an FSA prohibition against flashing, intermittent, or moving lights.

On appeal, plaintiff acknowledges that the second and third factors favor the government, but it nonetheless takes issue with the district court's application of the first and fourth factors. Each of its arguments is unpersuasive.

With respect to the first factor, plaintiff asserts that the Guidance "produced [a] 'legislative basis' for agency action" because it "runs counter to the plain meaning of the FSA proscriptions of 'flashing' and 'intermittent' lights." Pl. Br. 11, 26. As the district court correctly explained, however, "'[a] statement which is interpretative does not become substantive simply because it arguably contradicts'" the text that it interprets. JA 93 (quoting *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982)). Indeed, "[a]n interpretive rule may be sufficiently within the language of a[n] [existing] legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation" of that authority. *Am. Mining Cong.*, 995 F.2d at 1113.

Plaintiff's argument on this score is particularly anomalous because the correctness of the agency's interpretation is not before this Court. As the district court observed, plaintiff has declined to assert a claim that the Guidance's interpretation of the FSAs is arbitrary and capricious. *See, e.g.*, JA 92-93 (plaintiff "has for some reason declined to offer [its] argument as a more straightforward, frontal

assault on FHWA's interpretation of the FSAs via section 706(2)(A)"); JA 107, 108 (similar). In any event, the agency's interpretation is not "180 degrees counter" to the FSAs, Pl. Br. 25, 29, but is instead reasonable and consistent with the agency's past guidance. (*See also infra* pp. 48-49, 54-58.) And as plaintiff itself argues, the Guidance lacks the "force of law," Pl. Br. 44, 45, so it necessarily could not serve as a "legislative basis" for enforcement action.

With respect to the fourth factor, plaintiff now argues that the Guidance effectively amended the FSAs "by granting substantive rights to digital billboard operators" and rendering them "immune from agency regulation." Pl. Br. 29-30. Plaintiff did not press this theory below, and thus the argument has been forfeited. *See, e.g.*, *Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 79 (D.C. Cir. 2014) ("'[I]ssues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.'"). In any event, as already explained, the Guidance does not alter the legal rights or obligations of States or of FHWA itself, much less those of billboard operators. States retain the prerogative to determine whether they will seek to authorize digital billboards, and if so, under what circumstances. *See* JA 537; 23 U.S.C. § 131(k); 23 C.F.R. §§ 750.701, 750.706(a). The Guidance does not and cannot "grant" to billboard operators a "right" to anything.

Nor can plaintiff seriously argue that billboard operators enjoy "unlimited authorization to emit changing commercial advertisement messages" (Pl. Br. 30) given

that most States and FHWA Divisions, both before and after the Guidance, have restricted the use of digital billboards based on timing, brightness, location, and other safety considerations. Finally, plaintiff's assertion that the Guidance has "significant effects on private interests" (Pl. Br. 31) necessarily fails because this Court has repeatedly held that such a "substantial impact" inquiry is no longer the law. *See, e.g.*, *Cent. Tex. Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (explaining that an assertion that a rule "'vitally affect[s] private interests'" does not serve to distinguish legislative and interpretive rules); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (similar); *Cabais*, 690 F.2d at 237 ("Simply because agency action has substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA.").

2. Plaintiff's Other Arguments Are Meritless.

Plaintiff devotes much of its attention on appeal to pressing two other arguments: (1) that the Guidance is legislative because it "establishes arbitrary numerical regulatory standards," Pl. Br. 17-21, and (2) that the Guidance is legislative because it "restricts agency enforcement discretion," *id.* at 22-25. Both of these arguments rest on the premise that the district court erred in "limit[ing] itself to [the] four-factor test" set forth in *American Mining Congress*. Pl. Br. 10, 15, 16. Yet plaintiff itself urged the district court to apply this four-factor test without presenting these other arguments as alternatives. *See* DE#29, at 29-34 (plaintiff's motion for summary

judgment) (citing and applying *American Mining Congress* factors). As a result, plaintiff cannot raise them now as a basis for reversal. *See, e.g.*, *Freedom Watch, Inc.*, 766 F.3d at 79. In any event, both arguments are meritless.

First, plaintiff argues that the Guidance cannot be interpretive because it contains "arbitrary numeric criteria." Pl. Br. 17.[14] Citing *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) and *Hoctor v. USDA*, 82 F.3d 165, 170-71 (7th Cir. 1996)—two cases it never mentioned below—plaintiff asserts that "an agency creates a legislative rule by creating standards 'in numerical terms that cannot be derived from a particular record.'" Pl. Br. 17. But plaintiff's argument is belied by its own authorities, each of which emphasizes that it is not true that "'an interpretive rule can never have a numerical component.'" *Catholic Health Initiatives*, 617 F.3d at 495 (quoting *Hoctor*, 82 F.3d at 171). To the contrary, "'[e]specially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation.'" *Id.* (quoting *Hoctor*, 82 F.3d at 171).

The circumstances of both *Catholic Health Initiatives* and *Hoctor* underscore the errors in plaintiff's argument. In each of those cases, the agency had adopted an

[14] In its reply brief below, plaintiff asserted in passing that the Guidance "introduces a detailed set of numerical parameters to govern the operation of digital billboards, completely untethered to any language in the statute or FSAs." DE#37, at 11. But plaintiff never suggested that the presence of "numerical parameters" alone compelled the conclusion that the Guidance was legislative.

inflexible numerical threshold that replaced the standard that the agency had purported to interpret. *See Catholic Health Initiatives*, 617 F.3d at 496 (purported interpretation of "reasonable costs" yielding a "detailed—and rigid—investment code"); *Hoctor*, 82 F.3d at 169-71 (purported interpretation of "structural strength" that required an "eight-foot perimeter fence"). The rigidity of these numerical thresholds was a key determinant in concluding that the rules were legislative rather than interpretive. *See Catholic Health Initiatives*, 617 F.3d at 496 n.6 ("'[T]he "flatter' a rule is, the harder it is to conceive of it as merely spelling out what is in some sense latent in a statute or regulation[.]'") (quoting *Hoctor*, 82 F.3d at 171).

The Guidance is different in every relevant respect. It identifies "ranges of acceptability," not a fixed rule. JA 537. These ranges of acceptability are simply factors for FHWA Divisions to consider, not mandatory requirements. *See, e.g.*, JA 537 (identifying non-exclusive factors that may be "useful [to FHWA Divisions] in reviewing State proposals on this topic"). The ranges are not purely arbitrary or prescriptive, but rather correspond to the results of a nationwide empirical survey of existing digital-billboard practices. *See* JA 531-32. And words like "intermittent" are precisely the kind that call out for quantitative interpretation. *Cf. Catholic Health Initiatives*, 617 F.3d at 495. The Guidance thus falls comfortably within the realm of interpretive rules. *Cf., e.g.*, *Am. Mining Cong.*, 995 F.2d at 1108 (rule interpreting the term "diagnos[is]" to require detailed, numerical findings was interpretive); *Am. Postal*

Workers Union, AFL-CIO v. U.S. Postal Serv., 707 F.2d 548, 559 (D.C. Cir. 1983) (rule interpreting the term "average pay" through detailed mathematical formula was interpretive).

More generally, a rule does not become legislative "merely because it supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong.*, 995 F.2d at 1112; *see also Cent. Texas Tel. Co-op., Inc.*, 402 F.3d at 214 ("[A]n agency may use an interpretive rule to transform 'a vague statutory duty or right into a sharply delineated duty or right.'"). The very purpose of interpretive rules is "to advise the public of the agency's construction of the statutes and rules which it administers," *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quotation marks omitted), so that the public may better understand and anticipate the agency's likely response to concrete regulatory problems. If an agency could not announce a detailed interpretation without passing through notice-and-comment rulemaking, an agency would have a greatly reduced incentive to ever make its interpretations known. *See, e.g.*, Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 458-60 (5th ed. 2011) (discussing the "beneficial effects" of interpretive rules that reduce vague standards to more definite, quantitative terms). Plaintiff's blinkered understanding of the permissible scope of interpretive rules reflects its lack of awareness of these considerations.

Second, plaintiff asserts that the district court improperly "disregarded precedent that finds [that] when an agency cabins its enforcement discretion . . . the agency creates a legislative rule." Pl. Br. 10-11; *see also id.* at 22-25. This argument, which also depends largely on authorities that plaintiff never presented to the district court, similarly fails in multiple respects.

As an initial matter, and as already explained (*see supra* pp. 27, 35-36), plaintiff is incorrect in arguing that the Guidance "cabins the discretion previously held by agency officials to determine if a billboard[] violates FSA common lighting prohibitions on intermittent, flashing, or moving lights." Pl. Br. 22; *see also, e.g.*, *id.* (arguing that FHWA must "adhere to specific numerical guidelines"). To the contrary, the Guidance expressly reaffirms the authority of FHWA Divisions to interpret each FSA's provisions, including the discretion to determine whether a particular proposal is consistent with FSA lighting rules. The Guidance does not have the legal effect that the plaintiff ascribes to it.

Even if the Guidance did limit the agency's discretion, plaintiff is incorrect to assume that this would render it in a legislative rule. Virtually every lawful interpretive rule that is promulgated by an agency can be said, in some sense, to standardize the agency's interpretation of some legal requirement and thereby to "cabin[]" the discretion of agency officials to follow a contrary view. For this reason, *American Mining Congress* squarely rejected the notion that "restricting discretion" is a dispositive

factor in distinguishing interpretive from legislative rules. *See* 995 F.2d at 1111 ("restricting discretion tells one little about whether a rule is interpretive."); *see also, e.g.*, *Warder v. Shalala*, 149 F.3d 73, 82 (1st Cir. 1998) (explaining that interpretive rules may "bind agency personnel" and nonetheless remain interpretive). Indeed, as with plaintiff's previous argument, if it were true that any attempt by an agency to limit its personnel's discretion would result in a legislative rule, much of the value of interpretive rules would be lost. Congress could hardly have intended such a result in enacting the APA. *See, e.g.*, Pierce, *Administrative Law Treatise* § 6.3, at 424-26 (5th ed. 2011) (discussing perverse effects that would follow from requiring a rulemaking anytime agencies seek to "limit the discretion of agency employees").

Plaintiff's reliance on *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (per curiam), does not advance its argument. In that case, this Court identified a "variety of factors" that collectively justified the conclusion that FDA's action levels for a particular food contaminant amounted to a legislative rule. *Id.* at 947. The Court emphasized that the action levels contained "mandatory, definitive language"; had "present effect"; and were "binding" on regulated parties. *Id.* It also concluded that, under the circumstances, the action levels appeared to "cabin[] [the] agency's prosecutorial discretion," in the sense that the agency likely would not succeed if it later pursued enforcement measures against producers whose foods were compliant with the announced standards. *Id.* at 948. But the fact that the cabining of

an agency's discretion "*can in fact* rise to the level of a . . . legislative rule" in one circumstance, *id.* (emphasis added), does not mean that it invariably does so. *Cf., e.g.*, *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007) (reading *Community Nutrition Institute* to apply only where an agency "narrowly limits administrative discretion") (emphasis omitted); *Nat'l Ass'n of Home Builders*, 415 F.3d at 16-17 (declining to hold that agency protocols amounted to a legislative rule where the protocols lacked "binding language" and were "not nearly as severe" as the language at issue in *Community Nutrition Institute*); *Am. Mining Cong.*, 995 F.2d at 1107 (holding that memorandum intended to "coordinate and convey agency policies, guidelines, and interpretations to agency employees" was interpretive, not legislative).

B. The *Paralyzed Veterans* Doctrine Is Inapplicable.

The determination that the Guidance is an interpretive rule is dispositive of the analysis whether notice-and-comment rulemaking is required. Nonetheless, invoking this Court's decision in *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999), plaintiff argues that the Guidance, even if interpretive, was still required to proceed through rulemaking on the theory that it "'significantly revise[d]' a prior 'definitive interpretation.'" Pl. Br. 31; *see id.* at 31-34.

Plaintiff's argument is unavailing. First, the doctrine on which plaintiff relies, which originated with *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), is inconsistent with the plain text of the APA, which explicitly

exempts "interpretative rules" from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A), (d)(2). At the government's request, the Supreme Court has granted certiorari to review this doctrine, and a decision is expected this Term. *See Perez v. Mortgage Bankers Ass'n*, Nos. 13-1041 & 13-1052 (S. Ct.) (argument held Dec. 1, 2014).

Even if the doctrine were to survive the Supreme Court's review, it would not be applicable here. The doctrine mandates notice-and-comment rulemaking only in the narrow circumstance in which the challenged agency interpretation contradicts a prior, definitive interpretation on the same topic. "[S]o long as a new guidance document 'can reasonably be interpreted' as consistent with prior documents, it does not significantly revise a previous authoritative interpretation." *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009).

That is precisely the case here. As an initial matter, it is doubtful that the agency's 1996 Memorandum—a non-binding guidance document that did not specifically address digital billboards—could be understood to count as a "previous authoritative interpretation." *See, e.g.*, *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1039-41 (D.C. Cir. 2008) (prior interpretation must be a "definitive and binding statement"). But even if it were, the 2007 Guidance is fully consistent with that document. Indeed, the Guidance was issued precisely to "confirm and expand on the principles set forth in the 1996 Memorandum." JA 536.

Plaintiff mistakenly asserts that the analysis should instead be conducted in reference to an earlier 1990 guidance. Pl. Br. 32; *see* JA 163. But as the district court correctly explained, the *Paralyzed Veterans* doctrine applies to the "most recent [definitive] statement of [the agency's] position on the matter." JA 106. Here, that statement is the 1996 Memorandum, which, by announcing that "'[c]hangeable message signs are *acceptable* for off-premise signs, *regardless of the type of technology* used,'" JA 106 (quoting 1996 Memorandum), "necessarily supersede[d]" the contrary 1990 guidance that had "'prohibit[ed]'" off-premise variable message signs "'irrespective of the method used.'" JA 106 (quoting 1990 guidance). In addition, the fact that 22 FHWA Divisions approved digital-billboard proposals between 1996 and 2007 only underscores the lack of justification for plaintiff's belief that the 1990 guidance authoritatively banned digital billboards in all circumstances.

C. Any Procedural Error Was Harmless.

Even if this Court were to determine that the agency erred in failing to undergo notice-and-comment procedures, any such error would be harmless. *See Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006) ("A petitioner must demonstrate that the agency's violation of the APA's notice and comment procedures has resulted in 'prejudice.'"); 5 U.S.C. § 706(2) ("[D]ue account shall be taken of the rule of prejudicial error.").

Plaintiff cannot demonstrate any prejudice from FHWA's asserted failure to proceed through rulemaking. Before the Guidance issued, Scenic America was afforded, and took full advantage of, multiple opportunities to consult directly with the agency about the subject of digital billboards. In particular, plaintiff submitted multiple written comments, *see* JA 427-32, 519-22; attended a meeting with several agency representatives, *see* JA 47, 433-35; and corresponded by email with FHWA employees, *see* JA 444-45. FHWA, in turn, considered plaintiff's views and circulated its comments within the agency. *See* JA 426, 433. Plaintiff itself appeared to discourage FHWA from proceeding through rulemaking, instead urging the agency to issue "definitive guidance" on digital billboards "*as soon as possible*." JA 445; *see also* JA 519-22. Under the circumstances, any technical deficiency in complying with 5 U.S.C. § 553 could not have prejudiced plaintiff in any way. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 40-41 (D.C. Cir. 2005) (holding harmless an agency's technical non-compliance with 5 U.S.C. § 553 where the agency provided notice and "received and considered comments" from petitioners before promulgating the rule); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487-88 (9th Cir. 1992) (holding error harmless where plaintiffs received actual notice, and the agency considered plaintiffs' comments prior to issuing its rule); *Sheppard v. Sullivan*, 906 F.2d 756, 762 (D.C. Cir. 1990)

(holding error harmless where, *inter alia*, plaintiff had "not even suggested how he might have suffered any injury" from lack of publication in Federal Register).[15]

IV. PLAINTIFF'S "CUSTOMARY USE" CLAIM IS WITHOUT MERIT.

Plaintiff also renews its erroneous claim that the Guidance violates the Highway Beautification Act's requirement that outdoor advertising signs be "consistent with customary use . . . [as] determined by agreement between the several States and the Secretary." 23 U.S.C. § 131(d). For the reasons already stated, the Court need not address this claim because plaintiff lacks standing and the Guidance does not constitute final agency action. Should the Court nonetheless reach the claim, it should affirm.

A. Plaintiff's Claim Rests On The Mistaken Premise That The Guidance Is A Legislative Rule.

First, as the district court concluded, plaintiff's argument is foreclosed by the determination that the Guidance is an interpretative, not legislative, rule. *See* JA 107-09. Plaintiff does not dispute that the existing federal-state agreements—including the prohibitions on flashing, intermittent, or moving lights contained in most FSAs—are "consistent with customary use" within the meaning of the statute. 23 U.S.C. § 131(d). Indeed, plaintiff itself equates "customary use" with "the permissions and

[15] Nor is this a case in which the agency has "utter[ly] fail[ed]" to afford any notice and comment. *Cf. Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). As noted, Scenic America submitted multiple comments about digital-billboard regulation, and the agency also published a notice inviting public comment about "regulatory approaches to new billboard technology." 72 Fed. Reg. at 9593.

prohibitions contained in [the] FSAs as set forth therein." Pl. Br. 36. As already explained, the Guidance does not alter those FSAs, but instead provides an interpretation of the phrase "flashing, intermittent, or moving light or lights." Because the Guidance interprets the FSAs rather than amending them, the district court correctly concluded that "the document is similarly consistent with customary use." JA 108.

Plaintiff itself told the district court that its "customary use" claim was derivative of its argument that the Guidance substantively amended the FSAs. In seeking summary judgment, the federal defendants had argued that if the Guidance were held to be interpretive, that holding would also resolve plaintiff's customary-use claim. *See* DE#35, at 18 (federal defendants' response and reply) ("[I]f the Court determines the 2007 Memorandum to be an interpretive rule, that determination should resolve Count 3 as well."). In reply, plaintiff did not contend otherwise, but instead accepted that the claim depended on success on its rulemaking claim: "*Assuming the Court accepts Plaintiff's arguments that the 2007 Guidance does not merely interpret the FSAs*, then the Court should also conclude that the 2007 Guidance violates the HBA's mandate[] that lighting standards . . . be 'consistent with customary use.'" DE#37, at 17 (emphasis added); *see also id.* at 19 (repeating same conditional language in the context of addressing other statutory claim). Thus, as framed by plaintiff, its customary-use claim required the district court to accept the premise that "[t]he 2007

Guidance does not interpret [the FSAs' lighting] provisions, but rather adds an exemption to them." *Id.* at 24.[16] The district court relied upon plaintiff's characterization, explaining that the customary-use claim "depends on the premise . . . that the Guidance does something other than interpret the FSAs." JA 108 (citing DE#37, at 24); *see also* JA 92-93 (plaintiff "declined to offer . . . a more straightforward, frontal assault on FHWA's interpretation of the FSAs via section 706(2)(A)"); JA 107 ("Scenic America has declined to bring an independent challenge to the validity of [the Guidance's] interpretation").

On appeal, plaintiff does not argue that the district court misconceived the legal basis for its claim. Instead, it persists in arguing that the Guidance does not "'merely interpret[]' the FSAs," but rather altered the FSAs "to such an extent that they are not 'consistent with customary use.'" Pl. Br. 34-35. Although plaintiff asserts in passing that the Guidance is "arbitrary [and] capricious" or not "in accordance with'" the Act, citing the standards of 5 U.S.C. § 706(2)(A) (Pl. Br. 35, 36, 41, 48), its efforts to recharacterize its claim are unavailing. Plaintiff may not hint at legal theories for the first time on appeal that the district court, relying on plaintiff's own representations,

[16] Plaintiff acknowledged below that if the district court held the Guidance to be legislative and vacated it on that basis, it "may obviate" the need to adjudicate plaintiff's customary-use claim. *See* DE#37, at 17 (plaintiff's reply). Plaintiff nonetheless urged the district court, "[a]ssuming [it] accept[ed] Plaintiff's arguments" on the first claim, to also reach the customary-use claim so that the agency could not "simply reissue its 2007 Guidance through proper rulemaking." *Id.* at 18.

had expressly concluded that plaintiff was not making.[17] Plaintiff thus has doubly forfeited any argument that the Guidance is independently violative of statutory requirements. *See, e.g.*, *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 168 (D.C. Cir. 2013) (argument is forfeited where not squarely presented below); *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (claim that lower court erred in some respect is forfeited unless squarely presented in opening brief).

B. The Guidance Is Consistent With Both The Statute And The FSAs.

Even if plaintiff had adequately presented and preserved its "customary use" arguments, however, its claim would not succeed.

1. First, the Guidance is entirely consistent with the Highway Beautification Act. Plaintiff and its amici insist that digital billboards are *per se* inconsistent with "customary use" because they did not exist in the 1960s or 1970s. *See*, *e.g.*, Pl. Br. 36 ("Anything outside the scope of what an FSA meant at the time it was created cannot be 'customary use.'"); Amici Br. 3 ("[B]ecause digital billboards did not exist when the HBA was enacted, they could not have constituted a 'customary use.'"). By this logic, the only technology that would be permitted in the twenty-first century is the paper

[17] Amici complain that the district court "focused . . . on whether notice-and-comment rulemaking was required" instead of whether the Guidance's interpretation was arbitrary and capricious. Amici Br. 2. But the court did so precisely because that was plaintiff's claim, as plaintiff itself acknowledged. Amici's disagreement with that approach cannot justify the adjudication of matters not presented below. *See, e.g.*, *New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (declining to adjudicate arguments by amici that "the party to the case[] has in effect renounced"); *Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001) (relying upon similar cases).

and paint buckets that predominated a half-century ago. But there is no reason to suppose that Congress intended for the Act or its implementing agreements to foreclose all innovation in the field of outdoor advertising. To the contrary, it was well-understood that "new and ingenious types of signs and devices [will be] brought forth in the future[,] which may or may not present a hazard" within the meaning of the Act. H.R. Rep. No. 89-1084, at 5 (Sept. 22, 1965) (letter from Secretary of Commerce). The Act's framers contemplated a "continuing process" of "refinement" of outdoor advertising standards "for the benefit of both the traveling public and private business concerns serving the motorists." *Id.* And as plaintiff itself acknowledges, "Congress added 'customary use' [to the statute] to assuage fears about federal agency overreach in determining billboard restrictions," not to frustrate the ability of States to permit new advertising technologies. Pl. Br. 38; *see* 111 Cong. Rec. 26,296 (Oct. 7, 1965) (statement of Rep. Wright).

2. The Guidance also reflects a reasonable interpretation of the FSAs themselves. The terms "flashing," "intermittent," and "moving" bear no inherent technical meaning, and thus are readily subject to further clarification and reasonable line drawing.[18] As the district court explained, it is certainly permissible to conclude

[18] Plaintiff's own interpretation demonstrates the necessity of such line drawing. For example, a traditional billboard spotlight that turns on every evening and off every morning is literally "[i]ntermittent" in that it "'stop[s] and start[s] at intervals.'" Pl. Br. 27 (quoting *Webster's New World College Dictionary* 745 (4th ed. 2009)). Yet even

Continued on next page.

that a digital billboard does not "flash" if its "brightness is limited"; that it is not "intermittent" if its light "remain[s] steady"; and that it does not "move" if its "images are static." JA 94. This reasoning is particularly sound when considered from the perspective of a passing motorist, for whom the visual effect of a digital billboard displaying a static message substantially resembles that of a traditional sign.

The Guidance thus reflects the agency's assessment that the FSAs' lighting standards should be interpreted in a pragmatic manner and in light of their purpose of "ensur[ing] the safety of the motoring public." JA 537. It is entirely reasonable to conclude that a digital billboard that is limited to displaying "stationary messages for a reasonably fixed time" would not constitute the type of distraction that FSA lighting provisions had been created to prohibit—just as the agency similarly concluded in 1996 that changeable messages signs that were "fixed for a reasonable time period" were not *per se* barred. JA 536. And precisely because this interpretive task implicates a weighing of competing policy considerations, the agency's interpretation of the federal-state agreements is accorded deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (affording "substantial deference to an agency's interpretation of its own regulations"); *Cajun Elec. Power Corp. v. FERC*, 924 F.2d 1132, 1135-36 (D.C.

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plaintiff acknowledges that such a light should not be construed to violate FSA prohibitions. *Cf.* Pl. Br. 28; Scenic Am., Pet. for Rulemaking at 3 (Feb. 23, 2010), *available at* http://tinyurl.com/ScenicAmericaPetition (urging interpretation that defines "intermittent" as "more frequently than once every twelve hours").

Cir. 1991) (agency is "entitled to just as much benefit of the doubt in interpreting . . . an agreement as it would in interpreting its own orders, its regulations, or its authorizing statute") (citations omitted).

Plaintiff's contrary arguments are unavailing. Plaintiff asserts that the Guidance's interpretation would render superfluous a common FSA provision categorically exempting signs displaying certain "public service information" (e.g., time, date, temperature, and weather) from the prohibition on flashing, intermittent, and moving lights. *See* Pl. Br. 40-41. But this exemption is plainly not superfluous, as it allows public-service signs to do things that are generally not permitted for digital billboards, such as blink, animate, or cycle content every second. *Cf.* JA 536 (suggesting that digital billboards are consistent with the FSAs only to the extent they display "stationary messages for a reasonably fixed time").[19] Meanwhile, plaintiff's assertion that the Guidance was formulated "without any logical reasoning or expert

[19] Amici commit a similar error (Amici Br. 15-17, 18) in relying on a failed legislative proposal that would have categorically authorized electronic signs for off-premise use. *See* H.R. 11733, § 117 (Sept. 21, 1978). Contrary to amici's suggestion, Congress's rejection of this proposal did not imply that it intended to prohibit all electronic signs in the future. It instead shows that Congress did not wish to legislate categorically, but rather to leave in place FHWA's discretion to interpret the FSAs and to reject lighting proposals that would pose unreasonable risks to public safety. *See, e.g.*, 124 Cong. Rec. 26,917-26,918 (Aug. 18, 1978) (colloquy among Sens. Stafford, Bentsen, and Jackson) (describing it as "imperative" that authorities be permitted to "assess[] . . . the effect of electronic signs on highway safety" before such signs "are permitted to proliferate further," and disapproving House proposal because it "would mandate" that such signs be permitted in all instances).

analysis," Pl. Br. 47, reflects nothing more than its lack of familiarity with the administrative record. *See supra* pp. 9-13 (summarizing agency's decisionmaking process). Although plaintiff may disagree with the interpretation of the FSAs reflected in the Guidance, plaintiff cannot identify any respect in which FHWA has exceeded the broad scope of its permissible policy discretion.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,890 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
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Counsel for Defendants-Appellees

STATUTORY AND REGULATORY ADDENDUM

CONTENTS

5 U.S.C. § 553—Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 704—Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

23 U.S.C. § 131—Control of outdoor advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to

(1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size,

number, and spacing of signs, and such other requirements as may be appropriate to implement this section,
(2) signs, displays, and devices advertising the sale or lease of property upon which they are located,
(3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located,
(4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and
(5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

. . .

(*l*) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136,

the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

. . . .

23 C.F.R. § 750.705—Effective control.

In order to provide effective control of outdoor advertising, the State must:

(a) Prohibit the erection of new signs other than those which fall under § 750.704(a)(1) through (6);

(b) Assure that signs erected under § 750.704(a)(4) and (5) comply, at a minimum, with size, lighting, and spacing criteria contained in the agreement between the Secretary and the State;

(c) Assure that signs erected under § 750.704(a)(1) comply with the national standards contained in subpart B, part 750, chapter I, 23 CFR;

(d) Remove illegal signs expeditiously;

(e) Remove nonconforming signs with just compensation within the time period set by 23 U.S.C. 131 (subpart D, part 750, chapter I, 23 CFR, sets forth policies for the acquisition and compensation for such signs);

(f) Assure that signs erected under § 750.704(a)(6) comply with § 750.710, Landmark Signs, if landmark signs are allowed;

(g) Establish criteria for determining which signs have been erected with the purpose of their message being read from the main-traveled way of an Interstate or primary highway, except where State law makes such criteria unnecessary. Where a sign is erected with the purpose of its message being read from two or more highways, one or more of which is a controlled highway, the more stringent of applicable control requirements will apply;

(h) Develop laws, regulations, and procedures to accomplish the requirements of this subpart;

(i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence and cause their prompt removal; and

(j) Submit regulations and enforcement procedures to FHWA for approval.