ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1075

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 ANTHONY R. FOXX, in his official capacity as United States Secretary of Transportation,
Respondents.

On Appeal from an Order of the
Federal Aviation Administration

REPLY BRIEF

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GLOSSARY

APA	Administrative Procedure Act
FAA	Federal Aviation Administration
EPIC	Electronic Privacy Information Center
NPRM	Notice of Proposed Rulemaking
NAS	National Airspace System
UAS	Unmanned Aircraft Systems

SUMMARY OF THE ARGUMENT

Congress ordered the Federal Aviation Administration in the FAA Modernization Act to develop a comprehensive plan to integrate drones into the national airspace, and to implement that plan through a public rulemaking scheduled to begin no later than August 14, 2014. Rather than follow this clear statutory command, the FAA has decided to take an "incremental" approach to drone regulation, excluding privacy and other key issues raised by drone integration. Resp't Br. 16; JA 23. To date, the agency has issued only a single proposed rule concerning limited, line-of-sight operation of small drones. The FAA denied EPIC's rulemaking petition [hereinafter "EPIC's Petition" or "Petition"] and determined that privacy is "beyond the scope" of the Small Drone Rulemaking, even though the agency admits that potential privacy invasions are a key problem created by the integration of drones into the national airspace.

In its brief, the FAA has provided no legitimate justification for its failure to issue the Congressionally Mandated Rulemaking or for its failure to provide a reasoned response to EPIC's Petition, as required under *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). The FAA's timeliness arguments are incorrect both as a matter of fact and as a matter of law: EPIC's petition for review of the FAA order is properly before this Court because EPIC sought review within sixty days after the agency announced that it was excluding privacy from the drone rulemaking,

which constituted the agency's denial of EPIC's Petition. The Court should grant EPIC's petition for review and reverse the agency's order for two independent reasons.

First, the FAA refuses to address privacy in the drone rulemakings even though the agency concedes that drone integration presents significant privacy and civil liberties challenges that need to be addressed. The FAA's failure to meet its statutory deadlines for drone integration and its decision not to initiate the Congressionally Mandated Rulemaking is further evidence that the agency is acting contrary to law. The argument in the FAA's brief that its participation in an interagency dialogue on privacy is sufficient to satisfy its statutory mandate is entirely backwards—the agency's participation only underscores the need to address privacy in the drone rulemakings. The FAA's prior and current experiences with drone regulation show that the agency is fully capable of addressing privacy issues, but the agency has refused to do so in the drone rulemakings despite its clear statutory mandate.

Second, the FAA's decision to exclude privacy issues from the drone rulemakings and therefore to dismiss EPIC's Petition was arbitrary and capricious. The FAA response violated its own petition regulations and did not explain why the agency reversed its prior position and decided not to address privacy issues. The FAA response letter and subsequent notice concluding that privacy issues

were "beyond the scope" of the Small Drone Rulemaking are not sufficient to satisfy the agency's burden under the APA. *See* 5 U.S.C. § 555(e); *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (setting aside a final agency action for failure to provide a "brief statement of the grounds for denial").

ARGUMENT

The FAA in its brief rests entirely on post-hoc rationalizations of a series of actions that violated the FAA Modernization Act mandate, were inconsistent with the agency's own regulations, and were arbitrary and capricious under the APA. This Court has long recognized that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Ctr. for Biological Diversity v EPA*, 722 F.3d 401, 409 (D.C. Cir. 2013) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The agency's post-hoc justifications must be rejected. *See NRDC v. EPA*, 755 F.3d 1010, 1020–21 (D.C. Cir. 2014).

But even if the Court permits consideration of the FAA's new rational for excluding privacy from the drone rulemakings, the Court should vacate the agency's order under *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987), because the decision was based on a plain error of law and was arbitrary and capricious. Both of the agency's arguments for dismissal should be rejected.

First, the FAA's renewed call to dismiss this case as untimely is inconsistent with the agency's own prior statements and the agency's own regulations.

- The FAA argues that the response letter sent in November 2014 was a final dismissal of EPIC's Petition even though the FAA clearly stated in the letter that it would consider EPIC's arguments as part of the Small Drone Rulemaking (JA 12). Resp't Br. 7.
- The FAA argues that EPIC's challenge is premature because the agency plans to respond to privacy concerns even though the order states conclusively that privacy is "beyond the scope" of the Small Drone Rulemaking (JA 23). Resp't Br. 10.

Second, the FAA's arguments that it reasonably dismissed EPIC's Petition are inconsistent with the agency's statutory mandate and its Comprehensive Plan, and are based on reasons not explained in the administrative record.

- The FAA argues that it reasonably declined to "engage in a free-standing" privacy rulemaking even though EPIC's Petition clearly requested that the agency issue privacy rules as part of the Congressionally Mandated rulemaking (JA 6). Resp't Br. 14.
- The FAA argues that it was not required to implement the Comprehensive Plan through a rulemaking, even though Section 332(b)(2) of the FAA Modernization Act explicitly directs the agency

to do so. Resp't Br. 16–17. The FAA also argues that it was not required to address privacy in the drone rulemakings even though establishing privacy rules was part of the agency's Comprehensive Plan (JA 81). Resp't Br. 15–16.

- The FAA argues that the response letter satisfies the APA's "brief statement" requirement even though the letter only referred EPIC's Petition to the Small Drone Rulemaking (JA 12). Resp't Br. 18. The FAA also argues that it has not "changed course" on privacy even though it excluded privacy from the drone rulemakings after including privacy in the Comprehensive Plan (JA 81). Resp't Br. 20.
- The FAA has not responded to, and therefore concedes, that it provided no reasoned explanation for excluding privacy from the Small Drone Rulemaking and other drone rulemaking projects.

I. EPIC's Suit is Properly Before This Court

The FAA's threshold argument, which is merely a recycled version of the agency's motion to dismiss, is based on the agency's unsupported conclusion that EPIC is either (1) challenging the use of the term "dismissal" in the response letter or (2) challenging the substance of the proposed rules for small drone line-of-sight operations. Resp't Br. 7–10. As the record shows, EPIC is not challenging either. Instead, EPIC is challenging the agency's dismissal of EPIC's Petition on February

23, 2015, when the agency concluded that privacy was "beyond the scope" of the Small Drone Rulemaking.

EPIC's petition for review is properly before this Court because EPIC filed within 60 days of the order, in accordance with 49 U.S.C. § 46110. And even if the Court were to construe the response letter as a final order, the agency's own statement that it would "consider" EPIC's arguments in the context of the Small Drone Rulemaking provided reasonable grounds for EPIC's delay in filing suit.

A. EPIC's petition for review was timely because it was filed within sixty days of the FAA order excluding privacy issues from the drone rulemaking.

1. The FAA did not dismiss EPIC's Petition in the response letter; rather, it referred the petition to an ongoing rulemaking project pursuant to 14 C.F.R. § 11.73(c).

The FAA's November 2014 response letter, sent nearly three years after EPIC filed the Petition, was not a model of clarity. But the FAA's brief simply ignores the text of the letter that referred EPIC's Petition to the Small Drone Rulemaking. EPIC is now challenging the FAA's order that privacy issues were "beyond the scope" of the Small Drone Rulemaking.

The FAA brief does nothing to clarify the significance of the response letter, in which the agency invoked conflicting provisions of the FAA regulation governing responses to rulemaking petitions, 14 C.F.R. § 11.73. Despite the untethered statements in the letter, the FAA promised, "We will consider your

comments and arguments as part of that project" (referring to the Small Drone Rulemaking). The agency therefore invoked Section 11.73(c) of the FAA petition regulations, which states that "If we have begun a rulemaking project in the subject area of your petition, *we will consider your comments and arguments for a rule change as part of that project*. We will not treat your petition as a separate action." 14 C.F.R. § 11.73(c) (emphasis added).

The FAA first promulgated the petition regulations in 2000. General Rulemaking Procedures, 65 Fed. Reg. 50,850 (Aug. 21, 2000) (codified at 14 C.F.R. § 11.73). No court has reviewed the precise meaning of Section 11.73, and the FAA has not issued any interpretative rules addressing the Section. Therefore, the Court must interpret Section 11.73 by looking to its plain language. *See Fabi Constr. Co., Inc. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (stating that this Court cannot give deference to agency interpretations of its regulations when they contradict "the plain language of the regulation").

Section 11.73 "How Does FAA Process Petitions for Rulemaking?" is the sole regulatory provision that addresses FAA responses to petitions for rulemaking. The regulation states unambiguously that the agency "may respond to your petition for rulemaking in *one* of the following ways." *Id.* § 11.73 (emphasis added). Despite the permissive word "may," the regulation enumerates three circumstances that require mandatory agency action—Sections 11.73(b), (c), (d). This Court must

therefore conclude that if the EPIC's request involves one of the circumstances listed in Sections 11.73(b), (c), or (d), the agency must proceed as directed or violate its own rule.

Section 11.73(c) states that if the FAA has "begun a rulemaking project in the subject area of your petition, [the FAA] *will* consider your comments and arguments for a rule change as part of that project." *Id*. § 11.73(c) (emphasis added). The regulation also states that the FAA "*will not* treat [the] petition as a separate action" if it falls within Section 11.73(c). The FAA's regulations therefore *require* the agency to refer any petition in the subject area of a rulemaking project. The agency cannot treat such a petition "as a separate action" and therefore cannot dismiss it under Section 11.73(e).

The FAA brief erroneously asserts that the agency "unequivocally" dismissed EPIC's Petition in the November 2014 response letter. Resp't Br. 7. Not only did the letter equivocate, but the FAA was required by its own regulations to refer EPIC's Petition to any ongoing rulemaking project "on the subject matter of" EPIC's Petition (*i.e.*, drones and privacy). Although the FAA stated in the letter that it was "dismissing [EPIC's] petition," the agency could not logically have dismissed EPIC's Petition while simultaneously referring it to an ongoing rulemaking project under Section 11.73(c).

2. The FAA Small Drone Rulemaking notice included an appealable final order excluding privacy issues from the drone rulemakings.

The FAA concedes in its brief that EPIC is challenging the agency's refusal to address privacy issues in the drone rulemakings. Resp't Br. 15. The FAA's brief erroneously states that EPIC does not dispute that the Small Drone Rulemaking notice is not a final order. Resp't Br. 10. To the contrary: EPIC's petition for review challenges the agency's conclusion that privacy is "beyond the scope" of the Small Drone Rulemaking as a final order. Although the FAA's proposed rules for line-of-sight small drone operations are not final, *the agency's decision as to scope is final*. *See Agape Church, Inc. v. FCC,* 738 F.3d 397, 411 (D.C. Cir. 2013) (stating that an agency's final rule must be "a logical outgrowth of its notice").

In arguing that EPIC's petition for review is not yet ripe, the FAA brief conflates EPIC's comments on the small drone NPRM, submitted to the FAA on April 24, 2015, with EPIC's Petition, submitted to the Department of Transportation on March 8, 2012. Resp't Br. 7, 10, 18. EPIC submitted the April 2015 comments *in response to* the FAA's recent NPRM and the FAA must respond to those comments. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."); *see also* 5 U.S.C. § 553(c) (2012). But the comments are not related to this case. By contrast, EPIC's Petition was *referred* by

the FAA to the Small Drone Rulemaking because that rulemaking was in "the subject area" of EPIC's Petition. 14 C.F.R. § 11.73(c); JA 12. By subsequently concluding that privacy and civil liberties issues "are beyond the scope of" the rulemaking (JA 23), the FAA effectively reversed its prior decision.

The FAA now argues in its brief that the agency "intends to address petitioner's detailed comments with respect to the privacy." Resp't Br. 10. This argument is contrary to the FAA's own order limiting the scope of the Small Drone Rulemaking. Although the FAA must *respond* to EPIC's April 2015 comments, *see Perez*, 135 S. Ct. at 1203, the FAA cannot now reverse course and substantively address the privacy and civil liberties issues that are beyond the scope of the rulemaking.

A final agency rule is allowed to diverge from the terms or substance of its proposed rule provided that the final rule is a "logical outgrowth of its notice." *Agape Church*, 738 F.3d at 411 (internal quotations omitted). A final rule is a logical outgrowth "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Id.* (internal quotation marks omitted). But a final rule violates the APA's notice requirement "where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." *Id.* (internal quotation marks omitted).

The FAA has conclusively stated that privacy and civil liberties issues exceed the scope of the Small Drone Rulemaking notice. JA 23. Therefore, the agency cannot now address these issues in a final rule because that would make it "surprisingly distant" from the proposed rule in the notice. *Agape Church*, 738 F.3d at 411. The FAA is bound by the conclusion it issued in February 23, 2015: that privacy issues are "beyond the scope" of the Small Drone Rulemaking. JA 23. EPIC's petition for review challenges this dismissal and is ripe for review.

3. The FAA is excluding privacy from all the drone rulemakings.

The FAA does not dispute in its brief that it will not address privacy in any future drone rulemakings. The FAA's response to and ultimate dismissal of EPIC's Petition also makes clear that the agency has excluded privacy from all of the drone rulemaking projects. The FAA petition regulation requires that the agency refer a rulemaking petition to existing rulemakings when the agency has "begun a rulemaking project in the subject area" of the petition, 14 C.F.R. § 11.73(c). The FAA has stated in the Small Drone Rulemaking notice that it is proceeding "with multiple incremental [drone] rules rather than a single omnibus rulemaking." Resp't Br. 16; JA 23. In its November 2014 response letter, the FAA made clear that, per Section 11.73(c), the only rulemaking project "in the subject area" of EPIC's Petition was the Small Drone Rulemaking. JA 12. Therefore, the FAA's

denial of EPIC's Petition to address the privacy implications raised by drone integration is ripe for review.

B. Even if EPIC's petition for review had not been timely filed, the FAA letter would have provided reasonable grounds for the delay.

As EPIC addressed at length in its response to the FAA's motion to dismiss, the statements made by the agency in the November 2014 response letter are reasonable grounds for any alleged delay in filing suit under *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 602–604 (D.C. Cir. 2007). The Court should not entertain the FAA's attempt to rehash these arguments in its brief.

EPIC did not file suit immediately following the FAA letter because the agency represented that it would consider privacy issues as part of an upcoming rulemaking. JA 12 ("We will consider your comments and arguments as part of that project."). Contrary to the arguments in the FAA's brief, the FAA provided the same type of misleading statement that justified delay in *Safe Extensions*. Resp't Br. 8–9. EPIC's alleged delay was likewise not a "pursuit of the wrong remedies" as in *Americopters, LLC v. FAA*, 441 F.3d 726, 734 (9th Cir. 2006), or an uncertainty "about where and when to file" suit as in *New York Republican State Committee v. SEC*, 799 F.3d 1126, 1129–30 (D.C. Cir. 2015).

II. The Court Should Grant EPIC's Petition for Review

The FAA's argument that EPIC's petition for review should be dismissed on the merits rests on a faulty premise: that it is reasonable for the agency to integrate

drones into the national airspace without first establishing privacy rules for drone operations. Resp't Br. 12–14. The President of the United States, the Secretary of Transportation, the Director of the FAA, and the hundreds of groups and individuals who support EPIC's Petition all recognize that drone use will present new privacy risks and challenges that must be addressed. *See, e.g.*, JA 133 (Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, And Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015)) ("As UAS are integrated into the NAS, the Federal Government will take steps to ensure that integration takes into account not only our economic competitiveness and public safety, but also the privacy, civil rights, and civil liberties concerns these systems may raise.").

Drone integration will fundamentally alter the relationships between neighbors, students, companies, media organizations, and government officials. The FAA has been charged by Congress with accelerating this integration process by establishing rules for safe and efficient operations, taking into account the unique characteristics and challenges of drone use.

This Court should grant EPIC's petition for review for two independent reasons. First, the FAA wrongfully excluded privacy issues from the drone rulemakings and has failed to conduct the Congressionally Mandated Rulemaking. Second, the FAA provided no justification for the denial of EPIC's Petition and the

FAA's processing of the petition violated the agency's own regulations. Because the FAA has acted contrary to its statutory obligations and "has offered no reasoned explanation," the Court should grant EPIC's petition for review. *Mass. v. EPA*, 549 U.S. at 534.

A. The FAA admits that it is not conducting a comprehensive rulemaking for drone integration, as required under the Modernization Act.

In its brief, the FAA does not deny that the agency has not published any notice or otherwise initiated a comprehensive rulemaking for drone integration. Nor does the FAA brief deny that the agency has excluded privacy issues from the current drone rulemaking projects. Instead the agency—in an effort to evade this Court's review—mischaracterizes EPIC's Petition as not seeking to compel "a rulemaking under section 332(b)." Resp't Br. 17. This ignores the plain language of EPIC's Petition, which requested that the agency "conduct notice and comment rulemaking" and address privacy issues "*within the scope of their comprehensive plan* to safely integrate civil drones into the national airspace." JA 6 (emphasis added). The FAA also argues in its brief that it reasonably decided to "proceed on an incremental basis" and to ignore privacy issues created by drone integration. Resp't Br. 16. The FAA's decisions are contrary to law and contrary to the agency's own regulations and cannot, by definition, be reasonable.

1. The FAA has improperly excluded privacy from the Small Drone Rulemaking and other rulemaking projects.

The FAA in its brief does not deny that it has excluded privacy issues from the drone rulemakings, even though the agency's Comprehensive Plan included a proposal to address privacy and other important issues presented by drone integration. Instead, the FAA argues that it has satisfied the Modernization Act mandate even though it has only proposed rules for a limited range of small drone operations, without addressing privacy issues at all in the rulemaking. Resp't Br. 15–16. The FAA's conclusions are contrary to the Modernization Act, the priorities set out in the Comprehensive Plan, and the evidence in the administrative record.

Congress ordered the FAA to develop and implement a "comprehensive plan" through a rulemaking, including establishing "acceptable standards for operation and certification" of drones and "standards and requirements for the operator and pilot" of drones. Modernization Act § 332(a)(2)(A). Congress clearly intended for the agency to identify in the plan important issues related to drone operations, and to address those issues through regulation. The FAA does not offer in its brief any other interpretation of the statutory text, but the agency has failed to follow through on its obligation.

The FAA recognized in the Comprehensive Plan that "expanded use" of drones "presents significant challenges" as drones are "inherently different from

manned aircraft." JA 81. In particular, the agency recognized that drones create new and significant risks to "safety, privacy, civil rights, civil liberties & security" and agreed on "the need to address privacy concerns of the public at large while safely integrating" drones into the national airspace. *Id*. The agency even proposed in its Plan an approach to establishing privacy rules for drone operation: first the agency "proposed and is requesting public input on a privacy approach for the UAS test site program that attempts to prudently address privacy concerns"; and second, the agency proposed that "lessons learned and best practices established at the test sites be applied more generally to protect privacy in UAS operations throughout the NAS." *Id.* The agency described this proposal as an "incremental approach" that would provide "a safe and secure way to employ UAS that is consistent with the need for privacy." *Id.* Yet now the FAA argues in its brief that it was not arbitrary and capricious to ignore privacy issues altogether in the drone rulemakings that implement the Comprehensive Plan. Resp't Br. 14–16.

Not only did Congress order the FAA to address issues raised by drone integration and operations through a rulemaking, but the agency identified privacy as a key issue in the Comprehensive Plan and the administrative record clearly shows that EPIC is not alone in its mission to ensure that the agency establish drone rules to protect privacy. The President issued a special memorandum addressing privacy issues raised by drone operations a week before the FAA

published the small drone NPRM. JA 133. The President outlined in the memo new rules governing drone use by federal agencies and highlighted the need for transparency and accountability measures, as well as limitations on the collection of personal information. JA 134–35. The FAA anticipated in its Comprehensive Plan that the agency would "allow public integration" of drones "to lay the framework for civil integration." JA 90. Yet the agency has refused to adopt and incorporate the President's recommendations into the proposed rules for drone operations. The agency's failure to implement its Plan, as required by Congress, is arbitrary and capricious under the APA.

In its brief, the FAA's sole justification for the exclusion of privacy from the drone rulemakings is that the agency's "core mission is aviation safety" and therefore Congress could not have charged the agency with establishing privacy rules for drone operations. Resp't Br. 14. But that statement is contradicted by the agency's actions and statements in its Comprehensive Plan: the FAA already established privacy rules for the drone test sites, and it did so as part of an "incremental" approach to addressing privacy risks associated with drone operations. JA 81. The FAA also seems to imply that Congress has not granted the agency authority to promulgate privacy rules even though the agency never mentioned in the Comprehensive Plan that it lacked authority to enact such rules. Resp't Br. 16. Indeed, the statute is clear on this point: the agency shall "define the

acceptable standards for operation and certification" of drones as well as the "standards and requirements for the operator[s] and pilot[s]." Modernization Act § 332(a)(2)(A). The FAA has also consistently asserted its own authority to address privacy issues, boasting that "the agency will successfully meet the challenges posed by [drone] technology in a thoughtful, careful manner that ensures safety *and addresses privacy issues* while promoting economic growth." JA 125 (emphasis added).

The FAA's exclusion of privacy from the drone rulemakings is contrary to law, contrary to the agency's Comprehensive Plan, contrary to the intent of Congress, and contrary to the direction of the President. The Modernization Act requires the FAA to conduct a "rulemaking to implement the recommendations of the plan" and the agency has failed to do so. Modernization Act § 332(b)(2). This Court has held that an agency "cannot justify its action" where the action is contrary to "the plain terms of the statute." *NRDC v. EPA ("NRDC II")*, 777 F.3d 456, 472 (D.C. Cir. 2014).

2. The FAA has refused to initiate the comprehensive drone rulemaking mandated by Congress.

Not only has the FAA improperly denied EPIC's request to address privacy issues in the comprehensive drone rulemaking, the agency has decided not to conduct a comprehensive rulemaking at all. In support of the FAA's so-called "incremental" rulemaking approach, the agency in its brief conflates the statutory

discussion of a "phased-in approach *to integration*," Modernization Act § 332(a)(2)(C) (emphasis added), with the mandatory rulemaking to implement the Comprehensive Plan. Resp't Br. 16–17. Congress made clear that "the Secretary [of Transportation] *shall* publish in the Federal Register"—no later than "18 months after" the Modernization Act was passed—"a *notice* of proposed rulemaking to implement the recommendations of the" Comprehensive Plan "with the final rule to be published not later than 16 months after" publication of the notice. *Id*. § 332(b) (emphasis added). The plain language of the Act mandates a single rulemaking to implement the Comprehensive Plan, resulting in a single, final rule. The FAA brief announces that the agency has chosen to depart from Congress's directive and pursue a piecemeal "incremental" approach instead.

The FAA in this case, like the agency in *Massachusetts v. EPA*, acts as if Congress gave it a "roving license to ignore the statutory text." 549 U.S. at 533. Even though the Modernization Act gives the FAA discretion to determine what rules to adopt, the law clearly requires that the agency propose rules governing drone integration. The agency can only "exercise discretion within defined statutory limits." *Id*. The Modernization Act imposes both substantive and procedural requirements that the FAA has failed to satisfy—defining operation and certification standards for drones and drone pilots, and doing so through a rulemaking initiated within 18 months of the Comprehensive Plan. In denying

EPIC's Petition without explanation, the FAA has entirely failed to appreciate and execute the statutory scheme that Congress enacted.

The FAA's response to this point reveals how far the agency has departed from its statutory directive. The agency states that it has "decided to proceed on an incremental basis" with the drone rulemakings, even though Congress ordered the agency to do exactly the opposite: conduct a single, comprehensive rulemaking under Section 332(b). Resp't Br. 16. The explanation the agency offers in its brief is that Congress was "contemplating" a "phased-in approach to integration" of drones. Resp't Br. 17. But the section of the Modernization Act that the FAA cites does not even support the agency's argument. Sub-sections (C) and (D) of Section 332(a)(2) are not about the rulemaking at all, they are about the agency's proposal (in the Comprehensive Plan) for *integrating* drones over time.

Congress made it clear that the agency could integrate drones into the airspace in different phases under the Comprehensive Plan. Modernization Act §§ 332(a)(2)(C)–(D). But Congress also made clear that the agency should "implement the comprehensive plan" through a single, comprehensive rulemaking. *Id*. § 332(b)(2).

Not only is the statutory text clear as to the FAA's rulemaking obligations, but the structure is consistent with the overarching goal of the Modernization Act: to accelerate the safe and efficient integration of drones into the airspace. Congress

was no doubt aware that a piecemeal approach to regulation (as opposed to a "phased-in approach to integration") would lead to many years of confusion and bureaucratic delays. Congress likely also expected that in the absence of clear rules, other state, local, and federal agencies would begin to promote their own rules to protect citizens from the risks of drone operations. Congress passed the Modernization Act to place the FAA in charge of creating and executing a Comprehensive Plan to regulate drone operations in the United States. But the agency has utterly failed to do so, and now it argues that it should be allowed to "phase-in" regulations in the future despite its binding statutory obligations.

B. Even if the FAA were not required to address privacy issues in the drone rulemakings, the order should be reversed because the agency failed to provide a reasoned justification for excluding privacy.

1. The FAA provided no reasoned justification for its determination that privacy was "beyond the scope" of the Small Drone Rulemaking.

The FAA's brief incorrectly asserts that the agency's November 2014 response letter satisfies the APA's "brief statement" requirement by providing an explanation for the FAA's exclusion of privacy issues from the drone rulemakings. Resp't Br. 19. But the FAA response letter cannot possibly satisfy the brief statement requirement because it was issued before the agency decided to exclude privacy from the drone rulemakings. Even in the Small Drone Rulemaking notice itself, the FAA provided no explanation for why it decided privacy issues are

"beyond the scope" of the Small Drone Rulemaking; it provided no explanation for why it referred EPIC's Petition to the Small Drone Rulemaking but not to the agency's other drone rulemakings; and it provided no explanation for why it referred EPIC's Petition to any rulemaking if privacy issues were "beyond the scope" of what the agency would consider.

The only defense offered by the agency is that the sentence "After reviewing your request, we have determined that the issue you have raised is not an immediate safety concern" was sufficient to satisfy the brief statement requirement. Resp't Br. 19. But that statement is irrelevant because the plain language of the FAA response letter makes clear that the agency did not "dismiss" EPIC's Petition, it referred the petition to the Small Drone Rulemaking. Not only was the FAA's order to exclude privacy issues contrary to law, the agency failed to provide any "reasoned justification" for the exclusion, and the order should be reversed on that basis alone. *Mass. v. EPA*, 549 U.S. at 501.

The FAA presents in its brief a number of contradictory justifications for the exclusion of privacy from the drone rulemakings. *See, e.g.*, Resp't Br. 12 (committing to address privacy through interagency process); Resp't Br. 13 (arguing that privacy is outside the FAA's "core mission"); Resp't Br. 17 (arguing that bad actors will invade privacy despite rules prohibiting misuse). The agency's post-hoc justifications cannot cure its failure to satisfy the requirements of the

APA. 5 U.S.C. § 555(e). This Court has long recognized that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Ctr. for Biological Diversity v EPA*, 722 F.3d 401, 409 (D.C. Cir. 2013) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The agency's proposed justifications for excluding privacy from the drone rulemakings are "entirely post hoc," similar to the rationale offered and rejected by this Court in *Natural Resources Defense Counsel v. EPA*, 755 F.3d 1010, 1020 (D.C. Cir. 2014).

The FAA's reliance on this Court's decision in *Butte County., California v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010), is similarly unavailing. Resp't Br. 19. The Court in *Butte County* found insufficient a letter sent by the Secretary of Interior in response to a petition for rulemaking where the letter was sent "two years" after the petition and provided nothing more than a conclusory response that the Department of Interior was "not inclined to revisit" its prior decision. *Id*. at 194. The FAA's statements in its November 2014 response letter (JA 12) and the Small Drone Rulemaking notice (JA 23) are even more conclusory than those made by the Secretary in *Butte*. The FAA offers no explanation for why it "chose what it did." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014). In fact, based on the FAA's brief it appears that the agency is not even aware of what it

did—refer EPIC's Petition to the Small Drone Rulemaking pursuant to 14 C.F.R. § 11.73(c).

In its brief, the FAA also mischaracterizes the statement in its response letter as a "freestanding invitation to participate in the ongoing rulemaking" even though the agency used the precise language of Section 11.73(c). Resp't Br. 7. The FAA's subsequent treatment of EPIC's Petition in the Small Drone Rulemaking notice is completely arbitrary.

The FAA's treatment of another drone-related rulemaking petition, submitted by the UAS America Fund, shows that a Section 11.73(c) referral is more than a "freestanding invitation to participate," it is a significant step in the rulemaking process. Specifically, after the FAA referred the UAS America Fund petition to the Small Drone Rulemaking, the agency included a direct reference to the petition in the rulemaking notice. 80 Fed. Reg. 9558 (2015). The FAA did not treat the UAS America Fund's petition as an "invitation to participate" but rather treated it exactly as Section 11.73(c) required: as part of the ongoing rulemaking project. *Id*.

The FAA's disparate treatment of EPIC's Petition reveals the arbitrary and capricious nature of the agency's response. The FAA did not directly reference EPIC's Petition in the Small Drone Rulemaking notice and the petition was not placed in the docket for comments. This disparate treatment, without any

explanation, is precisely the type of arbitrary and capricious action that warrants reversal under the APA. *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

2. The FAA provided no reasoned justification for its determination that privacy-invading drone operations do not present safety concerns.

The FAA in its brief mistakenly argues that its November 2014 response letter included an adequate explanation for why the agency concluded that EPIC's Petition did not implicate safety concerns. But the FAA's response letter did not address any of EPIC's arguments or evidence, or even provide an articulation of the agency's logic. The response letter included only a conclusory statement that the issues raised in EPIC's Petition were "not an immediate safety concern." JA 12. The FAA provided no further explanation of this conclusion in the Small Drone Rulemaking notice. This Court has repeatedly held that "when an agency denies a request, it must" provide a "brief statement of the grounds for denial." *SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184, 1187 (D.C. Cir. 2014). *See also Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014); *Butte Cty., Cal.*, 613 F.3d at 194. The FAA has failed entirely to satisfy the APA's brief statement requirement, and the agency's dismissal of EPIC's Petition should therefore be set aside.

The FAA's dismissal should also be set aside because it failed to address any of the substantive issues identified by EPIC in the Petition. Instead, the FAA merely stated that it "prioritizes rulemaking projects based on the issues that are crucial to the safety of the aviation community and the traveling public." JA 12. But this reasoning is not at all relevant to EPIC's request for drone privacy rules because the agency is required by law to conduct a rulemaking on drone integration. Congress already commanded the FAA to prioritize drone integration issues in the Modernization Act § 332. The FAA was required to "articulate a satisfactory explanation" for denying EPIC's Petition, *SecurityPoint*, 769 F.3d at 1188, but instead the agency provided boilerplate language that was inapplicable to the topic of EPIC's Petition.

This Court has vacated similar boilerplate responses in *SecurityPoint*, *Amerijet*, and *Butte County*. Like the final orders in those cases, the FAA response letter "offers no indication that [anyone at the agency] even considered the potential harms" outlined in EPIC's Petition. *SecurityPoint*, 769 F.3d at 1189. There is no evidence in the response letter or the Small Drone Rulemaking notice that the FAA "considered the substance" of EPIC's request, *Amerijet*, 753 F.3d at 1352, or considered the evidence that EPIC presented, *Butte Cty.*, 613 F.3d at 194.

The FAA also concedes in its brief that drone operations present important concerns of surreptitious surveillance and stalking, but argues that the agency only

has the authority to protect the safety of aircraft in flight. Resp't Br. 20. This argument is contrary to Congress's intent and to common sense. Indeed, the FAA's own regulations include a prohibition on the operation of aircraft "in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13(a). The FAA's post-hoc rationalization is irrational.

Most of the arguments proffered in the FAA's brief should be rejected outright because they are nothing more than post-hoc rationalizations, which cannot justify an unreasoned agency decision. *See Ctr. for Biological Diversity v EPA*, 722 F.3d 401, 409 (D.C. Cir. 2013). But the arguments in the FAA's brief should also be rejected because they are inherently flawed and self-contradictory. The FAA argues that state and local laws already adequately protect individuals from drone stalking, aerial trespass, and other privacy invasions. Resp't Br. 19–20. But while some states have attempted to fill the void left by the agency's failure to address drone privacy issues, the existing legal framework provides minimal recourse against privacy invasions from drones. The agency also concedes in its brief that "it will continue to participate in" an interagency process to "address privacy" issues "relating to the commercial and private use of" drones. Resp't Br. 6. The agency offers no explanation for why it will continue to participate in the process even as it argues that the problem is non-existent.

The FAA is particularly dismissive of the fact that individuals will engage in dangerous self-help measures to protect their property from drones, arguing that current laws prohibit such behavior. Resp't Br. 17. But, as the recent Kentucky case shows, individuals are not necessarily prohibited from shooting down drones under current state property laws. *See* Natalia Martinez, *'Drone Slayer' Claims Victory in Court*, WAVE 3 News (Oct. 26, 2015).[2] Other state laws are similarly unhelpful when it comes to addressing drone privacy issues. Common law invasion of privacy provides only minimal protections against intrusive drone surveillance, the use of drone likely does not fall within state stalking prohibitions, *see* John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 Harv. J.L. & Pub. Pol'y 457, 505–06 (2013), and state trespass laws were not drafted with drone intrusions in mind, *id*. at 499-500.

Drone operations enable surreptitious surveillance and stalking in ways and to degrees that have never been seen before. This real problem must be addressed with rules prior to the widespread deployment of drones in the national airspace. EPIC's suit is properly before this Court. The FAA concedes that it has not only abdicated a comprehensive rulemaking for drone integration, but also failed to provide any articulation of its reasons for denying EPIC's Petition. Even the post-hoc rationales offered in the agency's brief convey a fundamental

[2] http://www.wave3.com/story/30355558/drone-slayer-claims-victory-in-court.

misunderstanding of the privacy threats posed by drone operations. The agency has not considered any of EPIC's arguments or evidence, and the denial of EPIC's Petition was unlawful. For these reasons, this Court should vacate the FAA's order denying EPIC's Petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for review, vacate the FAA Order denying EPIC's Petition, and remand for further proceedings.

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)(iii) and D.C. Circuit Rule 32(e) because it contains 6,690 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 18th day of November 2015, 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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