ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1297 & 16-1302

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Petitioner,

v.

The FEDERAL AVIATION ADMINISTRATION, MICHAEL P. HUERTA, in his official capacity as Administrator of the Federal Aviation Administration, and ELAINE L. CHAO, in her official capacity as United States Secretary of Transportation,
Respondents.

On Petition for Review of an Order of the
Federal Aviation Administration

REPLY BRIEF FOR PETITIONER

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GLOSSARY

APA	Administrative Procedure Act
EPIC	Electronic Privacy Information Center
EPIC Br.	Brief for the Petitioner
FAA	Federal Aviation Administration
FAA Br.	Brief for the Respondents
Modernization Act	FAA Modernization and Reform Act of 2012
NAS	National Airspace System
NPRM	Notice of Proposed Rulemaking
NTIA	National Telecommunications and Information Administration
UAS	Unmanned Aircraft Systems

ARGUMENT

Arguing against privacy safeguards for small commercial drones—the gravamen of this case—the FAA profoundly mischaracterizes the aviation technology at issue. Surveillance cameras are not simply "technology and equipment . . . unrelated to the safe flight" of drones. FAA Br. 10. Drone cameras are an integral component of drone operations. The small commercial drones subject to the agency's final rule are necessarily equipped with high-definition cameras with real-time video transmission capabilities. Without a camera, it would be almost impossible to operate a commercial drone. Once this essential characteristic of drones is understood, the agency's high-flying response—that the final rule reflected a "comprehensive plan" for drone deployment and that the agency did not act in an arbitrary and capricious manner when it excluded privacy considerations from the drone rulemaking—falls to the ground.

When Congress passed the FAA Modernization Act, it recognized that drones pose novel and unique hazards that require the FAA to establish specific operational rules. The FAA's response that "its mission" does "not include regulating privacy," FAA Br. 10, ignores the mandate of Congress and the agency's prior statements. It is not possible to address the hazards associated with drone operations without addressing privacy in the final rule for small commercial drones.

I. The FAA's refusal to promulgate privacy regulations violates the Modernization Act and the APA.

A. The FAA's failure to address privacy hazards is contrary to the plain text of the Modernization Act.

The FAA has a statutory obligation to "determine" which "types of unmanned aircraft systems" create "a hazard to users of the national airspace system or the public." FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 333(b), 126 Stat. 11, 75 (2012). However, the FAA only conducted a narrow § 333(b) analysis in the final rule, addressing just two types of hazards: loss of control and collisions due to operator blindness. FAA Br. 28–29. The agency cites no definition for the term "hazard" or any other statutory provision in the Act that supports this cramped reading of § 333. There is none.

Without a limiting modifier, the term "hazard" signifies *any* "potential source of danger." Hazard, New Oxford American Dictionary (3d ed. 2010). This includes, for example, a drone hovering outside someone's bedroom to record images. *E.g.*, Nick Bilton, *When Your Neighbor's Drone Pays an Unwelcome Visit*, N.Y. Times (Jan. 27, 2016).[2] By using this simple, unqualified term, Congress "has directly spoken to the precise question at issue" and ordered the agency to consider the full range of drone hazards. *Mako Commc'ns, LLC v. FCC*, 835 F.3d 146, 150 (D.C. Cir. 2016). The FAA may not violate that command by limiting its analysis

[2] https://www.nytimes.com/2016/01/28/style/neighbors-drones-invade-privacy.html.

to two arbitrary sources of danger while ignoring other obvious hazards. FAA Br. 24 ("FAA has acknowledged that cameras and other sensors attached to unmanned aircraft may pose a risk to privacy interests. . . .").

Nor does the absence of the word "privacy" from § 333 withdraw privacy hazards from the scope of the statute, as the FAA implausibly suggests. FAA Br. 28. Section 333 also omits the terms "collision," "los[s of] control," "accident," and "injury." FAA Br. 28; JA 000006. Nonetheless, the FAA inferred these to be part of the "hazard[s]" that the agency must consider. FAA Br. 28. Privacy hazards are no different, the FAA's strained reading notwithstanding.

The FAA next diverts the Court's attention to the "core safety mission" of the agency and claims that privacy hazards are beyond its reach. FAA Br. 25–26. This bit of misdirection does not salvage the FAA's arguments. First, as the agency notes, the FAA's "core safety mission" includes "the protection of persons . . . on the ground." *Id.* at 25 (citing 49 U.S.C. § 40103(b)). "Protecti[ng]" a person extends to their personal privacy as well as their personal safety—a fact which the FAA does not appear to contest. *See, e.g.*, Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. Times (July 21, 2010) ("Privacy protects us from being unfairly judged out of context on the basis of snippets of private information that have been exposed against our will . . . .").[3]

[3] http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html.

Moreover, Congress may always add to an agency's responsibilities through subsequent enactments, just as it did here. *Cf. Nevada v. Dep't of Energy*, 400 F.3d 9, 14 (D.C. Cir. 2005) ("Congress may always enact legislation limiting, modifying, or cancelling a previously enacted appropriation."). Though 49 U.S.C. § 40103(b) sets a general baseline for the FAA's safety obligations, Congress has clarified and supplemented the agency's mission with the specific provisions of the Modernization Act. The FAA cannot shirk its responsibilities under a new statute simply by alleging vagueness or silence in an older provision. Nor can the agency cling to its "long history" of inaction where, as here, Congress directed the agency to act in response to the deployment of new technologies that pose new risks to the public. FAA Br. 26. This dereliction of regulatory duty by the FAA is anything but "reasonabl[e]." *Id*.

The FAA cannot reconcile its refusal to address drone privacy hazards with the plain text and purpose of the FAA Modernization Act. The Act is literally titled "Modernization" to establish the evolving regulatory responsibility of the FAA. On these grounds alone, the final rule should be vacated.

B. The FAA's interpretation of "hazard" in § 333 is impermissible.

The FAA has also offered no "'reasonable' explanation of how [the] agency's interpretation serves the statute's objective." *Mako Commc'ns, LLC*, 835 F.3d at 150. The agency has thus adopted an "[im]permissible construction of the

statute." *Id.*; *see also NRDC v. EPA*, 777 F.3d 456, 465 (D.C. Cir. 2014); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 213 (D.C. Cir. 2011).

Again and again, the FAA attempts to stiff-arm its statutory obligations by casting privacy hazards as "unrelated" or "unconnected" to the agency's aviation safety mandate. FAA Br. 29. These arguments are unavailing. First, privacy is a policy concern of the FAA. The agency has acknowledged as much by focusing on privacy in the FAA Roadmap for the integration of drones into the NAS, JA 000217; in the FAA drone test site rules, JA 000252; and as a participant in the NTIA-led privacy framework process, FAA Br. 27. Thus, the agency has conceded that it must address the privacy implications of drone deployment. The contrary conclusion is both arbitrary and inconsistent with the FAA's past statements.

Second, the FAA cannot credibly distance itself from the privacy hazards posed by drones because *cameras are integral to drone operations*. The FAA argues misleadingly that cameras are optional technologies that "may be installed" on drones. FAA Br. 10, 20, 26, 28, 29, 31, 35. Perhaps the agency is confused about the basic nature of the aircraft that Congress has ordered it to regulate. Small commercial drones are *routinely* equipped with cameras—in most cases by their manufacturers. Bas Vergouw et al., *Drone Technology: Types, Payloads, Applications, Frequency Spectrum Issues and Future Developments* (2016) ("Most

drones are equipped with cameras by [their] manufacturer.");[4] Brandon Gonzalez, *Drones and Privacy in the Golden State*, 33 Santa Clara High Tech. L.J. 288, 291 (2017) ("Almost all consumer drones are equipped with advanced camera technology that allows the operator to capture high-resolution pictures and video from a bird's eye view."); Sean M. Kilbane, *Drones and Jones: Rethinking Curtilage Flyover in Light of the Revived Fourth Amendment Trespass Doctrine*, 42 Cap. U. L. Rev. 249, 252 (2014) ("Most drones, for example, carry high definition cameras . . . ."); Wilson Elser, *Drone Use 'Takes Off' As Legal Consequences Remain Uncertain*, Lexology (Mar. 11, 2015) ("[M]ost drones are equipped with audio and video functionality, a key to their usefulness in everyday commercial and private use.").[5]

Cameras are integral to the operation of drones. *See Boring v. Comm'r of Internal Revenue*, No. 13828-14S, 2015 WL 7567454, at *2 (T.C. Nov. 24, 2015) (defining "unmanned aerial vehicles" as "drones with high resolution video cameras"); Timothy M. Ravich, *Courts in the Drone Age*, 42 N. Ky. L. Rev. 161, 173 (2015) ("[D]rones are essentially cameras and sensors with wings.").

In fact, the FAA knows this. A survey of the FAA's § 333 authorization database, which was established by the Modernization Act to enable the

[4] http://www.springer.com/cda/content/document/cda_downloaddocument/9789462651319-c2.pdf?SGWID=0-0-45-1592404-p180146657.
[5] http://www.lexology.com/library/detail.aspx?g=9a4ef641-320a-422b-82f3-73f94ad7ed37.

registration of small commercial drones, confirms that a camera, like a rotor or a fuselage, is an integral component of a drone. The FAA's website lists 3,114 authorizations issued in calendar year 2016. *Authorizations Granted via Section 333 Exemptions*, Federal Aviation Administration (Sept. 20, 2016).[6] At least 2,876, or 92%, were issued for drone operations that would clearly require a camera. *Id.*[7] Of the remaining 8% of drone authorizations, there was no definitive information that the drones did not have surveillance capabilities. Virtually all of those 8% were issued for missions that would typically involve a camera (such as mapping, surveying, aerial data collection, flight education, and training). *Id.* Thus even the FAA's own data shows that there are few, if any, small commercial drones that operate without a camera.

The FAA therefore strains credulity when it claims that regulating drone privacy is beyond the scope of the § 333 "hazard" mandate. To take an analogy: not every aircraft lands on wheels (e.g., floatplanes and skiplanes), yet the FAA still regulates hazards that arise from wheeled undercarriages. 14 C.F.R. § 25.733. Cell phones are by no means an integral component of aircraft, yet the FAA restricts their use by passengers to minimize the risks they present to navigation

[6] https://www.faa.gov/uas/beyond_the_basics/section_333/333_authorizations/.
[7] This figure covers any drone mission involving camera(s), cinematography, filming, film(s), footage, image(s), imagery, imaging, inspection(s), motion picture(s), observation(s), photo(s), photography, photogrammetry, shot(s), surveillance, video(s), videography, or visual monitoring.

and communication. 14 C.F.R. § 91.21. The agency can no more ignore the privacy hazards posed by cameras—an integral component of small commercial drones—than it can disregard the hazards of aircraft wheels or cell phones.

The FAA next argues that Part 107 already prohibits the dangerous self-help measures that EPIC has highlighted—including such measures undertaken for "privacy concerns." FAA Br. 29–30. But this argument is self-defeating: if the agency concedes that drone privacy threats can lead to unsafe conditions, it cannot simultaneously argue that privacy hazards fall outside the scope of § 333. A hazard is a hazard.

The FAA further argues that the agency's participation in the "multi-stakeholder engagement process" is sufficient to address drone privacy issues. FAA Br. 27. These informal intra-agency meetings reflect a recognition by the FAA that the agency has the authority to address drone privacy hazards. But participation in a non-binding process does not satisfy the FAA's statutory obligation to address privacy hazards under § 333, and the agency's participation certainly does not affect the meaning of Congress's statutory command.

Finally, the agency takes bizarre exception to EPIC's statement that FAA has "sole authority to regulate the national airspace." EPIC Br. 39; FAA Br. 30. Both Congress and the FAA have made the scope of the agency's mission abundantly clear. *E.g.*, 49 U.S.C. § 40128 note ("[T]he Federal Aviation

Administration has sole authority to control airspace over the United States."); *Air Tour Management Plans: Background and General Information*, Federal Aviation Administration (Oct. 17, 2016) ("The FAA has sole authority to control airspace over the United States. ").[8] Moreover, the existence of other laws that *might* reach conduct in the national airspace has absolutely no bearing on the agency's congressional mandate to address the hazards posed by drone operations. The FAA cannot so easily foist its regulatory obligations onto state and local law enforcement agencies.

Because the FAA has failed to show how its refusal to address privacy hazards is a "permissible" and "reasonable" interpretation of § 333, the Court should vacate the final rule.

C. The FAA's failure to address drone privacy hazards in the final rule is arbitrary and capricious.

The agency's decision to exclude privacy from the scope of the final rule was also arbitrary and capricious under well settled law. The cases cited by the FAA do little to support the agency's position. The FAA's references to *Personal Watercraft*, FAA Br. 31, and to *HBO*, FAA Br. 32, are unavailing because both cases are easily distinguishable.

In *Personal Watercraft*, Congress authorized the National Oceanic and Atmospheric Administration ("NOAA") to implement rules that "may be necessary

[8] http://fsims.faa.gov/PICDetail.aspx?docId=8900.1,Vol.11,Ch9,Sec1.

and reasonable" to protect a marine sanctuary. *Personal Watercraft Assoc. v. Dep't of Commerce*, 48 F.3d 540 (D.C. Cir. 1995). NOAA's final rule implemented restrictions on personal watercrafts known as "thrill crafts." *Id.* at 542. The record contained plenty of evidence that thrill crafts threatened the marine sanctuary. NOAA explained that "[t]he small size, maneuverability and high speed of these craft is what causes these craft to pose a threat to resources." *Id.* at 545. Furthermore, NOAA explained that the agency was conducting additional research on whether other, larger vessels posed a threat to the sanctuary that would require protective regulation. *Id.* at 545.

The FAA suggests that *Personal Watercraft* controls here. FAA Br. 31. But the current case is only similar to *Personal Watercraft* in that—just like "thrill crafts"—there is plenty of evidence on the record that the privacy risks associated with drones threaten safety. The difference in this case is that the FAA chose to ignore the evidence and the hazards posed by drone surveillance. Additionally, in *Personal Watercraft*, the agency was actively researching the need for further regulation of the vessels that fell outside of the final rule. By contrast, the FAA contends here that privacy falls entirely outside the scope of the agency's mission and that, therefore, the agency will not take any action to address privacy hazards created by drone operations.

The FAA also cites *HBO v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), for the proposition that the agency does not have to respond to comments unless they are relevant, would change the agency's rule, and "cast doubt on the reasonableness of a position taken by the agency." FAA Br. 32 (citing *HBO*, 567 F.2d at 35 fn.58). Of course, this is exactly what EPIC has done. EPIC cites numerous examples of privacy hazards that bear on the agency's statutory responsibility. The FAA has nonetheless "refused to articulate a satisfactory explanation for its action" in multiple respects. *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1498 (D.C. Cir. 1988).

The FAA was charged with determining whether certain small drones could operate safely in the national airspace. Modernization Act § 333(a). By enacting § 333, Congress required the FAA to determine, at a minimum:

> which types of unmanned aircraft systems, if any, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line of sight do not create a hazard to users of the national airspace system or the public or pose a threat to national security[.]

§ 333(b)(1). Drones' operational capabilities, including high-definition cameras and remote operation, create privacy hazards for the public as EPIC identified and the FAA ignored.[9] This decision was arbitrary and capricious.

[9] It is also worth restating that more than 100 technology experts and organizations petitioned the FAA within two weeks of the signing of the 2012 FAA

Despite the FAA's claims that "nowhere in the record" did the agency "commit to engage in a rulemaking to address" privacy issues, FAA Br. 33, the record is full of statements by both Congress and the agency regarding the need to address privacy risks posed by drones. The FAA Modernization Act required the agency to address *all* "hazard[s] to users of the national airspace system or the public," which by definition includes privacy hazards. § 333(b)(1). Congress also ordered the agency to develop and implement a "comprehensive plan" for the integration of drones into the National Airspace. § 332(a). The FAA in its Comprehensive Plan emphasized that privacy needs to "be taken into consideration as [drones] are integrated into the NAS." JA 000180.

Congress also made clear that the FAA was responsible for addressing privacy hazards posed by drone operations when it mandated that the agency compose a drone privacy report prior to issuing drone regulations. 160 Cong. Rec. H1186 (daily ed. Jan. 15, 2014) (directives as to "Unmanned aerial systems (UAS)" in explanatory statement regarding Consolidated Appropriations Act, 2014). The fact that the FAA has ignored this statutory responsibility as well is no defense of the agency's refusal to address privacy in the final rule.

The FAA submitted the Comprehensive Plan to Congress on November 6, 2013. JA 000203. On January 17, 2014, Congress ordered the FAA to "conduct a

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Modernization Act to establish privacy regulations to safeguard the public from the hazards of drone surveillance. JA 000153.

study on the implications of UAS integration into national airspace on individual privacy . . . and recommend next steps for how the FAA can address the impact of widespread use of UAS on individual privacy as it prepares to facilitate the integration of UAS into the national airspace." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat 5 (2014); 160 Cong. Rec. H1186 (daily ed. Jan. 15, 2014). Furthermore, Congress required the report to be conducted "well in advance of the FAA's schedule for developing final regulations on the integration of UAS into the national airspace." *Id.* at H1187.

The fact that Congress required that the privacy report be completed in advance of the drone rulemaking and explicitly drew the connection between the "implications" for individual privacy and "next steps" by the agency makes it clear that Congress intended privacy to be addressed by the FAA in the rulemaking. The FAA's contention that the drone privacy report requirement is "of no moment," FAA Br. 34, ignores the text enacted by Congress, the purpose of the privacy report, and this timeline of events.

II. The FAA violated the Modernization Act when it failed to conduct notice-and-comment rulemaking under § 332.

The FAA fails to even address EPIC's arguments regarding § 332 of the Modernization Act, claiming that the statute is "irrelevant" to this suit. FAA Br. 35. In doing so, the agency misconstrues the Modernization Act, ignores the history leading up to this drone rulemaking, and cedes the argument.

The Modernization Act required the FAA to conduct a drone rulemaking to implement the Comprehensive Plan under § 332. *See* Modernization Act § 332(b). The Modernization Act requires the Secretary of Transportation to "publish in the Federal Register" a "notice of proposed rulemaking to implement the recommendations of the" Comprehensive Plan "no later than 18 months after" the plan was to be submitted. *Id.* The Comprehensive Plan was required to be submitted "no later than 270 days after" the Modernization Act was enacted. § 332(a)(1). The agency was therefore required to issue the notice for the § 332 rulemaking more than three years ago, yet it still refuses to do so.

Instead of conducting the § 332 rulemaking as required by law, the FAA claims that it is taking an "incremental approach" to drone regulation. JA 000009. The Modernization Act does not provide for such a piecemeal approach to regulating drones. Even if it did, the agency would still be required to address privacy in any "incremental" drone rulemaking. Since the passage of the Modernization Act, the FAA has repeatedly emphasized that addressing drone privacy is integral to the Comprehensive Plan. *See* EPIC Br. 43–45 (citing FAA statements throughout the record). In addition, the sequence of events following Congress's passage of the Modernization Act shows that the FAA was well aware of the need to address privacy in the drone rulemaking.

Within two weeks of the passage of the Modernization Act, more than one hundred technology experts and organizations petitioned the FAA to establish privacy safeguard for drone deployment in a notice-and-comment rulemaking. The petition stated:

> The FAA should conduct a notice and comment rulemaking on the impact of privacy and civil liberties related to the use of drone in the United States. In order to adequately address all the potential threats, the FAA should examine and report on the impact on privacy to individuals within the scope of their comprehensive plan to safely integrate drones into the national airspace required under § 332(a) of the FAA Modernization and Reform Act.

JA 000158.

Subsequent to EPIC's petition, the FAA invited EPIC and other privacy advocates to comment on the privacy requirements for the drone test site program. Request for comments, Unmanned Aircraft System Test Sites, 77 Fed. Reg. 14,319 (proposed Mar. 9, 2012). Both the FAA's Roadmap and Comprehensive Plan identified privacy as an important issue to consider with the integration of drones into the National Airspace. The Roadmap explained that the "expanded use of [drones] . . . raises questions as to how to accomplish [drone] integration in a manner consistent with privacy and civil liberties considerations." JA 000219. The Comprehensive Plan clearly stated that privacy issues need to "be taken into consideration as [drones] are integrated into the NAS." JA 000180.

Despite all signs from Congress, the agency, and individual commentators indicating that the FAA should initiate the § 332 rulemaking and address privacy, the agency has so far refused to do both. In fact, the record shows that the FAA has not even begun the § 332 rulemaking as required by law.

The fact that the FAA referred EPIC's § 332 petition to this rulemaking supports the conclusion that the agency has failed to meet its statutory obligation of issuing an NPRM under § 332 to implement the Comprehensive Plan. In response to EPIC's § 332 petition, the FAA referred EPIC's comments regarding the need for drone privacy rules to the § 333 small drone rulemaking. JA 000257. Under the FAA's own regulations, that referral indicated that the small drone rulemaking was the only rulemaking "relevant" to EPIC's petition. 14 C.F.R. § 11.73(c).

Under the same regulations, the agency was obliged to "consider" EPIC's "comments and arguments" made in the § 332 petition "as part of" a "rulemaking project in the subject area of [the] petition." 14 C.F.R. § 11.73(c). Because the FAA did not refer EPIC's § 332 petition to any other rulemaking project, the agency has therefore failed to initiate the § 332 rulemaking as Congress directed.

The Court should accordingly order the FAA to conduct the Comprehensive Plan rulemaking as required by law.

III. EPIC has established both organizational and associational standing as necessary to satisfy Article III.

EPIC has clearly demonstrated an injury in fact both to itself as an organization and to its members as required to show Article III standing. The FAA's arguments to the contrary are based on a misreading of the factual record and a misinterpretation of the law.

It is undisputed that an organization "can assert standing on its own behalf, on behalf of its members, or both." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015). The FAA's argument that EPIC cannot establish organizational standing because EPIC engages in "advocacy," FAA Br. 18, is contradicted by more than three decades of case law and by the agency's own brief. As the FAA concedes, the plaintiff organization in *Abigail Alliance* engaged in "counseling, referral, *advocacy*, and educational services." FAA Br. 19 (emphasis added) (citing *Abigail All. For Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006)). Similarly, the plaintiff organization in *Havens Realty* was created "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982).

The FAA's attempts to rely on *Turlock*, *Center for Law and Education*, and *NAHB* are unavailing because those cases are easily distinguishable. FAA Br. 18. In *Turlock*, conservation groups sought review of a FERC licensing decision, not "to have the court change the decision, but only [to ask] the court to tell the

Commission that it should do so for four reasons instead of three." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23 (D.C. Cir. 2015). The Court found in *Turlock* that the plaintiff organizations "did not suffer an injury in fact because [they] received exactly what [they] sought." *Id*. Unlike the plaintiff organizations in *Turlock*, EPIC is not asking this Court to review the conclusions of a *favorable* regulatory decision. EPIC is challenging the FAA's unlawful refusal to promulgate privacy regulations for drone operations. EPIC clearly satisfies the standard, established in *National Taxpayers Union* (and cited in the agency's brief, FAA Br. 18–19) that an "organization must allege that discrete programmatic concerns are being directly and adversely affected by the challenged action." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

In *National Association of Home Builders*, the plaintiff trade associations sued to challenge the Environmental Protection Agency's regulatory authority under the Clean Water Act. *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 9 (D.C. Cir. 2011). But the court found that "NAHB has not shown" that they incurred any "'operational costs beyond those normally expended' to carry out [their] advocacy mission." *Id*. at 12. The only injury alleged by NAHB was the expenditure of resources "in the quest to clarify CWA jurisdiction" of the EPA itself, "such as submitting comments," "testifying before the United States Senate," and "participating in numerous court cases." *Id*. The FAA concedes that, unlike the

plaintiffs in *NAHB*, EPIC has alleged that "it must spend more money to protect" individual privacy and "must engage in more . . . advocacy" as a result of the challenged rule. FAA Br. 20. These are precisely the type of "discrete programmatic" injuries that this court has traditionally recognized.

In *Center for Law and Education*, the plaintiff organizations challenged the composition of a Department of Education advisory committee based on their allegation that the committee was not "equitably balanced." *Ctr. for Law and Educ. v. U.S. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005). The court held that the plaintiff organizations did not show any injury "arising from the effect of the final rules," *id.* at 1162, and that the plaintiffs' allegation that the advisory committee procedures "reduced their chances of serving on the committee" was insufficient, *id*. at 1158. The plaintiff organizations in *Center for Law and Education* were suing based on an allegation that they were denied a seat at the table. That is entirely different than this case. EPIC is suing because the FAA refused to bring *anyone* to the table. There is no final rule on drone privacy because the FAA refused to promulgate one.

Like the plaintiff organization in *PETA*, which the FAA concedes was "impaired by its inability to obtain information about, and to submit complaints regarding, the treatment of birds," FAA Br. 20, EPIC has been impaired in its ability to educate the public about and submit complaints regarding violations of

federal drone privacy rules. The agency's direct frustration of EPIC's organizational work on drone privacy is precisely the type of injury that courts have recognized in cases dating back to *Havens*. *See, e.g.*, *PETA*, 797 F.3d at 1096; *Abigail All.*, 469 F.3d at 133; *Havens*, 455 U.S. at 379. EPIC has been at the forefront of efforts in the United States to educate the public about the privacy risks of drone deployment for more than a decade. *See, e.g.,* EPIC, *Spotlight on Surveillance: Unmanned Planes Offer New Opportunities for Clandestine Government Tracking* (Aug. 2005).[10] And EPIC has routinely advocated for baseline drone privacy standards to safeguard the public. EPIC, *Domestic Unmanned Aerial Vehicles (UAVs) and Drones* (2017).[11] The FAA Modernization Act provided EPIC the opportunity to participate in a notice-and-comment rulemaking to establish these privacy standards.

The FAA compounds its failure to undertake the privacy rulemaking by causing specific harm to an organization whose very mission is to "focus public attention on emerging privacy and civil liberties issues." EPIC, *About EPIC* (2017).[12] The final rule has directly injured EPIC by making "activities more difficult" and creating a "direct conflict" with EPIC's mission. *Nat'l Treasury Empls. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). For

[10] https://epic.org/privacy/surveillance/spotlight/0805/.
[11] https://epic.org/privacy/drones/.
[12] https://epic.org/epic/about.html.

example, EPIC has had to expend additional resources to develop and track state drone privacy proposals and to educate the public about the different rules being adopted in different jurisdictions. That is precisely the type of organizational injury that satisfied Article III standing requirements in *PETA*. 797 F.3d at 1095.

The FAA's final argument against EPIC's organizational standing claim is similarly unavailing. The agency points to the "model aircraft" exception to the Final Rule, which is a complete non-sequitur with respect to the injury that EPIC has asserted. The Supreme Court in *Havens* upheld the plaintiff organization's standing claim despite the fact that *other* property owners were equally capable of engaging in discrimination. The fact that model aircraft may present some hazards to the public is unrelated to the privacy and safety hazards posed by the commercial operations authorized under the final rule. The organizational injury that EPIC has established here is directly connected to the final rule under review and is sufficient to satisfy the requirements of Article III.

Contrary to the FAA's assertions, EPIC has also demonstrated an injury-in-fact to its members which is traceable to the agency's refusal to address drone privacy hazards. EPIC therefore has associational standing.

As an initial matter, the FAA attempts to impose an artificially heavy standing burden on EPIC by claiming that it "has not alleged any procedural defects" in the agency's regulation of drones. FAA Br. 24. Yet EPIC has clearly

alleged two such defects under the Administrative Procedure Act. First, EPIC charged that the agency's refusal to address privacy hazards in the Order violated the procedural bar against arbitrary and capricious agency action. EPIC Br. 35–47; 5 U.S.C. § 706(2)(A). Second, EPIC charged that the agency's refusal to conduct a comprehensive drone rulemaking violated the procedural bar against unlawful withholding or unreasonable delay of agency action. EPIC Br. 50–52; 5 U.S.C. § 706(1). Thus the "relaxed standard for procedural injuries" set forth in *Sierra Club* applies with full force here. FAA Br. 24 (citing *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016)).

Indeed, it is *Sierra Club* that governs this case. There, the petitioner challenged the Federal Energy Regulatory Commission's authorization of an increase in production capacity at a natural gas terminal. *Sierra Club*, 827 F.3d at 62. The Court found associational standing based on a member's declaration (1) that he used and enjoyed the area adjacent to the terminal; and (2) that the increase in tanker traffic resulting from the production hike would harm his aesthetic interests, inconvenience him, and diminish his use and enjoyment of the waterways. *Id.* at 65–66. The petitioner also explained how the potentially harmful tanker activity would increase absent the petitioner's proposed alternative. *Id.* at 66–67. EPIC has likewise submitted two declarations by members who attest (1) that they live and travel in areas affected by drone flights and adjacent to known

drone testing operations; and (2) that the FAA's failure to address privacy hazards will diminish their privacy and freedom to travel without constant monitoring. ADD 000039–43. EPIC has also explained how drone surveillance activity will increase absent FAA regulation of privacy hazards. FAA Br. 6–12; 19–21. Thus, *Sierra Club* controls. *See also WildEarth Guardians v. Jewell*, 738 F.3d 298, 306–7 (D.C. Cir. 2013).

The FAA tries, yet fails, to undermine the declarations of EPIC's members with a blanket assertion that the final rule "does not authorize" the specified delivery drone tests. FAA Br. 24. The FAA offers no definition for the "air carrier operations" excluded under 14 C.F.R. § 107.1(b)(1); does not attempt to explain how package delivery services would meet such a definition; does not, in any event, show that mere drone *testing* by UPS and its contractors would be excluded from Part 107 even if the company's package delivery services were; and does not account for the privacy hazards posed by other drones operating in the vicinity of EPIC's members. FAA Br. 24. This argument thus falls flat.

The FAA's reliance on *Public Citizen* is also misplaced. *Public Citizen* was the rare case in which the petitioner failed to make "*any* attempt to demonstrate the difference in risk" between the challenged regulation and proposed alternative. *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 513 F.3d 234, 239 (D.C. Cir. 2008) (emphasis in original). Quite the opposite here. EPIC has explained in

detail how "[d]rone use is rapidly increasing in the United States," EPIC Br. 6–8; how "[d]rone operations create new and unique threats to privacy," *id.* at 8–12; how these increased threats affect "EPIC members' use and enjoyment of their property and ability to live and move free from constant monitoring," *id.* at 20; how these threats especially impact EPIC members who live close to particular drone testing areas, ADD 000039–43; and finally how the FAA's unlawful refusal to address drone privacy hazards creates a heightened prospect of privacy harms to such members, *id.* at 19–21. EPIC has thus plainly "demonstrate[d] the difference in risk" between the status quo (in which the FAA has promulgated *no* privacy rules for small drones) and the proposed alternative (in which the FAA has fulfilled Congress's statutory command to address privacy hazards in some fashion). *Pub. Citizen, Inc.*, 513 F.3d at 239. This readily distinguishes EPIC's allegations from the petitioner's silence in *Public Citizen*.

Food & Water Watch is similarly irrelevant. That case concerned a plaintiff's *quantitative* analysis of risk—one which the court found to be riddled with basic computational errors. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915–18 (D.C. Cir. 2015). First, the holding of *Food & Water Watch* is expressly limited to cases "where a plaintiff's allegations incorporate statistics and the plaintiff contends that the statistics demonstrate a substantial increase in the risk of harm." *Id.* at 917. EPIC, of course, does not rely on statistical analysis to

demonstrate the increased risk of harm arising from the FAA's failure to address privacy hazards. And as *Food & Water Watch* emphasizes, this court "has refused to require a quantitative analysis in order to establish standing in increased-risk-of-harm cases . . . ." *Id.* (citing *NRDC v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006)).

Second, EPIC's arguments are a far cry from the faulty math that doomed the plaintiff in *Food & Water Watch*. The plaintiff there made various statistical claims that the USDA's new poultry inspection regulations increased the risk of foodborne illness to its members. *Id.* at 915. But as the court found, the plaintiff's math completely ignored safety-*enhancing* aspects of the new rules, *id.* at 916; conflated an "ambiguous increase in risk" with a "substantial increase in risk," *id.* at 917; and fundamentally failed to describe how aspects of the new rules would be worse that "existing inspection systems," *id.* at 916. EPIC, by contrast, relies on a simple (and seemingly uncontroversial) proposition: that the risk of privacy harms is meaningfully greater when the FAA enacts *zero* drone privacy regulations than when it enacts *some* regulations.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Review, vacate the final rule, and remand for further proceedings consistent with the FAA Modernization Act and with the Comprehensive Plan, as required by Congress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Circuit Rule 32(e), because it contains 5,900 words, excluding parts of the brief exempted under Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 12th day of May, 2017 he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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