# Pepperdine University School of Law
## Legal Summaries

## Table of Cases
### United States Courts of Appeal

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation,</td>
<td>879 F.3d 339 (D.C. Cir. 2018)</td>
<td>384</td>
</tr>
<tr>
<td>Feldman v. Federal Deposit Insurance Corporation,</td>
<td>879 F.3d 347 (D.C. Cir. 2018)</td>
<td>392</td>
</tr>
<tr>
<td>Stolz v. Federal Communications Commission,</td>
<td>882 F.3d 234 (D.C. Cir. 2018)</td>
<td>396</td>
</tr>
<tr>
<td>Airmore Engineering Corporation v. Federal Aviation Administration,</td>
<td>882 F.3d 1157 (D.C. Cir. 2018)</td>
<td>399</td>
</tr>
</tbody>
</table>
UNITED STATES COURT OF APPEALS

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. V.
UNITED STATES DEPARTMENT OF TRANSPORTATION
879 F.3d 339 (D.C. Cir. 2018)

Synopsis:

Five commercial truck drivers, along with their industry association, brought action against the Department of Transportation (DOT or the Department), Secretary of the DOT, Federal Motor Carrier Safety Administration (FMCSA), and Administrator of the DOT. The drivers alleged that including previously dismissed citations in the Motor Carrier Management Information System (MCMIS) violated the Fair Credit Reporting Act. After the District Court granted the DOT motion for summary judgment for lack of Article III standing, drivers appealed. The United States Court of Appeals for the District of Columbia affirmed the district court’s grant of summary judgment for the Department as to three out of the five drivers.

Facts and Analysis:

The Federal Motor Carrier Safety Administration, which is part of the Department of Transportation, is tasked with ensuring “the highest degree of safety in motor carrier transportation.”1 To do so, it maintains a database of commercial truck drivers’ safety records.2 This database, called the Motor Carrier Management Information System (MCSIS), is maintained through the collaboration of state and federal authorities.3 States collect and report motor carrier safety data to the Department, and in turn, the Department is tasked with ensuring that the data is complete, timely, and accurate.4

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1 Owner-Operator Indep. Drivers Ass’n, Inc. v. United States Dep’t of Transportation, 879 F.3d 339, 340 (D.C. Cir. 2018)
2 Id. at 340–41.
3 Id. at 341.
4 Id.
Shippers and firms that want to hire truck drivers can access the information in the database. This information contains accident reports for the previous five years and inspection reports for the previous three years. The Department must ensure that any information that is released is done so in accordance with the Fair Credit Reporting Act. To further ensure the accuracy of the information contained in the database, the Department has established a web-based dispute system that allows drivers to contest the information contained in the database. When a driver challenges the information, the Department sends it to the state to “decide how to respond.”

Five commercial truck drivers, who were cited by state law-enforcement authorities for violating safety regulations, successfully challenged their citations in state court. Four of the drivers then used the web-based dispute system to ask that the violation reports related to the citations be removed from the database. The state rejected these requests because, at the time, the database only displayed initial citations and not adjudicated outcomes. While two of the driver’s records were shared to potential employers, the other driver’s records were never shared.

The drivers and their industry association sued, “challenging the Department’s failure to ensure the accuracy of the database and seeking injunctive and declaratory relief under the Administrative Procedure Act, as well as damages under the FCRA.” The Department filed a motion for summary judgment arguing that “the drivers lacked Article III standing because they failed to show

5 Id.
6 Id.
7 Id.
8 Id.
9 Id. (citation omitted)
10 Id.
11 Id.
12 Id.
13 Id.
14 Id. at 341–42.
concrete injury in fact.” 15 After the district court granted summary
judgment, the drivers appealed.16

The Court of Appeals for the District of Columbia began its de
novo review by noting that at a minimum, Article III standing
requires a showing of an “injury in fact that is both concrete and
particularized, and actual or imminent, not conjectural or
hypothetical.” 17 The Court explained that the issue in this case is
whether the alleged injury—“the Department’s failure to discharge
its statutory duty to ensure the accuracy of information in the
database—is sufficiently concrete to qualify as injury in fact.” 18

The court began its analysis on “whether a violation of a statutory
obligation constitutes injury in fact” with a discussion of Spokeo, Inc.
v. Robins, 136 S.Ct. 1540 (2016). 19 In Spokeo, a consumer filed a
class action alleging that a company that operates an online search
engine, which gathers and disseminates information, disseminated
information that was incorrect.20 The consumer argued that this
violated the FCRA because FCRA “imposes procedural requirements
on the creation and use of consumer reports, including obligating
reporting agencies to adopt mechanisms for ensuring the
information's accuracy.” 21 The Supreme Court explained that “where
the alleged injury arises only from a statutory violation[,] . . . a
concrete injury must . . . actually exist.” 22 The Court recognized that
although Congress can elevate injuries to a level that makes them
concrete, this “does not mean that a plaintiff automatically satisfies
the injury-in-fact requirement whenever a statute grants a person a
statutory right and purports to authorize that person to sue to
vindicate that right.” 23 This means that a person cannot merely

15 Id. at 342.
16 Id.
17 Id. (quoting Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 513 (D.C. Cir.
2016).
18 Owner-Operator, 879 F.3d at 342.
19 Id.
20 Id.
21 Id.
22 Id. (internal quotations omitted).
23 Id. (quoting Spokeo, 136 S.Ct. at 1549 (2016).
“allege a bare procedural violation” without a showing of concrete harm that is real and actually exists.24

Turning to the drivers’ argument that they have received injury merely from the existence of inaccurate information in the database, the court noted that the drivers focused on two sentences from Spokeo: “[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.”25 The drivers argued that these two sentences from Spokeo mean that “the Department’s failure to comply with its statutory obligation to ensure accuracy, by itself, inflicts injury in fact.”26

However, the Court disagreed.27 Instead, the Court noted that the use of the phrase additional harm presumes that the plaintiff has already suffered an injury that is actual and real.28 To reinforce its position, the Court pointed to the fact that when explaining the no additional harm proposition, the Supreme Court in Spokeo only cited to torts such as libel and slander per se—where the law has allowed recovery even without a specific showing of harm—and cases involving the “denial of access to publically [sic] available information.”29 Even though the Supreme Court did not indicate that “these two types of cases represent the only instances in which concrete injury results from a bare statutory violation,” all of the decisions that the drivers discussed involved either “disclosure of potentially harmful information or from the withholding of public information.”30

The drivers also argued that they have received injury merely from the Department allowing inaccurate information to remain in the database because it “expose[s] [them] to a material risk of harm

24 Id.
25 Owner-Operator, 879 F.3d at 343 (quoting Spokeo, 136 S.Ct. at 1549 (2016)).
26 Owner-Operator, 879 F.3d at 343.
27 Id.
28 Id.
29 Id.
30 Id.
contrary to their concrete statutory rights to accuracy.\textsuperscript{31} The Court again disagreed. The Court noted that “the drivers have identified no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.”\textsuperscript{32} Turning to the statutes themselves, the Court explained that Congress was concerned with the “dissemination of inaccurate information, not its mere existence in the Department's database.”\textsuperscript{33}

\textit{Holding:}

The Court held that “although the mere existence of inaccurate database information is not sufficient to confer Article III standing, the dissemination of that information to a potential employer is.”\textsuperscript{34} Because the Department’s counsel conceded at oral arguments that two of the driver’s information was disseminated to prospective employers, the Court held that these two drivers had suffered concrete harm and remanded their damages claims to the district court.\textsuperscript{35}

\textit{Impact:}

The Court, while upholding the idea that statutory violations require a separate showing of concrete harm, also explained that “it is possible that the mere existence of inaccurate information in a government database could cause concrete harm depending on how that information is to be used.”\textsuperscript{36} The court’s narrow holding means that other prospective plaintiffs might still seek damages from mere statutory violations so long as the information is used for sufficiently distinguishable purposes.

\textsuperscript{31} \textit{Id.} at 344.
\textsuperscript{32} \textit{Id.} at 344–45.
\textsuperscript{33} \textit{Id.} at 345.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 347.
PUBLI-INVERSIONES DE PUERTO RICO, INC. v. NATIONAL LABOR RELATIONS BOARD
886 F.3d 142 (D.C. Cir. 2018)

Synopsis:

Employer who had hired previous employees of a bankrupt newspaper company sought review of the National Labor Relations Board’s (NLRB) determination that the employer was a successor employer and that it was required to recognize and bargain with the employee’s union. The Court of Appeals for the District of Columbia upheld the NLRB’s determination.

Facts and Analysis:

Caribbean International News Corporation (Caribbean International) published a Spanish newspaper called El Vocero. Caribbean International employees, with the exception of certain positions, were part of a union. Caribbean International also paid other organizations to provide them with subcontracted workers called “inserters.” These inserters would physically place advertisements into copies of El Vocero.

In 2013, Caribbean International filed for bankruptcy. Publ-Inversiones Puerto Rico, Inc. (PI) bought all of Caribbean International’s assets at the public sale. PI then notified all of the former employees that they could apply for employment and explained all of the changes it was making. PI hired approximately 100 employees. Out of the 100 employees, 24 of them were “bargaining-unit members formerly employed by Caribbean

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38 Id. at 144.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
International."45 In total, 36 of the newly hired employees, including the 24 previous employees, “occupied jobs that were included in the previous bargaining unit.”46 PI also hired a group of part-time “inserters” which ranged from 27 to 51 at any given time.47

PI changed the “newspaper’s logo, font, color scheme, adopted a new printing method, and added the slogan ‘La verdad no tiene precio’ to its cover page.”48 It also began to publish other magazines, changed the “company’s organizational structure and reporting hierarchy[,] and changed the Board of Directors.”49

Less than a month later, the union sent PI a letter to schedule a meeting to begin negotiations on a new collective-bargaining agreement and to request information on the company’s structure and employees.50 After the company declined to do so, the union filed a charge with the NLRB alleging that PI “had violated the NLRA by refusing to bargain as a successor and by ‘blacklisting’ unit employees of the predecessor because of their support for the union.”51 Ultimately, the Board affirmed the findings and recommendations of the administrative judge that PI was a successor to Caribbean International and had violated the NLRA.52 PI filed the petition for review.53

In reviewing the Board’s decision, the Court explained it will endorse a “Board’s presumption of majority support for a union when three criteria of successorship are met.”54 These criteria include (1) a substantial continuity between the two enterprises, (2) “the presence within the bargaining unit of a majority of employees who had previously worked for the predecessor,” and (3) “the existence of an ongoing demand for collective bargaining on the part of the union.”55

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45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 145.
53 Id.
54 Id.
55 Id.
The Court found that the union’s continuing demand was undisputed.\textsuperscript{56} When looking at substantial continuity, the Court was unconvinced that mere superficial changes to PI’s business model were sufficient to defeat a finding of continuity.\textsuperscript{57}

Instead the court focused on the second criteria and whether the “hiring of regular part-time inserters, relatively unskilled workers who insert advertisements and magazines into the folds of the paper, expands the number of employees in the previous bargaining unit so that a majority are new employees.”\textsuperscript{58} If the inserters were combined with the 24 former employees, then the 24 employees would no longer constitute a majority and the second element would not be met.\textsuperscript{59} The Court recognized that the Board is not “required to determine the most appropriate unit, only an appropriate unit.”\textsuperscript{60} The Court noted that because the inserters worked under different conditions, were not covered under the company’s health plan, and earned lower wages, the Board could have found that an appropriate unit would exclude the inserters even if it were deciding the case initially.\textsuperscript{61} However, the Court explained that in a successorship case, prior bargaining history can be a factor that the Board weighs heavily.\textsuperscript{62} If a predecessor employer recognized a historical unit in the past, the Board has authority to find that unit appropriate.\textsuperscript{63} Therefore, “a historical unit can be rejected only if ‘truly inappropriate.’”\textsuperscript{64}

\begin{footnotesize}
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\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id. (citing Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227, 236 (D.C. Cir. 1996)).
\item \textsuperscript{61} Publi-Inversiones, 886 F.3d at 145.
\item \textsuperscript{62} Id. at 145–46.
\item \textsuperscript{63} Id. at 146.
\item \textsuperscript{64} Id.
\end{itemize}
\end{footnotesize}
Holding:

The Court denied PI's petition for review because the Board's decision that PI was the successor to Caribbean International was supported by substantial evidence.65

Impact:

The Court emphasized the importance that prior bargaining history can make regardless of whether it is an initial representation case or a successorship case. Where a predecessor employer has recognized a bargaining unit, a successor employer has little room to argue in that regard.

FELDMAN v. FEDERAL DEPOSIT INSURANCE CORPORATION
879 F.3d 347 (D.C. Cir. 2018)

Synopsis:

Bankruptcy trustee sought recovery of money related to alleged fraudulent transfers. Trustee filed proof of claims with the FDIC, but was denied as untimely. After filing a complaint with the district court, the FDIC moved to dismiss her complaint for the same reasons. The district court granted the motion to dismiss. Trustee appealed and the Court of Appeals for the District of Columbia reversed and remanded.

Facts and Analysis:

The FDIC, which is governed in part by the Financial Institution Reform, Recovery, and Enforcement Act, is required to mail out notice of deadline for filing claims against failed banks to any creditor on the bank's books.66 Claims are still allowed when filed late if the claimant can show that they did not receive notice in time

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65 Id.

to file a claim and the claim is filed in time to allow for payment of the claim.\textsuperscript{67}

Lynn Feldman, a Chapter 7 bankruptcy trustee, sought to recover about twelve million dollars in allegedly fraudulent transfers related to a “Ponzi” scheme.\textsuperscript{68} Eventually, six businesses, which were owned by the architect of the scheme, collapsed and the businesses filed for bankruptcy.\textsuperscript{69} Washington Mutual had provided mortgages to customers of the six businesses.\textsuperscript{70} Once it failed, the FDIC became a receiver and published notice of the receivership.\textsuperscript{71} It also set the bar date for creditor claims to December 30, 2008.\textsuperscript{72}

On October 8, 2008, Feldman sent a letter to David Schneider, president of Washington Mutual Home Loans Inc., seeking to avoid transfers of about $12 million by the six businesses.\textsuperscript{73} On August 3, 2009, after not receiving a response, she filed a proof of claim with the FDIC.\textsuperscript{74} The FDIC denied her claim as untimely because she filed her claim past the December 30, 2008 date.\textsuperscript{75} Feldman then filed a complaint in district court alleging that her October 8 letter “had advised Washington Mutual and the FDIC of her claim, she was entitled under FIRREA to receive, and had not received, mailed notice of the bar date.”\textsuperscript{76}

In their motion to dismiss, the FDIC “argued that the district court lacked subject matter jurisdiction because Feldman had filed her claim after the bar date and had failed to allege a lack of notice to invoke FIRREA’s late-filed claims exception.”\textsuperscript{77} They also stated that the Feldman did not appear on the Washington Mutual’s books as a creditor, that they had published notice of the bar date in newspapers on two separate occasions, and that Washington Mutual

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 350.
\textsuperscript{77} Id.
was the largest bank failure in U.S. history, which should have put Feldman on notice.\textsuperscript{78}

In response, Feldman argued that the district court does not lack subject matter jurisdiction merely because a claim is untimely, and “her lack of notice of the receivership was evident from her October 8 \textsuperscript{8} letter” because, given her experience as a trustee, she would have filed a claim with the FDIC had she known.\textsuperscript{79} The district court granted the FDIC’s motion to dismiss finding that “Feldman was not entitled to notice by mail because she was not a creditor shown on the institution’s books when the FDIC became a receiver” and “her October 8 letter could not have put the FDIC on notice of her claim” because it was sent to Schneider after he no longer worked for Washington Mutual and after it had ceased to exist.\textsuperscript{80} Additionally, the district court found that Feldman was not entitled to the late-filed claims exception because she “failed to allege that she lacked actual knowledge of the receivership or the date she learned of it. . . .”\textsuperscript{81} Furthermore, the court concluded that the FDIC’s publications provided Feldman with inquiry notice.\textsuperscript{82}

The Court of Appeals for the District of Columbia reviewed the dismissal of Feldman’s complaint \textit{de novo}.\textsuperscript{83} The Court began by recognizing that a court may not deny a motion to dismiss for lack of subject matter jurisdiction “merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant.”\textsuperscript{84} Instead, courts are given discretion to devise procedures that will “ferret out the facts pertinent to jurisdiction. . . .”\textsuperscript{85} Courts are required to afford plaintiffs with the “benefit of all reasonable inferences” and must not weigh the plausibility or credibility of their allegations.\textsuperscript{86}

On appeal, Feldman argues that if the district court had given her “the benefit of favorable inferences[,] . . . it would have found that

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 350–51.
\textsuperscript{81} \textit{Id.} at 351.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
she lacked notice of the FDIC’s receivership of Washington Mutual.”\textsuperscript{87} She contends that she was entitled to receive mailed notice of the bar date based on her October 8 letter.\textsuperscript{88} Additionally, she argues that the district court used her experience as a bankruptcy trustee against her instead of using it to conclude she must have not received notice.\textsuperscript{89}

The Court found that there was no evidentiary basis that the “October 8 letter was not duly processed upon receipt by the FDIC even if Washington Mutual ‘no longer existed.’”\textsuperscript{90} The court reasoned that it would be reasonable to infer that “the October 8 letter triggered the FDIC’s statutory obligation to mail her notice of the bar date or that she was eligible to file under the late filed exception.”\textsuperscript{91} Even though Feldman might have simply missed the date, the court recognized that it was premature to reach that conclusion at this state of the litigation.\textsuperscript{92}

The Court was unpersuaded by the FDIC’s argument that Feldman was not entitled to the late-filed exception merely because she received inquiry notice of the receivership.\textsuperscript{93} The Court noted that “appellate courts have been loath to conclude that inquiry notice as a result of publication of a receivership would suffice to bar claims under FIRREA.”\textsuperscript{94}

\begin{flushleft}
\textit{Holding:}
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The Court held that because “Feldman was entitled to the benefit of reasonable inferences” in her complaint, the district court was not warranted in dismissing her claims.\textsuperscript{95}

\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 351–52.
\textsuperscript{89} \textit{Id.} at 352.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at 353.
Impact:

The Court reinforced the reasoning of other appellate courts that notice through publication is not enough to bar claims under FIRREA. As it stands, the FDIC must likely wait until the summary judgment stage to show that plaintiffs had knowledge.

**Stolz v. Federal Communications Commission**  
882 F.3d 234 (D.C. Cir. 2018)

**Synopsis:**

Radio station owner sought review of a Federal Communications Commission’s (FCC) order granting a license transfer. Owner alleged that the transfer violated an FCC order because it would allow the transferee to acquire radio stations in excess of that allowed in the region. The FCC approved the transfer and the owner appealed. The Court of Appeals for the District of Columbia dismissed in part and denied in part.

**Facts and Analysis:**

The FCC has “exclusive authority to grant, deny, and approve the transfer of broadcast licenses to operate radio stations.”96 A broadcast station owner looking to transfer ownership to a third party must first seek approval from the FCC.97 To promote diversity, “the FCC limits the number of radio stations that a single entity can own within a local market.”98 In a market with 45 or more stations, a single entity can only operate 8 commercial radio stations.99 In a market with 30 to 44 stations, they can only operate up to 7 stations.100

In 2002, the FCC changed how it determined market size although it did not change the rules for the number of stations a

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97 Id.  
98 Id.  
99 Id.  
100 Id.
single entity can own.\textsuperscript{101} The FCC’s 2002 order contained a grandfather clause for existing license holders.\textsuperscript{102}

Edward Stolz held an FCC broadcast license for a radio station in Sacramento, California.\textsuperscript{103} In 1996, he signed a letter of intent to sell the radio station, including a transfer of the license, to Entercom.\textsuperscript{104} However, the deal fell through before any sale could occur.\textsuperscript{105} Entercom sued Stolz in California state court seeking specific performance.\textsuperscript{106} The court ordered Stolz to sign a license transfer application with the FCC.\textsuperscript{107}

In November 2002, Entercom filed the application with the FCC.\textsuperscript{108} However, instead of signing the application, Stolz asked the FCC to deny it.\textsuperscript{109} He “argued that the FCC’s methodology for measuring the size of the Sacramento local media market was flawed and that, if an accurate standard were employed, market concentration rules would bar Entercom from acquiring any more radio stations in that market.”\textsuperscript{110}

The FCC’s Media Bureau found that the transfer was permissible and granted the application.\textsuperscript{111} Within a month, the FCC adopted the 2002 Order.\textsuperscript{112} Had the order been in effect at the time, Entercom would not have been able to acquire Stolz’s radio station because it would have exceeded the number of allowed stations.\textsuperscript{113} Stolz petitioned the Media Bureau for reconsideration in light of this order.\textsuperscript{114} However, the Media Bureau still denied reconsideration.\textsuperscript{115} After seeking review by the full FCC, the FCC affirmed the Media

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id. at 236–37.}
\item \textit{Id. at 237.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
Bureau’s decision ten years later.\textsuperscript{116} Stolz filed a petition for reconsideration because it alleged that the Court’s intervening decision in Kidd Communications v. FCC, 427 F.3d 1 (D.C. Cir. 2005) made the transfer unlawful.\textsuperscript{117} The FCC denied the petition stating that Stolz should have raised this argument prior to the final decision.\textsuperscript{118} Stolz then sought review by the Court of Appeals.\textsuperscript{119}

Stolz’s first argued “that the FCC should have applied the 2002 Order’s new local-market definition to Entercom’s license transfer application because this case was still pending within the administrative process at the time the 2002 Order took effect.”\textsuperscript{120} However, the Court found that this argument was moot because Entercom had relinquished its license for one of its preexisting radio stations.\textsuperscript{121} Therefore, Entercom would be allowed to acquire the Stolz radio station even under the 2002 order.\textsuperscript{122}

Stolz also argued that the transfer was invalid under its holding in Kidd Communications v. FCC, 427 F.3d 1 (D.C. Cir. 2005).\textsuperscript{123} Although it found that Stolz’s reading of Kidd was incorrect, it took bigger issue with the FCC’s decision to deny reconsideration and state that Stolz had forfeited argument under Kidd because he had not presented it to the FCC through some supplemental filing.\textsuperscript{124} The Court found that there was no FCC rule that allowed or even required a filing after closure of the pleading cycle.\textsuperscript{125} Even worse, the FCC’s regulations explicitly state that a petition for reconsideration should be used to present any changes in events or circumstances.\textsuperscript{126} Under FCC rules, Stolz was correct in waiting until after the decision to file a petition for reconsideration.\textsuperscript{127}

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 237–38.
\textsuperscript{118} Id. at 238.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 239.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
**Holding:**

The Court held that Stolz’s challenge based on the 2002 order is moot and his *Kidd* argument lacked merit.\(^{128}\) Therefore, it dismissed in part and denied in part.\(^ {129}\)

**Impact:**

The Court’s opinion is rather constricted. Finding that Stolz’s argument was moot, it did not delve into the application of the grandfather clause to this case. Additionally, *Kidd* was easily distinguishable. The biggest impact likely comes from the Court’s harsh words to the FCC. It critiqued it’s ten year wait to file a decision, which only contained four pages. It also critiqued its decision to deny Stolz’s *Kidd* solely because he did not file supplemental briefing on that argument when the rules clearly provide otherwise. Moving forward, it is likely that the FCC will be more mindful of its process.

**AIRMOTIVE ENGINEERING CORPORATION v. FEDERAL AVIATION ADMINISTRATION**

**882 F.3d 1157 (D.C. Cir. 2018)**

**Synopsis:**

A manufacturer sought review of the Federal Aviation Administration’s (FAA) “airworthiness directive,” which mandated removal of some of the manufacturer’s parts.\(^ {130}\) The manufacturer challenged the methodology for assessing risk and whether there was substantial evidence to support the finding of an unsafe condition.\(^ {131}\) The Court of Appeals for the District of Columbia held that substantial evidence supported the FAA’s decision.\(^ {132}\)

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\(^{128}\) *Id.* at 240.

\(^{129}\) *Id.*

\(^{130}\) *Airmotive Eng’g Corp. v. Fed. Aviation Admin.*, 882 F.3d 1157, 1158 (D.C. Cir. 2018)

\(^{131}\) *Id.*

\(^{132}\) *Id.*
Facts and Analysis:

The FAA is tasked with promulgating safety standards for aircraft and component parts. To that end, it must ensure that aircraft parts manufacturers obtain a “parts manufacturer approval” that indicate that it is safe for operation. When a part is deemed to have an unsafe condition, the FAA may issue and airworthiness directive. These directives “can require inspections, impose conditions and limitations, and require actions to resolve an unsafe condition.”

Airmotive Engineering Corporation and Engine Components International, Inc. (Airmotive) manufacture replacement cylinder assemblies used in aircrafts. In August 2013, “the FAA published a notice of proposed rulemaking for an airworthiness directive regarding the ‘unsafe condition’ created by Airmotive cylinder assemblies.” This proposal would “require initial and repetitive inspections, replacement of cracked cylinders, replacement after reduced times in service[,]” and a prohibition of future installations. After appointing an independent team of agency experts, the FAA revised its proposal.

One year later, the FAA promulgated the airworthiness directive. The FAA explained that the cylinder assemblies presented an unsafe condition because they fail at least 32 times more often than the original manufacturer. It also found that failure could lead to “in-flight fire and loss of aircraft control.”

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133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
141 Id. at 1159.
142 Id.
143 Id.
directive required removal of the cylinder assemblies and prohibited future installation. Airmotive sought review of the Final Rule.

The Court of Appeals for the District of Columbia began its review outlining the standard of review. The Court explained that under the Administrative Procedure Act, courts “must uphold agency action unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’” The FAA’s factual findings are conclusive when supported by substantial evidence.

The Court noted that the “FAA used the risk-measurement methodology provided in FAA Order 8040.4A to assess the safety . . .” of the cylinders. Using this methodology, it determined the severity and likelihood of risk. Under the severity analysis, the FAA found that cylinder failure lead to “(1) substantial reduction in engine horsepower of about 20%; (2) increased engine vibration, which can cause stress on aircraft components and in-flight fires; and (3) in twin-engine planes, asymmetric drag.” The FAA concluded that the cylinder assemblies presented the second highest risk—a “hazardous” risk. The Court found that this conclusion was supported by substantial evidence.

The Court then turned to Airmotive’s evidentiary challenges to the “hazardous” determination. The Court noted that Airmotive did not challenge “that a 20% reduction in engine power may result from cylinder failure.” Instead, Airmotive’s argument was “that the FAA has not documented how a 20% reduction in engine power creates a ‘hazardous’ condition when other FAA risk guidelines define partial power loss as a ‘minor’ event.” The Court explained

\[144\] Id.
\[145\] Id.
\[146\] Id.
\[147\] Id.
\[148\] Id.
\[149\] Id.
\[150\] Id. at 1160.
\[151\] Id.
\[152\] Id.
\[153\] Id. at 1161.
\[154\] Id.
\[155\] Id.
that the FAA has many tools to “carry out its statutory mandate . . .” and therefore, a condition can be characterized as minor in one context, but hazardous in another.\textsuperscript{156} Additionally, the Court found that the FAA guidelines in fact described a 20\% reduction in engine power, which translates into a 40\% reduction in airplane rate of climb, as a hazardous condition.\textsuperscript{157}

Next, the Court turned to Airmotive’s challenge that there lacked sufficient evidence to find that the cylinders would cause in-flight fires.\textsuperscript{158} The Court explained that while there is no evidence that Airmotive’s specific cylinders had caught fire, the FAA had already confirmed “that fires have resulted from cylinder head separation[,] . . . and Airmotive point[ed] to no basis for questioning the legitimacy of considering general cylinder information in concluding . . . that [Airmotive’s] cylinders can fail in the same way . . . .”\textsuperscript{159}

Turning to the “likelihood” analysis, the Court noted that based on the quantitative and qualitative data it had, the FAA concluded that the cylinders presented a “‘remote’ risk of failure.”\textsuperscript{160} This finding, when combined with the severity analysis above “resulted in a risk level of ‘unacceptable.’”\textsuperscript{161}

Airmotive also challenged the methodology that the FAA implemented when reaching its conclusions.\textsuperscript{162} However, the Court pointed out that Airmotive challenged this methodology “without explaining why [using it] is suspect.”\textsuperscript{163} Therefore, because the FAA’s calculations were based on a proper application of the methodology, and was supported by substantial evidence, Airmotive failed to show why the case should be remanded for a new risk assessment.\textsuperscript{164}

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
Next the Court turned to Airmotive’s challenge to the FAA’s comparative approach.\textsuperscript{165} It argued that the FAA did not have substantial evidence to support its directive without specific evidence on Airmotive cylinders.\textsuperscript{166} However, again the Court found that because “FAA regulations require that it determine whether the unsafe condition ‘is likely to exist or develop in other products of the same type design[,]’” the FAA reasonably relied on comparative data.\textsuperscript{167}

Last, Airmotive argued “that the FAA ignored public comment stating that the risks posed by replacing faulty cylinders are greater than those posed by faulty cylinders themselves.”\textsuperscript{168} However, the Court found that the presumption that maintenance will be performed correctly by experience personnel was not rebutted.\textsuperscript{169} Additionally, the Court pointed out that the FAA had not observed any negative side effects of replacing the cylinders.\textsuperscript{170}

\textit{Holding:}

The Court found that the “FAA gathered the record evidence over a period of years, with multiple rounds of public comment, on the safety risks posed by [Airmotive] cylinders.”\textsuperscript{171} It further found that it’s unsafe condition determination was supported by substantial evidence and based upon a proper application of the FAA 8040.4A methodology.\textsuperscript{172} Therefore, the Court denied Airmotive’s petition for review.\textsuperscript{173}

\textsuperscript{165} Id. at 1162.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 1162–63
\textsuperscript{173} Id. at 1163.
Impact:

Like with other APA cases, the Court showed great deference to the FAA’s factual findings. Absent a showing of a true lack of substantial evidence supporting the FAA’s factual findings, it is unlikely that a mere challenge to the sufficiency of the evidence will lead to a grant of petition for review.

**Northwestern Corporation v. Federal Energy Regulatory Commission**

884 F.3d 1176 (D.C. Cir. 2018)

Synopsis:

Electric utility sought review of Federal Energy Regulatory Commission’s (FERC) order requiring it to modify its proposed rate and to refund customers the difference because the new rate was not just and reasonable. The Court of Appeals for the District of Columbia denied petition for review.

Facts and Analysis:

“The Federal Energy Regulatory Commission requires utilities that transmit electricity to supply extra power generation in order to balance moment-to-moment variations in demand for electricity.” 174 As demand for electricity changes, utilities must either add power to or withdraw power from the grid. 175 This process is called a regulation service. 176 Utilities are allowed to recover the costs associated with the regulation service “by charging them to customers, as long as the utilities charge rates that are ‘just and reasonable.’” 177

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175 Id.
176 Id.
177 Id. at 1179.
NorthWestern is an electric utility that is required to provide regulation-service.\(^{178}\) Prior to 2011, NorthWestern purchased regulation services from other utilities because it was unable to do so on its own.\(^{179}\) With FERC’s approval, NorthWestern was able to pass on the cost of the purchased regulation service to customers.\(^{180}\) Eventually, NorthWestern began to provide regulation services on its own and sought to modify the rate it charged customers.\(^{181}\) “FERC determined that NorthWestern’s proposed rate was not just and reasonable[,]” modified the proposed rate, and ordered NorthWestern to refund customers the difference.\(^{182}\) NorthWestern then petitioned for review of FERC’s decision arguing that it was arbitrary and capricious.\(^{183}\)

The Court of Appeals for the District of Columbia began its review with a discussion on the “just and reasonable” rate requirement.\(^{184}\) As the Court explained, “[a] just and reasonable rate must be fair both to the utility and to its customers: It ‘should be based on the costs of providing service to the utility’s customers, plus a just and fair return on equity.’”\(^{185}\) When NorthWestern began providing its own regulation services, it filed the new proposed rate for FERC’s approval pursuant to Section 205 of the Federal Power Act.\(^{186}\) This “place[d] the burden on [NorthWestern] to show that its proposed revised rate [was] just and reasonable.”\(^{187}\)

“The administrative law judge assigned to Northwestern’s case concluded that several aspects of the rate were not just and reasonable” and reduced the proposed rate.\(^ {188}\) FERC affirmed the

\(^{178}\) Id.

\(^{179}\) Id.

\(^{180}\) Id.

\(^{181}\) Id.

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) Id. (citing Alabama Electric Cooperative, Inc. v. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982)).

\(^{186}\) Nw. Corp., 884 F.3d at 1180.

\(^{187}\) Id.

\(^{188}\) Id. at 1181. NorthWestern’s revised proposed rate included: “(1) [charging] customers for regulation service by multiplying the [new station’s] revenue requirement by the cost-calculation ratio of .57; (2) [charging] customers
AJL’s decision and ordered NorthWestern to refund its customers the difference between the proposed rate and the new rate.189

Turning to NorthWestern’s contentions, the Court first looked at NorthWestern’s argument that “FERC unreasonably reduced the numerator of NorthWestern’s proposed cost-calculation.”190 FERC determined that only 19 megawatts were needed to serve the customers as opposed to the 60 megawatts that NorthWestern had calculated.191 According to NorthWestern, by reducing the needed megawatts from 60 to 19, it failed to account for “regulation-down” capacity.192 “Regulation down’, a component of regulation service, is the capacity associated with operating a generator at a set point, a steady point from which the utility can quickly ramp down if demand for electricity suddenly drops.”193 NorthWestern operates its “generators at a set point to reserve capacity for regulation down” and sought to recover the costs associated with doing so.194 The AJL found that NorthWestern had not shown how much regulation down capacity it needed to reserve and had not explained why it could not recover costs some other way.195 FERC added that “[c]ustomers should not pay for what is essentially a backup service if the utility can recover its costs by using or selling the energy it generates as a by-product.”196 Although FERC noted that NorthWestern could prove that it would be just and reasonable to charge customers the additional costs under specific circumstances, NorthWestern had failed to meet its burden under Section 205.197

for fuel costs, but [crediting] customers for any revenue the [new station] might bring in from off-system sales and other non-regulation-service sales; (3) [charging] customers for the regulation service that NorthWestern purchased for three months during [a] 2012 outage; and (4) [charging] customers for any regulation service that NorthWestern might need to purchase during future outages.” Id.

189 Id.
190 Id. at 1181–82.
191 Id.
192 Id.
193 Id. at 1182.
194 Id.
195 Id.
196 Id.
197 Id.
NorthWestern argued that FERC lacked authority to reduce the megawatts from 60 to 19 under Section 205 because it must act under Section 206 to modify an existing rate.\textsuperscript{198} Because the 60 megawatts were already previously approved when it was passing on the cost of purchasing the regulation-service, NorthWestern argued that FERC applied the incorrect standard—one that places the burden on NorthWestern and not FERC.\textsuperscript{199} However, the Court explained “[t]he 60–megawatt amount was never ‘embedded’ in any rate formula that FERC previously approved because it was never a component of a traditional cost-of-service rate.”\textsuperscript{200} Instead, it was passing down the cost of purchasing the regulation-service.\textsuperscript{201} Changing the status quo, the Court explained, required NorthWestern to bear the burden under Section 205.\textsuperscript{202} Additionally, the Court explained that it was not FERC’s burden to identify other customers that NorthWestern could use to bear the costs of reserving regulation down’s capacity.\textsuperscript{203} Instead, it was NorthWestern’s burden to show that there were no such customers.\textsuperscript{204}

Second, the Court looked at NorthWestern’s contention “that FERC arbitrarily increased the denominator of NorthWestern’s proposed cost-calculation ration from 105 megawatts to 150 megawatts.\textsuperscript{205} According to NorthWestern, the denominator would have been 105 megawatts because that was the amount it planned to provide.\textsuperscript{206} However, the Court pointed out that under FERC precedent, this number should reflect the amount that NorthWestern had the capacity to produce.\textsuperscript{207} Because the station had three generators each capable of producing 50 megawatts, the Court noted that 150 megawatts was the correct number for the denominator.\textsuperscript{208}

\textsuperscript{198} Id.
\textsuperscript{199} Id. at 1182–83.
\textsuperscript{200} Id. at 1183.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 1184.
\textsuperscript{208} Id.
Third, NorthWestern argued that “FERC wrongly rejected [its] proposal to recover fuel costs under Schedule 3.”\textsuperscript{209} FERC, adopting the AJL’s reasoning, explained that it ordinarily requires utilities to recover fuel costs under Section 4 and because NorthWestern had not made a sufficient showing that it would not be able to recover these costs under Section 4, it denied these costs.\textsuperscript{210} The Court found this explanation reasonable.\textsuperscript{211}

Fourth, NorthWestern argued that FERC acted arbitrarily by requiring NorthWestern to make a separate Section 205 filing (1) to recover costs associated with the 2012 outage, and (2) prior to “charging customers for any regulation service that NorthWestern might need to purchase during future outages.”\textsuperscript{212} The Court found that FERC’s justification for needing separate data for the 2012 outage and using a case-by-case analysis for future contracts was reasonable.\textsuperscript{213}

NorthWestern also challenged FERC’s decision to order a refund.\textsuperscript{214} According to NorthWestern, “FERC's refund decision resulted from faulty reasoning and an inadequate assessment of equitable factors.”\textsuperscript{215} Based on prior FERC practice, FERC had concluded that NorthWestern had over-collected from customers and this practice fell in line with the types of cases where FERC orders a refund.\textsuperscript{216} The Court found this assessment reasonable and found no reason why FERC should depart from its normal practice.\textsuperscript{217}

\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 1185.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
Holding:

The Court held that “FERC’s decision on NorthWestern’s proposed rate was reasonable and reasonably explained” and denied NorthWestern’s petition for review.218

Impact:

This case demonstrates the great deference that courts give to regulatory agencies. Although NorthWestern’s arguments might have been reasonable by themselves, the standard of review guided the Court’s entire opinion. This made NorthWestern’s challenges unpersuasive to the Court.

Kansas Corporation Commission v. Federal Energy Regulatory Commission
881 F.3d 924 (D.C. Cir. 2018)

Synopsis:

Regulatory body that oversees public utilities sought review of a Federal Energy Regulatory Commission (FERC) order setting future formula rates. The regulatory body alleged that FERC cannot determine whether these future rates, which are not yet attached to any specific entity, are just and reasonable. The Court of Appeals for the District of Columbia held that the regulatory body lacked standing and denied the petition for review.

Facts and Analysis:

FERC is tasked with regulating public utility rates and must ensure that these rates are just and reasonable.219 To do so, utilities are required to file a schedule of rates and charges with FERC.220

218 Id. at 1184.
220 Id.
FERC has the power to adjust any rates that are not just and reasonable.221

Transource Kansas, a utility company, sought to bid on a regional transmission project.222 To be able to bid competitively, it needed to know what the formula rate would be because other utility companies already had a rate in place and it would be impractical to wait for FERC approval.223 When it filed its schedule of rates with FERC, it also asked that FERC authorize any future affiliates to use the same rate because they would use the same data.224 Kansas Corporation Commission, a regulatory body authorized to regulate rates for Kansas (KCC) consumers, objected.225 "It argued that preapproving a formula rate for a future affiliate violated FERC’s section 205 mandate to ensure that rates are just and reasonable."226 However, FERC granted Transource Kansas’ request because "future Transource affiliates will be "similarly situated with respect to risk and capital requirements."227 KCC filed a petition for review of FERC’s order.228

The Court began its analysis with standing.229 To satisfy the requirements for standing, “a party must have (1) an injury in fact, (2) fairly traceable to the challenged agency action, (3) that will likely be redressed by a favorable decision.”230 “An injury in fact is an ‘invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.’”231 The Court explained that KCC’s injury is not obvious because it is not the object of the order.232 Although KCC states that FERC’s decision renders it an “aggrieved party[,]” the

221 Id.
222 Id. at 927.
223 Id.
224 Id.
225 Id. at 928.
226 Id.
227 Id.
228 Id.
229 Id. at 929.
230 Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).
231 Kansas Corp., 881 F.3d at 929 (internal quotes omitted).
232 Id.
Court noted that KCC must still “affirmatively demonstrate how it is adversely affected by FERC’s orders.”233

KCC also “asserts that FERC’s contravention of the Federal Power act is sufficient to support its standing.”234 However, as the Court explained, “[a] party claiming ‘only harm to his . . . interest in [the] proper application of the . . . laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large,’ has no concrete and particularized injury.”235 Without showing an actual injury, KCC’s alleged harm is merely a “generalized interest in the proper application of law.”236

KCC’s contention at oral argument that it its future burden of having to challenge the formula rates constitutes harm were also unpersuasive to the Court.237 KCC undermined its own argument by alleging that FERC could not determine whether formula rates for future potential utilities were just and reasonable at some unknown time in the future for some unknown entities.238 For these same reasons, KCC’s harm was not imminent and instead, was merely conjectural or hypothetical.239 The Court noted that KCC would not suffer any harm unless a chain of events first occurred.240 Additionally, KCC had not provided evidence that there was a substantial possibility that all of these steps would occur.241 More importantly, the formula rates could turn out to be just and reasonable at the time that they are imposed.242

233 Id.
234 Id.
235 Id. at 929–30 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).
236 Id. at 930.
237 Kansas Corp., 881 F.3d at 930.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id. at 930–31.
Holding:

The Court held that because KCC did not show a concrete, particularized, actual and imminent harm, it lacked standing. Therefore, the Court dismissed KCC’s petition for review.\textsuperscript{243}

Impact:

The Court expanded on the idea that mere statutory violations or an interest in the proper application of the law will not confer standing. Plaintiffs must still show how these violations caused real harm to them.

\textsuperscript{243} Id. at 931.