**No. 20-1443**

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**In The United States Court of Appeals**
**For the District of Columbia Circuit**

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CHARLES ERWIN,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

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ON PETITION FOR REVIEW OF AN ORDER
OF THE ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION

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# FINAL BRIEF FOR THE RESPONDENT FEDERAL AVIATION ADMINISTRATION

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April 29, 2021

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), counsel for Respondent Federal Aviation Administration (FAA) certifies the following:

A. Parties and Amici:

The parties before this Court are the Petitioner, Charles Erwin, and the Respondent FAA.

B. Ruling Under Review:

Petitioner seeks review of the FAA's September 11, 2020 decision denying his request for review of the withdrawal of his Authorization for a Special Issuance First-Class Medical Certificate (hereinafter "Authorization") due to a positive alcohol test.

C. Related Cases:

This case was not previously before this court. Mr. Erwin filed a petition for writ of mandamus on July 8, 2020 in the United States District Court for the Western District of Oklahoma requesting the FAA issue a decision on his request for review of the withdrawal of his Authorization. After the FAA issued its decision on September 11, 2020 – which is the order under review in this case – the parties filed a joint

stipulation to dismiss the district court case, which the district court granted.

/s *Casey E. Gardner*
Casey E. Gardner
Attorney for Respondent
Federal Aviation Administration

Dated: April 29, 2021

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| FAA | Federal Aviation Administration |
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## COUNTERSTATEMENT OF JURISDICTION

### A. Agency Subject Matter Jurisdiction

The FAA issues medical certificates to individuals under its statutory authority in 49 U.S.C. § 44703(a) [Addendum (Add.)], which authorizes the FAA to "issue an airman certificate to an individual when the Administrator finds . . . that individual is qualified for, and physically able to perform the duties related to, the position to be authorized by the certificate," and in accordance with its regulatory medical standards in 14 C.F.R. part 67.

The FAA may grant exemptions from a regulatory requirement, including the regulations setting forth the medical standards in part 67, if doing so is in the "public interest." 49 U.S.C. § 44701(f) [Add.]. The Administrator's authority to issue or deny a medical certificate, and to exempt an individual from an applicable medical standard, is delegated to the Federal Air Surgeon. 14 C.F.R. § 67.407(a). An exemption from the medical standards in part 67 is granted at the discretion of the Federal Air Surgeon under 14 C.F.R. § 67.401(a) [Add.] by issuance of an Authorization for Special Issuance of a Medical Certificate

("Authorization"). Id. An Authorization may also be withdrawn at the discretion of the Federal Air Surgeon. 14 C.F.R. § 67.401(f) [Add.].

### B. Appellate Jurisdiction

This matter is before the Court on review of the Federal Air Surgeon's September 11, 2020 decision to affirm the withdrawal of an Authorization previously granted to Mr. Erwin. R. 1-2; JA 303-304.[1] The decision is a final determination of the Administrator. Under 49 U.S.C. § 46110(a) [Add.], a person may seek judicial review of an order issued by the FAA Administrator by filing a petition for review within 60 days after the order is issued. 49 U.S.C. § 46110(a). Here, Mr. Erwin filed a timely petition for review on November 10, 2020.

## STATEMENT REGARDING PERTINENT STATUTES AND REGULATIONS

Pursuant to D.C. Cir. R. 28(a)(5), the statutes and regulations pertinent to this petition for review are set forth in a separately bound addenda.

[1] The notation "JA" refers to the deferred Joint Appendix filed by Petitioner pursuant to Fed. R. App. P. 30(c).

## COUNTERSTATEMENT OF THE ISSUE

Whether the Federal Air Surgeon's decision to affirm the withdrawal of Mr. Erwin's Authorization after he violated the express conditions of the Authorization by testing positive on a random alcohol test was neither arbitrary nor capricious.

## STATEMENT OF THE CASE

### A. Nature of the Case

Mr. Erwin is a pilot for Delta Airlines who has a clinical diagnosis of alcohol use disorder. R. 75; JA 38. Due to this diagnosis, he is disqualified from unrestricted medical certification under the FAA's medical standards in 14 C.F.R. part 67. See 14 C.F.R. §§ 67.107(a)(4), 67.207(a)(4), 67.307(a)(4) [Add.].[2] Using its discretionary exemption authority, the FAA issued Mr. Erwin an Authorization on May 7, 2017. R. 526-28; JA 68-70.[3] This Authorization allowed Mr. Erwin to hold a

[2] The FAA issues three different classes of unrestricted medical certificates; the class of medical certificate required depends on the type of pilot certificate the pilot holds and the privileges that the pilot wishes to exercise. See 14 C.F.R. § 61.23. Because Mr. Erwin's Authorization granted him a first-class special issuance medical certificate (i.e., an exemption from the first-class medical standards), for ease of reference, the remainder of this brief cites only the first-class medical standards.

[3] The authority of the Federal Air Surgeon to grant an exemption from the medical standards under 14 C.F.R. § 67.401 is also exercised by the

special issuance medical certificate as long as he complied with certain conditions, including the requirement to submit to random, unannounced alcohol tests and maintain "total abstinence from alcohol and mood altering chemicals." R. 526-28; JA 68-70. When Mr. Erwin tested positive on a random alcohol test, the FAA withdrew the Authorization. R. 423, 167; JA 170, 264. Mr. Erwin sought the Federal Air Surgeon's review of the withdrawal, R. 353; JA 187, and the Federal Air Surgeon affirmed the withdrawal of Mr. Erwin's Authorization. R. 1-2; JA 303-304. Mr. Erwin now seeks review of the Federal Air Surgeon's decision.

### B. Statutory & Regulatory Background

The FAA issues airman certificates to pilots who are "qualified for, and physically able to perform the duties related to [their] position." 49 U.S.C. § 44703(a). In order to ensure that pilots are physically able

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Manager of the Aeromedical Certification Division. 14 C.F.R. § 67.401(h) [Add.]. Here, it was the Manager of the Aeromedical Certification Division who issued the 2017 Authorization and later withdrew the Authorization after Mr. Erwin's positive test. It is the Federal Air Surgeon's affirmance of the withdrawal that is the final order under review in this case. Thus, all references hereinafter will be to the Federal Air Surgeon or to the FAA.

to safely perform their duties, the FAA's regulations generally[4] require a pilot to hold a medical certificate, in addition to a pilot certificate, in order to serve as a pilot. 14 C.F.R. §§ 61.3(c), 61.23(a).

The FAA's regulations in 14 C.F.R. part 67 provide the standards an individual must meet to be medically qualified. See 14 C.F.R. § 67.3. For example, there are specific mental, neurologic, and cardiovascular standards, among others, for each class of medical certificate, see generally 14 C.F.R. part 67, subparts B, C, D; and an individual must meet all of the medical standards for the class of certificate desired before he or she may be issued an unrestricted medical certificate. See, e.g., 14 C.F.R. § 67.101. As relevant here, the regulations preclude issuance of an unrestricted medical certificate to an individual, like Mr. Erwin, who has an "established medical history or clinical diagnosis of . . . [s]ubstance dependence, except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including

[4] Individuals who meet certain eligibility criteria may fly small aircraft without holding a third-class medical certificate. See generally 14 C.F.R. part 68. Because Mr. Erwin is a commercial pilot, he does not meet this criteria and must hold a medical certificate.

sustained total abstinence from the substance(s) for not less than the preceding 2 years". 14 C.F.R. § 67.107(a)(4) [Add.].

When a pilot does not meet the part 67 medical standards for an *unrestricted* medical certificate, the Federal Air Surgeon may, in his discretion, grant an exemption to the regulatory requirements, via an Authorization, if "the person shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering public safety during the period in which the Authorization would be in force." Id. § 67.401(a).

An Authorization allows an individual who is not otherwise qualified under the regulations to fly, subject to conditions and limitations specified by the Federal Air Surgeon to ensure an acceptable level of safety. In contrast to an unrestricted medical certificate, an Authorization can contain conditions and limitations on its use. The FAA may limit the duration of the certificate issued under the Authorization; impose operational and functional limitations needed for safety; or condition the granting of a new Authorization on the results of subsequent medical tests, examinations, or evaluations. § 67.401(d).

Granting an Authorization is discretionary, and it may be withdrawn at any time for a variety of reasons, including the individual's failure to comply with the conditions of the Authorization. 14 C.F.R. § 67.401(f). An Authorization can also be withdrawn if there is an adverse change in the individual's medical condition, or if public safety would be endangered by the holder's exercise of airman privileges. Id. An individual whose Authorization has been withdrawn may request the Federal Air Surgeon's review of the withdrawal and may submit evidence in support of that request. Id. § 67.401(i)(2). The Federal Air Surgeon's decision on that request under section 67.401(i)(3) is a final agency order.

### C. Facts and Procedural History

Mr. Erwin is a pilot for Delta Airlines. In 2016, Mr. Erwin's brother contacted Delta with a concern about his alcohol consumption. R. 39, 98, 108, 195; JA 280, 244, 257, 75. At the direction of Delta, Mr. Erwin underwent a psychiatric evaluation, R. 463-64; JA 1-3, which recommended Mr. Erwin complete an in-patient treatment program at Talbott Recovery Campus. R. 75; JA 38. At Talbott he received the clinical diagnosis of "Alcohol use disorder, severe." R. 75; JA 38. He was

discharged from Talbott in February 2017, after completing almost three months of treatment. R. 469-470; JA 36-37.

By virtue of his diagnosis, when Mr. Erwin reapplied for a medical certificate in March 2017, he was no longer qualified for an unrestricted certificate. R. 432-33; JA 40-41. See 14 C.F.R. § 67.107(a)(4) (precluding certification of airmen with a clinical diagnosis of substance dependence). Although Mr. Erwin did not meet the FAA's part 67 medical standards, the FAA reviewed his Talbott treatment records, R. 435-470; JA 4-37, and the subsequent psychiatric and psychological evaluations he submitted, R. 469, 479, 514, 521; JA 36, 43, 52, 64, and granted him an Authorization after being satisfied that he could fly without endangering public safety. This Authorization subjected Mr. Erwin to monitoring, R. 526-28; JA 68-70, and required him to comply with the following conditions:

- Undergo random, unannounced drug and alcohol testing at least 14 times in a 12-month period;
- Engage in an abstinence-based recovery program monitored by his Human Intervention Motivational Study-trained Aviation Medical Examiner;[5]

[5] The Human Intervention and Motivation Study (HIMS) program is program developed specifically for commercial pilots by the Air Line Pilots Association, in cooperation with the FAA and airline

- Provide a report from an aftercare counselor attesting to his continued progress and participation in abstinence-based sobriety every three months;
- Complete an in-person evaluation with a Human Intervention Motivational Study-trained Aviation Medical Examiner every six months;
- Undergo an evaluation from a Human Intervention Motivational Study-trained psychiatrist every twelve months;
- Provide a monthly report from Delta attesting to his "competence, crew interaction, and mood" and his continued total abstinence from alcohol.

The Authorization also expressly stated: "Continued airman certification remains contingent upon total abstinence from alcohol and mood altering chemicals." R. 527; JA 69.

Between May 2017 and December 2017, Mr. Erwin complied with these conditions. But on January 9, 2018, the FAA was notified by his Human Intervention Motivational Study-trained Aviation Medical Examiner that Mr. Erwin had tested positive on a random alcohol test

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management, and operates as an alcohol and drug assistance program that coordinates the identification, assessment, treatment, and medical certification of pilots. Information about the HIMS program can be found at https://himsprogram.com. HIMS Aviation Medical Examiners are specifically trained in evaluating airmen for substance- or alcohol-related conditions and other mental health conditions. Engagement with the HIMS program is a typical condition for Authorizations issued to commercial airline pilots. See FAA, Guide for Aviation Medical Examiners, pgs. 415-420, 424-430 (2021) [Add.].

and had entered a treatment program. R. 425; JA 33. Specifically, on December 14, 2017, Mr. Erwin tested positive on a random ethyl glucuronide (EtG) and ethyl sulfate (EtS) urine test[6] and at the direction of Delta, entered a treatment program again, this time at Metro Atlanta Recovery Residences. R. 87, 97, 195; JA 177, 243, 75.

Accordingly, on January 9, 2018 the FAA withdrew Mr. Erwin's Authorization due to his failure to comply with its conditions. R. 423, 167; JA 170, 264. On March 9, 2018, Mr. Erwin requested the Federal Air Surgeon review the decision to withdraw his Authorization, under 14 C.F.R. § 67.401(i). In support of his request, Mr. Erwin claimed that he had tested positive due to inadvertently consuming food cooked in beer, R. 353-56; JA 187-190, and provided a report from a forensic toxicologist in support of his claim. R. 295-304; JA 232-239.

[6] The fact that Mr. Erwin tested positive on December 14, 2017 with an ethyl glucuronide value of 144 and ethyl sulfate value of 157 is not in dispute. R.107, 146, 177, 297; JA 256, 271, 260, 234. However, the actual test report was not contained in the airman medical file provided to undersigned counsel by the FAA's Aerospace Medical Certification Division and, thus, was not included in the certified index to the record filed with the Court. The report has since been added to Mr. Erwin's file and an amended certified index has been filed to include the additional report at record page 684.

Over the next year, the FAA worked with Mr. Erwin towards the goal of recertification. The FAA reviewed the records Mr. Erwin submitted, including the forensic toxicology report, a new psychiatric evaluation dated July 2018 from Dr. Steven Lynn, R. 177; JA 260, and his treatment and discharge records from Metro Atlanta Recovery Residences from January-April 2018, R. 87-101, 195-289; JA 177-247, 75-169, which supported certification with rigorous monitoring. R. 100-101; JA 247-248.

In late 2018, the FAA sent Mr. Erwin's records to a psychiatric consultant, Dr. Alan Sager, for review. R. 154; JA 274.[7] In December, Dr. Sager prepared a memorandum for the FAA, opining that although Mr. Erwin's clinical diagnosis was "consistent with a high risk," there were "risk modification efforts" that could "reduce the risk to overall acceptable levels." R. 155; JA 275. He recommended the FAA certify Mr. Erwin with risk-mitigation criteria, including monitoring, random

[7] Although Mr. Erwin's opening brief states that Dr. Sager is an FAA employee, Pet'r Br. at 11, Dr. Sager is not. He is an *external* psychiatric consultant, R. 145, 154, JA 270, 274, who on occasion is retained to provide opinions and recommendations to the Federal Air Surgeon, as he did here.

testing, aftercare counseling, and psychiatric evaluations for a period of five years. R. 155; JA 275.

On January 31, 2019, after being satisfied that Mr. Erwin could perform the duties authorized by a first-class medical certificate without endangering public safety, the FAA issued Mr. Erwin a new Authorization that subjected him to the same monitoring terms as before. R. 150-153; JA 276-279. Under this new Authorization, Mr. Erwin was able to resume flying for Delta in early 2019.

The FAA then considered the matter of Mr. Erwin's medical certification resolved, as it was under the (perhaps mistaken) belief that Mr. Erwin's goal was to obtain FAA medical certification and resume flying for Delta. Therefore, after the FAA issued Mr. Erwin a new Authorization in 2019, the agency did not expressly rule on his request for review of the withdrawal. In July 2020, Mr. Erwin filed a petition for writ of mandamus in the United States District Court for the Western District of Oklahoma seeking to compel the FAA to issue a decision on his request for the Federal Air Surgeon's review of the withdrawal.

By letter dated September 11, 2020, the Federal Air Surgeon denied Mr. Erwin's request and affirmed the withdrawal of his 2017

Authorization. R. 1; JA 303. The letter explained that by his positive alcohol test Mr. Erwin failed to comply with the express conditions and limitations of his Authorization. Id. The positive test showed that he was not totally abstinent from alcohol. Id. The test result, in conjunction with his re-enrollment in a treatment program, reflected an adverse change in his medical condition. Given his history of alcohol dependence, his continued exercise of airman privileges without a new evaluation of his current medical condition would have endangered public safety. Id. Therefore, the letter explained that Mr. Erwin's 2017 Authorization was appropriately withdrawn in accordance with 14 C.F.R. § 67.401(f).

The Federal Air Surgeon's letter also explained why his granting of a new Authorization to Mr. Erwin in 2019 did not undermine the appropriateness of his decision to withdraw the 2017 Authorization. The new Authorization was issued *after* Mr. Erwin completed a new treatment program at Metro Atlanta Recovery Residences and also underwent a favorable psychiatric evaluation in July 2018. R. 1; JA 303. Thus, it was only *after* reviewing these records that the Federal Air Surgeon was satisfied, in accordance with the standard in 14 C.F.R. §

67.401(a), that Mr. Erwin could perform the duties of a commercial pilot without endangering public safety. R. 1-2; JA 303-304. In contrast, when the FAA withdrew his 2017 Authorization, it did not have the benefit of Mr. Erwin's new evaluations nor had he completed his new treatment program. R. 1; JA 303.

## SUMMARY OF THE ARGUMENT

Mr. Erwin is a commercial airline pilot with a clinical diagnosis of alcohol use disorder. He does not meet the FAA's part 67 standards for medical certification and, thus, in order to serve as a commercial pilot he must be issued an exemption from these regulations through an Authorization. Authorizations are discretionary, and are only issued after the FAA is satisfied that the pilot can fly without endangering public safety. 14 C.F.R. § 67.401(a). Here, the FAA determined that this standard was met only *if* Mr. Erwin complied with rigorous monitoring conditions that required, among other things, his "total abstinence from alcohol and mood altering chemicals." R. 526-28; JA 68-70. When Mr. Erwin tested positive on a random alcohol test, the FAA exercised its discretion to withdraw his Authorization in the interest of public safety.

The Federal Air Surgeon's decision to affirm the withdrawal of his Authorization is supported by substantial evidence in record and is neither arbitrary nor capricious. By regulation, Authorizations can be withdrawn if the pilot fails to comply with an Authorization's conditions; if there is an adverse change in the pilot's medical condition; or if public safety would be endangered by the pilot's continued exercise of airman privileges. 14 C.F.R. § 67.401(f). Although any one of these criteria are an independent basis for withdrawal, each is met here.

First, when presented with objective evidence of Mr. Erwin's alcohol consumption – *i.e.*, a positive alcohol test – the Federal Air Surgeon drew the reasonable conclusion that Mr. Erwin had not been totally abstinent from alcohol, in violation of the express conditions of his Authorization. Although Mr. Erwin points out that the ethyl glucuronide and ethyl sulfate tests cannot discern whether he intentionally or accidentally consumed alcohol, there is no dispute about the validity of the underlying positive test. The "low" positive values of Mr. Erwin's ethyl glucuronide and ethyl sulfate tests can indicate previous heavy drinking a few days before the test, light drinking in the hours before the test, or recent extraneous exposure.

Thus, while Mr. Erwin's inadvertent consumption of food cooked in beer is certainly a possible explanation for his positive test, it is not the only reasonable conclusion to draw. An equally reasonable explanation for his positive test is that Mr. Erwin intentionally consumed alcohol in the hours or days before his test. Faced with two reasonable explanations for Mr. Erwin's positive alcohol test – one of which signaled a potential relapse by a commercial airline pilot – the FAA rationally erred on the side of public safety.

Second, Mr. Erwin's positive alcohol test and his re-enrollment in an in-patient treatment program at Metro Area Recovery Residences demonstrated an adverse change in his medical condition – specifically, that he was no longer in stable recovery from his alcohol use disorder. Lastly, given that Mr. Erwin is entrusted with the responsibility of safely transporting the flying public, allowing him to continue to pilot commercial aircraft after his positive test without a new evaluation of his medical condition would have endangered public safety.

Thus, Mr. Erwin's Authorization was properly withdrawn. None of Mr. Erwin's arguments support the contrary conclusion.

## STANDARD OF REVIEW

A reviewing court must set aside agency action it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). In conducting this review, courts look to see whether the agency has "examined the relevant data and articulated a satisfactory explanation for its action, which may not neglect any important aspect of the problem, run counter to the evidence, or be so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Friedman v. FAA, 890 F.3d 1092, 1097 (D.C. Cir. 2018) (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotations and brackets omitted).

The Administrator's findings of fact are conclusive if supported by substantial evidence. 49 U.S.C. § 46110(c). When factual findings are supported by substantial evidence, the Court "must accept also the conclusions drawn therefrom unless they are seen to be arbitrary or capricious, or to rest on premises that are deemed contrary to ascertainable legislative intent or are otherwise contrary to law." Western Air Lines, Inc. v. Civil Aeronautics Bd., 495 F.2d 145, 152

(D.C. Cir. 1974)). A conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view. Id.

## ARGUMENT

**The Federal Air Surgeon properly exercised his discretion to affirm the withdrawal of Mr. Erwin's Authorization when Mr. Erwin tested positive on an alcohol test, in violation of the express conditions of his Authorization.**

It is undisputed that Mr. Erwin does not meet the medical standards for an unrestricted medical certificate under 14 C.F.R. § 67.107(a)(4) due to his clinical diagnosis of alcohol use disorder. In 2017, the FAA granted him a discretionary Authorization exempting him from that medical standard. R. 526-28; JA 68-70. Among other things, Mr. Erwin's Authorization was "contingent upon [his] total abstinence from alcohol and mood altering chemicals." R. 527; JA 69. When Mr. Erwin tested positive on a random alcohol test, the FAA drew the logical and reasonable conclusion that Mr. Erwin had not been totally abstinent from alcohol and withdrew his Authorization. For the reasons discussed below, the Federal Air Surgeon's decision to affirm the withdrawal of Mr. Erwin's Authorization is supported by the record and was neither arbitrary nor capricious.

### A. The FAA withdrew Mr. Erwin's Authorization in the interest of public safety.

The paramount consideration in determining whether to grant or withdraw an Authorization must be public safety. See 49 U.S.C. § 44701(f) (exemptions from a regulatory requirement may be granted if it is in the "public interest"); 14 C.F.R. § 67.401(a) (an Authorization may be granted if pilot duties can be "performed without endangering public safety"); § 67.401(f) (an Authorization may be withdrawn if "[p]ublic safety would be endangered by the holder's exercise of airman privileges").[8] The Federal Air Surgeon's duty when evaluating a regulatory exemption is to the public, not to an individual airman. Delta Air Lines, Inc. v. United States, 490 F. Supp. 907, 918 (N.D. Ga. 1980); Baker v. FAA, 917 F.2d 318, 319 (7th Cir. 1990) (explaining that public safety must be the dominant and controlling consideration when evaluating an exemption).

Concerns about public safety are heightened when, as is the case here, the airman in question is a commercial airline pilot. The FAA has

[8] The FAA's exemption statute, 49 U.S.C. § 44701(f), uses the term "public interest" and the FAA's implementing regulation in 14 C.F.R. § 67.401 uses the term "public safety." But the terms are considered synonymous. Holmes v. Helms, 705 F.2d 343, 346 (9th Cir. 1983).

a particular obligation to protect the public when it comes to commercial flight, and it "should do everything possible to assure the general public that the crew is competent both physically and professionally." Delta Air Lines, Inc., 490 F. Supp. at 918. Accordingly, Authorizations for first– and second-class special issuance medical certificates (like Mr. Erwin's), which are required to conduct commercial operations, are reviewed by the agency with heightened scrutiny, given the greater risk to the flying public involved. As the FAA explained in its Final Rule on Special Issuance of Airman Medical Certificates and Revision of Cardiovascular and Alcoholism Standards:

> [A] commercial or airline transport pilot, in virtually every circumstance, has the life or property of another individual in his or her care. For this reason, if there is a reasonable risk that such a pilot may experience an incapacitating medical event, even though that risk may be relatively small, the Federal Air Surgeon must consider the degree of protection to which the public is entitled in commercial operations.

47 Fed. Reg. 16298, 16301 (Apr. 15, 1982). The heightened scrutiny of pilots authorized to fly for commercial air carriers is consistent with FAA's statutory mandate to consider, among other things, "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1) [Add.]. See also

49 U.S.C. § 44701(c) [Add.] (mandating the FAA carry out its responsibilities "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation").[9]

Here, the Federal Air Surgeon was presented with objective evidence (*i.e.*, a positive alcohol test) that Mr. Erwin – a commercial airline pilot with an established history of alcohol dependence, who is entrusted with the responsibility of flying members of the public in air transportation – had failed to maintain total abstinence. Although the test results cannot discern whether Mr. Erwin intentionally or accidentally consumed alcohol (see argument in section B, *infra*), there is no dispute about the validity of the underlying test. In light of these facts, the Federal Air Surgeon concluded, as he explained in his decision, that Mr. Erwin's positive test reflected an adverse change in his medical condition. Moreover, Mr. Erwin re-enrolled in a treatment

[9] This distinction is further codified in the FAA's special issuance regulation itself, which states that "for a third-class medical certificate, the Federal Air Surgeon considers the freedom of an airman, exercising the privileges of a private pilot certificate, to accept reasonable risks to his or her person and property that are not acceptable in the exercise of commercial or airline transport pilot privileges, and, at the same time, considers the need to protect the safety of persons and property in other aircraft and on the ground." 14 C.F.R. § 67.401(e).

program after his positive alcohol test result – indicating that he was no longer in stable recovery further signaled an adverse change in his medical condition, to be sure. R. 87-101, 195-289; JA 177-247, 75-169. Given Mr. Erwin's history of alcohol dependence, allowing him to continue to exercise his airman privileges without an evaluation of his condition would have endangered public safety. R. 1; JA 303. In short, when faced with two possible explanations for the positive alcohol test, one of which signaled potential relapse by Mr. Erwin, the Federal Air Surgeon erred on the side of public safety.

The Federal Air Surgeon's judgment as to how public safety is best served is entitled to judicial deference. Cf. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (explaining that because Congress had granted the FCC broad discretion in effectuating the public interest standard, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference").

Determinations as to matters of aeromedical safety are uniquely within the institutional competence of the FAA, and neither Mr. Erwin's nor this Court's judgment should be substituted for the Federal Air Surgeon's reasonable conclusion in this regard. See Island

Airlines, Inc. v. Civil Aeronautics Bd., 363 F.2d 120, 125 (9th Cir. 1966) (declining to accept petitioner's views of the public interest over that of the Civil Aeronautics Board [FAA's predecessor], and finding that although the agency's "views of the public interest were not the only ones which could reasonably be maintained," the agency did not act arbitrarily); WAIT Radio v. FCC, 459 F.2d 1203, 1207 (D.C. Cir. 1972) ("[T]he role of the court is not to determine the public interest, but to determine whether the agency's delineation is contrary to law.").

### B. The Federal Air Surgeon's decision was based on a reasoned evaluation of the facts in the record.

There is no dispute that Mr. Erwin tested positive on a random alcohol test. Mr. Erwin does not contest the validity of the test results, only the cause. [10] To that end, Mr. Erwin's inadvertent consumption of food cooked in beer is certainly a possible, if not plausible, explanation

[10] Though Mr Erwin's brief emphasized that the report of his 2017 positive test is not in the administrative record, that omission has been corrected, as described *supra* note 6, and the fact of Mr. Erwin's 2017 positive test is not in dispute. It is clear from the record that Mr. Erwin tested positive at levels of ethyl glucuronide 144 and ethyl sulfate 157. R.107, 146, 177, 297. 301; JA 256, 271, 260, 234. To suggest, as he does, that the FAA did not consider the values of the test results when it reviewed his request for review of the withdrawal is disingenuous. Pet'r Br. at 15.

for his positive test. But it is not the only reasonable conclusion to draw from his positive test. An equally reasonable explanation is that Mr. Erwin intentionally consumed alcohol in the hours or days before his test. Presented with this ambiguity together with Mr. Erwin's history of alcohol dependence, his re-enrollment in a treatment program, and the agency's paramount concern with public safety, the Federal Air Surgeon reasonably relied on the objective evidence in the record – Mr. Erin's positive test – to conclude that he had not been totally abstinent. This conclusion was not arbitrary or capricious.

For background, Mr. Erwin tested positive on a test measuring ethyl glucuronide and ethyl sulfate in his urine. Ethyl sulfate and ethyl glucuronide are biomarkers of recent alcohol consumption that provide objective measures of abstinence.[11] These tests can generally detect ethanol metabolites up to three to five days after ethanol is ingested, depending on the amount consumed. R. 300; JA 237.[12] Light drinking

[11] See, e.g., Jatlow, et. al, Ethylglucuronide and Ethyl Sulfate Assays in Clinical Trials, Interpretation and Limitations: Results of a Dose Ranging Alcohol Challenge Study and Two Clinical Trials, 38 Alcoholism: Clinical and Experimental Research 2056 (2014) [Add.].

[12] See also Andresen-Streichert, et. al, Alcohol Biomarkers in Clinical and Forensic Contexts, 115 Deutsches Arzteblatt Int. 309-15 (2018)

can usually be detected for a few hours, moderate consumption can be detected for 24 to 48 hours, and heavy drinking for a few days after alcohol ingestion.[13] But ethyl sulfate and ethyl glucuronide tests only measure the existence of alcohol metabolites and, thus, cannot predict how much alcohol an individual consumed or when the person consumed it.

Mr. Erwin's opening brief cherry-picks literature that suggests ethyl sulfate and ethyl glucuronide tests are too sensitive because they can detect extraneous, incidental exposures to alcohol. Pet'r Br. at 15-16. To be clear, the Federal Air Surgeon is neither denying nor ignoring the fact that ethyl sulfate and ethyl glucuronide tests can sometimes produce positives due to incidental exposure. But, even acknowledging the possibility for detecting incidental exposure, the test is still a

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[Add.]; Substance Abuse and Mental Health Services Administration (SAMSHA), The Role of Biomarkers in the Treatment of Alcohol Use Disorders (2012) [Add.].

[13] See, e.g., McDonell, et. al, Using Ethyl Glucuronide in Urine to Detect Light and Heavy Drinking in Alcohol Dependent Outpatients, 157 Drug Alcohol Dependence 184 (2015) [Add.]; Elrasheed, et. al, Assessment of Alcohol Exposure: Testing for Ethylglucuronide (Etg), Ethylsulfate (Ets), 19 Int. Journal of Emergency Mental Health and Human Resilience 1 (2017) [Add.]; Andresen-Streichert, et. al, *supra* n. 12.

reliable, objective tool for the detection of recent drinking in persons with alcohol use disorders.[14] Many people deny alcohol ingestion or at least underreport the true amount they consume; thus obtaining reliable information about a person's drinking behavior is a difficult task.[15] Alcohol biomarkers like ethyl glucuronide and ethyl sulfate are generally considered more objective indicators than self-reporting and have a demonstrated utility in identifying drinking behaviors in a number of clinical and forensic situations.[16] Thus, the FAA believes

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[14] See, e.g., Dahl, et. al, Urinary Ethyl Glucuronide and Ethyl Sulfate Testing for Detection of Recent Drinking in an Outpatient Treatment Program for Alcohol and Drug Dependence, 46 Alcohol and Alcoholism 278 (2011) [Add.]; Dahl, et. al, Urinary Ethyl Glucuronide and Ethyl Sulfate Testing for Recent Drinking in Alcohol-Dependent Outpatients Treated with Acamprosate or Placebo, 46 Alcohol and Alcoholism 553, 556 (2011) (confirming "the value of urinary EtG and EtS as reliable indicators of recent drinking during outpatient treatment of persons with alcohol-related problems, and as objective outcome measures when evaluating new alcohol treatment strategies and pharmacotherapies.") [Add.]; Jatlow, et. al, *supra* n. 11.

[15] See, e.g., Dahl, et. al, *supra* n.14.

[16] Jastrzębska, et. al, Biomarkers of alcohol misuse: recent advances and future prospects, 11 Gastroenterology Rev 78–89 (2016) ("A number of patients fail to admit to their true alcohol consumption, particularly when they are forced to deny or minimise the magnitude of drinking behaviour in order to mitigate personal, professional, or legal ramifications of alcohol abuse . . . Therefore, it is of great importance to have objective diagnostic tools to discern subjects with excessive alcohol use and alcoholism or to confirm abstinence.") [Add.]; Jatlow, et. al,

ethyl glucuronide and ethyl sulfate tests are an objective and reliable tool to evaluate pilots who, like Mr. Erwin, have a history of denying alcohol abuse.[17]

Neither the phosphatidylethanol (PEth) nor ethyl glucuronide hair tests touted by Mr. Erwin undermine the Federal Air Surgeon's decision. Pet'r Br. at 17. First, these tests were not random and were scheduled by Mr. Erwin himself *two weeks* after his initial positive test; thus, their utility in painting an accurate picture of Mr. Erwin's alcohol consumption is limited, at best. R. 120-21; JA 73-74 (tests dated

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*supra* n. 11 ("Comparison of self-reports of abstinence and EtG-confirmed abstinence indicated under-reporting of drinking.").

[17] Mr. Erwin's records show that he has a history of being less than forthcoming about his alcohol use. His treatment records from his first in-patient program (at Talbott) show that, despite his diagnosis of severe alcohol use disorder, he initially denied any issues with alcohol, claimed "the whole situation [was] a misunderstanding," and displayed anger and defensive behaviors that "caused concern and ultimately resulted in an extension of his estimated length of stay." R. 462, 469; JA 1, 36. Mr. Erwin's psychological evaluation from the same time period (March 2017) states that he was initially "quite reluctant to accept the diagnosis of alcohol use disorder" and "does not see himself as having current difficulties with alcohol or drug use." R. 486; JA 50. Although he "had difficulty accepting that alcohol was having such a substantial impact on his functioning" his cognitive test results "rather clearly revealed a substantial potential for compromised flight safety at the time he arrived at [Talbott] for treatment." R. 485; JA 49.

12/28/17). Second, while PEth is a useful biomarker in some contexts, it does not invalidate Mr. Erwin's positive ethyl glucuronide and ethyl sulfate urine test. PEth accumulates in the body after repeated drinking, and is therefore most suitable for identifying excessive alcohol consumption and moderate drinking.[18] PEth tests are less helpful for detecting light or isolated instances of drinking, and some studies have even shown that individuals who engage in light drinking can still have a negative PEth test.[19] Moreover, PEth amounts will decrease over

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[18] Schröck, et. al, Assessing Phosphatidylethanol (PEth) Levels Reflecting Different Drinking Habits in Comparison to the Alcohol Use Disorders Identification Test, 178 Drug and Alcohol Dependence 80 (2017) (PEth accumulates in the body after repeated drinking, and is therefore suitable for the differentiation of problematic excessive alcohol consumption and moderate drinking) [Add.].

[19] See, e.g., Jastrzębska, et. al, *supra* n. 16 ("PEth is considered to be less sensitive than EtG or EtS to small amounts of ethanol and does not detect single drink episodes") [Add.]; Unwelling, et. al, The PEth Blood Test in the Security Environment: What it is; Why it is Important; and Interpretative Guidelines, 63 Journal of Forensic Sciences 1634 (2018) (negative PEth of <20 ng/mL is indicative of abstinence *or light drinking* averaging less than two drinks/day for several days a week) [Add.]; Schröck, et. al, *supra* n. 18 (finding individuals with "light drinking habits" had PEth concentrations below the limit of detection and concluding "as a consequence, persons who are negative for PEth do not necessarily have to be abstainers, but might belong to the group of moderate consumers").

time, and thus PEth tests are not well-suited to detect light alcohol use days or weeks after the fact.[20] The same rationale applies to the ethyl glucuronide hair test. While ethyl glucuronide in urine is appropriate for abstinence monitoring because the ethanol metabolites are quickly eliminated from the body in urine, ethyl glucuronide in hair is more apt at detecting chronic, excessive alcohol consumption; it is unlikely to detect isolated alcohol consumption and thus a negative test does not necessarily confirm abstinence.[21] Thus, Mr. Erwin's negative PEth and

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20 See, e.g., Schröck, et. al, *supra* n. 18 (finding 91.7 % of the tested persons who did not consume alcohol in the two weeks prior to blood sampling, but were classified as moderate drinkers, were PEth negative); Schröck, et. al,. Phosphatidylethanol (PEth) detected in blood for 3 to 12 days after single consumption of alcohol—a drinking study with 16 volunteers, 131 Int J Legal Med.153 (2017) (finding PEth can be detected in blood for up to 12 days after onetime alcohol intake).

21 See, e.g., Lees, et. al, Comparison of ethyl glucuronide in hair with self-reported alcohol consumption, 47 Alcohol and Alcoholism 267 (2012) (EtG hair sensitivity was greatest for the high-risk drinking group and a negative result does not necessarily provide good evidence for abstinence) [Add.]; Kronstrand, et. al, Ethyl glucuronide in hair after daily consumption of 16 or 32 g of ethanol for 3 months, 215 Forensic Science Int. 51 (2012) (in participants consuming either 16 or 32 g daily alcohol, hair EtG concentrations were detected in only 24% of alcohol consumers; and none of the participants who ingested 16 g/day (equivalent to one drink) had concentrations over the proposed abstinence threshold of 7 pg(pictograms)/mg) [Add.]; Crunelle, et. al, Ethyl glucuronide concentrations in hair: a controlled alcohol-dosing study in healthy volunteers, 408 Analytical and Bioanalytical

ethyl glucuronide hair tests almost two weeks after his initial positive ethyl glucuronide and ethyl sulfate test do not render the Federal Air Surgeon's conclusion unsupported by the record.

Mr. Erwin's brief also incorrectly alleges that the Federal Air Surgeon's decision is contrary to the FAA's own internal recommendations. Pet'r Br. at 11. But Dr. Alan Sager is an external *consultant*, who occasionally is contracted to provide psychiatric reviews, and is not an FAA employee. R. 145, 154; JA 270, 274. And while Dr. Sager did indeed opine that he believed accidental ingestion was the *most likely* explanation, R. 148; JA 273, Dr. Sager provided this opinion in connection with a review of Mr. Erwin's new application for certification; Dr. Sager was not tasked with assisting with the Federal Air Surgeon's review of the 2017 withdrawal. R. 145, JA 270 ("Erwin . . . is applying for a second special issuance [certificate]"). Mr. Erwin also ignores the fact that Dr. Sager's memo characterized Mr. Erwin diagnosis as "high risk" and determined that he could only be certified

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Chemistry 2019–2025 (2015) ("In participants consuming 100 g pure alcohol per week for 3 months, EtG concentrations lower than 7 pg(pictograms)/mg [indicating a negative EtG hair test] were still observed in 8 of 10 participants.") [Add.].

with appropriate risk mitigation, including annual psychiatric evaluations, random testing, and additional monitoring for a period of *five years*. R. 155; JA 275. The opinion expressed in his memorandum was certainly reviewed as part of the Federal Air Surgeon's decision-making, but ultimately it is the Federal Air Surgeon alone who is delegated the authority to make final determinations on Authorizations under 14 C.F.R. § 67.407(a), not an external consultant.

Notably, even Mr. Erwin's *own* forensic toxicology report acknowledges that there are multiple reasonable interpretations of the ethyl sulfate and ethyl glucuronide test results. R. 295-302; JA 232-239. As the report he submitted to the FAA explained, a low positive test of 100-500 ng/mL (like Mr. Erwin's) may indicate: "Previous heavy drinking (1-3 days [before the test]), Previous light drinking (12-36 hours [before the test], or Recent 'extraneous' exposure." R. 300; JA 237. Thus "it is challenging to differentiate extraneous exposure from actual alcohol use." R. 298; JA 235. Indeed, given the same information presented to the Federal Air Surgeon, Dr. Kupiec, a Ph.D with "over 30 years experience as a Forensic Scientist," R. 296; JA 233, was only able to opine that "the result of Mr. Erwin's urine analysis does not

represent *conclusive evidence* of intentional alcohol consumption." R. 302 (emphasis added); JA 239.

Despite what Mr. Erwin would like this Court to find, the Federal Air Surgeon does not need *conclusive evidence* of intentional consumption to withdraw a discretionary authorization. Indeed, the applicable standard of review does not demand a decision be supported by perfect information; it only requires substantial evidence. Wisconsin Power & Light Co. v. FERC, 363 F.3d 453, 464 (D.C. Cir. 2004). This Court has explained that an agency's conclusions are supported by substantial evidence even if they include findings made in light of uncertainty. Id.

Here, as is common in cases involving medical and scientific expertise, reasonable minds can certainly differ. But the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Domestic Sec., Inc. v. SEC, 333 F.3d 239, 249 (D.C. Cir. 2003). When faced with reasonable, but differing expert views, the Federal Air Surgeon chose to err on the side of safety and conclude that Mr. Erwin's positive test showed that he had not been

totally abstinent from alcohol. This conclusion is entitled to deference, "as an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989).

### C. Mr. Erwin's specious challenge to the lack of specificity in his Authorization does not invalidate his positive test.

Because he cannot reasonably dispute that he tested positive in violation of the terms of his Authorization, Mr. Erwin next attempts to attack the conditions of the Authorization itself. Pet'r Br. at 19-22. But Mr. Erwin's preoccupation with ethyl sulfate and ethyl glucuronide testing thresholds is misguided. He is indeed correct that the FAA did not specify a method of alcohol testing in Mr. Erwin's 2017 Authorization, but the FAA is not required to do so. It is important to recall the context of Authorizations within the FAA's certification scheme: they are *discretionary* regulatory exemptions, and are only granted after an individualized, case-by-case assessment of an airman's medical condition. The Federal Air Surgeon can impose any conditions and limitations on the Authorization that, in his aeromedical judgment, are needed to ensure that individual can exercise the privileges of his

pilot certificate without endangering public safety. See 14 C.F.R. 67.401(a) & (d).

In Mr. Erwin's case, the Federal Air Surgeon determined that random testing was necessary to ensure public safety – but as long as the testing is being done, the method does not necessarily need to be specified. This is, in part, because Mr. Erwin works for a large commercial airline that participates in the Human Intervention Motivational Study (HIMS) program and, thus, already has a well-established program for monitoring and testing its pilots.[22]

But it is also because withdrawals of Authorizations are similarly considered on an individualized, case-by-case basis. When an airman on an Authorization requiring abstinence tests positive, withdrawal is not necessarily automatic; the Federal Air Surgeon can consider the circumstances of the positive test. There may indeed be circumstances where errors or other concerns with the methodology or testing process

[22] As explained above, the Human Intervention and Motivation Study (HIMS) program was developed specifically for commercial pilots by the Air Line Pilots Association, in cooperation with the FAA and airline management, and operates as an alcohol and drug assistance program that coordinates the identification, assessment, treatment, and medical certification of pilots.

weigh against withdrawal of an Authorization but, as explained above, Mr. Erwin's circumstances were not one of them.

Indeed, Mr. Erwin is not suggesting that the test itself was somehow flawed, only that the use of a 100 ng/mL cut off was too sensitive. But even his own brief acknowledges that the cutoff for possible incidental exposure versus intentional use has not been accurately established. Pet'r Br. at 15. Moreover, studies have shown that a 100 ng/mL cutoff value is more likely to detect light drinking that may be missed at higher cutoff values.[23] While the FAA acknowledges that a low cutoff value may potentially detect extraneous exposure, it is imperative that when monitoring the abstinence of a pilot diagnosed with alcohol dependence, a test is sensitive to the detection of *any* drinking – including light or isolated instances.

Mr. Erwin can speculate about the existence of *hypothetical* pilots at *hypothetical* airlines that may (or may not) be using different testing methodologies or cutoff levels, Pet'r Br. at 19-20, but his postulating

[23] A higher cutoff value, like 500 ng/mL, can lead to lower sensitivity, especially with light to moderate drinkers, and is more apt at detecting heavy drinking. See, e.g., McDonnel, et. al, *supra* n. 13; Jatlow, et. al, *supra* n. 11.

does not detract from the concrete, objective facts presented to the Federal Air Surgeon here about Mr. Erwin's own positive test. At its core, Mr. Erwin's argument asks this Court to find that the Federal Air Surgeon should ignore his positive alcohol test because there *may* be other pilots abusing alcohol that have evaded the FAA's detection. Such an outcome is absurd.

Additionally, while Mr. Erwin's brief belabors the issue of the cutoff levels used for his positive ethyl glucuronide and ethyl sulfates tests, he ignores the fact that he *also* went back into a treatment program for three months after his positive test. R. 87-101, 195-289; JA 177-247, 75-169.[24] His re-enrollment in a treatment program was an adverse change in his medical condition that presented an independent basis for withdrawing his Authorization under 14 C.F.R. § 67.401(f)(1). Allowing Mr. Erwin to continue holding an Authorization in light of

[24] It bears emphasizing again that an Authorization is an exemption granted in the first place at the discretion of the Federal Air Surgeon, if the airman "shows to the satisfaction of the Federal Air Surgeon" that granting the Authorization will not endanger public safety. 14 C.F.R. § 67.401(a). Mr. Erwin was granted his first Authorization in 2017 only *after* he had successfully completed a treatment program at Talbott Recovery Campus. The continued monitoring specified under the 2017 Authorization allowed Mr. Erwin to safely exercise his duties as an air carrier pilot without endangering public safety.

that adverse change in his medical condition would be antithetical to public safety; thus withdrawal of his 2017 Authorization was warranted. 14 C.F.R. 67.401(f)(3). Only after Mr. Erwin completed another treatment program in 2018 did the Federal Air Surgeon grant him a new Authorization. R. 150-153; JA 276-79. As the Federal Air Surgeon aptly and correctly explained in his decision: "Given your history of alcohol dependence, your continued exercise of airman privileges without a new evaluation of your current medical condition would have endangered public safety. Therefore, your Authorization was appropriately withdrawn in accordance with 14 C.F.R. § 67.401(f)." R. 1; JA 303.

### D. The Federal Air Surgeon's decision was reasonably explained.

In a last-ditch effort to avoid the consequences of his positive test, Mr. Erwin challenges the sufficiency of the September 11, 2020 letter itself. Pet'r Br. at 21. Despite his contentions that the letter simply "rubber-stamped its previous decision," the rationale for the Federal Air Surgeon's decision may be, and is, reasonably discerned. The letter explained that Mr. Erwin tested positive on a random alcohol test,

contrary to the conditions of his discretionary authorization. Quite frankly, there is not much more the Federal Air Surgeon needed to say.

Although Mr. Erwin alleges the letter is "thin on findings of fact and devoid of conclusions of law," Pet'r Br. at 21, an agency "is not required to author an essay for the disposition of each application. It suffices, in the usual case, that [the court] can discern the why and wherefore." BellSouth Corp. v. FCC, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (quoting ICBC Corp. v. FCC, 716 F.2d 926, 929 (D.C Cir. 1983)). The FAA receives and processes over 400,000 applications for airman medical certification every year, with tens of thousands of pilots requiring Authorizations for special issuance certificates.[25] It is impractical, if not infeasible, for the FAA to provide an exhaustive disposition of every decision concerning an Authorization. The explanation of the Federal Air Surgeon reasoning set forth in his letter affirming the withdrawal of Mr. Erwin's Authorization was sufficient.

[25] Approximately 8.5% of applicants are certified by an Authorization for a Special Issuance. See U.S. Gen. Accounting Office, GAO-14-330, Aviation Safety: FAA Should Improve Usability of its Online Application System and Clarity of the Pilot's Medical Form 1 (2014).

While the Court may not "supply a reasoned basis for the agency's action that the agency itself has not given," Motor Vehicle Manufacturers, 463 U.S. at 43 (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)), it may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Motor Vehicle Manufacturers, 463 U.S. at 43 (quoting Bowman Transportation, Inc. v. Arkansas–Best Freight System, Inc., 419 U.S. 281, 286 (1974)). For all of the reasons discussed, the Federal Air Surgeon's rationale for affirming the withdrawal of Mr. Erwin's Authorization can reasonably be discerned from the September 11, 2020 letter. Thus, this standard is more than met here.

### E. Reinstating Mr. Erwin's 2017 Authorization would not eliminate his monitoring requirements.

Mr. Erwin requests that "his Authorization for Special Issuance of an Airman Medical Certificate dated May 17, 2017 be retroactively reinstated." Pet'r Br. at 23. Setting aside for the moment the fact that his 2017 Authorization was properly withdrawn, it is not clear what, if anything, "reinstatement" would accomplish. Mr. Erwin has already been issued a new Authorization that allows him to serve as a commercial pilot. He appears to be under the mistaken belief that the

expiration of his May 17, 2017 Authorization – which, had it not been withdrawn would have occurred on May 30, 2020 – would have "ended his monitoring requirements." Pet'r Br. at 9. This is not the case.

When an Authorization expires, it does not automatically mean that the airman is now entitled to an unrestricted certificate. Rather, an airman's qualifications are reviewed by the Federal Air Surgeon to determine if any modifications to the Authorization are necessary (or, in some cases, whether an Authorization is still necessary at all). This process involves an individualized, case-by-case review of the airman's medical condition – thus, some airmen with substance dependence are subject to monitoring for three years, some for seven, etc. It is entirely dependent on the unique facts of each airman's recovery.

Here, the only "harm" Mr. Erwin has identified is that his new 2019 Authorization "requires continued aftercare monitoring and other requirements until January 31, 2024." Pet'r Br. at 9. But, as explained above, Mr. Erwin will continue to be subject to an Authorization with monitoring requirements – regardless of the expiration date stated on his Authorization – unless and until he meets the medical standards for

an *unrestricted* certificate in part 67. Accordingly, "reinstating" his old Authorization would not provide him the relief he seeks.

Moreover, although the only issue before this Court is the propriety of the agency's withdrawal of Mr. Erwin's 2017 Authorization, the FAA notes that Mr. Erwin's records unequivocally support the need for his continued monitoring under an Authorization: Dr. Sager, a psychiatric consultant, recommended monitoring and random testing for 60 months in his December 2018 memorandum R. 155; JA 275; Mr. Erwin's records from his April 2018 discharge from the Metro Area Recovery Residences treatment program recommended participation in a monitoring program that includes, among other things, random alcohol tests for 60 months, R. 100; JA 246; and Dr. Stephen Lynn, a psychiatrist, evaluated Mr. Erwin in February 2020 and supported certification with "continued HIMS [Human Intervention Motivational Study] aftercare and monitoring." R.42; JA 283.

All of the remaining grievances Mr. Erwin identifies are actions taken by his employer Delta. Delta required him to enter into a "last chance contract," Pet'r Br. at 10, 23, and Delta required him to complete additional evaluations at Metro Atlantic Recovery Residences, Pet'r Br.

at R. 7, 23; R. 90, 97, 195; JA 180, 243, 75. Mr. Erwin has even acknowledged that his purpose for seeking review of the withdrawal decision is to void his "last chance" contract with Delta. R. 39, 108; JA 280, 257. But whatever private employment dispute Mr. Erwin has with Delta, it cannot be redressed by the FAA nor is it relevant to the question of whether the FAA properly exercised its discretion to withdraw his Authorization.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Respectfully Submitted,

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Dated: April 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Casey E. Gardner
Casey E. Gardner

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,824 words. This brief also complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Casey E. Gardner
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