ARGUED ON JANUARY 13, 2017
No. 16-1202

UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AVIATION SUPPLIERS ASS'N, INC.
Petitioner,
v.
MICHAEL P. HUERTA, Administrator, FEDERAL AVIATION ADMINISTRATION, and the UNITED STATES OF AMERICA,
Respondents

Aviation Suppliers Association's Petition for Panel Rehearing

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Summary of the Points of Law or Fact that ASA Believes the Court Has Overlooked or Misapprehended

ASA believes the Court of Appeals has overlooked the legal position established by the EU-US Maintenance Annex. This existing US-EU agreement shields US-based repair stations from directly complying with the EU regulations. That oversight has led the Court of Appeals to mistakenly believe that the EU must take some action for ASA to obtain redress. This is not true. No EU action is necessary to obtain redress because the Maintenance Annex serves as a shield between the EU regulations and the US-based repair stations. The Maintenance Annex prevents the EU from imposing its regulations directly on US-based repair stations; so the Court can provide redress by a mere injunction against FAA enforcement of the Maintenance Annex Guidance (hereinafter "MAG").

At the heart of this misunderstanding is the fact that the Maintenance Annex is part of a US-EU agreement that specifically supersedes the European regulations as they apply to US-based repair stations. The Annex permits mutual recognition of each others' systems: the US and EU have agreed that a US-based repair station that wants to hold a European repair station approval can follow US regulations (plus a short list of Special Conditions) *instead* of following EU regulations.

The MAG is subsidiary to the Maintenance Annex, so if an injunction is issued against a clause in the MAG, the Maintenance Annex remains unaffected.

If the Maintenance Annex remains unaffected, then the Maintenance Annex continues to shield US-based repair stations from conforming to any specific European aviation regulation (aside from the Special Conditions, as discussed *infra*), including any requirement to have 8130-3 tags on incoming inventory.

ASA believes that the court should reconsider its position on redressability, because an injunction against the enforcement of the Maintenance Annex Guidance language that is at the heart of this case, would redress the harm caused in this case, and there would be no requirement for US-based repair stations to specifically conform to the European Regulations so long as the Maintenance Annex remains in place.[1]

Argument

1. This Case Differs from *Spectrum Five* in One Crucial Respect

The court relied on the *Spectrum Five* case for the proposition of non-redressability; but *ASA v. Huerta* is different because it involves a situation where there is no additional action necessary on the part of a non-party in order to obtain

[1] ASA had requested that the court enjoin the FAA from enforcing the part of the Maintenance Annex Guidance that requires receipt of 8130-3 tags for aircraft parts as a condition of using those parts. *ASA's Opening Brief* at 61. ASA later clarified that it was not seeking to enjoin the entire Maintenance Annex; it was only seeking to enjoin the MAG provision affecting inbound documentation and such an injunction would not prevent the FAA from discharging its duties under the Maintenance Annex. *ASA's Reply Brief* at 29-31.

redress.[2] That is, the requested injunction, alone, would provide adequate redress to ASA's trade association members.

In the *Spectrum Five* case, Spectrum Five failed to demonstrate a significant likelihood that a decision of the Court would redress its injury, and that matter was dismissed for lack of standing. *Spectrum Five LLC v. FCC*, 758 F.3d 254, 256 (D.C. Cir. 2014). In that case, an FCC decision (to permit movement of a satellite to a new location) subsequently allowed the ITU to act on a petition from Bermuda (claiming Bermuda had access to a satellite at the new location). The ITU was not a party to the Spectrum Five litigation so it was not subject to the court's order. A favorable ruling for Spectrum Five against the FCC would not change the ITU ruling (which was the real source of the harm), and so the D.C. Circuit opined that a favorable ruling was unlikely to cause ITU to reconsider its ruling. The D.C. Circuit held that an order against the FCC (in the *Spectrum Five* case) would not lead to redress because it would not affect the ITU ruling.

The issue in *ASA v. Huerta* is different because a ruling against the FAA in this matter would result in immediate redress, and no additional action by any third party would be necessary to gain redress.[3] The main reason that a ruling against

[2] Specifically, the European Aviation Safety Agency (EASA) need not take any action in order for redress to be obtained.
[3] Specifically, EASA (who is not a party) would NOT need to take any subsequent action in order for ASA to obtain redress.

the FAA in this matter would result in adequate redress is because the FAA does not have any obligation to apply any EU parts-documentation-regulations (except for the obligation improperly imposed by the MAG). In fact, the Maintenance Annex permits US based repair stations to obtain EASA 145 certificates based only on compliance with US regulations plus a discrete list of EASA Special Conditions. Thus, an injunction against enforcement of the new MAG language would cause the United States to revert to the relationship described in the Maintenance Annex (which would reflect adequate redress).

The Maintenance Annex does not impose the documentation requirement at issue in this case. *E.g. ASA Opening Brief* at 16-17; *ASA Reply Brief* at 30-31 (discussing the fact that the documentation requirement is not found in the Maintenance Annex). They are imposed by the MAG. So the fact that the US-based repair stations are required to follow the Maintenance Annex instead of following the EU regulations means that the documentation requirement disappears for US-based repair stations if the MAG provision is enjoined.

2. Under the Requested Injunction, Redress Would Exist Because the Maintenance Annex Does Not Require In-Bound Documentation of Parts, and the Maintenance Annex is the Controlling Document[4]

If the FAA were enjoined from enforcing Section B, paragraph 10(k) of the MAG then the industry would revert to the *status quo ante* under the existing US-EU Maintenance Annex. *Agreement Between the United States of America and the European Community on Cooperation in the Regulation of Civil Aviation Safety*, Annex 2 (Maintenance) [Hereinafter "*Maintenance Annex*"] [Addendum at 221 et seq.]

Under the existing US-EU Maintenance Annex, EU regulations are not directly applied or enforced against repair stations located in the United States. Instead, the Maintenance Annex dictates that the FAA must find that the repair station applicant (1) meets US FAA regulatory standards [not European standards] and (2) meets the Special Conditions found in the Maintenance Annex. *Maintenance Annex*, ¶ 4.4.1 (2008) [Addendum at 227].

The MAG did not formally amend the Maintenance Annex.[5] Prior to the latest revision to the MAG, the Maintenance Annex did not require documentation

[4] This was raised in *ASA Opening Brief* at 15-17, 18 (as background in the statement of the case) and *ASA Replay Brief* at 30-31 (specifically replying to the FAA's claims). It is therefore not being raised for the first time in this petition.
[5] Text in the MAG is not an acceptable method for amending the Maintenance Annex. The Maintenance Annex can only be amended by an action of the Bilateral Oversight Board – which did not act in this case. *See Agreement Between the*

for parts coming into US-based repair stations, and the Annex still does not require such documentation. Enjoining the MAG clause would return the US and EU to the *status quo ante* situation in which U.S. FAA inspectors are not required to audit a repair station's compliance to each individual EASA regulation (and in which no documentation standard is imposed on inbound parts). *E.g. Maintenance Annex*, ¶ 4.4.1.

3. The Structure of the US-EU Agreements Makes the MAG Subordinate to the Maintenance Annex, and FAA Enforcement of the Maintenance Annex (Alone – Without the Disputed Clause of the MAG) Would Provide Adequate Redress[6]

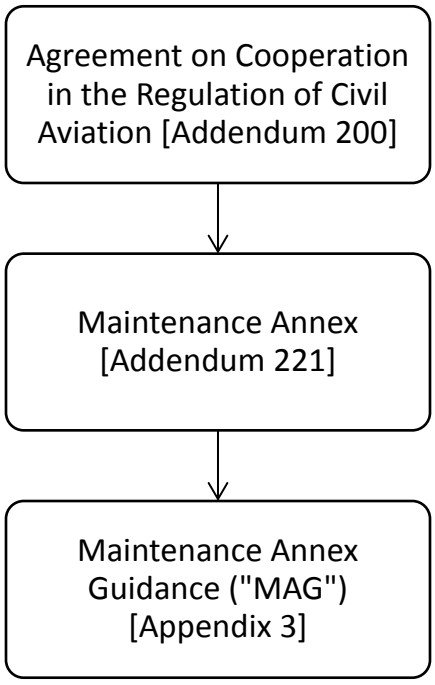
In order to understand why there is no obligation for inbound documentation in the Maintenance Annex, it is important to understand which resources reflect the bilateral aviation safety relationship between the US and the EU, and how those resources interact with US and EU regulations.

United States of American and the European Community on Cooperation in the Regulation of Civil Aviation Safety, Article 3, section C(2) [Addendum at 207] (June 30, 2008) (assigning responsibility for amending the Annex to the Bilateral Oversight Board); *id*. at Article 19 section B [Addendum at 219] (explaining the process for amending the Annex, which involves an exchange of diplomatic notes and an effecting action by the Bilateral Oversight Board.

[6] This relationship was described in the ASA Opening Brief at 17,18 and ASA Reply Brief at 20-23. It is not being raised for the first time in this petition.

a. Executive Agreement and Maintenance Annex

The three-tier hierarchy of documents in the bilateral aviation safety relationship between the US and the EU starts with an Agreement[7] which provides a high-level recognition that the US and EU regulatory systems are "sufficiently compatible to permit reciprocal acceptance of approvals and findings of compliance with agreed upon standards made by one Party on behalf of the other as specified in the Annexes." *Agreement Between the United States of America and the European Community on Cooperation in the Regulation of Civil Aviation Safety*, Article 5(a) (2008) [Addendum 209].



The executive agreement specifically cross-references the Annexes. *Id*. The Annex documents comprise the second tier in the bilateral aviation safety hierarchy. One of those two annexes is the Maintenance Annex. The Maintenance Annex explains that if a U.S.-based repair station wants to obtain European certification, then it must comply with (1) the US regulations and (2) the EASA Special Conditions. *Maintenance Annex* ¶ 4.4.1

[7] Agreement Between the United States of America and the European Community on Cooperation in the Regulation of Civil Aviation Safety (2008) [Addendum 200].

[Addendum 227]. No additional requirements exist. There is no requirement for general compliance with all EU regulations.

b. No Requirement in FAA Regulations Nor EASA Special Conditions for Inbound Documentation of Parts

The FAA regulations do not require any specific documentation to accompany parts when they are obtained by a repair station. *E.g. FAA Legal Interpretation Letter from Rebecca McPherson (FAA Assistant Chief Counsel for Regulations) to Jason Dickstein* (August 6, 2009) (explaining that an aircraft parts may be identified by documentation, markings, or inspection and testing) [App'x 139-140]. Nor do the EASA Special Conditions require any specific documentation to accompany parts when they are obtained by a repair station. *Maintenance Annex, EASA Special Conditions* [Addendum 237-240]. The Maintenance Annex specifically explains that the EASA Special Conditions are areas of the EASA regulations that are "not … common to both systems and which are significant enough that they must be addressed." This omission of other EASA regulations and standards from the Special Conditions can be explained by the fact that they were not significant enough to be included in the special conditions. Put another way, the US receiving requirements for new parts entering repair stations were deemed sufficiently compatible with EU regulation so as to merit reciprocal acceptance.

c. Contrast with a Requirement of the EASA Special Conditions

The lack of inbound parts documentation can be contrasted with an outbound documentation requirement associated with the maintenance work performed (which does have an EASA special condition).

The recordkeeping requirement found in the US regulations and the MAG is the requirement to document the work performed at the *conclusion* of the work, when the article is released (this would be the article into which the individual piece-parts were installed). 14 C.F.R. § 43.9 (requiring an Approval for Return to Service following maintenance, but not requiring any special form); *Maintenance Annex, EASA Special Conditions*, ¶ 1.1.1(b)(iii) (requiring the Approval for Return to Service to be issued on an 8130-3 tag) [Addendum 238]. This is an activity that takes place at the end of the repair station's maintenance – not at the time of receipt of parts to be used by the repair station, as with the MAG-based documentation requirements at issue in this case. Because US regulations do not require a specific form, but EASA requires a specific form in Europe, EASA insisted on a special condition requiring the Approval for Return to Service to be issued at the end of the maintenance activity on an 8130-3 tag.

d. The MAG Explains Standards, and In its Absence the Maintenance Annex Continues to Establish those Standards

The Maintenance Annex Guidance, or MAG, is the third step down in the bilateral agreement hierarchy. As the name implies, the role of the MAG is to explain the standards found in the Maintenance Annex. The Guidance is not the place for a new requirement. The MAG actually recognizes and repeats the standard stated in the Maintenance Annex: that the only two conditions for a US-based repair station to earn EASA 145 certification are 1) compliance with the US regulations and 2) compliance with the Special Conditions. *Maintenance Annex Guidance (rev. 6)* at 12 (2016) [Appendix 14].

If Section B, paragraph 10(k) of the Maintenance Annex Guidance was enjoined, the Maintenance Annex would still exist in effect as it did previously. The Maintenance Annex only requires US-based repair stations to meet the *US* regulatory requirements and the Special Conditions, and neither the US regulatory requirements nor the Special Conditions require documentation as a condition of receipt of a new aircraft part.

4. The Language of the EASA Regulations Does Not Matter Because They Do Not Apply Directly to US-Based Repair Stations

The parties to this litigation disagreed on what the underlying EASA regulations require; but no matter what those regulations require, the Agreement between the EU and the US does not require the US to enforce the European

regulations. The agreement requires the US to inspect to (1) US FAA standards, plus (2) the listed Special Conditions. *E.g. Maintenance Annex* ¶ 4.4.1 [Addendum 227]. Any additional requirements of the EU regulations are not part of the FAA's inspection criteria, as the US and EU have agreed in the Maintenance Annex. There is no legal obligation that requires FAA employees to generally inspect to European regulations, and the Maintenance Annex clarifies that the FAA is not expected to inspect to, nor implement, nor enforce, European regulations (except to the extent they are addressed in the Special Conditions). *Id*.

In the absence of the MAG Section B, paragraph 10(k), there is nothing in that document or the Maintenance Annex that requires the documentation that is at the heart of this matter, and it is solely the FAA's enforcement of the MAG paragraph 10(k) documentation requirement that has caused the injury in this case.

The FAA has claimed that striking this requirement "would not compel EASA to permit installation of parts." FAA Brief at 13. Such compulsion is unnecessary because EASA has already acquiesced to the notion that repair stations located in the US may operate according to FAA standards (including accepting parts according to FAA standards, which do not include the documentation requirements). *E.g. Maintenance Annex* ¶ 4.4.1 [Addendum 227].

The FAA suggests in its brief that if an injunction were to issue that "the European Union's regulations would continue to govern the documentation

required of parts." *FAA Brief* at 12. This claim is wrong for two reasons. First, the claim is contrary to the plain language of the Maintenance Annex, which permits US-based repair stations to obtain EASA certification merely by following FAA rules as supplemented by the Special Conditions; thus the claim has no legal basis. Second, the claim also has no factual basis. There is nothing in the record to support the claim that EASA documentation regulations would apply to US-based repair stations.

The only basis for this claim is a post-hoc declaration by Tim Shaver, which is not in the record before the court. The Supreme Court has stated that such post hoc rationalizations are not part of the record and therefore should not be considered by the court. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (explaining that courts may not accept the agency's *post hoc* rationalization for an agency action). ASA has specifically asked this court to reject this post-hoc rationalization. *ASA Reply Brief* at 31-33 (requesting that the court of appeals strike all references to the Shaver Declaration in the Reply Brief). And the declaration contradicts the plain language of the Maintenance Annex, so it inappropriately misleads the court.

Conclusion

US-based repair stations are not required to follow EU law, because the United States already negotiated (as published in the Maintenance Annex) that US-repair stations would follow FAA regulations as supplemented only by the Special Conditions.

Enjoining MAG Section B, paragraph 10(k) eliminates the requirement for an FAA inspector to impose the documentation requirement on inbound parts. That requirement is not found in the US regulations. That requirement does not exist in the Maintenance Annex (including the Special Conditions).

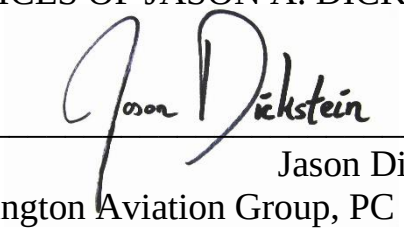
In the absence of MAG Section B, paragraph 10(k), US-based repair stations would follow the standards described in the Maintenance Annex. EASA regulations do not come into the equation, and no additional European action would be necessary to provide redress in this case.

If FAA enforcement of the MAG clause is enjoined, then US-based repair stations become free, once again, to accept parts and then determine the airworthiness of the parts based on traditional, proven, methods. An injunction issued against FAA enforcement of the clause will redress ASA's grievance and no further relief is necessary from EASA or from any other third party. ASA therefore requests that this Court reconsider its decision dismissing on standing,

and issue an injunction consistent with the arguments and conclusions of the ASA Opening Brief and Reply Brief.

RESPECTFULLY SUBMITTED this 27th day of February, 2017.

WASHINGTON AVIATION GROUP, PC AND THE
LAW OFFICES OF JASON A. DICKSTEIN

By 

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and 40(b)(1) because this brief contains less than 3,900 words.

February 27, 2017
Date

Jason Dickstein,
Attorney for Aviation Suppliers Association

Addendum to the Petition for Panel Rehearing

Certificate of Parties, Disclosure Statement and Panel Opinion

Certificate of Parties and Amici Curiae

Petitioner

The Petitioner in this matter is the Aviation Suppliers Association, Inc.

Respondents

The Respondents in this matter are Michael Huerta, Acting Administrator, Federal Aviation Administration, and the United States of America.

Amici Curiae

There are no amici curiae to this case.

Corporate Disclosure Statement

- The Aviation Suppliers Association, Inc. does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.
- The Aviation Suppliers Association, Inc. is a non-profit trade association that represents the interest of the aircraft parts distribution community.

Panel Opinion

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1202 **September Term, 2016**

FILED ON: JANUARY 25, 2017

AVIATION SUPPLIERS ASSOCIATION, INC.,
PETITIONER

v.

MICHAEL P. HUERTA, ADMINISTRATOR, ET AL.,
RESPONDENTS

On Petition for Review of a Guidance and
Notice Issued by the Federal Aviation Administration

Before: TATEL and MILLETT, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

Upon consideration of the record from the Federal Aviation Administration and the briefs and arguments of the parties, it is

ORDERED AND ADJUDGED that the petition for review be dismissed.

Because airplanes have a habit of crossing jurisdictional lines, the Federal Aviation Administration and the European Aviation Safety Agency ("EASA") have a practice of jointly issuing Maintenance Annex Guidance, which describe the requirements for maintaining European Union registered airplanes in American repair centers. Petitioner, a group representing suppliers of parts for airplane repairs, challenges and seeks to enjoin certain Guidance revisions that require parts to have specified documentation before they can be installed on European airplanes. Petitioners also challenge FAA Notice 8900.360 (May 2, 2016), which announced that the FAA and EASA had agreed temporarily to postpone the compliance deadline for that requirement. Petitioner's objection rests on the proposition that European Union regulations under some circumstances permit the use of parts lacking the documentation required under the revised Maintenance Annex Guidance. But the Guidance revisions describe EASA's view of the documentation required to comply with European law, so an injunction against FAA enforcement would provide petitioner's members no relief. See *Spectrum Five LLC v. Federal Commc'ns Comm'n*, 758 F.3d 254, 260-261 (D.C. Cir. 2014) (holding plaintiff lacked standing to challenge agency order because redress of the alleged harm depended on action by "an international organization that is not regulated by our government and therefore not bound by

this Court or the [agency]" and because plaintiff failed to show that a favorable ruling would create a "significant increase in the likelihood" that its injury would be redressed). Accordingly petitioner lacks standing and we lack subject matter jurisdiction.

Pursuant to Rule 36 of this Court, this disposition will not be published. The clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

ARGUED ON JANUARY 13, 2017
No. 16-1202

UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AVIATION SUPPLIERS ASS'N, INC.
Petitioner,
v.
MICHAEL P. HUERTA, Administrator, FEDERAL AVIATION ADMINISTRATION, and the UNITED STATES OF AMERICA,
Respondents

CERTIFICATE OF SERVICE

I certify that on February 27, 2017, Jason Dickstein filed by electronic transmission through the CM/ECF system an original of the:

Aviation Suppliers Association's Petition for Panel Rehearing

And I also certify that each participant in this case is a registered CM/ECF user and that service is accomplished through the appellate CM/ECF system.

I also certify that on this date I filed four paper copies, pursuant to Circuit Rule 27(b), by US First Class mail, return receipt requested, addressed to the Court of Appeals, at 333 Constitution Avenue, NW, Washington, DC 20001-2866.

/s/ Jason Dickstein

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