[NOT YET SCHEDULED FOR ORAL ARGUMENT]
CONSOLIDATED CASE NOS. 16-1297, 16-1302

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Petitioner,
v.

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.

JOHN A. TAYLOR,
Petitioner,
v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

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

BRIEF FOR THE RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIR. R. 28(a)(1)

A. Parties and Amici

Electronic Privacy Information Center and John A. Taylor are the petitioners. Federal Aviation Administration; Michael P. Huerta, Administrator, Federal Aviation Administration; and Elaine L. Chao, Secretary of Transportation, are respondents. There are no amici or intervenors.

B. Rulings Under Review

Petitioners seek review of the final rule, Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42,062 (June 28, 2016). The rule is available at JA 1.

C. Related Cases

These consolidated cases were not previously before this Court. Counsel is not aware of any related cases currently pending in this Court or in any other court within the meaning of Cir. R. 28(a)(1)(C).

s/ *Abby C. Wright*
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INTRODUCTION

In June 2016, the Department of Transportation (Department) and the Federal Aviation Administration (FAA) issued a final rule authorizing certain small, unmanned aircraft system operations in the national airspace system. Subject to certain conditions, the rule allows daytime operations within visual line of sight of the remote pilot for operations involving unmanned aircraft under 55 pounds. The rule also puts in place a knowledge test and other requirements for operators. By the rule's express terms, it does not apply to operations that fall within a class of model aircraft operations defined by Congress.

The rule has been challenged by two petitioners. The first petitioner urges that the rule is unlawful because it does not impose privacy restrictions on the operation of cameras or other sensors attached to unmanned aircraft operating subject to the rule. The second petitioner is an individual who operates unmanned aircraft recreationally. He urges that the challenged rule imposes too many requirements on recreational unmanned aircraft operators and is unlawful because it did not interpret the statutory terms governing when an operation is an exempt model aircraft operation. For the reasons that follow, both petitions should be dismissed or denied.

STATEMENT OF JURISDICTION

Petitioners in these consolidated cases challenge a final rule of the Department of Transportation and FAA issued on June 28, 2016. Petitioners timely filed their petitions for review on August 22, 2016, and August 28, 2016. This Court lacks

jurisdiction over the petition in Case No. 16-1297 because petitioner, Electronic Privacy Information Center, lacks Article III standing. For those claims for which petitioner John A. Taylor has standing, this Court has jurisdiction over the petition in Case No. 16-1302 under 49 U.S.C. § 46110.

STATEMENT OF THE ISSUES

In June 2016, the Department of Transportation and FAA issued a final rule governing the operation and certification of small unmanned aircraft systems. The rule imposes various operational limitations on small unmanned aircraft systems, including that the unmanned aircraft must remain within visual line of sight of the remote pilot and must not travel higher than 400 feet from the ground or a structure. The rule also explains that its operational provisions do not apply to model aircraft that meet certain congressionally defined criteria for operation. The rule also puts in place a regulation prohibiting model aircraft operations that endanger the national airspace. The issues presented in these consolidated petitions are:

1. Whether petitioner Electronic Privacy Information Center (EPIC) has demonstrated the injury in fact necessary for Article III standing.

2. Whether, assuming this Court has jurisdiction to reach the merits of EPIC's petition, it was arbitrary and capricious, or otherwise contrary to law, for the Secretary of Transportation and FAA to decline to promulgate regulations designed to protect individual privacy interests.

3. Whether petitioner John A. Taylor has demonstrated Article III standing with respect to all of his claims.

4. Whether, to the extent the final rule relates to model aircraft, the rule was arbitrary and capricious, or otherwise contrary to law.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Congress has directed FAA to "promote safe flight of civil aircraft in air commerce by prescribing" standards that govern the operation of "aircraft." 49 U.S.C. § 44701(a). Congress defined "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air." *See id.* § 40102(a)(6); *see also* 14 C.F.R. § 1.1 (implementing regulation defining "aircraft" as "a device that is used or intended to be used for flight in the air").

This case concerns the operation of "unmanned aircraft." In 2012, Congress enacted the FAA Modernization Act. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (Modernization Act). The Modernization Act addressed, among other things, such unmanned aircraft, which it defined as "aircraft that [are] operated without the possibility of direct human intervention from within or on the aircraft." *See* Modernization Act § 331(8). The Act further defines "unmanned aircraft system" as "an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are

required for the pilot in command to operate safely and efficiently in the national airspace system." *Id.* § 331(9).

In section 332 of the Modernization Act, Congress directed FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." Modernization Act § 332(a)(1). The Modernization Act requires FAA to conduct rulemaking proceedings to "implement the recommendations of the plan." *Id.* § 332(b).

B. In section 336(c) of the Modernization Act, Congress delineated a class of "model aircraft," which it defined as "unmanned aircraft" that are "(1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes." Modernization Act § 336(c). Section 336(a) further provides that FAA cannot promulgate future regulations with regard to a model aircraft so long as the model aircraft is operated in accordance with the additional limitations set forth in section 336(a), which include that the "aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization" and "operated in a manner that does not interfere with and gives way to any manned aircraft." *Id.* § 336(a). Congress expressly provided, however, that FAA retains the authority "to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system." *Id.* § 336(b).

Recognizing the restriction in section 336(a), FAA has not promulgated a rule governing the operations of model aircraft that fall within the section 336(a) operating limitations.[1] FAA has, however, issued an *Interpretation of the Special Rule for Model Aircraft*, 79 Fed. Reg. 36,172 (June 25, 2014), which provides guidance to model aircraft operators concerning what operations are covered by section 336(a) and what FAA regulations apply to such operations. FAA sought public comments on the interpretation and is currently reviewing those comments.[2] In 2015, FAA also issued Advisory Circular 91-57A, which reminds unmanned aircraft operators that airspace restrictions apply to all model aircraft and that operators should follow best practices, including limiting operations to below 400 feet above ground level. FAA also assists operators of unmanned aircraft by providing an application for mobile devices called "B4UFLY" that indicates whether it is legal to fly an unmanned aircraft at the user's location.

C. As relevant to this rulemaking, section 333 of the Modernization Act directed FAA and the Secretary of Transportation to determine "which types of unmanned aircraft systems, if any, as a result of their size, weight, speed, operational

[1] Model aircraft are subject to a statutory registration requirement implemented through a December 2015 interim final rule. *See* 80 Fed. Reg. 78,594, 78,640 (Dec. 16, 2015). This rule is the subject of a separate challenge by petitioner Taylor. *See Taylor v. Huerta*, Case No. 15-1495. Oral argument in that case was held on March 14, 2017.

[2] Two petitions for review challenging the interpretation have been held in abeyance pending issuance of a final interpretive rule. *See UAS America Fund, LLC v. FAA*, Case No. 14-1156, and *Academy of Model Aeronautics v. FAA,* Case No. 14-1158.

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." Modernization Act § 333(b)(1). The Modernization Act did not direct either the Secretary or the FAA Administrator to consider privacy issues in the rulemaking for small unmanned aircraft systems.

In response to Congress's direction in section 333 of the Modernization Act, the Secretary of Transportation and the FAA Administrator issued a notice of proposed rulemaking entitled "Operation and Certification of Small Unmanned Aircraft Systems." 80 Fed. Reg. 9544 (Feb. 23, 2015). The proposed rule set out a number of proposed requirements for small unmanned aircraft systems. *See* 80 Fed. Reg. at 9546. For example, consistent with the definition in section 331(6) of the Modernization Act, FAA proposed to define a small unmanned aircraft as weighing less than 55 pounds, including everything on board the aircraft. *Id.* FAA also proposed that small unmanned aircraft be operated only during the day and within the visual line of sight of the remote pilot and visual observer. *Id.* at 9559-61. And FAA further proposed that operators of small unmanned aircraft systems be required to pass a test demonstrating aeronautical knowledge and be vetted by the Transportation Security Administration. *Id.* at 9572, 9588. The proposed rule addressed aircraft meeting the operational definition of "model aircraft" found in section 336(a) to a very limited extent. The only proposal connected to such operations explained that the new rules did not apply to such model aircraft operations and codified a

prohibition on model aircraft operations that endanger the safety of the national airspace. *See id.* at 9546.

As relevant to the EPIC petition, FAA acknowledged in its notice of proposed rulemaking that privacy concerns had been raised regarding unmanned aircraft operations, 80 Fed. Reg. at 9552-53, and noted its ongoing participation in an interagency, multi-stakeholder engagement process to address those concerns, *see* Memorandum on Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, 2015 Daily Comp. Pres. Doc. 1 (Feb. 15, 2015). FAA explained, however, that it believed privacy issues were beyond the scope of its proposal to safely integrate small unmanned aircraft systems into the national airspace system. 80 Fed. Reg. at 9552.

The Secretary and FAA invited a broad range of comments on the proposed rule. The agency received over 4600 comments on its proposed rule, including a comment from petitioner EPIC. *See* Comments of the Electronic Privacy Information Center, Dkt. ID FAA-2015-0150-4314, https://go.usa.gov/x58vm. Petitioner Taylor did not submit comments on the proposed rule.

Following the notice of proposed rulemaking, EPIC filed a petition for review in this Court challenging FAA's earlier denial of a petition to initiate rulemaking. This Court denied that petition for review as untimely, and held that any challenge to the notice of proposed rulemaking was premature. *See EPIC v. FAA*, 821 F.3d 39 (D.C. Cir. 2016).

D. The Secretary and FAA issued the final rule on June 21, 2016. 81 Fed. Reg. 42,064 (published June 28, 2016, effective Aug. 29, 2016) (final rule). FAA explained that the final rule was part of an incremental approach "to incorporate the operation of [small unmanned aircraft] systems into the national airspace," "[b]ecause of the potential societally beneficial applications" of small unmanned aircraft operations. *Id.* at 42,065. As FAA explained, because "higher-risk [unmanned aircraft systems] operations pose additional safety issues that require more time to resolve, the FAA [limited] this rulemaking to small [unmanned aircraft systems] operations posing the least amount of risk so that the agency could move to quickly issue a final rule integrating those operations into the" national air space system. *Id.* at 42,071. FAA stated its intent to continue working on integrating higher risk unmanned aircraft operations into the national airspace and to issue notices of proposed rulemaking "for those operations once the pertinent issues have been addressed, consistent with the approach set forth in the [unmanned aircraft systems] Comprehensive Plan for Integration." *Id.*

FAA reiterated that the final rule was promulgated under section 333 of the Modernization Act, which directs FAA and the Secretary to determine whether certain small unmanned aircraft system operations may be conducted safely. *See* 81 Fed. Reg. at 42,067, 42,073. The final rule also relied upon the rulemaking authority found in 49 U.S.C. § 40103(b), which charges "FAA with issuing regulations: (1) To ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the

flight of aircraft for purposes of navigating, protecting, and identifying aircraft, and protecting individuals and property on the ground." 81 Fed. Reg. at 42,068. FAA further explained that it was acting pursuant to 49 U.S.C. 44701, which "charges the FAA with prescribing regulations that the FAA finds necessary for safety in air commerce and national security." 81 Fed. Reg. at 42,068.

In the final rule, FAA described the "two primary safety concerns associated with small" unmanned aircraft operations: "the ability to 'see and avoid' other aircraft with no pilot on board and the operator losing positive control of the small unmanned aircraft." 81 Fed. Reg. at 42,180. As required by section 333 of the Modernization Act, FAA made a determination that small unmanned aircraft systems operations conducted within the bounds of the final rule "would not create a hazard to users of the [national airspace system] or the public." *Id.*

The final rule adds a new Part 107 to FAA regulations found at Title 14 of the Code of Federal Regulations. 81 Fed. Reg. at 42,066. In addition, the rule promulgated three regulations relevant to model aircraft and petitioner Taylor's argument. Specifically, the rule put in place 14 C.F.R. § 107.1(b)(2), which provides that Part 107 does not apply to "model aircraft" as defined in the new 14 C.F.R. § 101.41. Section 101.41 repeats in materially identical fashion the definition of model aircraft operations found in the Modernization Act at section 336(a).[3] FAA also promulgated

[3] This brief will refer to model aircraft operations that meet the requirements contained in 14 C.F.R. § 101.41 as "Part 101 model aircraft."

14 C.F.R. § 101.43, which provides that "[n]o person may operate model aircraft so as to endanger the safety of the national airspace system." 14 C.F.R. § 101.43.

E. As relevant here, FAA responded in the final rule to comments it received regarding privacy concerns, comments raising concerns regarding drone hacking, and comments it received regarding model aircraft.

1. In responding to the approximately 180 comments (including those submitted by petitioner EPIC) expressing concern that unmanned aircraft systems could be used to invade the privacy of third parties, FAA reiterated that such concerns were beyond the scope of the rulemaking. The agency began by explaining that "its mission is to provide the safest, most efficient aerospace system in the world, and does not include regulating privacy." 81 Fed. Reg. at 42,190. Although FAA "recognizes that unique characteristics and capabilities of [unmanned aircraft systems] may pose risks to individual privacy," the agency observed that such "concerns are generally related to technology and equipment, which may be installed on an unmanned (or manned) aircraft [and] are unrelated to the safe flight of the aircraft." *Id.* As FAA noted, it "has never extended its administrative reach to regulate the use of cameras and other sensors extraneous to the airworthiness or safe operation of the aircraft in order to protect individual privacy." *Id.*

Responding specifically to EPIC's contention that FAA was *required* to regulate privacy, FAA explained that "[n]one of the [unmanned aircraft systems]-related provisions of [the Modernization Act] directed the FAA to consider privacy issues."

81 Fed. Reg. at 42,191. And "[r]eading such a mandate" into the Act "would be a significant expansion beyond the FAA's long-standing statutory authority as a safety agency." *Id.* The agency further observed that its rulemaking authority "neither mandates nor permits the FAA to issue or enforce regulations specifically aimed at protecting privacy interests between third parties." *Id.* at 42,191-92. Nor had FAA committed itself to engage in privacy rulemaking. FAA explained that in developing its test site program it had recognized that the program was "an opportunity to further the dialogue with regard to privacy concerns" and had used its broad authority to enter into contracts to impose certain privacy requirements. But, as FAA noted, it did "not specify the contents of any test site operator's privacy policy." *Id.* at 42,191.

FAA also responded to EPIC's assertion that failure to implement privacy regulations would lead individuals to engage in dangerous self-help measures, which might include geo-fencing, a means of disabling unmanned aircraft that cross a "geo-fence" or barrier. 81 Fed. Reg. at 42,192. FAA noted that there could be many different motivations for an individual to engage in unsafe conduct. Moreover, as FAA explained, if a person engages in unsafe conduct in operating their unmanned aircraft, such action is subject to sanction and is in violation of the final rule. *Id.* And FAA further observed that with respect to geo-fencing, specifically, some commenters actually recommended that FAA *require* geo-fencing as a safety mitigation. *Id.*

Although it declined to promulgate privacy regulations as part of the final rule, FAA affirmed that it would continue "addressing privacy concerns through

engagement and collaboration with the public, stakeholders and other agencies with authority and subject matter expertise in privacy law and policy" and continue to partner with other agencies to develop "best practices concerning privacy, transparency, and accountability." 81 Fed. Reg. at 42,190. FAA further explained that "[s]tate law and other legal protections may already provide recourse for a person whose individual privacy, data privacy, private property rights, or intellectual property rights may be impacted by a remote pilot's civil or public use of an [unmanned aircraft system.]" *Id.* at 42,192.

2. In discussing whether the unmanned aircraft operations authorized in the final rule were consistent with national security, FAA also responded to comments from petitioner EPIC regarding the vulnerability of unmanned aircraft to hacking. 81 Fed. Reg. at 42,180. FAA explained that because the final rule only authorized operations conducted within visual line of sight, any hacking would be readily apparent to the user, who could immediately report such activity to law enforcement. *Id.* at 42,181.

3. FAA also received approximately 2850 comments regarding the treatment of model aircraft in the final rule. *See* 81 Fed. Reg. at 42,081. Most commenters supported excluding Part 101 model aircraft from the reach of Part 107, although several organizations did argue in favor of more stringent regulation of model aircraft operations. *Id.* In response to calls for greater regulation, FAA explained that under section 336(a) it was prohibited from issuing new rules "with regard to model aircraft

that satisfy the statutory criteria" specified in the Modernization Act. *Id.* Therefore, "FAA cannot impose additional regulations on model aircraft that meet the criteria of section 336 nor can the FAA make those aircraft subject to the provisions of part 107." *Id.*

A few commenters recommended that FAA expand the class of aircraft operations not subject to the final rule to include "uses of small [unmanned aircraft systems] that do not comply with all of the criteria specified in section 336(a)." 81 Fed. Reg. at 42,081. As FAA explained in response, "[t]here is no data indicating that a small [unmanned aircraft system] operation whose operational parameters raise the safety risks addressed by part 107 would become safer simply as a result of being conducted for recreational or salutary purposes . . . the FAA declines the request to apply the terms of section 336 beyond the statutory criteria specified in that section." *Id.*

In addition, FAA responded to comments seeking further interpretation of the terms in section 336(a). 81 Fed. Reg. at 42,082. As FAA explained, those issues were beyond the scope of the rulemaking because the final rule, by its terms, did not apply to model aircraft operations described in section 336(a). FAA noted that it was interpreting those terms through a separate regulatory action, the *Interpretation of the Special Rule for Model Aircraft*, 79 Fed. Reg. 36,172. FAA explained that it was "currently considering the issues raised by these commenters." 81 Fed. Reg. at 42,082. To

consider these issues in the final rule would therefore be "duplicative" of those efforts. *Id.*

SUMMARY OF ARGUMENT

Petitioners challenge a final rule promulgated under section 333 of the Modernization Act. Section 333 requires the Secretary and FAA to determine whether and to what extent certain unmanned aircraft systems may operate without creating hazards to other users of the national airspace or the public. After notice-and-comment rulemaking, FAA and the Secretary concluded that certain small, unmanned aircraft could operate safely in the national airspace without posing hazards related to a potential loss of control or interference with other users of the national airspace system. The final rule therefore authorizes—within specified limitations—small unmanned aircraft operations in the national airspace.

Petitioner EPIC urges that the final rule is unlawful because FAA failed to promulgate regulations restricting the use of cameras and other sensors mounted on unmanned aircraft operated under the final rule. But EPIC has failed to demonstrate any injury in fact, either as an organization or on behalf of its members, and therefore has not demonstrated Article III standing. EPIC fails to demonstrate an organizational injury because its only alleged harm is injury to its abstract advocacy interests. As this Court has explained on multiple occasions, such injuries do not suffice to demonstrate organizational standing. And EPIC fares no better on an associational theory. To prevail on this theory, EPIC would need to demonstrate that

its members possess Article III standing. But the two EPIC members who have submitted declarations in this Court have failed to allege any imminent injury, instead pointing only to a generalized concern regarding increased invasions of their privacy. This is not sufficient to establish injury in fact.

Even assuming EPIC has standing to bring this suit, its petition for review should be denied. EPIC urges that section 333 of the Modernization Act requires FAA to promulgate privacy regulations as part of this rulemaking. EPIC bases this argument on an interpretation of the word "hazard" in section 333 that is untethered from the text of the statute, FAA's mission as an aviation safety agency, and general principles of administrative law. Even assuming FAA had discretion to engage in a privacy rulemaking, it was certainly not arbitrary and capricious for FAA to decline to promulgate privacy rules. FAA's mission is aviation safety, not the regulation of privacy interests between third parties. It is not arbitrary and capricious for an agency to limit the scope of a rulemaking consistent with its statutory mandate.

Petitioner Taylor's petition must also be dismissed in part. With respect to a subset of his claims, Taylor has failed to demonstrate that any change to the final rule would redress his alleged injuries. The final rule has no effect on model aircraft operations that fall within Part 101, and thus any order with respect to the final rule could not redress any of Taylor's alleged injuries as they relate to his Part 101 model aircraft operations. Petitioner also lacks standing to challenge the Modernization Act's requirement that, in order to fall within section 336(a)—and therefore be a Part 101

model aircraft exempt from Part 107—operators must provide notice when flying within five miles of an airport. That requirement stems directly from the Modernization Act, and no order addressing the final rule could redress petitioner's complaint.

The remainder of Taylor's petition should be denied. FAA has the authority to apply its Part 107 regulations to those recreational unmanned aircraft operations that fall outside Part 101, and quite reasonably determined to do so. As FAA explained, unmanned aircraft operations conducted for recreational reasons pose precisely the same safety risks as operations conducted for commercial gain. Nor does it advance Taylor's case to urge that FAA was required to interpret the provisions of the Modernization Act in this rulemaking. As FAA explained, the final rule was promulgated under section 333 to determine which operations of small unmanned aircraft could be conducted safely. FAA is engaged in a separate regulatory action interpreting the terms of the Modernization Act with respect to Part 101 model aircraft.

Taylor's Paperwork Reduction Act claim lacks merit. As explained, the final rule did not create the requirement that unmanned aircraft operators notify airports if they wish to operate as Part 101 model aircraft. And although not discussed in the final rule (because it was not the subject of the rule), FAA fully complied with the Paperwork Reduction Act with respect to the B4UFLY application.

STANDARD OF REVIEW

This Court may "affirm, amend, modify, or set aside" a final order of FAA or the Secretary. 49 U.S.C. § 46110(c). Orders of FAA and the Secretary may be set aside only when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "[f]indings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive." 5 U.S.C. § 706(2)(A); 49 U.S.C. § 46110(c); *see also J.A. Jones Mgmt. Servs. v. FAA,* 225 F.3d 761, 764 (D.C. Cir. 2000) (applying arbitrary and capricious standard to suit under section 46110).

ARGUMENT

I. EPIC Has Not Demonstrated an Injury in Fact Sufficient To Satisfy Article III Standing Requirements.

EPIC has failed to demonstrate an injury in fact either to itself, as an organization, or to any of its members.

A. As the Supreme Court has explained, the "irreducible constitutional minimum" of Article III standing requires a plaintiff to allege an injury in fact fairly traceable to the defendant's conduct and redressable by an order against defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 560-61 (1992) (plurality op.); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). To demonstrate injury in fact, a plaintiff must allege an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See Lujan*, 504 U.S. at 560

(quotation marks omitted). The defendant's conduct must have caused the injury, and the injury may not be "th[e] result [of] the independent action of some third party not before the court." *See id.* (alterations in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *See Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

When an organization sues on its own behalf, it must establish a "concrete and demonstrable injury to the organization's activities—with [a] consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (alterations in original) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

As this Court has "recognized . . . the expenditure of resources on advocacy is not a cognizable Article III injury." *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015); *see also Center for Law and Educ. v. Department of Educ.,* 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005); *National Ass'n of Home Builders v. EPA,* 667 F.3d 6, 12 (D.C. Cir. 2011). That is because "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *National Taxpayers Union,* 68 F.3d at 1434. The "organization must allege that discrete

programmatic concerns are being directly and adversely affected by the challenged action." *Id.* at 1433 (quotation marks omitted).

In *Havens Realty*, for example, the organization did not allege mere frustration of its purpose "to make equal opportunity in housing a reality," 455 U.S. at 368, but instead alleged impairment of specific services, such as counseling and referral services to home buyers. *Id.* at 379. The organization alleged that defendant's violations of the Fair Housing Act directly undermined these activities, compelling the groups to devote significant additional resources to identify and counteract defendant's actions in providing their services. *See id.* Similarly, in *Abigail Alliance*, the plaintiff organization was engaged in counseling, referral, advocacy, and educational services, which were curtailed because of the defendant's actions. *See Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006).

EPIC asserts that it has organizational standing with respect to FAA's decision not to address privacy issues and with respect to FAA's response to its comments on hacking. Although EPIC characterizes its injury as a "programmatic injury," EPIC Br. 18, it argues only that FAA's failures have made it more difficult for it to conduct its advocacy mission, and that EPIC has "had to expend additional resources to develop new advocacy strategies." *Id.* at 19. Because FAA declined to adopt federal privacy regulations, EPIC alleges that it has had to "track[] disparate protections across different jurisdictions." *Id.*

But, as explained, allegations regarding an increase in the expenditure of resources are not sufficient to demonstrate an injury in fact. *See Turlock Irrigation Dist.*, 786 F.3d at 24. Like the trust in *Turlock Irrigation District*, or the National Homebuilders in *National Ass'n of Home Builders v. EPA,* 667 F.3d at 12, EPIC has "not allege[d] impairment of its ability to provide services, only impairment of its advocacy." *Turlock*, 786 F.3d at 24. "[T]his will not suffice." *Id.* EPIC does not provide direct client services of the sort at issue in *Havens Realty* and *Abigail Alliance.* EPIC is an organization that exists to advocate on behalf of increasing privacy protections. That it may have to spend additional funds to do so because FAA has not promulgated regulations regarding privacy does not provide an injury in fact under this Court's precedent.

This Court's decision in *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015), is not to the contrary. *See* EPIC Br. 19. The alleged injuries PETA suffered were quite different from those allegedly suffered by EPIC. Because USDA had not promulgated regulations to implement the Animal Welfare Act with respect to birds, PETA's mission was impaired by its inability to obtain information about, and to submit complaints regarding, the treatment of birds. *See* 797 F.3d at 1094. There are no similar injuries here. EPIC is fully able to engage in its advocacy activities. It alleges only that it must spend more money to protect those interests and that it must engage in more of the advocacy it normally does, for

example, in "tracking disparate protections across different jurisdictions." EPIC Br. 19. That is not a cognizable injury.

As an additional matter, even assuming EPIC had demonstrated an injury in fact, a change to the Part 107 rules would not redress EPIC's alleged injuries. The final rule challenged here does not regulate Part 101 model aircraft, which, as explained, are subject to a limitation on rulemaking found in section 336 of the Modernization Act. As of the filing of this brief, more than 700,000 individuals had obtained registration numbers for small unmanned aircraft operated as model aircraft. Regardless of the existence of the final rule challenged here, EPIC would have to "track[] disparate protections across different jurisdictions" with respect to the operations of such a large number of model aircraft. EPIC Br. 19.

B. EPIC fares no better under an associational standing theory. To assert "associational" standing, EPIC would have to demonstrate that its members have suffered an injury in fact. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). It has failed to do so.

As a general matter, standing is "substantially more difficult to establish" where, as here, the parties invoking federal jurisdiction are not "the object of the government action or inaction" they challenge. *Lujan,* 504 U.S. at 562 (quotation marks omitted). EPIC's members are not, as relevant to their suit, operators of unmanned aircraft systems. To demonstrate injury in fact, EPIC's members must

allege an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See id.* at 560 (quotation marks omitted)

On several occasions, this Court has addressed an organization's standing when it relies on an alleged increased risk of harm to its members. This Court has explained that where "increased risk falls on a population in an undifferentiated and generalized manner[,] everyone in the relevant population is hit with the same dose of risk." *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279, 1298 (D.C. Cir. 2007), *dismissed on redetermination*, 513 F.3d 234 (D.C. Cir. 2008). In analyzing whether such increased risks create an injury in fact sufficient to support standing, this Court considers "whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes." *Id.*

As this Court recently reiterated, "[i]ncreased-risk-of-harm cases implicate the requirement that an injury be actual or imminent because '[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, nonimminent injuries could be dressed up as increased risk of future injury.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (second alteration in original) (quoting *Public Citizen*, 489 F.3d at 1294). Such "disputes about future events where the possibility of harm to any given individual is remote and speculative are properly left to the policymaking Branches, not the Article III courts." *Public Citizen*, 489 F.3d at 1295. This Court has, therefore, "limited its jurisdiction over cases alleging the possibility of increased-risk-

of-harm to those where the plaintiff can show '*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.'" *Food & Water Watch*, 808 F.3d at 914 (quoting *Public Citizen*, 489 F.3d at 1295).

In both *Food & Water Watch* and *Public Citizen*, this Court found inadequate the organization's allegations in support of standing. In *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 513 F.3d 234, 239 (D.C. Cir. 2008), a case involving tire-pressure regulations, this Court explained that "Public Citizen has not submitted any expert or other analysis demonstrating that a list of compatible tires in the owner's manual would substantially reduce the risk of death, injury, or economic loss to its members, as compared to" the challenged regulation. Similarly, in *Food & Water Watch*, which involved poultry processing regulations, this Court held that member poultry consumers had failed to demonstrate any substantial likelihood of an increase in the risk of harm. 808 F.3d at 917-18.

EPIC's members' allegations suffer from similar problems. The members fail to show any imminent injury to their privacy interests. Nor have the members even attempted to quantify any alleged increase in potential harm, other than to state that they are "concerned about an increasing loss of privacy." Addendum 40, 43, 44. The members have also provided no concrete information regarding where they expect unmanned aircraft operations to take place and why those operations are likely to invade their privacy.

Moreover, both declarations from EPIC members rely heavily on alleged privacy intrusions made by package delivery services using unmanned aircraft. *See* Addendum 40, 43. But the rule at issue does not authorize such operations, *see* 14 C.F.R. § 107.1(b)(1) (excluding air carrier operations from Part 107), which have not yet been the subject of an FAA rulemaking and operate only on a case-by-case certification basis. Thus, any action with respect to the final rule would have no effect on any potential risks posed by package delivery services.

EPIC's reliance on a relaxed standard for procedural injuries is misplaced. *See* EPIC Br. 20-21 (relying on *Sierra Club*, 827 F.3d at 65, a case involving a procedural injury under the National Environmental Policy Act). EPIC has not alleged any procedural defects in the final rule. EPIC challenges instead the substance of the final rule.

II. Even Assuming EPIC Had Demonstrated Standing, Its Petition for Review Is Without Merit.

Petitioner EPIC spends much of its brief detailing privacy concerns it believes are heightened by the operation of unmanned aircraft systems. FAA has acknowledged that cameras and other sensors attached to unmanned aircraft may pose a risk to privacy interests, and does not dispute that general proposition here. But FAA is an aviation safety agency; it is not an all-purpose regulatory agency. Absent a specific direction from Congress, FAA is under no obligation to address the potential harm that could result if operators of unmanned aircraft choose to use

cameras mounted on their unmanned aircraft systems to invade the privacy of individuals on the ground. And contrary to EPIC's contention, FAA has never committed to engaging in rulemaking on this subject. EPIC's claim that the final rule is unlawful because it fails to address potential privacy concerns is therefore without merit.

A. FAA reasonably determined not to address privacy interests in the challenged final rule.

FAA is the nation's aviation safety agency. FAA is vested by federal statute with the authority to protect the safety and efficient use of the national airspace system. 49 U.S.C. §§ 40103, 44703. FAA Administrator is empowered to "promote safe flight of civil aircraft in air commerce by prescribing minimum standards required in the interest of safety" and issue "regulations and minimum standards for other practices, methods, and procedure[s] the Administrator finds necessary for safety in air commerce and national security." *Id.* § 44701(a). The core safety mission of FAA includes the responsibility for issuing air traffic rules and regulations governing the flight of aircraft for the navigation, protection, and identification of aircraft; the protection of persons and property on the ground; the efficient use of the navigable airspace; and the prevention of collisions between aircraft and other vehicles or airborne objects. 49 U.S.C. § 40103(b)(2). FAA is thus empowered to regulate the operation of aircraft, including unmanned aircraft systems, to the extent necessary to ensure the safe operation of aircraft and efficient use of the airspace.

Given its regulatory mission, FAA reasonably declined petitioner's invitation to include in the final rule regulations addressing the privacy concerns that petitioner believes unmanned aircraft systems raise. In the final rule, and elsewhere, FAA has recognized that the size and the unique characteristics and capabilities of small unmanned aircraft systems may pose risks to individual privacy. *See* 81 Fed. Reg. 42,064, 42,190 (June 28, 2016). But these risks are connected to the use of recording equipment installed on the unmanned aircraft; they are not tied directly to the airworthiness or safe operation of the aircraft itself. Indeed, this technology has long been used on manned aircraft for a variety of purposes, including news and traffic reports, film and television production, and law enforcement. But, in its long history as a regulatory agency, FAA has never extended its administrative reach to regulate the use of cameras or other recording devices on manned aircraft in order to protect individual privacy.

As this suit demonstrates, there is substantial, ongoing debate among policymakers, industry groups, advocacy groups, and members of the public regarding the extent to which unmanned aircraft system operations pose novel privacy issues; whether those issues are addressed by existing legal frameworks; and the means by which privacy risks should be further mitigated. Recognizing the importance of addressing privacy concerns in the proper forum, the National Telecommunications and Information Administration led a multi-stakeholder engagement process to develop a framework for privacy, accountability, and transparency for commercial and

private use of unmanned aircraft systems. *See* Memorandum on Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, 2015 Daily Comp. Pres. Doc. 1 (Feb. 15, 2015) (Presidential Memorandum); 80 Fed. Reg. 11,978 (Mar. 5, 2015) (inviting comments on issues to be addressed); 80 Fed. Reg. 41,013 (July 14, 2015) (announcing plans to hold a series of public engagement sessions). FAA participated fully in this engagement process, which led to the publication of best practices in May 2016. *See* Voluntary Best Practices for UAS Privacy, Transparency, and Accountability: Consensus, Stakeholder Drafted Best Practices Created in the NTIA-Convened Multistakeholder Process, https://www.ntia.doc.gov/files/ntia/publications/uas_privacy_best_practices_6-21-16.pdf (May 18, 2016) (Best Practices).

FAA is therefore not ignoring the possible potential privacy risks posed by unmanned aircraft systems, as EPIC claims, but rather is addressing those risks collaboratively, recognizing its role as an aviation safety agency, and not as an agency with expertise in privacy regulations. In furtherance of this process, FAA is continuing to partner with other agencies to develop "best practices concerning privacy, transparency, and accountability." 81 Fed. Reg. at 42,190. Specifically, as it explained in the final rule, "FAA intends to continue addressing privacy concerns through engagement and collaboration with the public, stakeholders and other agencies with authority and subject matter expertise in privacy law and policy." *Id.*

B. Section 333 of the Modernization Act does not require FAA to promulgate privacy regulations.

Petitioner does not dispute that FAA's core mission is aviation safety. But petitioner nonetheless urges that Congress directed FAA to promulgate privacy regulations when it engaged in section 333 rulemaking. Petitioner is incorrect. Nothing in the text of section 333 compels FAA to regulate how individuals choose to use data that may be collected using cameras and other recording devices mounted on unmanned aircraft.

Section 333 of the Modernization Act directs FAA to "determine if certain unmanned aircraft systems may operate safely in the national airspace system" and to identify the "types of unmanned aircraft systems . . . [that] do not create a hazard to users of the national airspace system or the public or pose a threat to national security." Modernization Act § 333(b)(1). Although section 333 does not contain the word "privacy," petitioner contends that Congress nonetheless required FAA to promulgate regulations designed to protect individual privacy when it directed FAA to address "hazard[s] to users of the national airspace or the public." EPIC Br. 25-34.

In the final rule, FAA identified the two relevant hazards to users of the national airspace system and persons and property on the ground potentially posed by unmanned aircraft systems, *see* 81 Fed. Reg. at 42,180. First, if an unmanned aircraft cannot "see and avoid" other aircraft, the aircraft may pose a danger to other users of the national airspace system and to the public if an accident occurs. Second, if the

remote pilot loses control of the unmanned aircraft, hazards are similarly created because of the potential for an accident causing injury to persons or property on the ground.

In contrast, the purported "hazards" described by petitioner in its brief are caused not by the unmanned aircraft or its operation, but by data-collection technologies, such as cameras, that may be installed on unmanned aircraft. Section 333's reference to "hazards" does not expand FAA's authority to matters wholly unrelated to aviation safety, such as private citizens' use and retention of data unconnected to the flight operations of the unmanned aircraft. The "hazards" to which section 333 refers are safety hazards to other users of the national airspace system and persons and property on the ground stemming from the operation of unmanned aircraft. Congress did not direct FAA to eliminate "all source[s] of danger," however attenuated, before authorizing certain small, unmanned aircraft operations. EPIC Br. 26.[4]

Petitioner asserts that unmanned aircraft systems cannot be safely integrated into the national airspace system without privacy regulations. EPIC Br. 38-39. Petitioner urges that individuals may resort to "self-help" measures in the absence of

[4] Petitioner's reliance on this Court's "no hazard" cases in *Town of Barnstable v. FAA*, 740 F.3d 681 (D.C. Cir. 2014), and *Clark County v. FAA*, 522 F.3d 437 (D.C. Cir. 2008), is misplaced. EPIC Br. 28-29. Those cases both concerned hazards to the navigable airspace, and the hazard determinations at issue fell squarely within FAA's statutory authority as an aviation safety agency. They have no bearing on this suit.

FAA regulation, such as attempting to shoot down unmanned aircraft or resorting to geo-fencing, which prevents unmanned aircraft from entering certain airspace. As an initial matter, some of the described self-help measures are likely illegal under state and local law. Moreover, there are many different motivations (not just privacy concerns) for an individual to engage in unsafe conduct; regulating the operation of recording equipment on unmanned aircraft is no guarantee that individuals will not engage in unsafe conduct with respect to unmanned aircraft systems on their property. And, as FAA noted in the final rule, if a person engages in unsafe conduct in the operation of their unmanned aircraft, that is also in violation of Part 107 and subject to sanctions. 81 Fed. Reg. at 42,192.

EPIC errs in asserting that FAA has the "sole authority" to regulate conduct in the national airspace system and thus if FAA does not regulate privacy, no legal recourse exists. EPIC Br. 39. EPIC's own examples refute this contention and illustrate that legal frameworks are in place to address invasions of privacy. For example, EPIC refers to an incident in which a couple used an unmanned aircraft to record persons in their homes. *See* EPIC Br. 5. But that couple was arrested. *Id.* Indeed, EPIC acknowledges that the privacy concerns it raises may amount to "[t]raditional crimes such as stalking, harassment, voyeurism, and wiretapping [that] may all be committed through the operation of a drone." EPIC Br. 10 (quoting Alissa M. Dolan & Richard M. Thompson II, Cong. Research Serv., R42940, *Integration of Drones into Domestic Airspace: Selected Legal Issues* 29 (2013)). The fact that a crime is

committed through the use of manned or unmanned aircraft does not take that crime out of the jurisdiction of traditional law enforcement.

C. FAA properly declined to promulgate privacy regulations.

EPIC's contention that FAA's determination not to address risks posed to individual privacy was arbitrary and capricious similarly fails to advance its claim. EPIC Br. 35. Regulations "are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem." *Personal Watercraft Indus. Association v. Department of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995).

FAA explained, in response to comments expressing concern that unmanned aircraft systems could be used to invade individual privacy, that promulgating regulations of the use of cameras and sensors on unmanned aircraft was beyond the scope of the rulemaking. As FAA explained, "its mission is to provide the safest, most efficient aerospace system in the world, and does not include regulating privacy." 81 Fed. Reg. at 42,190. Although FAA recognized that the "unique characteristics and capabilities" of unmanned aircraft may pose risks to individual privacy, FAA explained that "these concerns are generally related to technology and equipment, which may be installed on an unmanned (or manned) aircraft [and] are unrelated to the safe flight of the aircraft." *Id.* Such concerns were therefore beyond the scope of the rulemaking, and it was not arbitrary and capricious for FAA to so conclude.

EPIC proceeds here as if privacy concerns were part of the scope of the rulemaking and FAA simply failed to respond to its comments. *See* EPIC Br. 35-41.

But, as FAA explained, regulating the conduct of operators of unmanned aircraft systems in order to protect individual privacy was not part of the rulemaking at issue. An agency is required to respond to comments that are "*relevant* to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast doubt on the reasonableness of a position taken by the agency." *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (emphasis added); *see also National Mining Ass'n v. Mine Safety and Health Admin.,* 116 F.3d 520, 549 (D.C. Cir. 1997) (not requiring a substantive response where comments were beyond the scope of the rulemaking). Because EPIC's comments addressed issues beyond the scope of the rulemaking, the agency's response to that effect was all that was required.

FAA's response to EPIC's "drone hacking" comment was similarly not arbitrary and capricious. EPIC Br. 40. FAA explained that because Part 107 only authorizes operations conducted within visual line of sight, any hacking should be readily apparent to the user, who may immediately report such activity to law enforcement. 81 Fed. Reg. at 42,181. Regulating drone hacking was therefore not required for a determination that Part 107 operations did not pose a hazard to users of the national airspace system.

Contrary to EPIC's claim, FAA's decision not to engage in a privacy rulemaking does not reverse any prior agency position. *See* EPIC Br. 42-47. In support of its argument, petitioner points to examples in the record where FAA has recognized that unmanned aircraft systems, because of their size and capabilities, may

enhance privacy concerns. But nowhere in the record did FAA commit to engage in a rulemaking to address those issues; and an agency's recognition of an issue or concern does not mean that the agency has the expertise or authority to regulate that issue. Use and misuse of unmanned aircraft systems may raise a host of issues: zoning, public health, civil liberties, privacy, and others. But simply recognizing that fact does not mean FAA thereby takes on the responsibility for regulating in these diverse areas of law.

FAA's decision to require unmanned aircraft system test site operators to establish privacy policies is not in tension with its decision not to promulgate privacy regulations. *See* EPIC Br. 43-44. FAA implemented privacy requirements for unmanned aircraft test site operators pursuant to its broad authority in 49 U.S.C. § 106(*l*)(6), which allows the Administrator to enter into contracts under "such terms and conditions as the Administrator may consider appropriate." FAA did not specify the contents of any test-site operator's privacy policy and noted its expectation that the public entities operating the test sites, and their respective state and local oversight bodies, would monitor and enforce a test site's compliance with its own policies. 78 Fed. Reg. 68,360, 68,363 (Nov. 14, 2013). As FAA explained, "[a]lthough the FAA's mission does not include developing or enforcing policies pertaining to privacy or civil liberties, experience with the UAS test sites will present an opportunity to inform the dialogue in . . . interagency forums concerning the use of UAS technologies and the areas of privacy and civil liberties." JA 219. FAA has consistently emphasized that

the privacy requirements for the unmanned aircraft systems test sites "are not intended to predetermine the long-term policy and regulatory framework under which [unmanned aircraft systems] would operate." *See* FAA, U.S. Dep't of Transportation, *Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap* § 1.4.4, JA 219-20 (Unmanned Aircraft Systems Roadmap); *see also* 78 Fed. Reg. 18,932 (Mar. 28, 2013); 78 Fed. Reg. 12,259 (Feb. 22, 2013); 78 Fed. Reg. 68,360 (Nov. 14, 2013).

EPIC's reliance on statements in the Unmanned Aircraft Systems Roadmap is similarly misplaced. *See* EPIC Br. 33, 44. In that document, FAA recognized a potential impact on individual privacy, but expressly stated that "FAA's mission does not include developing or enforcing policies pertaining to privacy or civil liberties." JA 219. Nor does it assist petitioner to note that FAA has acknowledged that it will "meet the challenges" posed by small unmanned aircraft while "address[ing] privacy issues." *See, e.g.,* EPIC Br. 45 (emphasis omitted). As explained, FAA is part of a multi-stakeholder group addressing such issues.

It is also of no moment that Congress asked FAA to study the privacy impact of unmanned aircraft systems in an explanatory statement to the 2014 appropriations bill. *See* EPIC Br. 33. The fact that Congress took this step indicates that a requirement to promulgate privacy regulations was not already contained in the 2012 Modernization Act, and the direction from Congress in 2014 did not require FAA to engage in rulemaking. As explained, FAA is engaged in addressing the impact of

unmanned aircraft systems on individual privacy. FAA fully participated in a multi-stakeholder engagement process led by the National Telecommunications and Information Administration to develop a framework for privacy, accountability, and transparency for commercial and private use of unmanned aircraft systems. *See* Presidential Memorandum. That collaboration resulted in best practices that were published in May 2016. *See* Best Practices.

D. EPIC's remaining arguments are irrelevant to this suit.

In addition to relying on section 333 of the Modernization Act, petitioner urges that section 332 also required FAA to engage in a rulemaking that protects individual privacy interests from the use of equipment that may be installed on unmanned aircraft systems. *See* EPIC Br. 29-30. This argument is without merit.

As FAA explained in the final rule, it was acting under the authority of section 333 of the Modernization Act in promulgating the rule. Section 333 directs FAA to determine "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." Modernization Act § 333(b)(1); 81 Fed. Reg. at 42,073. FAA was not engaged in rulemaking under section 332 of the Modernization Act.

And EPIC's petition for review makes no claims under section 332 either. In its petition for review, EPIC states that it "hereby petitions this Honorable Court for

review of the . . . 'Operation and Certification of Small Unmanned Aircraft Systems Final Rule'. . . . EPIC petitions the Court to hold unlawful the FAA's withholding of unmanned aircraft systems (UAS) privacy regulations, which the FAA has previously recognized as an important part of UAS integration, from the June 28, 2016 FAA Final Rule." EPIC Pet. for Review. EPIC did not seek to compel a rulemaking under section 332 (which would, in any event, be subject to a very deferential standard of review, *see American Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987)). EPIC's argument that FAA has violated section 332 is, therefore, beside the point. *See* EPIC Br. 47-52.

In any event, petitioner's contention that the development of a "comprehensive" plan committed FAA to engage in rulemaking fundamentally misapprehends the nature of the comprehensive plan and the Secretary's statements in the plan that refer to privacy. Section 332(a) of the Modernization Act required the Secretary of Transportation to develop—in consultation with representatives of the aviation industry, federal agencies that employ unmanned aircraft systems technology in the national airspace, and the unmanned aircraft systems industry—a "comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." *See* Modernization Act § 332(a)(1). That mandate included specific directions regarding the contents of the plan, none of which required consideration of the privacy implications of unmanned aircraft systems operations. *See id.* § 332(a)(2). The Secretary's plan was therefore

comprehensive in the way Congress intended: it addressed those issues necessary for the safe integration of unmanned aircraft systems into the national airspace. *See* EPIC Br. 41-42.

That the Secretary's comprehensive plan recognizes the privacy issues that may be heightened by the unique capabilities of unmanned aircraft systems does not change the analysis. *See* EPIC Br. 29, 44. In engaging in a thorough discussion of unmanned aircraft systems, the Secretary included a figure describing "Safety, Privacy, Civil Rights, Civil Liberties & Security." JA 183. But that discussion expressly contemplates that the Secretary will work with interagency partners to address those issues and did not commit the Secretary to engage in rulemaking. Indeed, under petitioner's expansive reading of the Modernization Act and comprehensive plan, FAA could regulate, without limitation, any subject matter area, regardless of whether it is addressed in the Modernization Act and regardless of its connection to aviation safety, including the zoning, public health, and civil liberties implications of unmanned aircraft systems.

Contrary to EPIC's contention, FAA has not "shirked its statutory obligations" under the Modernization Act. EPIC Br. 47. As FAA explained, *see* 81 Fed. Reg. at 42,071, because of the complexities of integrating unmanned aircraft systems into the national airspace, the agency has decided to proceed on an incremental basis. Nothing in the Modernization Act forbids such an approach. *See* Modernization Act § 332(a)(2)(C)-(D) (contemplating a "phased-in approach to the integration of civil

unmanned aircraft systems"). Indeed, section 333, the provision relevant to this suit, is the first step in an incremental approach. *See* 81 Fed. Reg. at 42,073 (describing section 333 rule as prior to any section 332 rule). And section 332(b) itself contemplates multiple rulemakings. *See* Modernization Act § 332(b).

III. Taylor's Petition Should Be Denied.

Petitioner Taylor brings his petition as an individual who operates unmanned aircraft systems for recreational purposes. As set forth above, the rule challenged in this case touches upon model aircraft to a very limited extent. Part 107 expressly excepts from its scope those unmanned aircraft operations that satisfy the definition and operational limitations of "model aircraft" set forth in section 336. In implementing section 336, 14 C.F.R. §§ 101.41 and 107.1(b)(2) provide that Part 107 does not apply to the operation of an unmanned aircraft if the aircraft is "flown strictly for hobby or recreational use"; is "operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization"; weighs less than 55 pounds; and "does not interfere with and gives way to any manned aircraft." The remote pilot of the aircraft must also provide notice to an airport operator when the aircraft is flown within five miles of an airport. 14 C.F.R. § 101.41(e). Part 101 precisely mirrors the model aircraft definition and operating limitations Congress set forth in section 336 of the Modernization Act. With respect to such model aircraft operations, "FAA cannot impose additional

regulations." 81 Fed. Reg. at 42,081. And FAA recognized in the final rule that it cannot "make those aircraft subject to the provisions of part 107." *Id.*[5]

The only regulation of Part 101 model aircraft found in the challenged rule provides that "[n]o person may operate model aircraft so as to endanger the safety of the national airspace system." 14 C.F.R. § 101.43. FAA promulgated this regulation pursuant to the authority reserved to it in section 336(b) of the Modernization Act, which provides that—despite other limitations on rulemaking with respect to model aircraft—FAA retains the authority "to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system." Modernization Act § 336(b). Petitioner does not appear to challenge this regulation.

A. Petitioner Taylor lacks standing to assert some of his claims.

Petitioner John Taylor asserts standing in this Court based on his operation of unmanned aircraft systems for recreational purposes. Taylor Br. 10; Standing Addendum i-ii. Although Taylor likely has sufficiently described an injury in fact, a number of his arguments concern requirements that arise out of the Modernization Act itself and could therefore not be redressed by any order with respect to the final

[5] In passing, petitioner Taylor argues that the regulation describing which model aircraft are not subject to part 107 violates Section 336(a)'s prohibition on rulemaking. Taylor Br. 24. This argument is without merit. The rule precisely copies the statutory requirements to explain which aircraft part 107 does *not* apply to. The agency is not barred from explaining to the public the scope of its rule; indeed, elsewhere in his brief petitioner urges that FAA should have done more to interpret the Modernization Act.

rule. For example, petitioner argues that he should not have to notify an airport when operating within five miles of the airport in order to operate as a Part 101 model aircraft. Taylor Br. 47. But that requirement stems from the Modernization Act itself, not from the final rule. Nor does Taylor have standing to challenge any of the Part 107 rules to the extent his operations are Part 101 model aircraft, because Part 107 expressly does not apply to those operations. Thus, the question of whether FAA has authority generally to regulate Part 101 model aircraft is irrelevant to this suit.

Taylor does allege, however, that he would like to engage in recreational unmanned aircraft operations that do not fall within Part 101. Taylor Br. 10; Standing Addendum i-ii. He urges that Part 107 may not permissibly apply to such operations and thus challenges 14 C.F.R. § 107.1(b)(2). Although that argument is meritless, if this Court were to agree with petitioner, a modification of the final rule would redress the alleged injury. Petitioner also alleges that he is injured by the final rule's failure to interpret the terms of the Modernization Act concerning "model aircraft." Such an alleged injury is theoretically redressable by an order directing the agency to engage in an interpretive model aircraft rulemaking within the section 333 rulemaking.

B. Petitioner Taylor's challenge to the regulation of small unmanned aircraft operated for recreational purposes—but not falling within Part 101—lacks merit.

1. Petitioner's argument that FAA may not apply the final rule to unmanned aircraft being operated for recreational purposes, but not meeting the requirements of 14 C.F.R. § 101.41, fails. Petitioner urges that he may wish to operate his unmanned

aircraft as a hobby, but not bring those operations within the bounds of section 336(a) and 14 C.F.R. § 101.41. For example, petitioner might wish to operate his unmanned aircraft outside a community based organization. *See* 14 C.F.R. § 101.41. Such operations would be subject to Part 107, even though performed as a hobby. Although Taylor himself did not comment on the rulemaking, other commenters did recommend to FAA that certain recreational uses of unmanned aircraft should be subject to reduced regulation. *See* 81 Fed. Reg. at 42,081.

Petitioner's unsupported assertion that unmanned aircraft systems operated for recreational purposes do not "affect navigable airspace or air commerce" and therefore pose no safety risks is without basis in law or logic. *See* Taylor Br. 8, 38-39.[6] As FAA explained, the final rule was designed to mitigate two primary safety concerns: (1) unmanned aircraft interference with other aircraft in the national airspace; and (2) loss of positive control that would result in injuries to persons or property on the ground. *See* 81 Fed. Reg. at 42,180. As FAA explained in response to the comments, "[t]here is no data indicating that a small [unmanned aircraft system] operation whose operational parameters raise the safety risks addressed by Part 107 would become safer simply as a result of being conducted for recreational purposes

[6] Petitioner's reliance on *United States v. Causby*, 328 U.S. 256, 264 (1946), is misplaced. Taylor Br. 39. Petitioner here complains about the regulation of activities occurring on his property, not the taking of his property for a public use or a physical trespass on his property. That model aircraft are advised to fly no higher than 400 feet is a safety measure, not a recognition of a law-free zone below 400 feet. *See* Taylor Br. 39 n.20.

. . . the FAA declines the request to apply the terms of section 336 beyond the statutory criteria specified in that section." *Id.* at 42,081. Put simply, the purpose of the operation of an unmanned aircraft, whether hobby or commercial, has no meaningful bearing on the risks posed by the unmanned aircraft operation.

Petitioner's argument that FAA is prohibited from regulating recreational uses of unmanned aircraft that fall outside Part 101 founders on the text of the Modernization Act. *See* Taylor Br. 6. In section 336 of the Act, Congress carved out a discrete category of model aircraft operations and stated that, as to those operations, FAA could not promulgate new rules or regulations. Modernization Act § 336(a). That carveout confirms FAA's authority to regulate all other unmanned aircraft, including those operated for recreational purposes.

2. As explained, petitioner lacks standing to challenge the final rule to the extent his operations fall within the model aircraft operations described in 14 C.F.R. § 101.41 and section 336(a) of the Modernization Act. This Court need not decide, therefore, the scope of FAA's background authority to regulate model aircraft.

In any event, FAA does have authority to regulate model aircraft more broadly. Congress has charged FAA with promoting safe flight and ensuring safe and efficient use of the national airspace through, among other things, "prescrib[ing] air traffic regulations on the flight of aircraft." 49 U.S.C. §§ 40103(b), 44701. Federal law defines

"aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air." *See id.* § 40102(a)(6).[7]

The FAA Modernization Act creates a subset of "aircraft," called "model aircraft," that are "unmanned aircraft" capable of sustained flight in the atmosphere; flown within visual line of sight of the person operating the aircraft; and flown for hobby or recreational purposes. Modernization Act § 336(c). Because "model aircraft," as defined in the Modernization Act, are plainly "contrivance[s] invented, used, or designed to navigate, or fly in, the air," 49 U.S.C. § 40102(a)(6), model aircraft are subject to regulation by FAA as "aircraft." *See* 80 Fed. Reg. 78,594, 78,599 (Dec. 16, 2015); *see also Huerta v. Pirker*, No. CP-217, 2014 WL 8095629, at *11 (Nov. 17, 2014) (affirming that model aircraft are "aircraft").

It has long been FAA's position that the statutory term "aircraft" includes unmanned aircraft, whether operated recreationally or commercially. *See* 79 Fed. Reg. at 36,172 ("Historically, the FAA has considered model aircraft to be aircraft that fall within the statutory and regulatory definitions of an aircraft, as they are contrivances or devices that are 'invented, used, or designed to navigate, or fly in, the air.'"); *see also* 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007) ("The current FAA policy for [unmanned aircraft system] operations is that no person may operate [an unmanned aircraft

[7] Petitioner asserts that the definition of "aircraft" is unconstitutionally vague. Taylor Br. 54-55. But a term is not vague just because it is broad. In any event, any injury stemming from that claim relates not the to the final rule before this Court, but the statute.

system] in the National Airspace System without specific authority [from FAA]. . . . [F]or model aircraft the authority is AC 91-57."). Because the meaning of the statute is clear, and model aircraft fall within the statute's plain terms, petitioner's discussion of his view that the agency has changed position is misplaced, even assuming he had standing to make this argument here. *See* Taylor Br. 30-33, 42-44.

The fact that recreationally operated unmanned aircraft are "aircraft" does not conflict with other regulatory provisions. *See* Taylor Br. 36-38; 41-46. Certain of FAA's regulations for manned aircraft cannot apply by their terms to unmanned aircraft; others would be overly burdensome to apply to unmanned aircraft. Indeed, that is the reason for the Part 107 rule. And as to Part 101 model aircraft, FAA has explained in interpretive guidance what regulations could apply. *See, e.g.*, *Interpretation of the Special Rule for Model Aircraft*, 79 Fed. Reg. at 36,175-76 (citing particular regulations that would commonly apply to model aircraft operations).

Petitioner also argues that the Modernization Act creates a distinction among "civil aircraft" (commercially operated aircraft subject to FAA regulation), "public aircraft" (aircraft owned and operated by the government), and "model aircraft," which he asserts are not "aircraft." Taylor Br. 34-36. In addition to not grappling with the plain text of the statutory definition of "aircraft" in 49 U.S.C. § 40102(a)(6), this argument ignores the statutory definitions of "public aircraft" and "civil aircraft." *See* 49 U.S.C. §§ 40102(a)(16), (41), 40125. The definition of "civil aircraft," which is any

aircraft other than a public aircraft, remains unchanged by the Modernization Act. *See* Modernization Act §§ 331-336. [8]

C. FAA was not required to further interpret the provisions of Section 336 of the Modernization Act in this rulemaking.

Petitioner argues that the terms of section 336(a) of the Modernization Act are so vague that it was unlawful for FAA to use those terms in 14 C.F.R. § 101.41 when explaining which model aircraft operations were not subject to Part 107. That argument lacks merit.

FAA responded to comments seeking further interpretation of the category of model aircraft operations described in section 336(a). *See* 81 Fed. Reg. at 42,082. As FAA explained, those issues were beyond the scope of the rulemaking, and the agency had, in any event, interpreted those terms through a separate regulatory action, the *Interpretation of the Special Rule for Model Aircraft*. As FAA noted, that rule was published in June 2014 and received over 33,000 public comments. *Id.* "The FAA is currently considering the issues raised by these commenters." *Id.* Thus, to consider these issues in the Part 107 rulemaking would have been "duplicative" of those efforts. *Id.*

Thus, petitioner errs in arguing that FAA was required to further describe what it means for an aircraft to be operated in accordance with community-based

[8] Petitioner correctly notes that FAA sometimes uses the term "civil aircraft" as shorthand for aircraft flown commercially, rather than for other purposes. Taylor Br. 35 n.18. But FAA shorthand is not an interpretation of the statutory definitions in 49 U.S.C. § 40102, and when FAA uses the term "civil aircraft" in the final rule, it refers to the statutory definition.

standards. Taylor Br. 49-51, 57-58; Modernization Act § 336(a). As FAA explained, further interpretations of section 336(a) were beyond the scope of the final rule, and any lack of clarity in that definition is attributable to congressional action, not the rule challenged here.

D. Even assuming he had standing to raise them, petitioner Taylor's remaining arguments are meritless.

At various points in his brief, petitioner attempts to challenge FAA's treatment of Part 101 model aircraft. *See* Taylor Br. 24-26, 41-46. But the treatment of Part 101 model aircraft is not the subject of the final rule, except to the extent that the final rule prohibits operations that endanger the national airspace. *See* 14 C.F.R. § 101.41.

Similarly unpersuasive are petitioner's objections to the airport notice requirement for Part 101 model aircraft. *See* Taylor Br. 9, 47-49. Petitioner complains that section 101.41(e) "requires recreational model aircraft operators to notify airports within five miles of any anticipated operation." Taylor Br. 47. This is incorrect. The final rule does not impose any such requirement; rather it excepts from Part 107 any operation so conducted. Petitioner is correct that FAA did not require Part 107 operators to notify airports, because FAA did not view such a requirement as significantly enhancing the safety of the national airspace system. *See* Taylor Br. 48

(citing 81 Fed. Reg. at 42, 149). But that has no bearing on the congressionally defined category of Part 101 model aircraft, which FAA cannot alter.[9]

A similar error underlies petitioner's reliance on the Paperwork Reduction Act. The Paperwork Reduction Act, 44 U.S.C. § 3507(a), provides that "[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information" the agency complies with certain procedural steps. And "no person shall be subject to any penalty for failing to comply with a collection of information" unless the requisite procedure are followed. *Id.* at § 3512(a).

In its final rule, FAA addressed the Paperwork Reduction Act as it relates to submission of applications for a remote pilot certificate, accident reporting, application for a certificate of waiver, and reporting of deviations from Part 107. Petitioner contends that the rule is unlawful because FAA did not address the "collection of information" that occurs in the B4UFLY application and when a model aircraft operator notifies an airport of his or her intent to fly within five miles of the airport. Taylor Br. 27-28. But neither of those items is the subject of the final rule, so it is quite sensible that FAA declined to address them in the rule at issue here.

[9] "Model aircraft" are capable of sustained flight in the atmosphere. Modernization Act § 336(c). Petitioner's paper airplane example is therefore unpersuasive. Taylor Br. 48.

In any event, with respect to the B4UFLY application, the Office of Management and Budget (OMB) approved the collection of information, and OMB issued a control number (2120-0764). *See* www.reginfo.gov/public/doPRAViewOCR?ref_nbr=201602-2120-001. And, as a final matter, neither petitioner nor any other commenter raised any alleged deficiencies in the Paperwork Reduction Act notice. Any such arguments would therefore be waived. *See National Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, the petition for review in Case No. 16-1297 should be dismissed, or in the alternative, denied, and the petition for review in Case No. 16-1302 should be dismissed in part and denied in part.

Respectfully submitted,

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APRIL 2017

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,056 words, according to the count of Microsoft Word.

s/ *Abby C. Wright*
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Abby C. Wright*
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ADDENDUM

Table of Contents

FAA Modernization and Reform Act of 2012

Subtitle B—Unmanned Aircraft Systems

SEC. 331. DEFINITIONS.

In this subtitle, the following definitions apply:

(1) ARCTIC.—The term "Arctic" means the United States zone of the Chukchi Sea, Beaufort Sea, and Bering Sea north of the Aleutian chain.

(2) CERTIFICATE OF WAIVER; CERTIFICATE OF AUTHORIZATION.—The terms "certificate of waiver" and "certificate of authorization" mean a Federal Aviation Administration grant of approval for a specific flight operation.

(3) PERMANENT AREAS.—The term "permanent areas" means areas on land or water that provide for launch, recovery, and operation of small unmanned aircraft.

(4) PUBLIC UNMANNED AIRCRAFT SYSTEM.—The term "public unmanned aircraft system" means an unmanned aircraft system that meets the qualifications and conditions required for operation of a public aircraft (as defined in section 40102 of title 49, United States Code).

(5) SENSE AND AVOID CAPABILITY.—The term "sense and avoid capability" means the capability of an unmanned aircraft to remain a safe distance from and to avoid collisions with other airborne aircraft.

(6) SMALL UNMANNED AIRCRAFT.—The term "small unmanned aircraft" means an unmanned aircraft weighing less than 55 pounds.

(7) TEST RANGE.—The term "test range" means a defined geographic area where research and development are conducted.

(8) UNMANNED AIRCRAFT.—The term "unmanned aircraft" means an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft.

(9) UNMANNED AIRCRAFT SYSTEM.—The term "unmanned aircraft system" means an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system.

SEC. 332. INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS INTO NATIONAL AIRSPACE SYSTEM.

(a) REQUIRED PLANNING FOR INTEGRATION.—

(1) COMPREHENSIVE PLAN.—Not later than 270 days after the date of enactment of this Act, the Secretary of Transportation, in consultation with representatives of the aviation industry, Federal agencies that employ unmanned aircraft systems technology in the national airspace system, and the unmanned aircraft systems industry, shall develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system.

(2) CONTENTS OF PLAN.—The plan required under paragraph (1) shall contain, at a minimum, recommendations or projections on—

(A) the rulemaking to be conducted under subsection (b), with specific recommendations on how the rulemaking will—

(i) define the acceptable standards for operation and certification of civil unmanned aircraft systems; (ii) ensure that any civil unmanned aircraft system includes a sense and avoid capability; and (iii) establish standards and requirements for the operator and pilot of a civil unmanned aircraft system, including standards and requirements for registration and licensing;

(B) the best methods to enhance the technologies and subsystems necessary to achieve the safe and routine operation of civil unmanned aircraft systems in the national airspace system;

(C) a phased-in approach to the integration of civil unmanned aircraft systems into the national airspace system;

(D) a timeline for the phased-in approach described under subparagraph (C);

(E) creation of a safe

(F) airspace designation for cooperative manned and unmanned flight operations in the national airspace system;

(G) establishment of a process to develop certification, flight standards, and air traffic requirements for civil unmanned aircraft systems at test ranges where such systems are subject to testing;

(H) the best methods to ensure the safe operation of civil unmanned aircraft systems and public unmanned aircraft systems simultaneously in the national airspace system;

and

(I) incorporation of the plan into the annual NextGen Implementation Plan document (or any successor document) of the Federal Aviation Administration.

(3) DEADLINE.—The plan required under paragraph (1) shall provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015.

(4) REPORT TO CONGRESS.—Not later than 1 year after the date of enactment of this Act, the Secretary shall submit to Congress a copy of the plan required under paragraph (1).

(5) ROADMAP.—Not later than 1 year after the date of enactment of this Act, the Secretary shall approve and make available in print and on the Administration's Internet Web site a 5-year roadmap for the introduction of civil unmanned aircraft systems into the national airspace system, as coordinated by the Unmanned Aircraft Program Office of the Administration. The Secretary shall update the roadmap annually.

(b) RULEMAKING.—Not later than 18 months after the date on which the plan required under subsection (a)(1) is submitted to Congress under subsection (a)(4), the Secretary shall publish in the Federal Register—

(1) a final rule on small unmanned aircraft systems that will allow for civil operation of such systems in the national airspace system, to the extent the systems do not meet the requirements for expedited operational authorization under section

333 of this Act;

(2) a notice of proposed rulemaking to implement the recommendations of the plan required under subsection (a)(1), with the final rule to be published not later than 16 months after the date of publication of the notice; and

(3) an update to the Administration's most recent policy statement on unmanned aircraft systems, contained in Docket No. FAA–2006–25714.

(c) PILOT PROJECTS.—

(1) ESTABLISHMENT.—Not later than 180 days after the date of enactment of this Act, the Administrator shall establish a program to integrate unmanned aircraft systems into the national airspace system at 6 test ranges. The program shall terminate 5 years after the date of enactment of this Act.

(2) PROGRAM REQUIREMENTS.—In establishing the program under paragraph (1), the Administrator shall—

(A) safely designate airspace for integrated manned and unmanned flight operations in the national airspace system;

(B) develop certification standards and air traffic requirements for unmanned flight operations at test ranges;

(C) coordinate with and leverage the resources of the National Aeronautics and Space Administration and the Department of Defense;

(D) address both civil and public unmanned aircraft systems;

(E) ensure that the program is coordinated with the Next Generation Air Transportation System; and

(F) provide for verification of the safety of unmanned aircraft systems and related navigation procedures before integration into the national airspace system.

(3) TEST RANGE LOCATIONS.—In determining the location of the 6 test ranges of the program under paragraph (1), the Administrator shall—

(A) take into consideration geographic and climatic diversity;

(B) take into consideration the location of ground infrastructure and research needs; and

(C) consult with the National Aeronautics and Space Administration and the Department of Defense.

(4) TEST RANGE OPERATION.—A project at a test range shall be operational not later than 180 days after the date on which the project is established.

(5) REPORT TO CONGRESS.—

(A) IN GENERAL.—Not later than 90 days after the date of the termination of the program under paragraph (1), the Administrator shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure and the Committee on Science, Space, and Technology of the House of Representatives a report setting forth the Administrator's findings and conclusions concerning the projects.

(B) ADDITIONAL CONTENTS.—The report under subparagraph (A) shall include a description and assessment of the progress being made in establishing special use airspace to fill the immediate need of the Department of Defense—

(i) to develop detection techniques for small unmanned aircraft systems; and

(ii) to validate the sense and avoid capability and operation of unmanned aircraft systems.

(d) EXPANDING USE OF UNMANNED AIRCRAFT SYSTEMS IN ARCTIC.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Secretary shall develop a plan and initiate a process to work with relevant Federal agencies and national and international communities to designate permanent areas in the Arctic where small unmanned aircraft may operate 24 hours per day for research and commercial purposes. The plan for operations in these permanent areas shall include the development of processes to facilitate the safe operation of unmanned aircraft beyond line of sight. Such areas shall enable over-water flights from the surface to at least 2,000 feet in altitude, with ingress and egress routes from selected coastal launch sites.

(2) AGREEMENTS.—To implement the plan under paragraph (1), the Secretary may enter into an agreement with relevant national and international communities.

(3) AIRCRAFT APPROVAL.—Not later than 1 year after the entry into force of an agreement necessary to effectuate the purposes of this subsection, the Secretary shall work with relevant national and international communities to establish and implement

a process, or may apply an applicable process already established, for approving the use of unmanned aircraft in the designated permanent areas in the Arctic without regard to whether an unmanned aircraft is used as a public aircraft, a civil aircraft, or a model aircraft.

SEC. 333. SPECIAL RULES FOR CERTAIN UNMANNED AIRCRAFT SYSTEMS.

(a) IN GENERAL.—Notwithstanding any other requirement of this subtitle, and not later than 180 days after the date of enactment of this Act, the Secretary of Transportation shall determine if certain unmanned aircraft systems may operate safely in the national airspace system before completion of the plan and rulemaking required by section 332 of this Act or the guidance required by section 334 of this Act.

(b) ASSESSMENT OF UNMANNED AIRCRAFT SYSTEMS.—In making the determination under subsection (a), the Secretary shall determine, at a minimum—

(1) 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; and

(2) whether a certificate of waiver, certificate of authorization, or airworthiness certification under section 44704 of title 49, United States Code, is required for the operation of unmanned aircraft systems identified under paragraph (1).

(c) REQUIREMENTS FOR SAFE OPERATION.—If the Secretary determines under this section that certain unmanned aircraft systems may operate safely in the national airspace system, the Secretary shall establish requirements for the safe operation of such aircraft systems in the national airspace system.

….

SEC. 336. SPECIAL RULE FOR MODEL AIRCRAFT.

(a) In General.--Notwithstanding any other provision of law relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies, including this subtitle, the Administrator of the Federal Aviation Administration may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft, if--

(1) the aircraft is flown strictly for hobby or recreational use;

(2) the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;

(3) the aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;

(4) the aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and

(5) when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually-agreed upon operating procedure with the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport)).

(b) Statutory Construction.--Nothing in this section shall be construed to limit the authority of the Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system.

(c) Model Aircraft Defined.--In this section, the term ``model aircraft'' means an unmanned aircraft that is--

(1) capable of sustained flight in the atmosphere;

(2) flown within visual line of sight of the person operating the aircraft; and

(3) flown for hobby or recreational purposes.

49 U.S.C. § 40103

(a) Sovereignty and public right of transit.--(1) The United States Government has exclusive sovereignty of airspace of the United States.
(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.
(b) Use of airspace.--(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.
(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for--
(A) navigating, protecting, and identifying aircraft;
(B) protecting individuals and property on the ground;
(C) using the navigable airspace efficiently; and
(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.
(3) To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator, in consultation with the Secretary of Defense, shall--
(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and
(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.
(4) Notwithstanding the military exception in section 553(a)(1) of title 5, subchapter II of chapter 5 of title 5 applies to a regulation prescribed under this subsection.
(c) Foreign aircraft.--A foreign aircraft, not part of the armed forces of a foreign country, may be navigated in the United States as provided in section 41703 of this title.

(d) Aircraft of armed forces of foreign countries.--Aircraft of the armed forces of a foreign country may be navigated in the United States only when authorized by the Secretary of State.

(e) No exclusive rights at certain facilities.--A person does not have an exclusive right to use an air navigation facility on which Government money has been expended. However, providing services at an airport by only one fixed-based operator is not an exclusive right if--

(1) it is unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide the services; and

(2) allowing more than one fixed-based operator to provide the services requires a reduction in space leased under an agreement existing on September 3, 1982, between the operator and the airport.

49 U.S.C. § 44701

(a) Promoting safety.--The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing--

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for--

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards.--The Administrator may prescribe minimum safety standards for--

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents.--The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.--When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall--

(1) consider--

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and
(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.
(e) Bilateral exchanges of safety oversight responsibilities.--
(1) In general.--Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).
(2) Relinquishment and acceptance of responsibility.--The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.
(3) Conditions.--The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.
(4) Registered aircraft defined.--In this subsection, the term "registered aircraft" means--
(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and
(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.
(f) Exemptions.--The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections

44702-44716 of this title if the Administrator finds the exemption is in the public interest.

14 C.F.R. § 101.41

This subpart prescribes rules governing the operation of a model aircraft (or an aircraft being developed as a model aircraft) that meets all of the following conditions as set forth in section 336 of Public Law 112–95:
(a) The aircraft is flown strictly for hobby or recreational use;
(b) The aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;
(c) The aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;
(d) The aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
(e) When flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation.

14 C.F.R. § 107.1

(a) Except as provided in paragraph (b) of this section, this part applies to the registration, airman certification, and operation of civil small unmanned aircraft systems within the United States.
(b) This part does not apply to the following:
(1) Air carrier operations;
(2) Any aircraft subject to the provisions of part 101 of this chapter; or
(3) Any operation that a remote pilot in command elects to conduct pursuant to an exemption issued under section 333 of Public Law 112–95, unless otherwise specified in the exemption.