

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JEREMY RIVERS

Plaintiff,

v.

FEDERAL AVIATION
ADMINISTRATION,

BRYAN BEDFORD, in his official
capacity as Administrator of the Federal
Aviation Administration, WILLIAM
MCKENNA, in his official capacity as
Chief Counsel of the Federal Aviation
Administration,

U.S. DEPARTMENT OF
TRANSPORTATION, and SEAN
DUFFY, in his official capacity as
Secretary of Transportation,

Defendants.

Civil No. 2:26-cv-13694-JJCG-KGA

Judge: Hon. Jonathan J.C. Grey

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Jeremy Rivers respectfully moves the Court for summary judgment pursuant to Federal Rule of Civil Procedure 56. There exists no genuine dispute of material fact in this case and Rivers is entitled to judgment as a matter of law. Rivers requests this Court grant summary judgment, declaring that the common purpose test, third-party reimbursement ban, and overbroad definition of compensation (“challenged actions”) are agency actions not in accordance with law, vacating the challenged actions, and issuing a permanent injunction that enjoins Defendants from enforcing the challenged actions against Rivers.

INTRODUCTION

Jeremy Rivers is an aviation enthusiast who uses his pilot certificate to give back to his community. Rivers is a volunteer pilot with Wings of Mercy East Michigan (“WOM-EM”). WOM-EM is a network of pilots that help patients in Eastern Michigan reach appointments at world-class facilities like the Mayo Clinic, University of Wisconsin Hospital, and the Cleveland Clinic. WOM-EM does not accept any payment from patients or their insurers for these flights. Instead, WOM-EM operates on monetary and in-kind donations.

WOM-EM has funds available to offset Rivers’s flight operating costs. But the FAA is currently preventing Rivers and pilots like him from receiving those funds. FAA regulations allow a pilot to receive a pro rata reimbursement for operating costs like fuel and airplane rental fees incurred on a flight with passengers. FAA *interpretations*, however, effectively prohibit volunteer pilots from receiving any reimbursement. Although Rivers would like to provide additional charitable

medical flights, the high cost for each flight prevents him from doing so without reimbursement from WOM-EM.

These FAA interpretations of its regulation find no support in the regulation's text. Rivers seeks to vacate these FAA interpretations so he can be reimbursed for his charitable flights. There exists no genuine dispute of material fact as this case presents pure questions of law.

BACKGROUND

I. FAA Designates Classes of Pilot Certificates

Congress gave FAA broad authority to “promote safe flight of civil aircraft in air commerce” and to issue airman certificates (often called “pilot’s licenses”). 49 U.S.C. §§ 44701(a), 44703(b)(1)(C). Other than designating the name and minimum hours required for the airline transport pilot (“ATP”) certificate, Congress gave FAA little guidance on the classes, privileges, and limitations for airman certificates. *See id.* § 44703(b)(2). Thus the privileges and limitations on a pilot certificate largely come from FAA regulations, not statutes.

Pursuant to section 44703, FAA created several categories of pilot certificates, including the “private pilot certificate,” a common entry-level certificate. 14 C.F.R. § 61.5(a)(1). Under that same authority, FAA imposed limitations on the privileges a private pilot¹ may exercise. 14 C.F.R. § 61.113.

FAA also prohibits private pilots from acting as pilot in command of flights “for compensation or hire” and from acting as pilot in command of flights carrying

¹ This brief uses “private pilot” as shorthand for a person who holds and is exercising the privileges of a private pilot certificate.

passengers “for compensation or hire.” 14 C.F.R. § 61.113(a). The phrase “for compensation or hire” is not defined in statute or regulations. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015). Instead, FAA interprets “for compensation or hire” to mean “the receipt of anything of value.” Sommer Interpretation, Ex. 1 at 1.

Section 61.113 has five exceptions that allow a private pilot to receive compensation for acting as pilot in command. 14 C.F.R. § 61.113(b)–(f). Only § 61.113(c) is relevant to this case. It reads: “A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees.” *Id.* § 61.113(c). This “pro rata” exception allows a pilot to offset certain costs of “a flight with passengers” so long as the pilot does not pay “less than the pro rata share of the operating expenses.” *Id.* For example, if a pilot flies with only one passenger, he or she must pay at least half of the operating costs. If a pilot flies with three passengers, he or she must pay at least one quarter of the operating costs.

II. FAA Interpretations Add Additional, Extratextual Limitations

FAA has added additional requirements to § 61.113(c) by interpretation. These extratextual requirements are referred to in this brief as the “challenged actions.”

The “common purpose” test. This test requires the pilot and passengers have a common purpose for the flight. The purpose cannot be solely for the passenger’s benefit. In the charitable flying context, having the passenger rather than the pilot choose the destination means there is no common purpose for the flight. *See Bunce Interpretation*, Ex. 2 at 1.

The third-party reimbursement ban. FAA interpretations do not allow a private pilot to receive a reimbursement under § 61.113(c) from a third party, including charitable organizations. Instead, the pro rata reimbursement must come directly from the passenger. Lamb Interpretation, Ex. 3 at 2.

The overbroad definition of compensation. “FAA views compensation as the receipt of anything of value.” Sommer Interpretation, Ex. 1 at 1. FAA also considers non-operating costs that are reimbursed in connection with the flight as compensation. *Id.* This includes meals or lodging on multi-day flights and even accrued flight time. *Id.*; Harrington Interpretation, Ex. 4 at 2.

These three challenged actions effectively prohibit charitable organizations from reimbursing pilots for aircraft operating expenses.

III. How Section 61.113 Applies to Pilots with Higher Certificates

Section 61.113 only applies to private pilots. Commercial pilot certificate holders can act as pilot in command for compensation or hire. 14 C.F.R. § 61.133(a)(1). But a commercial pilot certificate alone does not authorize a pilot to fly passengers for compensation or hire. Instead, the pilot must be affiliated with an operator that has a FAA-issued air carrier or commercial operator certificate. *See* Kirwan Interpretation, Ex. 5 at 2 (“These forms of compensation are sufficient to require the operator to have a part 119 certificate.”); *see generally* 14 C.F.R. § 119.5. Section 119.5’s requirement means a commercial pilot certificate holder cannot receive reimbursement for passenger-carrying flight expenses from a volunteer pilot organization unless the organization holds a Part 119 certificate. These organizations generally do not hold a Part 119 certificate.

If a pilot is not exercising the privileges of a higher certificate (like a commercial pilot certificate) the FAA treats the person as exercising the privileges of a lower certificate (like a private pilot certificate). Section 61.113 applies to the holder of a commercial pilot certificate while he or she is exercising the privileges of a private pilot certificate. So § 61.113 applies to pilots when they engage in charitable flights.

IV. Volunteer Pilots Meet Charitable Needs

More than 5.8 million Americans miss medical appointments each year due to transportation barriers. *See* Compl. at ¶ 51. To meet this need, pilots have been volunteering for decades to transport patients to and from medical appointments. Dozens of organizations provide free transportation to medical appointments across the United States. *See id.* at ¶ 53. Other volunteer pilot groups meet needs ranging from disaster relief to endangered species recovery. *Id.* at ¶ 54.

Unless the volunteer pilot organization holds a Part 119 certificate or applies for an exemption, however, it cannot provide reimbursement to its volunteer pilots. Bunce Interpretation, Ex. 2 at 1. WOM-EM does not hold a Part 119 certificate. Welch Decl. ¶ 8. Nor does any other volunteer pilot organization hold a Part 119 certificate, as small nonprofits are not able to bear the regulatory burden to obtain and operate under such a certificate. *See* Compl. ¶ 57.

V. Plaintiff Volunteers to Meet Charitable Needs

Rivers received his private pilot certificate on September 19, 2023. Rivers Decl. ¶ 2. He incurs significant costs to provide volunteer flights. The airplane he rents for volunteer flying costs \$155 per hour. *Id.* ¶ 7. For example, in July 2026

Rivers was the pilot in command on part of a WOM-EM mission to transport a patient to the Mayo Clinic. *Id.* ¶ 8. He paid \$460 to complete this mission. *Id.*

The three challenged actions prevented Rivers from receiving reimbursement for this expense. *Id.* ¶¶ 9, 13. WOM-EM has the funds to reimburse its pilots and would have reimbursed Rivers, but for the three challenged actions. Welch Decl. ¶¶ 13–15. So long as the three challenged actions remain in force, Rivers will continue to incur additional costs to provide volunteer flights.

STANDARD OF REVIEW

Summary judgment is proper if the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating there is no genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once it has done so, the burden of production shifts to the non-movant, who “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

ARGUMENT

I. FAA’s Regulatory Interpretations Are Not in Accordance with Law

APA § 706 empowers courts to “hold unlawful and set aside agency actions” that are “not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency action that misinterprets or misapplies the governing law is agency action “not in accordance with law.” *See Ohio Telecom Ass’n v. FCC (In re MCP No. 185)*, 124 F.4th 993, 1001 (6th Cir. 2025). Agency action that is “not in accordance with law” is a “separate and

independent ground[]” to vacate the agency action, even if the action is not arbitrary and capricious. *Rest. L. Ctr. v. U.S. Dep’t of Labor*, 120 F.4th 163, 177 (5th Cir. 2024) (quoting 5 U.S.C. § 706(2)(A)); *see also Ohio Telecom Ass’n*, 124 F.4th at 1009.

When it comes to statutes, the Court’s role is straightforward. Courts use “the traditional tools of statutory construction” to determine “‘the best reading of the statute’ in the first instance.” *Ohio Telecom Ass’n*, 124 F.4th at 998 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400–01 (2024)). But the earlier *Auer* decision established that an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (cleaned up). The Supreme Court later cabined *Auer* deference, clarifying that “a court should not afford *Auer* deference unless the regulation is genuinely ambiguous.” *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019). “And before concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction.” *Id.* at 575. Accordingly, the traditional tools of construction are the starting point for interpreting statutes and regulations. *See id.*

A. The Common Purpose Test Is Not in Accordance with Law

FAA regulations allow a pilot to offset certain costs of “a flight with passengers” so long as the pilot does not “pay less than the pro rata share of the operating expenses.” 14 C.F.R. § 61.113(c). FAA interprets § 61.113(c) as requiring the pilot and passenger to have a common purpose. *Bunce Interpretation*, Ex. 2 at 1. On a charitable flight, where the passenger chooses the destination (*i.e.*, the medical treatment facility) and the pilot does not have a purpose for the flight other than to

assist the passenger, FAA has determined there is no common purpose for the flight. *Id.* Thus the common purpose test prevents Rivers from being reimbursed.

The common purpose test has no basis in § 61.113(c)’s text. By its own terms, § 61.113(c) applies to “a flight with passengers.” 14 C.F.R. § 61.113(c). Section 61.113(c) does not use any other language to indicate that pro rata reimbursement is conditioned on the particular destination or which occupant chooses it. Nor does § 61.113(c) use ambiguous language. A charitable medical flight is plainly “a flight with passengers.” *Id.* In that case, § 61.113(c) allows a pilot to receive reimbursement so long as the pilot does “not pay less than the pro rata share of the operating expenses.” *Id.* The regulatory language plainly means that on a flight with passengers, a pilot may receive reimbursement so long as he or she does not pay less than the pro rata share. *See Kisor v. Wilkie*, 588 U.S. 558, 574 (2019) (“The regulation then just means what it means—and the court must give it effect, as the court would any law.”). Because § 61.113(c) is not ambiguous, the Court should not defer to the agency’s interpretation. *Id.* at 574 (“[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous.”).

Auer deference does not “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Id.* at 575. Yet that is exactly what FAA did here. It added the common purpose test as a substantive new requirement to § 61.113(c) without amending the regulation. FAA cannot add such a substantive requirement to § 61.113(c) by mere interpretation—it must use notice-and-comment rulemaking. *Id.*

Because the common purpose test finds no support whatsoever in § 61.113(c)'s text, it is "agency action" that is "not in accordance with law." 5 U.S.C. § 706(2). Because § 61.113(c) is not "genuinely ambiguous" this Court should not defer to FAA's interpretation. *Kisor*, 588 U.S. at 574. Therefore, the Court should declare the common purpose test is not in accordance with law, vacate the common purpose test, and issue a permanent injunction prohibiting its enforcement.

B. The Third-Party Reimbursement Ban is Not in Accordance with Law

As explained above, FAA regulations allow a pilot to offset certain costs of "a flight with passengers" so long as the pilot does not pay "less than the pro rata share of the operating expenses." 14 C.F.R. § 61.113(c). FAA interprets § 61.113(c) as allowing pro rata cost sharing only when the passengers personally pay for their share. Lamb Interpretation, Ex. 3 at 2 ("[A] pilot may only seek reimbursement from his or her fellow passengers, not from a third party such as an employer." (cleaned up)). This poses a barrier to Rivers receiving reimbursement, as the passengers on charitable medical flights do not pay anything to receive the flight. Rivers Decl. ¶ 5. Thus, the third-party reimbursement ban prevents Rivers from being reimbursed.

The third-party reimbursement ban has no basis in § 61.113(c)'s text. By its own terms, § 61.113(c) applies to "a flight with passengers." 14 C.F.R. § 61.113(c). Section 61.113(c) only mandates what *the pilot* must pay. *Id.* It contains no language limiting who may pay for the remaining pro rata shares. Nor does § 61.113(c) use ambiguous language. A charitable medical flight is plainly "a flight with passengers." *Id.* In that case, § 61.113(c) provides "[a] private pilot may not pay less

than the pro rata share of the operating expenses.” *Id.* The regulatory language plainly means that on a flight with passengers, a pilot may receive reimbursement so long as he or she does not pay less than the pro rata share.

Even if § 61.113(c) were ambiguous, “a court must exhaust all the ‘traditional tools’ of construction” before deferring to the agency. *Kisor*, 588 U.S. at 575. FAA has long referred to § 61.113(c) and its predecessors as “share-the-cost operations.” *See, e.g.*, Ware Interpretation, Ex. 6 at 1. That’s because the predecessor regulations to § 61.113(c) read: “A private pilot may share the operating expenses of a flight with his passengers.” Private Pilot General Privileges and Limitations, 29 Fed. Reg. 4717, 4718 (Apr. 2, 1964) (codified at 14 C.F.R. 61.101(a)(2); *see also* 14 C.F.R. § 61.118(c) (1995) (identical language recodified in a different section). For 34 years FAA regulations allowed reimbursement only when the “share” came from “his passengers.”

This changed with a major rewrite of 14 C.F.R. Part 61 in 1997, when FAA changed the language from *allowing* a pilot to “share the operating expenses of a flight with his passengers” to *mandating* that the pilot “not pay less than the pro rata share of the operating expenses of a flight with passengers.” Pilot, Flight Instructor, Ground Instructor, and Pilot School Certification Rules, 62 Fed. Reg. 16,220, 16,333 (Apr. 4, 1997). The new regulation changed from a permissive one (a pilot “may” share costs) to a prohibitive one (a pilot “may not pay less than”). The word “his” (or “hers”) could have been added before “passengers” to maintain the previous “share-the-cost” approach. But that word is noticeably omitted from § 61.113(c).

The presumption of purposive amendment canon presumes an amendment is intended “to have real and substantial effect.” *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995). This canon is one of the “‘traditional tools’ of construction” that *Kisor* directed courts to use when interpreting regulations. *See Kisor*, 588 U.S. at 575; *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982) (“Regulations are generally subject to the same rules of construction as statutes.”). FAA heavily revised Part 61 in 1997, including striking the words “share the operating expenses of a flight with his passengers.” The new subsection 61.113(c) deleted “share the operating expenses” and lacks any indication that the pilot must receive reimbursement from his or her passengers. Reading the passenger-sharing requirement (and corresponding third-party reimbursement ban) back into § 61.113(c) makes FAA’s 1997 amendment “an exercise in futility” and violates the presumption of purposive amendment canon. *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003).

FAA knows how to limit cost sharing to only passengers. Consider 14 C.F.R. § 61.315(b), which applies to sport pilots (a pilot certificate that is more restrictive than the private pilot certificate). Section 61.315 states: “You may share the operating expenses of a flight with a passenger” This language was first adopted in 2004—just seven years after the Part 61 rewrite in 1997. Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft, 69 Fed. Reg. 44,772, 44,872 (July 27, 2004). In fact, FAA amended another subsection of 61.113 in that same 2004 rulemaking. *Id.* at 44,869 (amending § 61.113(g)). Yet FAA did not amend § 61.113(c) to require cost sharing from passengers.

The presumption of meaningful variation canon posits that different statutory wording suggests a different meaning. William N. Eskridge, Jr. et al., *Cases and Materials on Statutory Interpretation* 854 (2012); *See Russello v. United States*, 464 U.S. 16, 23 (1983). FAA reintroduced the “share-the-cost operations” concept for sport pilots in § 61.315(b). This makes sense given that sport pilot privileges are more restrictive than private pilot privileges. Yet FAA did not make a conforming amendment to § 61.113(c)—despite making an amendment to another part of § 61.113 in the same rulemaking. The fact that both § 61.315(b) and § 61.113(c) impose similar operating limitations and that FAA touched both sections in the same 2004 rulemaking makes it logical to apply the presumption of meaningful variation canon. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 173 (2012) (“But the more connection the cited statute has with the statute under consideration, the more plausible the argument becomes.”).

“[A] court must exhaust all the ‘traditional tools’ of construction” before deferring to the agency. *Id.* at 575. The presumption of purposive amendment and presumption of meaningful variation canons resolve any ambiguities in § 61.113(c). The canons demonstrate that the third-party reimbursement ban has no basis in § 61.113(c)’s text. Thus the Court should not defer to the agency’s interpretation. *Kisor*, 588 U.S. at 574–75.

Perhaps FAA intended to transmute the old “share-the-cost operations” approach into § 61.113(c). If it so intended, FAA could have required a private pilot to not pay less than the pro rata share of the operating expenses of a flight with “his or her” passengers. Or FAA could have adopted the language it used in § 61.315(b)

that allows a sport pilot to “share the operating expenses of a flight with a passenger.” But FAA did not adopt either approach in § 61.113(c). It is impermissible for FAA to add, via interpretation, words that are not in the regulation. *Kisor*, 588 U.S. at 575.

Because the third-party reimbursement ban finds no support in § 61.113(c)’s text, it is “agency action” that is “not in accordance with law.” 5 U.S.C. § 706(2). Section 61.113(c) is not “genuinely ambiguous” so the Court should not defer to FAA’s interpretation. *Kisor*, 588 U.S. at 574. Therefore, the Court should declare the third-party reimbursement ban is not in accordance with law, vacate the third-party reimbursement ban, and issue a permanent injunction against its enforcement.

C. FAA’s Definition of Compensation is Not in Accordance with Law

Section 61.113(c) exists because § 61.113(a) prohibits a private pilot from flying “compensation or hire.” 14 C.F.R. § 61.113(a). But FAA views “compensation” in § 61.113(a) far broader than just receiving money to offset a flight’s operating cost.

The phrase “for compensation or hire” in § 61.113(a) is not defined in statute or regulations. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015). It is only defined in FAA interpretations. “The FAA construes ‘compensation or hire’ very broadly. It does not require a profit, a profit motive or the actual payment of funds. Instead, compensation under the FAA’s view, is the receipt of *anything of value*.” Kirwan Interpretation, Ex. 5 at 2 (emphasis in original). This extends to non-monetary things of value such as “the building up of flight time” when “the pilot does not have to pay the costs of operating the aircraft.” Harrington Interpretation, Ex. 4 at 2. Thus a volunteer pilot who operates another person’s aircraft (without the

pilot in command paying the operating expenses) or a pilot who has his fuel billed directly to the volunteer pilot organization has received “compensation” in the form of flight hours.

1. FAA’s Definition of Compensation is Not the Best Reading of § 61.113(a)

FAA’s capacious interpretation of “compensation” is not the best reading of the regulation. Consider its application to logging flight hours. Logged flight time is an official record of the pilot’s aeronautical experience. FAA explains in detail what flight time may be logged in 14 C.F.R. § 61.51. Indeed, FAA *requires* logging flight time that is used to meet training and currency requirements. 14 C.F.R. § 61.51(a) (“Each person *must* document and record the following time in a manner acceptable to the Administrator” (emphasis added)). Falsifying a flight time log is grounds to revoke a person’s certificates. 14 C.F.R. § 3.403. Yet FAA treats the flight hours it mandates be logged *as* compensation—even if it is not being used to meet a training or currency requirement (and thus has no marginal value to the pilot). Bobertz Interpretation, Ex. 7 at 3 (“Generally, accrual of flight time is compensation and the FAA does not enter into a case-by-case analysis to determine whether the logging of flight time is of value to a particular pilot.”). FAA’s “compensation” definition fits uneasily within this regulatory regime.

FAA itself provided the best reading of the regulation. In 1963, when it first proposed the language now codified at § 61.113(a), FAA explained: “The ordinary meaning of ‘compensation’ includes the act of making up for whatever has been suffered or lost through another, and the act of remuneration.” Clarification of

Private Pilot Privileges, 28 Fed. Reg. 8157, 8158 (Aug. 8, 1963) (proposed rule). The modern § 61.113(a) is not substantively different from the regulatory language in that 1963 notice of proposed rulemaking. FAA’s 1963 definition fits closely with a 1966 dictionary definition for compensation: “[S]omething given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc.” The Random House Dictionary of the English Language 300 (1966).

“[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous.” *Kisor*, 588 U.S. at 574. “And before concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction.” *Id.* at 575. “Where no statutory definition exists, a court may consult a dictionary definition for guidance in discerning the plain meaning of a statute’s language.” *Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014).

Both the FAA’s definition and the Random House Dictionary definition focus on giving something of similar value to make up for something that has been lost or suffered. Applying those definitions here, it makes little sense to categorize flight time as “compensation.” Flight time is not something “suffered or lost through another” nor “an equivalent for services” rendered as a pilot. As explained above, flight time is an official record of the pilot’s aeronautical experience. 14 C.F.R. § 61.51. The flight still occurred—regardless of whether the pilot wrote it in his or her logbook. Yet FAA considers logging flight time to be compensation—even when the flight time has no marginal value to the pilot. *See* Bobertz Interpretation, Ex. 7 at 3.

The best reading of the term “compensation” means payment directly to the pilot for the flight operating costs. Such a payment is “making up for whatever has

been suffered or lost through another.” *See* 28 Fed. Reg. at 8158. That definition of compensation does not include simply logging flight time when another person directly pays the flight operating costs.

2. *Auer* Deference Cannot Condone a Regulatory Interpretation that is Not the Best Reading of the Regulation.

The previous section used the traditional tools of construction to find the best meaning of “compensation” in § 61.113(a). But that is not the only possible meaning of the word “compensation.” The 1966 Random House Dictionary lists five definitions for “compensation.” Random House Dictionary, *supra*, at 300. Two of those definitions depend on the definition of “compensate” which in turn has five definitions also. *Id.* Webster’s 1955 dictionary lists seven definitions for “compensation.” Webster’s New Twentieth Century Dictionary of the English Language 370 (2d ed. 1955).

If the Court finds the word “compensation” to be genuinely ambiguous, then *Auer* and *Kisor* direct the Court to defer to the agency’s interpretation “unless it is plainly erroneous or inconsistent with the regulation.” *Kisor*, 588 U.S. at 568 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Even if § 61.113(c) were ambiguous, the common purpose test and ban on third-party reimbursement are inconsistent with the regulation because they impermissibly modify the plain meaning of “a flight with passengers” by adding extratextual requirements. The same cannot be said about § 61.113(a), where “compensation” is undefined in statute and regulations and FAA’s “anything of value” definition is not plainly inconsistent with the word “compensation.” But in light of *Loper Bright*,

Auer should not be read as requiring this Court to defer to FAA’s interpretation when it is not the best reading of the regulation.

II. *Auer* Is Irreconcilable with *Loper Bright*.

That this Court may have to defer to an agency interpretation that is not the best reading of the regulation highlights an irreconcilable tension between *Auer* and *Loper Bright*. The Supreme Court has made clear that the APA requires courts to adopt “the best reading of the statute.” *Loper Bright*, 603 U.S. at 400. Despite arising from the exact same sentence in § 706, *Auer* does not require an agency’s interpretation to be the best reading of the regulation. *Kisor*, 588 U.S. at 575. In this way, *Auer* deference conflicts with the APA’s text, *Loper Bright*, and the Constitution’s separation of powers.

A. *Auer* Is Not Consistent with the APA’s Text

In *Loper Bright* the Supreme Court interpreted § 706’s directive that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” *Loper Bright*, 603 U.S. at 391 (quoting 5 U.S.C. § 706). The Court held that § 706 means “that courts decide legal questions by applying their own judgment. . . . even those [questions] involving ambiguous laws.” *Id.* at 392. The Court further held that § 706 “prescribes no deferential standard for courts to employ in answering those legal questions.” *Id.* Such deference “requires a court to *ignore*, not follow, ‘the reading the court would have reached’ had it exercised its independent judgment as required by the APA.” *Id.* at 398–99.

Although the holding in *Loper Bright* concerned *Chevron*'s deference to agency statutory interpretations, its reasoning applies with equal force to agency interpretations of its own regulations. *Loper Bright*'s holding rests on the *same sentence* of the APA that requires the reviewing court to “determine the meaning or applicability of the *terms* of an agency action.” *Id.* at 391–92 (emphasis added). There is no textual distinction between the APA's command that courts independently “interpret constitutional and statutory provisions” and the command that courts independently “determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The language Congress used to instruct courts—“shall decide all relevant questions of law”—is the *exact same*. *Id.*

It is a basic tenet of statutory construction that “identical words used in different parts of the same act are intended to have the same meaning.” *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). Therefore, the Supreme Court's holding in *Loper Bright* as to agency interpretations of statutes must naturally apply to agency interpretations of regulations as well.

In *Loper Bright* the Supreme Court held that the “APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.” *Loper Bright*, 603 U.S. at 391–92. *Kisor* and *Loper Bright* both agree that the APA codified the 1946 understanding of judicial review of agency actions. Compare *id.* at 393 (“Section 706 merely restated the present law as to the scope of judicial review.” (cleaned up)), with *Kisor*, 588 U.S. at 581 (plurality opinion) (“We

have thus interpreted the APA not to ‘significantly alter the common law of judicial review of agency action.’”). But *Kisor* and *Loper Bright* disagree on what judicial review of agency actions meant in 1946.

Loper Bright held that § 706 “incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.” *Loper Bright*, 603 U.S. at 394. Writing for the *Kisor* plurality, Justice Kagan opined that § 706 does not proscribe a particular standard of review, so judges are free to use “common law methods” to fashion their own standard of review that defers to agencies. *Kisor*, 588 U.S. at 583 (plurality opinion). The *Kisor* plurality’s standard of review conflicts with *Loper Bright*’s holding that § 706 requires courts to “exercise independent judgment” as part of deciding all relevant questions of law. *Loper Bright*, 603 U.S. at 394, 413. Because less than a majority of the Court joined Justice Kagan’s reasoning as to § 706’s standard of review, *Loper Bright*’s majority opinion establishes the standard of review under § 706. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

The language Congress used to instruct courts in § 706—“shall decide all relevant questions of law”—is the *exact same* for both statutes and regulations. *Id.* Thus *Loper Bright*’s holding as to § 706’s standard of review applies with the same force to agency interpretations of regulations.

B. *Auer* Violates Separation of Powers

For many of the same reasons *Auer* violates the APA, *Auer* deference also violates separation of powers. *Auer* infringes on the judicial power of “a court to exercise its independent judgment in interpreting and expounding upon the laws.”

Loper Bright, 603 U.S. at 414 (Thomas, J., concurring); *see also id.* at 433 (Gorsuch, J., concurring) (“*Chevron* deference precludes courts from exercising the judicial power vested in them by Article III to say what the law is.”). Although the *Loper Bright* majority rested its holding solely on the APA, Justices Thomas and Gorsuch would have held that deference to agency interpretations is unconstitutional.

Deference to agency interpretations “compels judges to abdicate their Article III ‘judicial Power.’” *Id.* at 414 (Thomas, J., concurring). As Justice Thomas explains, “[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” *Id.* “But, under *Chevron*, a judge must accept an agency’s interpretation of an ambiguous law, even if he thinks another interpretation is correct. *Chevron* deference thus prevents judges from exercising their independent judgment to resolve ambiguities. By tying a judge’s hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive.” *Id.* (citations omitted).

It does not matter that here the Executive is interpreting a rule of its own creation. Deferring to the Executive’s interpretation—whether of a law or of a regulation—equally interferes with the judicial power of “a court to exercise its independent judgment.” *Id.* Thus *Auer* deference violates separation of powers because it deprives courts of their Article III powers.

III. The Court Should Award Declaratory Relief, Vacatur, and Injunctive Relief

A. The Court Should Declare the Three Challenged Actions Are Not in Accordance with Law

Rivers brings “a mixed action for declaratory and injunctive relief.” *Fire-Dex, LLC v. Admiral Ins. Co.*, 139 F.4th 519, 527 (6th Cir. 2025). Although the Declaratory Judgments Act is framed in permissive terms, “in a mixed action, the district court may have less discretion than normal to refuse to hear a declaratory judgment claim.” *Id.* at 528. This is especially true where, as here, the declaratory claims and injunctive claims “hinge on the same substantive legal issue.” *Id.* In sum, when “claims in a mixed action are tightly linked, it would most likely be an abuse of discretion to abstain on the declaratory claims.” *Id.* at 529.

There is good reason for the Court to award declaratory relief here. The common purpose test, ban on third-party reimbursements, and overbroad definition of compensation are not singular agency actions. Rather, they appear across numerous agency actions—arising most often in FAA letters of interpretation. Rivers has labored to identify each letter of interpretation in FAA’s database that contains the three challenged actions. Compl. at 24 n.2; *see generally* Fed. Aviation Admin., Interpretations Search, <https://tinyurl.com/2xecbjjet> (last visited Sept. 14, 2026). But other interpretations exist that are not in the database, such as a 1985 interpretation describing the common purpose test. *See* Bunce Interpretation, Ex. 2 at 1 (citing Legal Interpretation 1985-26). Therefore, Rivers respectfully requests the Court grant declaratory relief by declaring that the common purpose test, ban on third-party reimbursement, and overbroad definition of compensation are not in

accordance with law. As to FAA’s definition of compensation, the Court should specifically declare that logging flight time when another person directly pays the flight operating costs is not flying “for compensation or hire” under 14 C.F.R. § 61.113(a). The declaratory relief requested herein should extend to any FAA action that purports to rely on the invalid agency actions.

B. The Court Should Vacate the Three Challenged Actions

APA § 706 empowers this Court to “hold unlawful and set aside” agency actions that are “not in accordance with law.” 5 U.S.C. § 706(2). Once the Court finds an agency acted unlawfully, “courts treat vacatur as the default and remand without vacatur as the ‘rare’ remedy.” *Kentucky v. EPA*, 123 F.4th 447, 473 (6th Cir. 2024). The government has the burden to establish the two factors that warrant remand without vacatur. *See id.* FAA cannot establish those factors here.

First, FAA must show that it did not make a “serious error.” *Id.* at 472. Here, FAA made a serious error because it added substantive requirements to the text of a regulation that did not exist—effectively “ignoring notice-and-comment requirements” for amending the regulation. *Id.* This is not “a technical error that it could easily fix on remand.” *Id.* The only way FAA can “fix” this error is by amending the regulation through notice-and-comment rulemaking.

Second, FAA must also show that vacatur here will cause more disruption than “just the normal uncertainty that follows every vacatur of agency action.” *Id.* at 473. While the three challenged actions have been enforced for some time, they ultimately regulate private pilots, not commercial operations, and thus will not “upend years of transactions entered in reliance on the agency’s action.” *Id.*

FAA cannot establish that this is a “rare” case justifying remand without vacatur. Therefore, the Court should award the “default” remedy and vacate the three challenged actions. Specifically, the Court should vacate each of the FAA letters of interpretation identified in the Complaint on page 24, footnote 2.

C. The Court Should Permanently Enjoin the Three Challenged Actions

A party must satisfy four factors to obtain a permanent injunction: (1) actual success on the merits; (2) irreparable injury; (3) whether the injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest. *Kentucky v. Biden*, 57 F.4th 545, 550 (6th Cir. 2023); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”). Factors (3) and (4) “merge when the government is the defendant.” *Kentucky*, 57 F.4th at 556.

Rivers satisfies each of the factors to obtain a permanent injunction. For the reasons stated above, Rivers has shown actual success on the merits of his claims and shown irreparable harm absent a permanent injunction. *See id.* (“The federal government’s sovereign immunity typically makes monetary losses like these irreparable.”); Rivers Decl. ¶¶ 7–8 (describing unrecoverable costs). When a plaintiff demonstrates “success on the merits and imminent irreparable injuries, the federal government faces a high hurdle in showing that the[remaining] factors warrant withholding relief,” *id.*, because “the public’s *true* interest lies in the correct

application of the law.” *Tennessee v. U.S. Dep’t of Educ.*, 104 F.4th 577, 614 (6th Cir. 2024) (emphasis in original). And the government suffers “no harm whatsoever” when it is prevented from enforcing an unlawful agency action. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021); *see Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) (applying *BST Holdings*). Therefore, Rivers has satisfied the final two permanent injunction factors.

CONCLUSION

For the foregoing reasons, Plaintiff Jeremy Rivers requests this Court grant his motion for summary judgment.

DATED: October 2, 2026

Respectfully submitted,

/s/Eric Heigis

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Counsel for Jeremy Rivers

CERTIFICATE OF CONFERENCE

In compliance with Local Rule 7.1(a), undersigned counsel hereby certifies that I have conferred with Defendants' counsel, who indicated the Defendants do not consent to the relief sought in this motion.

/s/Eric Heigis
ERIC HEIGIS

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2026, I served a physical copy of the foregoing document by U.S. Certified Mail, return receipt requested, in accordance with Federal Rule of Civil Procedure 5(b)(2)(C).

/s/Eric Heigis
ERIC HEIGIS

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JEREMY RIVERS

Plaintiff,

v.

FEDERAL AVIATION
ADMINISTRATION,

BRYAN BEDFORD, in his official
capacity as Administrator of the Federal
Aviation Administration, WILLIAM
MCKENNA, in his official capacity as
Chief Counsel of the Federal Aviation
Administration,

U.S. DEPARTMENT OF

TRANSPORTATION, and SEAN
DUFFY, in his official capacity as
Secretary of Transportation,

Defendants.

Civil No. 2:26-cv-13694-JJCG-KGA

Judge: Hon. Jonathan J.C. Grey

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
1	Sommer 2010 Legal Interpretation
2	Bunce 2008 Legal Interpretation
3	Lamb 2010 Legal Interpretation
4	Harrington 1997 Legal Interpretation
5	Kirwan 2005 Legal Interpretation
6	Ware 1976 Legal Interpretation

7

Bobertz 2009 Legal Interpretation

EXHIBIT 1



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

OCT - 8 2010

Mr. Mike Sommer
[REDACTED]
[REDACTED]

Dear Mr. Sommer:

This is in response to your inquiry requesting clarification under 14 C.F.R. Part 61 of the privileges of a private pilot with a balloon rating regarding what constitutes flying for compensation or hire, and whether the specific cost-sharing arrangements amount to less than a pro-rata share of contributions.

Your letter raises three issues. One, whether the free dinner constitutes compensation or hire in violation of §61.113(a), which prohibits private pilots from carrying passengers or property for compensation or hire, or acting as pilot-in-command of an aircraft for compensation or hire, with certain exceptions. Issue two, whether flying a balloon with a logo violates the same provision as discussed above. Issue three, whether the cost-sharing arrangements between the pilots and the owner constitute less than a pro-rata share of contributions in violation of §61.113(c).

The first issue raised by your letter is whether the balloon owner's offer of free dinner to the pilots and crew constitutes compensation or hire in violation of 14 C.F.R. §61.113(a). The rule states that, "no person who holds a private pilot certificate may ... for compensation or hire, act as pilot in command of an aircraft." There are two specified exceptions to this rule; one, if the pilot is flying an aircraft in connection with a business or employment, but only if the flight is incidental to that business or employment; and, two, if the aircraft does not carry passengers or property for compensation or hire. The situation you describe in your letter does not meet either exception.

The FAA construes the terms "compensation or hire" very broadly. It does not require a profit, profit motive, or the actual payment of funds. Instead, the FAA views compensation as the receipt of anything of value. In an interpretation letter to John W. Harrington, from Donald Byrne, Assistant Chief Counsel, October 23, 1997, it is stated that, "any reimbursement of expenses (fuel, oil, transportation, lodging, meals, etc.), if conditioned upon the pilot operating the aircraft, would constitute compensation." You schedule your flights so as to take advantage of the offer of a free dinner. We presume the owner would not provide you and your crew a free dinner if you did not fly the balloon. Thus, the offer of a free dinner in return for flying the balloon therefore constitutes compensation, and it would violate §61.113(a).

The second issue raised by your letter is whether flying a balloon with a logo constitutes flight for compensation or hire under the same provision cited above. We have already discussed that the offer of a free dinner in return for flying the balloon is a form of compensation. We assume that the restaurant owner is deriving the benefit of advertising from the balloon flights. Such dinner-for-advertising exchange would be enough to establish a beneficial economic relationship between your group of pilots and the owner, accordingly, such an exchange would establish a commercial operation which would require the pilot to hold a commercial flight certificate, and would §61.113(a).

Your letter raises a third issue, whether the cost-sharing arrangement described in your letter constitutes a less than pro-rata share of contributions in violation of §61.113(c). This section states that, "a private pilot may not pay less than the pro-rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees." This provision has been interpreted to allow the pilot to seek reimbursement for expenses only from his or her passengers, not a third party. See Guy Mangiamale, from Rebecca B. MacPherson, Assistant Chief Counsel, March 4, 2009. In your letter, you state that the private pilot has always paid his share of the propane (fuel), as well as shares of other expenses not covered by §61.113(c). This arrangement would not violate the rule, however, you go on to state that the balloon owner has begun paying some of the expenses related to propane. Unless the owner is also a passenger on the flights for which he pays his share of the propane, such an arrangement would constitute reimbursement by a third party. This type of arrangement would violate §61.113(c).

In conclusion, the issues raised in your letter with regards to the private pilot flying the balloon are violations of 14 C.F.R. §61.113(a) and §61.113(c). We hope this response is helpful to you. If you have any additional questions regarding this matter, please contact my staff at (202) 267-3073. This response was prepared by Neal O'Hara, an Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the Certification and General Aviation Operations Branch of the Flight Standards Service.

Sincerely,



Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

Enclosure

EXHIBIT 2



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

NOV 19 2008

Mr. Peter Bunce
General Aviation Manufacturers Association
1400 K Street, N.W., Suite 801
Washington, DC 20005-2485

Dear Mr. Bunce:

This is in response to your May 6, 2008, email request for a legal interpretation regarding whether 14 C.F.R. § 61.113 allows volunteer private pilots to be reimbursed for operating expenses incurred in transporting individuals who are ill or injured and cannot financially afford commercial transportation to medical treatment facilities. Specifically, you question whether, in these instances, a volunteer pilot and his or her passengers may be deemed to share a common purpose in the charitable flight, such that the pilot may seek a pro rata share of the operating expenses of the flight from the passengers under §61.113(c). Based on the following, such a construction is not permissible.

In the situation you present, the choice of destination, i.e. the medical treatment facility, is dictated by the passenger, not the pilot. The only purpose the volunteer pilot has in making the flight is to provide transportation for the sick or injured passenger. In such cases, the FAA has permitted these flights to be conducted under part 91 provided that the pilot receives no compensation for the flight. Reimbursement for the pro rata share of operating expenses constitutes compensation and would be considered a commercial operation for which a part 119 certificate is required. *See* Legal Interpretation to Joseph Kirwan, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 27, 2005) (recognizing that charitable medical flights that involve point to point transportation for which any kind of compensation is received would be considered commercial operations); Legal Interpretation 1985-26 (Dec. 26, 1985) (recognizing that the “only allowable share-the-costs operations are those which are *bona fide*, i.e., joint ventures for a common purpose,” and concluding that there is no “common purpose” if the pilot is flying to a destination where he or she has no particular business to conduct).

The humanitarian efforts of these volunteer pilots are commendable and the FAA recognizes the value to the public of the services rendered by these individuals, especially given the rising costs of fuel. However, when money is exchanged for transportation, the public expects, and the FAA demands, a higher level of safety for the flying public. In these instances, the FAA may consider a petition for exemption from §61.113(a), submitted by a volunteer pilot or volunteer pilot organization, that would allow for reimbursement of fuel expenses provided additional safety conditions and limitations are in place during these

operations. The FAA may consider, among other conditions and limitations, increased flight time hours for pilots, aircraft equipment requirements, etc.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Anne Bechdolt, an attorney in the Operations Law Branch of the Regulations Division of the Office of the Chief Counsel, and coordinated with the General Aviation and Commercial Division of Flight Standards Service.

Sincerely,

A handwritten signature in black ink, appearing to read "Rebecca B. MacPherson", followed by a long horizontal flourish.

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

EXHIBIT 3



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

MAR 1 2010

Ronald R. Lamb, Esq.
Wilke, Fleury, Hoffelt, Gould & Birney, LLP
400 Capitol Mall
Twenty-Second Floor
Sacramento, CA 95814

Dear Mr. Lamb:

This letter is in response to your October 27, 2009 request for interpretation of whether certain operations, related to your client's business, could be conducted under part 91.

Your client is considering entering into a contract with a firm of physicians to conduct reviews of the firm's examination facilities. In some instances, your client would fly himself to the examination facilities in his Cessna 182. You indicate that in many cases the firm's physicians would accompany your client as he travels to the facilities. Under the proposed contract, if your client travels to an examination site in his aircraft, he would be reimbursed for the full cost of operating the aircraft regardless of whether he travels alone, or is accompanied by the firm's physicians.

First, to exercise the privileges of his commercial pilot certificate, your client would need to hold at least a second-class medical certificate. *See* § 61.23(a)(2) (stating the requirement to hold "at least a second-class medical certificate when exercising the privileges of a commercial pilot certificate"); Legal Interpretation to John W. Harrington, from Donald Byrne, Assistant Chief Counsel (Oct. 23, 1997). You note that your client holds a commercial pilot certificate, and a third class medical certificate. He would therefore not be permitted to conduct the proposed operations using his commercial pilot certificate. However, we note that a third-class medical certificate is sufficient for operations conducted as a private pilot. *See* § 61.23(a)(3)(i); Legal Interpretation to Harrington.

Private pilots are prohibited from carrying passengers for compensation or hire with certain exceptions. *See* § 61.113(a)-(d). One exception is that a pilot may act as pilot in command of an operation in connection with any business or employment for compensation or hire. *See* § 61.113(b). Such operations must be incidental to the pilot's business or employment, and the aircraft may not carry passengers or property for compensation or hire. *See* Legal Interpretation to Guy Mangiamiele, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Mar. 4, 2009). In your scenario, your client's business is to conduct on-site visits of medical facilities, and he would use his personal aircraft to travel to the firm's facilities in order to conduct reviews. We would consider these flights to be incidental to his business and within the scope of § 61.113(b). *See* Legal Interpretation to Mangiamiele

(noting that a private pilot may be compensated for the expense of a flight when transporting him or herself to a business meeting). However, § 61.113(b) does not permit carrying passengers or property for compensation or hire. Therefore, although the flights may be incidental to his business, your client could not receive compensation for transporting physicians on those flights. *See* § 61.113(b)(2); Legal Interpretation to Mangiamele; Legal Interpretation to Harrington (stating that the FAA broadly defines compensation, which includes reimbursement of operating expenses).

Additionally, there is a second exception which may allow a private pilot to receive reimbursement from his or her passengers for fuel, oil, airport expenditures, or rental fees, provided that the pilot pays at least his or her pro rata share of the operating expenses. *See* § 61.113(c); Legal Interpretation to Mangiamele; Legal Interpretation to Thomas H. Chero, from John H. Cassady, Assistant Chief Counsel, Regulations and Enforcement Division (Dec. 26, 1985). The FAA has consistently interpreted this exception to require a pilot to share with his passengers a bona fide common purpose for conducting the flight. *See, e.g.*, Legal Interpretation to Don Bobertz, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 18, 2009); Legal Interpretation to Mangiamele; Legal Interpretation to Peter Bunce, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Nov. 19, 2008); *cf.* § 91.501(b)(8) (permitting transport of a group of people having a common purpose in certain aircraft provided no charge, assessment, or fee, is made for that carriage).

The existence of a bona fide common purpose is determined on a case-by-case basis. Here it appears that if your client was flying to a facility in order to conduct a review, and a physician travelled with him to that facility in order to conduct examinations, a bona fide common purpose for the travel would exist. However, a pilot may only seek reimbursement “from his or her fellow passengers, not from a third party such as [an] employer.” Legal Interpretation to Mangiamele. Therefore, the draft contract enclosed with your letter appears to violate the provisions of § 61.113(c) because your client would receive full reimbursement of the operating costs of the aircraft from the firm, rather than a pro rata share from his passengers, for those flights with physicians on board the aircraft.

Accordingly, because your client would be carrying passengers, and would be receiving compensation in the form of reimbursement for operating the aircraft, the proposed operations could not be conducted without a part 119 certificate. *See* § 119.1(a)(1) (stating applicability of part 119 to air carriers and commercial operators in air commerce); § 1.1 (defining “air commerce” and “commercial operator”); Legal Interpretation to Bobertz; Legal Interpretation to Harrington.

This response was prepared by Dean Griffith, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Rebecca B. MacPherson", with a long horizontal flourish extending to the right.

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

EXHIBIT 4

Westlaw

1997 WL 34613525 (D.O.T.)

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1997 WL 34613525 (D.O.T.)

Department of Transportation (D.O.T.)
Federal Aviation Administration

***1 Legal Interpretation**

Interpretation 1997-23

October 23, 1997

John W. Harrington

Thank you for your letter dated July 16, 1997, to the Office of the Chief Counsel, Federal Aviation Administration (FAA), on behalf of the Confederate Air Force (CAF), requesting an interpretation of what is considered compensation under section 61.113 of the Federal Aviation Regulations (14 CFR 61.113, formerly 14 CFR 61.118). You also request an opinion regarding the necessary medical certification for pilots conducting operations for the CAF at airshows and other aviation events.

In your letter you state the following: the CAF owns, maintains, and operates a number of aircraft throughout the Country and members of the CAF volunteer to fly these aircraft, without compensation, to various CAF and other aviation events. The CAF aircraft flown to these aviation events are used as static displays or used to perform fly-by activities before those in attendance at the event. During the course of the airshow or aviation event, these CAF pilot volunteers may receive lodging, use of cars for local transportation, meals, or other minor amenities (e.g. hats, T-shirts, programs, etc.); nothing more than other CAF volunteers who are not flying CAF aircraft. You ask whether the above is considered compensation under section 61.113, and whether the above flying activities are permissible if the CAF volunteer holds either a private pilot certificate and a third-class medical certificate or a commercial pilot certificate, or airline transport pilot certificate, and a third-class medical certificate. The answers to these questions are discussed below.

Section 61.113 sets forth the privileges and limitations of the holder of a private pilot certificate. That section states, in pertinent part, that a person who holds a private pilot certificate may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensation or hire, act as pilot in command of an aircraft. Section 61.113 does provide for exceptions to the above (incidental business activity, expense sharing, charitable airlifts, search and location missions, glider towing); however, none of the exceptions are applicable based on the facts presented in your letter.

Section 61.133 (14 CFR 61.133) sets forth the privileges and limitations of the holder of a commercial pilot certificate. That section states, in pertinent part, that a person who holds a commercial pilot certificate and who is qualified in accordance with this part and with the applicable parts of this chapter that apply to the operation, may act as pilot in command of an aircraft carrying persons or property for compensation or hire; and that person may, for compensation or hire, act as pilot in command of an aircraft.

Section 61.23 (14 CFR 61.23) sets forth the medical certificate requirements (first-class, second-class, third-class, or no medical certificate) when conducting various pilot operations. That section states, in pertinent part, that a person

must hold at least a second-class medical certificate when exercising the privileges of a commercial pilot certificate and at least a third-class medical certificate when exercising the privileges of a private pilot certificate.

*2 In order for a person to act as pilot in command of an aircraft for compensation or hire, a pilot must have at least a commercial pilot certificate and a second-class medical certificate. If no compensation or hire is involved, then a person may act as pilot in command of an aircraft with a private pilot certificate and a third-class medical certificate.

In determining what is considered compensation, it has been the FAA's long-standing policy to define compensation in very broad terms. For example, any reimbursement of expenses (fuel, oil, transportation, lodging, meals, etc.), if conditioned upon the pilot operating the aircraft, would constitute compensation. In addition, the building up of flight time may be compensatory in nature if the pilot does not have to pay the costs of operating the aircraft. While it could be argued that the accumulation of flight time is not always of value to the pilot involved, the FAA does not consider it appropriate to enter into a case-by-case analysis to determine whether the logging of time is of value to a particular pilot, or what the pilot's motives or intentions are on each flight.

Based on the facts provided in your letter, there are several areas where the CAF volunteers may be receiving compensation. First, you state that the CAF owns, maintains, and operates a number of aircraft throughout the country and that members of CAF fly these aircraft to various CAF and other aviation events. You state that these pilots receive no compensation, however, you do not state whether these pilots pay the operating cost to ferry the aircraft from where they are based to the various CAF and other aviation events. If these pilots are not paying the costs of operating the aircraft while ferrying the aircraft then the building up of flight time would be considered compensation. To avoid compensation, these pilots could either not log the flight time or they could log the flight time while bearing the full cost, including fuel and oil, for ferrying the aircraft.

Second, you state that during the course of the airshow or aviation event, CAF volunteers may receive lodging, use of cars for local transportation, meals, or other minor amenities. The determining factor in whether these items would be considered compensation is whether they are conditioned upon the CAF volunteer ferrying the CAF aircraft to the airshow or aviation event, or operating the CAF aircraft at the airshow or aviation event. In other words if the CAF volunteers did not ferry CAF aircraft to the event, or operate the CAF aircraft at the event, would the CAF still provide these volunteers with lodging, transportation, meals, etc. If the CAF would provide the above amenities to these CAF volunteers even if they did not ferry or operate the CAF aircraft, then the amenities would not be considered compensation. If, however, the above amenities are conditioned upon the CAF volunteers ferrying or operating the CAF aircraft at the airshow or aviation event then the amenities would be considered compensation.

*3 With respect to the necessary medical certification for pilots operating the CAF aircraft at airshows and other aviation events, the determining factor is what privileges the pilot will be exercising. If the pilot is exercising commercial pilot privileges (e.g. receiving compensation), then the pilot must hold at least a commercial pilot certificate and a second-class medical certificate. If the pilot is exercising private pilot privileges (e.g. not receiving compensation), then the pilot must hold at least a private pilot certificate and a third-class medical certificate. As stated earlier, section 61.23 explains the necessary medical certification requirements for various pilot operations.

I trust that the foregoing satisfactorily responds to your questions. This opinion has been coordinated with Flight Standards.

Donald Byrne
Assistant Chief Counsel

1997 WL 34613525 (D.O.T.)

END OF DOCUMENT

EXHIBIT 5

May 27, 2005

Mr. Joseph A. Kirwan
Ogden, Newell & Welch, PLLC
1700 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202

RE: Charity Flight Operations Concept

We received your letter requesting guidance and interpretation of the Federal Aviation Regulations governing Life Flight^s operations. The facts, as outlined in your letter, are as follows:

A charitable organization proposes to provide free medical benefit flights for financially needy patients. The charity would use volunteer pilots to conduct the flights and third parties would donate money to the charity to cover flight expenses. The pilots would log the flight hours, but would not take a tax deduction for the donated time. The aircraft would either be co-owned with or dry leased from a separate company, and the owners of the separate company would be allowed to use the aircraft for personal travel at their own expense when the aircraft is not being flown on charity flights. Based on the arrangement described above, you asked whether the charity could operate under part 91.²

The charity cannot operate under part 91 because the arrangement would constitute a commercial operation for which a part 119 certificate is required. Section 1.1 of the Federal Aviation Regulations defines a commercial operator as a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property.

"Life Flight" refers to pilots or organizations that conduct flights characterized as "volunteer," "charity," or "humanitarian." These flights are referred to by numerous generic names, including "lifeline flights," "life flights," "mercy flights," and "angel flights."

²The petitioner also asked other questions regarding cost sharing and maintenance requirements under part 91. The FAA did not reach these issues because it determined that the proposed operations could not be conducted under part 91.

Where it is doubtful that an operation is for compensation or hire, the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit.

The FAA construes "compensation or hire" very broadly. It does not require a profit, a profit motive or the actual payment of funds. Instead, compensation under the FAA's view, is the receipt of *anything of value*. Thus, compensation for the flights as proposed would exist in two forms. First, the expenses associated with the flight would be paid by donors to the charity, not the individual pilot; and second, the pilots would acquire flight hours at the charity's expense -- flight hours that could be used to demonstrate aeronautical experience eligibility for an airman certificate.³ These forms of compensation are sufficient to require the operator to have a part 119 certificate.

In addition to the problems cited above related to compensation or hire, the FAA specifically notes that the proposed ownership and operating arrangement is akin to a flight department company. According to your letter, the aircraft would either be co-owned with, or dry leased from, a separate company that is owned by one of the pilots. If the aircraft was owned and operated by an entity that had no business purpose other than owning and operating the aircraft, that arrangement would constitute what many refer to as a "flight department company." The FAA has previously stated that a company organized solely for the purpose of owning and operating aircraft to transport people or property for compensation or hire must have an air carrier operating certificate because the air transportation provided by the company is not "incidental" to the company's business.⁴ Moreover, even if the pilot dry leased the aircraft from a separate company that he co-owned, it could be argued that the leasing arrangement is not a true dry lease because the company providing the aircraft is owned (at least in part) by the pilot. Thus, the practical effect is that the aircraft and crew used in the air transportation are both provided by the same company, which is effectively a flight department company operation that cannot be conducted under part 91.⁵

Alternatively, the issue regarding prohibited uncertificated flight department companies would be resolved as to the company if the pilot dry leased the aircraft from a company that was truly separate, i.e. a company he did not own or co-own. Nevertheless, a part 119 certificate would still be required for the pilot because, as explained above, the pilot would be providing air transportation and receiving "compensation" in the form of donations for the costs of the flights and the accrual of flight hours at the charity's expense.

~~³ See FAA Interpretation 1987-14. See~~

FAA Interpretation 1989-22.

⁵ See e.g., U.S. v. Bradley, 252 F.Supp. 804 (S.D. Tex. 1966); Aircrane Inc. v. Butterfield, 369 F.Supp. 598 (1974).

The FAA wishes to clarify that the proposed operations are distinguishable from the FAA charitable airlift exception. Under that exception, flights conducted by private pilots and offered to the public by a charitable organization in exchange for donations may be operated under part 91 if they do not involve the point-to-point transportation of persons or property, which would implicate the requirements of part 119.⁶ For example, under the charitable airlift exception, the passengers are flown around for a brief period of time, and then returned to the point of origin; whereas with your proposal, the passengers would be flown from point A to point B. Since the flights would involve point-to-point transportation for compensation, a part 119 certificate is required.

Your letter also stated that current flights for patients of charitable Life Flight organizations are conducted under part 91, but again, these types of flights are distinguishable from your proposed operations. It is true that some Life Flight organizations are permitted to operate under part 91, and are allowed to accept donations from the public. However, these organizations use the services of pilots who donate their time and pay the flight expenses out of their own personal resources. In addition, the public donations made to these organizations are not used, as you propose, to reimburse pilots for flight expenses, but instead are used to cover the administrative costs associated with the passengers' medical care, such as providing on-board medical equipment and other medical necessities. Life Flight pilots are not permitted to accept any money (or other form of compensation) from a charity, the public or the patient. Therefore, the flights are not being conducted for compensation, and are not required to comply with part 119.

Finally, you questioned whether pilots could log flight time and take a tax deduction for charitable flights. If the pilots conduct the flights as described above (i.e. donating their time and using their personal resources to pay all flight expenses), they would be allowed to log the flight time because it was incurred at their own expense (not at the expense of a charitable organization that paid some or all of the costs of the flights). Moreover, the pilots may be eligible for a tax deduction in connection with the flights. Although a charitable tax deduction is considered to be a form of compensation for pilots, the FAA, in 1993, issued an enforcement policy stating that:

"Since Congress has specifically provided for the tax deductibility of some costs of charitable acts, the FAA will not treat charitable deduction of such costs, standing alone, as constituting "compensation or hire" for the purpose of enforcing [the Federal Aviation Regulations]." If taking a charitable tax deduction for transporting persons or property is coupled with any reimbursement of expenses, or other compensation of any kind, then this policy does not apply. See FAA Order 8400.10, Vol. 4, Chap. 5, § 1, ¶ 1345 (1994).

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The humanitarian efforts of many individuals in the aviation community are laudable, yet the need to maintain the highest level of safety for commercial operations remains. Accordingly, the FAA believes that the interests of safety are best served by requiring operations conducted for

⁶ See FAA Interpretation 1990-41. See also 14 C.F.R. § 61.113(d).

compensation or hire to be conducted under parts 121 or 135 of the Federal Aviation Regulations.

We trust that the foregoing interpretation is responsive to your inquiry. This interpretation was prepared by the Operations Law Branch of the Office of the Chief Counsel, and coordinated with the Air Transportation Division of the Flight Standards Service. Please contact us if we can be of further assistance.

EXHIBIT 6

61-118

AGC-20
G

In Reply Refer To: ACE-7

February 13, 1976

CONCUR

Mr. Paul D. Ware

RECOMMENDED

DATE 3/22/76

61-118(b)

Dear Mr. Ware:

This is in response to your letter of February 12 concerning your telephone conversation on the 11th with both Inspector Peck of our Kansas City GADO and myself. You question the interpretation given you and wish confirmation in writing.

As I understand the facts as given by you, you are a student at the Maple Woods Community College and desire to advertise on the bulletin board for passengers to share expenses in local flights around Kansas City in order to defray your expenses while you build time.

While the share-the-cost operations under the provisions of Section 61.118(b) are permissible, the circumstances of the particular case must indicate that it is a bona fide "share-the-cost" situation, i.e., that it is a joint venture situation for a common purpose with the expenses being defrayed by all of the passengers on the aircraft including, of course, yourself. For instance, if you plan to go to St. Louis for a weekend, there would be nothing wrong with your advertising on the school bulletin board for other students to accompany you in order to defray your costs. You may wish also to refer to Amendment 61-8 effective May 4, 1964, titled "Clarification of Private Pilot Privileges" which discusses the share-the-cost concept.

However, if I understood the facts as given to me on the telephone correctly, your purpose for the flights you intend is to build time, and thus constitutes an operation for gain or advantage other than the transportation itself. As such, it would be considered an operation for compensation or hire. It may be that neither Inspector Peck nor I myself adequately explained the basis behind our position, and I hope that you find the foregoing of assistance.

Sincerely yours,

KENNETH E. GEIER
Regional Counsel

cc: ACE-GADO-11 (Mr. Peck); AGC-20

ACE-7:KEGeier:rs:X5446:2/13/76

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File 3.25

2/19/76

AGC-20-76/119R

EXHIBIT 7



Federal Aviation Administration

Memorandum

MAY 18 2009 MAY 18 2009

Date:

To: Don Bobertz, Attorney, Office of the Regional Counsel, Western Pacific
Region, AWP-007

From:  Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, AGC-200

Prepared by: Dean Griffith, Attorney, Regulations Division, AGC-220

Subject: Legal Interpretation on 14 C.F.R. § 61.113(c) - Shared Operating Expenses

This memorandum is in response to your inquiry regarding whether a pilot shared the common purpose with his passengers of traveling to a canoe race thereby enabling him to share operating expenses for a series of flights under 14 C.F.R. § 61.113(c).

The information you provided to us contains the following scenario. A pilot, who holds an airline transport pilot (ATP) certificate, was asked to fly members of a canoe club from Honolulu, Hawaii, to Molokai, Hawaii, for a race. He agreed and arranged to use a four-seat Cessna 172 airplane owned by a person who "is also friends with the Canoe Club." The pilot would fly three club members to the race site, return without passengers, and then pick up another three passengers. These flights would be repeated until the entire team was transported to the race site. The airplane's owner and the pilot discussed the airplane's operating costs and determined that each flight would cost \$120-150. They also determined that the pilot and passengers could each pay a pro rata share of each passenger-carrying flight; \$100 of the cost of each flight would be divided among the three passengers and the pilot would contribute \$35.

The pilot made nine trips to transport the team to the race – four on one day, and five on the next. The total expenses for the flights came to \$1,280. To cover the expenses the canoe club paid the pilot \$900 (collected from the passengers), representing the cost of transporting the racers, and the pilot contributed \$380. The pilot states that he "knew and had socialized and paddled with numerous club members," and contends that he had a common purpose with the canoe racers in attending the event of "furthering the club's cultural interests, its competition record, and the continued development of our teams." See Nov. 25, 2008 Letter to Chris J. Collins, Manager, Honolulu Certificate Management Office, and Oct. 4, 2008 Letter to Jon B. Murakami, Aviation Safety Inspector, Honolulu Flight Standards District Office (both letters contained in the materials provided).

Private pilots are prohibited from carrying passengers for compensation or hire with certain exceptions. See 14 C.F.R. § 61.113(a)-(d). Section 61.113(c) provides an exception to the

general rule by allowing a private pilot to obtain a pro rata reimbursement from his passengers for fuel, oil, airport expenditures, or rental fees. The FAA has consistently interpreted this exception to require a pilot to share with his passengers a bona fide common purpose for conducting the flight. *See* Legal Interpretation to Guy Mangiamele, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Mar. 4, 2009); Legal Interpretation to Peter Bunce, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Nov. 19, 2008); Legal Interpretation to Thomas H. Chero, from John H. Cassady, Assistant Chief Counsel, Regulations and Enforcement Division (Dec. 26, 1985); Legal Interpretation to Bob Von Seggern, from John L. Fitzgerald Jr., ACE-7 (Dec. 19, 1977-81).

Absent a bona fide common purpose for their travel, reimbursement for the pro rata share of operating expenses constitutes compensation and the flights would be considered a commercial operation for which a part 119 certificate is required. *See* Legal Interpretation to Peter Bunce, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Nov. 19, 2008). Whether a bona fide common purpose exists depends upon the facts of the situation at hand. *See, e.g., id.* (finding no common purpose when a volunteer pilot transported ill or injured individuals to medical treatment facilities for compensation because the choice of destination was dictated by the passenger and the pilot's only purpose was to provide transportation to the passenger); Legal Interpretation to Thomas H. Chero, from John H. Cassady, Assistant Chief Counsel, Regulations and Enforcement Division (Dec. 26, 1985) (finding no common purpose if the pilot is transporting passengers to a destination where he has no particular business to conduct).

The pilot in this scenario claims that he shared a common purpose with his passengers because the flights were to further the canoe club's cultural interests, its competition record, and the continued development of its teams. The pilot was asked to fly the team to the race by another pilot who previously transported team members. There is nothing to suggest that the pilot intended to attend the race, or to fly to the race site, for any reason other than to transport the team. Furthermore, the pilot needed to conduct a total of nine flights in order to transport the entire team.

Based on these facts, it is clear that the team dictated the destination and the flights were conducted with the purpose of transporting the team to the race. Because the purpose of the flights was to transport the team members from Honolulu to the race site, the § 61.113(c) exception does not apply, and the pilot is prohibited from receiving compensation in the form of the passengers' pro rata share of the operating costs of the flights. *See* 14 C.F.R. § 61.113.

Assuming, however, that the pilot planned to attend the race and conducted the flights with this purpose, his bona fide common purpose with his passengers for making the trip would only extend to the first flight to the race site. This is because following this flight he would be at his destination and able to attend the race. If the pilot had carried any passengers from the race back to Honolulu, then the bona fide common purpose would also extend to the one flight the pilot needed to conduct in order to return home. Subsequent flights would not be necessary for achieving his purpose of attending the race and would therefore be solely for the purposes of transporting the team.

With respect to conducting the flights for compensation, your request notes that the pilot, who holds an ATP certificate, argues that any time logged on these flights should not count as compensation because building general aviation flying time in a Cessna 172 does not advance his career. Generally, accrual of flight time is compensation and the FAA does not enter into a case-by-case analysis to determine whether the logging of flight time is of value to a particular pilot. Legal Interpretation to John W. Harrington, from Donald Byrne, Assistant Chief Counsel (Oct. 23, 1997) [1997-23]. Moreover, this argument does not alter the fact that, as discussed above, the pilot received compensation for the flights from the canoe club members by accepting their pro rata share of the cost of the flights.

Second, as noted above, the pilot holds an ATP certificate which raises the issue of whether the pilot could have conducted these flights for compensation or hire. One privilege conferred upon ATP certificate holders is the ability to act as a pilot in command of an aircraft carrying persons or property for compensation or hire. See 14 C.F.R. § 61.167(a), 61.133(a)(1). However, in order to conduct such operations, the ATP certificate holder must also obtain a part 119 operating certificate when operating a civil aircraft as a commercial operator in air commerce. See 14 C.F.R. § 119.1(a)(1). A commercial operator is a “person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property.” 14 C.F.R. § 1.1. Air commerce is defined as “interstate, overseas, or foreign air commerce . . . or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.” *Id.*

Here, the pilot received compensation from the canoe club members he transported to the race. See Legal Interpretation to Peter Bunce, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Nov. 19, 2008) (noting that a pro rata share of operating expenses is compensation). The flights were also conducted in air commerce; the fact that the flights were conducted solely within the state of Hawaii does not except them from the FAA’s oversight. See Legal Interpretation to Allan W. Read, from John H. Cassady, Assistant Chief Counsel (March 14, 1985) [1985-4] (noting that the FAA’s authority has been broadly construed to extend to intrastate flights because of their safety impact on interstate air commerce); *Administrator v. Clifford O. Barrows*, NTSB Order No. EA-3061 (Jan. 3, 1990); *Administrator v. Michael Dan Ferguson*, NTSB Order No. EA-1822 (Aug. 13, 1982); *Administrator v. Mira Slovak*, NTSB Order No. EA-587 (June 5, 1974). Accordingly, the pilot would need a part 119 air operator certificate to conduct these flights for compensation or hire.

This response was prepared by Dean Griffith, Attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of further assistance.