

ORAL ARGUMENT NOT YET SCHEDULED**No. 21-5257**

United States Court of Appeals for the D.C. Circuit

FLYERS RIGHTS EDUCATION FUND, INC., *ET AL.*,
Appellants,

v.

FEDERAL AVIATION ADMINISTRATION
Appellee.

On Appellee's Motion for Summary Affirmance of the District Court for the
District of Columbia's Grant of Summary Judgment to Appellee

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS' RESPONSE
TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for *Amici Curiae* certifies as follows:

Parties and *Amici*. Appellants Flyer Rights Educational Fund, Inc. and Paul Hudson, and Appellee Federal Aviation Administration (“FAA”), appeared before the District Court and appear here. *Amici Curiae* did not appear before the District Court, although one of the *Amici* parties filed a letter that was rejected by the District Court below and another filed a declaration included in the record below. The *Amici* parties appearing in this Court and represented on this brief, collectively referred to as the Six Aviation Safety Experts, are:

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Ruling Under Review. The ruling at issue is the September 16, 2021 Memorandum Opinion and Order of the U.S. District Court for the District of Columbia denying Appellants’ motion for summary judgment and granting Appellee’s motion for summary judgment. R.31, R.32.

Related Cases. To the knowledge of *Amici Curiae*, (1) the case on review has not previously been before this Court, (2) there is no related case pending before

the Court, and (3) No. 22-1004, although involving the same parties, does not involve the same or similar issues.

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INTEREST OF AMICI CURIAE¹

The Six Aviation Safety Experts (“Safety Experts” or “*Amici*”) filing this brief as *amici curiae* do so in the interest of ensuring that the flying public, pilots, and the nation are safeguarded from unsafe aircraft. Among them, *Amici* have extensive experience in aviation operations and safety as commercial airline pilots with air carriers throughout the world. Their goal is to reveal and understand the basis for the FAA’s recertification of the Boeing 737 MAX airliner.

¹ This brief was not authored in whole or in part by counsel for a party. No person or entity other than *Amici* or their counsel made a monetary contribution to preparation or submission of this brief. Counsel for Appellants have consented to the Safety Experts’ participation as *amici*. The FAA has not responded to Safety Experts’ request.

INTRODUCTION

The 737 MAX was grounded following two disastrous airline crashes. Three-hundred-forty-six people died in those crashes, which were attributed by numerous governmental organizations to the implementation of Boeing's Maneuvering Characteristics Augmentation System (MCAS) on the aircraft. MCAS was designed to compensate for changed flight characteristics of the 737 MAX as compared with previous models of that aircraft. These new characteristics had the potential to cause the aircraft to stall and potentially crash in certain conditions that were more likely to occur given the 737 MAX's new configuration.

The Federal Aviation Administration grounded the 737 MAX following the second of the plane's dramatic failures. Twenty months later, the FAA ungrounded the 737 MAX.

Following recertification, and during the rulemaking necessary to unground the 737 MAX, both Boeing and the FAA have steadfastly, persistently, and ultimately refused to answer basic aviation-related safety questions or to provide access to the data necessary for pilots and independent safety experts to verify and confirm the airworthiness of the aircraft. In response to a Freedom of Information Act (FOIA) request filed by Appellants seeking documents and data related to the ungrounding of Boeing's 737 MAX, the FAA identified over 49,000 pages of responsive documents. The parties then narrowed the request to "those records upon

which the FAA would rely in considering the 737 MAX's 'return to service.'" Mem. Op. (R.32) at 4. After the documents were winnowed by party agreement to 108, the FAA released five in their entirety, but the remainder were either substantially redacted or withheld in their entirety. Appellants characterize the withheld documents as directly related to the recertification process. *Id.* at 6.

These documents would tell the story of the 737 MAX's ungrounding, and would provide information on which basis Boeing's actions and the FAA's oversight of the recertification process could be scrutinized by experts and pilots. They are the key to understanding whether the 737 MAX is safe to fly. The FAA justified its actions under an exemption to FOIA, 5 U.S.C. §552(b)(4), that allows records to be withheld from public disclosure where they are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.*

The FAA should not be permitted to keep basic airplane safety information out of public view, and out of reach of pilots and independent aviation safety experts, through application of a limited exemption to FOIA's disclosure mandate. That over 9,000 pages of documents are at issue here, hidden behind the FAA's refusal to respond to basic inquiries about the 737 MAX's airworthiness, is telling. These documents would allow pilots to meet their obligations and outside safety experts to confirm the 737 MAX is safe to fly. With so much data hidden by the exemption, the exemption becomes the rule. Such an interpretation is contrary to congressional

intent, the language of the statute, and leaves the air safety of the Boeing aircraft in question.

ARGUMENT

I. THE FAA'S POSITION KEEPS VITAL INFORMATION FROM PILOTS AND SAFETY EXPERTS, PREVENTING THEM FROM VERIFYING THE SAFETY OF THE 737 MAX

A. The Freedom of Information Act provides a backstop for safety and legal obligations in relation to aviation

The Freedom of Information Act provides a remedy for this problem through its requirement that agencies disclose records under their control.

The FAA has taken a contrary position, going so far as to state:

The FAA supports the public's rights to be reasonably informed of the basis for agency rulemaking. This does not, however, require putting interested members of the public in a position to reconstruct for themselves the underlying technical analyses that are based on proprietary data.²

The FAA seems to be relying on an understanding of *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019), that would allow the documents provided here to be held confidentially to encourage private parties to participate in various federal programs, such as the SNAP program at issue in *Food Marketing*. *Id.* at 2363. But airline manufacturers are not grocery retailers being asked to participate in a federal program that benefits citizens. They are participants in a highly

² Airworthiness Directives; The Boeing Company Airplanes, 85 Fed. Reg. 74560, 74578 (Nov. 20, 2020) (responding to comments received in recertification proceeding).

regulated, coordinated relationship with the government to protect citizens from the use and operation of unsafe aircraft. The two are not comparable.

B. Pilots and Independent Aviation Safety Experts Must Have the Ability to Verify the Safety of the 737 MAX

Federal law imposes significant obligations on pilots. These include being fully and legally responsible for their aircraft, its safety, and its operation. To meet their legal obligations, pilots need information sufficient to be able to know the plane and its workings, be prepared for emergencies that might occur while in flight, and understand the ways in which the aircraft responds to stress and system failures. The FAA's refusal, and Boeing's failure, to provide basic information related to its MCAS system leaves pilots in the untenable position of being required to fly an aircraft that they cannot personally ensure is safe and ready for flight. It also leaves outside safety experts unable to "check" Boeing's and the FAA's work leading up to recertification.

Complete responsibility for the safe operation of aircraft is placed on the Pilot in Command. *See* 14 C.F.R. §91.3: Responsibility and authority of pilot in command; *see also* 14 C.F.R. §91.7: Civil aircraft worthiness. Section 91.3(a) of the FAA's regulations provides: "The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." This regulation both imposes a legal responsibility on the pilot ("is directly responsible for") and provides authority to meet that responsibility ("is the final authority as

to ... the operation of that aircraft”). This obligation was noted by the court in

United States v. Newman, where the court observed:

Air Line operation generally requires the highest standard of care, and a commercial pilot, upon whose skill and judgment the lives and property of others are peculiarly dependent, owes at all times in the operation of the aircraft entrusted to him, the duty of exercising the highest standard of care.

331 F. Supp. 1240, 1244 (D. Haw. 1971).

FAA regulations further provide: “In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.” 14 C.F.R. §91.3(b). This awesome power, both in breadth and in responsibility, which is given only to the pilot in command, is unequaled in any other regulatory or statutory provision. The pilot in command plays *the* pivotal role in aircraft safety.

In a related vein, independent aviation safety experts have a vital role to play in understanding and independently verifying that aircraft certified as airworthy are as they claim to be. At a time when the FAA works closely with Boeing on safety matters, and Boeing is fined for violating the terms of an FAA-delegated safety inspection program and deceiving the FAA,³ it is more important than ever that the information that forms the basis of FAA air safety decision-making be transparent

³ *Boeing to Pay \$6.6 Million in Penalties to FAA*, <https://www.faa.gov/newsroom/boeing-pay-66-million-penalties-faa> (Feb. 25, 2021).

and externally verifiable. Only through such access can the public have confidence that the FAA is performing its statutory duties. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-74 (1989).

The initial rollout and certification of the 737 MAX provides additional support for this need for external verification. The very existence of the MCAS system, a system that was not easy to override but that could play a critical role in the safe operation of the aircraft, was not disclosed to pilots flying the 737 MAX jets. That lack of disclosure, along with the concomitant failure to train pilots to be ready for issues arising due to MCAS's operation, played a significant role in the 737 MAX crashes. Had pilots been aware of the system, and external safety experts apprised of its existence, the problems that followed from its implementation and use might have been avoided. That possibility, however, was hidden from view behind the veil of darkness pulled across the plane's certification by Boeing and the FAA.

Trust is earned. Given the experience with the initial rollout of the 737 MAX and the continuing recalcitrance of both the regulator and the regulated entity in relation to the Boeing 737 MAX to provide the basis for their actions—and at times not even clearly stating what those actions were—that trust has not been earned. In the absence of trust, external verification of the program that led to ungrounding of

the aircraft is essential. Yet, given the FAA's refusal to provide the documents requested by Appellants in this case, verification is not possible.

C. The information currently available from Boeing and the FAA leaves too many open questions regarding the safety and utilization of the MCAS system, and thus of the Boeing 737 MAX

Amici are concerned by a number of questions about the ungrounded 737 MAX that have been posed to the FAA and Boeing that remain unanswered. Many of these relate directly to the MCAS system, and some relate directly to the most basic questions about how the system is designed to integrate with the remainder of the 737 MAX's flight control system and how pilots are being trained to use the system. Others relate to manufacturing and the growing number of inflight malfunctions that have occurred since the MAX ungrounding. Meanwhile, Boeing is announcing plans to ramp up production.

MCAS was added to the 737 MAX to make the plane fly in a way that pilots of Boeing's other 737s would be accustomed to. According to a report of the House Committee on Transportation and Infrastructure compiled in 2020, following the two 737 MAX disasters:

[T]he 737 MAX contained a new feature in its flight control computer—the Maneuvering Characteristics Augmentation System (MCAS)—that has become the center of scrutiny for both MAX crashes. The new system had the ability to trigger non-pilot-commanded flight control movements that could place the airplane into a dangerous nose-down attitude that challenged the pilots' ability to control the aircraft. In addition, the MCAS software operated on input

from one of the two angle-of-attack (AOA) sensors externally mounted on the fuselage on either side of the airplane.⁴

From the information that is currently available, the MCAS system has been redesigned in the recertified 737 MAX such that it disengages when inputs from the aircraft's two Angle of Attack (AoA) sensors disagree.⁵ This means that, while MCAS is active as a part of the flight control system on all 737 MAX aircraft, it can at any time be shut off such that the pilot in command will be required to operate the aircraft without it.

Yet, even with the difficulties that inhered in the initial certification of the 737 MAX and the MCAS system, and the designed potential for the aircraft to have to operate without MCAS in place, it is still unclear whether MCAS is present in the recertified 737 MAX for its handling qualities or whether it is a necessary element of the aircraft's recertification. Boeing's own documents do not make clear which of these understandings is correct. At the top of its "737 MAX Updates" webpage, Boeing states: "The Maneuvering Characteristics Augmentation System (MCAS) flight control law was designed and certified for the 737 MAX to enhance the pitch

⁴ Majority Staff of H. Comm. on Transp. & Infrastructure, *Final Committee Report: The Design, Development & Certification of the Boeing 737 MAX*, p. 8 (Sept. 2020).

⁵ The system previously relied on one sensor, and if that one sensor provided a false reading, the MCAS system could erroneously engage and force the plane into a nosedive. This is what occurred in both of the crashes of the originally certified 737 MAX. *See id.* at 8-9.

stability of the airplane – so that it feels and flies like other 737s.”⁶ Yet, in the definitions section on that same page, Boeing defines MCAS as a “flight control law implemented on the 737 MAX to improve aircraft handling characteristics and decrease pitch-up tendency at elevated angles of attack,”⁷ defining a “control law” as a “set of software that performs flight control function or task.”

If it is the former, and MCAS is simply for aircraft handling, then issues with MCAS do not affect the safety of the aircraft and the aircraft may be safely flown if the MCAS system disengages. If it is the latter—if MCAS is a “control law” related to the safety of the aircraft in flight—then any time it disengages the aircraft becomes un-airworthy and unsafe and the pilot must land at the earliest opportunity.

Which is it? We do not know, because Boeing’s own information on this point is contradictory and the FAA has refused to provide an answer. This means that pilots in command cannot conceivably meet the law’s requirements that they determine whether a 737 MAX they have been directed to pilot is airworthy and safe.

Additional questions revolve around whether pilots are being trained to fly the 737 MAX with MCAS disengaged. MCAS was initially designed to give the 737 MAX flight characteristics that were closer to those of the previous version of the

⁶ <https://www.boeing.com/commercial/737max/737-max-software-updates.page>.

⁷ *Id.*

737, the 737 NG. Without MCAS, the 737 MAX will, inevitably, have *different flight characteristics*. Yet, it appears from the available public information that pilots are not being trained in what to expect when the MCAS system cuts out, or how to fly the aircraft when this occurs. This, again, means that 737 MAX pilots cannot confidently verify that the 737 MAX is safe to fly.

CONCLUSION

Amici have presented important, unanswered questions about how the troubled Boeing 737 MAX came to be ungrounded following the 346 deaths caused by the initial implementation of Boeing's MCAS system. The FAA's answer to these questions is: "Trust us." FOIA's answer is and should be: "That's not how this works. That's not how any of this works." Given this background, this case is not suitable for summary affirmance, particularly given the novel and undecided questions of law that Appellants have presented, and a full briefing and argument by the parties, with additional assistance from your *amici curiae*, should proceed. This is the clearest path to enabling pilots to meet their professional and legal obligations, while also enabling safety experts to ensure decision-making in relation to the problem-ridden Boeing 737 MAX is effective in overcoming the MCAS system's initial dangers and limitations and the public to assess whether the FAA is fulfilling its statutory obligations.

Dated: March 1, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,586 words, excluding the parts of the brief exempted by Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

(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)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2022, I caused the foregoing *Amici Curiae* Brief in Support of Appellants' Response to Appellee's Motion for Summary Affirmance to be electronically filed with the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF.

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