[NOT YET SCHEDULED FOR ORAL ARGUMENT]
NO. 15-1075

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,
Administrator of the Federal Aviation Administration; and
ANTHONY FOXX, Secretary of Transportation,

Respondents.

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

BRIEF FOR 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 is the petitioner. The Federal Aviation Administration (FAA), Michael P. Huerta, Administrator, and Anthony Foxx, Secretary of Transportation, are respondents. There are no intervenors or amici.

B. Ruling Under Review

Petitioner seeks review of FAA's November 26, 2014, dismissal of petitioner's request to initiate rulemaking.

C. Related Cases

Counsel is aware of no 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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GLOSSARY

APA	Administrative Procedure Act
Department	Department of Transportation
FAA	Federal Aviation Administration
JA	Joint Appendix
Modernization Act	FAA Modernization and Reform Act of 2012
Pet. Br.	Petitioners' Brief

STATEMENT OF JURISDICTION

This Court has jurisdiction under 49 U.S.C. § 46110.

STATEMENT OF THE ISSUE

Petitioner challenges the FAA's dismissal of its request to initiate rulemaking to impose privacy restrictions on operators of unmanned aircraft systems. Petitioner filed its suit more than sixty days after the FAA dismissed its request for rulemaking. The questions before this Court are:

1. Whether the petition for review should be dismissed because petitioner has demonstrated no reasonable grounds for its failure to file suit within sixty days of the FAA's dismissal of its rulemaking petition;
2. If this Court reaches the merits of petitioner's challenge, whether the FAA reasonably determined not to initiate the requested rulemaking.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

1. Congress has charged the FAA with protecting the safety and efficient use of the national airspace system. *See* 49 U.S.C. §§ 40103, 44701. This case concerns the operation of "unmanned aircraft," which are defined as "aircraft that [are] operated without the possibility of direct human intervention from within or on the aircraft." *See* Pub. L. No. 112-95, § 331(8) (2012). An "unmanned aircraft system" (commonly known as a "drone") is the term used to describe an unmanned aircraft and the

"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). These aircraft vary greatly in size: some are the size and weight of small birds, while others have wingspans of hundreds of feet and weigh tens of thousands of pounds. *See* FAA, Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007).

In 2012, Congress enacted the FAA Modernization and Reform Act, Pub. L. No. 112-95, 126 Stat. 11 (Modernization Act). Congress directed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." Pub. L. No. 112-95, § 332(a)(1). The Modernization Act also requires the FAA to conduct rulemaking proceedings to "implement the recommendations of the plan." *Id.* § 332(b). With respect to small unmanned aircraft systems, the Modernization Act directed the Secretary of Transportation 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." *Id.* § 333. The Modernization Act did not direct either the Secretary or the FAA Administrator to consider privacy issues in its rulemaking for small unmanned aircraft systems.

2. In 2012, following enactment of the Modernization Act, petitioner sent the FAA a letter requesting the agency to initiate notice-and-comment rulemaking to address "the threat to privacy and civil liberties that will result from the deployment of aerial drones within the United States." JA 2, 6. The petition noted the increased use of unmanned aircraft systems by individuals and law enforcement agencies, JA 2-4, and requested that the FAA "assess the privacy problems associated with the highly intrusive nature of drone aircraft, and the ability of operators to gain access to private areas and to track individuals over large distances," JA 5.

The FAA denied petitioner's request on November 26, 2014, under 14 C.F.R. § 11.73. JA 12-13. The FAA explained that it must prioritize its rulemaking projects and that "after reviewing [petitioner's] request," it had concluded that "the issue [petitioner] raised is not an immediate safety concern." JA 12. The FAA further explained that it had begun a rulemaking to address small unmanned aircraft systems and that it would consider petitioner's comments as part of that rulemaking process. *Id.* In the conclusion of the letter, FAA confirmed that it was "dismissing [the] petition for rulemaking." JA 13.

3. In February 2015, the Secretary and the Administrator issued a notice of proposed rulemaking entitled "Operation and Certification of Small Unmanned Aircraft Systems" as part of its incremental approach to rulemaking to safely integrate small unmanned aircraft systems into the national airspace system as required under sections 332 and 333 of the Modernization Act. 80 Fed. Reg. 9544 (Feb. 23, 2015), JA

14. The proposed rule sets out a number of proposed requirements for small unmanned aircraft systems. 80 Fed. Reg. at 9546. For example, consistent with the definition in section 331(6) of Public Law 112-95, the FAA proposed to define a small unmanned aircraft as weighing less than 55 pounds, including everything on board the aircraft. *Id.* The FAA also proposed that small unmanned aircraft be operated only during the day and within the visual line of sight of the operator or visual observer. *Id.* at 9559-61. And the 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.

As relevant here, the FAA acknowledged in its notice of proposed rulemaking that privacy concerns had been raised regarding unmanned aircraft operations and noted its ongoing participation in an interagency, multi-stakeholder engagement process to address those concerns. *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, JA 133. The 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 Department invited a broad range of comments on its proposed rule, and petitioner submitted a comment. *See* Comments of the Elec. Pr. Inf. Ctr., Dkt. ID FAA-2015-0150-4314, http://www.regulations.gov/#!documentDetail;D=FAA-

2015-0150-4314 (Petitioner Comments). The Department is currently in the process of drafting a final rule and responding to the comments it received on the proposed small unmanned aircraft systems rule.

SUMMARY OF ARGUMENT

I. Congress has provided that a person aggrieved by a final order of the FAA must file a petition for review within sixty days. Here, the FAA denied petitioner's request to initiate rulemaking in a letter dated November 26, 2014. Accordingly, the deadline for seeking judicial review of that denial was January 26, 2015. But the petition for review in this case was not filed until March 31, and petitioner has provided no reasonable grounds to excuse its delay in seeking judicial review. The petition should therefore be dismissed as untimely.

Petitioner contends that the FAA's November 2014 letter did not dismiss petitioner's request for rulemaking, but instead deferred decision on that request for consideration in the agency's small unmanned aircraft systems rulemaking. But that rulemaking has not been completed, and the Department has therefore yet to issue a final rule giving rise to legal consequences. Any challenge to the small unmanned aircraft systems rulemaking would thus be premature and should be dismissed on that ground.

II. Even if this Court were to reach the merits of petitioner's challenge, petitioner could not succeed. Congress has charged the FAA with maintaining the safety and efficiency of our national airspace. The FAA's primary duty, therefore, is to

regulate aviation safety. Contrary to petitioner's contention, Congress's enactment in 2012 of the Modernization Act did not fundamentally alter the FAA's core duties. Nothing in that statute directs the FAA or the Department to issue regulations to protect individual privacy interests with respect to the use of cameras and other recording equipment that may be installed on unmanned aircraft systems. The FAA has reasonably determined that, rather than initiate rulemaking at this time, it will continue to participate in an established interagency, multi-stakeholder engagement process designed specifically to address privacy, transparency and accountability issues relating to the commercial and private use of unmanned aircraft systems. The petition for review should therefore be denied, even if this Court reaches the merits of petitioner's challenge.

STANDARD OF REVIEW

This Court may "affirm, amend, modify, or set aside" a final order of the FAA. 49 U.S.C. § 46110. Challenges under 49 U.S.C. § 46110 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; *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. This Court Should Dismiss Petitioner's Untimely Suit.

A. Petitioner filed its petition for review more than sixty days after the FAA dismissed the rulemaking petition.

Under 49 U.S.C. § 46110, a person aggrieved by a final order of the FAA must file a petition for review within sixty days. The FAA denied petitioner's request to initiate rulemaking in a letter dated November 26, 2014; the deadline for seeking review of that denial was therefore January 26, 2015. Yet petitioner did not file a petition for review until March 31. This untimely suit should therefore be dismissed.

Petitioner's argument that the FAA did not dismiss its rulemaking petition is based on a misreading of the agency's November 2014 letter. The letter states unequivocally that the agency was "*dismissing* [the] petition for rulemaking in accordance with 14 C.F.R. § 11.73." JA 13 (emphasis added).

Petitioner's reliance on the FAA's statement that it had begun a rulemaking to address small unmanned aircraft systems and would consider petitioner's comments in that rulemaking process is misplaced. JA 12. That statement did not qualify the definitive agency determination "dismissing" the rulemaking petition, which came at the conclusion of the letter. It was not a deferral of a decision on petitioner's request for rulemaking; it was instead a freestanding invitation to participate in the ongoing rulemaking, which petitioner chose to do by submitting a detailed description of the privacy concerns it believes are implicated by use of unmanned aircraft systems. *See*

Petitioner Comments, Dkt. ID FAA-2015-0150-4314, http://www.regulations.gov/#!documentDetail;D=FAA-2015-0150-4314.

An examination of the relevant FAA regulation cited in the agency's letter underscores this point. Section 11.73 provides several enumerated actions the FAA may take in response to a rulemaking petition. 14 C.F.R. § 11.73. In determining the appropriate action to be taken, the FAA considers the immediacy of the safety or security concerns raised in the petition, the priority of other issues the FAA must address, and the resources it has available to address these issues. *Id.* § 11.73(a). The FAA may exercise its discretion to "dismiss [the] petition" based on these considerations. *Id.* 11.73(e). That is precisely what the FAA did here, expressly stating that it was "dismissing" the petition because the issue raised by petitioner was not an immediate safety concern. *See* JA 12-13.

Petitioner's suit is therefore untimely, and petitioner has provided no convincing explanation for its delay in filing suit. Petitioner invokes *Safe Extensions v. FAA*, 509 F.3d 593, 602-04 (D.C. Cir. 2007), but the timeliness issue in that case turned on a factual dispute regarding the content of oral statements by FAA employees to Safe Extensions employees with respect to the tentativeness of an advisory circular. Here, in contrast, the FAA unequivocally dismissed the rulemaking petition, and petitioner has presented no reasonable grounds for its delay in challenging that dismissal. *Cf. Americopters, LLC v. FAA*, 441 F.3d 726, 734 (9th Cir.

2006) ("To be sure, idleness did not cause [petitioners] to miss their deadlines. But their quixotic pursuit of the wrong remedies was not a reasonable ground for delay."); *New York Republican State Comm. v. SEC*, 799 F.3d 1126, 1129-30 (D.C. Cir. 2015) ("[I]f the plaintiffs were uncertain about where and when to file their suit, our precedent gives precise instructions about what to do. The proper course for the plaintiffs to protect their rights was to file a petition with this court within sixty days of the rule's issuance.").

Petitioner has therefore failed to advance any "reasonable grounds" for delay sufficient to excuse its untimely filing. 49 U.S.C. § 46110. Petitioner's suit should therefore be dismissed.

B. Even if the FAA had deferred decision on petitioner's request for rulemaking, petitioner's suit is still not properly before this Court because the small unmanned aircraft systems rulemaking is not complete.

Petitioner contends that the FAA did not deny its rulemaking petition under 14 C.F.R. § 11.73(e) (providing that the FAA may dismiss a rulemaking petition), but rather subsumed it into the ongoing small unmanned aircraft systems rulemaking under 11.73(c) (providing that the FAA will not treat the rulemaking petition as a separate action when a rulemaking on the same topic has begun). Pet. Br. 17. This cannot be squared with the language of the letter, which "dismissed" the petition, *see supra* p. 7, nor can it rescue petitioner's suit, as a challenge under such a theory would be premature and still subject to dismissal.

Petitioner does not dispute that the small unmanned aircraft systems notice of proposed rulemaking is not itself a final order. *See Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438–39 (D.C. Cir. 1976) (discussing 49 U.S.C. § 1486, the predecessor to section 46110, and limiting its application to final orders); *Las Brisas Energy Center, LLC v. EPA*, 2012 WL 10939210 (Dec. 13, 2012) (unpublished) (granting motions to dismiss and explaining that "[t]he challenged proposed rule is not final agency action subject to judicial review"). Petitioner nonetheless contends that it may avoid the requirement of final agency action under 49 U.S.C. § 46110 by construing the notice of proposed rulemaking as a "denial" of its request for rulemaking.

Petitioner is incorrect. If the FAA had, in fact, consolidated petitioner's request for rulemaking with the ongoing rulemaking proceedings, petitioner would be required to wait for issuance of a final rule in order to challenge any perceived shortcomings in the FAA's response to its comments regarding privacy concerns. Indeed, in the final rule, which is forthcoming, the FAA intends to address petitioner's detailed comments with respect to the privacy interests that may be implicated by the use of cameras and recording equipment installed on small unmanned aircraft systems. Once the final rule issues, petitioner will have sixty days in which to seek judicial review of the agency's rulemaking. Petitioner may not, however, circumvent the finality requirement in section 46110 by construing a notice of proposed rulemaking as a denial of its separate rulemaking petition.

II. If This Court Reaches the Merits of Petitioner's Challenge, the Petition Should Be Denied Because FAA's Dismissal of Petitioner's Rulemaking Request Was Not Arbitrary and Capricious.

In this suit under 49 U.S.C. § 46110, the Court may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 49 U.S.C. § 46110. Where, as here, petitioner seeks review not of affirmative agency conduct but rather of a "[r]efusal[] to promulgate rules," an extremely deferential standard applies. *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); *see id.* (characterizing the court's review as "extremely limited' and 'highly deferential"). An agency's refusal to conduct rulemaking proceedings can be "overturned 'only in the rarest and most compelling of circumstances,'" *American Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981)), such as where the agency commits a "plain error[] of law," *id.* (quotation marks omitted). *See also, e.g., National Mining Ass'n v. Mine Safety & Health Admin.*, 599 F.3d 662, 667 (D.C. Cir. 2010) (agency's refusal to institute rulemaking is "at the high end of the range of levels of deference" that courts "give to agency action under [the APA's] 'arbitrary and capricious' review").

A. FAA reasonably declined to engage in a rulemaking regulating the use of cameras and other recording devices installed on unmanned aircraft systems.

FAA—the nation's aviation safety agency—quite reasonably decided that, rather than initiate a rulemaking addressing the privacy concerns that petitioner believes unmanned aircraft systems might raise, it would participate in an interagency, multi-stakeholder engagement process open to the public and designed specifically to consider privacy concerns associated with the use of certain recording equipment installed on unmanned aircraft systems. That reasonable choice contains no "plain error of law"; nor does it even approach "the rarest and most compelling of circumstances," in which this Court has reversed an agency's determination not to engage in rulemaking. *American Horse*, 812 F.2d at 5.

The 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. The 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." 49 U.S.C. § 44701(a). The core safety mission of the 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). The 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.

The FAA recognizes that the size and the unique characteristics and capabilities of small unmanned aircraft systems may pose risks to individual privacy. 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, the 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, an issue that does not implicate FAA's core function of ensuring aviation safety.

Moreover, 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 President directed the National Telecommunications and Information Administration to lead a multi-stakeholder

engagement process to develop a framework for privacy, accountability, and transparency for commercial and private use of unmanned aircraft systems. *See* Presidential Memorandum, Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015), JA 133; 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). The FAA is participating in the Administration's efforts, helping educate stakeholders and providing insight and expertise regarding aviation safety issues as relevant to the development of privacy policies for civil use of unmanned aircraft systems.

Given the FAA's core safety mission, its lack of unique expertise in the area of privacy, and its participation in the interagency process created by the President and designed to address privacy issues, the FAA's decision not to engage in a free-standing rulemaking to regulate particular uses of equipment installed on unmanned aircraft systems to protect individual privacy does not present "the rarest and most compelling of circumstances,' in which an agency's decision not to initiate rulemaking proceedings may be reversed. *American Horse*, 812 F.2d at 5.

B. Petitioner's arguments that the FAA was required to initiate a rulemaking addressing privacy are without merit.

Petitioner does not dispute that the FAA's core mission is aviation safety. But petitioner nonetheless urges that Congress has implicitly directed the FAA to regulate

operation of unmanned aircraft systems (in effect, the use of cameras and recording devices affixed to unmanned aircraft) to protect individual privacy. Though presented in a number of variations, petitioner's central contention is that because the Modernization Act directed FAA to create a comprehensive plan for the integration of unmanned aircraft systems into the national airspace system, and because that plan acknowledges privacy concerns, the FAA is required to initiate a rulemaking that protects individual privacy interests from the use of equipment that may be installed on unmanned aircraft systems.

Petitioner's contention fundamentally misapprehends the nature of the comprehensive plan and the Department'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; JA 75. 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). Indeed, none of the provisions of the Modernization Act concerning unmanned aircraft systems directed the Department or FAA to consider privacy issues when addressing the safe integration of small unmanned aircraft systems into the airspace.

The Department'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.

That the Department'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* Pet. Br. 27 (asserting that FAA has refused "to include the full range of important considerations identified by the agency" in the small unmanned aircraft systems proposed rule). In engaging in a thorough discussion of unmanned aircraft systems, the Department included a figure describing "Safety, Privacy, Civil Rights, Civil Liberties & Security." JA 81. But that discussion expressly contemplates that the Department will work with interagency partners to address those issues and did not commit the Department to engage in rulemaking. Indeed, under petitioner's expansive reading of the Modernization Act and comprehensive plan, the 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 environmental, zoning, public health, and civil liberties implications of unmanned aircraft systems.

Nor has the FAA "refused to publish" any "Congressionally Mandated Rulemaking Notice." Pet. Br. 28. As the FAA explained, JA 23, due to the complexities of integrating unmanned aircraft systems into the national airspace, the agency has decided to proceed on an incremental basis. *See* Modernization Act

§ 332(a)(2)(C)-(D) (contemplating a "phased-in approach to integration of civil unmanned aircraft systems"). In any event, that question is not properly before the Court. Petitioner did not seek to compel a rulemaking under section 332(b); this petition for review challenges the FAA's denial of petitioner's request for a rulemaking regulating unmanned aircraft systems with respect to privacy concerns.

Petitioner further contends that the FAA letter demonstrates that the agency misunderstands its statutory authority. Pet. Br. 31 (citing *Massachusetts v. EPA*, 549 U.S. at 528). But petitioner ignores that the petition was dismissed because the request did not pose an "immediate safety concern," a proposition which petitioner cannot seriously dispute, *see infra* p. 19-20.

Petitioner also asserts that unmanned aircraft systems cannot be safely integrated into the national airspace without privacy regulations. Petitioner urges that individuals may resort to "self-help" measures in the absence of FAA regulation, such as attempting to shoot down unmanned aircraft or resorting to geo-fencing, which prevents unmanned aircraft from entering certain airspace. Pet. Br. 56-57. 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. This highly attenuated connection does not demonstrate the kind of compelling

circumstance in which this Court will determine that an agency is required to engage in rulemaking.

C. FAA's letter dismissing petitioner's request for rulemaking satisfied the APA's "brief statement" requirement.

Petitioner contends that the FAA failed to adequately explain its decision to deny petitioner's rulemaking request. Pet. Br. 42. Petitioner's argument only underscores the jurisdictional problems with this petition for review. Petitioner (Pet. Br. 53) urges that the FAA's statement in its denial letter that privacy issues are not "an immediate safety concern" is inadequate under the APA and that its petition for review can be granted "for that reason alone." Pet. Br. 53. But petitioner's theory is that the notice of proposed rulemaking is the final agency action at issue here, not the FAA's November 2014 letter. Pet. Br. 17. And petitioner fares no better in criticizing FAA's statement in the notice of proposed rulemaking that it considered privacy concerns to be beyond the scope of the rulemaking. The FAA's statement reflected the fact that the rule was designed to "establish requirements for the safe operation" of unmanned aircraft systems in the national airspace. JA 16. The FAA's statements in the proposed rule were, by necessity, preliminary and made before consideration of the comments submitted during the rulemaking process. Petitioner has now commented on the proposed rule, and FAA will respond to petitioner's comments in the forthcoming final rule.

In any event, the FAA's November 2014 letter is the only final agency action at issue in this case, and, contrary to petitioner's assertions, the FAA provided a reasoned explanation for its dismissal of petitioner's rulemaking request. The APA requires only "a brief statement of the grounds for denial" of a rulemaking petition. 5 U.S.C. § 555(e). This Court has described this requirement as "minimal," *Butte County v. Hogen,* 613 F.3d 190, 194 (D.C. Cir. 2010), explaining that it "may even diminish[] the burden put on an agency by the APA's provision for judicial review." *Roelofs v. Secretary of Air Force,* 628 F.2d 594, 601 (D.C. Cir. 1980). To satisfy this requirement, an agency must simply make clear why it "chose to do what it did." *Amerijet Int'l, Inc. v. Pistole,* 753 F.3d 1343, 1350 (D.C. Cir. 2014).

The FAA's letter clearly explains the reason for the agency's decision: petitioner's invocation of the privacy concerns that may be raised by operation of recording devices on unmanned aircraft does not demonstrate an "immediate safety concern" under 14 C.F.R § 11.73. Petitioner provides no rebuttal to the FAA's reasonable conclusion that the widespread and diffuse privacy interests described by petitioner pose no immediate risk to aviation safety. *See* Pet. Br. 53-58. Petitioner focuses almost entirely on surreptitious surveillance and stalking behaviors and the threat those activities can pose to "personal security and integrity." Pet. Br. 53-54; *see also* Pet. Br. 55 (discussing potential for blackmail and extortion); Pet. Br. 58 (invoking the "right to enjoy life"). But the agency was not required to factor into its aviation safety analysis the possibility that individuals will choose to engage in such activities,

many of which are already illegal. And the concerns raised by surveillance and stalking are present whether that stalking occurs via an unmanned aircraft system or through any number of other means. *See* Pet. Br. 54; *see also* JA 81 ("[M]any states have laws that protect individuals from invasions of privacy which could be applied to intrusions committed by using [an unmanned aircraft system]."). That the FAA declined to regulate privacy concerns does not mean those concerns are not "important"; that they do not need to be addressed through an interagency process; or that operators of unmanned aircraft systems may ignore state and local privacy laws. *See* Pet. Br. 57 (describing "Know Before You Fly" guidance, which puts users on notice that state or local privacy laws could apply).

Petitioner's assertion that the FAA has changed course on privacy interests—and was therefore required to offer a more fulsome explanation of its dismissal—demonstrates a misreading of the record. *See* Pet. Br. 48-53. In support of its argument, petitioner points to examples in the record where the FAA has recognized that unmanned aircraft systems, because of their size and capabilities, may enhance privacy concerns. But nowhere in the record did the 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: environmental, national security, zoning, public health, civil liberties, privacy and others. But that does not mean that by recognizing that fact the FAA thereby takes on

the responsibility for regulating in these diverse areas of law. Instead, the FAA quite reasonably decided to engage in the interagency process led by the National Telecommunications and Information Administration. *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (February 15, 2015), JA 133; *see supra* p. 14.

FAA's decision to require unmanned aircraft system test site operators to establish privacy policies is not in tension with its decision not to engage in a privacy rulemaking. *See* Pet. Br. 49. The 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." The 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 the 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 38. The 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* Civil Unmanned Aircraft Systems Roadmap at 1.4.4, JA 38-39; *see also* 78 Fed. Reg. 18,932 (Mar. 28, 2013); 78 Fed. Reg. 12,259 (Feb. 22, 2013); and 78 Fed. Reg. 68,360 (Nov. 14, 2013).

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed or, in the alternative, denied.

Respectfully submitted,

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NOVEMBER 2015

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 **5,252 words**, according to the count of Microsoft Word.

s/ *Abby C. Wright*
Abby C. Wright
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, 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.

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s/ *Abby C. Wright*
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ADDENDUM

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49 U.S.C. § 46110

(a) Filing and venue.—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection *(l)* or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.—When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

2012 Modernization Act

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.