

No.

IN THE
Supreme Court of the United States

YATISH JOSHI, INDIVIDUALLY, AS EXECUTOR OF THE ESTATE
OF GEORGINA JOSHI AND MEMBER OF YATISH AIR, LLC,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Tejinder Singh
GOLDSTEIN & RUSSELL P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814

Brian E. Casey
Counsel of Record
Timothy J. Maher
BARNES & THORNBURG LLP
100 N. Michigan St.
Suite 700
South Bend, IN 46601
(574) 233-1171
brian.casey@btlaw.com

QUESTION PRESENTED

The National Transportation Safety Board (NTSB) investigates every civil aviation accident, determines its probable cause, and, when appropriate, issues safety recommendations to other agencies and entities aimed at preventing future accidents. 49 U.S.C. §§1131(a)(1)(A), (e), 1135. The NTSB makes over 1000 probable cause determinations and issues over 200 safety recommendations annually. These reports are published on the NTSB's website, and can therefore have a significant impact on the business and reputation of the parties to the accident. When a report includes a safety recommendation to the Federal Aviation Administration, the agency is required by statute to respond. 49 U.S.C. §1135(a).

Pursuant to the Independent Safety Board Act, “[a] person disclosing a substantial interest” in an NTSB “final order” may seek review of that order with a court of appeals. 49 U.S.C. §§1153(a), (b)(1). On review, the court has “exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Board to conduct further proceedings.” *Id.* §1153(b)(3).

The question presented is whether an NTSB probable cause determination regarding a fatal airplane accident, or the NTSB's denial of a petition for reconsideration of that determination, is a judicially reviewable “final order” under 49 U.S.C. §1153.

CORPORATE DISCLOSURE STATEMENT

Petitioner Yatish Joshi is the sole member of Yatish Air, LLC. No public company has any ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED..... i
CORPORATE DISCLOSURE STATEMENT..... ii
TABLE OF CONTENTS..... iii
TABLE OF AUTHORITIESv
PETITION FOR A WRIT OF CERTIORARI 1
OPINION BELOW 1
JURISDICTION..... 1
STATUTORY PROVISIONS AT ISSUE..... 1
INTRODUCTION 2
STATEMENT OF THE CASE 4
 I. Statutory Background 4
 A. Agency history. 4
 B. Judicial review provisions. 8
 II. Factual Background..... 11
REASONS FOR GRANTING THE PETITION..... 17
 I. The Court Of Appeals’ Decision
 Conflicts With This Court’s Precedents. 17
 II. The Question Presented Is Of
 Surpassing Importance..... 23
 III. Certiorari Should Be Granted To
 Resolve A Conflict Regarding The
 Scope Of Judicial Review Of NTSB
 And FAA Orders..... 27
 IV. This Case Presents An Ideal Vehicle To
 Address These Issues. 32
CONCLUSION 34

App. A: Denial of Rehearing 1a

App. B: Court of Appeals opinion 3a

App. C: Response to Petition for Reconsideration 13a

App. D: Statutory and Regulatory Provisions 49a

Supp. App. A: Factual Report SA1

Supp. App. B: Probable Cause Report SA16

TABLE OF AUTHORITIES

CASES

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	17, 21
<i>Aerosource, Inc. v. Slater</i> , 142 F.3d 572 (3d Cir. 1998)	32
<i>Air Line Pilots Ass’n Int’l. v. Civil Aeronautics Bd.</i> , 750 F.2d 81 (D.C. Cir. 1984)	9
<i>Air Line Pilots’ Ass’n Int’l. v. Dept. of Transp.</i> , 446 F.2d 236 (5th Cir. 1971)	31
<i>Aircraft Owners and Pilots Ass’n v. FAA</i> , 600 F.2d 965 (D.C. Cir. 1979)	29
<i>Avia Dynamics, Inc. v. FAA</i> , 641 F.3d 515 (D.C. Cir. 2011)	29
<i>Ballenger v. Sikorski Aircraft Corp.</i> , 2011 WL 5358552 (M.D. Ala. Nov. 4, 2011)	19
<i>Benna v. Reeder Flying Serv., Inc.</i> , 578 F.2d 269 (9th Cir. 1978).....	6
<i>Bennett v. NTSB</i> , 66 F.3d 1130 (10th Cir. 1995).....	10
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	17, 18, 20, 21

<i>BFI Waste Systems v. FAA</i> , 293 F.3d 527 (D.C. Cir. 2002)	29, 31
<i>Blitz v. Napolitano</i> , 700 F.3d 733 (4th Cir. 2012)	11
<i>Block v. Cmty. Nutrition Ins.</i> , 467 U.S. 340 (1984)	17
<i>Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.</i> , 333 U.S. 103 (1948).....	26, 27
<i>Citizens to Protect Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	14
<i>City of Dania Beach v. FAA</i> , 485 F.3d 1181 (D.C. Cir. 2007)	11, 28, 30, 34
<i>City of Rochester v. Bond</i> , 603 F.2d 927 (D.C. Cir. 1979)	29, 30, 31
<i>Civil Aeronautics Bd. v. Delta Air Lines, Inc.</i> , 367 U.S. 316 (1961).....	25
<i>Civil Aeronautics Bd. v. State Airlines, Inc.</i> , 338 U.S. 572 (1950)	25
<i>Creed v. NTSB</i> , 758 F. Supp.2d 1 (D.D.C. 2010)	23
<i>CSI Aviation Serv., Inc. v. Dep't of Transp.</i> , 637 F.3d 408 (D.C. Cir. 2011)	29
<i>FAA v. Robertson</i> , 422 U.S. 255 (1975).....	25

<i>Foretich v. United States</i> , 351 F.3d 1198 (D.C. Cir. 2003)	33, 34
<i>Fox TV Stations, Inc. v. FCC</i> , 280 F.3d 1027 (D.C. Cir. 2002)	19
<i>Gibson v. NTSB</i> , 118 F.3d 1312 (9th Cir. 1997)	15, 25
<i>Helicopters, Inc. v. NTSB</i> , 2015 WL 5936370 (7th Cir. Oct. 13, 2015).....	25, 32
<i>Hughes Tool Co. v. Trans World Airlines, Inc.</i> , 409 U.S. 363 (1973).....	25
<i>Joshi v. United States</i> , No. 3:08-CV-498, 2009 WL 2449234 (N.D. Ind. Aug. 6, 2009)	16
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	33
<i>Mach Mining, LLC v. EEOC</i> , 135 S. Ct.1645 (2015)	17, 24
<i>Menard v. FAA</i> , 548 F.3d 353 (5th Cir. 2008)	30
<i>Miller v. Rich</i> , 845 F.2d 190 (9th Cir. 1988)	23
<i>Mistick PBT v. Chao</i> , 440 F.3d 503 (D.C. Cir. 2006)	22
<i>Moorhead v. Mitsubishi Aircraft Int'l, Inc.</i> , 828 F.2d 278 (5th Cir. 1987).....	19

<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	14
<i>Pan American World Airways, Inc. v. United States</i> , 371 U.S. 296 (1963).....	25
<i>Paskar v. U.S. Dep't of Transp.</i> , 714 F.3d 90 (2d Cir. 2013).....	31, 32
<i>Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic</i> , 400 U.S. 62 (1970)	18
<i>Reno v. Catholic Soc. Serv., Inc.</i> , 509 U.S. 43 (1993)	17
<i>Safe Extensions, Inc. v. FAA</i> , 509 F.3d 593 (D.C. Cir. 2007)	30
<i>St. Pierre v. Maingot</i> , 2002 WL 31473850 (E.D. La. Oct. 31, 2002)	19
<i>Scripps-Howard Radio v. FCC</i> , 316 U.S. 4 (1942)	25
<i>Shays v. FEC</i> , 528 F.3d 914 (D.C. Cir. 2008)	33
<i>Sierra Club v. Skinner</i> , 885 F.2d 591 (9th Cir. 1989)	22
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998)	33

<i>Thomas Brooks Chtd. v. Burnett</i> , 920 F.2d 634 (10th Cir. 1990)	6, 23
<i>Twentieth Century Airlines v. Ryan</i> , 74 S. Ct. 8 (1953)	25
<i>United States v. Students Challenging Regulatory Agency Procedures</i> , 412 U.S. 669 (1973)	33

STATUTES

Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931	4
§3(e)(2)	5
§5(a)	4
§§5(b)-(f)	5
§6(d)	5
Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731	9
§1006(a)	9
Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166	5
§§301-09	5
§302(2)	6
§304(d)	10
§304(1)	5
§304(2)	5
Transportation Act of 1994, Pub. L. 103-272, 108 Stat. 745	10, 11, 28
§7(b)	10

S. Rep. No. 101-450, 1990 U.S.C.C.A.N. 6376 (1990)	24
5 U.S.C. §551(6)	28
49 U.S.C. §1131(a)(1)(A)	2
49 U.S.C. §1131(e)	2
49 U.S.C. §1132(c)	6
49 U.S.C. §1135(a)	3, 7, 19, 31
49 U.S.C. §1153	4, 10, 11, 14, 25, 28
49 U.S.C. §1153(a)	1, 4, 9
49 U.S.C. §1153(b)	2, 4
49 U.S.C. §1154(b)	2, 15, 21
49 U.S.C. §46110	2, 4, 11, 28
49 U.S.C. App. §646.....	9, 25
49 U.S.C. App. §646(a) (1958 ed.).....	9, 26, 27
49 U.S.C. App. §1486(a) (1982 ed.).....	9, 27, 28
49 U.S.C. App. §§1651-60.....	4
49 U.S.C. App. §1655(c)(1) (1982 ed.).....	5
49 U.S.C. App. §1655(d) (1982 ed.).....	5, 10, 28
49 U.S.C. App. §1903(a).....	5

49 U.S.C. App. §1903(d) (1982 ed.)..... 10, 28

REGULATIONS

49 C.F.R. §831.4. 16, 21
49 C.F.R. §831.5.6
49 C.F.R. §831.8.6
49 C.F.R. §831.11.....6
49 C.F.R. §835.2.6
49 C.F.R. §835.3. 15
49 C.F.R. §845.40.....2, 7, 19, 31
49 C.F.R. §845.41(a). 8, 13

OTHER AUTHORITIES

Lloyd Burton & M. Jude Egan, *Courting Disaster: Systemic Failures and Responses in Railway Safety Regulation*, 20 Cornell J. L. & Pub. Pol’y 533 (2011) 11
Crash That Killed 5 IU Students Blamed on Pilot Error, WIBC.com (June 29, 2007), <http://www.wibc.com/blogs/crash-killed-5-iu-students-blamed-pilot-error> 20
William R. Dorsey, III, *A Sea Chase for Sea Lawyers: Marine Casualty Investigations by the U.S. Coast Guard and the NTSB*, 75 Tul. L. Rev. 1387 (2001) 8

Thomas Frank, <i>Unfit for Flight: Decades of manufacturer cover-ups have contributed to 45,000 small-aircraft deaths and dozens of multimillion-dollar verdicts</i> , USA Today, June 18, 2014, at 1A.....	3, 12, 24
Robert M. Hardaway, <i>Airport Regulation, Law and Public Policy</i> 13-21 (1991).....	5
Walter W. Jones, Jr., <i>What constitutes ‘order’ of civil aeronautics board or of administrator of Federal Aviation Agency subject to judicial review, or what orders are subject to such review, under §1006(a) of Federal Aviation Act (49 U.S.C.A. §1486(a))</i> , 14 A.L.R. Fed 725 (2008)	9
NTSB Annual Report to Congress 2014, http://www.nts.gov/about/reports/Documents/2014_Annual_Report.pdf	3
NTSB Annual Report to Congress 1995, http://www.nts.gov/about/Documents/SPC9801.PDF	4, 6
NTSB Webpage (Aviation Accident Database & Synopses), http://www.nts.gov/layouts/nts.aviation/index.aspx	7
NTSB Webpage (Accident Reports), http://www.nts.gov/investigations/accidentreports/pages/accidentreports.aspx	6
Pilot Error Blamed In Deadly Bloomington Plane Crash, TheINDYChannel (June 29, 2007), http://www.theindychannel.com/news/pilot-error-blamed-in-deadly-bloomington-plane-crash	20
Liam P. Sarsfield et al., <i>Safety in the Skies: Personnel and Parties in NTSB Aviation Accident Investigations</i> (2000).....	7, 8, 20, 21

J. Bryan White, *FAA Endorsements – Escaping Judicial Review – The Second Circuit Rules That an Endorsement of Panel Recommendations is Not a “Final Order,”* 79 J. Air. L. & Com. 201 (2014) 31

PETITION FOR A WRIT OF CERTIORARI

Petitioner Yatish Joshi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in this case.

OPINION BELOW

The court of appeals' decision is reported at 791 F.3d 8. *See* App. B. Its denial of rehearing is unpublished. App. A. The NTSB's factual accident report (Supp. App. A) and its probable cause report (Supp. App. B) are not precedential, but are published on the NTSB website. The NTSB's denial of Joshi's petition for reconsideration (App. C) is also published on the NTSB website.

JURISDICTION

The D.C. Circuit issued its decision on June 19, 2015, and denied petitioner's timely petition for rehearing on August 19, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

The relevant provisions of the Independent Safety Board Act provide in pertinent part:

[T]he United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter [49 USCS §§ 1101 *et seq.*]. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.

49 U.S.C. §1153(a).

A person disclosing a substantial interest in an order related to an aviation matter issued by the

Board under this chapter [49 USCS §§ 1101 *et seq.*] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit . . .

49 U.S.C. §1153(b)(1).

No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. §1154(b).

The relevant provision of the Federal Aviation Act provides in pertinent part:

[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

49 U.S.C. §46110(a).

These and other relevant provisions are reproduced in the appendix to this petition. App. D.

INTRODUCTION

The NTSB's primary function is to "investigate every civil aviation accident," determine the probable cause of such accidents and, when appropriate, issue safety recommendations to prevent future accidents. 49 U.S.C.

§§1131(a)(1)(A), (e); 49 C.F.R. §845.40. Thus, every single time an aviation accident occurs, the NTSB investigates to determine the probable cause. When the NTSB decides that additional safety regulations or measures are required, it makes recommendations to the Federal Aviation Administration (FAA), which is legally required to respond within 90 days. 49 U.S.C. §1135(a). It also makes recommendations to other federal or state agencies, industry, and other entities.¹

The NTSB has investigated over 140,000 aviation accidents, determined the probable cause of each of these accidents, and issued more than 14,000 safety recommendations. *2014 Annual Report* at v. The general aviation (in contrast to commercial or commuter aviation) accidents it has investigated have resulted in over 45,000 deaths.² In 2014 alone, the NTSB investigated and made probable cause determinations for 1690 domestic aviation accidents and incidents. *2014 Annual Report* at 3. It issued 131 safety recommendations. *Id.* at 1, 3. Over “73 percent of [the NTSB’s] recommendations from 2010 through 2014 have been adopted.” *Id.* at v. These reports and recommendations are the most important decisions the NTSB makes: they play critical roles in ensuring aviation safety and providing important information to pilots, passengers, manufacturers, and others in the aviation sector.

¹ NTSB, *Annual Report to Congress*, at 1, 3 (2014), http://www.nts.gov/about/reports/Documents/2014Annual_Report.pdf (last visited Nov. 16, 2015) (*2014 Annual Report*).

² Thomas Frank, *Unfit for Flight: Decades of manufacturer cover-ups have contributed to 45,000 small-aircraft deaths and dozens of multimillion-dollar verdicts*, USA Today, June 18, 2014, at 1A (“Safety Last”).

The Independent Safety Board Act's (ISBA) judicial review provision provides that "[a] person disclosing a substantial interest" in an NTSB "final order" may seek review from a federal appellate court. 49 U.S.C. §§1153(a), (b)(1). Taking a narrow view of this language, the D.C. Circuit in this case concluded that probable cause determinations in NTSB accident reports, and denials of petitions for reconsideration of those determinations, are not "final agency action" and so are not subject to judicial review under 49 U.S.C. §1153. The court of appeals reasoned that NTSB reports do not themselves have binding legal consequences—dismissing as irrelevant their substantial practical effects. Two other circuit courts have reached the same conclusion.

These decisions conflict with this Court's precedents emphasizing the importance of judicial review, and they undermine aviation safety. They also exacerbate an existing circuit conflict regarding the scope of judicial review under Section 1153 versus the Federal Aviation Act's judicial review provision, 49 U.S.C. §46110, which came from the same statutory predecessor and uses virtually identical language. Certiorari is warranted to resolve these tensions and establish that courts have the power to review the NTSB's most consequential decisions.

STATEMENT OF THE CASE

I. Statutory Background

A. Agency history.

The NTSB was created as part of the Department of Transportation in 1966. *See* Department of Transportation Act of 1966, Pub. L. 89-670, 80 Stat. 931, 935, §5(a) (Oct. 15, 1966); 49 U.S.C. App. §§1651-60; NTSB, *Annual Report to Congress* (1995) at 1, <http://www.nts.gov/about/Documents/SPC9801.PDF> ("1995 NTSB Annual Report") (last visited Nov. 16, 2015). The NTSB assumed the Civil

Aeronautics Board's (CAB) responsibility to conduct aviation accident investigations, determine the causes of accidents, and report on them. 80 Stat. at 935-37, §§5(b)-(f), 6(d); 49 U.S.C. App. §1655(d); *see also* ROBERT HARDAWAY, AIRPORT REGULATION, LAW AND PUBLIC POLICY, 13-21 (1991). In addition to transferring all the CAB's "functions, powers, and duties" to the NTSB, Congress provided that "[d]ecisions of the [NTSB] made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection shall be administratively final, and appeals as authorized by law or this chapter shall be taken directly to the courts." 80 Stat. at 938-39, §6(d); 49 U.S.C. App. §1655(d) (1982 ed.) (Section 1655(d)).³

In 1974, the ISBA re-established the NTSB as an independent federal agency. *See* Pub. L. 93-633, 88 Stat. 2166, §§301-309 (Jan. 3, 1975). The agency's responsibilities still included the duty to investigate aviation accidents and report on their facts, conditions, circumstances, and probable cause. *Id.* §304(1), (2) (codified at 49 U.S.C. App. §1903(a)). But Congress decided to make the agency independent because:

Proper conduct of the responsibilities assigned to [the NTSB] requires vigorous investigation of accidents involving transportation modes regulated by other agencies of Government; demands continual review, appraisal, and assessment of the operating practices and regulations of all such agencies; and calls for the making of conclusions and recommendations that

³ The act also replaced the Federal Aviation Agency with the FAA, which was also housed within the Department of Transportation. 80 Stat. at 932, §3(e)(2); 49 U.S.C. App. §1655(c)(1).

may be critical of or adverse to any such agency or its officials.

Id. §302(2). Thus, it was necessary for the NTSB to be “totally separate and independent from any other . . . agency of the United States.” *Id.*; see also 1995 NTSB Annual Report at 1-2.

An NTSB investigation “has priority over all other investigations of [accidents] conducted by other Federal agencies.” 49 C.F.R. §831.5. The NTSB’s investigator-in-charge (“IIC”) “has the responsibility and authority to supervise and coordinate all resources and activities of all personnel, both Board and non-Board, involved in the on-site investigation.” 49 C.F.R. §831.8. This includes designating which parties can participate in an investigation and which cannot. 49 C.F.R. §831.11. Typically, the NTSB allows the FAA, 49 U.S.C. §1132(c), as well as manufacturers of the aircraft, engine, and other parts involved in an accident to participate in an investigation—but not representatives of the pilot or family members. *Id.*; 49 C.F.R. §831.11; *Thomas Brooks Chtd. v. Burnett*, 920 F.2d 634, 638 (10th Cir. 1990).

Once the NTSB investigates, it issues a factual report and a probable cause report. See Supp. App. A (factual report) and B (probable cause report); 49 C.F.R. §835.2 (defining “board accident report” (*i.e.*, probable cause report) and “factual accident report”). These reports are “the main products of an NTSB investigation,” giving “details about the accident, analysis of the factual data, conclusions and the probable cause of the accident, and the related safety recommendations.” See <http://www.nts.gov/investigations/accidentreports/pages/accidentreports.aspx>. They “plac[e] a government stamp of officiality on the probable cause of the accident.” *Benna v. Reeder Flying Service, Inc.*, 578 F.2d 269, 272 (9th Cir. 1978). The NTSB publishes its reports on its public

website.⁴ If the NTSB deems it appropriate, it also makes safety recommendations to others. 49 C.F.R. §845.40 (NTSB will make “any appropriate recommendations formulated on the basis of the investigation”); 49 U.S.C. §1135(a) (FAA must respond to recommendations).

In the year 2000, the Chairman of the NTSB commissioned a study by the RAND Corporation to evaluate the effectiveness of the agency’s methods and its contribution to aviation safety. The study explains that the statement of probable cause is “[t]he most controversial result of the NTSB investigation process,” because it “reverberates far beyond the halls of the NTSB.” LIAM P. SANSFIELD ET AL., SAFETY IN THE SKIES: PERSONNEL AND PARTIES IN NTSB AVIATION ACCIDENT INVESTIGATIONS xlv (2000) (“RAND Report”).⁵

Probable cause sets off a chain reaction of regulatory activity that may result in the FAA issuing new safety regulations, airworthiness directives, service bulletins, or myriad other requirements. Beyond the regulatory effects, a finding of probable cause is a highly significant event for the civil litigation associated with a major commercial aviation accident. These findings are used by lawyers on both sides to pursue theories of liability or defenses that the NTSB factual and analytical reports suggest. Although the determination of potential liability is not part of the NTSB mission, the Safety Board’s findings and conclusions offer such powerful

⁴ See http://www.nts.gov/_layouts/ntsb.aviation/index.aspx (Aviation Accident Database & Synopses) (last visited Nov. 16, 2015).

⁵ Available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1122.1.pdf.

statements on what caused an accident that conclusions about liability are inevitably drawn from them.

Id.; see also William R. Dorsey, III, *A Sea Chase for Sea Lawyers: Marine Casualty Investigations by the U.S. Coast Guard and the NTSB*, 75 TUL. L. REV. 1387, 1418-19 (2001) (“Whatever may be the primary purpose of NTSB investigations, they often do materially influence civil litigation.”). “In terms of the assignment of fault and blame for a major aviation accident, by the media or in a legal proceeding, the NTSB’s probable cause finding is a crucial one.” RAND Report, *supra*, at xlv. Indeed, “almost every individual interviewed” in the course of the RAND study, “no matter his or her association or relationship to the accident investigation process,” described “the NTSB’s probable cause finding” as “the whole ballgame.” *Id.* 120.

After the NTSB publishes its factual and probable cause reports, its regulations provide that a petition for reconsideration of the NTSB’s findings and determination of probable cause can be filed by any “person having a direct interest in the accident investigation,” but it “will be entertained only if based on the discovery of new evidence or on a showing that the Board’s findings are erroneous.” 49 C.F.R. §845.41(a). The NTSB will reject out of hand any reconsideration petition that raises points already considered. *Id.*

B. Judicial review provisions.

The judicial review provision at issue in this case, Section 1153, provides that:

The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the [NTSB] under this chapter. A

person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.

49 U.S.C. §1153(a).

The statute is the latest incarnation of a broad judicial review provision originally enacted as part of the Civil Aeronautics Act of 1938. *See* Walter W. Jones, Jr., *What constitutes 'order' of civil aeronautics board or of administrator of Federal Aviation Agency subject to judicial review, or what orders are subject to such review, under §1006(a) of Federal Aviation Act (49 U.S.C.A. §1486(a))*, 14 A.L.R. FED 725, n.3 (2008) (describing amendments). Section 1006 of the 1938 Act stated that:

Any order, affirmative or negative, issued by the [Civil Aeronautics] Authority, except any order in respect of any foreign air carrier subject to the approval of the President . . . shall be subject to review” in a federal appellate court “upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

49 U.S.C. App. §646(a).

In 1958, Congress re-enacted this provision as §1006(a) of the Federal Aviation Act. *See* Pub. L. 85-705, §1006(a); 49 U.S.C. App. §646 (1958 ed.) (“Section 646 . . . provided for judicial review, and is now covered by section 1486 of this title.”). Section 1006(a) retained the same scope of judicial review, except it now referenced orders of “the Board or Administrator” and later “the Board or Secretary of Transportation” rather than the Civil Aeronautics Authority. *See* 49 U.S.C. App. §1486(a) (1982 ed.); *Air Line Pilots Ass’n Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 84 n.10 (D.C. Cir. 1984).

When Congress enacted the ISBA in 1974 (taking the NTSB outside the Department of Transportation), it provided a parallel basis for judicial review of the NTSB's actions using language essentially identical to 49 U.S.C. §1486(a):

Any order, affirmative or negative, issued by the [NTSB] under this title shall be subject to review by the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. Such review shall be conducted in accordance with the provisions of chapter 7 of title 5, United States Code.

ISBA §304(d) (codified at 49 U.S.C. App. §1903(d) (1982 ed.)). The statute then also provided that the NTSB's decisions were "administratively final," and that "appeals . . . shall be taken directly to the courts." 49 U.S.C. App. §1655(d) (1982 ed.).

Finally, when Congress re-codified the transportation laws in 1994, it created the current version of the statute. Thus, Congress "repealed both Sections 1486 and 1903 . . . by, redistributing their provisions so that both sections are now embodied in 49 U.S.C. §1153(a)." *Bennett v. NTSB*, 66 F.3d 1130, 1132 n.2 (10th Cir. 1995); Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745, 1379, 1383, 1388, § 7(b); 49 U.S.C. §1153 (Historical Notes) (Section 1153(a) created when Congress combined 49 U.S.C. App. §1903(d) and 49 U.S.C. App. §1655(d)). In the re-codification, Section 1655(d)'s statements that the NTSB's determinations were "administratively final," and "appeals . . . shall be taken directly to the courts" were omitted solely to "eliminate unnecessary words." 49 U.S.C. §1153

(Historical Notes); 108 Stat. at 756. However, Congress intended that omission to be “without substantive change.” Pub. L. 103-272, 108 Stat. 745, 745 (July 5, 1994).

Simultaneously, Section 1486 also became the judicial review provision under the re-codified Federal Aviation Act, 49 U.S.C. §46110. *Blitz v. Napolitano*, 700 F.3d 733, 739 n.6 (4th Cir. 2012) (“In 1994, §1486 was recast into §46110, with minor and nonsubstantive modifications.”); *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007); 49 U.S.C. §46110(a) (Historical Notes) (§1486(a) became §46110(a)). The NTSB judicial review provision is therefore a close sibling of the Federal Aviation Act’s review provision: the two continue to use similar language, and to serve essentially the same function.

II. Factual Background

1. Petitioner Yatish Joshi is the sole member of Yatish Air, LLC, which owns several small planes. On the evening of April 20, 2006, one of those planes crashed in a wooded area on approach to Bloomington (Indiana) Airport, killing the pilot, Georgina Joshi (petitioner’s daughter) and all four passengers. After a brief NTSB investigation (assisted by the FAA—in which Joshi could not participate), the NTSB’s Probable Cause Report found that pilot error was the sole probable cause of the accident. *See* Supp. App. SA16-17 (Probable Cause Report) and SA1-15 (Factual Report).

The NTSB’s findings were not surprising. “Human operator error is typically the first—and most agencies and firms hope—the last organizational refuge after an accident.” Lloyd Burton & M. Jude Egan, *Courting Disaster: Systemic Failures and Responses in Railway Safety Regulation*, 20 CORNELL J. L. & PUB. POL’Y 533, 536 (2011). “Blaming the human operator . . . tends to shield both industries and regulatory agencies from the costly and

time-consuming process of governmental and public accident investigations that might reveal deliberate indifference and therefore necessitate systemic reforms.” *Id.* Consistent with those incentives, the NTSB determines that “pilot error” is the probable cause of an aviation accident 86% of the time—including in cases where subsequent investigation (usually in the course of litigation) debunks that explanation. *See Safety Last, supra* note 2, at A1.

In this case, the NTSB determined that the accident’s probable cause was “[t]he pilot’s continued descent below decision height and not maintaining adequate altitude/clearance from the trees while on approach.” Supp. App. SA17.⁶ The NTSB concluded that the plane struck the trees, causing an “uncontrolled descent” into the ground. *Id.*

The NTSB’s determination lacked supporting record evidence and ignored the investigators’ contemporaneous notes, physical evidence, and the laws of physics. For example, one FAA investigator’s notes stated that “[t]he lower portion of the aircraft revealed no evidence of contacting trees prior to the accident.” D.C. Cir. J.A. 428-30. That investigator also observed that the aircraft “impacted the terrain inverted with the bottom of the aircraft facing north [the direction it was flying].” *Id.* An uncontrolled descent after contacting trees (which were damaged no higher than 20 feet from the ground) could not have resulted in the plane turning 180 degrees before hitting the ground. Another FAA investigator noted that the aircraft descended “in a steep, nose down, right turn

⁶ The “decision height” is the specified altitude or height where a missed approach must be initiated if the pilot has not visualized the runway.

attitude.” *Id.* Photos and an accident site sketch depicted a very compact debris field, with damage scarcely wider than the plane’s wingspan, tree damage only 20 feet high, and the engine and propeller buried three to four feet into the ground. *Id.* 217, 254-57. The record evidence thus showed that the aircraft could not have descended too low on approach, contacted trees at approximately 20 feet from the ground, causing it to crash into the ground. Instead, the aircraft must have been ascending at a steep angle, causing it to stall and then roll and fall straight down, propeller-first into the ground.

Joshi engaged technical experts who performed their own investigation, recreated the accident flight, interviewed witnesses, and performed acoustic testing to determine the accident’s cause. The experts realized that many of the witnesses who heard or saw a plane shortly before the accident were describing a different plane than Georgina’s. They concluded that the Probable Cause Report was flawed and that more likely cause(s) of the accident included: (a) a second plane flying below FAA radar attempting to land on a perpendicular runway as Georgina was approaching the airport; and (b) flaws in the airport’s air traffic control system for night landings. *Id.* 45, 76-77.

These findings critically undermined the NTSB’s conclusions. Indeed, in tort litigation with the FAA, the agency’s attorneys conceded in a written statement to Joshi that a “court could find merit in at least some” of Joshi’s arguments and determine that “air traffic control negligence was a cause of this unfortunate crash.” *Id.* 186.

Pursuant to 49 C.F.R. §845.41(a), Joshi submitted his evidence to the NTSB in a Petition for Reconsideration asking the NTSB to re-examine its probable cause determination. In its response, the NTSB dismissed this evidence. Ignoring its own finding that there was no

damage to the plane's underside, the NTSB reaffirmed its conclusion that Georgina descended into the trees. Dismissing the recorded weather conditions of 1 mile visibility and a 100 foot ceiling, the NTSB speculated that an eyewitness saw Georgina's plane 1.5 miles away, rather than a second plane, because "airplane lights can sometimes be seen from greater distances than reported visibility distances." *Id.* 201. The NTSB also misconstrued petitioner's audiological evidence showing that several people who called 911 when the accident occurred could not have heard Georgina's plane approach on her radar-documented flight path. The NTSB rejected that information because "none of the [911] callers reported hearing more than one airplane during the time surrounding the accident." *Id.* This ignores Joshi's evidence demonstrating that the one plane these witnesses heard was not Georgina's plane. The NTSB's conclusion that those witnesses heard Georgina's plane is unsupported. The NTSB also dismissed the FAA's own concession, App. C, 46a-48a, affirmed its probable cause determination blaming Georgina alone for the accident and denied the Petition. App. C, 48a.

2. Pursuant to 49 U.S.C. §1153, Joshi petitioned the D.C. Circuit for review of the NTSB's denial of the Petition for Reconsideration. He argued that the NTSB's investigation and analysis was fundamentally flawed, making the NTSB's conclusion arbitrary and capricious because it failed to "consider relevant factors," *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), "consider an important aspect of the problem," and support its conclusions with substantial evidence and "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

The D.C. Circuit dismissed Joshi's petition for lack of jurisdiction, agreeing with the NTSB that its determination and denial of the Petition for Reconsideration were

unreviewable because they were not “final agency actions.” App. B, 11a.

The D.C. Circuit stated first that “to constitute a final, reviewable order, an agency disposition must mark the consummation of the agency's decisionmaking process, and it must determine rights or obligations or give rise to legal consequences.” *Id.* 7a (quotation marks omitted). The court of appeals adopted the Ninth Circuit's view that neither NTSB decision qualified because neither had “determinate consequences.” *Id.* 7a-8a (quoting *Gibson v. NTSB*, 118 F.3d 1312, 1315 (9th Cir. 1997)).

The court of appeals acknowledged that Joshi had “surely” faced adverse consequences from the NTSB's reports, including “reputational harm, financial harm, emotional harm, and informational harm” as a result of the NTSB's reports in this case. App. 9a, 8a. But it dismissed these harms, holding that “these are practical consequences, not legal harms that can transform the Reports into a final agency order and trigger our jurisdiction.” *Id.* 8a. Because the reports did not legally bind Joshi, the court determined that they did not have the sort of “legal consequence[s]” that enabled judicial review. *Id.*

The court relied heavily on Section 1154(b) which states that “[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.” 49 U.S.C. §1154(b). The court of appeals interpreted Section 1154(b) expansively to mean that such reports could not “be admitted as evidence or for any other use in civil litigation.” App. B, 8a (citing without quoting 49 U.S.C. §1154(b) and 49 C.F.R. §835.3). It extrapolated even further from that reading to the conclusion that “no legal consequences of any kind result from the NTSB's

factual report or probable cause determinations.” *Id.* The panel concluded that the denial of reconsideration likewise “‘no more imposed legal obligations, fixed rights, or altered a legal relationship’ than did the initial probable cause determination.” *Id.* 11a (quotation omitted).

The court also relied on the NTSB’s own assertion that the agency “ascribes no ‘legal significance’ to the facts it finds in determining the probable cause report.” *Id.* 10a. According to the court, the NTSB “does not intend that its determination will be relied upon in other proceedings” and “is used only within the government in making decisions regarding the need for further safety regulations.” *Id.*; *id.* 4a-5a (citing 49 C.F.R. §831.4).

The court’s logic leaves NTSB probable cause determinations, and denials of petitions for reconsideration of those determinations, forever unreviewable. It elevates Section 1154(b)’s evidentiary limitation in damages cases into a *de facto* judicial review preclusion statute.

3. Separately, petitioner settled with estates of the four passengers who died in the crash for the maximum amount allowed under Indiana law. Petitioner’s company, Yatish Air, sued the United States for indemnification; he personally sued the United States for negligence arising from the FAA’s failures that led to the accident. The indemnification claim was dismissed under Indiana law. *See Joshi v. United States*, No. 3:08-CV-498, 2009 WL 2449234, at *7 (N.D. Ind. Aug. 6, 2009). The negligence claims settled for the maximum amount recoverable, and as part of the settlement the United States admitted that a court could find merit in the claim that “air traffic control negligence was a cause of this unfortunate crash.” D.C. Cir. J.A. 185-86.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Decision Conflicts With This Court's Precedents.

1. The decision below unduly limits judicial review under Section 1153 and conflicts with this Court's precedents. Courts must begin with the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quotation omitted); *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 63-64 (1993). "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Ins.*, 467 U.S. 340, 351 (1984).

The specific question presented is whether an NTSB probable cause determination or the denial of a subsequent petition for reconsideration is a "final order" within the meaning of Section 1153. The phrase "final order" is synonymous with "final agency action" under the Administrative Procedure Act. *See* App. 7a. In *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), this Court explained that agency action is properly regarded as "final" if it "mark[s] the 'consummation' of the agency's decisionmaking process," and either "determine[s]" "rights or obligations," or causes "legal consequences" to "flow."

The facts of *Bennett* are instructive here. *Bennett* involved a Fish and Wildlife Service ("FWS") opinion examining the potential impact to endangered fish caused by a Bureau of Reclamation water project. The opinion set forth terms and conditions under which the project could proceed—which were advisory in nature but which would,

if followed, protect the Bureau from potential liability under the Endangered Species Act. Similar to its position in this case, the government opposed judicial review in *Bennett* by arguing that the FWS opinion was not final agency action because it did not “legally obligate[]” the Bureau to adopt the alternatives specified in the opinion, and because the opinion did not “constrain the Bureau’s discretion as to how the available water should be allocated among potential users.” *Id.* at 177. This Court acknowledged that the Bureau was “technically free to disregard the Biological Opinion and proceed with its proposed action,” if it chose to do so. *Id.* at 170. But the Court rightly rejected the government’s challenge to finality, holding that because the FWS opinion set forth terms and conditions under which the Bureau could safely pursue the project, it “alter[ed] the legal regime,” and therefore had sufficiently “direct and appreciable legal consequences” to be final agency action. *Id.* at 178.

In *Bennett*, this Court relied on *Port of Boston Marine Terminal Ass’n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (*Port of Boston*)—another helpful case. There, the Court dismissed an argument that an agency’s order allocating responsibility for a tariff was not final and reviewable because it “had no independent effect on anyone,” *id.* at 70-71, as having “the hollow ring of another era.” *Id.* The Court explained that “[a]gency orders that have no independent coercive effect are common.” *Id.* Even without an “independent coercive effect,” an agency determination allocating responsibility for the tariff had sufficient “legal consequences” to merit review. *Id.*

Under these precedents, an NTSB report or denial of reconsideration, even if “advisory,” or without “independent coercive effect,” still “alter[s] the legal regime” under which others act, in and out of the

government, and so has legal consequences. Most obviously, if the NTSB “submits a recommendation about transportation safety” as part of its report, *e.g.*, because it finds that the FAA or some other agency erred, then the agency is required to “give to the Board a formal written response to each recommendation not later than 90 days after receiving the recommendation.” 49 U.S.C. §1135(a). Such recommendations are included in NTSB reports. *See* 49 C.F.R. §845.40. Like the advice in *Bennett*, the NTSB’s recommendations are regularly adopted by governmental and private entities. In fact, the failure to adopt an NTSB recommendation by an agency, manufacturer, or other entity can sometimes be evidence of that entity’s negligence in subsequent tort litigation—thus “alter[ing] the legal regime” in those future cases.⁷ Reports making such vital determinations have sufficiently “determinate consequences” to be reviewable final agency action.

Similarly, NTSB’s *failure* to make safety recommendations (including its decision to ignore the FAA’s *admitted* failings) also creates determinate consequences. *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1037-38 (D.C. Cir. 2002) (inaction can be final agency action). Pilots, like Joshi, who still use the airport, face the same systemic air traffic control issues the FAA conceded were potential causes of the accident. Deciding not to make a safety recommendation thus has legal consequences also.

⁷ Courts disagree, but some courts view NTSB recommendations and probable cause findings as evidence of the standard of care, or knowledge, or permissible evidence upon which experts can rely. *See, e.g., Moorhead v. Mitsubishi Aircraft Int’l, Inc.*, 828 F.2d 278, 284 n.7 (5th Cir. 1987); *St. Pierre v. Maingot*, 2002 WL 31473850, *3 (E.D. La. Oct. 31, 2002); *Ballenger v. Sikorski Aircraft Corp.*, 2011 WL 5358552 (M.D. Ala. Nov. 4, 2011).

Aside from potential regulatory follow-up (or the lack thereof), probable cause reports and denials of petitions for reconsideration are “final” because they carry tremendous real-world consequences. An NTSB report is effectively an agency adjudication of culpability. Today, the NTSB’s website features a report wrongly stating that petitioner’s deceased daughter was at fault for the air crash that killed her and four of her friends. That report offered a “roadmap[] to liability” for the other victims of the crash, with whom petitioner settled. RAND Report, *supra*, at 98. Media reports of the accident also blame Georgina Joshi for the crash. *See, e.g.*, Pilot Error Blamed In Deadly Bloomington Plane Crash, TheINDYChannel (June 29, 2007), <http://www.theindychannel.com/news/pilot-error-blamed-in-deadly-bloomington-plane-crash>; Crash That Killed 5 IU Students Blamed on Pilot Error, WIBC.com (June 29, 2007), <http://www.wibc.com/blogs/crash-killed-5-iu-students-blamed-pilot-error>. Every day, that report continues to damage petitioner’s reputation as well as that of his deceased daughter, to say nothing of his emotional wellbeing.

2. The D.C. Circuit offered several counter-arguments to the foregoing analysis. None are persuasive.

First, the court’s analysis focused principally on whether the NTSB’s decision had “legal consequences” for Joshi. However, whether agency action is final is a “separate question” from whether the petitioner challenging the action has sufficient injury for standing. *Bennett*, 520 U.S. at 177. The finality inquiry does not focus simply on the impact on the one challenging the action; rather it looks more broadly at whether the action is “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett*, 520 U.S. at 178 (citation omitted). Here, regardless of whether Joshi has suffered consequences personally (and he has), the NTSB’s identification of an

accident's probable cause, and any safety recommendations it makes (or does not make) to the FAA, another agency, or industry, create reviewable "legal consequences." *Id.*

Second, the court of appeals relied heavily on 49 U.S.C. §1154(b), which provides that "[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action *for damages* resulting from a matter mentioned in the report." 49 U.S.C. §1154(b) (emphasis added). Both the D.C. Circuit and the Ninth Circuit in *Gibson* expanded the statute to mean that such reports have no place in *any* litigation, and therefore, have no legal consequences whatsoever.

However, the statute does *not* bar using a report in litigation other than litigation for damages. In fact, "NTSB Accident Reports, factual reports, and other documents have been regularly admitted into evidence in private litigation for a variety of purposes." RAND Report, *supra*, at 97. And even when the report itself is not admitted, the personnel who prepared it or were consulted in its preparation can be called into court; and the submissions made by any party during the reporting process can be subpoenaed. *Id.* at 97-98.

Third, the court of appeals credited the NTSB's explanation that its investigations are merely "fact-finding proceedings" that "are not conducted for the purpose of determining the rights or liabilities of any person." App. B, 8a (citing 49 C.F.R. §831.4). Instead, the NTSB argued, its reports are "only used within the government in making decisions regarding the need for further safety regulations." *Id.* 10a. But the NTSB's explanation of the "purpose" of accident investigations cannot countermand Congress' statutory directive. Congress' statutory scheme, not the agency's regulations, determines whether judicial

review is appropriate. *Abbott Labs.*, 387 U.S. at 141 (“‘clear and convincing evidence’ of a contrary legislative intent” needed to restrict access to judicial review); *Mistick PBT v. Chao*, 440 F.3d 503, 510 (D.C. Cir. 2006) (agency cannot adopt regulations erasing the presumption of reviewability unless the enabling statute evidences Congressional intent to preclude judicial review); *Sierra Club v. Skinner*, 885 F.2d 591, 592 (9th Cir. 1989) (FAA decision reviewable under §1486 because its “characterization of its own action is not determinative”).

Finally, as *Bennett* shows, an agency’s conclusions used by another agency to govern its activities create sufficient “legal consequences” for judicial review. Thus, the D.C. Circuit’s conclusion that probable cause determinations are used “within the government in making decisions regarding the need for further safety regulations,” App. B, 10a, confirms, rather than refutes, the conclusion that such determinations are “final agency action.”

3. The court of appeals’ faulty logic also leads to anomalous results. For example, it leads to the possibility that reviewability of the NTSB’s probable cause reports turns on how the agency resolves the inquiry. If the NTSB finds any cause other than “pilot error,” it makes safety recommendations which, under *Bennett*, would be reviewable because the FAA is legally required to respond. If it finds “pilot error” and makes no recommendations, the determination would be unreviewable under the D.C. Circuit’s rule. Such inconsistency lacks any support in Section 1153.

Nor is this the sole anomaly. The D.C. Circuit disregarded the consequences arising from continued publication of the NTSB’s finding blaming Georgina Joshi for the accident in which four others died. Had she survived, that determination would undeniably injure her reputation and impair her ability to fly or obtain

insurance—consequences that should make the report reviewable. Thus, the availability of judicial review could turn on whether the pilot survives. That also has no basis in Section 1153.

Even more strange: courts have already held that *intermediate* steps in an investigation are reviewable. Thus, when the NTSB denied interested parties the right to participate in various phases of the investigation, courts have reviewed those decisions. *See Thomas Brooks Chtd.*, 920 F.2d at 641-42 (decision to prevent pilot representatives from participating in investigation was reviewable); *Miller v. Rich*, 845 F.2d 190 (9th Cir. 1988) (construing NTSB regulation and concluding that NTSB abused discretion by prohibiting aircraft owner from observing disassembly of aircraft). And in a case involving the investigation of a trucking accident, a district court held that the NTSB's decision to include a driver's medical information in an accident investigation docket "created definitive consequences" subject to review under Section 1153(a). *Creed v. NTSB*, 758 F. Supp. 2d 1, 7 (D.D.C. 2010). It is irreconcilable that these intermediate steps in NTSB investigations are sufficiently final to warrant judicial review, but the ultimate result of that process is not.

Certiorari is therefore necessary to confirm that probable cause determinations, and denials of petitions for reconsideration, are judicially reviewable.

II. The Question Presented Is Of Surpassing Importance.

Certiorari is warranted because the question presented is of national importance. As noted in the Statement of the Case, *supra*, every year the NTSB investigates hundreds of fatal general aviation accidents. The NTSB's findings determine whether safety recommendations are made or not, and they provide roadmaps to liability for the parties

to those accidents. In this regard, “[t]he NTSB’s mission . . . is critical.” S. Rep. No. 101-450, 1990 U.S.C.C.A.N. 6376, 6377 (1990).

Nevertheless, evidence is mounting that the NTSB often incorrectly attributes general aviation accidents to pilot error—thus permitting unsafe aircraft components to stay in the air, and leaving other systemic problems unaddressed. *See Safety Last, supra* note 2, at 1A. A thorough investigative report determined that while the NTSB “has an international reputation for exhaustive investigations of commercial jet crashes,” its investigations of general aviation crashes (*e.g.*, crashes involving small private planes), “are far more brief.” *Id.* These investigations are therefore uniquely susceptible to manipulation by interested parties, including manufacturers and the FAA. This case is a vivid illustration: the FAA was invited to participate in the NTSB investigation, even though the FAA’s own negligence likely caused the accident in question and the agency had every incentive to steer the investigation toward the conclusion that the pilot was to blame. In other cases, aircraft manufacturers are invited to participate in NTSB investigations, even though the safety of their designs and components is at issue. And there is clear evidence that in many cases, the manufacturers have attempted to protect themselves by misleading the NTSB. *Id.*

Judicial review is therefore a critical check on the quality of the agency process. As this Court has explained, “legal lapses and violations occur” without judicial review because mistakes happen, “especially [] when they have no consequence.” *Mach Mining, LLC*, 135 S. Ct. at 1652-53. Without judicial review of NTSB probable cause determinations and denials of petitions for reconsideration, the aviation community and the public at-large cannot evaluate whether the NTSB is performing its most

important function because the NTSB itself will be the sole arbiter of its own effectiveness. Nevertheless, under the D.C. Circuit's rule--also adopted by the Ninth and Seventh Circuits, *see Gibson*, 118 F.3d at 1315; *Helicopters, Inc. v. NTSB*, 803 F.3d 844 (7th Cir. 2015)--courts will never review the NTSB's probable cause determinations.

Notwithstanding the importance of the question presented, this Court has never decided what constitutes a judicially reviewable "order" under Section 1153. Indeed, this Court has never interpreted Section 1153 at all. Its predecessor statutes, Sections 1903 and Section 1486, have not been examined in any meaningful way either. Section 1903 has not been interpreted at all, and Section 1486 has been mentioned in passing (and only to state that NTSB or CAB orders are judicially reviewable).⁸

Likewise, Section 646 was mentioned only in passing by this Court, with one exception.⁹ This Court did construe 49 U.S.C. App. §646, in a legally distinct (but

⁸ *See FAA v. Robertson*, 422 U.S. 255, 270 (1975) (Stewart, J., concurring) ("[A]s the Solicitor General has pointed out, . . . under 49 U.S.C. §1486, judicial review of an order of nondisclosure under 49 U.S.C. §1104 is available in the courts of appeals."), *superseded on other grounds; Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 379 (1973) (quotation omitted); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309 (1963) (noting issue is "for the Board, subject of course to judicial review as provided in 49 U.S.C. §1486."); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 335, n.2 (1961) (Whittaker, J., dissenting) (quoting 49 U.S.C.A. §1486(a)).

⁹ *Twentieth Century Airlines, v. Ryan*, 74 S. Ct. 8, 10 & n.3 (1953) ("[u]nder the Civil Aeronautics Act a provision for review by judicial process of the final orders of the Board is provided."); *Civil Aeronautics Bd. v. State Airlines, Inc.*, 338 U.S. 572, 574 n.3 (1950) ("[a]uthority for judicial review is given by §1006" of the Civil Aeronautics Act, 49 U.S.C. §646); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 16, n.10 (1942) (off-point).

nonetheless informative) context in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). There, this Court examined whether Section 646, which “authoriz[ed] judicial review of described orders of the Civil Aeronautics Board, include[d] those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation which are subject to approval by the President under §801 of the Act.” *Id.* at 104. At the time, the CAB issued orders granting or denying air routes to foreign airlines, but those orders required Presidential approval to become effective. *Id.* at 106.

Section 646 authorized review of “any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President. . .” *Id.* (quoting 49 U.S.C. App. §646(a)). After the CAB issued an order denying certain international air routes to Waterman Steamship Corp. and granting one to another carrier, Waterman sought judicial review under Section 646. In affirming the dismissal of Waterman’s petition for review, the Court distinguished orders addressing domestic transportation from those involving foreign transport. *Id.* at 109. Orders regarding domestic transport “which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down.” *Id.* Those orders “serv[e] as a final disposition of the application” and are “the conclusion of the administrative process.” *Id.*

However, the review process is “completely inverted” for orders regarding overseas transport which required Presidential approval. *Id.* Those orders are not reviewable because, before they receive final Presidential approval, they are not “mature” and not “susceptible to judicial review.” *Id.* at 114. But after Presidential approval, “the final orders embody Presidential discretion as to political

matters beyond the competence of the courts to adjudicate.” *Id.*

Because *Waterman* interpreted Section 646’s exception for Presidential approval of foreign air transport, it did not specifically examine the scope of judicial review for orders involving domestic aviation, as here. But even *Waterman*’s general discussion of Section 646 underscores that, except for orders dealing with foreign transport, CAB (now NTSB) orders should be seen as a “final disposition,” “the conclusion of the administrative process,” and “subject to judicial review to assure application of” Congressional standards. *Id.* at 109.

Since *Waterman* seventy-seven years ago, this Court has not construed Section 646 or its progeny down through Section 1153. This Court’s guidance about the proper interpretation of Section 1153, including whether it permits review of NTSB probable cause determinations and denials of petitions for reconsideration, is long overdue and sorely needed.

III. Certiorari Should Be Granted To Resolve A Conflict Regarding The Scope Of Judicial Review Of NTSB And FAA Orders.

Certiorari is also warranted to resolve the ongoing tension between appellate courts’ narrow interpretation of judicial review under Section 1153 and broader interpretation of judicial review under the FAA’s judicial review statute, Section 46110—both of which are recodifications of the same predecessor statute, Section 1486(a).

As discussed in Part I.B of the Statement of the Case, Section 646 governed judicial review of CAB orders and begat Section 1486(a), which governed judicial review of orders by both the then-CAB and the FAA. 49 U.S.C. App. §646 (1958 ed.) (“Section 646 . . . provided for

judicial review, and is now covered by section 1486 of this title.”); 49 U.S.C. App. §1486(a) (1982 ed.) (referring to orders of “the Board or Administrator”). When the NTSB was created, Congress transferred the CAB’s functions to the NTSB and mandated that the NTSB’s decisions “shall be administratively final, and appeals as authorized by law or this chapter shall be taken directly to the courts.” 49 U.S.C. App. §1655(d) (1982 ed.). Then, when Congress enacted the ISBA, it created a second judicial review statute that specifically addressed NTSB actions, Section 1903(d). That statute parroted the language already in Section 1486(a). *Compare* 49 U.S.C. App. §1486(a) (1982 ed.) *with* 49 U.S.C. §1903(d) (1982 ed.).

In the 1994 re-codification, Congress combined Sections 1486, 1903, and 1655(d) into the current Sections 1153(a) and (b) to govern NTSB “final orders.” 49 U.S.C. §1153 (Historical Notes). Section 1486 also became Section 46110, the judicial review provision for FAA orders under the Federal Aviation Act. 49 U.S.C. §46110(a) (Historical Notes); *City of Dania Beach*, 485 F.3d at 1187. Congress stated that the re-codification was “without substantive change.” Pub. L. 103-272, 108 Stat. 745, 745 (July 5, 1994). The two new statutes not only share a predecessor, they also use similar language: both authorize a “person disclosing a substantial interest” to file a petition for review in a court of appeals. Section 46110 refers to “orders,” and Section 1153 refers to “final orders,” but there is no suggestion that Congress intended any difference in effect. Indeed, all evidence is to the contrary: the legislative history shows that Congress did not intend any meaningful substantive difference between Section 46110 and its predecessor, and the word “order,” without more, is defined in the Administrative Procedure Act to be part of a “final disposition,” and therefore must be “final” anyway. 5 U.S.C. § 551(6).

Courts also interpreted the predecessor statute, Section 1486, appropriately broadly. For example, the Tenth Circuit held that an FAA “no-hazard” letter, “although technically advisory in nature, is a ‘final disposition,’ judicially reviewable as an order under [§1486(a)].” *Aircraft Owners and Pilots Ass’n v. FAA*, 600 F.2d 965, 967 & n.2 (D.C. Cir. 1979) (“*AOPA*”). A “no-hazard” letter is a determination by the FAA that a proposed structure of particular dimensions and within a particular proximity to airports does not pose a hazard to air navigation. *Id.* at 966. It “has no enforceable legal effect,” and the FAA “is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation.” *Id.* at 966-67. However, because the determination has “substantial practical impact” and “promotes air safety through ‘moral suasion’ by encouraging the voluntary cooperation of sponsors of potentially hazardous structures,” the court held that it was judicially reviewable under Section 1486(a). *Id.* at 967-68.

Nevertheless, courts now construe judicial review under Section 1153 much more narrowly than under Section 46110. Other cases, both before and after re-codification, demonstrate that FAA letters and informal FAA pronouncements are often judicially reviewable under Section 46110 even though they are simply “declaratory adjudications” made by the FAA with the “intention that its ‘advice’ will affect the proposed construction, even if only informally.” *City of Rochester v. Bond*, 603 F.2d 927, 933 (D.C. Cir. 1979); *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 520 (D.C. Cir. 2011) (FAA “informal adjudication” is “reviewable ‘order’ under section 46110(a)"); *CSI Aviation Serv., Inc. v. Dep’t of Transp.*, 637 F.3d 408, 412-13 (D.C. Cir. 2011) (letter “cast[ing] a cloud of uncertainty over the viability of CSI’s ongoing business” was final agency action even without monetary penalties or an enforcement action); *Safe*

Extensions, Inc. v. FAA, 509 F.3d 593, 601-02 (D.C. Cir. 2007) (advisory circular reviewable); *Dania Beach*, 485 F.3d at 1187-89 (letter permitting new use for runway was final agency action); *BFI Waste Systems v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002) (no-hazard letter judicially reviewable under §46110). As the D.C. Circuit said about another “no hazard” letter, they are “final actions, *declaratory in character and indisputably reviewable Somewhere.*” *City of Rochester*, 603 F.2d at 933 (emphasis added; footnote omitted).

The Fifth Circuit also has concluded that FAA “no-hazard” letters and other informal FAA determinations are judicially reviewable under §46110 or §1486. *See, e.g., Air Line Pilots’ Ass’n Int’l v. Dep’t of Transp.*, 446 F.2d 236, 240-41 (5th Cir. 1971) (“*ALPA*”); *Menard v. FAA*, 548 F.3d 353, 357 (5th Cir. 2008). In *ALPA*, the Fifth Circuit explained that an FAA “no-hazard” letter was reviewable even though it had “no enforceable effect” and “the only effectiveness of its determination of ‘no hazard’ or ‘hazard’ lies in the power of ‘moral suasion’ ascribed to the determination.” *ALPA*, 446 F.2d at 241. The *Menard* court likewise concluded that FAA “conditional” determinations allocating airspace at certain regional airports were reviewable even though they were only “advisory” and enforceable through “moral suasion.” 548 F.3d at 357.

The *ALPA* court also recognized that a “hazard/no-hazard” determination was reviewable, regardless of the FAA’s ultimate conclusion. If the FAA determined that a proposed structure was a hazard to air navigation, it could be more difficult to secure financing or obtain insurance for the structure. *Id.* at 241. Conversely, if the structure was not deemed a hazard, parties opposing it would have more difficulty arguing against its safety. *Id.* Whether the determination was “final agency action” therefore did not

turn on the outcome of that determination. Either way, “[t]o say . . . that the FAA’s determination on the question of hazard is either practically, administratively, or legally insignificant is to ignore reality.” *Id.*

The reviewable agency actions in these decisions mirror the D.C. Circuit’s view of NTSB reports, *i.e.*, they typically have “no legal consequences” and are “only used within the government in making decisions regarding the need for further safety regulations.” App. B 10a. Nonetheless, they are reviewable under Section 46110 or its predecessor, Section 1486(a). There is no logical difference between reviewable “no action” letters used by other entities in deciding where to site radio towers, *City of Rochester*, 603 F.2d at 933, or landfills, *BFI Waste Systems*, 293 F.3d at 532, 535, and NTSB probable cause reports that make safety recommendations used by others, or do not because they find pilot error. *See* 49 C.F.R. §845.40 (report will include “appropriate recommendations”); 49 U.S.C. §1135(a) (DOT “shall give a formal written response” to NTSB safety recommendations). Indeed, if “moral suasion” sufficed to warrant judicial review in *AOPA*, *Menard*, and *ALPA*, the NTSB’s reports also have the requisite impact.

In contrast with these courts, some circuits have interpreted Section 46110 more narrowly. *See Paskar v. U.S. Dep’t. of Transp.*, 714 F.3d 90 (2d Cir. 2013); *see also* J. Bryan White, *FAA Endorsements – Escaping Judicial Review – The Second Circuit Rules That an Endorsement of Panel Recommendations is Not a “Final Order,”* 79 J. Air. L. & Com. 201 (2014) (describing split). In *Paskar*, the court determined that an FAA letter, concurring in findings from a task force examining construction near an airport, and urging their adoption by New York City, was not a “final order” because the FAA lacked the legal authority to prohibit the construction, the letter reiterated prior “no

hazard” letters, and it could have been ignored. *Paskar*, 714 F.3d at 96-98. The Second Circuit acknowledged its disagreement with the Fifth Circuit in *ALPA* and *Menard* on the scope of Section 46110 review but determined that the Fifth Circuit’s view “is not the test in the Second Circuit.” *Id.* at 98. The Third Circuit likewise has concluded that certain FAA letters are not reviewable “final agency action” because they did not impose any “legal consequences.” *Aerosource, Inc. v. Slater*, 142 F.3d 572, 581 (3d Cir. 1998).

This Court’s guidance is necessary to rationalize the divergent scopes of review under these two fundamentally identical statutes, and to illuminate the existing split regarding the scope of judicial review under Section 46110.

IV. This Case Presents An Ideal Vehicle To Address These Issues.

This case presents an ideal vehicle to address the issues raised. Because Joshi sought reconsideration of the NTSB’s probable cause determination, the Court can consider both the original conclusion and the denial of the petition, in case these two actions vary in terms of finality.

The decision below is also the lynchpin of modern precedent on the question presented. As the Seventh Circuit’s recent decision demonstrates, courts now use the D.C. Circuit’s rationale as a template with little independent analysis. *See Helicopters, Inc. v. NTSB*, 803 F.3d 844 (7th Cir. 2015) (citing the decision below nine times and adopting its reasoning). Future courts addressing this issue are likely to do the same.

The NTSB may attempt to gin up a vehicle problem by challenging petitioner’s Article III standing. The D.C. Circuit itself, however, declined to rule on this alternate ground, App. B 11a—most likely because it is meritless. Petitioner challenged the NTSB’s actions in his personal

capacity, as Georgina’s executor, and as the member of Yatish Air, the owner of the aircraft. In at least one of these capacities, he meets all the requirements for standing. Because petitioner is “an object of the action (or forgone action) at issue, . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

First, petitioner has suffered injury. An “identifiable trifle is enough for standing.” *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973) (“*SCRAP*”). In this case, the NTSB published a report wrongly claiming that petitioner’s daughter, flying petitioner’s plane, caused an accident that killed five people—harming petitioner’s reputation, and prompting him to conduct his own independent investigation at substantial personal expense. The NTSB then effectively rendered that entire effort a nullity when it wrongly refused to reconsider its findings in the face of clear evidence undermining their credibility. Thus, petitioner has suffered reputational injury (as Georgina’s executor and individually), *Foretich v. United States*, 351 F.3d 1198, 1211-13 (D.C. Cir. 2003), financial injury from his investigation, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107-08 (1998), informational injury, and procedural injury because the NTSB has not properly investigated and determined the causes of this accident. *Shays v. FEC*, 528 F.3d 914, 922-23 (D.C. Cir. 2008). Individually, and collectively, these injuries exceed the “identifiable trifle” needed for standing. *SCRAP*, 412 U.S. at 690, n.14.

In addition, petitioner’s injury is “traceable to the challenged action[s]” and can be redressed by a favorable decision. *Lujan*, 504 U.S. at 562. Petitioner’s injuries are directly traceable to the NTSB’s actions, and “[a]

declaratory judgment that the government's actions were unlawful will consequently provide meaningful relief." *Foretich*, 351 F.3d at 1214 (citation omitted). Similarly, "procedural injuries are easily redressable, as a court may order the agency to undertake the procedure." *Dania Beach*, 485 F.3d at 1186 (quotation marks omitted).

This case is an ideal vehicle to consider the question presented—and the time has come for this Court to weigh in on this critically important issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Tejinder Singh
GOLDSTEIN & RUSSELL P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814

Brian E. Casey
Counsel of Record
Timothy J. Maher
BARNES & THORNBURG LLP
100 N. Michigan St.
Suite 700
South Bend, IN 46601
(574) 233-1171
brian.casey@btlaw.com

APPENDIX

1a

**APPENDIX A — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT, FILED
AUGUST 19, 2015**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14-1034

YATISH JOSHI, INDIVIDUALLY, AS EXECUTOR
OF THE ESTATE OF GEORGINA JOSHI AND
MEMBER OF YATISH AIR, LLC,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND FEDERAL AVIATION ADMINISTRATION,

Respondents.

September Term, 2014
Filed On: August 19, 2015

BEFORE: Griffith and Millett, Circuit Judges; Edwards,
Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for panel
rehearing filed on August 4, 2015, it is

2a

Appendix A

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

3a

**APPENDIX B — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT, FILED
JUNE 19, 2015**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1034

YATISH JOSHI, INDIVIDUALLY, AS EXECUTOR
OF THE ESTATE OF GEORGINA JOSHI AND
MEMBER OF YATISH AIR, LLC,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND FEDERAL AVIATION ADMINISTRATION,

Respondents.

March 24, 2015, Argued
June 19, 2015, Decided

On Petition for Review of a Decision of
the National Transportation Safety Board.

Before: GRIFFITH and MILLETT, *Circuit Judges*, and
EDWARDS, *Senior Circuit Judge*.

GRIFFITH, *Circuit Judge*: After a tragic plane crash, the
National Transportation Safety Board (NTSB) completed

Appendix B

an investigation and issued a Factual Report and a Probable Cause Report identifying the pilot, Georgina Joshi, as the most likely cause of the accident. The pilot's father, Yatish Joshi, filed a petition asking the agency to reconsider its conclusion in light of new evidence he gathered. The Board denied the petition. Joshi now seeks review of both the NTSB's reports of its investigation and the response to his petition for reconsideration. Because neither the reports nor the response can be considered a final order subject to judicial review, we dismiss this case for lack of jurisdiction.

I

On April 20, 2006, a private airplane crashed near the Monroe County Airport in Indiana, claiming the lives of the pilot, Georgina Joshi, and all four passengers. With help from two Federal Aviation Administration (FAA) investigators, the NTSB conducted an investigation of the accident in accordance with its statutory duties under the Federal Aviation Act to determine “the facts, circumstances, and cause or probable cause” of the crash. 49 U.S.C. § 1131(a)(1). The NTSB's purpose in conducting such investigations is “to promote transportation safety” and “formulat[e] safety improvement recommendations.” *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir. 1986) (quoting 49 U.S.C. § 1901(1) (1982)); *see also* 49 C.F.R. § 831.4 (“Accident and incident investigations . . . are . . . used to ascertain measures that would best tend to prevent similar accidents or incidents in the future.”). The agency does not engage in traditional agency adjudications, nor does it promulgate

Appendix B

or enforce any air safety regulations. “Rather, it simply analyzes accidents and recommends ways to prevent similar accidents in the future.” *Chiron Corp. v. NTSB*, 198 F.3d 935, 937, 339 U.S. App. D.C. 188 (D.C. Cir. 1999). At the conclusion of an investigation, the NTSB compiles and publishes a final accident report that contains factual findings, a probable cause finding, and recommendations for any safety improvements thought necessary. *See* 49 U.S.C. § 1131(e); *see also Chiron*, 198 F.3d at 939. Such reports are used within government agencies to determine whether to promulgate additional safety regulations. Upon the completion of the investigation of Joshi’s crash, the NTSB released a Factual Report and a Probable Cause Report (the Reports). The Factual Report explained the various data the agency gathered, including information on the aircraft, the weather conditions, the airport where Joshi attempted to land, and the state of the wreckage. The Probable Cause Report gave a brief summary of the accident and concluded that it was likely the product of the pilot’s actions during the approach to landing.

Petitioner Yatish Joshi, the father of Georgina Joshi, believed that the investigation was not thorough and the Reports were faulty. He took it upon himself to hire an engineering firm to reconstruct the accident by analyzing radar data, air traffic control transmissions, witness statements, and other relevant materials available to the NTSB during the investigation. After gathering evidence, the engineering firm concluded that another plane most likely interfered with Georgina Joshi’s flight path and caused her to take evasive action, which caused the crash. Yatish Joshi petitioned the NTSB to

Appendix B

reconsider the Probable Cause Report¹ and submitted as new evidence the results of the investigation by the engineering firm, along with a Department of Justice (DOJ) letter addressing the settlement of civil litigation related to the accident.² Joshi argued in his petition that the engineering report showed that a second aircraft was operating in the area and contributed to the accident. He also claimed that the civil litigation had revealed that certain FAA failures played a role in the crash, that the FAA had admitted as much in the DOJ letter, and that this merited inclusion in the Probable Cause Report. The NTSB reviewed Joshi's materials, but found that the

1. Although Joshi only petitioned for reconsideration of the Probable Cause Report, he challenges both Reports on appeal. Because we conclude that neither of the Reports is an order of the NTSB, we need not concern ourselves with whether Joshi's failure to challenge the Factual Report before the NTSB raises questions of exhaustion.

2. In 2008, Joshi filed a claim against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, asserting that the FAA's actions contributed to the crash because it failed to properly staff its facilities, adequately train the controller on duty the night of the accident, and provide adequate weather information to the controllers. That case was settled and, as a condition of the settlement, the Department of Justice provided Joshi with a letter. After reciting Joshi's arguments as to how the FAA's own actions had contributed to the accident, the letter concluded that "[a]lthough the United States would present a full defense to these allegations if this case were tried, we have agreed to settle this case based upon our assessment that the court could find merit in at least some of these allegations and determine that air traffic control negligence was a cause of this unfortunate crash." J.A. 186.

Appendix B

engineering firm's methodologies were flawed, that its conclusions were not supported by the evidence, and that new witness statements the firm had obtained and relied upon were consistent with the NTSB's original report. The NTSB also addressed the alleged FAA failures and concluded that proper procedures were used and that the DOJ letter Joshi submitted did not show otherwise. Because in its judgment the probable fault remained with the pilot, the NTSB denied the petition for reconsideration. Joshi now petitions this court for review of the Reports and the denial of his petition for reconsideration.

II

The Federal Aviation Act limits our jurisdiction to the review of “final order[s] of the National Transportation Safety Board.” 49 U.S.C. § 1153(a). We have explained that to constitute a final, reviewable order, “an agency disposition must mark the consummation of the agency’s decisionmaking process, and it must determine rights or obligations or give rise to legal consequences.” *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598, 379 U.S. App. D.C. 66 (D.C. Cir. 2007) (internal quotation marks omitted). In considering whether NTSB reports satisfy these requirements, we note that we are not the first court to answer this question. In *Gibson v. NTSB*, 118 F.3d 1312 (9th Cir. 1997), the Ninth Circuit was presented with similar facts when a pilot petitioned for review of the NTSB’s determination that he and his flight crew were responsible for a plane accident. The court concluded that there was no final agency action for it to review because the NTSB reports and denial of the motion

Appendix B

for reconsideration lacked the necessary “determinate consequences.” *Id.* at 1315.

We agree. According to NTSB regulations, accident investigations are “used to ascertain measures that would best tend to prevent similar accidents or incidents in the future.” 49 C.F.R. § 831.4. They are considered “fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act and are not conducted for the purpose of determining the rights or liabilities of any person.” *Id.* (citation omitted). Indeed, under the Federal Aviation Act and related NTSB regulations, no part of an NTSB accident report that relates to an accident investigation may be admitted as evidence or for any other use in civil litigation. 49 U.S.C. § 1154(b); 49 C.F.R. § 835.3. Thus, no legal consequences of any kind result from the NTSB’s factual report or probable cause determinations.

Joshi alleges that various consequences have resulted from the Reports, including reputational harm, financial harm, emotional harm, and informational harm. But even if Joshi is right and has suffered such harms, these are practical consequences, not legal harms that can transform the Reports into a final agency order and trigger our jurisdiction. We explained the distinction between practical and legal consequences in *Reliable Automatic Sprinkler Co., Inc. v. CPSC*, 324 F.3d 726, 355 U.S. App. D.C. 346 (D.C. Cir. 2003). There, the agency conducted an investigation into the safety of the appellant’s sprinkler heads, issued a statement of the agency’s intention to make a preliminary determination

Appendix B

that the sprinkler heads presented a substantial product hazard, and requested that the appellant take voluntary corrective action. *Id.* at 731. The appellant sued the agency, arguing that the agency lacked jurisdiction to regulate the sprinkler heads. We dismissed the case for lack of jurisdiction, holding that the agency had not completed a final agency action. We recognized that “there may be practical consequences, namely the choice [the appellant] faces between voluntary compliance with the agency’s request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement.” *Id.* at 732. But, we explained, the agency’s actions “clearly ha[d] no legally binding effect.” *Id.* So too here. The consequences Joshi alleges are surely realities that he has faced following the release of the Reports, but unless the NTSB’s actions result in a legal consequence, we lack the power to review them.

Joshi seeks to avoid the outcome in *Reliable* by citing our review of an FAA determination in what he claims is an analogous situation in *Aircraft Owners and Pilots Ass’n v. FAA*, 600 F.2d 965, 195 U.S. App. D.C. 151 (D.C. Cir. 1979) (“*AOPA*”). But that case involved a very different sort of agency undertaking, with very different consequences. In *AOPA*, we held that the FAA’s determination that the construction or alteration of a structure near an airport is hazardous constitutes a final order subject to judicial review, although it is “technically advisory in nature.” *Id.* at 966 n.2. We cited to an earlier case, *City of Rochester v. Bond*, in which we explained that the FAA’s hazard/no hazard determinations are final

Appendix B

and “declaratory at least in the commonly understood sense of formally ascribing legal significance to facts.” 603 F.2d 927, 933, 195 U.S. App. D.C. 345 (D.C. Cir. 1979). The FAA conducts such adjudications “with the intention that its advice will affect the proposed construction.” *Id.* (internal quotation marks omitted). And indeed, the FAA’s determination of whether a hazard exists “directly affects the proceedings before other agencies.” *Id.* at 933 n.27. The Federal Communications Commission, for example, relies on the determinations in considering whether to grant a construction permit to broadcasting companies. *Id.* Here, by contrast, the NTSB ascribes no “legal significance” to the facts it finds in determining the probable cause of the accident. The agency does not intend that its determination will be relied upon in other proceedings, and indeed the relevant statute and regulations forbid such reliance. *See* 49 U.S.C. § 1154(b); 49 C.F.R. § 835.3. The NTSB’s report is only used within the government in making decisions regarding the need for further safety regulations.

Nor may we exercise jurisdiction to review the NTSB’s denial of the petition for reconsideration. The reconsideration procedure Joshi used is not created by any statute. It is the result of a regulation that the NTSB promulgated to allow the agency to receive new evidence after it completes an accident investigation, ensuring that the agency develops safety recommendations based on the most complete record possible. As such, reconsideration petitions are simply another stage of the accident investigation procedure and are not subject to our review for the same reason we do not have jurisdiction to

Appendix B

review the Reports: neither the denial of the petition nor the Reports impose any legal consequences. The NTSB's denial of Joshi's petition for reconsideration differs from the Reports only in that it represents the final step of the agency's process as it relates to the new evidence Joshi brought forth. Although the response to Joshi's petition is the "consummation of the agency's decisionmaking process" regarding Joshi's evidence, our precedent is not satisfied by this alone. Before we may consider the agency's action a final "order," the action must "determine rights or obligations or give rise to legal consequences." *Safe Extensions, Inc.*, 509 F.3d at 598. It is at this step of our analysis that Joshi's argument falters. The NTSB's response "no more imposed legal obligations, fixed rights, or altered a legal relationship" than did the initial probable cause determination. *Aerosource, Inc. v. Slater*, 142 F.3d 572, 581 (3d Cir. 1998) (holding that the FAA's refusal to reconsider a decision did not constitute a final order when the initial decision imposed no legal obligations); *see also Gibson*, 118 F.3d at 1315 ("[T]he NTSB's denial of a petition for reconsideration of a report . . . has no determinate consequences and is not a 'final order of the [NTSB]' under 49 U.S.C. § 1153."). We conclude that we may not review either the Reports or the denial of Joshi's petition for reconsideration.³ *See* 49 U.S.C. § 1153(a).

3. Because we conclude that we lack jurisdiction to review the NTSB's determinations, we need not and do not consider the agency's alternative argument that Joshi lacks standing. *See Baltimore Gas and Elec. Co. v. FERC*, 252 F.3d 456, 461-62, 346 U.S. App. D.C. 265 (D.C. Cir. 2001) (declining to consider standing after finding that the court lacked jurisdiction on other grounds). In addition, Joshi seeks in this proceeding to challenge the FAA's

12a

Appendix B

III

For the foregoing reasons, we dismiss the petition for lack of jurisdiction.

role in the NTSB's investigation. But he asserts no independent basis for jurisdiction over that challenge. Our conclusion as to § 1153 thus closes off the one proffered avenue for jurisdiction over the FAA challenge as well.

**APPENDIX C — RESPONSE TO PETITION
FOR RECONSIDERATION OF THE NATIONAL
TRANSPORTATION SAFETY BOARD, FILED
MAY 2, 2014**

**National Transportation Safety Board
Washington, DC 20594**

Response to Petition for Reconsideration

Date: January 16, 2014

Mr. Yatish Joshi, Petitioner
c/o Mr. Timothy J. Maher
Barnes and Thornburg LLP
600 First Source Bank Center
100 North Michigan Street
South Bend, Indiana 46601

In accordance with 49 *Code of Federal Regulations* (CFR) 845.41, the National Transportation Safety Board (NTSB) has reviewed the April 19, 2013, petition for reconsideration and modification of the probable cause for the aircraft accident involving a Cessna 206, N120HS, on April 20, 2006, near Bloomington, Indiana (CHI06FA117). On the basis of this review, the NTSB hereby denies the petition in its entirety.

On April 20, 2006, about 2345 eastern daylight time, a Cessna 206, N120HS, impacted trees and terrain while on approach to runway 35 at Monroe County Airport (BMG), near Bloomington, Indiana. The instrument-rated private pilot and the four passengers died as a result of their injuries, and the airplane was destroyed. The flight

Appendix C

was operating under the provisions of 14 CFR Part 91. An instrument flight rules (IFR) flight plan was filed. Night instrument meteorological conditions prevailed at the time of the accident.

The findings and probable cause of the accident, which were adopted on June 27, 2007, were as follows:

Occurrence #1: In flight collision with object

Phase of operation: Approach—Final approach fix/outer marker to threshold (IFR)

Findings

1. Object—Trees
2. Decision height—Continued below—Pilot in command (Cause)
3. Light condition—Night—Pilot in command (Factor)
4. Altitude/clearance—Not maintained—Pilot in command (Cause)
5. Weather condition—Drizzle/mist (Factor)

Occurrence #2: flight collision with terrain/water

Phase of operation: Descent—Uncontrolled

Findings

6. Terrain condition—Ground

The NTSB determined that the probable cause of this accident was “the pilot’s continued descent below decision

Appendix C

height and not maintaining adequate altitude/clearance from the trees while on approach. Factors were the night lighting conditions, and the mist.”

The petitioner is the executor of the estate of the accident pilot and the owner of the accident airplane. He disagreed with the probable cause for this accident, stating that “there is no indication that N120HS descended to or below the decision height in controlled flight” and that “all of the available flight data indicates the opposite.” The petitioner also presented new evidence to demonstrate that “the current [probable cause] determination is erroneous.” The petitioner stated that this evidence was not available to the NTSB at the time that it released the probable cause for this accident.

Background

The NTSB’s investigation of this accident found that the flight originated from Purdue University Airport, near Lafayette, Indiana, about 2245. Radar data for the flight were consistent with an airplane being vectored for an instrument landing system (ILS) approach to BMG runway 35. The radar track depicted the airplane flying above the glidepath and to the right of course until radar coverage was lost at an altitude of 2,000 feet; at that time, the airplane was about 2 1/2 miles from the approach end of the runway.¹ The airplane crashed into trees about 1/2 mile from the approach end of the runway. Witnesses

1. Unless otherwise indicated, all altitudes are expressed as mean sea level (msl), and all miles are expressed as nautical miles.

Appendix C

to the accident heard an engine acceleration and then a “thud,” after which no additional engine sounds were heard.²

A postaccident inspection of the ILS determined that it was operating normally. An on-scene examination of the airplane wreckage revealed no preimpact anomalies. A review of data from the airplane’s engine data management system showed a reduction in fuel flow, consistent with a descent, followed by an increase in fuel flow, consistent with full power.

Petitioner’s Claims*Possibility of Second Aircraft Near Airport*

The petitioner stated that, during the investigation of this accident, the NTSB did not consider the possible involvement of another airplane operating near BMG at the time of the accident and assumed that all of the airplane sounds reported by the witnesses were from the accident airplane. The petitioner believes that another airplane was banking toward the accident airplane during its final approach. The petitioner also believes that this other airplane “would have interfered with the approach of N120HS by attempting to land on either of the runways at BMG from the east” and that the airplane “would have

2. These witness accounts were based on the information reported during 911 calls to the Indiana State Police on the night of the accident.

Appendix C

been invisible to N120HS due to the weather conditions.”³ The petitioner provided new evidence to support this position, as discussed below.

After the NTSB issued the probable cause for this accident, the petitioner retained Engineering Systems, Inc. (ESI), of Colorado Springs, Colorado, to review the available evidence and further investigate the accident. The petitioner asked ESI to (1) analyze radar data, air traffic control (ATC) transmissions, witness statements, NTSB reports, and other relevant information and (2) reconstruct the flightpath of the accident airplane. In September 2010, ESI issued the first of two reports for the petitioner. On the basis of its review of the available information and the reconstruction of the accident flightpath,⁴ ESI determined the following:

3. BMG has two runways, 17/35 and 6/24. At 2340, the automated surface observing system (ASOS) at BMG was reporting a visibility of 1 mile, mist, and an overcast ceiling at 100 feet. Visibility is expressed in statute miles, and cloud cover is expressed in feet above ground level (agl).

4. To determine the accident airplane’s flightpath, altitude history, and specific flight parameters (including airspeed and bank angle), ESI obtained from the FAA (1) a continuous data recording (CDR) airplane radar track data file (which the NTSB used during its investigation) and (2) a national track analysis program (NTAP) data listing that contained radar returns from the accident airplane. The CDR data ended at 2338:34, and the last radar return showed the airplane at an altitude of 2,000 feet. The NTAP data ended at 2339:13 and included radar returns until the airplane reached an altitude of 1,600 feet. ESI used the NTAP data as the primary data source for its study. Radar plots developed by ESI showed that the CDR and NTAP data were “in excellent agreement, providing confidence in the accuracy of the flight path.”

Appendix C

Based on the approach flown by [the accident pilot] there is no evidence to conclude that the accident resulted from pilot error as opposed to some other external factor. One possible external factor could have been evasive actions by N120HS resulting from a potential conflict with a second low-flying aircraft in the vicinity.

To determine if the witnesses to the accident had heard N120HS or another aircraft, ESI conducted flight tests during which an exemplar Cessna 206 followed the flightpath of the accident airplane (referred to as scenario A).⁵ The exemplar airplane then flew two “flight path scenarios” that “were thought to represent” the possible flightpaths of another airplane that could have been near BMG when N120HS was on final approach. One flightpath scenario was an aborted landing on runway 24 that crossed the accident flightpath (referred to as scenario B), and the other flightpath scenario was a flight heading from north to south, turning east, and crossing the runway 35 ILS at a location south of runway 6/24 (referred to as scenario C).⁶ Acoustic measurements of these flights were taken at the location of seven “key” witnesses⁷ to quantify

5. According to ESI, radar data from one of the scenario A flight tests were obtained from the FAA and compared with data from an onboard GPS receiver to ensure consistency among the data.

6. ESI stated that the altitudes of these two scenarios were below 1,500 feet, which “would have placed the aircraft below radar detection as would have been the case on the night of the accident if another aircraft was in the area at that time.”

7. ESI indicated that, for its study, 15 witnesses came forward to report what they had heard on the night of the accident. (One of

Appendix C

“the relative level of aircraft noise for different flight path scenarios.”⁸ The acoustic measurements were then analyzed to determine if any of the scenarios matched what the witnesses reported hearing on the night of the accident.

During the flight testing, only scenario A sounds were measured at the witness location that was “far north” of BMG. ESI indicated that, during this scenario A flight, the “Sound Level from the aircraft was below ambient noise. The low level aircraft noise was briefly heard for only a second.” For the six other witness locations, the sound levels measured for the scenario A flights were compared with the sound levels measured for the scenario B and

the documents that ESI used in its study was titled “Responses to Newspaper Request for Information.”) ESI selected 7 of the 15 witness positions for acoustic measurements “as a result of [the witnesses’] locations and observations.” ESI explained that six of these locations were near the south end of BMG and that one location was “far north” of the airport. ESI further explained that four of the seven locations were “quite close” to the accident site and that the other three locations were farther away. In addition, 4 of the 15 witnesses identified by ESI had called 911 on the night of the accident, and two of the 911 callers were among the seven key witnesses included in ESI’s study.

8. Two measurement stations were used to collect acoustic data captured by a microphone and digital recorder mounted near each of the seven witness locations. According to ESI, the frequency response of the recording system was beyond the range of the noise made by a Cessna 206. As a result, the primary sources of noise measured by ESI’s equipment were from the airplane’s propeller blades; its exhaust pipe; and the air flowing over the airplane’s landing gear, flaps, and struts.

Appendix C

C flights. The scenario B sound levels were between 3.5 and 19.2 decibels higher than the scenario A levels. The difference between scenarios C and A at four of the six witness locations was less than 2.5 decibels.⁹ ESI indicated that this finding suggested that “a portion of [the] Scenario ‘C’ flight path is not representative of what people heard” on the night of the accident because all of the sound levels from scenario B were “significantly higher” than scenario A and would have been “definitely noticeable.”

ESI stated that, according to the seven witnesses’ observations from the night of the accident, one witness might have heard the accident airplane, but the other six witnesses had likely heard another airplane. Among the observations made by these six witnesses were reports of an airplane that was “loud,” “flying low,” and “sputtering.” ESI indicated that some of these witnesses also reported hearing an airplane traveling in a different direction than the flightpath of the accident airplane. ESI asserted that “there is no way one aircraft could have been the source of all those reports.” The ESI report concluded the following:

The acoustic analysis of the sounds from the three flight path scenarios (‘A,’ ‘B,’ and ‘C’) coupled with the witness statements indicate that there clearly had to be another aircraft in the vicinity of the ILS approach to BMG runway 35 at the time of the accident involving N120HS.

9. At the other two witness locations, the difference between scenarios C and A was 18.0 and 6.2 decibels.

Appendix C

In addition to the ESI report, the petitioner provided a copy of the incident report prepared by the Van Buren Township Fire Department, which organized the search for the accident airplane after 911 calls were received. (The incident report was not provided to the NTSB during its investigation of the accident.) The incident report included the following account of a witness who reported seeing an airplane immediately before hearing the accident:

[An] eye witness . . . came to the staging area and stated that he lived at [street address of an apartment complex] and was out side [*sic*] and hear[d] the plane saw the plane very low to the west of the apartment complex and looked like it was banking toward the airport, then heard the crash.¹⁰

The petitioner indicated that the witness, from his location about 1 1/2 statute miles due east of the accident site, would have observed an airplane banking toward BMG from the east. The petitioner believes that this witness saw another airplane and not N120HS because of “the approach that N120HS is known to have flown.”¹¹

10. Although the incident report included the address of the apartment complex, the report provided no information (other than gender) from which this witness could be identified. According to the petitioner, the witness provided his statement about 0400 on April 21, 2006.

11. The petitioner stated that, although witnesses indicated “seeing or hearing a low flying plane to the east of the airport,” at that time “N120HS was visible on radar at an altitude between 5,000 and 2,500 feet agl [5,846 and 3,346 feet msl, respectively] and

Appendix C

The petitioner also stated that the conditions reported by the ASOS at BMG immediately before the accident (ceiling of 100 feet and visibility of 1 mile) would have precluded the witness from seeing the accident airplane at his reported location.

The petitioner sent this witness' location information and observations to ESI for further analysis. ESI considered the relationship between the witness' location and the scenario A and B flightpaths. ESI issued a second report, dated September 2012, that concluded, "due to the location of this witness relative to the flight path of N120HS and the very foggy conditions that existed that night ... it is extremely unlikely that the very low flying aircraft observed and heard by the witness was the accident aircraft." ESI also concluded that "the witness most likely saw a second aircraft flying a 'Scenario B' flight path, or some variation of it."¹² ESI stated that these conclusions supported those in the company's September 2010 report.

on approach from the west side of the airport." (BMG has an airport elevation of 846 feet msl.) The NTSB notes that, during the time that the accident airplane was visible on radar, the airplane would have been traveling to the west of BMG during the downwind leg and then to the east of the airport during the final leg. Radar data showed that the airplane had completed the turn onto the final leg at an altitude of 4,200 feet msl.

12. ESI found that "the banking of the aircraft back toward the airport could have been the low flying 'Scenario B' aircraft veering to the north as it approached the apartment complex."

*Appendix C**Air Traffic Control Issues*

The petitioner asserted that “there were significant problems with the way in which air traffic control handled the final flight of N120HS.” The petitioner explained that “some of those problems [were] peculiar to the controller who was assigned this duty” and that “some [were] systemic problems resulting from improperly implemented changes in the air traffic system.”

According to the petitioner, the Terre Haute Terminal Radar Approach Control (TRACON) facility had previously been closed for the overnight shift because the number of qualified personnel at the time did not allow for at least two qualified approach control specialists during that shift, per Federal Aviation Administration (FAA) policy. As a result, the FAA had transferred approach control responsibility during the overnight shift to the Indianapolis Air Route Traffic Control Center (ARTCC). The petitioner indicated that this transfer of approach control services “replaced a specially trained controller who had access to the appropriate radar and weather information with a controller who had no real training in approach control.”¹³

13. The controller who handled the accident flight was working a radar control position. The petitioner indicated that the controller “had only 10 minutes of final approach control training,” but the NTSB is not aware of any approach control training that can be completed in 10 minutes. The controller’s training is addressed later in this response.

Appendix C

The petitioner believes that the Indianapolis ARTCC controller who handled the accident airplane placed it “into an unstable approach.” The petitioner explained that the accident airplane “was kept at too high an altitude for too long and [was] turned in to the approach gate at the minimum allowable distance,” which required the airplane to descend an additional 800 feet between the final approach fix/outer marker and the runway while the pilot managed “the remaining steps of an IFR night landing.”¹⁴

The petitioner stated that the controller provided the pilot with the incorrect common traffic advisory frequency (CTAF) for BMG.¹⁵ Instead of providing the pilot with a frequency of 120.77 megahertz (MHz), the controller provided the pilot with a frequency of 128.02 MHz, which is the frequency for the Terre Haute ATC tower. As a result, the pilot “had to determine that she had been given the wrong frequency, input the correct frequency, and reissue her landing advisory on the correct frequency while descending from an improperly high altitude.”

According to the petitioner, after the pilot had been instructed to contact the CTAF on the incorrect frequency, the ASOS at BMG issued “several Special

14. Radar data showed that the airplane reached the final approach fix/outer marker at an altitude of 3,300 feet. The crossing altitude was 2,533 feet.

15. The BMG ATC tower was staffed from 0630 to 2130. After-hours local traffic communications were accomplished via the CTAF. The tower did not record CTAF transmissions made after hours.

Appendix C

Weather Observations” that indicated that the conditions at BMG were “deteriorating rapidly.” The petitioner stated that the Indianapolis ARTCC controller did not have “automated access to weather information” and that it is unknown whether the pilot became aware that the cloud ceiling (overcast at 100 feet) was below minimums for the approach (decision height 200 feet).¹⁶

The petitioner also stated that, because BMG did not record after-hours CTAF transmissions, there is no way to know whether the accident pilot “made any distress call or other transmission indicating the cause of the accident” after she received the correct CTAF from the Terre Haute ATC tower. The petitioner further stated that it is not possible to know whether the accident pilot might have missed an announcement from another aircraft near BMG while the accident airplane’s radio was tuned to the Terre Haute ATC tower frequency.

In addition, the petitioner claimed, “the FAA has admitted that its air traffic controllers contributed to the cause of this accident. That admission should be

16. The petitioner claimed that, after the accident, the FAA’s Air Traffic Safety Oversight Service (AOV) investigated the circumstances of this accident and found that “Automated Surface Observation System (ASOS) information available to approach controllers is not available to en route controllers providing approach control.” The petitioner also claimed that AOV “expressed concerns about the currency and proficiency of the ZID [Indianapolis ARTCC] controllers tasked with providing approach control services.” However, the petitioner did not provide any evidence supporting these claims.

Appendix C

reflected in the fault allocation of the Probable Cause Report.” To support this claim, the petitioner provided, as new evidence, a July 20, 2010, letter that was signed by a trial attorney from the Torts Branch, Civil Division, Department of Justice, and sent to the family of the accident pilot after a civil lawsuit arising from this accident had been settled. The letter indicated that, according to the petitioner’s attorneys, the controller who handled the accident airplane was negligent by doing the following:¹⁷

- Vectoring the airplane too close to the final approach fix, which resulted in an unstabilized approach.
- Vectoring the airplane to the final approach course at too great an intercept angle, which created difficulties in becoming established on the localizer.
- Delay[ing] issuance of a descent clearance, which led to difficulties in intercepting the glideslope prior to the final approach fix.
- Providing an incorrect radio frequency for the Bloomington Common Traffic Advisory Frequency (CTAF) as the airplane approached

17. The Department of Justice letter also stated the following: “Although the United States would present a full defense to these allegations if this case were tried, we have agreed to settle this case based upon our assessment that the court could find merit in at least some of these allegations and determine that air traffic control negligence was a cause of this unfortunate crash.”

Appendix C

the final approach fix, resulting in an unnecessary distraction and additional workload for the pilot during an important phase of flight.

The petitioner also claimed that, “as a result of those failures, FAA concluded that a court could determine that air traffic control negligence was a cause of this unfortunate accident.” However, as discussed in the next section of this response, the petitioner provided no evidence showing that the FAA had reached any such conclusion or that the allegations made by the petitioner’s attorneys during the civil lawsuit were admitted by the FAA or the Department of Justice.

NTSB Response to Petitioner’s Claims

The petitioner believes that another airplane near BMG, which “interfered with the approach of N120HS,” and “air traffic control failures” either caused or contributed to the accident. However, the NTSB’s analysis of the original case material and the subsequent information provided by the petitioner found that (1) it is unlikely that another airplane was near BMG about the time of the accident, especially given the time (just before midnight) and the poor visibility, and (2) the pilot’s performance on the night of the accident was not the result of any ATC failure. The NTSB’s analysis is discussed in more detail in the sections that follow.

*Appendix C**Pilot Actions During the Flight*

The pilot was ultimately responsible for conducting a safe approach to BMG and reaching a position for a safe landing, but she did not maintain situation awareness during this segment of flight. Radar data showed that the airplane was too high and too fast¹⁸ for the approach and that it crossed the final approach fix/outer marker to the right (east) of the runway 35 centerline. Also, the ATC transcript showed that the pilot did not relay any concerns to the controller about the airplane's position or speed or her ability to successfully perform the approach given the deteriorating weather conditions.

The air traffic controller had cleared the pilot to descend the airplane to 2,600 feet until the airplane was established on the localizer. The crossing altitude

18. According to the radar data used by the NTSB during this investigation, the airplane was traveling at a groundspeed of about 166 knots at the beginning of the turn from the downwind to base legs and about 154 knots at the time of the last radar return (2,000 feet in the CDR data). ESI's analysis of radar data found that the airplane's groundspeed decreased from about 125 knots when the airplane crossed the final approach fix/outer marker to about 94 knots at the time of the last radar return (1,600 feet in the NTAP data). Although the NTSB's data showed the airplane crossing the final approach fix/outer marker at a similar groundspeed (about 127 knots), these data also showed that the groundspeed increased, rather than decreased, after that time. In addition, ESI asserted that the airplane was "slowing to the appropriate approach speed," but this assertion could not be fully analyzed because no groundspeed data for the airplane before 2337 or above an altitude of 3,000 feet were included in the petition.

Appendix C

for the final approach fix/outer marker was 2,533 feet, but the airplane crossed the marker at 3,300 feet. The pilot could have performed a missed approach if she was concerned about descending the airplane an additional 800 feet between the final approach fix/outer marker and the runway while performing other tasks to prepare for a night IFR landing. Instead, the pilot continued flying the approach, and the airplane remained east of the runway 35 centerline through the last radar return (2,000 feet). In addition, the last radar return showed that the airplane was about 340 feet higher than would be expected for an airplane located about 2 1/2 miles from the approach end of the runway. (The descent performed by the pilot is discussed later in this response.)

The ILS glideslope and localizer signals to runway 35 provided the necessary guidance for the airplane to reach the decision height.¹⁹ When the airplane reached the decision height (200 feet), the pilot could have taken one of two safe courses of action: she could have either landed the airplane if she saw the runway environment,²⁰ or she could have executed a missed approach and climbed to a safe altitude. Given the weather conditions, it is unlikely that the pilot would have had the runway environment

19. Even though the airplane was above the glideslope and to the right of the localizer, the pilot could have used cockpit instruments to determine the airplane's position relative to the glideslope and localizer to make course corrections for the approach.

20. Title 14 CFR 91.175, "Takeoff and Landing Under IFR," also prohibits operations below the decision height unless an airplane "is continuously in a position from which a descent to a landing on the intended runway can be made."

Appendix C

in sight at the decision height, and no evidence indicated that the pilot attempted a missed approach. Thus, the available information indicated that the pilot descended the airplane below the decision height and crashed into the trees located below the glideslope.²¹

The NTSB notes that, if the pilot had decided to perform a missed approach and had properly executed the missed approach procedure, radar would have captured the airplane during the climb. The pilot could then have elected to go back to the Indianapolis ARTCC frequency and asked to be directed to another airport where visual meteorological conditions prevailed,²² or she could have made another approach to BMG.

21. The increase in engine power at the end of the flight, as recorded by the airplane's engine data management system, likely occurred once the pilot descended below the decision height and saw the trees. The petitioner believes that the increase in power was the result of the pilot taking "evasive action" to avoid another airplane in the area. However, the NTSB believes that no other airplane was in the area at the time of the accident, as discussed in the section that follows.

22. The pilot did not include an alternate airport when she filed an IFR flight plan, as required by 14 CFR 91.169, "IFR Flight Plan: Information Required." The regulation states that "each person filing an IFR flight plan shall include in it ... an alternate airport." The transcript of the pilot's weather briefing with a Terre Haute automated flight service station briefer showed that the pilot had intended to file a visual flight rules flight plan but changed her mind after receiving weather information indicating IFR ceilings at BMG.

Appendix C

The petitioner claimed that “there is no indication that N120HS descended to or below the decision height in controlled flight.” The NTSB disagrees with this statement because the radar track, ATC transcript information (specifically, no voiced concerns about the approach and no missed approach transmissions before leaving the ARTCC frequency at 2336:43),²³ and the impact location (1/2 mile from the approach end of the runway) were consistent with a continued approach below the decision height. The NTSB also disagrees with this statement because the recorded engine data showed that full power was applied toward the end of the flight, which was consistent with the pilot attempting to take evasive action to avoid the trees, but the data stopped after only a few seconds, which was consistent with an in-flight collision with trees. After the airplane collided with the trees, it entered an uncontrolled descent until the impact with the ground. Tree branches near the accident site were found separated and cut through, which was consistent with an operating engine and propeller, and no preimpact malfunctions were found.²⁴

In summary, we continue to believe that the accident was the result of the pilot’s descent below the decision

23. After the accident, the owner of the accident airplane (the petitioner) stated his concern that after-hours CTAF transmissions were not recorded at BMG and indicated that such a recording could have shown whether the pilot had intended to execute a missed approach.

24. In addition, ESI derived bank angles for the airplane from the radar data and found that the “bank angles ... provided no indication the aircraft was experiencing any difficulty.”

Appendix C

height without the airport environment in sight and her failure to maintain adequate clearance from trees.

Claim of Interference From Another Airplane in the Area

The petitioner claimed that another airplane was banking toward the accident airplane while it was on final approach and that this other airplane “would have interfered with the approach of N120HS by attempting to land on either of the runways at BMG from the east” and “would have been invisible to N120HS due to the weather conditions.” The petitioner based these claims on the results of the sound testing performed by ESI (as discussed previously).

The NTSB reviewed the methodology that ESI used during its sound testing and found that the testing was flawed for several reasons, including the following:

- ESI’s acoustic measurements were taken during the early fall (on September 30, 2008). Heavy tree leaf and tall grass cover tend to attenuate sounds (that is, decrease their amplitude), especially in subdivision settings such as those where the seven witnesses cited in ESI’s study were located. ESI’s results may not be accurate because of the tree leaf and grass cover at the time.
- ESI indicated that it was important to take acoustic measurements after dark “to achieve noise levels from traffic similar to what existed

Appendix C

at the time of the accident.” However, all but 2 of ESI’s 21 flight tests were performed during daylight hours (between 1531 and 1900). The two flight tests performed after dark (at 2054 and 2058) involved only scenario A (the accident flightpath). The accident time (2345) was about 3 hours later than the time of these two scenario A flights. There would have been more traffic just before 2100 (the BMG tower was open until 2130) than just before midnight on a night with a cloud ceiling below minimums.

- ESI did not consider the prevailing wind during the some of the tests. For example, about the time of first two tests (1531 and 1535), the wind was from 310° at 5 knots with gusts to 14 knots.²⁵ The wind blows sounds around, so the acoustic measurements for these tests may not be valid.
- Sound propagation characteristics differ depending on the atmospheric conditions. The accident occurred during extremely foggy conditions,²⁶ which were not occurring during the flight testing. ESI did not compensate for the different atmospheric condition during the testing, which is noteworthy given that sound attenuation in air is directly linked to the temperature and humidity of the air mass.

25. The wind at the time of the accident was from 230° at 5 knots. No wind gusts were reported.

26. At the time of the accident, there was a 1° C difference between the temperature and the dew point.

Appendix C

- ESI indicated that the acoustic sound recordings “were made over a grass surface minimizing the impact of sound reflections from the ground,” but ESI did not compensate for the noise associated with local vehicle traffic activity, which would have obscured the acoustic measurements.

The NTSB’s review of ESI’s sound testing found that the conclusions reached were not supported by evidence. One conclusion stated, “there is significant evidence to conclude that there was another aircraft in the area of the Monroe County Airport around the time of the accident.” ESI indicated that this “significant evidence” comprised “the acoustic analysis of the sounds from the three flight path scenarios (‘A,’ ‘B,’ and ‘C’) coupled with the witness statements” from the seven “key” witnesses cited in the study.

It is important to note that the seven key witnesses in ESI’s study did not provide the company with their recollections from the night of the accident until some time after June 2007 (when the NTSB issued the probable cause for this accident), which was 14 months after the accident occurred. In fact, it is likely that these witnesses provided their statements well after that date given the amount of time needed for the petitioner to identify and contract with ESI and the amount of time that ESI needed to plan its work, identify witnesses, and gather their statements.

In its report on the investigation of the TWA flight 800 accident, the NTSB cited research indicating that human memory is subject to error, people tend to be unaware

Appendix C

of their memory errors and may be overconfident in the accuracy of their memories, and this confidence may increase over time.²⁷ The NTSB's report also stated that "some witnesses' recollections might [be] influenced by exposure to other witnesses' accounts; being interviewed together; engaging in conversations with other people; or hearing, watching, or reading media accounts of [a] crash." Thus, the accounts from the witnesses in ESI's study need to be considered along with other evidence from the accident.

Only two of the seven witnesses in ESI's study heard one or more of the flight test scenarios. One of these witnesses heard scenarios A (the accident flightpath) and B (an aborted landing on runway 24 that crossed the accident flightpath) and reported that scenario A "was a normal landing" and that what he heard on the night of the accident was a "loud, low aircraft." This witness added that he "could not be exactly sure of the direction that the loud, low aircraft flew" because he was lying down inside his house at the time that the aircraft flew over the house. The other witness heard scenarios A, B, and C. This witness reported that scenario A "was a normal landing sound" and that what he heard on the night of the accident was "more like scenario 'B.'" This witness went behind his house with an ESI consultant and "pointed in a direction slightly north of due east" to indicate the

27. For information about this research, see *In-flight Breakup Over the Atlantic Ocean, Trans World Airlines Flight 800, Boeing 747-131, N93119, Near East Moriches, New York, July 17, 1996*, Aircraft Accident Report NTSB/AAR-00/03 (NTSB: Washington, DC, 2000).

Appendix C

direction that airplane traveled when it flew over his house. The witness further indicated that the flight on the night of the accident was “almost 90 degrees from the normal landing flight path of scenario ‘A’” and was “loud and flying low to the ground.”

Both of these witnesses indicated that the scenario A flight test produced a “normal landing” sound, which was not what they had heard on the night of the accident. However, the accident airplane did not make a normal landing at BMG and did not follow the expected flightpath toward the runway. Both of these witnesses also indicated that the airplane that they heard on the night of the accident was flying low and producing a louder-than-normal noise. These observations are consistent with the accident airplane descending below the decision height and the pilot increasing the engine to full power to try to clear the terrain located directly below.

The other five witnesses did not hear any of the three scenarios during the flight tests. However, ESI determined that four of these five witnesses could not have heard the accident airplane because of their location relative to either the accident site or the airport. For example, one of these four witnesses, who lives on the east side of BMG runway 6/24, heard an airplane on the night of the accident that was “close and flying low from the northwest to the southeast.” ESI explained that this witness “lives too far away from the crash site to hear a Cessna 206 on an ILS 35 approach to BMG that would have ended at the crash site” and that “it is most likely that what [she] heard was similar to scenario ‘B.’” The NTSB

Appendix C

notes that the witness' description was consistent with the flightpath flown by the accident airplane (downwind through final leg). Also, multiple reports indicated that the airplane heard on the night of the accident was louder than normal, so it is possible that this witness could have heard the accident airplane from her location, especially when the engine power increased.

Another of the four witnesses, who lives about 5 miles north of BMG, was outside his house on the night of the accident and heard an airplane to the west heading south and "sputtering." ESI indicated that this witness did not hear the accident airplane because "what he heard had to be louder than the Cessna 206." ESI also indicated that, because the Cessna 206 has a fuel-injected engine, the airplane does not sputter, which "tends to indicate that another aircraft other than N120HS was flying in the area." The NTSB notes that, from his location, this witness might not be able to hear a Cessna 206 making a normal approach to and landing at BMG. However, the sounds that this witness heard on the night of the accident could have been from the accident airplane, especially when its engine power increased. In addition, although the NTSB recognizes that this witness reported hearing a sound similar to sputtering, no evidence indicated that another airplane was near BMG at the time of the accident, as discussed later in this section of the response. Because engine data from the accident airplane (showing the increase in power at the end of the flight) did not match the witness' observation, it is possible that this observation might not be accurate.

Appendix C

Two of the seven key witnesses indicated that they did not hear any other airplanes at the time that they heard the accident airplane. (The other five witnesses did not indicate whether they heard one or two airplanes on the night of the accident.) Because human memory can be subject to error over time, the NTSB reviewed the transcripts of the 911 calls to the Indiana State Police on the night of the accident and found that none of the callers reported hearing more than one airplane during the time surrounding the accident.

The evidence presented by the petitioner also included an eyewitness account of an airplane just before the accident. The witness reported that he heard an airplane and saw it bank toward the airport at a “very low” altitude, and then he heard sounds associated with a crash.²⁸ The petitioner believes that this witness saw another airplane and not the accident airplane because the 1-mile visibility at the time of the accident would have precluded the witness from seeing the accident airplane at his reported location, which was about 1 1/2 statute miles due east of the accident site.

28. The petitioner stated that the Van Buren Township Fire Department incident report contained this witness’ address but “no further information by which he can be identified.” As a result, the petitioner was unable to locate the witness. The NTSB’s review of the 911 transcripts found one caller who might have been the witness cited in the fire department’s incident report. This caller (who was not included in ESI’s study) reported hearing an airplane accelerate and then a “pop.” The NTSB’s further review of the 911 transcript showed that the 911 operator asked the caller if he could go to the search and rescue staging area while on his way to work to report what he saw. The caller then told the operator, “I’d like to show ‘em where I am talking about.”

Appendix C

Because this accident occurred at night during extremely foggy conditions, it is likely that this witness saw only the lights of the airplane. The NTSB notes that airplane lights can sometimes be seen from greater distances than reported visibility distances. Further, the ATC transcript did not show any evidence of another airplane being vectored to BMG between 2314 and 2357,²⁹ and the petitioner did not provide any radar data showing another airplane near BMG at the time of the accident.³⁰ The other airplane, if it existed, would have had to remain below 1,154 feet agl during the entire flight to be undetected by radar and would have had to clear obstacles along the flightpath during the extremely foggy conditions. As a result, it is likely that no other airplane was near BMG at the time of the accident and that the witness saw the accident airplane's lights.

In addition, the docket for this accident included a statement from a manager at BMG. The statement indicated the following:

About 12:10 AM the father [of the accident pilot] called me on my cell phone and asked me to go

29. Because of the reported instrument meteorological conditions, the other airplane would have been required by FAA regulations to be vectored by the Indianapolis ARTCC to BMG.

30. The FAA retains ATC recordings and radar data for 5 years after an accident. (For this accident, the 5-year period ended April 20, 2011.) As a result, the NTSB was not able to request this information to confirm that the only airplane on approach to BMG during the 31 minutes preceding the accident (2314 to 2345) was the accident airplane.

Appendix C

to the airport to look for his daughter, she had not reported landing. I had an employee at the airport at the time so I called him to check for her on the ramp. He said the airport lights came up about a half an hour ago but nobody landed.

If another airplane near BMG had interfered with the accident airplane's approach to the airport, as asserted by the petitioner, then the other airplane would likely have landed at BMG between 2340 on the night of the accident (when the lights "came up") and 0010 on April 21, 2006. However, this statement showed that no airplanes landed at BMG during that timeframe.

In summary, on the basis of the available evidence, we believe that no other airplane was near BMG at the time that the accident airplane was making its final approach. Even though the petitioner asserted that ESI's work demonstrated that the "aircraft noise reported by several of the witnesses could not have been made by N120HS," analysis of the available evidence showed that the engine and other airplane sounds described by the witnesses to the accident emanated from the accident airplane.

Claim of Air Traffic Control Negligence

The petitioner claimed that there were "significant problems" with the ATC services provided to the accident pilot. For example, the petitioner explained that the transfer of approach control responsibility during the overnight shift from the Terre Haute TRACON to the Indianapolis ARTCC resulted in the accident flight being

Appendix C

handled by a controller who had “no real training in approach control.”

The NTSB notes that it is routine for TRACONs to transfer approach control responsibilities to the overlying ARTCC when the TRACON facilities close at night. The NTSB also notes that ARTCC and TRACON air traffic controllers are required to provide approach control services in accordance with FAA Order 7110.65, “Air Traffic Control.” TRACON controllers, in general, would have more opportunities to routinely provide these services compared with ARTCC controllers because of the differences between the controllers’ general responsibilities. However, the NTSB’s review of the controller’s performance on the night of the accident indicated that he was properly trained in providing approach control services to airports within the Indianapolis ARTCC’s delegated airspace.

The petitioner also claimed that the controller did not have access to “appropriate” weather radar information. The NTSB notes that ATC facilities, including the Indianapolis ARTCC and the Terre Haute TRACON, have controller displays that show precipitation derived from next-generation weather radar (commonly known as NEXRAD) along with ATC radar data. The ASOS at BMG reported no precipitation on the night of the accident.

At 2213:27, about 30 minutes before the airplane departed, the accident pilot requested a weather briefing from the Terre Haute automated flight service station. The weather briefing indicated that the conditions at

Appendix C

BMG were ceiling broken at 800 feet with a visibility of 8 miles but that within 1 hour the ceiling could be 600 feet with scattered clouds and a visibility of 5 miles in mist. At 2320:19, the accident pilot told the Indianapolis ARTCC controller that she had received the latest ASOS report for BMG. Afterward, the pilot could have received updated ASOS information on her radio;³¹ she did not need to learn this information specifically from the controller.

The ASOS at BMG generated four special weather observations as a result of deteriorating visibility. Three special weather observations issued at 2316, 2325, and 2333 indicated that the visibility had decreased from 2 1/2 to 1 1/2 miles. At 2333, the cloud ceiling was broken at 300 feet. At 2340, the fourth special weather observation was issued. This observation indicated that the visibility had decreased to 1 mile with an overcast ceiling at 100 feet, which was below the 200-foot decision height for the approach.

The petitioner stated that, according to the FAA's AOV office, ASOS information "is not available to en route controllers providing approach control." The NTSB could not determine whether ASOS data were available to the Indianapolis ARTCC controller at the time of the

31. The accident pilot would have been able to access ASOS data that were updated every 1 minute. If the Indianapolis ARTCC had the ability at the time of the accident to receive ASOS data, the controller would have received hourly observations and special weather observations.

Appendix C

accident.³² However, even if the controller had access to ASOS information, he would not have been able to relay the information about the 100-foot ceiling to the accident pilot because, about 3 1/2 minutes before the fourth special observation was issued, the controller instructed the pilot to change to the CTAF, and the pilot acknowledged the controller's instruction. It is also unknown whether the pilot was aware that the cloud ceiling was below minimums for the approach, given that after-hours radio transmissions were not recorded on the CTAF, but she (and not the controller) was ultimately responsible for ensuring that the approach criteria were met and for safely executing the published missed approach procedure if the approach criteria were not met.

The petitioner believes that the Indianapolis ARTCC controller who handled the accident airplane placed it "into an unstable approach" by keeping the airplane "at too high an altitude for too long." The petitioner explained that the airplane's high position during the approach resulted in the airplane crossing the final approach fix/outer marker about 800 feet above the minimum crossing altitude for an ILS approach to runway 35 and remaining "consistently above the recommended glide slope."

The NTSB's review of the ATC transcript and radar data showed that the controller cleared the pilot to descend the airplane with sufficient time and distance to successfully complete the runway 35 ILS approach

32. All ARTCCs currently have the ability to receive ASOS data for airports under their jurisdiction.

Appendix C

procedure. According to the ATC transcript, at 2333:03 the controller instructed the pilot to descend to 4,000 feet “at pilot’s discretion,” which provided the pilot with an initial descent before the final descent for the approach. FAA Order 7110.65 states that a discretionary descent used with altitude assignments “means that ATC has offered the pilot the option of starting climb or descent whenever he/she wishes and conducting the climb or descent at any rate he/she wishes.” The order also states that the pilot “may temporarily level off at any intermediate altitude. However, once he/she has vacated an altitude, he/she may not return to that altitude.” At the time of the discretionary descent clearance, the airplane was about 14.5 miles from the runway threshold and at an altitude of 5,100 feet.

At 2334:36, the controller cleared the pilot for the ILS approach to runway 35. The clearance provided the pilot with sufficient time and distance to intercept the glideslope at an altitude that could have allowed the approach to be successfully conducted. At the time, the airplane was at an altitude of 4,400 feet (3,554 feet agl).

The 50-foot agl threshold crossing height required the airplane to descend a total of 3,504 feet. The airplane was about 10.9 miles from the runway threshold when the controller cleared the pilot for the approach, which would have required the pilot to descend at a rate of about 321 feet per mile. The published 3° glideslope required pilots to descend at a rate of 318 feet per mile. Thus, the airplane was not kept at an “improperly high altitude,” as claimed by the petitioner. In fact, the altitude of the airplane, when

Appendix C

the pilot received clearance for the ILS approach, was only about 50 feet higher than the altitude that would have been expected at that point with a 3° glideslope.

After the airplane was cleared for the ILS approach, the pilot was responsible for descending the airplane at a normal rate to 2,600 feet until becoming established on the localizer. The controller told the pilot that he could see the airplane “joining up on the localizer” at 2336:15; radar data showed that the airplane was at an altitude of 3,600 feet at the time. Afterward, the pilot was responsible for descending the airplane at a normal rate until intercepting the glideslope at the final approach fix and then following the vertical guidance provided by the glideslope. However, the pilot did not descend the airplane fast enough to intercept the glideslope at the final approach fix; as a result, the airplane remained above the glideslope. Thus, the airplane’s high position on the approach and the difficulties that the pilot experienced in establishing the airplane on the localizer and intercepting the glideslope were not the result of any action by or instruction from the controller.

The petitioner also stated that, because the pilot received the incorrect CTAF from the controller, her workload increased because she “had to determine that she had been given the wrong frequency, input the correct frequency, and reissue her landing advisory on the correct frequency” while conducting the approach to BMG. The NTSB recognizes that the controller instructed the pilot to “change to advisory tower frequency of one two eight point zero two” instead of providing the pilot

Appendix C

with the correct CTAF of 120.77 MHz. However, the pilot was based at BMG and should have known the correct frequency. In addition, the correct frequency appeared on the approach chart for BMG. Most importantly, though, after contacting a controller at the Terre Haute ATC tower (at the 128.02 MHz frequency) and being advised that the CTAF for BMG was 120.77 MHz, the pilot would have diverted her attention from the cockpit gauges to the radio at a time when she should have been focused on aviating and navigating. The pilot should have executed a missed approach if she had been distracted by the incorrect frequency assignment.

As previously stated, the petitioner provided a copy of a July 2010 letter from the Department of Justice, indicating that it had agreed to settle the petitioner's case based on an assessment that "the court could find merit in at least some of [the petitioner's] allegations." The letter detailed the allegations made by the petitioner's attorneys that the controller had (1) vectored the airplane too close to the final approach fix, (2) vectored the airplane to the final approach course at too great an intercept angle, (3) delayed the issuance of a descent clearance, and (4) provided an incorrect radio frequency for the CTAF at BMG.

The NTSB notes that the petitioner mischaracterized the content and significance of the letter by claiming that it contained admissions by the FAA that "its approach control of N120HS on the night of the accident failed to meet applicable standards" and that "as a result of those failures, FAA concluded that a court could 'determine

Appendix C

that air traffic control negligence was a cause of this unfortunate crash.” The petitioner provided no evidence indicating that the FAA made these or any other admissions related to this accident. Rather, the letter, which originated from a Department of Justice trial attorney (after the civil case had been settled) and not the FAA, merely restated the allegations that had been made and outlined some of the considerations that led to the Department of Justice’s decision to settle the lawsuit. Regarding these allegations, we have determined the following after reviewing the available evidence:

- the airplane was vectored to the final approach fix at the minimum allowable distance, which was in accordance with the provisions of FAA Order 7110.65;
- the airplane was vectored to the final approach course at the maximum allowable intercept angle for the distance from the approach gate, which was also in accordance with the provisions of FAA Order 7110.65;
- the descent clearance was issued with enough time and distance for the airplane to properly intercept the glideslope; and
- the incorrect CTAF provided by the controller did not cause or contribute to the accident.

As a result, none of the allegations made by the petitioner’s attorneys during the civil case and raised in

Appendix C

the petition for reconsideration necessitates modification of the NTSB's probable cause determination.

Disposition

After review of the evidence, the petition for reconsideration of the NTSB's probable cause in connection with the aircraft accident involving a Cessna 206, N120HS, on April 20, 2006, near Bloomington, Indiana, is denied in its entirety.

Chairman HERSMAN, Vice Chairman HART, and Members SUMWALT, ROSEKIND, and WEENER concurred in the disposition of this petition for reconsideration.

APPENDIX D — STATUTES AND REGULATIONS**49 CFR 845.41****§ 845.41 Petitions for reconsideration or modification.**

(a) Petitions for reconsideration or modification of the Board's findings and determination of probable cause filed by a party to an investigation or hearing or other person having a direct interest in the accident investigation will be entertained only if based on the discovery of new evidence or on a showing that the Board's findings are erroneous. The petitions shall be in writing. Petitions which are repetitious of proposed findings submitted pursuant to § 845.27, or of positions previously advanced, and petitions filed by a party to the hearing who failed to submit proposed findings pursuant to § 845.27 will not be entertained. Petitions based on the discovery of new matter shall: identify the new matter; contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board's adoption of its findings. Petitions based on a claim of erroneous findings shall set forth in detail the grounds relied upon.

AUTHORITY: Title VII, Federal Aviation Act of 1958, as amended (49 U.S.C. 1441 et seq.); and the Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.).

50a

Appendix D

49 USCS § 1131

§ 1131. General authority

(a) General.

(1) The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of--

(A) an aircraft accident the Board has authority to investigate under section 1132 of this title [49 USCS § 1132] or an aircraft accident involving a public aircraft as defined by section 40102(a)(37) of this title other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States; ...

(2)

(A) Subject to the requirements of this paragraph, an investigation by the Board under paragraph (1)(A)-(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.

...

Appendix D

(e) Accident reports. The Board shall report on the facts and circumstances of each accident investigated by it under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.

HISTORY:

(July 5, 1994, P.L. 103-272, § 1(d), 108 Stat. 752; Oct. 25, 1994, P.L. 103-411, § 3(c), 108 Stat. 4237; Nov. 1, 2000, P.L. 106-424, §§ 6(a), 7, 114 Stat. 1885, 1886; Dec. 6, 2003, P.L. 108-168, § 7, 117 Stat. 2034; Dec. 21, 2006, P.L. 109-443, § 9(b), (c), 120 Stat. 3301.)

*Appendix D***HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1131(a)(1)...	49 App.:1903(a)	Jan. 3, 1975, Pub. L. 93-633, (1)(A)-(E) (less Sec. 304(a) (1)(A)-(F), 88 Stat. last sentence of 2168; Oct. 24, 1992, Pub. L. (E)), (F). 102- 508, Sec. 303, 106 Stat. 3307.
1131(a)(2)...	49 App.:1903(a)(1)	Jan. 3, 1975, Pub. L. 93- 633, (2d, 3d sentences). Sec. 304(a)(1) (less (A)-(F)), 88 Stat. 2168; Nov. 3, 1981, Pub. L. 97-74, Sec. 3, 95 Stat. 1065.

Appendix D

In this section, the word “conditions” is omitted as being included in “circumstances”. The words “head of the department in which the Coast Guard is operating” are substituted for “Secretary of the department in which the Coast Guard is operating” for consistency in the revised title and with other titles of the United States Code.

In subsection (a)(1)(A), the words “the Board has authority to investigate under section 1132 of this title” are substituted for “which is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 1655(d) of this Appendix pursuant to title VII of the Federal Aviation Act of 1958, as amended [49 App. U.S.C. 1441 et seq.]” because of the restatement.

.....

49 USCS § 1132

§ 1132. Civil aircraft accident investigations

(a) General authority.

(1) The National Transportation Safety Board shall investigate--

(A) each accident involving civil aircraft; and

(B) with the participation of appropriate military authorities, each accident involving both military and civil aircraft.

Appendix D

(2) A person employed under section 1113(b)(1) of this title [49 USCS § 1113(b)(1)] that is conducting an investigation or hearing about an aircraft accident has the same authority to conduct the investigation or hearing as the Board.

(b) Notification and reporting. The Board shall prescribe regulations governing the notification and reporting of accidents involving civil aircraft.

(c) Participation of Secretary. The Board shall provide for the participation of the Secretary of Transportation in the investigation of an aircraft accident under this chapter [49 USCS §§ 1101 et seq.] when participation is necessary to carry out the duties and powers of the Secretary. However, the Secretary may not participate in establishing probable cause.

...

HISTORY:

(July 5, 1994, P.L. 103-272, § 1(d), 108 Stat. 753.)

*Appendix D***HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1132(a)(1)...	49 App.:1441(a)(2).	Aug. 23, 1958, Pub. L. 85-726, Secs. 701(a) (1), (2), (c) (1st sentence), (g), 702, 72 Stat. 781, 782.
	49 App.:1442(a).	
	49 App.:1655(d)	Oct. 15, 1966, Pub. L. 89-670, (1st sentence) Sec. 6(d) (1st sentence), 80 Stat. 938.
	49 App.:1903(a)	Jan. 3, 1975, Pub. L. 93-633, (1)(A). Sec. 304(a)(1)(A), 88 Stat. 2168.

Appendix D

49 USCS § 1153

§ 1153. Judicial review

(a) General. The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter [49 USCS §§ 1101 et seq.]. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.

(b) Persons seeking judicial review of aviation matters.

(1) A person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter [49 USCS §§ 1101 et seq.] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60 days only if there was a reasonable ground for not filing within that 60-day period.

(2) When a petition is filed under paragraph (1) of this subsection, the clerk of the court immediately shall send a copy of the petition to the Board. The Board shall file with the court a record of the proceeding in which the order was issued.

Appendix D

(3) When the petition is sent to the Board, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Board to conduct further proceedings. After reasonable notice to the Board, the court may grant interim relief by staying the order or taking other appropriate action when cause for its action exists. Findings of fact by the Board, if supported by substantial evidence, are conclusive.

(4) In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.

(5) A decision by a court under this subsection may be reviewed only by the Supreme Court under section 1254 of title 28.

...

HISTORY:

(July 5, 1994, P.L. 103-272, § 1(d), 108 Stat. 756; Aug. 9, 2004, P.L. 108-293, Title VI, § 622, 118 Stat. 1063; Feb. 14, 2012, P.L. 112-95, Title III, Subtitle A, § 301(b), 126 Stat. 56.)

*Appendix D***HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1153(a)....	49 App.:1655(d)	Oct. 15, 1966, Pub. L. 89-670, (last sentence) Sec. 6(d), 80 Stat. 938.
	49 App.:1903(d)	Jan. 3, 1975, Pub. L. 93-633, Sec. 304(d), 88 Stat. 2171.
1153(b)(1)...	49 App.:1486(a),	Aug. 23, 1958, Pub. L. 85-726, (b) (as 1486(a), Sec. 1006(a), (b), (e), (f) (b) relates (as Sec. 1006(a), (b), (e), to CAB) (f) relates to CAB), 72 Stat. 795. 49 App.:1655(d) (1st sentence).

Appendix D

1153(b)(2)...	49 App.:1486(c)	Aug. 23, 1958, Pub. L. 85- 726, (related to CAB). Sec. 1006(c) (related to CAB), 72 Stat. 795; restated June 29, 1960, Pub.L. 86- 546, Sec. 1, 74 Stat. 255. 49 App.:1655(d) (1st sentence).
1153(b)(3)...	49 App.:1486(d),	Aug. 23, 1958, Pub. L. 85- 726, (e) (1st sentence). Sec. 1006(d) (related to CAB), (as 1486(d), (e) 72 Stat. 795; restated Sept. (1st sentence) 13, 1961, Pub.L. 87-225, Sec. relates to CAB). 2, 75 Stat. 497.

Appendix D

- 49 App.:1655(d)
1st sentence).
- 1153(b)(4) 49 App.:1486(e)
(last sentence
related to CAB). 49
App.:1655(d) (1st
sentence).
- 1153(b)(5)... 49 App.:1486(f)
(related to CAB).
49 App.:1655(d) (1st
sentence).

In subsection (a), the text of 49 App.:1903(d) (last sentence) is omitted as unnecessary because 5:ch. 7 applies by its own terms. The words “final order” are substituted for “order, affirmative or negative” in 49 App.:1903(d) and “Decisions of the National Transportation Safety Board made pursuant to the exercise of the functions, powers, and duties enumerated in this subsection shall be administratively final” in 49 App.:1655(d) to eliminate unnecessary words. The words “is issued” are substituted for “after the entry” for consistency in the revised title and with other titles of the United States Code. The text of 49 App.:1655(d) (last sentence words after last comma) is omitted as unnecessary because of 49 App.:1903(d).

In subsection (b)(1), the words “affirmative or negative” are omitted as surplus. The words “related to an aviation matter” are added because the source provisions being restated only apply to aviation matters. The words “is issued” are substituted for “the entry of”

Appendix D

for consistency in the revised title and with other titles of the Code.

...

49 USCS § 1154

(b) Reports. No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

49 USCS § 46110

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [49 USCS § 41307 or 41509(f)], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part [49 USCS §§ 40101 et seq.], part B [49 USCS §§ 47101 et seq.], or subsection (l) or (s) of section 114 [49 USCS § 114] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The

Appendix D

petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

...

HISTORY:

(July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 1230; Nov. 19, 2001, P.L. 107-71, Title I, § 140(b)(1), (2), 115 Stat. 641; Dec. 12, 2003, P.L. 108-176, Title II, Subtitle B, § 228, 117 Stat. 2532.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
46110(a).....	49 App.:1486(a),(b)	Aug. 23, 1958, Pub. L. 85-726, (as 1486(a), (b) Sec. 1006(a), (b), (e), (f) relates to (as Sec. 1006(a), (b), (e), Secretary (f) relates to Administrator and CAB), 72 Stat. 795.

Appendix D

- 49 App.:1551(b) Aug. 23, 1958,
Pub. L. 85-726,
(1)(E). 72 Stat.
731, Sec. 601(b)
(1) (E); added
Oct. 4, 1984,
Pub. L. 98-443,
Sec. 3(e), 98
Stat. 1704.
- 49 App.:1655(c)(1). Oct. 15, 1966,
Pub. L. 89-670,
Sec. 6(c)(1), 80
Stat. 938; Jan.
12, 1983, Pub.
L. 97- 449, Sec.
7(b), 96 Stat.
2444.