

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE COALITION OF CONCERNED CITIZENS
TO MAKEARTSMART, an Unincorporated
Association; 2706 CENTRAL AVE., LLC,
A NEW MEXICO LIMITED LIABILITY COMPANY,
FOX PLAZA, LLC, a New Mexico Limited
Liability Company, JULIE STEPHENS,
and JEAN AND MARC BERNSTEIN,

Plaintiffs,

vs.

THE FEDERAL TRANSIT ADMINISTRATION OF
U.S. DEPARTMENT OF TRANSPORTATION,
an Agency of The United States;
ANTHONY FOXX, SECRETARY
OF THE UNITED STATES DEPARTMENT
OF TRANSPORTATION, in His Official Capacity;
ROBERT C. PATRICK, REGIONAL DIRECTOR
FOR REGION VI OF THE FEDERAL TRANSIT
ADMINISTRATION, in his official capacity,
DONALD R. KOSKI, DIRECTOR, PLANNING
AND PROGRAM DEVELOPMENT OF THE FEDERAL
TRANSIT ADMINISTRATION, in His Official Capacity;
THE CITY OF ALBUQUERQUE, NEW MEXICO,
A MUNICIPAL CORPORATION; RICHARD J. BERRY,
MAYOR OF ALBUQUERQUE, in His Official Capacity; and
BRUCE RIZZIERI, DIRECTOR, ABQ-RIDE TRANSIT,
in His Official Capacity,

Defendants.

**COMPLAINT FOR DECLARATORY, STATUTORY AND
INJUNCTIVE RELIEF**

For their complaint against the defendants Federal Transit Administration et al., Plaintiffs

Coalition of Concerned Citizens to Make Art Smart et al., (“the Coalition”) allege as follows:

NATURE OF THE ACTION

1. This action is for declaratory and injunctive relief pursuant to the National Environmental Policy Act (“NEPA”), the Administrative Procedure Act (“APA”), and regulations of the Federal Transit Administration (FTA). It arises out of the \$119 million, federally-funded “Albuquerque Rapid Transit” project (“ART”) and the related decision by the FTA and the FTA defendants to relieve Albuquerque of its obligation to perform either an Environmental Assessment or prepare an Environmental Impact Statement in connection with the ART project. Plaintiffs also bring this action pursuant to 4.10.12.13 NMAC providing that “either the State Historic Preservation Officer or any other interested person may seek enforcement of the provisions of the New Mexico Prehistoric and Historic Sites Preservation Act by an action for injunction or other appropriate relief.”

2. This action is brought by Central Avenue property and business owners, *inter alia*, to challenge as arbitrary and capricious and otherwise contrary to law the FTA’s final decision of August 26, 2015 to grant Albuquerque a “Documented Categorical Exclusion” (“CE” or “Exclusion”) that relieved Albuquerque from the legal obligation it would otherwise have had to perform, together with the FTA, an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”) assessing ART’s effects on the human, vehicular and business environment along the Central Avenue corridor, together with its impact on the historic character of Central Avenue and its landmarks. This action also challenges and seeks to rectify, *inter alia*, the impact on FTA’s regulatory decisionmaking of the false statements and assurances given to the FTA by Albuquerque in its application for a CE a) that the ART would not significantly impact the foregoing human environmental factors; and b) that the ART would not generate intense public discussion, concern or controversy within any subset of the Albuquerque

Community. The City's assurances to the FTA, together with the FTA's failure to consider, address and reasonably evaluate those assurances, its failure to provide a reasoned basis for its decision and its violations of its own regulations as described hereinafter, resulted in the City of Albuquerque obtaining the CE from the FTA. Albuquerque and the FTA were thereby relieved, contrary to law, of their obligations to meaningfully assess the impact of ART on the Central Avenue corridor, through an Environmental Assessment or, if later determined appropriate, an Environmental Impact Statement.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1331 (federal question), as the claim arises under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 and under 5 U.S.C. §§ 702 and 706 (APA) because the claim challenges the final decision of a federal agency. It also arises under the Declaratory Judgment Act, 28 U.S.C. § 2201.

4. Venue is proper in this district under 28 U.S.C. 1391(b) and (e), and under 5 U.S.C. §703 as the actions giving rise to this claim and its effects have occurred and will occur in New Mexico; because it is a civil action against an agency and/or officers or employees of an agency of the United States acting in their official capacities, and; because it is brought under the APA.

PARTIES

5. Plaintiff Coalition of Concerned Citizens to Make Art Smart is an unincorporated association, the purpose of such is to improve bus transit along Central Avenue without harming the businesses, shops, restaurants, neighborhoods and property values and to prevent the ART

project from going forward as designed, without meaningful consideration of alternatives and without meaningful public participation.

6. 2706 Central Ave., LLC, a New Mexico Limited Liability Company, owns property at the corner of Central Ave. and Girard in Albuquerque that will be significantly affected and harmed if ART is constructed as presently designed.

7. Fox Plaza, LLC, a New Mexico Limited Liability Company, owns a shopping plaza at the Southwest Corner of Central and Pennsylvania that will be significantly affected and harmed by ART if it is constructed as presently designed.

8. Julie Stephens owns and operates a consulting firm located in the Nob Hill area of Albuquerque in the Central Avenue Corridor. Her consulting business will be harmed by ART if it is constructed as presently designed.

9. Jean and Marc Bernstein are the owners of Flying Star Restaurants, one of whose locations is on the south side of Central Avenue in the Nob Hill area. Their restaurant business will be harmed by ART if it is constructed as presently designed.

10. Defendant Federal Transit Administration (FTA) is an agency of the United States, within the U.S. Department of Transportation. It provides financial and technical assistance to local public transit systems, including buses, subways, light rail, commuter rail, trolleys and ferries. It expends more than \$10 billion annually to support and expand public rail, bus, trolley, ferry and other transit services. New Mexico is within Region VI of the FTA.

11. Defendant Anthony Foxx is the Secretary of the United States Department of Transportation, which oversees and has responsibility for the conduct of the Federal Transit Administration. Defendant Secretary Anthony Foxx is an official of the United States Government who is subject to orders of this Court pursuant to the APA, should the Court

determine to rectify the conduct of the named officials of Region VI of the Federal Transit Authority.

12. Defendant Robert C. Patrick is Regional Director for Region VI of the Federal Transit Administration and bears responsibility for overseeing the activities of the FTA in Region VI, including granting or withholding CEs when local government units such as Albuquerque apply for them. On information and belief Patrick approved the CE that is a subject of this Complaint. Patrick is an agency official subject to relief fashioned by a court pursuant to the provisions of the APA.

13. Defendant Donald R. Koski is Director of Planning and Program Development of the Federal Transit Administration. On information and belief, Koski bore responsibility for reviewing, or supervising the review of, Albuquerque's submission in support of its application for a CE from the requirement to conduct an Environmental Assessment or Environmental Impact Statement in connection with ART. Koski signed and issued the letter of August 26, 2015 from FTA Region VI to Albuquerque, granting the Categorical Exclusion that is a subject of this Complaint. Koski is an agency official subject to relief fashioned by a court pursuant to the provisions of the Administrative Procedure Act.

14. Defendant City of Albuquerque, New Mexico, is a New Mexico municipal corporation and a political subdivision of the State of New Mexico. It undoubtedly claims an interest in the subject matter and outcome of this proceeding and should be named as a party for that reason. In addition, Plaintiffs raise a direct claim against Albuquerque for declaratory and injunctive relief arising from Albuquerque's violation of state law and local ordinances in connection with its promotion and development of ART as designed.

15. Defendant Richard J. Berry is the Mayor of Albuquerque and bears overall supervisory responsibility for the design, development, construction and implementation of ART.

16. Defendant Bruce Rizzieri is the Director of ABQ-RIDE Transit. In that capacity, he bears direct responsibility for the design, development, construction and implementation of ART. Defendant Rizzieri signed and submitted the application to FTA for a Categorical Exclusion through which the FTA relieved the City of Albuquerque of its statutory and regulatory responsibility to carry out an Environmental Assessment or, if appropriate, an Environmental Impact Statement, either of which would have required Albuquerque to meaningfully assess the environmental impacts of the ART.

ALLEGATIONS COMMON TO ALL COUNTS

17. The ART project is an urban bus transit project designed by one or more outside consulting firms at the request of and under the supervision of Defendants City of Albuquerque, Mayor R.J. Berry and Bruce Rizzieri (the City Defendants). It will run from Coors to Tramway and will transform Central Avenue in ways that will significantly impact and harm businesses along Central and the adjoining residential neighborhoods.

18. The design for ART, which relies fundamentally on the elimination of Central Avenue's medians and the construction and use of two "dedicated" lanes in the middle of Central Avenue for the sole use of ART rapid transit buses, requires the reduction of Central Avenue for all other traffic to one lane in either direction, including in currently thriving business, dining and entertainment areas such as Nob Hill, West Central between 8th and Rio Grande and elsewhere, which depend for their vitality and success on access by automobiles, pedestrians and deliveries. As explained in greater detail below, the impact of this design on Central Avenue itself, on

businesses, shops and restaurants along Central, on adjoining neighborhoods and on established traffic patterns will undeniably be enormous, for better or worse. Plaintiffs believe, based on an exhaustive expert analysis, their own knowledge of their business environments, and common sense, that it will be for the worse for them and their neighborhoods, by far.

19. Unknown to the Plaintiffs and other business owners along Central, and most area residents, the foregoing basic design for what is now known as the ART project has been in place since 2012 or earlier.

20. The ART project's total cost is projected to be approximately \$119 million, of which \$69 million will be funded by the federal government through the FTA's "Small Starts" program, with the remainder coming from other federal sources (approximately \$30.9 million) and City sources (approximately \$16.4 million).

21. The stated intent of the ART project is to modernize and speed up bus service throughout Central Avenue from Coors Boulevard to Tramway Boulevard, a distance of approximately 14 miles, approximately ten miles of which will include dedicated center lanes for the ART buses.

22. Astonishingly, City officials responsible for the ART project have informed the Plaintiffs, other members of the public and, on information and belief, FTA, that the ART project is necessary because the buses currently serving Central Avenue are "full" or "at capacity" or "standing room only." Even the most casual observer of City buses traveling along Central Avenue knows these statements are divorced from reality. In fact, the buses currently serving Central are for the most part sparsely occupied and frequently empty.

23. The current design of ART, as presented to the FTA and on the City's web site essentially "forces" two dedicated ART lanes into the middle of Central even though much of

Central is far too narrow to reasonably accommodate such a design. Specifically, the design contains the following elements that reflect this:

- a. Two lanes created in the center of Central Avenue are dedicated for use exclusively by ART buses, which will replace the current “Rapid Ride” buses that run along the “curb” sides of Central Avenue;
- b. In order to accommodate the two center express bus lanes, most medians will be removed;
- c. Central Avenue traffic other than the two lanes for ART buses, from which other traffic will be excluded, will for significant portions be reduced to single east and west-bound lanes, which are supposed to accommodate all vehicular traffic, including cars, local buses and truck/van deliveries to businesses, restaurants and shops along Central;
- d. A majority of the presently-existing left turns along Central will be eliminated;
- e. The plan will explicitly and intentionally encourage drivers attempting to reach destinations that they have had to pass (because of the elimination of left turns) to make U-Turns at the next of the remaining left turns;
- f. Many additional traffic lights will be installed;
- g. Many street parking places, already scarce in some areas, will be eliminated and/or relocated;
- h. Mature landscaping and trees on medians will be eliminated;
- i. The plan will eliminate most pedestrian crossings, requiring pedestrians to cross only at three or four block intervals. Further, many of the remaining

pedestrian crossings will require pedestrians to zig-zag through bus stops at the center of Central Ave in order to reach the other side of Central;

j. Where Central is too narrow to accommodate double dedicated lanes for ART buses, ART buses will travel on single, bi-directional lanes; and

k. Although the City has touted its plan as allowing for widening sidewalks, adding trees along the widened sidewalks and adding other pedestrian amenities, the width of Central in areas where pedestrians are and will be present is such that sidewalk widening is not possible except only very sporadically.

Many other design features of significance to this litigation, but of less importance, are not included above.

24. The effect of the foregoing design elements, and other design elements not described herein, will be to impact the businesses and residents along the Central Corridor in the following fashions, among others:

a. Reduction of all east bound and west bound traffic to single lanes which must accommodate all Central Avenue traffic other than ART buses, including autos, local buses and vans will significantly disrupt and alter traffic patterns throughout the Central Avenue corridor, including Lead and Coal because those single lanes will become choked, forcing traffic, including trucks and delivery vans, into adjacent residential neighborhoods, or through those neighborhoods in an effort to reach Lead or Coal to the South, or Campus or Lomas to the North. The result will be not just to snarl and divert traffic but to alter the quiet, residential character of neighborhoods adjacent to Central Avenue;

b. The City's current plans for ART suggest that existing "local" buses that must travel along the remaining single lanes of east and west-bound non-ART traffic will not have space to move out of the lane of traffic when they stop to

receive or discharge passengers, resulting in what is likely to be a “blockade” of traffic by the local buses;

c. The redirection of traffic by the clogging of single lanes will direct traffic away from the restaurants, shops and businesses on Central that depend on vehicle access and presence in the neighborhood for their financial survival;

d. Elimination of most left turns on Central Avenue will necessarily eliminate convenient access to businesses, shops and restaurants along Central, reducing customer volume and endangering the success of those businesses, shops and restaurants and the jobs of their employees;

e. The combination of the foregoing design elements will significantly interfere with and frustrate customer and potential customer access to the businesses, shops and restaurants that line Central Avenue along the planned ART route;

f. Most left turns on Central will be eliminated, forcing many delivery trucks and vans into residential areas to “circle” back to delivery locations that they have had to pass;

g. ART as designed will impose the following public and pedestrian safety and other problems along Central Avenue;

i) ART’s design, if implemented, will attempt to force pedestrians to cross Central at only three or four block intervals, thereby increasing jaywalking in areas where the median no longer exists and where “express” ART buses will be passing in either direction along the two dedicated lanes in the center of Central. This will significantly magnify the danger of accidents and pedestrian injuries or fatalities;

ii) ART’s design for dealing with the elimination of most left turns is to encourage U-Turns at the remaining left turns. This is not only

dangerous but will hopelessly congest the intersections where the U-Turns must take place and will further force traffic into the adjoining residential neighborhoods;

iii) ART's design is to use "yellow lines" to indicate that its two dedicated lanes are off-limits to other vehicles. This is unrealistic. Drivers are likely either not to see the lines, particularly when they are entering Central from a side street, or simply ignore them. This will create an extraordinarily unsafe condition, particularly for drivers who approach Central from a side street and do not understand that they are forbidden to cross the yellow lines in order to cross Central in order to proceed in the direction they want to go; and

iv) The ART design includes six "midblock" stations that, like others, are to be located in the middle of Central Avenue. Their mid-block location is intended to accommodate pedestrians, but their design relies on forcing pedestrians to cross half-way across Central and then walk the length of the station to reach the other "half" of the cross-walk. It is probable that many pedestrians will simply jay-walk the second half of their crossing rather than walking the length of the station, thereby endangering themselves.

The foregoing design and safety issues are not exhaustive.

25. Some Plaintiffs and many other business, restaurant and shop owners along the Central corridor were unaware until August 12, 2015 or later (many other becoming aware only in September-December, 2015) of the existence of the ART project or its design.

26. City officials managing the ART project failed to provide and, on information and belief, affirmatively withheld information regarding the ART project from the Plaintiffs and other similarly situated business owners along Central. They did so, on information and belief,

because they knew, assumed or suspected that the plan would be highly controversial and would meet extraordinary resistance because of the impact of its design on businesses and neighborhoods along the Central Avenue corridor.

27. When, at various times and under various circumstances, Plaintiffs and other business, restaurant and shop owners along Central Avenue finally learned of the existence of ART and its design, the great majority of them reacted with shock and opposition. City employees responsible for interacting with “stakeholders” whose interests would be affected by the ART, including Dayna Crawford, Lawrence Klein and others, were unquestionably aware, by August 12, 2015 at the latest, that the great majority of Central Avenue business, shop and restaurant owners either were completely unaware of ART’s design and incipience, or had become aware of it and were apoplectic about it.

28. The August 12 date is significant because it was on that date that Crawford and Klein, who were responsible, *inter alia*, for informing stakeholders about ART and its design, met at Scalo Northern Italian Grill with approximately 40 Nob Hill and nearby business owners.

29. The business owners who came to the meeting expressed near-unanimity in their alarm when they learned that the ART project was not only to take place but that it would split Central in half and have the features identified above in this Complaint. At that meeting, the gathered business people expressed near-unanimous and alarmed opposition to ART’s design because of its dire effect on their businesses, shops and restaurants.

30. In addition to other exchanges at the August 12 meeting, Crawford, who spoke for the City, was asked why the City had failed to “communicate with us.” Her response was that there had been some sort of technical problem with the City’s email delivery system. The assembled business owners were visibly and vocally skeptical and appalled at this statement. In

response to a question as to why such a bus line was needed, Crawford told the gathered business people that the buses along Central are currently “full,” “at capacity” or “standing room only” and that a new bus system was therefore needed. The vast majority of the attendees expressed disbelief that she would say such a thing since they all knew from personal observation over many years that buses along Central rarely have more than a few people on them, often carry fewer than ten or sometimes no passengers at all. Finally, Crawford was asked who the City believed would be riding the ART buses. She replied that “people from the Heights” would drive their cars to East Central locations near ART stations, park their cars and board the ART buses. Then they would ride them to Nob Hill for a meal at one of its restaurants, would then ride the ART buses as families, to the BioPark and then return to their cars on an ART bus. To say that the attendees expressed skepticism at this extraordinary prediction is to put it mildly. In short, Crawford and Klein were clearly made aware at this meeting and others preceding it that there was deep opposition to ART among business people, restaurant and shop owners, etc., and that many people had received no notice that the project was planned or what its design was.

31. Notwithstanding what the City learned at the August 12 meeting and earlier meetings, and notwithstanding that at the few public meetings it had held about ART the negative written comments had far outnumbered positive comments, notwithstanding direct communications from stakeholders vehemently objecting to ART, and notwithstanding that its representatives were well aware that the ART project was and would continue to be enormously controversial to business owners and residents along the Central corridor, the City’s representatives, including defendant Rizzieri, took the position that ART was a “done deal” and would not be modified.

32. Under applicable FTA regulations the ART project, because it involved greater than \$5 million in federal funds, is subjected to a NEPA-required process under which its environmental impacts are assessed, alternatives with less environmental impact considered and an evaluation performed of whether its benefits exceeded its impacts on the environment.

33. Under applicable NEPA regulations, an agency must prepare either an environmental impact statement (EIS) or an environmental assessment (EA) or must determine that the project fits in a category that makes both an EIS and an EA unnecessary. *See* 40 C.F.R. § 1501.4; *see also* 23 C.F.R. § 771.115.

34. An EIS is necessary whenever a federally-funded project involving the FTA will have a significant effect on the environment, including the human environment, traffic congestion, traffic patterns, economic vitality and the like, in an urban area. This is a “Class I” action within the meaning of FTA’s regulations. *See* 23 C.F.R. § 771.115(a); *see also* 40 C.F.R. § 1508.27.

35. An EA, which is less demanding and comprehensive than an EIS must be completed whenever the project is one “in which the significance of the environmental impact is not clearly established.” The purpose of an EA is to study the effects of a project sufficiently to determine, *inter alia*, whether an EIS is necessary. Under FTA regulations, these are “Class III” actions. *See* 23 C.F.R. § 771.115(c). For transit projects such as ART, an EA “shall consider the direct and indirect costs of reasonable alternatives and such factors as mobility improvements; social, economic, and environmental effects; safety; operating efficiencies; land use and economic development; financing and energy consumption.” 23 CFR § 450.318(c).

36. There are federal transit projects which, under FTA regulations, are categorically excluded from the requirement that either an EIS or EA be performed. These are “Class II”

actions known as “Categorical Exclusions.” *See* 23 C.F.R. § 771.115(b). Such projects are comparatively minor. The list include projects such as “administrative activities” that “do not lead directly to construction,” installation or replacement of utilities, safety measures, replacement of vehicles and the like. *Id.* The list is intended to encompass the types of projects that FTA knows, unless unusual circumstances are present, will not have significant environmental impacts.

37. Finally, in addition to “categorical exclusions” there are projects that may be candidates for “Documented Exclusions” (DEs) which require that the recipient of the federal funds – in this case the City of Albuquerque – provide documentation establishing “that significant environmental effects will not result” *See* 23 C.F.R. § 771.118(d). In addition to showing that there will not be significant environmental impacts, the applicant for a DE must demonstrate that there will not be a substantial controversy on environmental grounds associated with the project, that it will not have a significant effect on historic properties and is not inconsistent with any Federal State, or local law. 23 CFR 771.118(c).

38. Significantly for purposes of ART, FTA regulations categorically *preclude* granting an exclusion (whether by CE or DE) for projects that have “significant impacts on travel patterns.” 23 CFR 771.118(a).

39. ART is designed and intended to have a significant impact on travel patterns along Central Avenue in Albuquerque and will undoubtedly have such an impact. Furthermore, it will have many significant impacts on the human environment along Central Avenue, including not just on traffic patterns, but on the Central Avenue economy, on residential neighborhoods, society and safety. It will also affect historical properties and, as alleged below,

violate local law. Accordingly, ART under NEPA and applicable FTA regulations, cannot be approved for federal funding without either an EIS or an EA.

40. In addition to the foregoing regulations, Albuquerque was subject to 23 CFR § 450.316 (b)(1) which required that Albuquerque demonstrate that its planning process included “a *proactive* public involvement process that provides *complete* information, timely public notice, *full public access* to key decisions, and supports early and continuing involvement of the public in developing plans.” Emphasis added.

41. Contrary to the requirements of the foregoing regulation, the City provided poorly advertised public hearings during late 2014, at which the few citizens who learned of them and attended were informed that the City was giving the public a “choice” between a new rapid transit line that would run down the middle of Central, replacing medians but preserving parking spaces and permitting for widened sidewalks or one that would run along the outside lanes of Central that would prevent the addition of widened sidewalks and eliminate storefront parking. The City’s presentation of the alternative designs as a “choices” subject to public input was false and misleading inasmuch as the City, by 2011 or earlier, had already settled on the middle lane design. Far from being transparent about the plans for ART, the City’s representatives significantly misrepresented the status and nature of the design for ART. Furthermore, at these public meetings, ART’s representatives provided only vague descriptions of the “alternatives.”

42. Notwithstanding the controversy and strong opposition; notwithstanding that the ART project was intended to and/or would significantly alter existing traffic patterns; notwithstanding the inadequate and misleading information provided to the few members of the public who attended meetings, the City on August 17, 2016 applied to the FTA for a “documented exemption” from the requirement that it and the FTA prepare an EIS or EA. In its

application, the City made, *inter alia*, two extraordinary responses to questions posed by the FTA on the face of the FTA's form application for a documented exception (Attached as Exhibit "A" to this complaint). Those questions and responses were these:

Q. Will the project significantly impact the natural, physical, social and/or economic environments?

A. No.

.....

Q. Is the project likely to generate intense public discussion, concern, or controversy, even though it may be limited to relatively small subset of the community?

A. No.

....

Q. Is the significance of the project's natural, physical, social and/or economic unknown?

A. No.

43. The City of Albuquerque provided these responses even though it was aware that many if not most business, restaurant and shop owners along the central stretch of Central, including Nob Hill and other areas, were up in arms about the project, and were complaining that they had not been provided any information regarding the project. The City provided misleading answers to the FTA's questions in order to avoid the requirement of an Environmental Analysis or Environmental Impact Statement, either of which would likely have doomed the ART project, given its design and its predictable impact on the Central Avenue businesses and residents. The City was also aware that many business, restaurant and shop owners along Central held the view that the ART project would significantly harm their businesses and the value of their properties.

44. In addition to the fact that the answers provided by Albuquerque to the form's questions were false, the attachments provided by the City of Albuquerque to support the foregoing answers were facially inadequate to meaningfully support them.

45. In providing its answer to the FTA's form's question regarding the existence of public discussion, concern or controversy, the City submitted a misleading analysis and summary of the written comments that its few public meetings and other contacts had generated. First, although the City assured the FTA that it had not identified any "intense public concerns," the "opposition" written comments the City received outnumbered, by its own estimation, the "support" comments. Furthermore, in the appendix to its application, the City disclosed 510 of the comments it had received about the ART, and **the expressions of concern outnumbered the supportive comments by a ratio of more than ten-to-one.**

46. In addition to the foregoing false assurances to the FTA, the City falsely informed the FTA that it had engaged in extensive public outreach and had identified no intense public concern.

47. Plaintiffs were told, as were other members of the public, that the ART project was needed because Central Avenue buses were already operating "at capacity," and "standing room only." On this basis, Plaintiffs reasonably believe that the City of Albuquerque made similar assertions to the FTA in connection with the FTA's consideration of Albuquerque's application for an Exclusion. These statements, as alleged above, were and continue to be false. The Central Avenue buses for the most part run with very few passengers and are often almost empty. The ART project is entirely unjustified other than as a project that will capture significant federal funds, resulting in a short-lived boost to the local economy and contractors at

the expense of the residents and businesses along the Central corridor who will have to live with the economic fallout for years to come.

48. In February, 2016, after the City had requested an Exclusion from environmental analyses and the FTA had granted it, the City held a meeting with business people and residents at a hall next to the HiLand Theater on East Central. The hall was packed with irate residents and business owners who demanded answers to their concerns and expressed extreme displeasure for, among many other things, the fact that they were just then learning about the details of the ART project and how it could be expected to impact them, their homes and business. Despite the uproar at the meeting and the vociferous opposition that it generated in front of the attending City officials, Albuquerque's ART representatives did nothing to correct the false statement that the City had made to the FTA that the ART project was not the topic of intense controversy or comment.

49. For its part, the FTA's Region VI failed to take any reasonable steps to determine whether Albuquerque's application for a documented exclusion was accurate and should be granted. Instead, without any analysis or meaningful explanation, nine days after the date of Albuquerque's application for exclusion, the FTA granted the exemption, stating only that "[o]n the basis of the documentation submitted, FTA has determined that the proposed ART project meets the criteria for Categorical Exclusion in accordance with 23 CFR Part 771.118(d). The attached CE document provides sufficient environmental analysis for the proposed project and no further environmental review is required." See Ex. "B."

50. The FTA's Region VI granted Albuquerque the Exclusion notwithstanding it was familiar with the plans for the ART and knew or should have understood that the ART would have an enormous impact on traffic patterns, on public safety, on the economy of Central

Avenue, and would otherwise significantly impact the human environment along the Central Avenue corridor.

COUNT I

ADMINISTRATIVE PROCEDURE ACT (APA)

51. The FTA's decision to grant Albuquerque a documented exclusion from the legal requirement to perform either an EIS or EA in connection with ART is a final decision within the meaning of 5 U.S.C. § 704 and is therefore reviewable by this Court.

52. Pursuant to notice published by the FTA in the federal register, this action is timely filed. F.R./Vol. 80, No. 215, Nov. 6, 2015, p. 68897 "Notices" (judicial review barred unless action filed on or before April 4, 2016).

53. Under the 5 U.S.C. § 706 (2), a reviewing court "shall..hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (D) without observance of procedure required by law.

54. This Court should hold the FTA's decision to grant Albuquerque an Exclusion from the legal requirement of performing either an EIS or EA was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and should, accordingly, set it aside for the following reasons:

a. The FTA granted the Exclusion even though the ART, by its nature and size, is a project that falls outside the category of projects for which Exclusions are permissible under 23 CFR § 771.118. Accordingly, the decision to grant the Exclusion was not in accordance with law and/or was arbitrary or capricious;

b. The FTA granted the exclusion even though the ART project is designed to have and/or will have significant effects on travel patterns along the Central

Avenue corridor within the meaning of 23 CFR 771.118(a), which forbids the grant of Exclusions for such projects. Accordingly, the decision to grant the Exclusion was not in accordance with law and/or was arbitrary or capricious;

c. The size, nature and design of the ART project was at all material times known to the FTA and, accordingly, the FTA knew or should have known that it would have significant impacts on the human environment along the Central Avenue corridor for the reasons described above. Accordingly, even if an Exclusion for the ART project were otherwise legally permissible, the decision to grant it was arbitrary and capricious, an abuse of discretion or otherwise contrary to law because any project over \$5,000,000 which will have a significant effect on the environment or is a matter of intense comment or controversy may not have an Exclusion under applicable FTA regulations, including §771.118, *supra*;

d. The FTA acted arbitrarily and capriciously in approving Albuquerque's application for an Exclusion because the FTA accepted Albuquerque's assertion that the ART was not a topic of intense controversy or comment even though the appendix to Albuquerque's application showed not only that, among the few people the City had actually interacted with regarding the ART, opponents outnumbered supporters, and the negative comments outnumbered the positive comments by more than 10-1 in a sample of over 500. Accordingly, the FTA should have taken reasonable steps to determine whether there was controversy or should have questioned Albuquerque's claim. The FTA should not have accepted it, particularly when faced with attachments that refuted the claim;

e. The FTA acted arbitrarily and capriciously and otherwise in violation of law by failing to recognize and determine that the ART project was in violation of state and local law, as alleged below in Counts II-IV;

e. The FTA acted arbitrarily and capriciously in granting the Exclusion to Albuquerque because the FTA defendants had before them Albuquerque's application and its supporting attachments and were well aware that the

supporting attachments were inadequate to meaningfully support Albuquerque's responses to the key questions on FTA's form, detailed above;

f. The FTA acted arbitrarily and capriciously in approving the Exclusion in that Albuquerque's application for an Exclusion showed on its face, at Technical Supplement 2 (BISSIM Analysis) that traffic congestion along Central was not "deficient" at any intersections now, but will significantly degrade at numerous intersections, becoming "deficient" as a result of the completion of the ART project; that traffic at more and more intersections will become "deficient" over the coming years as a result of the ART project, and that ART itself will, after it is built, will only operate at a "D" "Level of Service" (out of a scale of "A" being the best level of service and F being the worst) and that at two major intersection (Rio Grande and Central and San Pasquale and Lomas), it will operate at an "F" level of service during PM peak hours. In addition, Albuquerque's application included a "supporting" analysis that stated that the ART line would experience "high delays" at some intersections along Central and that "spillback cues" from the adjacent intersections would extend and cause backup, including ART delays. These studies can be summarized with the question, "Why would anyone want to build this?" Nevertheless, FTA, acting arbitrarily and capriciously, approved the Exclusion, thereby relieving Albuquerque from the obligation, with the FTA, of performing a meaningful environmental analysis;

g. In its grant of Albuquerque's application for an Exclusion, the FTA failed to "inform the public of the potential significant environmental impacts of their proposed actions and explain how the decision addresses these impacts" as required by NEPA. Further, the decision fails to show, through "contemporaneous documentation that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision." *Wilderness Watch and Public Employees for Federal Responsibility v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004). Finally, the decision by the FTA to grant the Exemption, attached as Exhibit 2, fails to

demonstrate, as required, that the FTA examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *United Techs. Corp.*, 601 F.3d at 562 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). These failings make the FTA's decision to grant the Exclusion arbitrary, capricious or otherwise not in accordance with law; and

h. In addition to misrepresenting the facts and being an entirely inappropriate application for an Exclusion for the reasons set forth above, Albuquerque failed to inform FTA that its ART project will violate local law as alleged in Counts II-IV.

COUNT II

VIOLATION OF THE NATIONAL HISTORIC PRESERVATION ACT

55. The U.S. Department of Transportation, Federal Highway Administration (FHA) has designated Historic Route 66 as an All American Road and as a National Scenic Byway based on its archeological, cultural, historic, natural, recreational and scenic qualities.

56. The term "scenic" is not isolated to natural scenery but also man-made scenery. The FHA states that its definition of "scenic" "reaches beyond breathtaking vistas. All of America's Byways® are 'scenic,' representing the depth and breadth of scenery in America-- natural and man-made panoramas; electrifying neon landscapes; ancient and modern history coming alive; native arts and culture; and scenes of friends, families and strangers sharing their stories."

57. According to the City's own survey reports prepared to support the ART project, the ART route contains 138 historic building and four historic districts. This report identified 82 historic buildings that are eligible to be placed on the National Registry of Historic Places (NRHP).

58. The City estimates that over 700 historic buildings, approximately 30 of which are listed on the National Register of Historic Places (NRHP) and the New Mexico State Register of Cultural Properties (SRCP), are within the overall corridor. Additionally four historic districts are present within the corridor. Also, five Multiple Property Documentation Forms (MPDF) reference resources located within the project area.

59. In addition to historic buildings, Route 66 itself is included in the NRHP.

60. The FTA and the City failed to properly consider and evaluate the impact that the ART project would have on the historical integrity of Route 66 and its adjacent historic resources.

61. For example, the area of potential effect (APE) was defined too narrowly in the historic review, considering only bus *station* locations, rather than more broadly considering the impact on Historic Route 66 itself and the adjacent historic resources along the rest of the proposed ART route. Moreover, the defendants did not consider the entire route in its APE and the significant modification of the roadway caused by the addition of the dedicated center lanes, the removal of vehicle lanes, the removal of medians, the removal of left turns, the relocation and removal of parking, and the like.

62. For these reasons, the FTA failed to take into account the effect the ART project would have on the historic route 66 and all of the historic resources along the proposed route in violation of the National Historic Preservation Act. Accordingly, its decision to grant an Exclusion from further environmental review, which would have included assessment of impacts on historic Route 66, was arbitrary, capricious and contrary to law.

COUNT III

VIOLATION OF PREHISTORIC AND HISTORIC SITES PRESERVATION ACT BY THE CITY OF ALBUQUERQUE

63. In addition to having violated federal law by filing a false application for Exclusion, Albuquerque's application for Exclusion and its ART project itself violates local law in the following respects.

64. The NM Prehistoric and Historic Sites Preservation Act prohibits the use of public funds of the state, state agencies, or political subdivisions on a project that requires the use of any portion of or any land from a significant prehistoric or historic site unless there is no feasible and prudent alternative to such use, and unless the program or project includes all possible planning to preserve and protect and to minimize harm to the significant prehistoric or historic site resulting from such use. N.M. Stat. Ann. 1978, § 18-8-7

65. The Act permits enforcement of the prohibition with an injunction in a court of competent jurisdiction. *Id.*

66. The City failed to properly consider and evaluate the impact that the ART project would have on the historical integrity of Route 66 itself and the historic sites adjacent to it.

67. The City's current ART design does not reflect all possible planning or alternatives to preserve and protect and to minimize harm to significant historic sites along the bus route, including Route 66 itself and adjacent historical sites.

68. For example, the City defined the area of potential effect (APE) too narrowly, considering only bus station locations, rather than more broadly considering the impact on Historic Route 66 itself. Moreover, the City did not consider the entire route in its APE and the significant modification of the roadway caused by the addition of the dedicated center lanes, the removal of vehicle lanes, the removal of medians, the removal of left turns, the relocation and

removal of parking, and the like, thereby unalterably harming the historic, commercial character of Route 66 as it passes through Albuquerque.

69. Because the ART project requires the use of public funds, the City violates the Prehistoric and Historic Sites Preservation Act in using such funds without due regard for the harm done to Historic Route 66 and the adjacent historical sites along the proposed ART route, and should be enjoined.

COUNT IV

VIOLATION OF THE CITY'S COMPLETE STREETS ORDINANCE

70. On January 21, 2015 the City Council by unanimous vote adopted its Complete Streets Ordinance 4-3-7-5ROA1994.

71. The ordinance applies to all roadways and or segments of a roadway on a City right-of-way located within the Central and Established Urban Areas specified by the Albuquerque/Bernalillo Comprehensive Plan and are listed on the Mid Region Council of Governments Current Roadway Functional Classification Map; or are designated a Complete Street by Resolution of the City Council or action of the Mayor.

72. All major projects, such as the ART project, involving streets under the authority of this ordinance, including road construction, resurfacing, reconstruction of sidewalks or restriping, must be considered an opportunity to either retrofit existing streets or construct new streets consistent with the principles of the Complete Streets ordinance.

73. One of these principles is that the design of the street project balances the need to move vehicles efficiently with other outcomes specific to communities and neighboring properties through which a street passes, such as placemaking, pedestrian-friendliness, historic preservation and economic development.

74. The ART project does not balance the need to move vehicles efficiently with the other context sensitive outcomes the City was required to consider. For this reason the City's proposed ART design violates the Completes Street Ordinance and should be enjoined.

WHEREFORE, Plaintiffs respectfully request that the Court award the following relief:

A. Declare the FTA's grant of a "documented exclusion" to Albuquerque for its ART project to be arbitrary or capricious and/or contrary to law or as contrary to required procedure;

B. Set aside the documented exclusion and require that the FTA follow the procedures by requiring an Environmental Assessment, followed by an Environmental Impact Statement, if appropriate, in connection with ART;

C. Enter appropriate orders pursuant to 5 U.S.C.A. §705 postponing the effective date of any agency actions the FTA intends now to undertake in furtherance of its decision to grant the Documented Categorical Exclusion, including the transfer of any funds to Albuquerque or taking any other action in furtherance of the ART project until such time as the appropriate environmental process (whether an EA, EIS or both) is complete;

D. Declare the FTA to be in violation of the National Historic Preservation Act;

E. Enjoin the City of Albuquerque from undertaking any actions to commence or carry out the ART project until such time as it has performed the reviews and design changes required by State and local law and has completed an appropriate environmental analysis in the form of either an EA or EIS, or both as may be appropriate under law;

F. Declare Albuquerque to be in violation of the Historic and Preshistoric Sites Preservation Act;

G. Declare Albuquerque's ART project as currently designed to violate the Complete Streets Ordinance; and

H. Grant such other relief as the Court may deem appropriate.

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