OAAA Digital Technology Brief

Digital Billboards

Message Points

- Digital billboards serve businesses and communities by communicating information that can be quickly changed
- Digital billboards are accepted by government and the public
- Digital billboards are regulated by government and self-regulation by the industry
- Digital billboards are not distracting to drivers, according to government research
- Government relies of digital billboards on behalf of public safety
- Digital billboards support jobs

Government-sponsored anti-distraction message on digital billboard in Connecticut

Digital Billboards

High-tech communication for advertisers and communities

Digital technology is a non-manual way to change billboard "copy," via computer. Digital billboards do not flash or scroll; they display static images that rotate typically every six or eight seconds.

Advertisers can change their messages quickly, without the time and expense of printing or posting. Other media are major buyers of digital billboards, featuring news, sports, weather, programming, and personalities.

Likewise, communities use digital billboards to deliver information to the public.

Other media are major buyers of digital billboards

Digital billboards are accepted/regulated

"Digital billboards are right in line with the whole cityscape. They communicate that we are a city that embraces technology. We actually have some of the newest state-of-the art cutting edge advertising," said Joe Cimperman, a long-time city councilman in Cleveland, OH.

Keeping pace with technology, government has regulated and authorized digital billboards. The federal government says states can allow digital billboards as long as they do not flash, scroll, or feature full motion. Nearly all states with billboards allow digital billboards, which operate in nearly 1,000 communities.

Anti-billboard Scenic America attacked the federal guidelines in court; in 2014 a federal judge dismissed the case, with prejudice.

Industry practices conform to federal guidance, such as display times and lighting. Federal guidelines, issued in 2007, say digital billboards should "adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety of the motoring public." Digital billboards are equipped with light sensors that adjust brightness to surrounding light conditions, to avoid glare.

The out of home advertising industry has established standards that lighting levels should not exceed 0.3 foot candles above the level of surrounding light conditions. State and local governments have incorporated this standard into regulations.

The OAAA *Code of Industry Principles* commits to providing effective and safe digital billboards:

- We are committed to ensuring that the commercial and noncommercial messages disseminated on standard-size digital billboards will be static messages and the content shall not include animated, flashing, scrolling, intermittent or full-motion video elements (outside established entertainment areas).
- We are committed to ensuring that the ambient light conditions associated with standard-size digital billboards are monitored by a light sensing device at all times and that display brightness will be appropriately adjusted as ambient light levels change.

The respected media research firm Arbitron has studied public opinion (Los Angeles County, 2009, and the metro area of Cleveland, OH, 2008). With similar findings in each study, Arbitron says most commuters feel that digital billboards are a cool way to advertise and also provide important community information.

Traffic Safety

On December 30, 2013, the Federal Highway Administration (FHWA) released the findings of its multi-year research on drivers' behavior in proximity to digital billboards.

"DOT study finds digital billboards don't distract drivers," said the headline in *The Hill* newspaper in Washington, DC (January 7, 2014).

The government's findings tracked the outcome of industry-sponsored research, which found no connections to accidents.

FHWA's sister agency the National Highway Traffic Safety Administration (NHTSA) said in 2006: "Short, brief glances away from the forward roadway for the purpose of scanning the driving environment are safe and actually decrease near-crash/crash risk."

This 2006 NHTSA study ("100-Car Naturalistic Driving Study") said glances totaling more than 2 seconds increase crash risk. FHWA's later research on digital billboards, released December 30, 2013, said the longest glances toward digital billboards were less than 1.3 seconds.

State review of crash data

Meanwhile, states have reviewed crash data. Effective January 1, 2015, New York State switched from 24-hour to 8-second display time on digital billboards. New York's analysis of crash data "suggests there is no change in the crash patterns in the vicinity of the off-premise CEVMS billboards," and continued monitoring is warranted.

Massachusetts DOT also looked at crash data: "The traffic engineers preparing the reports found no detrimental safety impacts" of the digital billboards.

A media report in 2015 summarized state regulatory acceptance of digital billboards, including New York State and Massachusetts.

Digital billboards help public safety

Emergency message after the Boston Marathon bombing

Government relies on digital billboards to communicate with the public.

Since 2008, the National Center for Missing & Exploited Children has transmitted more than 1,000 AMBER Alerts to digital billboards. The Center points out that time is of the essence after child abductions, and, therefore, quick posting on digital billboards is an important part of the AMBER Alert network.

The FBI says it has apprehended 53 fugitives as a direct result of tips from the public prompted by information on digital billboards.

The FBI calls digital billboards a "force multiplier." On March 16, 2012, FBI Director Robert S. Mueller presented the Director's Community Leadership Award to Ken Klein of the Outdoor Advertising Association of America in recognition of the industry's partnership to help law enforcement via digital billboards.

FBI Director Robert S. Mueller presents award to Ken Klein (OAAA)

At the local level, Albuquerque, NM, used digital billboards to urge conservation during a winter-time natural gas shortage. Police in Janesville, WI, post a variety of messages. "An elderly female suffering from Alzheimer's disease wandered away from family in a local shopping mall and was found by a citizen using the digital billboard information. When spring floods along the Rock River posed significant danger to the public, billboards were used to post warnings about the danger," wrote Chief of Police Neil Mahan (retired) in The Police Chief magazine.

FEMA message on digital billboard after storms hit Tuscaloosa, AL

Digital billboards support jobs

Billboard advertising supports jobs in local communities, typically more than two dozen jobs per advertiser. The digital sign industry also supports thousands of manufacturing jobs, incubates new ideas, and produces exports.

In 2001, Time-O-Matic, known for time-and-temperature signs, added Watchfire to its name to represent new products such as LED signs. "Watchfire is a living, thriving example for communities across America" that small business development is an engine of the overall economy, says Vicki Haugen of the economic development arm of Danville, IL, and surrounding Vermillion County.

U.S. Senator John Thune, R-SD, echoes that point. "Daktronics is the type of company that communities dream of having," said Thune, calling the company an "integral" part of the community of Brookings, SD. Daktronics designs and builds digital displays, electronic scoreboards, and programmable display systems. Each day in nearly 100 countries, millions of people depend on displays and scoring systems made by Daktronics, which is competing globally from small-town America.

In 1920, an immigrant from England named Tom Young went into the sign business with $300. Today, Young Electric Sign Company – based in Salt Lake City, UT -- manufactures on-premise and off-premise signs including high-tech LED boards in Logan, UT.

References

“Built in the USA: Growing Outdoor at Home,” Ken Klein, *Outdoor Advertising Magazine*, January/February 2009

"Digital Advertising Board -- Pilot Program," Bonnie Polin, Chief Safety Analyst, Massachusetts Department of Transportation, November 22, 2011

“Digital Billboards and Law Enforcement Agencies: A New, High-Tech Partnership,” Neil Mahan, chief of police (retired), Janesville, WI, The *Police Chief* magazine, March 2009

"Digital Billboard Initiative: Catching Fugitives in the Information Age," Federal Bureau of Investigation, posted online December 24, 2014

“Driving Performance and Digital Billboards,” Virginia Tech Transportation Institute, Center for Automotive Safety Research, March 22, 2007

"DOT study finds digital billboards don't distract drivers," The Hill, 1625 K Street, NW, Washington, DC 20006, January 7, 2014

“Guidance on Off-premise Changeable Message Signs,” Federal Highway Administration memorandum, Gloria M. Shepherd, Associate Administrator for Planning, Environment, and Realty, September 25, 2007

"The Effects of Commercial Electronic Variable Message Signs (CEVMS) on Driver Attention and Distraction: An Update," John A. Molino, Jerry Wachtel, John E. Farbry, Megan B. Hermosillo, Thomas Granda; Publication No. FHWA-FHT-09-018, Federal Highway Administration, February 2009

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Laws, Regs and Policy Guidance

Guidance On Off-Premise Changeable Message Signs

U.S. Department of Transportation Federal Highway Administration	Memorandum

Subject:	INFORMATION: Guidance On Off-Premise Changeable Message Signs	Date:	September 25, 2007
	ORIGINAL SIGNED BY: Gloria M. Shepherd		
From:	Gloria M. Shepherd Associate Administrator for Planning, Environment, and Realty	Reply to	HEPR-20
To:	Division Administrators ATTN: Division Realty Professionals		

Purpose

The purpose of this memorandum is to provide guidance to Division Realty Professionals concerning off-premises changeable message signs adjacent to routes subject to requirements for effective control under the Highway Beautification Act (HBA) codified at 23 U.S.C. 131. It clarifies the application of the Federal Highway Administration (FHWA) July 17, 1996, memorandum on this subject. This office may provide further guidance in the future as a result of additional information received through safety research, stakeholder input, and other sources.

Pursuant to 23 CFR 750.705, a State DOT is required to obtain the FHWA Division approval of any changes to its laws, regulations, and procedures to implement the requirements of its outdoor advertising control program. A State DOT should request and the Division offices should provide a determination as to whether the State should allow off-premises changeable Electronic Variable Message Signs (CEVMS) adjacent to controlled routes, as required by our delegation of responsibilities under 23 CFR 750.705(j). The Divisions that already have formally approved CEVMS use on HBA controlled routes, as well as, those that have not yet issued a decision, should re-evaluate their position in light of the following considerations. The decision of the Division should be based upon a review and approval of a State's affirmation and policy that: (1) is consistent with the existing Federal/State Agreement (FSA) for the particular State, and (2) includes but is not limited to consideration of requirements associated with the duration of message, transition time, brightness, spacing, and location, submitted for the FHWA approval, that evidence reasonable and safe standards to regulate such signs are in place for the protection of the motoring public. Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s.

This guidance is applicable to conforming signs, as applying updated technology to nonconforming signs would be considered a substantial change and inconsistent with the requirements of 23 CFR 750.707(d)(5). As noted below, all of the requirements in the HBA and its implementing regulations, and the specific provisions of the FSAs, continue to apply.

Background

The HBA requires States to maintain effective control of outdoor advertising adjacent to certain controlled routes. The reasonable, orderly and effective display of outdoor advertising is permitted in zoned or unzoned commercial or industrial areas. Signs displays and devices whose size, lighting and spacing are consistent with customary use determined by agreement between the several States and the Secretary, may be erected and maintained in these areas (23 U.S.C. § 131(d)). Most of these agreements between the States and the Secretary that determined the size, lighting and spacing of conforming signs were signed in the late 1960's and the early 1970's.

On July 17, 1996, the Office of Real Estate Services issued a memorandum to Regional Administrators to provide guidance on off-premise changeable message signs and confirmed that the FHWA has "always applied the Federal law 23 U.S.C. 131 as it is interpreted and implemented under the Federal regulations and individual FSAs." It was expressly noted that "in the twenty-odd years since the agreements have been signed, there have been many technological changes in signs, including changes that were unforeseen at the time the agreements were executed. While most of the agreements have not changed, the changes in technology require the State and the FHWA to interpret the agreements with those changes in mind." The July 17, 1996, memorandum primarily addressed tri-vision signs, which were the leading technology at the time, but it specifically noted that changeable message signs "regardless of the type of technology used" are permitted if the interpretation of the FSA allowed them. Further advances in technology and affordability of LED and other complex electronic message signs, unanticipated at the time the FSAs were entered into, require the FHWA to confirm and expand on the principles set forth in the July 17, 1996, memorandum.

The policy espoused in the July 17, 1996, memorandum was premised upon the concept that changeable messages that were fixed for a reasonable time period do not constitute a moving sign If the State set a reasonable time period, the agreed-upon prohibition against moving signs is not violated. Electronic signs that have stationary messages for a reasonably fixed time merit the sam considerations.

Discussion

Changeable message signs, including Digital/LED Display CEVMS, are acceptable for conforming off-premise signs, if found to be consistent with the FSA and with acceptable and approved State regulations, policies and procedures.

This guidance does not prohibit States from adopting more restrictive requirements for permitting CEVMS to the extent those requirements are not inconsistent with the HBA, Federal regulations, and existing FSAs. Similarly, Divisions are not required to concur with State proposed regulations, policies, and procedures if the Division review determines, based upon all relevant information, that the proposed regulations, policies and procedures are not consistent with the FSA or do not include adequate standards to address the safety of the motoring public. If the Division Office has any question that the FSA is being fully complied with, this should be discussed with the State and a process to change the FSA may be considered and completed before such CEVMS may be allowed on HBA controlled routes. The Office of Real Estate Services is available to discuss this process with the Division, if requested.

If the Division accepts the State's assertions that their FSA permits CEVMS, in reviewing State-proposed regulations, policy and procedures for acceptability, the Divisions should consider all relevant information, including, but not limited to duration of message, transition time, brightness, spacing, and location, to ensure that they are consistent with their FSA and that there are adequate standards to address safety for the motoring public. The Divisions should also confirm that the State provided for appropriate public input, consistent with applicable State law and requirements, in its interpretation of the terms of their FSA as allowing CEVMS in accordance with their proposed regulations, policies, and procedures.

Based upon contacts with all Divisions, we have identified certain ranges of acceptability that have been adopted in those States that do allow CEVMS that will be useful in reviewing State proposals on this topic. Available information indicates that State regulations, policy and procedures that have been approved by the Divisions to date, contain some or all of the following standards:

- Duration of Message
    - Duration of each display is generally between 4 and 10 seconds - 8 seconds is recommended.
- Transition Time
    - Transition between messages is generally between 1 and 4 seconds - 1-2 seconds is recommended.
- Brightness

- Adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety of the motoring public.

- Spacing
  - Spacing between such signs not less than minimum spacing requirements for signs under the FSA, or greater if determined appropriate to ensure the safety of the motoring public.
- Locations
  - Locations where allowed for signs under the FSA except such locations where determined inappropriate to ensure safety of the motoring public.

Other standards that the States have found helpful to ensure driver safety include a default designed to freeze a display in one still position if a malfunction occurs; a process for modifying displays and lighting levels where directed by the State DOT to assure safety of the motoring public; and requirements that a display contain static messages without movement such as animation, flashing, scrolling, intermittent or full-motion video.

Conclusion

This guidance is intended to provide information to assist the Divisions in evaluating proposals and to achieve national consistency given the variations in FSAs, State law, and State regulations, policies and procedures. It is not intended to amend applicable legal requirements. Divisions are strongly encouraged to work with their State in its review of their existing FSAs and, if appropriate, assist in pursuing amendments to address proposed changes relating to CEVMS or other matters. In this regard, the Office of Realty Estate Services is currently reviewing the process for amending FSAs, as established in 1980, to determine appropriate revisions to streamline requirements while continuing to ensure there is adequate opportunity for public involvement.

For further information on guidance on Off-Premise Changeable Message Signs, you may contact the Office of Real Estate Services' "Point of Contact" serving your Division or the contact on this page.

836 F.3d 42
United States Court of Appeals,
District of Columbia Circuit.

Scenic America, Inc., Appellant,
v.
United States Department of Transportation, et al., Appellees.

No. 14-5195
|
Argued September 25, 2015
|
Decided September 6, 2016

Synopsis

Background: Non-profit organization brought action pursuant to Administrative Procedure Act (APA) against Department of Transportation and its Secretary, as well as Federal Highway Administration (FHWA) and its Administrator, challenging guidance memorandum issued by FHWA, which interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of those digital billboards that met certain timing and brightness requirements. After defendants' motion to dismiss for lack of standing was denied, 983 F.Supp.2d 170, the United States District Court for the District of Columbia, James E. Boasberg, J., 49 F.Supp.3d 53, granted defendants' motion for summary judgment. Organization appealed.

Holdings: The Court of Appeals, Wilkins, Circuit Judge, held that:

[1] organization's alleged organizational injury was not redressable through vacatur of guidance memorandum;

[2] organization presented sufficient evidence that it had suffered representational injury-in-fact;

[3] organization's representational injury was redressable through repudiation of FHWA's interpretation;

[4] guidance memorandum was final agency action; and

[5] guidance memorandum was not promulgated contrary to law.

Affirmed in part; vacated and remanded in part.

West Headnotes (19)

[1] Federal Courts
Limited jurisdiction;jurisdiction as dependent on constitution or statutes

170B Federal Courts
170BII Jurisdiction, Powers, and Authority in General
170BII(A) In General
170Bk2012 Judicial Power of United States; Power of Congress
170Bk2015 Limited jurisdiction;jurisdiction as dependent on constitution or statutes

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. U.S. Const. art. 3.

Cases that cite this headnote

[2] Constitutional Law
Separation of Powers

Constitutional Law
Nature and scope in general

Federal Civil Procedure
In general;injury or interest

92 Constitutional Law
92XX Separation of Powers
92XX(A) In General
92k2330 In general
92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 Nature and scope in general
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest

The standing requirements of Article III are grounded in respect for the separation of powers tenets that are the foundation of the nation's system of government, and they help prevent the judicial process from being used to usurp the powers of the political branches. U.S. Const. art. 3.

Cases that cite this headnote

[3] **Federal Courts**
Determination of question of jurisdiction

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3252 Determination of question of jurisdiction

Observing the federal court's Article III limitations is always important, and particularly so in a case where the Court of Appeals is asked to invalidate an action of the Executive branch. U.S. Const. art. 3.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
In general;injury or interest

Federal Civil Procedure
Causation;redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation;redressability

The irreducible constitutional minimum of standing requires that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. U.S. Const. art. 3.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**
In general;injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest

The party invoking federal jurisdiction bears the burden of establishing the elements of Article III standing; each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. U.S. Const. art. 3.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Pleading

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.5 Pleading

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to establish Article III standing. U.S. Const. art. 3.

Cases that cite this headnote

[7] **Federal Civil Procedure**
In general;injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest

A court's determination that a plaintiff has established Article III standing at the motion to dismiss stage by alleging sufficient facts in her pleadings is only the first step, because that finding does not obviate the court's responsibility to ensure that the plaintiff can actually prove those allegations when one or both parties seek summary judgment. U.S. Const. art. 3.

Cases that cite this headnote

[8] **Federal Civil Procedure**
In general;injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest
Even where the court denies a motion to dismiss based on lack of Article III standing, in response to a summary judgment motion, the plaintiff can no longer rest on mere allegations, but must set forth by affidavit or other evidence specific facts establishing standing; if, upon review of the evidence, the court determines that the plaintiff has not introduced sufficient evidence into the record to at least raise a disputed issue of fact as to each element of standing, the court has no power to proceed and must dismiss the case. U.S. Const. art. 3.

3 Cases that cite this headnote

[9] **Federal Courts**
Determination of question of jurisdiction
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3252 Determination of question of jurisdiction
Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.

Cases that cite this headnote

[10] **Federal Courts**
Determination of question of jurisdiction
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(B) Appellate Jurisdiction and Procedure in General
170Bk3252 Determination of question of jurisdiction
If the Court of Appeals determines that the district court was without jurisdiction, then the Court of Appeals has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Cases that cite this headnote

[11] **Federal Courts**
Standing
170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)2 Standard of Review
170Bk3576 Procedural Matters
170Bk3585 Parties
170Bk3585(2) Standing
The Court of Appeals reviews a district court's decision as to Article III standing de novo. U.S. Const. art. 3.

Cases that cite this headnote

[12] **Federal Civil Procedure**
In general;injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general;injury or interest
When the existence of one or more of the essential elements of Article III standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, it becomes substantially more difficult to establish standing. U.S. Const. art. 3.

1 Cases that cite this headnote

[13] **Federal Civil Procedure**
Causation;redressability
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation;redressability
Mere unadorned speculation as to the existence of a relationship between the

challenged government action and the third-party conduct will not suffice to invoke the federal judicial power under the redressability element of Article III standing. U.S. Const. art. 3.

Cases that cite this headnote

[14] Associations

Actions by or Against Associations

41 Associations
41k20 Actions by or Against Associations
41k20(1) In general

Non-profit organization lacked Article III standing to challenge, through Administrative Procedure Act (APA) notice-and-comment claim, Federal Highway Administration (FHWA) guidance memorandum which interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of digital billboards that met certain timing and brightness requirements; organization's alleged injury, that it was forced to expend greater resources opposing digital billboards, was not redressable through vacatur of the memorandum, since state officials could find such billboards permissible for reasons other than those stated in the memorandum. U.S. Const. art. 3.; 5 U.S.C.A. § 551 et seq.; 23 U.S.C.A. § 131.

Cases that cite this headnote

[15] Associations

Actions by or Against Associations

41 Associations
41k20 Actions by or Against Associations
41k20(1) In general

Non-profit organization presented sufficient evidence that it had suffered representational injury-in-fact, stemming from Federal Highway Administration's (FHWA) promulgation of guidance memorandum that interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of those digital billboards that met certain timing and brightness requirements, as required for organization to have Article III standing to bring an arbitrary and capricious challenge to the memorandum; one of organization's members alleged that digital billboard near her home generated bright flash, and that billboard marred view from her home and negatively affected value of her property. U.S. Const. art. 3.; 5 U.S.C.A. § 551 et seq.; 23 U.S.C.A. § 131.

Cases that cite this headnote

[16] Associations

Actions by or Against Associations

41 Associations
41k20 Actions by or Against Associations
41k20(1) In general

Alleged representational injury of non-profit organization stemming from Federal Highway Administration's (FHWA) promulgation of guidance memorandum that interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of digital billboards that met certain timing and brightness requirements, was redressable through judicial repudiation of FHWA's interpretation, as required for organization to have Article III standing to bring an arbitrary and capricious challenged to the memorandum; repudiation would prohibit FHWA from relying on that interpretation in future rulemaking and require FHWA to subject extant billboards to either removal or an order requiring their operation consistent with flashing light restrictions. U.S. Const. art. 3.; 5 U.S.C.A. § 551 et seq.; 23 U.S.C.A. § 131.

Cases that cite this headnote

[17] Administrative Law and Procedure

Finality;ripeness

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(B) Decisions and Acts Reviewable
15Ak704 Finality;ripeness

An agency action will be deemed final, and therefore reviewable under the Administrative Procedure Act (APA), if it marks the consummation of the agency's decisionmaking process and is an action by which rights or obligations have been determined, or from which legal consequences will flow; the most important factor in determining whether an agency action is one from which legal consequences will flow concerns the actual legal effect, or lack thereof, of the agency action in question on regulated entities. 5 U.S.C.A. § 551 et seq.

Cases that cite this headnote

[18] Highways

Billboards and highway beautification in general

200 Highways
200IX Regulation and Use for Travel
200IX(A) Obstructions and Encroachments
200k153.5 Billboards and highway beautification in general

Federal Highway Administration's (FHWA) promulgation of guidance memorandum, which interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of those digital billboards that met certain timing and brightness requirements, was final agency action that was subject to review under Administrative Procedure Act (APA); memorandum came to definitive conclusion in interpreting HBA, and memorandum withdrew some of the discretion concerning billboard permitting that states previously held. 5 U.S.C.A. § 551 et seq.; 23 U.S.C.A. § 131.

Cases that cite this headnote

[19] Highways

Billboards and highway beautification in general

200 Highways
200IX Regulation and Use for Travel
200IX(A) Obstructions and Encroachments
200k153.5 Billboards and highway beautification in general

Federal Highway Administration's (FHWA) guidance memorandum, which interpreted Highway Beautification Act's (HBA) prohibition on "flashing, intermittent or moving" lights on billboards to permit state approval of digital billboards that met certain timing and brightness requirements, was not promulgated contrary to law in violation of the Administrative Procedure Act (APA); HBA required lighting standards in federal-state agreements to be "consistent with customary use," and guidance memorandum did not change lighting standards to such extent that those standards were no longer consistent with customary use. 5 U.S.C.A. § 551 et seq.; 23 U.S.C.A. § 131.

Cases that cite this headnote

***45** Appeal from the United States District Court for the District of Columbia, (No. 1:13-cv-00093)

Attorneys and Law Firms

Daniel H. Lutz, Orrville, OH, argued the cause for appellant. With him on the briefs was Hope M. Babcock. Thomas M. Gremillion entered an appearance.

William D. Brinton, Jacksonville, FL, was on the brief for amici curiae The American Planning Association, et al. in support of petitioner.

Jeffrey E. Sandberg, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief were Ronald C. Machen Jr., U.S. Attorney at the time the brief was filed, and Mark R. Freeman, Attorney.

Kannon K. Shanmugam argued the cause for intervenor-appellee Outdoor Advertising Association of America, Inc. With him on the brief was Allison B. Jones, Washington, DC.

Before: Pillard and Wilkins, Circuit Judges, and Ginsburg, Senior Circuit Judge.

Opinion

Wilkins, Circuit Judge:

The Highway Beautification Act ("HBA"), 23 U.S.C. § 131, requires the Federal Highway Administration ("FHWA") and each state to develop and implement individual federal-state agreements ("FSAs"), detailing, among other things, "size, lighting and spacing" standards for the billboards now found towering over many of our country's interstate highways. One of those adopted standards, included in most states' FSAs, prohibits those states from erecting any billboard with "flashing, intermittent or moving" lights (the "FSA lighting standards").

Plaintiff-Appellant Scenic America is a non-profit organization which "seeks to preserve and improve the visual character of America's communities and countryside." Compl. ¶ 7, J.A. 10. It challenges a guidance memorandum issued by the FHWA in 2007, which interpreted that prohibition on "flashing, intermittent or moving" lights to permit state approval of those digital billboards that met certain timing and brightness requirements. Scenic argues that the guidance memorandum must be invalidated because it (1) was not promulgated using notice-and-comment procedures, and (2) violates the HBA, and was therefore promulgated "contrary to law" in violation of § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.

We hold that we lack jurisdiction to hear Scenic's notice-and-comment claim because Scenic has failed to demonstrate that it has standing to bring that challenge, and deny its § 706 claim on the merits.

I.

A.

In 1965, Congress enacted the Highway Beautification Act to control "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System ... 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." 23 U.S.C. § 131(a). The HBA penalizes those states that fail to maintain "effective control" over their advertising signs by permitting the Secretary of Transportation to reduce their federal highway funds by ten percent. *Id.* § 131(b).

To maintain effective control, each state is required to, among other things, negotiate ***46** an FSA with the Secretary that establishes standards for the "size, lighting and spacing" of billboards that come within 660 feet of the Interstate. *Id.* § 131(d). The HBA requires that those standards be "consistent with customary use." *Id.* All fifty states entered into such FSAs, most of which were written in the 1960s and 1970s. *See Scenic Am., Inc. v. U.S. Dep't of Transp.* (*Scenic II*), 49 F.Supp.3d 53, 57 (D.D.C. 2014). FHWA regulations, promulgated under the HBA, require that states "[d]evelop laws, regulations, and procedures" that implement the standards contained in each state's FSA. 23 C.F.R. § 750.705(h). States must submit these laws, regulations, and procedures to the FHWA's regional offices, known as Division Offices, for approval. *Id.* § 750.705(j). The FHWA has one Division Office located in each state.

Although each of the FSAs was individually negotiated, most contain similar terms. Nearly all of the FSAs contain a prohibition against "flashing," "intermittent," and "moving" lights. *See, e.g.*, J.A. 120 (New York FSA); J.A. 131 (Colorado FSA); J.A. 139 (North Carolina FSA).

As billboard technology changed, states began considering or passing laws that permitted digital billboards to be displayed along the Interstate. *See, e.g.*, J.A. 422-23 (letter from Indiana Department of Transportation to Indiana FHWA Division Office informing the Division Office that Indiana had passed a law permitting certain digital billboards); J.A. 424 (letter from the Indiana FHWA Division Office to the Indiana Department of Transportation acknowledging the letter and agreeing that the digital billboards discussed in Indiana's previous letter "do[ ] not constitute flashing, intermittent or moving lights"); J.A. 437 (letter from Arkansas Highway Commission to Arkansas FHWA Division Office noting new regulations permitting digital billboards); J.A. 183 (United States Department of Transportation memorandum discussing digital billboard in Nebraska). These billboards, sometimes referred to as "commercial electronic variable message signs" ("CEVMS"), typically use LED lights to display

a static advertisement that remains on the screen for a specified period of time before quickly transitioning to a different static advertisement. Advertisements typically remain visible for around ten seconds, and usually take approximately two seconds to transition to the next ad.

The FHWA's Division Offices differed on whether digital billboards complied with the FSA lighting standards. *Compare, e.g.*, J.A. 424 (Indiana Division Office agreeing that digital billboards "do[ ] not constitute flashing, intermittent or moving lights"), *with, e.g.*, J.A. 263 (Texas Division Office stating that "[w]hile the technology for LED displays did not exist at the time of the [FSA], the wording in the [FSA] clearly prohibits such signs"). In 2007, the national FHWA office weighed in. It issued to its Division Offices a memorandum entitled "Guidance on Off-Premise Changeable Message Signs" (the "Guidance" or "2007 Guidance"), a portion of which stated as follows:

> Proposed laws, regulations, and procedures that would allow permitting CEVMS subject to acceptable criteria (as described below) do not violate a prohibition against "intermittent" or "flashing" or "moving" lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s.

J.A. 535. The FHWA went on to identify those "acceptable criteria" based on "certain ranges of acceptability that have been adopted in those States that do allow CEVMS." J.A. 534, 537 (recommending, among other things, that each display generally remain static for between four and ***47** ten seconds, and transition to a new display in one to four seconds).

According to a survey the FHWA distributed to states shortly before issuing the 2007 Guidance, many states with FSAs that included a ban on intermittent, flashing, or moving lights permitted digital billboards before the FHWA issued the Guidance. J.A. 531-32. The Division Office for at least two states, Texas and Kentucky, did not permit digital billboards prior to the 2007 Guidance. *See Scenic Am., Inc. v. U.S. Dep't of Transp.* (*Scenic I*), 983 F.Supp.2d 170, 179–80 (D.D.C. 2013). After the Guidance, Texas began to permit the use of digital billboards. Lloyd Decl. ¶ 9, J.A. 41.

B.

Scenic brought this suit against the United States Department of Transportation, the federal executive department responsible for implementation of the HBA; the FHWA, which promulgated the 2007 Guidance; Ray LaHood, the Secretary of Transportation at the time; and Victor Mendez, the Administrator of FHWA at the time. Scenic did not include any of the FHWA's Division Offices in this suit. Outdoor Advertising Association of America, Inc. ("OAAA") intervened as a defendant shortly after Scenic brought suit.

Scenic's suit alleges two claims relevant to this appeal: (1) the 2007 Guidance constitutes a legislative, not interpretive rule, thus violating § 553 of the APA, because it was not promulgated using notice-and-comment procedures; and (2) the Guidance violates § 706 of the APA because it creates a new lighting standard that is not "consistent with customary use," as required by the HBA.[1] Compl. ¶¶ 48-53, 57-62, J.A. 17-19.

[1] Scenic abandoned a third claim on appeal—that the Guidance improperly creates new lighting standards, in contravention of the procedures for creating new standards set forth in the HBA. *See* Br. for Defendants-Appellees [hereinafter "FHWA Br."], *Scenic Am., Inc. v. U.S. Dep't of Transp.*, No. 14–5195 (D.C. Cir. Feb. 20, 2015), Doc. No. 1538780, at 16 & n.7.

The FHWA and the OAAA (collectively "Defendants") moved to dismiss, contending that Scenic lacked standing, and that the court lacked jurisdiction over the Guidance because it did not constitute final agency action under the APA. *Scenic I*, 983 F.Supp.2d at 172–73. The District Court denied Defendants' motion as to both claims. *Id.*

Relevant to our decision here, the District Court held, at the motion to dismiss stage, that Scenic's requested relief would redress its harm because "vacating the Guidance would return the FHWA to agnosticism on the question [of permitting digital billboards], leaving Division Offices free to draw their own conclusions." *Id.* at 181. According to the District Court, this would prevent Scenic from "hav[ing] to police as intensively new digital-billboard construction around the country." *Id.*

Defendants later moved for summary judgment, and the District Court granted the motions, finding that the Guidance was not subject to notice-and-comment requirements because it was an interpretive, not legislative rule, and that it did not violate the "consistent with customary use" provision of the HBA. *Scenic II*, 49 F.Supp.3d at 59–71. Defendants, in their summary judgment briefing below, did not again challenge Scenic's standing, and the District Court did not discuss Scenic's standing in its written Opinion granting Defendants' summary judgment motions.

II.

We begin, as we must, by addressing our jurisdiction to review Scenic's appeal. Because Scenic must demonstrate its ***48** standing separately as to each of the two claims it brings on appeal, *see Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994), we find that, although Scenic has standing to bring its claim concerning FHWA's alleged § 706 violation, Scenic has failed to demonstrate it has standing to bring its notice-and-comment claim.

A.

[1] **[2]** **[3]** As has been expressed time and time again, "[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). As Chief Justice Marshall observed, "[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision [and] if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)) (emphases omitted). Thus, without studious adherence to the metes and bounds of our jurisdiction as imposed by Article III, Chief Justice Marshall warned that "the other departments [of the government] would be swallowed up by the judiciary." *Id.* The standing requirements of Article III are therefore grounded in respect for the separation of powers tenets that are the foundation of our system of government, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-74, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), and they help "prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013). Observing our Article III limitations is therefore always important, and particularly so in a case such as this, where we are asked to invalidate an action of the Executive branch.

[4] **[5]** The "irreducible constitutional minimum of standing" requires that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements"; "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561, 112 S.Ct. 2130.

[6] **[7]** **[8]** Thus, the plaintiff must meet this burden at the outset of *each* phase. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice...." *Id.* And a court's determination that a plaintiff has established standing at the motion to dismiss stage by *alleging* sufficient facts in her pleadings is only the first step, because that finding does not obviate the court's responsibility to ensure that the plaintiff can actually *prove* those allegations when one or both parties seek summary judgment. So even where the court denies a motion to dismiss based on lack of standing, "[i]n response to a summary judgment motion, ... the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts [establishing standing]." *Id.* (internal quotation marks omitted).[2] If, upon review ***49** of the evidence, the court determines that the plaintiff has not introduced sufficient evidence into the record to at least raise a disputed issue of fact as to each element of standing, the court has no power to proceed and must dismiss the case. *See, e.g.*, *Clapper*, 133 S.Ct. at 1148–49 (dismissing case where plaintiff did not raise an issue of fact as to standing at summary judgment).

2 Our treatment of standing in cases that come to us directly on administrative review is instructive. Because these petitions for administrative review

bypass the district court and come to us directly, we treat them as a district court would in deciding a motion for summary judgment. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). In *Sierra Club*, we held, "mindful of our independent obligation to be sure of our jurisdiction," that the petitioner there had failed to establish its burden as to standing. *Id.* at 898, 902. We explained that "[t]he petitioner's burden of production in the court of appeals is ... the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing 'by affidavit or other evidence.' " *Id.* at 899 (quoting *Defs. of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130).

> Just as we must ensure our jurisdiction over petitions brought to us directly, so too must the district court assure itself of its jurisdiction before assessing a summary judgment motion on the merits.

[9] **[10]** In addition, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.' " *Bender*, 475 U.S. at 541, 106 S.Ct. 1326 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934)). If we determine that the District Court was without jurisdiction, then "we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)).

[11] We review the District Court's decision (or lack thereof) as to standing *de novo*, *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003), and hold that Scenic has not met its burden of establishing its standing to bring its notice-and-comment claim. [3]

[3] The FHWA challenged Scenic America's standing at the motion to dismiss stage, and though the District Court held in favor of Scenic, it noted that the issue "presents difficult and close questions." *Scenic I*, 983 F.Supp.2d at 172. When the FHWA later moved for summary judgment, therefore, Scenic was already on notice that its standing might be questioned on appeal, at which time the record would be closed. Scenic therefore cannot claim to have been deprived of a fair and "full opportunity to make a record of [its] standing in the district court." *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 241 (D.C. Cir. 2015). Scenic should have accompanied its summary judgment materials with evidence of its standing. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 897, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

> Because the plaintiff has the burden to establish the evidentiary basis for its standing at the summary judgment stage *in every case*, just as it has the burden to plead sufficient facts at the motion to dismiss stage *in every case*, the District Court may wish to consider amending its local rules to provide that the plaintiff include its evidentiary basis for standing in the statement of material facts that every party is required to file either in support of, or in opposition to, a motion for summary judgment. *See* Civil Local Rule 7(h)(1). Such a rule would ensure that the plaintiff is on notice of its obligation to present such evidence, make the District Court's job much easier (as well as ours), and function similarly to our Circuit Rule 28(a)(7), which we adopted after our ruling in *Sierra Club*.

***50 B.**

1.

Scenic's notice-and-comment claim turns on the redressability prong of Article III standing. Scenic asserts that the 2007 Guidance forced certain FHWA Division Offices to reinterpret the FSA lighting standards—that billboards may not contain "flashing, intermittent or moving" lights—so that those offices would thereafter find the FSA language to permit, rather than bar, digital billboards. Scenic claims that this alleged change of position made it easier for states to erect digital billboards, because they no longer had to worry about being prevented from doing so by the Division Offices. As a result, Scenic allegedly has to work harder, and thus spend greater resources, to fight these billboards—its injury in fact. Scenic claims that vacating the Guidance will redress that injury.

[12] **[13]** In this way, Scenic asserts injuries that stem not directly from the FHWA's issuance of the 2007 Guidance, but from third parties not directly before the court—the Division Offices and the states. When "[t]he existence of one or more of the essential elements of standing"—

in this case redressability—" 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,' " it becomes " 'substantially more difficult' to establish" standing. *Defs. of Wildlife*, 504 U.S. at 562, 112 S.Ct. 2130 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *Allen v. Wright*, 468 U.S. 737, 758, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)); *accord Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). "[M]ere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct 'will not suffice to invoke the federal judicial power.' " *Nat'l Wrestling*, 366 F.3d at 938 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)).

Scenic's complaint makes only two arguments concerning the redressability of its notice-and-comment claim. First, it argues that if we vacate the 2007 Guidance, "Scenic America and its affiliate members would spend fewer resources combating new digital billboards." Compl. ¶ 21, J.A. 12. This speaks to Scenic's alleged organizational standing. *See PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (organizational standing "requires [an organizational plaintiff], like an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision" (internal quotation marks omitted)). Second, Scenic contends that if we vacate the 2007 Guidance, "digital billboards that injure Scenic America members would be subject to removal or an order to cease operating in a manner that violates the regulatory prohibition against intermittent lighting in billboard advertisements." Compl. ¶ 21, J.A. 12. This speaks to Scenic's representational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (recognizing "that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit").

2.

a.

[14] Scenic has failed to demonstrate that our vacatur of the Guidance would ***51** redress its alleged organizational injury—that it is forced to expend greater resources fighting digital billboards because the 2007 Guidance makes it easier for states to erect such billboards.

States are required to seek permission from the FHWA Division Offices before they permit the use of digital billboards. *See* 23 C.F.R. § 750.705(j). Prior to the FHWA's issuance of the Guidance, those Offices could, and often did, authorize that use, finding that it accorded with a given state's FSA. Scenic has introduced no evidence into the record—as it must at summary judgment—establishing that if we were to vacate the Guidance, any Division Office would respond by preventing the state it oversees from erecting digital billboards; nor has Scenic submitted evidence establishing that states would successfully erect, or even seek to erect, fewer billboards. Without providing any indication that our vacatur of the Guidance will diminish the number of billboards Scenic has to fight, Scenic has failed to demonstrate that its requested remedy would prevent Scenic from having to expend the same amount of resources fighting these billboards.

A brief look at some of our previous decisions in this area reinforces the point. In *National Wrestling*, we assessed the standing of several associations representing men's wrestling teams, some of whom had been cut from college athletic programs. 366 F.3d at 933. Department of Education regulations, promulgated under Title IX, required college athletic programs to ensure that they provided equal athletic opportunities to both sexes, based in part on the resources that are devoted to various programs. *Id.* at 934–35. Plaintiffs did not challenge those regulations. Instead, plaintiffs challenged a Department of Education interpretation of those regulations, which they claimed caused several athletic programs to eliminate their wrestling teams. *Id.* We held that plaintiffs lacked standing because they were unable to show that a favorable decision would redress their injuries. *Id.* at 938.

We noted that the "direct causes of appellants' asserted injuries—loss of collegiate-level wrestling opportunities for male student-athletes—are the independent decisions of educational institutions." *Id.* at 936–37. Even if we vacated the Department of Education's interpretation, there was no indication that it would alter those institutions' independent decisions to eliminate their wrestling teams. *Id.* at 939. Nothing in the Department's interpretation required schools to eliminate their wrestling teams; schools did so in an attempt to ensure that they were distributing athletic resources equally—a requirement of Title IX more generally, irrespective of the interpretation that plaintiffs challenged. *See id.* at 939–40 (asserting that "nothing but speculation suggest[ed] that schools would act any differently" if the court vacated the interpretation). We noted that plaintiffs would only meet standing requirements if they "took the position that gender-conscious elimination of men's sports teams would be illegal in the absence of the challenged" interpretation, but that plaintiffs made no such claim. *Id.* at 941. Finally, we explained that the "possibility" that wrestling teams would have "better odds" if we vacated the Department's interpretation "falls far short of the mark." *Id.* at 942 (emphasis omitted).

We held similarly in *Renal Physicians Ass'n v. United States Department of Health and Human Services*. 489 F.3d 1267 (D.C. Cir. 2007). That case involved the Stark Law, which limited the ability of a physician to refer a Medicare patient to clinical laboratories with which the physician had a "financial relationship," but permitted ***52** referrals where the physician's only financial interest was the receipt of compensation at "fair market value." *Id.* at 1269. The Department of Health and Human Services, which was authorized to promulgate regulations under the Law, created a "safe harbor" provision, describing two methods for demonstrating that a physician's hourly rate was at fair market value. *Id.* at 1270. The Department also noted, however, that the safe harbor was voluntary, and that health care providers could continue to establish fair market value through other methods. *Id.* at 1269–71.

After a physicians' association challenged the safe harbor provision under the APA, we held that plaintiff lacked standing because it failed to show that vacating the safe harbor provision would redress its members' alleged injuries—namely that the safe harbor provision caused them to be paid less for their services than would otherwise be the case. *Id.* at 1276–78. Because the safe harbor was merely one way that hospitals could determine "fair market value," we noted that "it is 'speculative,' rather than 'likely,' that invalidating the safe harbor will somehow cause these facilities to pay more," and that "[t]he effect (if any) of the safe harbor cannot be simply undone." *Id.* at 1277.

As in *Renal Physicians*, the FHWA created what is, in essence, a safe harbor provision regarding digital billboards. The 2007 Guidance made it clear that state laws and regulations regarding digital billboards meeting the specifications listed in the Guidance would not be rejected for violating the FSA lighting standards. Yet even after the Guidance, Division Offices can still approve state laws and regulations permitting billboards that fall outside those specifications, and they can still reject laws and regulations allowing billboards that meet those specifications, but that violate state FSAs for other reasons. The safe harbor created by the Guidance is voluntary in the same way as the safe harbor in *Renal Physicians*; Division Offices can rely on it to find certain billboards permissible, but those Offices can find those billboards permissible for other reasons as well. It is "speculative," rather than "likely," that invalidating the Guidance would stop any particular billboard from being constructed. Indeed, many states with FSAs that included a ban on intermittent, flashing, or moving lights permitted digital billboards prior to the 2007 Guidance.

In sum, we cannot assume, without more, that vacating the Guidance would eliminate or lessen the construction of digital billboards.

Scenic contends that because the Texas Division Office barred Texas from constructing digital billboards prior to the Guidance, vacating the Guidance would redress Scenic's injuries, at least with respect to Texas. However, Scenic has introduced no evidence suggesting that Texas, or the Texas Division Office, would behave any differently in the absence of the 2007 Guidance. Scenic simply assumes, without any proof, that Texas will revert to its pre-Guidance position as soon as the Guidance is invalidated.

Scenic's assumption is nothing more than "unadorned speculation." *Simon*, 426 U.S. at 44, 96 S.Ct. 1917. Several other possibilities seem just as likely, were we to vacate the 2007 Guidance. The Guidance may have focused the Texas Division Office on the fact that a majority of states

had already determined that the FSA lighting standards permitted digital billboards. Knowing as much, Texas's Division Office might be more inclined to "jump on the bandwagon" and permit such billboards going forward, even absent the 2007 Guidance. Or the Division Office might be persuaded to continue allowing digital billboards now that Texas has already ***53** issued permits for at least 150 of them, Lloyd Decl. ¶ 9, J.A. 41. *See Renal Physicians*, 489 F.3d at 1278 ("[T]he word is already out, and therefore it is too late to reverse course.... [T]he undoing of the governmental action will not undo the harm, because the new status quo is held in place by other forces.").

Scenic has introduced no evidence that would make any one of these possibilities more likely than another. Particularly given the difficulty of establishing standing based on the actions of third parties not before the Court, *see Defs. of Wildlife*, 504 U.S. at 562, 112 S.Ct. 2130, Scenic's lack of any evidentiary basis for its redressability contentions requires us to reject its standing as to its notice-and-comment claim.

As a final argument, Scenic relies on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and contends that vacating the 2007 Guidance would remove one of several barriers to Scenic's anti-digital billboard efforts, and that this is sufficient for redressability purposes. However, *Arlington Heights* is inapposite here.

As an initial matter, *Arlington Heights* involved a party directly harmed by the challenged action, not one harmed by the actions of a third party not before the Court. *See id.* at 254, 97 S.Ct. 555. Moreover, *Arlington Heights* involved a developer's challenge to a zoning ordinance that prevented it from building low-income housing. *Id.* at 255–58, 97 S.Ct. 555. The Supreme Court characterized the zoning ordinance as an "absolute barrier." *Id.* at 261, 97 S.Ct. 555. Although the developer still needed to secure financing and qualify for federal subsidies, the challenged zoning ordinance ensured that the developer could not proceed with its goal of constructing low-income housing. *Id.* at 261–62, 97 S.Ct. 555. A court decision to remove that barrier would redress the developer's injury because a major impediment to the developer's efforts would be eliminated.

Scenic has introduced no evidence showing that vacating the 2007 Guidance would remove an "absolute barrier" to its efforts. As we have already stated above, absent the 2007 Guidance, states remain free to pursue digital billboard construction, and Division Offices remain free to permit such construction. Thus, Scenic has not established that invalidating the Guidance would improve or ease Scenic's efforts in any way. [4]

4 Scenic did not argue that the FHWA's failure to undertake notice and comment before promulgating the Guidance constitutes a procedural injury, and we express no opinion on such an argument. Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction. *See Huron v. Cobert*, 809 F.3d 1274, 1279–80 (D.C. Cir. 2016).

b.

Scenic's representational standing claim fares no better. Scenic argues that vacating the 2007 Guidance will redress its members' injuries because it will cause the digital billboards allegedly injuring those members to be removed. Compl. ¶ 21, J.A. 12. Scenic came dangerously close to forfeiting this argument. *See Huron v. Cobert*, 809 F.3d 1274, 1279–80 (D.C. Cir. 2016).

Presumably because the District Court had upheld Scenic's standing at the motion to dismiss stage, and Defendants had not contested Scenic's standing before the District Court at the summary judgment stage, Scenic did not address its standing in its opening brief on appeal. In their responding brief, however, the FHWA challenged anew Scenic's standing. The FHWA contended that Scenic had offered "no basis for expecting that vacating the ***54** Guidance would cause any existing digital billboards to be dismantled." *See* FHWA Br. 29. In reply, Scenic appeared to abandon the allegation. It repeated the FHWA's contention and responded that "Plaintiff need only show that vacatur would reduce Plaintiff's continuing injury of diverting limited resources to counteract billboard approvals." Reply Br. for Appellant 10.

Nonetheless, Scenic appears to have preserved its representational standing argument by painting it in a somewhat different light. It argues that the alleged injuries of one of its members—Nikki Laliberte—are "traceable to the Guidance" because the Guidance prohibits the Division Office in Minnesota, where Laliberte lives, from considering whether digital billboards violate the

FSA lighting standards. *See* Reply Br. for Appellant 12. Scenic's implication seems to be that vacating the Guidance might cause Minnesota's Division Office to remove some digital billboards. Although Scenic's argument is couched in terms of causation, "causation and redressability are closely related, and can be viewed as two facets of a single requirement." *Newdow v. Roberts*, 603 F.3d 1002, 1012 n.6 (D.C. Cir. 2010) (internal quotation marks omitted). Thus, Scenic's assertion is sufficient to preserve its representational standing claim.

As we noted above, however, Scenic has introduced no evidence demonstrating that our vacatur of the Guidance would cause Division Offices or states to prohibit the construction of new digital billboards. *See supra* Part II.B.2.a. It is even less plausible, given Scenic's complete lack of any evidentiary showing on the matter, that Division Offices or states would require extant billboards to be dismantled.

By neglecting to "set forth by affidavit or other evidence specific facts" establishing its representational standing, *Defs. of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted), Scenic has failed to meet its burden to demonstrate its representational standing to bring its notice-and-comment claim.

3.

Scenic does fare better, however—at least as to standing—on its claim that the Guidance violated § 706, although barely.

a.

In its complaint, Scenic alleges that FHWA's actions, in promulgating the Guidance, are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA." Compl. ¶ 62, J.A. 19. That language appears to be taken from § 706(2)(A) of the APA, which sets forth the well-known "arbitrary and capricious" standard, and which would likely provide an effective cause of action for Scenic to challenge the FHWA's alleged failure to comport with the HBA. Confusingly, however, Scenic does not cite § 706 as part of its second claim, but rather cites § 553, the provision that concerns notice-and-comment rulemaking. *See id.* ¶¶ 57-62, J.A. 18-19.

Construing the complaint liberally, as is sometimes appropriate, *but cf. Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1104, 1106 (D.C. Cir. 2005) (explaining that although "the complaint—particularly a complaint filed by a pro se prisoner—should be construed liberally," "the rule of liberal construction of complaints applies to factual allegations," and refusing to liberally construe a counseled plaintiff's complaint so as to include new defendants (quoting *Fletcher v. District of Columbia*, 370 F.3d 1223, 1227 n.* (D.C. Cir. 2004))), it might be possible to construe Scenic's complaint as having relied upon § 706 rather than, or in addition to, § 553. At oral argument, however, counsel for Scenic was specifically asked whether its second ***55** claim included a § 706 challenge to FHWA's promulgation of the guidance, and Scenic's counsel replied "no, we did not present that." Counsel went on to state that to the extent it brought anything resembling an arbitrary-and-capricious challenge it did it through the "backdoor" of its notice-and-comment claim, specifically highlighting its argument that that the Guidance is a legislative rule because it is 180 degrees counter to the FSA text it alleged to be interpreting. Thus, it appears that Scenic disclaimed any arbitrary-and-capricious challenge to FHWA's alleged failure to comport with the HBA.

Nonetheless, during that same colloquy at oral argument, Scenic did state, with respect to its § 706 claim, that it "focused solely on the customary use provision, finding that it was contrary to law." Giving Scenic the benefit of the doubt, Scenic's papers and statements at oral argument are sufficient for us to eke out a § 706 claim.

b.

[15] Scenic has standing to bring such a § 706 claim. First, Scenic has offered sufficient evidence that it has suffered a representational injury in fact. The record at summary judgment demonstrates that at least one of its members, Nikki Laliberte, has suffered a concrete injury because a digital billboard near her home "generates a bright flash when its display transitions from one advertisement to another." Laliberte Decl. ¶ 4, J.A. 52. She asserts that the billboard "has marred the view from [her] home[ ]," and that she is "concerned that the billboard has negatively

affected the value of [her] property." *Id.* ¶¶ 6, 9, J.A. 52-53. This sort of harm to an individual's property is sufficient to constitute a concrete injury in fact. *See Idaho, By & Through Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 591 (D.C. Cir. 1994) (noting that a private landowner "suffers concrete injury if [her] property is despoiled").

[16] The causation and redressability prongs of our standing analysis are equally clear here. Scenic's § 706 claim is that the Guidance runs afoul of the statute's "customary use" requirement as that requirement has been interpreted in the FSAs. If we were to find for Scenic on the merits of its claim, a point we must assume for standing purposes, *see LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011), we could only do so by effectively repudiating the FHWA's interpretation of the FSAs. Repudiation would provide much more robust relief than vacatur. Not only would it prohibit the agency from relying on that interpretation in any future rulemakings, it would also require the agency to subject extant billboards to either removal or an order requiring those billboards to operate in a manner that does not violate the FSAs, for instance by keeping the image displayed by the billboard constant and unchanging. Scenic's injury, clearly caused by the Guidance, is therefore redressable. *See Renal Physicians*, 489 F.3d at 1278 (holding that "the only way to prevent" a finding that redressability is lacking in the third-party context is "for a court not only to invalidate [the contested agency action] but also to repudiate" it).

III.

FHWA argues that the Guidance is not a final agency action and is therefore not reviewable under the APA. We disagree.

[17] An agency action will be deemed final if it "mark[s] the consummation of the agency's decisionmaking process" and 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, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal quotation ***56** marks omitted). "The most important factor" in determining whether an agency action is one "from which legal consequences will flow" "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

[18] The Guidance marks the consummation of FHWA's decision-making process. It comes to a definitive conclusion: the FSA's prohibition on "flashing, intermittent or moving" lights does not prevent states from permitting digital billboards, so long as they meet certain prescribed requirements. Although the Guidance does state that the FHWA "may provide further guidance in the future as a result of additional information" FHWA might receive, J.A. 535, such a statement is fairly read as a "boilerplate" indication that the agency may issue further interpretations in the future. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000). The fact that a regulation might be interpreted again at some point in the indeterminate future cannot, by itself, prevent the initial interpretation from being final.

The Guidance is also an action "from which legal consequences will flow." It creates a safe harbor such that Division Offices and states may not deny a digital billboard permit for violating the FSA lighting standards where that billboard meets the timing and other requirements set forth in the Guidance. In this way, the Guidance withdraws some of the discretion concerning billboard permitting the Division Offices and states previously held. *See NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) (concluding that where agency action withdraws an entity's previously-held discretion, that action "alter[s] the legal regime," "binds" the entity, "and thus qualifies as final agency action"). That safe harbor has a clear legal effect on the regulated entities here —the Division Offices and the states—and the Guidance is therefore a final agency action.

IV.

Having concluded that Scenic has standing to bring its § 706 claim, and that the Guidance constitutes final agency action, we now review the merits of the claim *de novo*, *see Khan v. Parsons Glob. Servs., Ltd.*, 428 F.3d 1079, 1082 (D.C. Cir. 2005), and find them lacking.

Scenic argues that the Guidance is invalid because it fails to comport with the HBA's "customary use" provision. That provision states that "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" within 660 feet

of the Interstate. 23 U.S.C. § 131(d) (emphasis added). Scenic contends that the FHWA, in issuing the Guidance, changed the FSA lighting standards to such an extent that those standards are no longer "consistent with customary use." According to Scenic "[a]nything outside the scope of what an FSA meant at the time it was created cannot be 'customary use.' " Opening Br. for Appellant 36.

In *Cajun Electric Power Cooperative, Inc. v. FERC*, we clarified that

> [a]ny agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. That means that when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest. And, therefore, the agency to which Congress entrusted the protection and discharge of the public interest is entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders, ***57** its regulations, or its authorizing statute.

924 F.2d 1132, 1135 (D.C. Cir. 1991) (internal citations omitted); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569–71 (D.C. Cir. 1987) (treating an agency interpretation of a settlement agreement as entitled to deference similar to that owed under *Chevron* where the settlement agreement had to be approved by the agency). The FSAs, as agreements between the FHWA and individual states, *see* 23 U.S.C. § 131(d), were thus approved by the FHWA as described in *Cajun Electric*.

Further, as the District Court explained, "[b]oth Defendants and Scenic America recognize ... that all FSA lighting provisions were established consistent with customary use." *Scenic II*, 49 F.Supp.3d at 71 (quoting or citing both parties' briefing) (internal quotation marks omitted); *see also* Opening Br. for Appellant 36; FHWA Br. 51-52. Thus, so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be "consistent with customary use," whether or not it is precisely the interpretation that would have been given to the standards at the time the FHWA and states first agreed upon them. *Cf. Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 162 F.3d 101, 107 (D.C. Cir. 1998) ("Our deference to an agency's reasonable interpretation of its governing statute 'is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.' " (quoting *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979))).

[19] We agree with the District Court's conclusion that the FHWA's interpretation of the FSA lighting standards is not one that " 'runs 180 degrees counter to the plain meaning of the' FSAs," and that it therefore "construes, rather than contradicts" the FSAs. *Scenic II*, 49 F.Supp.3d at 62–63, 70 (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)). Although it might be possible to read the FSA lighting standards to prohibit digital billboards, those standards do not foreclose other interpretations, including the FHWA's here. Because the FHWA's interpretation of the FSA lighting provision was reasonable, the interpretation cannot be "contrary to customary use." Accordingly, Scenic's claim that the Guidance violates § 706 must fail.

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For the foregoing reasons, we affirm the District Court's grant of summary judgment as to Scenic's § 706 claim, vacate its judgment as to Scenic's notice-and-comment claim, and remand with instructions to dismiss Scenic's notice-and-comment claim.

So ordered.

All Citations

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