ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1144

In the United States Court of Appeals for the District of Columbia Circuit

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MATSON NAVIGATION COMPANY, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; MARITIME ADMINISTRATION,

Respondents,

and

APL MARINE SERVICES, LTD.; APL MARITIME, LTD.,

Intervenors for Respondents.

On Petition for Review of Decisions and Orders of the Maritime Administration

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BRIEF OF INTERVENORS APL MARINE SERVICES, LTD., AND APL MARITIME, LTD.

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January 19, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing in the proceedings below and in this Court are listed in the Opening Brief for Petitioner Matson Navigation Company, Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, intervenors APL Marine Services, Ltd., and APL Maritime, Ltd., make the following disclosures. APL Marine Services, Ltd., and APL Maritime, Ltd., are privately held corporations organized under the laws of Delaware. Both entities are wholly owned subsidiaries of Automar (Bermuda) Ltd., a Bermuda corporation. Automar (Bermuda) Ltd. is a wholly owned subsidiary of NOL Liner (Pte.) Ltd., a Singapore corporation. NOL Liner (Pte.) Ltd. is a subsidiary of Neptune Orient Lines Limited, a Singapore corporation. Neptune Orient Lines Limited is a wholly owned subsidiary of CMA CGM S.A., a privately owned French corporation. No publicly held company has a 10% or greater ownership interest in either APL Marine Services, Ltd., or APL Maritime, Ltd.

B. Rulings Under Review

References to the rulings at issue appear in Matson's brief.

C. Related cases

Intervenors APL Marine Services, Ltd., and APL Maritime, Ltd., are not aware of any related case pending in this or any other court.

January 19, 2018 /s/ William M. Jay

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Gov't Br.	Brief for Respondents
MARAD	Maritime Administration
Matson	Matson Navigation Company, Inc. (Petitioner)
Matson Br.	Opening Brief for Petitioner Matson Navigation Company, Inc.
MSP	Maritime Security Program
Pet.	Petition for Review

INTRODUCTION

Through an initiative known as the Maritime Security Program (MSP), Congress has authorized the Federal Government to maintain a fleet of privately owned, militarily useful vessels that can both meet national security needs and strengthen the United States' presence in international commercial shipping. 46 U.S.C. § 53102(a). Program participants agree to make their ships available to the military during a time of war or other national emergency. *Id.* § 53107. In exchange, they receive an annual subsidy for each vessel enrolled in the MSP fleet. *Id.* § 53106(a).

The present dispute arises out of the Federal Government's decision to allow intervenors APL Marine Services and APL Maritime (collectively, APL) to replace two large MSP vessels in the Middle East with two smaller vessels in the Pacific. In approving APL's replacement applications, the U.S. Maritime Administration (MARAD)—which oversees the MSP—concluded that APL's chosen vessels met all the statutory criteria for the MSP. As relevant here, the agency determined that APL's replacement vessels were "commercially viable," and found that they would be "operated … in providing transportation in foreign commerce." *Id.* § 53102(b)(2), (b)(4)(B).

Petitioner Matson Navigation Company challenged MARAD's replacement decisions, and it now asks this Court to review MARAD's denial of its

administrative appeal. But this Court lacks jurisdiction over Matson's petition for review. Matson premises jurisdiction on the Hobbs Act, which authorizes federal courts of appeals to review "final orders of … the Secretary of Transportation issued pursuant to [46 U.S.C. §] 50501." 28 U.S.C. § 2342(3)(A). That provision does not support jurisdiction because Section 50501 governs whether a corporation is deemed a U.S. citizen for purposes of certain federal maritime programs, and the decision under review did not involve any questions of corporate citizenship.

In any event, Matson's claims also fail on the merits. In the proceedings below, Matson relied primarily on the contention that APL's carriage of goods from the mainland United States to the U.S. territory of Guam violated the MSP statute's requirement that a vessel "operate[] … in providing transportation in foreign commerce" in order to be eligible for the MSP fleet. 46 U.S.C. § 53102(b)(2). But Matson misreads the statute: Section 53102(b)(2) requires only that a vessel engage in *some* foreign commerce—not that it engage *exclusively* in foreign commerce. That standard is easily satisfied here.

Perhaps recognizing as much, Matson now seeks to inject a new issue into the case by raising claims regarding APL's service to Saipan (an island in the Commonwealth of the Northern Mariana Islands). But Matson forfeited these arguments by failing to raise them with MARAD. Moreover, Matson's new Saipan-based arguments are off-point because they address an issue (APL's

compliance with MSP operating agreements) that is unrelated to the issue decided by MARAD (the *eligibility* of APL's replacement vessels to participate in MSP). There is thus no reason for the Court to address difficult and novel questions about the charter governing the Northern Marianas' political status in this case, as those questions are not properly presented.

Matson also disputes whether MARAD correctly determined that APL's vessels were "commercially viable," as required by the MSP statute. 46 U.S.C. § 53102(b)(4)(B). But as APL's replacement applications made clear, there were strong commercial (and military) justifications for APL to shift focus away from the Middle East to the Pacific, where the United States was growing its military presence. Matson's efforts to reconceive the "commercial viability" requirement are unavailing: the standard that Matson invents, which would require MSP participants to show that their vessels do not need federal subsidies to thrive under a U.S. flag, is unmoored from the statute's purpose of bolstering the size and health of the nation's merchant marine.

The Court accordingly should dismiss or deny Matson's petition for review.

STATEMENT OF JURISDICTION

This Court does not have subject-matter jurisdiction because the Hobbs Act provision on which Matson relies does not authorize the Court to review the agency determinations at issue here. *See* pp. 17-19, *infra*; Gov't Br. 20-26.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum filed with Matson's opening brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background.

The MSP is the latest iteration of a longstanding federal effort to maintain a fleet of privately owned, militarily useful vessels that can assist the United States in times of war or other emergencies. Congress created the current program in 1996 to address "a state of crisis" in the merchant marine fleet. H.R. Rep. No. 104-229, at 9-10 (1995). At the time, legislators noted, the number of U.S.-flag ships engaged in foreign commerce had been shrinking dramatically due to the "higher operating costs" faced by U.S. carriers (who, unlike foreign-flag carriers, bear the expense of complying with federal law). *Id.* at 11. Members of Congress recognized that "[w]ithout remedial action" to provide "adequate financial incentives" for vessels to register under the U.S. flag, there "simply [would] be no U.S. fleet to conduct foreign commerce, and the United States [would] have to rely on foreign-flag shipping" not only for "all imports and exports," but also for cargo needed to support "future military operations." *Id.* at 9-11.

Congress thus enacted the Maritime Security Act of 1996, Pub. L. No. 104-239, 110 Stat. 3118, establishing the MSP to financially support and thereby maintain an active fleet of U.S.-flag vessels. The program offers financial

assistance to participating vessel owners and operators in exchange for agreeing to make their ships available to the military during a time of war or national emergency. 46 U.S.C. §§ 53106, 53107. Congress has twice amended and reauthorized the program—once in 2003, and again in 2013—and it is now authorized through 2025. *See* Maritime Security Act of 2003, Pub. L. No. 108-136, §§ 3531-3537, 117 Stat. 1392, 1803-20; National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 3508, 126 Stat. 1632, 2223.[1]

An MSP vessel must satisfy eligibility criteria set forth in 46 U.S.C. § 53102. For example, the vessel must be "a United States-documented vessel" (or on track to become one), and its owners and operators must satisfy certain U.S. citizenship requirements. 46 U.S.C. § 53102(b)(5), (c). The vessel must also be self-propelled, below a certain age, and "suitable for use by the United States for national defense or military purposes in time of war or national emergency." *Id.* § 53102(b)(3), (b)(4)(A). Most relevant here, the vessel must be (1) "operated (or in the case of a vessel to be constructed, will be operated) in providing

[1] Congress recently amended the MSP again in the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 3503, 131 Stat. 1283, 1911 (2017). MARAD also recently promulgated new MSP regulations to implement the 2013 Authorization Act. *See* Maritime Security Program, 82 Fed. Reg. 56,895 (Dec. 1, 2017). These amendments are not relevant to Matson's petition.

transportation in foreign commerce," and (2) "commercially viable, as determined by [MARAD]." *Id.* § 53102(b)(2), (b)(4)(B).[2]

Once MARAD selects an eligible vessel for the MSP (and the Department of Defense finds it suitable for military use), the vessel's owner or operator must enter into an operating agreement with the government spelling out its rights and obligations. 46 U.S.C. §§ 53103-53106. As relevant here, the agreements specify that participating vessels must "operate[] exclusively in the foreign commerce *or* in mixed foreign commerce and domestic trade allowed under a registry endorsement." *Id.* § 53105(a)(1) (emphasis added).[3] In other words, MSP vessels do *not* have to operate exclusively in foreign commerce: the agreements contemplate that vessels may also engage in domestic (or "coastwise") trade authorized by a "registry endorsement." A registry endorsement, which is available only to U.S.-flag vessels with U.S. crews, allows a ship to engage in domestic trade with certain U.S. territories, including Guam, without needing to satisfy Jones Act requirements, such as that vessels participating in coastwise trade

[2] The statute refers to the Secretary of Transportation in setting MSP requirements. Because the Secretary has delegated her authority to MARAD, *see* 49 C.F.R. § 1.93(a), this brief refers to MARAD throughout.

[3] The MSP regulations follow this structure, defining "[f]oreign [c]ommerce" as service in "foreign trade *or* in mixed foreign and domestic trade allowed under a registry endorsement." 46 C.F.R. § 296.2 (emphasis added).

be built in the United States. *See* 46 U.S.C. §§ 12103(a)(3), 12111(a)-(b), 12112, 55102(b); 46 C.F.R. § 67.17(a).[4]

The contractual requirements that operating agreements impose are distinct from the statutory eligibility requirements for joining the MSP, and vessel operators do not forfeit MSP eligibility by violating their operating agreements. Rather, the statute specifies different remedies for different forms of noncompliance. For example, the statute restricts MSP payments "during a period" in which an owner/operator engages in "noncontiguous domestic trade"—defined as trade between the continental United States and Hawaii, Puerto Rico, or most of Alaska. 46 U.S.C. § 53106(e).[5] For violations of other coastwise-trade restrictions, the statute provides for only "a pro rata reduction in payment for each

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[4] As the government notes (at 37), it is Matson's position that APL's registry endorsement does not apply to Saipan. But controlling Coast Guard regulations include a provision that allows vessels to engage in trade not subject to coastwise restrictions. 46 C.F.R. § 67.17(a); *see also* Vessel Documentation, 69 Fed. Reg. 5390, 5394 (Feb. 4, 2004) ("Congress entrusted the Coast Guard with the responsibility … to administer the vessel documentation laws."). Thus, the registry endorsement authorizes trade with Saipan except to the extent—and *only* to the extent—that particular trade violates the coastwise laws.

[5] The statute provides an exemption for U.S.-citizen carriers like Matson, which may participate in the MSP even while engaging in coastwise trade with Hawaii, Alaska, and Puerto Rico. 46 U.S.C. § 53106(e)(2); *see also* A63 (noting that Matson has an "important competitive benefit … relative to APL" because "[t]he entire trans-Pacific market, including the important Hawaii market, is open to Matson, but APL is explicitly barred from the Hawaii market"). Matson ignores this (and other) competitive advantages when it laments that APL's receipt of MSP subsidies is "unfair" and supposedly "distort[s]" the market. *See* Matson Br. 4, 17, 21, 34 49.

day less than 320 in a fiscal year" that a vessel is not operated in foreign trade or permissible mixed foreign and domestic trade. 46 U.S.C. § 53106(d)(3); 46 C.F.R. § 296.41(b)(1)(i). MARAD also has authority to terminate an operating agreement for a material breach, but only after giving an MSP participant notice and an opportunity to cure. 46 U.S.C. § 53104(c).

MSP participants have a statutory right to "replace a vessel under an operating agreement with another vessel" provided the new vessel satisfies Section 53102(b)'s eligibility requirements and MARAD (in conjunction with the Department of Defense) approves the transfer. 46 U.S.C. § 53105(f). This case involves two transfer approvals under Section 53105(f).

II. APL's Replacement Applications.

APL (together with its affiliates) is one of the world's largest ocean carriers, with an international shipping network that reaches over 70 countries. *See* APL, COMPANY OVERVIEW, http://bit.ly/2BGloSM. APL has participated in the United States' merchant marine since its earliest days. APL HISTORY, p. 48, http://bit.ly/2zynNN8. Currently, APL has nine vessels enrolled in the MSP. A3, A21-A22.

The present dispute stems from APL's decision to replace two of those vessels after recent changes in the market for global shipping services. In the mid-2000s, during the United States' military buildup in Iraq and Afghanistan, APL

dispatched several of its MSP vessels to the Middle East. A2. As those conflicts waned, demand for U.S.-flag service fell dramatically, and, by 2014, APL determined that its U.S.-flag services there were no longer viable—even with MSP support. *Id.* APL decided to reorganize its fleet and redirect capacity to areas with greater need. A3-A4.

In December 2014, APL sought MARAD's permission to transfer two of its MSP operating agreements from larger vessels in the Middle East to two smaller vessels. A1-A6. In its application, APL detailed its plan to assign one of the replacement vessels to a biweekly service between Guam and the Japanese port of Yokohama, with the ultimate goal of adding a second vessel in order to provide weekly service. A6. This new Guam service, the application explained, would carry (1) "U.S. mainland cargo moving to Guam," (2) "U.S. mainland cargo moving beyond Guam [to] Palau, Micronesia, the Marshall Islands and New Guinea," (3) "Asia cargo moving to Guam" by way of Japan, and (4) "Guam export cargo (principally to Asia)." *Id.* As APL noted, this service would inject much-needed competition into the Guam shipping market: while Guam had traditionally been served by two U.S. carriers, Matson had since secured a monopoly on shipping between Guam and the mainland. A5. APL's letter also explained that its new service would provide important benefits to the U.S. military, which was in the process of expanding its operations in Guam. *Id.*

In January 2015, MARAD approved the basic outlines of APL's request. A7-A8. APL then proceeded to identify specific replacement vessels, submitting follow-on applications to MARAD.

The first application, dated September 2015, sought to transfer Operating Agreement No. MA/MSP-54 to a vessel with a registry endorsement called the *APL Guam*. A17-20; *see* A14. On October 21, 2015, MARAD granted the application, finding, among other things, that the vessel satisfied Section 53102(b)'s "foreign commerce" and "commercial viability" requirements. A25, A28-A29, A37-A38, A44. In reaching those determinations, MARAD noted that the vessel would operate as part of APL's "established world-wide services," and that APL—with its long track record of operating nine MSP vessels—had "demonstrated to MARAD's satisfaction" that it had "the resources and expertise" to carry out its MSP responsibilities. A10, A25, A28, A37, A44. With the approval in place, the *APL Guam* entered into service in late 2015, calling on Guam and nearby Saipan as part of a biweekly route from Asia. A49.

APL filed its second application in October 2016, seeking permission to transfer Operating Agreement No. MA/MSP-57 to a vessel with a registry endorsement called the *APL Saipan* that would operate along the same route. A47-A53; *see* A69. APL reiterated the strong commercial and military justifications for its service to Guam, which had introduced competition by ending Matson's

monopoly in that market. A49. APL further indicated that although its biweekly service had support from many customers—"particularly foreign shippers to Guam"—a single vessel was insufficient to serve the market because the largest shippers demanded weekly service. A49-A50. A second ship, APL explained, would allow the company to begin providing that service. *Id.* On December 20, 2016, MARAD approved the second application, finding that the *APL Saipan*, like its sister ship, was commercially viable and would operate in foreign commerce. A69-A70, A77, A84, A100-A101.

III. Matson's Challenge to APL's Applications.

With a fleet of 22 vessels, Matson is a dominant player in Pacific shipping. A114. As a company that qualifies as a U.S. citizen under the Jones Act, Matson receives substantial competitive benefits from the Federal Government. For example, Matson participates in the Capital Construction Fund, which allows Matson to defer paying federal income taxes on deposits used to fund the construction, reconstruction, or acquisition of vessels. *See* 46 U.S.C. § 53501 *et seq*. Moreover, as noted above, Matson may participate in the MSP while continuing to serve the major domestic markets of Hawaii, Alaska, and Puerto Rico—a valuable privilege that APL lacks. *See* note 5, *supra*.

In December 2016, Matson submitted letters arguing that MARAD should not approve APL's replacement application for its second vessel. A85-A99. Then,

on February 17, 2017, after MARAD's approval decision, Matson filed an administrative appeal (which it later amended) to challenge the agency's decisions to approve APL's vessel-replacement applications. A105-A137. Consistent with Matson's interest in restoring its monopoly in Guam, Matson's argument focused almost entirely on its contention that MSP subsidies could not be awarded to "vessels operating in regular service in Guam." A106. According to Matson, APL's vessels were "not being operated *exclusively* in foreign commerce," because they carried goods between the United States and Guam, a U.S. territory. A107, A121 (emphasis added); *see also* A85-A86 (earlier Matson letter arguing that MSP vessels must operate "exclusively in foreign commerce"). In Matson's view, an MSP participant cannot engage in *any* domestic trade, including trade "authorized by a U.S. registry endorsement." A108, A113.

In addition, Matson briefly advanced two other objections to MARAD's transfer approvals. First, Matson argued (in a single paragraph) that APL had not established the commercial viability of its replacement vessels. A122. Second, Matson contended that if APL's vessels are MSP eligible, MARAD should reduce its payments to APL for any time the vessels spent serving Guam. A123. Notably, however, Matson did *not* challenge APL's right as an MSP participant to provide service to Saipan.

On April 7, 2017, MARAD issued a letter to Matson's counsel, in which the agency concluded that Matson lacked standing to bring its administrative appeal. A138. Under MARAD regulations, MSP "Contractor[s]" may appeal adverse decisions related to the administration of their operating agreements. 46 C.F.R. § 296.50(a). Matson relied on this provision, but MARAD concluded that "[b]ecause Matson is not an MSP 'Contractor,'" it could not "appeal MARAD's determinations with respect to the APL vessel replacements." A138.

MARAD recognized that its standing decision was dispositive, but it also offered brief comments "in response to Matson's concerns." *Id.* The agency explained that, contrary to Matson's assertions, the MSP statute "clearly and unambiguously established that trade with Guam under a registry endorsement … is allowed in the MSP." A138-A139. The agency also noted that its regulations implementing the MSP statute recognize that a vessel engaged in mixed foreign and domestic commerce satisfies the MSP's "foreign commerce" requirement. A139. APL was engaged in foreign commerce according to this standard, MARAD concluded, because its vessels carry cargo "to and from Guam that originates in, or is destined for, other countries." A140.

On June 2, 2017, Matson filed a petition for review. This Court granted APL's motion to intervene, and it referred the government's motion to dismiss for lack of subject-matter jurisdiction to the merits panel.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to consider Matson's petition. Under the Hobbs Act, federal courts of appeals have exclusive jurisdiction to hear challenges to certain administrative orders "issued pursuant to [46 U.S.C. §] 50501." 28 U.S.C. § 2342(3)(A). But Section 50501 governs U.S.-citizenship determinations, and this case does not present any citizenship questions. The only decision within the Hobbs Act's 60-day limitations period, the April 2017 decision rejecting Matson's administrative appeal, does not even mention citizenship. And Matson does not challenge the primary (and independently sufficient) basis for MARAD's decision—that Matson lacked standing to bring an administrative appeal.

II. It was not arbitrary and capricious for MARAD to find that APL's two replacement vessels satisfy the MSP statute's "foreign commerce" requirement, 46 U.S.C. § 53102(b)(2). The plain text of the statute requires only that a vessel engage in some foreign commerce—not that it engage *exclusively* in foreign commerce. MARAD properly found that APL's replacement vessels satisfy this requirement because APL's new vessels transport foreign cargo between Guam and major ports in Japan and South Korea that operate as hubs for APL's worldwide services. Matson's assertions that there is insufficient evidence to support the agency's decision cannot be squared with the administrative record.

Matson also raises a new argument, contending that APL's service to Saipan constitutes impermissible coastwise trade, in breach of APL's operating agreement. Matson forfeited this argument by failing to raise it with MARAD. In any event, this new argument is completely divorced from the agency decision under review. In approving APL's replacement applications, MARAD only decided whether the new vessels were *eligible* to participate in the MSP. *See* 46 U.S.C. §§ 53102(b), 53105(f). Matson's Saipan argument has nothing to do with MSP eligibility. Moreover, although there is no occasion for this Court to address the issue, Matson's argument is wrong on the merits. Matson relies on a flawed interpretation of the Covenant establishing the Commonwealth of the Northern Mariana Islands. The Covenant exempts shipments to and from the Northern Mariana Islands from the coastwise laws, but has a narrow exception that applies laws regarding "coastal shipments" to "the activities of the United States Government and its contractors in the Northern Mariana Islands." 48 U.S.C. § 1801 note. Matson's assertion that this exception applies to all shipments between the U.S. mainland and the Northern Mariana Islands—rather than only to shipments *within* the Northern Marianas—is not supported by the text of the Covenant and is inconsistent with decades of maritime-industry practice.

III. MARAD reasonably concluded that APL's replacement vessels are "commercially viable"; indeed, there were strong commercial justifications for

APL to shift its focus from the Middle East (where two major U.S. military engagements were winding down) to the Pacific. Matson's argument to the contrary relies on an invented (and illogical) test for commercial viability. According to Matson, in order to secure a subsidy, an MSP applicant must show that its vessel could succeed *without* MSP subsidies. That interpretation would undermine the MSP's purpose, as Congress recognized that financial support was necessary to preserve a robust merchant marine. Matson also contends that it was arbitrary and capricious for MARAD to consider APL's overall financial health and MSP experience in deciding that its two replacement vessels were "commercially viable." But Matson's argument has no basis in the statutory language, and it would require the agency to ignore facts that are of obvious relevance to its decision.

STANDARD OF REVIEW

Under the Administrative Procedure Act, a court may set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court may reverse an agency's factual findings "only when the record is so compelling that no

reasonable factfinder could fail to find to the contrary." *Orion Reserves L.P. v. Salazar*, 553 F.3d 697, 704 (D.C. Cir. 2009).

ARGUMENT

Matson challenges MARAD's approval of APL's replacement applications, arguing that APL's vessels do not "provid[e] transportation in foreign commerce" and that they are not "commercially viable" within the meaning of the MSP statute. This Court does not have jurisdiction over this dispute, however, and it should dismiss the petition on that basis. Moreover, even if the Court did have jurisdiction, Matson's challenges to MARAD's replacement decisions lack merit. It was not arbitrary and capricious for the agency to find that APL's vessels satisfy both the "foreign commerce" and "commercial viability" requirements. Matson's arguments to the contrary not only misconstrue the MSP statute, but often have nothing to do with the statute's eligibility criteria. In particular, Matson's dubious new contention that MSP participants may not serve Saipan—an argument that it did not raise with MARAD—is, at most, an issue of contractual enforcement that has no relevance to this proceeding.

I. This Court Does Not Have Jurisdiction To Consider Matson's Petition.

Matson filed this petition pursuant to the Hobbs Act, and it bases this Court's jurisdiction on a provision that gives federal courts of appeals exclusive jurisdiction to hear challenges to "orders of … the Secretary of Transportation issued pursuant to [46 U.S.C. §] 50501." 28 U.S.C. § 2342(3)(A). But as the

government explains in its brief (at 23-26), this case does not present a challenge to any order "issued pursuant to section 50501."

Section 50501 sets requirements for vessel owners and operators to qualify as U.S. citizens. Although there is a citizenship requirement for MSP eligibility, *see* 46 U.S.C. § 53102(c), there is no conceivable dispute about citizenship here. The order that Matson asks this Court to review does not even *mention* citizenship; it thus cannot have been "issued pursuant to section 50501." And Matson has never questioned APL's citizenship, either before the agency or in its brief to this Court. *See* Matson Br. 28-29. For that reason, the unpublished decision on which Matson principally relies (at 27-29) is clearly inapposite. There, a district court held that the case belonged in the court of appeals because adjudication of the plaintiff's claims "rest[ed] *almost entirely* on the reviewing court's evaluation of [MARAD]'s interpretation of the statutory … citizenship definition." *Liberty Global Logistics LLC v. U.S. Mar. Admin.*, No. 13-cv-0399, 2014 WL 4388587, at *4 (E.D.N.Y. Sept. 5, 2014) (emphasis added). Here, by contrast, Matson's claims do not rest on citizenship *at all*.[6]

Moreover, even if the Hobbs Act did provide jurisdiction, its 60-day limitations period would sharply limit this Court's review. 28 U.S.C. § 2344; *see*

[6] Matson's other authority is also off-point, because the court addressed a challenge to a MARAD regulation directed at citizenship. *See Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1209-10 (3d Cir. 1992).

Gov't Br. 26-28. Matson filed its petition on June 2, 2017—590 days and 164 days after MARAD's decisions approving the *APL Guam* and the *APL Saipan*, respectively. A41, A84. Perhaps recognizing that a petition challenging these approval decisions is time-barred,[7] Matson's petition purports to seek review of the April 7, 2017 decision rejecting its administrative appeal. Pet. 1. But as the government explains (28-31) that decision rested on MARAD's conclusion that Matson lacked standing to pursue an appeal. A138. Matson does not even try to challenge MARAD's decision that it had no right to appeal under the agency's regulations, and its petition should be denied for that reason alone.

II. APL's Replacement Vessels Satisfy the MSP Statute's "Foreign Commerce" Requirement.

Before MARAD, Matson asserted—repeatedly—that APL's vessels do not satisfy the "foreign commerce" requirement because they provide service from the U.S. mainland to Guam. *See* p. 12, *supra*. Matson has abandoned that position, although it remarkably criticizes MARAD for "focusing solely" (Matson Br. 23) on that argument, which Matson had characterized as "*[t]he* issue" presented in its administrative appeal. A106 (emphasis added). Instead, Matson now contends

[7] The Hobbs Act limitations period for the second replacement decision was not tolled by Matson's administrative appeal because that appeal clearly was not authorized by MARAD regulations. *Cf. Owner-Operator Indep. Drivers Ass'n, Inc. v. Dep't of Transp.*, 858 F.3d 980, 983 (5th Cir. 2017) (Hobbs Act limitations period not tolled by a procedurally defective motion for reconsideration); *see* Gov't Br. 28 n.6.

that (1) there is no evidence to support MARAD's finding that APL's replacement vessels engage in *any* "foreign commerce," and (2) APL's service to Saipan constitutes impermissible coastwise trade. But the first argument is contradicted by the administrative record, and the second is both irrelevant and wrong.

A. APL's Replacement Vessels "Provid[e] Transportation in Foreign Commerce" Under Section 53102(b).

1. As discussed above, the MSP statute allows program participants to replace vessels in the MSP with other vessels that also satisfy the eligibility criteria of Section 53102(b). 46 U.S.C. § 53105(f). Section 53102(b), in turn, states that a vessel is eligible for the MSP if, *inter alia*, it is "operated … in providing transportation in foreign commerce." Matson previously argued that this provision required MSP vessels to engage "exclusively" in foreign commerce, supposedly making it impermissible for APL to serve Guam. A85-A86, A107, A121. Matson has retreated from that position (Matson Br. 40), and correctly so.

Section 53102(b)'s plain text requires only that a vessel "provid[e] transportation in foreign commerce," and there is no basis to read into the statute a requirement that a vessel engage in foreign commerce *exclusively*. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (noting that courts "ordinarily resist reading words or elements into a statute that do not appear on its face"). To the contrary, the statute's structure forecloses such a reading. As noted, pp. 6-7, *supra*, MSP participants are authorized to engage in "mixed foreign commerce and domestic

trade allowed under a registry endorsement." 46 U.S.C. § 53105(a)(1)(A). An "exclusivity" requirement for MSP eligibility is impossible to square with this provision: it would mean that Congress simultaneously excluded all vessels that engage in any domestic trade from the MSP even as it *expressly authorized* MSP contractors to engage in "mixed" trade pursuant to their operating agreements.

As a result, MARAD's "foreign commerce" inquiry under Section 53102(b) is narrow. The agency need not find that a vessel will engage solely—or even primarily—in foreign trade. Rather, a vessel satisfies this requirement so long as it engages in *some* foreign trade.

2. It was not arbitrary and capricious for MARAD to find that APL's two replacement vessels would operate in "foreign commerce," as the agency correctly understands that term.

In its initial 2014 application, APL explained that its vessels would engage in mixed foreign and domestic trade that would connect both the U.S. mainland and Guam to Asian markets. A6. Specifically, APL indicated that the vessels not only would carry U.S. mainland cargo to Guam (and vice versa), but also would carry (1) "U.S. mainland cargo moving beyond Guam" to Pacific destinations such as New Guinea, (2) "Asia cargo moving to Guam," and (3) "Guam export cargo (principally to Asia)." *Id.*

Based on APL's descriptions of its services, MARAD reasonably concluded that APL's replacement vessels would engage in "foreign commerce" because, as feeder vessels in APL's Pacific fleet connecting Guam and Saipan to major ports in Japan and South Korea, they would operate in APL's "established world-wide services." A28, A37, A44, A77, A100. As the agency further explained, APL's ships engage in foreign commerce because they "operate on a rotation between" Japan, Guam, Saipan, and South Korea, and "carry cargo to and from Guam that originates in, or is destined for, other countries." A140. Notably, MARAD's foreign-commerce finding did not depend in any way on the foreign-port transshipment of domestic cargo. Rather, the agency relied on cargo moving between Guam and *foreign countries* in Asia. *Id.* Matson's extended digressions on the law of transshipment (at 8, 22-23, 36-37, 45-46) are thus beside the point.

Aside from those digressions, Matson argues (at 47) that there was insufficient evidence for MARAD to conclude that "APL vessels would carry foreign cargo," which Matson contends does not follow from the fact that the vessels "call at foreign ports." But Matson simply ignores the very first document in the administrative record, which makes plain APL's intention to ship U.S. mainland and Guam cargo to Asian markets, as well as Asian cargo to Guam. A6.

To the extent Matson insists that MARAD must require documentary evidence confirming that APL's vessels carry cargo between the United States and

Asian countries, its demand is inconsistent with the statute. Section 53102(b)(2) contemplates that MARAD may evaluate a vessel's MSP eligibility based on descriptions of its *intended* service; indeed, the agency may determine that a potential vessel is eligible for the MSP even before it is built, provided the vessel "*will* be operated" in "foreign commerce." 46 U.S.C. § 53102(b)(2) (emphasis added). In any event, the record shows that APL's ships carry cargo between foreign countries via ports in Japan and South Korea. For example, in APL's second vessel-replacement application, it noted that the *APL Guam* had been servicing "foreign shippers to Guam." A49. Similarly, advertising materials from APL submitted into the record *by Matson* describe the scope of the two vessels' foreign trade and note that they connect Guam and Saipan "to APL's global network." A134, A137; *see also* Gov't Br. 36 (identifying additional record support).

In short, there is ample evidence to support MARAD's finding that APL's two replacement vessels engage in foreign commerce. Certainly, this is not a case in which "the record is so compelling that no reasonable factfinder could fail to find to the contrary," as Matson must establish to prevail. *Orion Reserves*, 553 F.3d at 704.

B. Matson's New Arguments About APL's Saipan Service Provide No Basis To Overturn MARAD's Decision.

For the first time before this Court, Matson contends that APL's vessels may not receive MSP subsidies because they transport government cargo to and from Saipan. Matson's argument depends on a flawed reading of the Covenant establishing the Commonwealth of the Northern Mariana Islands. The Covenant generally provides that the coastwise laws do not apply to trade with the Northern Mariana Islands. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 503(a), 48 U.S.C. § 1801 note. But it also includes a qualification, under which U.S. laws "regarding *coastal shipments* and the conditions of employment … will apply to the activities of the United States Government and its contractors *in* the Northern Mariana Islands." *Id.* § 502(b) (emphasis added). According to Matson (at 7-8, 39), this narrow exception subjects shipments carrying government cargo between the U.S. mainland and Saipan to the restrictive coastwise laws, apparently on the theory that sending cargo across 6,000 miles of open ocean is both a "coastal shipment" and an "activit[y] … in the Northern Mariana Islands."[8]

[8] Matson's claim must be limited to mainland shipments because there is no question that APL's registry endorsement authorizes Guam-Saipan trade. *See* pp. 6-7, *supra.* Further, Matson's claims can only plausibly apply to the shipment of government cargo itself. To the extent Matson makes the broader suggestion that a company providing *some* services to the government is a "government contractor" even when shipping private cargo, its view is unsupportable and would cause the

Matson's interpretation of the Covenant is contrary to decades of practice in the maritime industry, and would seemingly render Matson's own longstanding shipments of government cargo to Saipan illegal. But regardless, this Court has no occasion to address the scope of the Covenant because Matson failed to raise its argument about Saipan to MARAD, and because the issue is irrelevant to the agency's vessel-replacement decision under review.

1. Matson repeatedly criticizes MARAD for supposedly "ignor[ing] APL's carriage of goods to and from Saipan in ruling on Matson's appeal." Matson Br. 41; *see id.* at 42, 44. But Matson brazenly fails to acknowledge the obvious reason for the agency's silence: Matson *never* challenged APL's Saipan service in any filing with MARAD. To borrow Matson's phrasing (at 44), there was "nary a mention of Saipan" in any of Matson's letters to the agency or in its appeal. A85-A92, A115-A125. Thus, as the government argues (at 37-38), Matson's Saipan-based arguments come too late: "It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an

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Covenant's narrow exception to swallow the rule. Notably, Matson itself would also become a government contractor as to all of its Saipan trade under this expansive interpretation, since Matson is a party to a universal-service contract with the Department of Defense and a participant in MARAD's Voluntary Intermodal Sealift Agreement. *See* U.S. Dep't of Defense, Contracts: U.S. Transportation Command (Jan. 6, 2016), http://bit.ly/2mF3toS; MARAD, VISA Participants as of August 2016, http://bit.ly/2B9WsSv.

agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004).

2. Even leaving waiver aside, this Court should reject Matson's new theory based on APL's Saipan service because it is wholly unrelated to the agency decisions at issue. MARAD decided that APL's vessels are eligible to join the fleet and enter into operating agreements. Matson, however, is arguing that the way the vessels operate in practice will breach those agreements. Matson's attempt to conflate certain operating-agreement terms with the conditions for vessel eligibility has no basis in the MSP statute.

MARAD's replacement decisions are governed solely by the standards for MSP eligibility: an MSP participant may replace a vessel subject to an operating agreement with any vessel "that is eligible to be included in the Fleet under section 53102(b)." 46 U.S.C. § 53105(f). Matson's argument regarding APL's Saipan service has nothing to do with MSP *eligibility* under Section 53102(b). As discussed above, pp. 20-21, *supra*, the relevant eligibility provision requires only that APL's vessels operate "in providing transportation in foreign commerce," which they clearly do by transporting domestic cargo to foreign ports in Asia and foreign cargo from Asia to domestic ports such as Guam. A6, A140.

Instead, Matson's contention is that APL has breached the terms of its operating agreements pursuant to Section 53105(a) by supposedly engaging in

impermissible coastwise trade to Saipan. *See* Matson Br. 40, 43 (citing Section 53105(a)(1) to support its argument, rather than Section 53102(b)'s eligibility requirements). But even if Matson were correct about that (and it is not, *see* pp. 30-33, *infra*), the anticipated breach of an operating-agreement provision would not render a vessel ineligible to participate in the MSP under Section 53102(b). As Matson itself argued to the agency, it is "improper [to] conflate[] the statutory vessel eligibility provisions with the statutory vessel operating limitation provisions." A117. The latter are "independent of and unrelated to" the former. *Id.*

Once again, the structure of the MSP statute (as reinforced by MARAD's implementing regulations) makes this distinction clear. Both the statute and the regulations presuppose that an MSP vessel may breach certain operating-agreement conditions, including by engaging in coastwise trade not permitted by a registry endorsement, while still retaining program eligibility. Indeed, MSP participants do not necessarily forfeit their right to receive MSP subsidies while they are engaged in such trade.

To receive subsidy payments, MSP participants certify that their vessel has been "operated in accordance with [the limitations on domestic trade in] section 53105(a)(1) *for at least 320 days* in the fiscal year." 46 U.S.C. § 53106(b) (emphasis added). Moreover, "for each day less than 320" in which a vessel "is

not operated in accordance with section 53105(a)(1)," MARAD reduces the annual subsidy on a "pro rata" basis. *Id.* § 53106(d)(3); *see also* 46 C.F.R. § 296.41(b). In other words, the potential consequence under the MSP for engaging in domestic trade not otherwise permitted under a registry endorsement is a reduction in subsidy payments—not an automatic rescission of MSP eligibility. *See* 46 C.F.R. § 296.41(b). To the contrary, before MARAD may terminate an operating agreement, it must decide that the participant's breach is material *and* provide the participant notice and an opportunity to cure. 46 U.S.C. § 53104(c).

Thus, although Matson purports to challenge MARAD's conclusion that APL's vessels are eligible for the MSP fleet, its argument reduces to a claim that APL allegedly would breach its operating agreement by transmitting government cargo from the U.S. mainland to Saipan. But Matson does not have any right to compel MARAD to initiate a contract-enforcement action. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 842-43 (D.C. Cir. 1982); *cf. Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (recognizing that an agency's decision not to initiate enforcement proceedings is presumptively unreviewable).[9] Nor is there any final agency action for this Court to review concerning APL's

[9] Matson cites (at 48) one case supposedly showing that the agency could be forced to pursue recoupment of a (different) subsidy. Matson fails to note that this Court vacated that decision in relevant part because the plaintiff lacked standing. *Safir v. Dole*, 718 F.2d 475, 481, 484 (D.C. Cir. 1983) (Scalia, J.), *vacating Safir v. Klutznick*, 526 F. Supp. 921 (D.D.C. 1981).

compliance with the terms of its operating agreement and Section 53105(a). *See* 28 U.S.C. § 2342(3)(A) (limiting the Court's jurisdiction to review of "final orders").

The mismatch between Matson's new legal theory and the actual decision under review is reflected by the absence of any record evidence concerning the nature and scope of APL's service to Saipan. Matson relies (at 41) on promotional materials and general statements made by APL that its service would provide "Saipan shippers an alternative for shipping from the U.S. mainland." A132; *see also* A60. But even under Matson's interpretation of the Covenant, the majority of potential shipments to and from Saipan would raise no legal concern—shipments between Saipan and foreign ports, shipments between Saipan and Guam, and shipments of private commercial cargo between the U.S. mainland and Saipan are entirely permissible. Matson's challenge implicates only the shipment of U.S. government cargo between the U.S. mainland and Saipan.[10] But the record is silent

[10] In a footnote (at 39 n.2), Matson asserts that APL qualifies as a government contractor under the Covenant merely because it participates in the MSP. By mentioning this argument in "a single footnote," Matson failed to preserve it. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007). In any event, Matson's suggestion that APL's status as a contractor under the MSP regulations automatically makes it a contractor under the Covenant is meritless. An MSP participant may ship entirely private cargo; it merely contracts with the Federal Government to guarantee *future* shipping capacity in the event of a war or national emergency. *See* pp. 4-5, *supra*.

as to the frequency of any such shipments, for the simple reason that MARAD had no reason to develop such facts when making vessel eligibility determinations.

3. The Court accordingly has no reason to interpret the Covenant in order to resolve this case. Moreover, the Court should be careful not to endorse Matson's unsupported interpretation of the Covenant, which conflicts with both the text of the Covenant and decades of industry practice.

For years, the shipping industry and the Department of Defense have acted on the understanding that, based on the Covenant's express carve-out, the coastwise laws do not apply to the carriage of goods into and out of the Northern Mariana Islands, including by federal contractors. Indeed, Matson itself has long transported U.S. government cargo to and from Saipan using a *foreign*-flag vessel.[11] That practice would be illegal under Matson's newfound view that federal contractors' trade with Saipan is domestic trade, since the coastwise laws ordinarily prevent foreign-flag vessels from engaging in domestic trade. 46 U.S.C. § 55102(b).

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[11] *See* Matson, Inc., 2015 Annual Report at 3 n.3 (noting that Matson's vessel *Mana* is "foreign flagged"); Add. 1 (listing the *Mana*'s service to Saipan). Neither the record nor Matson's public filings disclose the nature of the *Mana*'s carriage, but Matson cannot deny that its ship carries government cargo. Indeed, Matson's theory of injury with respect to APL's Saipan service presupposes that both companies transport government cargo to Saipan. As explained above, note 8, *supra*, there is no question that APL may transport non-government cargo to Saipan. Thus, Matson's complaint can only be that it has lost business from APL's carrying government cargo between the U.S. mainland and Saipan.

Matson's attempt to upend settled practice relies on an unsupported and facially dubious reading of the Covenant. As noted, p. 24, *supra*, Section 503(a) of the Covenant stipulates that "except as otherwise provided in [Section 502(b)], the coastwise laws of the United States" "will not apply to the Northern Mariana Islands." 48 U.S.C. § 1801 note. Section 502(b), in turn, provides that "[t]he laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees" are deemed to "apply to the activities of the United States Government and its contractors in the Northern Mariana Islands." *Id.* In arguing that Section 502(b) subjects federal contractors to the coastwise laws as to all Saipan trade, Matson assumes that "laws … regarding coastal shipments" is coextensive with the "coastwise laws." But "coastwise laws" is a legally defined term in U.S. maritime law, and it is notably absent from Section 502(b)—which refers to "coastal shipments"—even though Section 503 uses the term "coastwise laws." Matson fails to account for this difference. Thus, absent a statutory definition of "coastal shipments" or drafting history from the Covenant that bears on the term's meaning, the logical inference is that "coastal shipments" is used in its ordinary sense. And the ordinary meaning of "coastal" applies only to shipments moving between points along a coast or within a particular chain of islands—not to a 6,000-mile open-ocean voyage between the U.S. mainland and the Northern Mariana Islands. *See* Webster's Third

New International Dictionary 433 (1976) (defining "coastal" as "of or relating to a coast"; "located on or near a coast"; "bordering on a coast"); MARAD, America's Marine Highway Program, http://bit.ly/2io2p7Z (distinguishing between "coastal" and "open-ocean" shipping).

Thus, the phrase "laws … regarding coastal shipments" is best understood to describe shipments *within* the Northern Mariana Islands (*e.g.*, trade between Saipan and a neighboring island within the chain), and to subject only those local shipments by the U.S. government and its contractors to restrictions on domestic trade. This interpretation is further supported by the Covenant's prescription that these U.S. laws regarding coastal shipments should apply only to "activities … *in* the Northern Mariana Islands." Covenant § 502(b), 48 U.S.C. § 1801 note (emphasis added). Shipping between the U.S. mainland and Saipan is not an "activit[y] … in the Northern Mariana Islands." *Id.*[12]

[12] Although Matson does not cite it, a 1981 ruling by the U.S. Customs Service adopted the view that the Covenant applied U.S. coastwise laws to shipments made by the Department of Agriculture between Saipan and the U.S. mainland. *Vessels: The Application of the Coastwise Laws to the Shipment of Food Commodities by an Agency of the U.S. Government*, 15 Cust. B. & Dec. 1082 (1981). But the Customs Service's reasoning was cursory; after recounting inapposite legislative history, the agency announced its decision in a single, conclusory paragraph. *Id.* at 1085. Moreover, the decision is non-precedential, *see* 19 C.F.R. § 177.9(c), and it is not entitled to deference, particularly since the Customs Service has not been delegated authority to resolve ambiguities in the Covenant, which emerged from bilateral negotiations under the auspices of the United Nations. APL is aware of no instance in which the ruling has been cited or applied.

At a minimum, Matson's interpretation of the Covenant is subject to serious doubt. This Court should not wade into this issue—which would have significant implications not only for federal contractors but for the Federal Government itself—in a case in which the argument concerning the Covenant was not exhausted and cannot affect the outcome.

III. MARAD Reasonably Concluded That APL's Replacement Vessels Are "Commercially Viable."

Matson also raises a challenge under the statutory provision requiring all MSP vessels to be "commercially viable, as determined by the [agency]." 46 U.S.C. § 53102(b)(4)(B). By its plain terms, this provision gives broad discretion to MARAD to decide whether a vessel is capable of active commercial use. The agency reasonably exercised that discretion here.[13]

As APL's replacement applications made clear, there were strong commercial justifications for APL to shift its focus away from the Middle East: the wind-down of American military activities in Iraq and Afghanistan had decreased its customers' demands for U.S.-flag shipping services there. A2.

[13] Matson contends that the letter denying Matson's appeal "silently concede[d]" that MARAD did not make a proper commercial viability finding because the agency "simply ignored" Matson's challenge on the issue. Matson Br. 48, 50. Matson mischaracterizes the record. MARAD denied Matson's appeal because it lacked standing, and the agency chose to "offer[]" a brief "response to Matson's concerns" about APL's Guam service. A138. The fact that MARAD did not also gratuitously opine on Matson's commercial-viability argument—which Matson raised in a single paragraph of a 21-page brief, A122—is not a concession of anything.

Moreover, the applications explained, there were equally strong commercial justifications for APL to concentrate its new efforts on the Pacific trade, and specifically on commerce with Guam, which was the site of a military expansion. A5. The island had traditionally supported two shipping services from the United States, and customers were reporting dissatisfaction with Matson's then-monopoly on that route. A6, A62-A63. Based on these accounts—and on the agency's extensive experience with APL's operation of multiple MSP vessels—MARAD reasonably concluded that APL would find commercial success in transferring its operations from the Middle East to a new route serving Guam and Saipan. A25, A29, A78, A101.

Matson faults MARAD (at 48-51) for supposedly failing to apply the proper legal standard to determine commercial viability, but the test Matson offers is its own invention. According to Matson, an applicant is required to show that each individual U.S.-flag vessel proposed for the MSP could "succeed without the [MSP] subsidies." Matson Br. 50-51. Moreover, Matson contends that it is impermissible for the agency to "consider[] the commercial viability of the [MSP] carrier" when deciding if the carrier's vessel is commercially viable. *Id.* at 49-50. Neither contention is sound.

A. MSP Applicants Are Not Required To Show That They Could Profitably Operate a U.S.-Flag Vessel Without MSP Support.

Matson's proposed rule limiting MSP funding to U.S.-flag vessels that would succeed without subsidies conflicts with the MSP's central purpose. In establishing the MSP, Congress intended to ensure that the United States would have a healthy, adequately sized merchant marine fleet at its disposal—one that the government could rely on in a time of need. *See* pp. 4-5, *supra*. The legislative history recognized that subsidies were essential to achieve that goal, and that without them "there simply [would] be no U.S. fleet to conduct foreign commerce." H.R. Rep. No. 104-229, at 9. It would be perverse to read the statute's "commercial viability" requirement in a way that undermines the statute's objectives by limiting financial assistance to those vessels that do not really need it. *See Wagner v. FEC*, 717 F.3d 1007, 1014 (D.C. Cir. 2013) (en banc) ("A statute should ordinarily be read to effectuate its purposes rather than to frustrate them.").

The problem with Matson's approach is especially pronounced in the context of Section 53105(f) replacement determinations like those at issue here. As discussed above, pp. 8-9, *supra*, APL sought to replace its MSP vessels operating in the Middle East after realizing that its services in that region were no longer commercially viable even with MSP subsidies. A2. That is, by transferring two of its operating agreements to vessels in the Pacific, APL left behind a trade

route that was no longer viable in favor of one with a significant commercial (and military) need. But under Matson's restrictive understanding of "commercial viability," the agency might have to reject applications to replace struggling vessels with new vessels that could serve more commercially sound routes—forcing vessels either to lose money or to leave the MSP.

Rather than focusing exclusively on the commercial viability of an unsubsidized vessel, the statute is best understood to allow MARAD to consider whether a proposed vessel will be commercially viable *with* an MSP subsidy. In contrast to Matson's proposal, this construction aligns with the statute's structure and purpose. Specifically, rather than artificially restricting access to the MSP and discouraging the growth of U.S. merchant marine (as occurs under Matson's view), the commercial-viability requirement under this interpretation simply protects the Federal Government from throwing good money after bad by subsidizing vessels that cannot succeed as U.S.-flag vessels even with government support. In doing so, the statutory requirement ensures that funds are used to further Congress's objectives of "maintain[ing] a United States presence in international commercial shipping" and guaranteeing that a fleet of U.S.-flag ships is available to serve the nation's "defense and other security requirements." 46 U.S.C. § 53102(a).

Rejecting Matson's flawed statutory interpretation also disposes of its supposed evidence that the APL replacement vessels were not commercially

viable. Matson first points (at 50) to an email by APL's CEO to Department of Transportation officials touting the procompetitive benefits of the company's new service to Guam and recognizing that the service was "made possible with the help of Marad." A128. This innocuous expression of gratitude shows the MSP *working as intended* by providing incentives for carriers to expand their services while operating under a U.S. flag. Second, Matson cites (at 50-51) a passage from APL's second vessel-replacement application in which the company explained that, for its Guam/Saipan service to succeed, it needed to add a second vessel to the route. A49-A50. This statement was not an "admission" from APL that its service "d[id] not meet … commercial requirements." Matson Br. 51. To the contrary, APL merely explained that a second vessel would allow it to serve more customers by offering weekly service (A49)—the company's goal from the outset when it requested preliminary approval from MARAD back in 2014 (A6).

B. MARAD Had Discretion To Consider APL's Overall Financial Health and Experience When Deciding If Its Replacement Vessels Are Commercially Viable.

Matson's final contention—that MARAD erred in considering the overall health of APL in deciding that the *APL Saipan* and the *APL Guam* are commercially viable—is also misguided. Matson asserts (at 48-49) that the agency must evaluate commercial viability "at the vessel level." But nothing in the MSP statute or its implementing regulations precludes MARAD from considering APL's experience, resources, and expertise in deciding whether its vessels were eligible to

participate in the MSP. In fact, the agency's regulations expressly recognize the relevance of a company's overall financial health by requiring operators to submit periodic financial reports. 46 C.F.R. § 296.32.

That should come as no surprise: one would hardly expect MARAD to blind itself to a carrier's known strengths and weaknesses in making eligibility determinations. Matson surely cannot mean, for example, that the agency may not even consider a carrier's history of commercial failures and poor financial condition when deciding if a proposed new vessel will be commercially viable. But if that inquiry is permissible, so is the converse. As in any business, a company's resources can help show the commercial viability of a new venture. Matson accordingly errs in suggesting (at 50) that APL's overall financial strength and experience in the MSP were factors "outside the statute."

CONCLUSION

The Court should dismiss the petition for lack of subject-matter jurisdiction or, in the alternative, deny the petition.

Respectfully submitted,

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January 19, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Circuit Rule 32(e)(2)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 8,968 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2010 in 14-point Times New Roman font, a proportionally spaced typeface.

January 19, 2018 /s/ William M. Jay

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I electronically filed the foregoing brief and all attachments with the Clerk of Court of the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF filing system. I certify that the following counsel of record are registered CM/ECF users and were served via the CM/ECF system:

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Addendum

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Matson.	WESTBOUND TO GUAM						12.15.17	SAIPAN
VESSEL VOYAGE	Portland	Departs Seattle	Departs Oakland	Departs Los Angeles	Departs Honolulu	ARRIVES GUAM		Arrives Saipan
MANULANI 137	Manoa 377	Manoa 377 Sat 11/11	Manoa 377 Wed 11/15	Wed 11/15	Tue 11/21	Wed 11/29		Mane 173 12/1
MANULANI 137 is the target vessel for Kyowa Rose 065B / Kyowa Orchid 073C								
MAUNAWILI 157	Kaual 784	Kaual 784 Sat 11/18	Kaual 784 Tue 11/21	Wed 11/22	Tue 11/28	Tue 12/05		Mane 174 12/8
MAUNALEI 119	Manoa 378	Manoa 378 Sat 11/25	Manoa 378 Tue 11/28	Wed 11/29	Tue 12/05	Tue 12/12		Mane 175 12/14
MAUNALEI 119 is the target vessel for Kyowa Cattleya 175B / Kyowa Rose 065C								
RJ PFEIFFER 427	Kaual 785	Kaual 785 Sat 12/02	Kaual 785 Tue 12/05	Wed 12/06	Tue 12/12	Wed 12/20		Mane 176 12/22
MANUKAI 184	Manoa 379	Manoa 379 Sat 12/09	Manoa 379 Tue 12/12	Wed 12/13	Tue 12/19	Tue 12/26		Mane 177 12/29
MANUKAI 184 is the target vessel for Kyowa Orchid 074B / Kyowa Cattleya 175C								
MANULANI 138	Kaual 786	Kaual 786 Sat 12/16	Kaual 786 Tue 12/19	Thu 12/21	Wed 12/27	Wed 01/03		Mane 178 1/5
MAUNAWILI 158	Manoa 380	Manoa 380 Sat 12/23	No Vessel Sailing Oakland	Thu 12/28	Wed 01/03	Wed 01/10		Mane 179 1/12
MAUNAWILI 158 is the target vessel for Kyowa Rose 066B / Kyowa Orchid 074C								
MAUNALEI 120	Kaual 787	Kaual 787 Sat 12/30	Kaual 787 Tue 01/02	Wed 01/03	Tue 01/09	Tue 01/16		Mane 180 1/19
RJ PFEIFFER 428	Manoa 381	Manoa 381 Sat 01/06	Manoa 381 Tue 01/09	Wed 01/10	Tue 01/16	Tue 01/23		Mane 181 1/26
RJ PFEIFFER 428 is the target vessel for Kyowa Cattleya 176B / Kyowa Rose 066C								
MANUKAI 185	Kaual 788	Kaual 788 Sat 01/13	Kaual 788 Tue 01/16	Wed 01/17	Tue 01/23	Tue 01/30		Mane 182 2/2
MANULANI 139	Manoa 382	Manoa 382 Sat 01/20	Manoa 382 Tue 01/23	Wed 01/24	Tue 01/30	Tue 02/06		Mane 183 2/9
MANULANI 139 is the target vessel for Kyowa Orchid 075B / Kyowa Cattleya 176C								
MAUNAWILI 159	Kaual 789	Kaual 789 Sat 01/27	Kaual 789 Tue 01/30	Wed 01/31	Tue 02/06	Tue 02/13		Mane 184 2/16
MAUNALEI 121	Manoa 383	Manoa 383 Sat 02/03	Manoa 383 Tue 02/06	Wed 02/07	Tue 02/13	Tue 02/20		Mane 185 2/23
MAUNALEI 121 is the target vessel for Kyowa Rose 067B / Kyowa Orchid 075C								
RJPFEIFFER 429	Kaual 790	Kaual 790 Sat 02/10	Kaual 790 Tue 02/13	Wed 02/14	Tue 02/20	Tue 02/27		Mane 186 3/2
MANUKAI 186	Manoa 384	Manoa 384 Sat 02/17	Manoa 384 Tue 02/20	Wed 02/21	Tue 02/27	Tue 03/06		Mane 187 3/9
Manukai 186 is the target vessel for Kyowa Cattleya 177B / Kyowa Rose 067C								

Note: This Guam-Micronesia Service Vessel Schedule is publicly accessible on Matson's website. *See View Vessel Schedules*, MATSON, https://www.matson.com/ocean-services/online-services/view-vessel-schedules.html (last visited Jan. 17, 2018).