No. 11-1366

In The Supreme Court of the United States

AVIDAIR HELICOPTER SUPPLY, INC.,

Petitioner,

v.

ROLLS-ROYCE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE AERONAUTICAL REPAIR STATION ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, and with consent of both parties, the Aeronautical Repair Station Association (ARSA) respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

ARSA is a non-profit, non-stock membership trade association incorporated under the laws of the Commonwealth of Virginia. ARSA has 450 members worldwide, including independent repair stations, aircraft operators, manufacturers and other companies related to, or having an interest in, the maintenance, preventive maintenance or alteration of aircraft.[2]

The vast majority of ARSA members are certificated by the Federal Aviation Administration (FAA), and the association is therefore heavily focused on fostering compliance with aviation safety regulations. ARSA's interest in this case stems from existing

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk of this Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.

[2] For purposes of this brief, all references to aircraft include any related products, parts and articles that may be installed on, or are eligible for installation on, a type-certificated aircraft.

regulatory requirements for the provision of technical information used to perform aircraft maintenance, preventive maintenance or alterations, and the federal agency's failure to enforce its own regulation.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In filing this *amicus curiae* brief, ARSA draws the Court's attention to an instance of a federal regulatory agency disregarding the plain language of its own rules, which are mandated by federal statute. Without intervention from the federal courts, the public, whom these regulations are designed to protect, has no forum to redress the situation. It is therefore critically important for this Court to intervene.

Specifically, the Court should grant Petitioner's request for a writ of certiorari because the lower court failed to consider the federal agency's unwillingness to enforce its regulation requiring design approval holders to make technical information available regarding the performance of maintenance, preventive maintenance or alterations. The FAA states that "[*d*]*esign approval* means a type certificate (including amended and supplemental type certificates) or the approved design under a PMA [parts manufacturer approval], TSO [technical standard order] authorization, letter of TSO design approval, or other approved design." 14 C.F.R. § 21.1(b)(4) (2012). Despite the regulatory requirements, design approval holders have

exhibited a reluctance to furnish such information.[3] And, instead of enforcing its regulation, the federal agency has essentially looked the other way. The FAA's inaction creates a dilemma for maintenance providers who are required by regulation to comply with the technical instructions.

As it relates to Petitioner's case, the matters at issue in the Eighth Circuit proceeding would not have existed if the FAA had enforced its regulation regarding the availability of technical information. Therefore, the Court should grant review of Petitioner's case to ensure that proper recourse exists when a federal agency disregards its own rules.

ARGUMENT

I. A FEDERAL REGULATORY AGENCY MUST RECOGNIZE AND ENFORCE THE PLAIN LANGUAGE OF ITS OWN REGULATIONS.

A. The FAA is required by statute to issue rules necessary to carry out its assigned functions.

The FAA is a federal regulatory agency in the Department of Transportation tasked with ensuring aviation safety. As stated in the United States Code,

[3] The detailed maintenance information at issue is referred to as "Instructions for Continued Airworthiness" (ICA) in the FAA regulations. *See* discussion, *infra*, Part B.

"national objectives of general welfare, economic growth and stability, and security of the United States require the development of transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation at the lowest cost consistent with those and other national objectives, including the efficient use and conservation of the resources of the United States." 49 U.S.C. § 101(a) (2006).

B. In its duty to promote safe flight, the FAA must issue minimum standards for design and continued airworthiness.

The FAA is authorized to issue, rescind and revise regulations necessary for carrying out its mandate, *id.* §§ 106(f)(3)(A), 40113(a), to promote safe flight of civil aircraft in air commerce by prescribing minimum standards in the interest of safety for design and construction of aircraft, as well as the inspection, servicing and overhauling of aircraft and related parts. *Id.* § 44701(a). The regulations promulgated according to this statutory requirement are at the heart of petitioner's case. *See* 14 C.F.R. (containing the regulations promulgated by the FAA to carry out its mandate, commonly referred to as the "Federal Aviation Regulations").

In particular, these regulations require the holder of an FAA design approval to "furnish at least one set of complete Instructions for Continued Airworthiness [ICA] to the owner of each type aircraft, aircraft

engine, or propeller upon its delivery, or upon issuance of the first standard airworthiness certificate for the affected aircraft, whichever occurs later." *Id.* § 21.50(b). The ICA must be prepared in accordance with additional regulations specifying the required content. *See*, e.g., *id.* pt. 23 (normal, utility, acrobatic, and commuter category airplanes); *id.* pt. 25 (transport category airplanes); *id.* pt. 26 (continued airworthiness and safety improvements for transport category airplanes); *id.* pt. 27 (normal category rotocraft); *id.* pt. 29 (transport category rotocraft); *id.* pt. 31 (manned free balloons); *id.* pt. 33 (aircraft engines); *id.* pt. 35 (propellers).

1. A type certificate is issued when FAA design standards are met.

As required by federal statute, the FAA issues a type certificate for a civil aviation product after finding it is "properly designed and manufactured, performs properly, and *meets the regulations and minimum standards prescribed under section 44701(a)*." 49 U.S.C. § 44704(a) (emphasis added).

Since the ICA requirements, discussed previously,[4] flow from the FAA design regulations containing the certification procedures for products and parts prescribed under 49 U.S.C. § 44701(a), there is no discretion in the FAA's enforcement of its rule.

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[4] *See* discussion, *supra*, Part I.B.

The issuance of a type certificate by the FAA is conditioned upon the existence, and availability, of proper technical information. As such, the FAA has a statutory and regulatory duty to ensure the initial, and continuing, provision of ICA by design approval holders. The statutory language stresses that persons are prohibited from violating a regulation prescribed under section 44701(a). *See id.* § 44711(a)(7) (specifying that a person may not violate any term, regulation, or order issued under section 44701(a)).

2. Continued airworthiness requirements include providing technical information.

The ICA furnished to the owner and/or operator under 14 C.F.R. § 21.50(b) must also be made available "to any other person required by this chapter to comply with any of the terms of those instructions." 14 C.F.R. § 21.50(b). Changes to the ICA must also be "made available to any person required by this chapter to comply with any of those instructions." *Id.*

Maintenance providers, such as FAA-certificated repair stations, are required to comply with ICA. Specifically, FAA regulations state that "[e]ach person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current [design approval holder's] manual or Instructions for Continued Airworthiness prepared by its [design approval holder],

or other methods, techniques, and practices acceptable to the Administrator." *Id.* § 43.13(a); *see id.* § 145.201(a)(1) (directing repair stations to perform maintenance in accordance with 14 C.F.R. pt. 43).

As such, a design approval holder is required to provide ICA, and changes to ICA, to maintenance providers such as Petitioner.

C. As it relates to Instructions for Continued Airworthiness, the FAA is not enforcing minimum standards for design and continued airworthiness.

Notwithstanding the clear language of its regulations, the FAA has shied away from enforcing the design approval holder's obligations to make ICA available to maintenance providers.[5]

In 2005 and 2008, ARSA submitted formal complaints to the FAA Administrator, *see* Compl., *Aeronautical Repair Station Ass'n v. Parker Hannifin Corp.*, AGC-10 (FAA filed Mar. 9, 2008), *available at* http://www.arsa.org/files/ARSA-FAA-PMAComplaint-Final.pdf; Compl., *Aeronautical Repair Station Ass'n*, AGC-10 No. 13-05-02 (FAA filed Nov. 23, 2005), *available at* http://www.arsa.org/files/Final.Filed.Heros.ICA.Part13.Complaint.11.23.05.pdf, alleging violations of the ICA

[5] At the same time, the FAA actively enforces the requirement for maintenance providers to follow ICA.

regulatory provisions.[6] While the 2005 complaint was formally withdrawn in 2011, *see* Grant of Withdrawal, *Aeronautical Repair Station Ass'n*, AGC-10 No. 13-05-02 (FAA filed Apr. 21, 2011), a response from the FAA was never received. Likewise, the FAA has not responded to the outstanding 2008 complaint.

Additionally, in a recent ARSA survey, seventy-two percent of respondents reported that in the past two years they had seen an increase in practices limiting access to ICA. *Survey Identifies Top Threats to Growing Maintenance Industry*, *ARSA Action, News & Media*, Aeronautical Repair Station Ass'n (Mar. 9, 2012), http://www.arsa.org/node/837.

As further evidenced by the case at hand, the problem for the aviation maintenance industry continues to grow.

D. A federal regulatory agency must follow its own regulations.

In what has come to be known as the *Accardi* doctrine, this Court has recognized "the long-settled principle that rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency." *See Leslie v. Attorney Gen. of the U.S.*, 611 F.3d 171, 175 (3d Cir. 2010)

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[6] The complaints were filed as provided for by 14 C.F.R. § 13.5.

(citing *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942)) (explaining the *Accardi* doctrine and its history). The rights and interests of all persons in the safety of aircraft design and construction, as well as inspection, servicing and overhauling of aircraft and related parts, are guaranteed by federal statute. *See* 49 U.S.C. § 44701(a) (requiring the FAA to prescribe standards and regulations to promote flight and aircraft safety). Therefore, regulations promulgated by the FAA to ensure public safety in aircraft design and maintenance through the creation, and provision, of detailed ICA are controlling upon the agency. The FAA cannot simply turn a blind eye to its own rules, especially those mandated by federal law.

This Court has stated that: "A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." *United States v. Caceres*, 440 U.S. 741, 749 (1979). Also, this Court has recognized "that government officials no less than private citizens are bound by rules of law." *Id.* at 758. With the clear statutory mandate for safety in aircraft design and maintenance, and clarity of the related FAA regulations calling for detailed ICA, there should be no question regarding noncompliance. Yet, as Petitioner's case demonstrates, parties are left to argue commercial aspects due to FAA's absence in enforcing its rules. As a result, intervention by this Court is necessary to return to the safety intent in

the federal statute, and FAA regulations, regarding ICA.

Involvement by this Court is not prevented; although the Administrative Procedure Act precludes judicial review of actions committed to agency discretion by law, 5 U.S.C. § 701(a)(2), this Court has found that such discretion exists when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In this instance, the statute is clear; the FAA must promote the safe flight of civil aircraft in air commerce by prescribing minimum standards in the interest of safety for design and construction of aircraft, as well as the inspection, servicing and overhauling of aircraft and related parts. 49 U.S.C. § 44701(a). As a result, this Court should compel agency action unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1) (directing a reviewing court to compel agency action that is unlawfully withheld or unreasonably delayed). The FAA must recognize its regulations requiring detailed ICA.

CONCLUSION

ARSA supports Petitioner's request for a writ of certiorari and believes a writ should issue. Otherwise, the safety objective embedded in the federal statute, and resulting FAA regulations pertaining to ICA, is not fulfilled. Without federal court intervention,

the federal agency's reluctance to acknowledge and enforce its rules will continue, and the public is left with no recourse.

Respectfully submitted,

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