

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

No. 20-1291

WARBIRD ADVENTURES, INC.; and THOM RICHARD,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

*Petition for Review from an Emergency Cease and Desist Order Issued by the
Federal Aviation Administration on July 28, 2020*

BRIEF OF AMICI CURIAE EXPERIMENTAL AIRCRAFT ASSOCIATION, AIRCRAFT OWNERS AND PILOTS ASSOCIATION, THE INTERNATIONAL COUNCIL OF AIR SHOWS, THE NATIONAL ASSOCIATION OF FLIGHT INSTRUCTORS, THE NORTH AMERICAN TRAINER ASSOCIATION, AND THE GENERAL AVIATION MANUFACTURERS ASSOCIATION, NEUTRAL ON THE MERITS OF PETITIONERS' REVIEW OF FEDERAL AVIATION ADMINISTRATION DECISION, FAA-07-28-2020

Alan L. Farkas
John W. Harrington
SmithAmundsen, LLC
150 N. Michigan, Ste. 3300
Chicago, IL 60601
312-894-3200
afarkas@salawus.com

-and-

Kathleen A. Yodice
Yodice Associates
12505 Park Potomac, Ste. 600
Potomac, MD 20854
202-810-6800
Kathy.yodice@yodice.com
*Attorneys for Experimental
Aircraft Association*

Lauren Lacey Haertlein
General Counsel
1400 K Street NW, Suite 801
Washington, DC 20005
202.393.1500
lhaertlein@gama.aero
*Attorney for General Aviation
Manufacturers Association*

Justine Harrison
421 Aviation Way
Frederick, Maryland 21701
(301) 695-2206
justine.harrison@aopa.org
*Attorney for International
Council of Air Shows, National
Association of Flight
Instructors, and North American
Trainer Association*

Justine Harrison
Ronald D. Golden
Jared M. Allen
Ian J. Arendt
421 Aviation Way
Frederick, Maryland 21701
(301) 695-2206
justine.harrison@aopa.org
*Attorneys for Aircraft
Owners and Pilots
Association*

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amici hereby certify the following:

A. Parties and Amici. All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioners, Warbird Adventures, Inc. and Thom Richard. All parties have consented to the participation of amici in this matter.

B. Rulings Under Review. The case concerns a Federal Aviation Administration (“FAA”) Cease and Desist Order (CDO) issued on July 28, 2020, against Petitioners, Warbird Adventures, Inc. and Thom Richard for allegedly violating 14 C.F.R. § 91.315 by providing flight training to persons in a limited category aircraft (LCA) for compensation or hire. Petitioner seeks review of the CDO pursuant to 49 U.S.C. § 46110(a).

C. Related Cases. This case was not previously before this Court or any other court. There are no other related cases pending before this Court.

RULE 26.1 DISCLOSURE STATEMENT

There are no companies, publicly-held or otherwise, that hold any ownership interest in any of the Amici. Amici are associations representing various interest in aviation. General nature and purpose of amici are further identified in the statement of interest, below.

TABLE OF CONTENTS

	<i>Page(s)</i>
CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES.....	i
RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
GLOSSARY.....	vi
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS	viii
I. INTRODUCTION.....	1
II. STATEMENT OF INTEREST AND AUTHORITY OF AMICI.....	2
A. Aircraft Owners and Pilots Association.	2
B. Experimental Aircraft Association.	2
C. The International Council of Air Shows.	3
D. The National Association of Flight Instructors.	3
E. The North American Trainer Association.	4
F. The General Aviation Manufacturers Association.....	4
III. ARGUMENT	5
A. Regulatory History of Limited Category Aircraft.....	5
B. The FAA Distinguishes Flight Training from Commercial Operations and from the Carriage of Persons or Property for Compensation or Hire.....	7
C. Owners of Limited Category Aircraft do not Violate 14 C.F.R. § 91.315 by Obtaining Flight Training in their Own Aircraft without an Exemption or Special Authorization.	11
IV. CONCLUSION	16
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.....	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Cases:

<i>Nishio v. Saipan Int’l Airport</i> , FAA Docket No. 16-13-03, Director’s Determination, 2016 WL 9685577 (Apr. 29, 2016)	10
--	----

Regulations:

14 C.F.R. Part 9	6, 7
14 C.F.R. Part 42	8
14 C.F.R. Part 61	7
14 C.F.R. Part 91	9
14 C.F.R. Part 119	7, 8
14 C.F.R. Part 121	9
14 C.F.R. Part 135	8, 9
14 C.F.R. § 21.27	6, 7
14 C.F.R. § 21.175	5
14 C.F.R. § 21.183	5
14 C.F.R. § 21.191(g)	11
14 C.F.R. § 45.1	8
14 C.F.R. § 91.315	1, 7, 11, 13
14 C.F.R. § 91.319	12
14 C.F.R. § 91.319(a)(2)	11, 12, 13

14 C.F.R. § 119.1(e)(1).....	8
14 C.F.R. § 119.1(e)(3)	8
14 C.F.R. § 135.1(b)(1).....	8
14 C.F.R. § 135.1(b)(3).....	8

Federal Register:

Air Taxi Operators and Commercial Operators of Small Aircraft, 29 Fed. Reg. 2988 (Mar. 5, 1964).....	8
Certification of Surplus Military Aircraft, 28 Fed. Reg. 13394 (Dec. 11, 1963).....	5, 6
Certification Procedures for Products and Parts, 29 Fed. Reg. 14562 (Oct. 24, 1964)	6
Commercial Operator Certification and Operating Rules, 19 Fed. Reg. 1369 (Mar. 11, 1954).....	8
Commuter Operations and General Certification and Operations Requirements, 60 Fed. Reg. 65832 (Dec. 20, 1995)	8
Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules, 62 Fed. Reg. 16220 (Apr. 4, 1997)	9
Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 68 Fed. Reg. 54520 (Sept. 17, 2003).....	8
Revision of General Operating and Flight Rules, 54 Fed. Reg. 34284 (Aug. 18, 1989)	7
Type Certificates for Surplus Aircraft of the Armed Forces, 59 Fed. Reg. 19114 (April 21, 1994).....	6
Withdrawal of Proposed Rules, 68 Fed. Reg. 43885 (July 24, 2003).....	6-7

Other Authorities:

Advisory Circular 61-83J: Nationally Scheduled, FAA-Approved, Industry-Conducted Flight Instructor Refresher Course (Sept. 13, 2018).....	10
Civil Aeronautics Manual 42 Irregular Air Carrier and Off-Route Rules, Appendix B Air Taxi Operators, § 42.0-3 Operations for which an Air Taxi Operator Certificate is not required (Aug. 1954)	8
FAA Legal Interpretation Letter from Jeffrey Klang, Regional Counsel, to Roger Schaffner, 2014 WL 1869849 (May 5, 2014)	9-10
FAA Legal Interpretation Letter from Lorelei Peter, Assistant Chief Counsel for Regulations, to William Grannis, 2017 WL 3399663 (Aug. 3, 2017).....	7
FAA Legal Interpretation Letter from Mark W. Bury, Assistant Chief Counsel for International Law, to Gregory Morris (Oct 7, 2014)	13
FAA Order 8900.1, Flight Standards Information Management System (2020)	12
FAA Order 8900.1, vol. 3, ch. 11, § 1, ¶ 3-291	12
FAA Order 8900.1, vol. 3, ch. 11, § 1, ¶ 3-292(A)	12
FAA Order 8900.1, vol. 3, ch. 11, § 1, ¶ 3-292(B).....	12
FAA Order 8900.1, vol. 3, ch. 11, § 1, ¶ 3-292(C).....	12
Grant of Exemption No. 6811 from Richard Gordon, Acting Director of Flight Standards Service to The Stallion 51 Corp., Regulatory Docket No. FAA-2002-12993; previously Docket No. 29197 (Sept. 17, 1998)	12
KENT S. JACKSON, FEDERAL AVIATION REGULATIONS EXPLAINED: PARTS 1, 61, 91, 141, AND NTSB 830 (2003).....	11-12

Letter re: Exemption No. 10356 from David Gillion, Acting Deputy
Director, Flight Standards Service to Randy Hansen, Experimental
Aircraft Association, Regulatory Docket No. FAA-2011-0656
(Sept. 9, 2011)..... 15

Nat'l Transp. Safety Bd., SA-040, Understanding Flight Experience
(Mar. 2015) 15

U.S. Dep't of Transp., Fed. Aviation Admin., Flight Standards Serv.,
FAA-H-8083-9B, Aviation Instructor's Handbook (2020)..... 10-11

GLOSSARY

AOPA: Aircraft Owners and Pilots Association

Airworthiness certificate: FAA authorization to operate an aircraft in flight

CAB: Civil Aeronautics Board (FAA Predecessor)

CDO: Cease and Desist Order

EAA: Experimental Aircraft Association

FAA: Federal Aviation Administration

FAST: Formation and Safety Team

GAMA: General Aviation Manufacturers Association

ICAS: International Council of Air Shows

LCA: Limited Category Aircraft

NAFI: National Association of Flight Instructors

NATA: North American Trainer Association

Special airworthiness aircraft: aircraft granted a non-standard airworthiness certificate

Warbirds: Former military aircraft

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to FRAP 29(a)(4)(E) amici state that no party's counsel authored this brief in whole or part. No party or party's counsel contributed any money that was intended to fund the preparation or submission of this brief. No person or organization other than the amici contributed money to fund the preparation or submission of this brief.

I. INTRODUCTION

The case concerns a Federal Aviation Administration (“FAA”) Cease and Desist Order (CDO) against Petitioners, Warbird Adventures, Inc. and Thom Richard for allegedly violating 14 C.F.R. § 91.315 by providing flight training to persons in a limited category aircraft (LCA) for compensation or hire. Amici take no position on facts applicable to the CDO. Rather, they address related issues so this Court may avoid unintended, adverse impacts to safe and compliant flight instructors and LCA owners who otherwise would not have a voice before the Court.

Specifically, the CDO alleges Petitioners solicited and provided flight training to the public without an exemption or FAA authorization. The FAA has never issued clear policy on whether an exemption or special authorization is required to provide flight training to the public in an LCA. The FAA has, however, clearly distinguished compensation for carriage of persons or property from compensation for flight training, and accordingly, the ability of an LCA owner to receive and provide compensation for flight training in his or her own aircraft. Access to flight training provided by a flight instructor is necessary for pilots to meet regulatory requirements and essential to safety. Amici urge this Court to avoid language in a ruling that may interfere with the distinction between paid flight training and compensation for carriage of persons or property, or with the ability of LCA owners to obtain flight training in their own aircraft without an exemption or special authorization from the

FAA. A decision that unintentionally restricts access to flight training will negatively affect air safety in the United States.

II. STATEMENT OF INTEREST AND AUTHORITY OF AMICI

Amici have distinct interests but are all concerned with the ability of instructors to provide, and owners to receive, instruction in LCA. Amici fear that safety critical instruction will become less available, less utilized, and more expensive if owners are only able to train in their LCA if they obtain exemptions issued at the discretion of the FAA. Amici appear by consent of the parties.

A. Aircraft Owners and Pilots Association.

Aircraft Owners and Pilots Association (AOPA), the world's largest aviation membership association, is a nonprofit trade association representing the interests of general aviation pilots and aircraft owners. AOPA represents over 300,000 members,¹ consisting primarily of aircraft owners and pilots. AOPA's central mission is to preserve the freedom to fly and ensure general aviation remains accessible.

B. Experimental Aircraft Association.

The Experimental Aircraft Association, Inc. (EAA) is a non-profit association of 240,000 aviation enthusiasts, including approximately 8,000 members in its "Warbirds" division supporting former military aircraft. EAA provides education and hands-on workshops, and it advocates for rules and policies

¹ Petitioner Thom Richard is a current member of AOPA, EAA, and ICAS.

that promote aviation. At EAA's annual meeting, members display approximately 10,000 aircraft, including approximately 350 warbirds—many of which hold special airworthiness certificates. EAA owns and operates 19 special airworthiness aircraft, including a B-17G, a TB-25H, a P-51D, and numerous Light-Sport and Experimental Amateur-Built aircraft.

C. The International Council of Air Shows.

International Council of Air Shows (ICAS) is a 501(c)(6) trade association founded in 1968. ICAS focuses its time and resources on improving safety in the worldwide air show community, representing the interests of the air show business and the industry's individual practitioners with government officials, military representatives, the media, and the general public. A significant segment of the ICAS membership is engaged with the demonstration of vintage military aircraft, which makes issues related to flight training in those types of aircraft vital to the safety and well-being of individual members and the air show business as a whole.

D. The National Association of Flight Instructors.

The National Association of Flight Instructors (NAFI) is a 501(c)(6) trade association founded in 1967. NAFI is dedicated to the promotion of a high level of professionalism among aviation educators and provides recognition for individual and organizational contributions to aviation safety, education, and training. NAFI has 5,950 current members, the overwhelming majority of whom are past or

current FAA-Certified Flight Instructors. NAFI members adopt and uphold a Code of Ethics that focuses on safe and effective aviation training to others as well as a dedication to continual personal improvement in teaching and flying skills. To that end, NAFI engages its membership with publications, interactive sessions, aviation education resources, and an advanced flight instruction accreditation program.

E. The North American Trainer Association.

North American Trainer Association (NATA) is a 501(c)(3) non-profit corporation organized in 1987. NATA is dedicated to the preservation, restoration, and safe operation of former military aircraft and has over 1,200 members in 13 countries. NATA's primary mission is safety. NATA promotes safety by focusing on pilots: their training, their evaluation, and the continual improvement of their skills. NATA conducts several formation flying clinics each year and facilitates instructional flights for members by recruiting and certifying NATA Check Pilots. NATA also is a signatory to the Formation and Safety Team (FAST), a worldwide educational organization dedicated to standardized instruction in formation flying.

F. The General Aviation Manufacturers Association.

The General Aviation Manufacturers Association, Inc. (GAMA) is an international not-for-profit trade association representing the world's leading manufacturers of general aviation aircraft, engines, avionics, components, and related services. GAMA's members produce nearly all of the general aviation

aircraft flying today, including special airworthiness aircraft and products on them. GAMA's members also operate repair stations, fixed-base operators, and pilot and technician training facilities, and manage aircraft fleets. Throughout its fifty-year history, GAMA has been dedicated to fostering and advancing the welfare, safety, interests, and activities of the general aviation industry.

III. ARGUMENT

A. **Regulatory History of Limited Category Aircraft.**

An airworthiness certificate is an FAA document that grants authorization for an aircraft to be flown. The FAA issues an airworthiness certificate after an aircraft has been inspected, is found to meet regulatory requirements, and is in a condition for safe operation. *E.g.*, 14 C.F.R. § 21.183 (issuing of standard airworthiness certificates). A standard airworthiness certificate is issued in the normal, utility, acrobatic, commuter, and transport categories. *Id.* Familiar examples include a Cessna 172 (normal) and Boeing or Airbus airliners (transport). All other aircraft receive one of seven types of Special Airworthiness certification. *Id.* § 21.175. Limited category special airworthiness certificates are granted to retired military aircraft converted to civilian use under specified conditions.

LCA certification was born after World War II when the U.S. experienced increasing needs for civil aircraft. *See* Certification of Surplus Military Aircraft, 28 Fed. Reg. 13394 (Dec. 11, 1963) (explaining the history of LCA). The FAA's

predecessor, the Civil Aeronautics Board (CAB), “permitted certification of surplus military aircraft in the limited category upon a finding that the service record had been satisfactory, that the particular aircraft was in a good state of preservation and repair, and that it was in a condition for safe operation.” *Id.* CAB made these surplus military aircraft available to the public “so long as the operation was confined to flights in which neither passengers nor cargo are carried for hire,” to wit:

This part is for the purpose of making available to the public certain military surplus aircraft which were originally designed for the military services of the United States for combat and other specialized purposes and which experience in military service has shown to be safe for operation so long as the operation is confined to flights in which neither passengers nor cargo are carried for hire.

14 C.F.R. Part 09 (1946). In other words, the FAA made these aircraft available for individual use, including flight training.

14 C.F.R. Part 09 was rescinded by the adoption of Part 9a and ultimately replaced in 1965 with § 21.27, which remains in effect today. Certification Procedures for Products and Parts, 29 Fed. Reg. 14562, 14576 (Oct. 24, 1964). Section 21.27 allows the FAA to issue a type certificate to a military surplus aircraft that is shown to comply with applicable regulations. In 1994, the FAA published a Notice of Proposed Rulemaking (NPRM) proposing to remove regulations for issuing type certificates for surplus aircraft, including § 21.27. Type Certificates for Surplus Aircraft of the Armed Forces, 59 Fed. Reg. 19114 (April 21, 1994). 590 commenters responded. Withdrawal of Proposed Rules, 68 Fed.

Reg. 43885 (July 24, 2003). An overwhelming majority opposed eliminating § 21.27, citing, *inter alia*, that the proposal would have a negative economic impact and would provide inadequate safety and certification coverage. *Id.* The FAA withdrew the NPRM. *Id.* at 43885–86.

The FAA also issued corresponding operating rules for LCA prohibiting carriage of persons or property for compensation or hire, ultimately codified at § 91.315—the regulation at the center of this case. Revision of General Operating and Flight Rules, 54 Fed. Reg. 34284, 34309 (Aug. 18, 1989). Neither Part 9a, nor § 21.27, nor the operating rules ever restricted the use of LCA for flight training.

B. The FAA Distinguishes Flight Training from Commercial Operations and from the Carriage of Persons or Property for Compensation or Hire.

Throughout the history of aviation regulation in the United States, the FAA has consistently distinguished flight training² from commercial operations and from the carriage of persons or property for compensation or hire. At least as early as 1954, CAB promulgated rules excluding “student instruction” from “the

² Throughout Title 14, the FAA has used several related terms virtually interchangeably: “flight training,” “flight instruction,” “student instruction,” and “training flights.” In 1997, the FAA replaced the term “flight instruction” in Part 61 with “flight training”; however, Part 119 was not updated and continues to utilize the outdated nomenclature of “student instruction” and “training flights.” *See* FAA Legal Interpretation Letter from Lorelei Peter, Assistant Chief Counsel for Regulations, to William Grannis, 2017 WL 3399663, at *1-2 (Aug. 3, 2017) (explaining the FAA’s use training and instruction nomenclature).

carriage of goods or persons for compensation or hire.” Commercial Operator Certification and Operating Rules, 19 Fed. Reg. 1369, 1370 (Mar. 11, 1954) (codified at 14 C.F.R. § 45.1 (1955)); *see also* Civil Aeronautics Manual 42 Irregular Air Carrier and Off-Route Rules, Appendix B Air Taxi Operators, § 42.0-3 Operations for which an Air Taxi Operator Certificate is not required (Aug. 1954) (excepting “student instruction” from the “carriage by aircraft of persons or property” in guidance to 14 C.F.R. Part 42 (irregular air carriers)).

In 1964, the FAA broadened the exceptions from Part 135 air carrier and operator certification requirements to include both “student instruction” and “training flights.” Air Taxi Operators and Commercial Operators of Small Aircraft, 29 Fed. Reg. 2988, 2992 (Mar. 5, 1964) (codified at 14 C.F.R. §§ 135.1(b)(1), 135.1(b)(3) (1965)). The FAA restated these exclusions again when it incorporated portions of Part 135 into Part 119 certification requirements for air carriers and operators. Commuter Operations and General Certification and Operations Requirements, 60 Fed. Reg. 65832, 65914 (Dec. 20, 1995) (codified at 14 C.F.R. §§ 119.1(e)(1), 119.1(e)(3)).³

³ These exclusions are consistent with the FAA’s position that regulations contain different levels of oversight depending upon the operational control and compliance responsibility. Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 68 Fed. Reg. 54520 (Sept. 17, 2003). In contrast to commercial operations involving carriage of persons or property for compensation or hire, the FAA has observed that aircraft owners flying aircraft they own “exercise full control over and bear responsibility for the airworthiness and operation of their aircraft.” *Id.*

The FAA maintains the distinction between flight training and carriage “for compensation or hire” in the requirements for pilot medical certificates. Specifically, flight instructors are not required to hold first or second-class medical certificates—which are required for pilots to fly passengers or cargo for compensation—because “the compensation a certified flight instructor receives for flight instruction is not compensation for piloting the aircraft, but rather is compensation for the instruction.” Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules, 62 Fed. Reg. 16220, 16242 (Apr. 4, 1997). The FAA further explained, “[a] certificated flight instructor who is acting as pilot in command or as a required flight crewmember and receiving compensation for his or her flight instruction is not carrying passengers or property for compensation or hire, nor is he or she, for compensation or hire, acting as pilot in command of an aircraft.” *Id.*

In 2014, the FAA clarified that a flight instructor without a valid medical certificate is authorized to provide flight training to a pilot even when the pilot receiving instruction is not authorized to carry passengers because the instructor is not considered a passenger. FAA Legal Interpretation Letter from Jeffrey Klang,

As a result, these private operations are properly regulated under the rules in Part 91, which are generally less stringent than the regulations applicable to commercial operators who are holding out to the general public to provide carriage of persons or property for compensation or hire under 14 C.F.R. parts 121 or 135. *Id.*

Regional Counsel, to Roger Schaffner, 2014 WL 1869849, at *1 (May 5, 2014). The

FAA explained:

[A]n authorized instructor providing instruction in an aircraft is not considered a passenger with respect to the person receiving instruction, even where the person receiving the instruction is acting as [pilot in command] The instructor is not a passenger because he is present specifically to train the person receiving instruction. Neither is the person receiving instruction a passenger with respect to the instructor.

Id.

More recently, in a 2016 “Director’s Determination,” the FAA again concluded “flight training does not involve transporting persons or property from one place to another for compensation” and, therefore, “flight training operations . . . are not considered ‘common carriage.’” *Nishio v. Saipan Int’l Airport*, FAA Docket No. 16-13-03, Director’s Determination, 2016 WL 9685577, at *17 (Apr. 29, 2016).

This longstanding treatment of paid flight training recognizes not only the importance of training with an instructor to maintain aviation safety, but also that instructors are being compensated for their professional knowledge and skill as instructors. *See* Advisory Circular 61-83J: Nationally Scheduled, FAA-Approved, Industry-Conducted Flight Instructor Refresher Course ¶ 10.3.3 (Sept. 13, 2018) (“Professionalism is normally defined as receiving pay or compensation for expert knowledge or skill in a particular area or field.”); U.S. Dep’t of Transp., Fed. Aviation Admin., Flight Standards Serv., FAA-H-8083-9B, Aviation Instructor’s

Handbook (2020) at 8–6. (“Aviation instructors are on the front line of efforts to improve the safety record of the aviation industry.”).

C. Owners of Limited Category Aircraft do not Violate 14 C.F.R. § 91.315 by Obtaining Flight Training in their Own Aircraft without an Exemption or Special Authorization.

In the interest of safety, the FAA has consistently interpreted its regulations to allow LCA owners to obtain flight training in their own aircraft *without* violating 14 C.F.R. § 91.315. As explained above, the FAA distinguishes compensation for flight training from compensation for carriage of persons or property. Section 91.315 should be read with this in mind. When a flight instructor is paid to provide flight training to an owner in the owner’s LCA, the aircraft is not deemed to be carrying persons or property for hire and the LCA owners does not need to obtain an exemption or special authorization.

It is instructive to examine how the FAA treats owner training in experimental amateur-built aircraft, another type of aircraft issued special airworthiness certificates (*id.* § 21.191(g)), which are subject to a parallel prohibition against “[c]arrying persons or property for compensation or hire (*id.* § 91.319(a)(2)). In a 1982 FAA Chief Counsel opinion, the FAA advised that flight training may be provided in experimental amateur-built aircraft when the aircraft is provided without compensation because it is owned by the individual receiving the instruction. KENT S. JACKSON, FEDERAL AVIATION REGULATIONS EXPLAINED:

PARTS 1, 61, 91, 141, AND NTSB 830, at 91-155 (2003) (citing FAA Chief Counsel opinion, dated May 27, 1982). In other words, § 91.319(a)(2) is not violated because the fee paid to the instructor is for training and not carriage of persons or property for compensation or hire.

Similarly, FAA Order 8900.1, Flight Standards Information Management System (2020), the repository of FAA Flight Standards policy and guidance concerning aviation safety inspectors, further clarifies the FAA's policy and applies it to all aircraft certificated in the experimental category. Paragraph 3-291 reiterates that, pursuant to 14 C.F.R. § 91.319(a)(2), “[n]o person may operate an aircraft that has an experimental certificate [for] [c]arrying persons or property for compensation or hire.” FAA Order 8900.1, vol. 3, ch. 11, § 1, ¶ 3-291. Nonetheless, paragraph 3-292(A) states that: “Persons may receive, *and provide compensation for, flight training* in an aircraft holding an experimental certificate” (emphasis added); *see also* ¶ 3-292(C) (“Owners of experimental aircraft may receive, and provide compensation for, flight training received in their aircraft.”). Additionally, paragraph 3-292(B) states that: “Flight instructors may receive compensation for providing flight training in an experimental aircraft, but may not receive compensation for the use of the aircraft [unless they obtain special authorization].” *Id.* at ¶3-292(B). Thus, the FAA makes clear that under § 91.319, when an owner pays for training in his or her own experimental aircraft, the FAA does not consider the aircraft to be carrying

persons or property for compensation or hire, and no special authorization is required.

The prohibition against carrying persons or property for compensation or hire in § 91.319(a)(2) is identical to the prohibition found in § 91.315. The FAA's determination that compensation for flight training in experimental category aircraft is not considered carriage of persons or property for hire, provided no compensation is paid for use of the aircraft, further supports that LCA owners do not violate § 91.315 when they obtain flight training in their own LCA.⁴

Exemptions issued to LCA operators providing flight training to the general public also recognize that exemptions clearly are *not* needed by owners receiving flight training in their own aircraft.⁵ In 1998, the FAA granted the first exemption to an LCA operator, Stallion 51, to provide flight training to third parties. Grant of Exemption No. 6811 from Richard Gordon, Acting Director of Flight Standards Service to The Stallion 51 Corp., Regulatory Docket No. FAA-2002-12993;

⁴ The FAA cites a 2014 legal interpretation regarding § 91.315, which states: "an instructor who is being paid to provide flight training in a limited category aircraft is operating the aircraft for compensation or hire." FAA Legal Interpretation Letter from Mark W. Bury, Assistant Chief Counsel for International Law, to Gregory Morris (Oct 7, 2014); JA12. Section 91.315, however, prohibits *carrying persons or property* for compensation or hire. As explained above, the FAA has long differentiated between compensation for carriage and compensation for flight training.

⁵ Significantly, amici are not aware of any FAA policy requiring an LCA operator seeking to provide flight training to third parties to obtain an exemption.

previously Docket No. 29197 (Sept. 17, 1998). The FAA explains the reason

Stallion 51 sought an exemption as follows:

According to the petitioner, Stallion 51's original TF-51 aircraft possessed a standard airworthiness certificate. However, the petitioner states that the FAA reissued a limited category special airworthiness certificate to the TF-51 aircraft 3 years later. The petitioner contends the FAA assured Stallion 51 that because Stallion 51's TF- 51 aircraft have dual cockpits and fully-functional dual controls and *because a trainee would be considered a crewmember and not a passenger, "Section 91.315 would not apply."* Nevertheless, the petitioner states that the use of certain aircraft for flight training operations that do not hold standard category airworthiness certificates recently has come under review by the FAA, prompting Stallion 51 to seek an exemption from Section 91.315. *The petitioner, however, does not seek relief to provide transportation for compensation or hire in its TF-51 aircraft.*

Id. at 2 (emphasis added).

In the exemption, and consistent with the policy discussed above, the FAA states that “[a] person who is the owner or operator of an aircraft with a special airworthiness certificate in the experimental category may receive flight instruction in that aircraft and pay for the services of a flight instructor.” *Id.* at 5. The FAA also acknowledges that LCA are certificated to “*higher standards*”, which “provides for an increased level of safety over that of experimental category aircraft” *Id.* at 5-6 (emphasis added). This highlights the absence of a safety rationale for a more restrictive policy toward training in LCA than in experimental aircraft.

In a more recent exemption issued to EAA, the FAA also emphasized the importance of the availability of training to safety:

The FAA promotes training as evidenced by the requirements for the biennial flight review, the FAA sponsored pilot proficiency award program, and the many FAA-sponsored safety seminars provided by the safety program managers found in all Flight Standards District Offices (FSDOs) located throughout the United States. The FAA, therefore, found a grant of exemption to Stallion 51 would provide a segment of the aviation community with flight instruction that might not otherwise be available.

Letter re: Exemption No. 10356 from David Gillion, Acting Deputy Director, Flight Standards Service to Randy Hansen, Experimental Aircraft Association, Regulatory Docket No. FAA-2011-0656 (Sept. 9, 2011) at 2. Aviation safety data underscores the importance of training including familiarization with the specific aircraft characteristics and systems. For example, in 2015, the National Transportation Safety Board issued a Safety Alert noting that “[a]ircraft have different flight characteristics, performance, and systems” and emphasizing the importance of experience specific to the make/model and/or equipment a pilot is flying. Nat’l Transp. Safety Bd., SA-040, Understanding Flight Experience (Mar. 2015). Indeed, aircraft insurers often require certain specific training or experience in the make and model aircraft to be insured. The ability of owners to obtain flight training in their aircraft is critical to safety and should not be impeded.

IV. CONCLUSION

On behalf of their own organizations, the owners of LCA, and everyone who has an interest in aviation safety, amici urge this Court to be mindful of the potential impact of its decision in this case. The Court should exercise caution to preserve the important distinction between flight training for compensation and compensation for carriage, and that LCA owners are not operating their aircraft for compensation or hire when they obtain instruction and training in their aircraft. Air safety is improved by increasing the availability of flight training, not restricting its availability.

Respectfully submitted,

/s/ Alan L. Farkas

Alan L. Farkas
John W. Harrington
SmithAmundsen, LLC
150 N. Michigan, Ste. 3300
Chicago, IL 60601
312-894-3200
afarkas@salawus.com

and

Kathleen A. Yodice
Yodice Associates
12505 Park Potomac, Ste. 600
Potomac, MD 20854
202-810-6800
Kathy.yodice@yodice.com

Attorneys for Experimental Aircraft Association

/s/ Lauren Lacey Haertlein

Lauren Lacey Haertlein
General Counsel
1400 K Street NW, Suite 801

Washington, DC 20005
202.393.1500
lhaertlein@gama.aero

*Attorney for General Aviation Manufacturers
Association*

/s/ Justine Harrison

Justine Harrison
Ronald D. Golden
Jared M. Allen
Ian J. Arendt
421 Aviation Way
Frederick, Maryland 21701
(301) 695-2206
justine.harrison@aopa.org
*Attorneys for Aircraft Owners and Pilots
Association*

/s/ Justine Harrison

Justine Harrison
421 Aviation Way
Frederick, Maryland 21701
(301) 695-2206
justine.harrison@aopa.org
*Attorney for International Council of Air Shows,
National Association of Flight Instructors, and
North American Trainer Association*

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because:

X this brief contains 3,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); DC Cir. Rule 32(e)(1)

2. 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)(7)(B)(i); D.C. Cir. Rule 32(e)((B)(i) because:

X The brief has been prepared in a proportionally spaced typeface using MS Word in a 14 point Times New Roman font or

November 16, 2020

/s/ Alan L. Farkas
Alan L. Farkas

**United States Court of Appeals
for the District of Columbia Circuit**
Warbird Adventures, Inc., et al v. FAA, No. 20-1291

CERTIFICATE OF SERVICE

I, Robyn Cocho , being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by COUNSEL FOR AMICI CURIAE to print this document. I am an employee of Counsel Press.

On **November 16, 2020**, counsel has authorized me to electronically file the foregoing **Brief of Amici Curiae** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice, to any of the following counsel registered as CM/ECF users:

Gregory S. Winton, Esq.
The Aviation Law Firm
1997 Annapolis Exchange
Parkway
Suite 300
Annapolis, MD 21401
Tel: 301-294-8550
Fax: 301-294-2525
TheAviationLawFirm.com
Counsel for Petitioners

John Starcher
Michael S. Raab
U.S. Department of Justice, Civil
Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
Tel: 202-514-2000
john.e.starcher@usdoj.gov
michael.raab@usdoj.gov
Counsel for Respondent

November 16, 2020

/s/ Robyn Cocho
Robyn Cocho
Counsel Press