U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

In the matter of:	)	FDMS No. 2021-0762
	)	Case No. 2020SO150008
COLLINGS FOUNDATION	)	
	)	

JUDGE RAWALD

COMPLAINANT'S OPPOSITION TO MOTION FOR STAY

The Complainant, through undersigned counsel, files this Opposition to Respondent's Motion for Stay.

Respondent's motion is based on speculation that Congress may pass legislation affecting aircraft with special airworthiness certificates (including limited category aircraft) and the fact that the FAA may decide to update its guidance on limited category aircraft. As explained below, the proposed legislation is not relevant to this litigation and, even if it were, Respondent fails to show that any of the proposed legislation would be retroactive to the flights alleged in this proceeding. Accordingly, the Complainant opposes Respondent's Motion for Stay and respectfully requests that the Administrative Law Judge deny it.

1. **The FAA July Policy Statement Merely Confirms the FAA's Longstanding Position Regarding Limited Category Aircraft**

Respondent's first argument centers on a policy statement issued by the FAA on July 12, 2021. *See generally* Attachment 6 to Resp.'s Squiccimaro Declaration. As that statement makes clear, the differences between pilot privileges contained in 14 C.F.R. part 61 are separate from the restrictions on the operational use of aircraft in 14 C.F.R. part 91. This makes sense because even if someone holds the highest level of pilot certificate under part 61 (an Airline Transport Pilot

Certificate) that does not allow him to buzz a crowd of spectators or otherwise exceed the minimum altitude requirements in part 91. Further, the policy statement echoes the D.C. Circuit decision in the *Warbird* case that "under 91.315, no person may operate a limited category aircraft carrying persons . . .for compensation or hire." *Id.* at 36494. Accordingly, if a flight instructor provides "flight training in one of these categories of aircraft for compensation," that person would need "a letter of deviation authority (LODA), if applicable, or exemption." *Id*. The policy statement mentioned by Respondent acknowledges that FAA Order 8900 permitted *owners* of aircraft to pay for flight training in those aircraft which created a possible conflict with the regulatory language. *Id.* at 36494 – 495. For limited category aircraft however, the policy statement made it clear that section 91.315 "does not permit an individual to obtain deviation authority" to conduct training; accordingly, "the only way to provide flight training for compensation in a limited category aircraft is pursuant to an exemption from the regulation." *Id.* at 36495. In an effort to accommodate owners of limited category aircraft to train in their own aircraft, the FAA noted it "will consider adopting a fast-track exemption process for owners" of the aircraft to pay for training in their own aircraft. Similarly, the FAA "will consider granting relief for flight training operations when compensation is provided solely for the flight training and not the use of the aircraft." *Id.* at 36495 – 496.

Nothing in the above-mentioned FAA policy statement is contrary to the Morris Interpretation, the D.C. Circuit decision, or even the plain language of section 91.315. The policy statement even cites to the D.C. Circuit decision. At best, the policy statement suggests that the FAA "will consider" fast-tracking the exemption process for owners of limited category aircraft to pay for instruction in their own aircraft. Even if the above-mentioned events were to come to pass, they would remain irrelevant to this case. As mentioned above, it is an important distinction that the possibilities articulated in the policy statement are for *owners* of the aircraft to obtain

training. The Complaint in this matter alleges that multiple *non-owners* paid for "instruction" in a limited category aircraft. Therefore, it strains credulity to see why this FAA policy statement would compel a stay.

2. The Legislation Cited by Respondent is Speculative and Prospective

Similar to the suggestions made in the policy statement, the legislation cited by Respondent is still in the hypothetical. *See generally* Attachment 7 to Resp.'s Squiccimarro Declaration. Respondent did not even suggest when the houses of Congress will vote on each bill, or when (or indeed *if*) the President will sign it into law. Most tellingly, Respondent fails to indicate anywhere in the motion or attachments that the speculative legislation is retroactive in any way. It is axiomatic that legislation is presumed to be prospective in application. *See, e.g.*, *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607, 206 L. Ed. 2d 904 (2020) ("The principle that legislation usually applies only prospectively is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. This principle protects vital due process interests, ensuring that individuals have an opportunity to know what the law is before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later. The principle serves vital equal protection interests as well: If legislative majorities could too easily make new laws with retroactive application, disfavored groups could become easy targets for discrimination, with their past actions visible and unalterable. No doubt, reasons like these are exactly why the Constitution discourages retroactive lawmaking in so many ways, from its provisions prohibiting ex post facto laws, bills of attainder, and laws impairing the obligations of contracts, to its demand that any taking of property be accompanied by just compensation") (internal quotations and citations omitted). Further, the proposed legislation would direct the Administrator to promulgate regulations consistent with the proposed legislation; Respondent fails to indicate how those

regulations themselves would also be retroactive. With two layers of speculation as to the legislative enactment then regulatory promulgation, neither of which apparently would be retroactive, it is unclear why a stay is needed at all.

3. There is No Judicial Economic Reason to Stay These Proceedings

Considering the foregoing, it is clear that there is no overriding judicial purpose in staying the proceedings. Despite what Respondent claims, neither the policy statement nor the proposed legislation "rescinds all previous agency policies on point." Resp. at p. 8. The only case cited by Respondent in support of their motion is similarly unavailing. *Id.* (citing *Oceana, Inc. v. Bryson*, 2012WL13060013 (D.C. 2012)). That case involved a plaintiff's claim that governmental agencies erred in issuing a biological opinion. *Oceana* at 1. The plaintiffs claimed that the opinion contravened controlling legislation by misapplying the Endangered Species Act, violating regulations issued by the National Marine Fisheries Service, and violating the Administrative Procedures Act because it failed to consider the plaintiff's submitted comments to the opinion. *Id.* The *Oceana* defendants moved for a stay since it was reconsidering rescinding the subject opinion and replacing it with a new one. *Id.* In this case, the policy statement does not change anything in the regulation, the Morris Interpretation or the D.C. Circuit decision; and the proposed legislation is prospective at best. Thus, the *Oceana* decision is inapplicable.

Even the time proposed for the stay is unsupported by a rationale. Respondent proposes a stay of 90 days "to allow for the legislation to be considered and at least preliminary legislative and executive branch action plans to take shape." Resp. Motion at 1. This request further highlights how hypothetical and remote the basis for the stay is and shows that the stay does not further any judicial economy or interest of justice. Respondent cannot guarantee that Congress will pass legislation (and make it retroactive, of course) within those ninety days. Further, the policy

statement makes no timeline for when the FAA will consider a fast track for exemptions (and, again, only for owners receiving instruction which is not alleged in this matter). Additionally, the speculative legislation states that it asks the FAA to propose regulations to conform to the legislation within 180 days of its passage. Thus, there is no guarantee (and, in fact, many reasons to believe) that nothing will have changed ninety days from now, leaving this case to linger for an indeterminate amount of time. This is antithetical to judicial economy.

Finally, Respondent argues that the FAA suffers no prejudice by the delay and that Respondent would be prejudiced if a stay is not granted. Neither is correct. The FAA is hamstrung in its efficient processing of legal enforcement cases such as this one if the matters are unnecessarily delayed. Respondent also suffers no additional cost since this litigation is unaffected by the proposed legislation they cite. Respondent's costs would actually increase the longer this matter lingers in anticipation of putative legislation. Therefore, all parties are served by denying the motion to stay.

Based on the foregoing, the Complainant respectfully moves the ALJ to deny Respondent's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent a copy of the foregoing in the matter of *Collings Foundation*, FDMS Docket No. 2021-0762 by electronic mail to:

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