IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLYERS RIGHTS EDUCATION FUND, INC. d/b/a FLYERSRIGHTS.ORG, *et al.*,	)
Petitioners	)
v.	) Case No. 20-1486
FEDERAL AVIATION ADMINISTRATION, *et al.*,	)
Respondents	)

PETITIONERS' EMERGENCY MOTION FOR STAY PENDING REVIEW

Pursuant to Rules 18 and 27 of the Federal Rules of Appellate Procedure and Circuit Rule 18, Petitioners Flyers Rights Education Fund, Inc. d/b/a FlyersRights.org ("FlyersRights"), Paul Hudson, Thomas J. Connell, Lee Troutman Cory and James Mindling, hereby move the Court for an order, pending review by this Court, staying the final orders of Respondent Federal Aviation Administration ("FAA") allowing the return to service of the Boeing 737 MAX aircraft. Two of those aircraft crashed within a period of five months, resulting in the deaths of 346 passengers and crew members.

The two related orders are the order ungrounding the 737 MAX, FAA,

Notification of Rescission of Emergency Order of Prohibition, 85 Fed. Reg. 74260 (Nov. 20, 2020) ("Ungrounding Order") (attached as Exhibit 1 hereto); and a final Airworthiness Directive, finding the 737 MAX fit and safe to operate again based on design changes proposed to the agency by The Boeing Company, the aircraft's manufacturer. FAA, *Airworthiness Directives: The Boeing Company Airplanes, Final Rule*, 85 Fed. Reg. 74560 (Nov. 20, 2020)(the "Final AD") (attached as Exhibit 2 hereto). The Petition for Review of these orders was filed by Petitioners in this Court on December 7, 2020.

As set forth in detail below, FlyersRights is a national organization advocating for the rights of airline passengers; it participated in the rulemaking proceeding leading to the Ungrounding Order and Final AD. The individual petitioners are frequent flyers whose travel will make it impossible and/or expensive, in practice, for them to avoid flying the 737 MAX aircraft once it is returned to regular service by the airlines. The domestic airlines intend to start phasing in regular flights using the 737 MAX over the next three months (January, February, and March 2021).

The individual Petitioners are fearful for their lives and safety because, although the FAA has approved design and software changes the agency says now make the plane safe to fly, the agency has withheld from the public record the actual procedures it used to test these changes for safety and in flight, and the actual results of those tests. Independent experts have determined that without such information,

it is impossible to determine if there is an adequate factual basis for the FAA's decision to allow the plane to fly again.

FlyersRights brought suit a year ago to compel disclosure of this information under the Freedom of Information Act. *Flyers Rights Education Fund, Inc., et al. v. Federal Aviation Administration,* Civ. Action No. 19-cv-3749-CKK (D.D.C) (the "FOIA Case"). The agency has, for more than a year, resisted producing this information, withholding it under Exemption 4 of FOIA (confidential commercial information). Cross-motions for summary judgment on that issue are pending before the District Court.

The grounds for issuing a stay pending review are compelling. First, Petitioners are likely to prevail on the merits. This Court has made clear that it will not and cannot find that an agency's decision was supported by substantial evidence if that evidence remains hidden, from the public and from this reviewing Court. Here the FAA has explained the design and software changes, but then repeatedly affirms only in conclusory fashion that it has analyzed and tested those changes and found that they make the aircraft safe to fly again. But the agency has withheld from the record any specific information about *how* it tested and analyzed the redesigned plane, and the specific *results* of those analyses and tests.

Second, if the FAA orders are not stayed, the 737 MAX returns to service and those orders lacked adequate factual basis—as the original certification orders did—

there is a serious imminent risk of additional crashes that could cause loss of life or limb to the individual Petitioners and/or any of the thousands of member passengers of FlyersRights. Such harm is irreparable by definition.

Third, the balance of the equities and public interest clearly favor Petitioners. The FAA will suffer no harm as its highest priority should be ensuring passenger safety. To be sure, Boeing may suffer some financial loss from delay in ungrounding, but it can avoid that harm simply by allowing FAA to make the needed information available. The airlines will not suffer from any delay. On the other side of the scale, the safety of millions of passengers will be protected. The public has an overriding interest in ensuring that the FAA had an adequate factual basis for ungrounding the aircraft.

I. FACTUAL BACKGROUND

A. Certification and Failure of 737 MAX

The B737 MAX aircraft series "is the fourth generation of the B737 (*i.e.*, a "derivative" or "related" aircraft), succeeding the B737 NG. Boeing applied for certification of the B737 MAX 8 (the first in the series) on June 30, 2012, and the FAA certified the aircraft on March 8, 2017. *Boeing 737 MAX Flight Control System: Joint Authorities Technical Review: Observations Findings and Recommendations* I (Oct. 2019) (attached hereto as Exhibit 4) ("JTAR Report"). Twenty months later, on October 29, 2018, a 737 MAX operated by Lion Air

crashed after taking off from Jakarta, Indonesia, killing all 189 passengers and crew members on board. On March 10, 2019, a 737 MAX operated by Ethiopian Airlines similarly crashed minutes after takeoff from Addis Ababa, Ethiopia, killing all 157 passengers and crew members on board. On March 13, 2019, the FAA issued an emergency order prohibiting operation of the 737 MAX aircraft by U.S. certificated operators. *Operators of Boeing Company Model 737-8 and Boeing Company Model 737-9 Airplanes: Emergency Order of Prohibition*, 84 Fed. Reg. 9705 (March 18, 2019).

The 737 MAX had engines that did not fit under the wings of the older version of the airplane. Boeing pigeonholed the new engines by taking certain steps to mount them forward of the wing and further away from the ground, generating greater lift for the aircraft and creating a tendency for the nose to pitch up during flight. R. Vartabedian, *How a 50 Year Old Design Came Back to Haunt Boeing With Its Troubled 737 MAX Jet*, Los Angeles Times March 15, 2019 https://www.latimes.com/local/california/la-fi-boeing-max-design-20190315-story.html (last visited Oct. 29, 2020). To compensate, the 737 MAX's flight control system contains a "Maneuvering Characteristics Augmentation System" ("MCAS"), that is automatically activated when one sensor indicates the nose going up, signaling a potential stall situation. MCAS causes the horizontal stabilizer to force the nose down. But in the crashes, the

MCAS activated repeatedly, when it should not have, with the pilots unable to control the aircraft or override MCAS, so that the MCAS kept forcing the planes to head down until they crashed. Majority Staff, U.S. Senate Committee on Transportation and Infrastructure, *The Design, Development & Certification of the Boeing 737 MAX* 7-12 (Sept. 2020).

A Safety Recommendation Report issued by the National Transportation Safety Board (NTSB) in September 2019 pointed to the pilots' inability to override the automatic operations of MCAS. NTSB, *Safety Recommendation Report* at 2-3 (Sept. 19, 2019), https://www.ntsb.gov/investigations/AccidentReports/Reports/ASR1901.pdf (last visited Oct. 26, 2020). In October 2019, an expert international panel commissioned by the FAA harshly criticized the process followed by the FAA in its original certification of this aircraft, including delegating many agency functions to Boeing. JTAR Report, Ex. 4 hereto at II-XIII.

Throughout 2019, Boeing submitted proposed solutions and fixes to the FAA, seeking recertification of the airworthiness of the aircraft—the legal condition for ungrounding it. FAA, *FAA Updates on Boeing 737 MAX* https://www.faa.gov/news/updates/?newsid=93206 (last visited Dec. 17, 2020). In June 2020, FAA issued a proposed Airworthiness Directive, requiring certain changes to be made to the design of the 737 MAX as a condition of returning it

to service. FAA, *Airworthiness Directives: The Boeing Company Airplanes, Notice of Proposed Rulemaking*, 85 Fed. Reg. 47698 (Aug. 6, 2020).

B. Re-Certification and Ungrounding

On November 20, 2020, the FAA issued the two orders for which Petitioners have petitioned for review, the Ungrounding Order (Ex. 1) and the Final AD (Ex. 2). The agency also issued a final version of its *Summary of the FAA's Review of the Boeing 737 MAX* (Nov 18, 2020) (attached hereto as Ex. 3) (the "Final Summary").

The Final AD approved a number of design and software changes submitted by Boeing, including use of two sensors to detect when MCAS should be activated; automatic de-activation if the sensors disagree by more than a certain amount; limitation of MCAS activation to one per flight; and supposed limit of MCAS function so that the crew could control the aircraft's pitch using the stick with MCAS turned on. Final AD, 85 Fed. Reg. at 74561.

II. THE RELATED FOIA LITIGATION

On October 31, 2019, FlyersRights submitted a FOIA request to the FAA seeking the documents submitted by Boeing on which the FAA would rely in determining when the 737 MAX aircraft should be re-certified to fly. FOIA Case Docket, Doc. No. 1-1 On December 16, 2019, Plaintiff filed a complaint to compel the FAA to grant expedited treatment and to produce the requested

records on an expedited basis. *Id*. Doc. No. 1.

After the search request was narrowed by agreement, the FAA reviewed responsive documents from April to September 2020. Ultimately the agency withheld virtually all the substantive information in the documents. In October 2020, the FAA filed a *Vaughn* Index. (Doc. No. 19) (attached hereto as Ex. 5). The *Vaughn* Index lists 83 documents withheld in full or heavily redacted, based on FOIA Exemption 4 (exempting confidential commercial information).

Among the categories of information withheld based on Exemption 4 are all documents showing the actual process followed by the FAA in determining whether, with the design changes proposed by Boeing, the agency would find the aircraft safe to fly again--specifically, the certification plans, which set out the steps to be taken by the manufacturer to show that the aircraft complies with FAA rules and standards; methods to be used to test the aircraft and particular components; plans for flight tests; the results of those tests; and safety analyses, that is, the results of assessments of how design changes mitigate potential failure situations. Cross-motions for summary judgment on the issue of whether these documents were validly withheld under Exemption 4, are pending before the District Court. FOIA Case Docket, Docs. No. 21, 22, 23, 24, 25.

III. SEEKING A STAY FROM THE FAA WOULD BE FUTILE AND IMPRACTICABLE

Petitioners have not sought a stay from the FAA because to do so would be futile and impracticable. Petitioners contend that a stay is warranted, on the merits, because the FAA has withheld from the public record the factual basis for its findings that that the design and software changes it approved actually allow the 737 MAX aircraft to be flown safely. As noted, the FAA has withheld the process it followed (the certification plans), the safety analyses conducted and the flight test procedures and results.

In the FOIA Case, the FAA has consistently taken the position that it cannot release that information because it is proprietary to Boeing. FlyersRights contends that the FAA should release these documents because the agency and Boeing both pledged transparency in the re-certification process; there can be no transparency without release of these documents precisely because they are a critical part of the factual basis for the FAA's re-certification decision; and therefore Boeing could not have expected these documents to have been kept confidential by the agency. For that reason, FlyersRights argues, the documents were not provided by Boeing "under as assurance of privacy" as required by *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019). Plaintiff's Memorandum in Support of Summary Judgment, FOIA Case Docket Doc. 21-1 at 14-27.

The FAA has rejected those arguments. Defendant's Combined

Memorandum, FOIA Case Docket Doc. 23-4 at 25-30. In its latest filing, the FAA insists that a "commitment to be transparent in the ungrounding process is simply not tantamount to a commitment to disclose the specific, confidential information at issue here." *FAA Reply*, FOIA Case Docket Doc. No. 28 at 7. Thus the central argument for a stay (as to the merits) has already been rejected by the FAA. It would clearly be futile to apply to the FAA for a stay.

It would also be impracticable to do so. With the Final AD and Ungrounding Order providing the green light, the domestic airlines are planning to return the 737 MAX to service over the next three months. American Airlines will phase in regular commercial service beginning after January 4, 2021. American Airlines, 737 MAX Return to Service, https://www.aa.com/i18n/travel-info/737-MAX-return-to-service.jsp (last visited Dec. 18, 2020). United Airlines expects to return the plane to service in February 2021. Dominic Gates, *United gets first 737 MAX to be delivered in 21 months as Boeing jet returns to skies*, Chicago Tribune (Dec, 9, 2020), https://www.chicagotribune.com/business/ct-biz-boeing-737-max-return-20201209-dfz4ipzrtzdgdhpbijmtvcq2re-story.html (last visited Dec. 18, 2020). Southwest Airlines expects to return the 737 MAX to commercial service in March 2021. Securities & Exchange Commission, SouthWest Airlines Form 8-K (filed Dec. 16, 2020) https://www.sec.gov/ix?doc=/Archives/edgar/data/92380/000009238020000161/lu

v-20201216.htm (last visited Dec. 18, 2020).

If Petitioners applied to the FAA for a stay now, by the time the agency issued its inevitable rejection, Petitioners re-filed this motion and this Court could render a decision, the airlines would have commenced flying the 737 MAX regularly again, and the motion would be moot. For that reason, applying first to the agency would be impracticable. Fed. R. App. P. 18(a)(2)(i).

IV. PETITIONERS' STANDING AND POTENTIAL INJURY

FlyersRights is a nonprofit organization advocating for the rights and interests of airline passengers, with more than 50,000 members and supporters. Declaration of Paul Hudson, Ex. 6 hereto ("Hudson Decl.") ¶1. FlyersRights submitted extensive comments in the Final AD rulemaking. *Id*. ¶18.

The group has many members who will be flying on the 737 MAX, will not be able to avoid doing so(either at all or without expense and inconvenience), and fear for their lives and safety in the absence of an adequate factual basis for the ungrounding. *Id.* ¶¶19-22. This Court has recognized that FlyersRights is the functional equivalent of a traditional membership organization, and thus has associational standing to seek relief from this Court on behalf of its members. *Flyers Rights Education Fund, Inc. v. U.S. Dep't of Transportation*, 957 F.3d 1359, 1361-62 (D.C. Cir. 2020).

Each of the individual petitioners is a frequent flyer who fears for his safety if

forced to fly on the 737 MAX, given the inadequate public record for the ungrounding. Although the type of aircraft to be used on a particular flight is sometimes disclosed when making a reservation, or can be checked on certain websites, the airline is not legally required to disclose that information until the passenger has boarded the plane and can retrieve the safety card. 14 C.F.R. §121.571(b). Flying on the MAX will be unavoidable in any event because airlines may change the aircraft at the last minute without notice, due to weather, maintenance, or other considerations. Hudson Decl. ¶20. And merely avoiding reserving any flight using the MAX will incur expense and inconvenience. Declarations of Lee Troutman Cory (Ex. 7 hereto), James Mindling (Ex. 8) and Thomas Connell (Ex. 9); Hudson Decl. ¶21. Each of these Petitioners thus has individual standing to bring this Petition and seek the stay. *See Flyers Rights Education Fund, Inc. v. U.S. Dep't of Transportation,* 810 Fed. Appx. 1 *2 (D.C. Cir. 2020) (individual petitioner with "substantial risk" of incurring expense and inconvenience to avoid injury at issue has standing).

V. THE FAA's ORDERS SHOULD BE STAYED PENDING REVIEW

In determining whether to grant a stay pending appeal, the Court is to consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure

the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See* Circuit Rule 18(a)(1). In this case, all four factors weigh in favor of staying the Final AD and the Ungrounding Order.

A. Petitioners Are Substantially Likely to Prevail on the Merits

In reviewing an FAA airworthiness directive, as with agency action, the Court considers whether it is "'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.'" *Automotive Engineering Corp. v. FAA*, 882 F.3d 1157, 1159 (D.C. Cir. 2018) (quoting 5 U.S.C. §706(2)(A)).

The FAA's factual findings "are conclusive" when "supported by substantial evidence." 49 U.S.C. §46110(c). The Court will reverse the action "only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). "Substantial evidence" is "'evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Automotive Engineering*, 882 F.3d at 1159 (quoting *Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000)). In that regard, this Court "must also determine whether the agency 'adequately explained the facts and policy concerns it relied on and [whether] ... those facts have some basis in the record.'" *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (quoting *WWHT Inc. v. FCC*, 656

F.2d 807, 817 (D.C. Cir. 1981)).

In this case, in the Final AD and Final Summary, the FAA has described the design changes that it reviewed, what those changes do and how they are supposed to operate. But did those changes make the 737 MAX safe to fly again? To determine that, the FAA conducted safety analyses and test flights. The Final AD claims that those analyses and test flights were successful. But the FAA has withheld from the record all of the factual support for that conclusion: the certification plans (list of actual specific steps taken to analyze and test the design changes); testing methods, plans and conditions; flight test plans and criteria; flight test results; and safety analyses. *See* FOIA Case Vaughn Index, Ex. 5 hereto, descriptions of documents 2, 3, 4, 5, 6, 9. 11, 13, 18, 23, 26, 28, 37, 43, 44, 46, 48, 50, 51, 55, 63, 65, 76, 77, 57, 60, 70, 75, 98 and 100.

The FAA states that "Boeing completed individual safety assessments on the Enhanced Digital Flight Control System (EDFCS) and Stabilizer to show that those systems' designs meet the reliability and integrity safety requirements…" Final Summary (Ex. 3) at 40. But the actual assessments have been withheld from the record. Nowhere does the FAA disclose what steps were taken in those assessments and what the results were.

Similarly, the FAA claims that "[m]ore than 4,000 hours of flight testing supported the design changes associated with the updated [flight control]

software and updated [MAX Display System] software." *Id*. at 41. The agency also states that "Boeing testing included extensive human-factors and crew-workload testing," *id*. at 42 and discloses how many crews were involved and what general features were being tested. *Id*. at 41-49. But nowhere in the record does the FAA disclose the flight test plans, what took place during the tests or any of the specific results of the test flights. What did the pilots actually do? What specific maneuvers did they make and using what instruments or controls? And what happened?

The absence of this information from the record means that the FAA's conclusions that the 737 MAX is safe to fly again do not actually have any specific "factual basis in the record." And the "reasonable minds" of aviation experts do *not* "accept as adequate" the FAA's evidence, without disclosure of that withheld information.

Capt. Chesley ("Sully") Sullenberger, retired airline captain and aviation safety professional with over 40 years of experience, whose emergency landing of an aircraft in the Hudson River, saving 155 passengers, was the subject of the feature film *Miracle on the Hudson*, states that without the withheld information, "[i]t is impossible for me and other experts to provide to the public, other stakeholders and interested parties…any objective independent assessment of the FAA's life-or-death decision in ungrounding the Boeing 737 MAX without

being able to review the technical information and related testing and analysis submitted to the FAA that formed the basis for its decision…." Declaration of Chesley Sullenberger, Ex. 10 hereto ¶12.

Similarly, Dr. Javier de Luis (aeronautical engineer and scientist with 30 years of experience, published technical author and former MIT instructor) states, as to the claimed testing of the updated flight control system (including MCAS), that in the public record, "there is no actual information about exactly how this design change was tested and what the specific results of the test were…. Without that information, FAA's conclusory statements that safety and flight testing was successful are meaningless… I cannot determine whether there is any factual basis for the agency's conclusions." Declaration of Javier de Luis, Ex. 11 hereto ("de Luis Decl.") ¶¶17-18.

The experts are specifically concerned about the lack of substantial evidence in the record to support three fundamental findings. First, the FAA claims that it is necessary to retain MCAS on the MAX (to improve pilot handling when the nose goes up too much) but also claims that the aircraft can be operated safely *without* MCAS operating (since it supposedly will be automatically deactivated if the signals for its activation disagree, indicating they're unreliable). Final AD, 85 Fed. Reg. at 74562-63. FAA is saying that compliance with its rules "cannot be achieved without the proper functioning of

MCAS. Yet the FAA also states that MCAS is not necessary for safe flight and landing. These statements cannot both be true." Declaration of Richard Spinks P.E. (professional engineer and project manager with thirty-eight years of experience in process safety), Ex. 12 hereto ¶5.

Second, FAA's conclusion that the MAX *can* be flown safely without MCAS operable is unsupported. The FAA states that this conclusion is based on "analyses, simulation and flight testing." *Id*. at 74562-63 Dr. de Luis notes, however, that the FAA has not provided, anywhere in the public record, the data the FAA relied on in determining that the aircraft actually *is* safe to fly without MCAS. "It is impossible for me or any other independent expert to address this question... without being able to review results of the actual tests of the aircraft conducted with and without MCAS in operation—information not included in the public record…." De Luis Decl. ¶13. That view is shared by another expert, a retired aeronautical/avionics systems and safety engineer with more than 30 years of experience. Declaration of Gregory Barrance, Ex. 13 hereto ("Barrance Decl.") ¶¶15, 17 ("the FAA has withheld from the public record all details of its safety analyses, simulation testing and flight testing" and has "failed to disclose the essential factual basis for its determination that the 737 MAX can safely be returned to service").

Third, a crucial defect that contributed to the crashes was an erroneous

signal from a single failed angle of attack sensor, triggering activation of the MCAS in a situation in which it should not have been turned on. De Luis Decl. ¶15. Boeing's solution is to use two sensors, and if they disagree by more than a certain amount, MCAS will be automatically disabled. Final AD, 85 Fed. Reg. at 74565. But what if MCAS is de-activated in a situation in which it should actually be turned on because one of the two sensors was off? There is an algorithm that picks a middle value. Does it work? The FAA claims that they tested it. *Id.* "However, no data is provided that demonstrates this to be the case—no information about how such a test was conducted or what were the specific results." de Luis Decl. ¶16; Barrance Decl. ¶18.

The FAA may contend that given the agency's technical expertise, its finding that successful tests and analyses were conducted should simply be accepted at face value, without any supporting evidence in the record. There could be no more powerful rejoinder to that contention—and affirmation of the need for the record to include the actual test procedures and results—than a report released just days ago by the U.S. Senate Committee on Commerce, Science and Transportation. That Report revealed, based on information from a whistleblower, that in a crucial test of pilot reaction time—how quickly they would react to a certain kind of mistaken MCAS activation—Boeing officials were present for the testing and tipped off the test pilots in advance. That way,

their reaction time would be artificially lowered to match an unrealistic Boeing assumption used in the re-certification process. Senate Commerce Committee, *Committee Investigation Report, Aviation Safety Oversight* 44-45 (Dec. 18, 2020)(excerpts attached as Ex. 14 hereto). "Boeing officials inappropriately coached test pilots in the MCAS simulator testing contrary to testing protocol… It appears, in this instance, that FAA and Boeing were attempting to cover up important information that may have contributed to the 737 MAX tragedies." *Id*. at 45. This complete corruption of crucial testing demonstrates how imperative it is that the factual record include the *actual* safely analyses, flight testing procedure and results.

This Court has made clear that it will not uphold the FAA's action when the agency has relied on information that it refuses to disclose because the information is supposedly proprietary. In *FlyersRights Education Fund, Inc., v. FAA*, 864 F.3d 738 (D.C. Cir. 2017), FlyersRights challenged the FAA's refusal to engage in rulemaking on airplane seating, arguing that the shrinking space between airline seat rows, coupled with an increase in average passenger size, created a safety risk by making it harder for passengers to get out in an emergency. In rejecting the request for rulemaking, the FAA claimed that emergency evacuation tests had been successfully conducted in planes with the smaller seat dimensions. But the agency refused to disclose the actual tests,

claiming they were proprietary.

This Court granted the petition for review in part, holding that the FAA had "relied on undisclosed tests using unknown parameters," 864 F.3d at 741 and that the agency simply could not rely on tests that it insisted on withholding from the public record:

> [T]hat is not how judicial review works... We cannot affirm the sufficiency of what we cannot see.... Whatever deference we generally accord to administrative agencies, "we will not defer to a declaration of fact that is 'capable of exact proof' but is unsupported by any evidence.'"

Id. at 746 (quoting *McDonnell Douglas Corp. v. U.S. Dep't of Air Force,* 375 F.3d 1182, 1190 n.4 (D.C. Cir. 2004)). "[I]information critically relied upon by the agency that no one can see does not count." *Id*. at 747.

In this case, the safety analyses and flight plans and tests "critically relied upon" by the FAA have been withheld from the public record. Accordingly, the record will not support the agency's finding that the 737 MAX has been proven safe to return to service. That finding is not supported by substantial evidence. For that reason, Petitioners are substantially likely to prevail on the merits.

B. <u>Petitioners Will Be Irreparably Harmed in the Absence of a Stay</u>

To demonstrate irreparable harm, the movant must show that harm will be "certain and great," "actual and not theoretical," and so "imminent[t] that there is a clear and present need for equitable relief…' " *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (quoting *Chaplaincy of Full*

Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation omitted)).

In this case, if the FAA orders are not stayed, the 737 MAX returns to service and those orders lacked adequate factual basis—as the original certification orders did—there will be a serious imminent risk of additional crashes that would cause loss of life or limb to the individual Petitioners and/or any of the thousands of member passengers of FlyersRights. Individual Petitioners may be unable to avoid flying on the MAX once it is returned to commercial service because airlines may switch the aircraft used after the reservation is made. And among FlyersRights members, many will inevitably be flying the MAX. Hudson Decl. ¶22.

Domestic airlines are planning to return the MAX to commercial service beginning at various times in the first quarter of 2021. *See* section I, *supra*. That will occur before briefing is complete on the Petition for Review, let alone issuance of a decision by this Court. Of course, it is not "certain" the redesigned airplane will crash. But the absence of an adequate factual basis for the ungrounding decision—as far as the record shows—creates a real and tangible risk of a catastrophic injury that could never be reparable—loss of life or limb. There is a "clear and present need for equitable relief."

C. The Balance of Harms and Public Interest Weigh in Favor of a Stay

The balance of harms and public interest factors "merge when the

Government is the opposing party." *Nken*, 556 U.S. at 435. Here, the FAA will suffer no harm from a stay; it will not be required to incur any significant additional effort or expense from delay of its Ungrounding Order. The mandate of FAA under its authorizing statute is both to promote safety and air commerce, but that statute makes clear that the agency is to consider "assigning and maintaining safety as the highest priority in air commerce." 49 U.S.C. §40101(a)(1). To be sure, Boeing may suffer some financial loss from delay in ungrounding, but that harm would be self-inflicted: it is Boeing that cheated in the re-certification and now insists that the essential facts on which the FAA relied be kept secret from the public and this Court.

The airlines will not be harmed. Their need to put the plane back into service quickly has been reduced by decreased demand caused by the pandemic and concerns about the plane's safety, as evidenced by the carriers' cancellation of 1,068 orders for the plane through the end of November 2020. Dominic Gates, *Boeing lost more 737 MAX orders and delivered zero 787's in November,* Dec. 8, 2020 (https://www.seattletimes.com/business/boeing-aerospace/boeing-loses-more-737-max-orders-and-delivers-zero-787s-in-november/ (last visited Dec. 21, 2020).

For their part, Petitioners and the flying public have an overriding interest in ensuring that the FAA had an adequate factual basis for returning an aircraft to service that it had approved as safe before, but that crashed twice soon after that approval resulting in deaths of all passengers and crew on both flights.

VI. NOTICE OF MOTION

Pursuant to Circuit Rule 18(a)(2), Petitioners state that the FAA was notified in advance that that this motion would be filed today. On December 21, 2020, Jeffrey Sandberg, attorney for the Respondents in this matter, contacted Petitioners' counsel to acknowledge notice and agree to accept electronic service of this Motion.

CONCLUSION

For the reasons set forth above, Petitioners' Motion for Stay Pending Review should be granted.

Respectfully submitted,

_/s/ Joseph E Sandler

December 23, 2020

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)

I hereby certify that the foregoing Motion complies with the length limitation of Fed. R. App. P. 27(d)(2) because the Motion contains 5,128 words using the Word Count function of Microsoft Word.

/s/ Joseph E. Sandler
Joseph E. Sandler
Counsel for Petitioners

Dated: December 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of December 2020, I served the foregoing Motion for Stay Pending Review by e-mail on the following, who have consented to receive electronic service of the Motion on behalf of Respondents:

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ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners	)
v.	) Case No. 20-1486
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Respondents	)

PETITIONERS' PROVISIONAL CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rules 18(a)(4) and 28(a)(1), Petitioners Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org, Paul Hudson, *et al.*, collectively "FlyersRights") state as follows:

A. Parties:

Petitioners

The Petitioners in this case are:

Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org ("FlyersRights"). FlyersRights is a nonprofit corporation exempt from taxation as a charitable and

educational organization under section 501(c)(3) of the Internal Revenue Code as amended. FlyersRights has no parent, subsidiary or affiliate and has never issued shares or debt securities to the public.

Paul Hudson, an individual, President of FlyersRights

Thomas J. Connell, an individual

Lee Troutman Cory, an individual

James Mindling, an individual

Respondents

The Respondents are the Federal Aviation Administration and Stephen Dickson, in his official capacity as Administration of the Federal Aviation Administration.

B. Rulings Under Review

The rulings under review are:

(1) the FAA's order ungrounding the 737 MAX, FAA, *Notification of Rescission of Emergency Order of Prohibition*, 85 Fed. Reg. 74260 (Nov. 20, 2020) ("Ungrounding Order") (attached as Exhibit 1 hereto); and

(2) the final Airworthiness Directive, finding the 737 MAX fit and safe to operate again based on design changes proposed to the agency by The Boeing Company, the aircraft's manufacturer. FAA, *Airworthiness*

Directives: The Boeing Company Airplanes, Final Rule, 85 Fed. Reg. 74560 (Nov. 20, 2020)(the "Final AD") (attached as Exhibit 2 hereto).

C. Related Cases

There is currently pending before the United States District Court for the District of Columbia a case brought by FlyersRights against the FAA under the Freedom of Information Act, involving similar issues. *Flyers Rights Education Fund, Inc., et al. v. Federal Aviation Administration*, Civ. Action No. 19-cv-3749-CKK (D.D.C).

Respectfully Submitted,

/s/ Joseph E. Sandler____
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