ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

USCA Case No. 16-1302 (Consolidated with Case No. 16-1297)

JOHN A. TAYLOR,

Petitioner,

vs.

FEDERAL AVIATION
ADMINISTRATION,

Respondent.

PETITION FOR REVIEW FROM
THE FEDERAL AVIATION ADMINISTRATION

REPLY BRIEF OF PETITIONER JOHN A. TAYLOR

May 12, 2017

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/s/ *John A. Taylor*
John A. Taylor,
Petitioner
Dated: May 12, 2017

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

EX	Petitioner's Addendum of Exhibits
FAA	The Federal Aviation Administration.
SUPP EX	Petitioner's Supplemental Addendum of Exhibits (attached)

STATUTES AND REGULATIONS

Cited statutes and regulations are contained in a separate addendum, and an attached Supplemental Addendum.

PETITIONER'S SUMMARY OF ARGUMENT

The FAA's promulgation of 14 C.F.R. 101.41 is, on its face, a violation of § 336(a).[1] It is a regulation regarding recreational model aircraft whose operations meet the criteria of that statute.

In addition, the placement of 14 C.F.R. 101.41 within Part 101 renders recreational model aircraft subject to regulation specifically referencing Part 101, and other aviation regulations not specifically exempting it, and thus imposes regulatory prohibitions on recreational model aircraft – in direct violation of § 336(a).

More broadly, the FAA's expansion of the definition of "aircraft" to include recreational model aircraft brings them (along with every other contrivance that flies), under the existing comprehensive FAA regulation of "aircraft," in violation of § 336(a).

The requirement the hobbyists notify local airports is a product of the Rule.[2] It is arbitrary and capricious and its promulgation violated the Paperwork Reduction Act.

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[1] Pub. L. 112-95.

[2] 14 C.F.R. 101.41(e); 14 C.F.R. 107.1(a)(2).

The FAA's defense is based largely on a misreading of § 336(a). The FAA reads § 336(a) as creating affirmative duties on recreational model aircraft hobbyists (*e.g.*, notifying local airports). It does not. It creates only prohibitions on FAA regulation, subject to certain qualifications. The prohibition on regulation applies only where certain conditions are met, but the conditions themselves are not independent requirements placed upon hobbyists.

Further, the FAA also reads § 336(a) as giving absolute unlimited authorization, or even a mandate, to the regulation of all activities that are excepted from the prohibition. It does not. Regulation of activities not protected by § 336(a) must still pass the threshold of not being arbitrary and capricious. The FAA may not lump all such activities together, lock-stock-and-barrel and subject them to authoritarian regulation with no rational basis and no reasoned explanation. An exception to a prohibition is just that, and nothing more. It does not affirmatively create a blanket authority to regulate - free from the need to consider the subject matter and engage in reasoned rulemaking.

Certainly, where the FAA has found that requiring an activity is unwarranted, such as notification of local airports, it is arbitrary and capricious for the FAA to require the activity occur solely in the name of conformity with an exception to the § 336(a) regulatory prohibitions.

The FAA has distorted § 336(a), using any deviation from its criteria as a triggering event for imposing upon casual hobbyists and others complex and authoritarian regulations applicable to commercial unmanned aircraft, and done so with no basis other than the absence of a specific prohibition on such regulation.

The FAA similarly, and improperly, blames its failure to comply with the Paperwork Reduction Act on Congress – claiming that it was Congress, and not the FAA, that established the notice rule and it therefore had no duty to comply with the requirements of the Act. FAA Brief pp. 15-16, 46-57; *See* 44 U.S.C. § 3501, *et seq.* Again, the FAA has misread § 336(a)(5) as creating a requirement on hobbyists that is not in the statute.

While Petitioner did not submit comments on the Rule during rulemaking, numerous hobbyists commented on the excess burdens created by the airport notice requirements – satisfying any exhaustion requirement.[3] Commenters could not know, at that time, that the FAA would ignore their comments – violating both the Paperwork Reduction Act and the requirement that the agency appropriately consider comments. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203, 191 L. Ed. 2d 186 (2015).

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[3] *State of Ohio v. U.S. E.P.A.*, 838 F.2d 1325, 1329 (D.C. Cir. 1988); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 824 F.2d 1146, 1151 (D.C.Cir.1987).

Further, because FAA compliance with Paperwork Reduction Act was a known independent statutory duty inherent in the rulemaking process, comment by the public was not required to preserve the challenge.[4]

While § 336 allows for certain regulation of all recreational model aircraft, and does not specifically protect model aircraft outside of its criteria, they cannot lawfully, or even rationally, be regulated as "aircraft." In addition to the legal impediment of a lack of statutory authority, the FAA has not proposed a functional regulatory scheme for it. The FAA acknowledges its position that all flying contrivances are "aircraft," but dodges the broad ramifications of such an extreme reading of the statute - not only for radio-controlled toys, but for every other flying thing made by man. It simply does not work.

As set forth at length in Petitioner's Brief (pp. 11-22, 29-34), the FAA has, for many decades, properly drawn a distinction between recreational model aircraft and the "aircraft" that are within its statutory authority. In its Brief, the FAA goes all-in with its recent and blatant misrepresentation that it has "historically"

[4] *Oklahoma Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 192 (D.C. Cir. 2014), *quoting, Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C.Cir.1998).

considered recreational model aircraft to be "aircraft." *See* FAA Brief, p.43. That is simply untrue.

Assuming, arguendo, that bringing recreational model aircraft within regulation as "aircraft" under the statute were within the FAA's deference under *Chevron*,[5] despite decades of interpretation to the contrary, the FAA would still have to: 1) acknowledge that they are making that radical shift in interpretation;[6] 2) engage in appropriate rulemaking to justify and establish the new interpretation - subject to notice and comment; and 3) modify the current body of "aircraft" regulation to work with model aircraft so that they are not rendered arbitrary and capricious by their inclusion, and can be complied with by members of the public.

The FAA has done not of that – preferring to stick with the fiction that they have always considered recreational model aircraft to be statutory aircraft, despite a mountain of evidence to the contrary, then cramming vague and unfathomable new regulations into an existing body of law without making the modifications necessary to make them work together.

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[5] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

[6] *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1038 (D.C. Cir. 2012); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009).

ARGUMENT

I. The Rule Violated Federal Statutes:

A. The Rule Violated § 336(a) of Pub. L. 112-95 by Promulgating a Rule or Regulation Regarding Model Aircraft:

The FAA does not, and cannot in good faith, deny that the adoption of 14 C.F.R. 101.41 in the Rule, and its reference in 14 C.F.R. § 107.1(a), constitute the promulgation of a rule or regulation regarding model aircraft. As such, those provisions of the Rule violate § 336(a) of Pub. L. 112-95.

The FAA argues that it was merely parroting the terms of § 336(a), while having no real effect. That assertion is untrue. Even if it were true, the Rule would still constitute an entirely gratuitous violation of § 336(a).[7]

However, the promulgation of 14 C.F.R. 101.41 is no mere technical violation of § 336(a). It has real-world impact. The FAA contends that, "The final rule has no effect on model aircraft operations that fall within Part 101…" (FAA

[7] To the degree that operation outside of the criteria of § 336(a) may be subject to regulation, they could be described simply as such, or describe the specific activity outside of § 336(a) that is being regulated. There was no need or justification for unlawfully promulgating a regulation regarding these model aircraft in 14 C.F.R. 101.41. Further, that an activity is outside of § 336(a) protections, *per se*, is not itself a meaningful criterion for regulation. The FAA would still need supply a reasoned basis for that which it seeks to regulate. It does not.

Brief, p.15), and that "…the treatment of Part 101 model aircraft is not the subject of the final rule…" (p.46), but that is untrue.[8]

By placing 14 C.F.R. 101.41 within the existing Part 101, the FAA has made recreation model aircraft activities, protected by § 336(a), subject to all regulation of Part 101 operations.

For example, all operations under Part 101 are prohibited in the Washington D.C. area under a regulation whose application did not previously include recreational model aircraft. 14 C.F.R. § 93.341(a).[9]

As direct result of the Rule's inclusion of recreational model aircraft activities into Part 101, such activities are now prohibited in the DC FRZ. That violates § 336(a). Even if it did not violate § 336(a), there has been no consideration of whether this prohibition, drafted to protect the nation's capital

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[8] Petitioner submits that a regulation that truly has no effect is inherently arbitrary and capricious. A regulation that does nothing has no rational connection to anything.

[9] The Washington, DC Metropolitan Area Flight Restricted Zone (DC FRZ) extends 15 nautical miles in all directions from the tower at Reagan National Airport. 14 C.F.R. § 93.335. It includes Petitioner's home in Silver Spring, Maryland, and areas well beyond.

from full-sized aircraft, and applied to model aircraft through the Rule, has a reasoned basis - which would render it arbitrary and capricious.[10]

The FAA could easily have avoided this aspect of the mischief by placing the regulation in a Part that was not already subject to existing regulations, or by establishing a new Part. By placing the terms of 14 C.F.R. 101.41 within Part 101, and thereby making it subject to 14 C.F.R. § 93.341(a), the FAA has promulgated a regulation in violation of § 336(a).

The FAA's inclusion of recreation model aircraft as a type of "aircraft" brings the whole world of "aircraft" regulation down upon them and their operators. That is the most significant, and far-ranging manner in which the Rule violates the letter, and indeed the very spirit, of § 336(a).

Moreover, recreational model aircraft operators may not, under the FAA's regulations, avail themselves of the various regulatory exemptions applicable to commercial operators under Part 107. Hobbyists are exempt from Part 107, but only Part 107 operators are exempt from still more complex and burdensome "aircraft" regulations (*e.g.,* pilots licensure (14 C.F.R. § 61.1(a)), airworthiness

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[10] Even if some restrictions on ***some*** model aircraft operations are intuitively appealing, the issue has not been considered by the FAA. Certainly, an absolute ban, which includes all flying toys, of all sizes, at all altitudes, and at all locations within the DC FRZ is excessive.

certification (14 C.F.R. § 21.1(a)), repair and maintenance requirements (14 C.F.R. § 43.1(b)(3)) and the entirety of Chapter I of Title 14 (14 C.F.R. § 91.1(f)). Whether the FAA plans to enforce the laws as they have written them, or use these impossible requirements to effectively end the hobby, remains to be seen.

B. The Rule Violated the Paperwork Reduction Act (44 U.S.C. § 3501, *et seq.*) by Requiring Operator Notice to Airports:

The FAA does not dispute that the airport notification requirement would be a collection of information subject to the Paperwork Reduction Act.[11] Rather, it contends that the requirement was created, not by the FAA, but by Congress. *See* FAA Brief, pp.15-16, 47. The FAA asserts "the final rule did not create the requirement that unmanned aircraft operators notify airports if they wish to operate as Part 101 model aircraft." FAA Brief, p.16. "That requirement stems directly from the Modernization Act..." *See* FAA Brief, p. 16.

Again, the FAA has created a notification requirement and now denies having created the requirement.

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[11] *See* 44 U.S.C. § 3501, *et seq.*

A hobby flier who does not notify local airports is subject to fines and imprisonment (49 U.S.C. § 46307), unless he pursues the unrealistic alternative of obtaining a pilot's license.

The FAA's argument that challenge to the Rule based upon the Paperwork Reduction Act was waived is without merit.

Numerous commenters addressed the burdens created by the Rule's 5-mile airport notice requirement,[12] which satisfied the exhaustion requirement.[13] The FAA did not violate the Paperwork Reduction Act until it issued a final rule without consideration of those comments.[14] Once commenters noted the burden of data collection, they were not required to then add something along the lines of, "… and if you do not now consider our comments, you will be in violation of the Paperwork Reduction Act."

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[12] "Many commenters … restated arguments such as … requiring notification when operating within 5 miles of an airport is too burdensome" 81 Fed. Reg. at 42082; *See, e.g.,* SUPP EX 51.

[13] *State of Ohio v. U.S. E.P.A.*, 838 F.2d 1325, 1329 (D.C. Cir. 1988); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 824 F.2d 1146, 1151 (D.C.Cir.1987).

[14] Commenters typically address the subject matter of the rulemaking, not the agency's duty, thereafter, to consider the comments. A commenter cannot know, during the comment period, that the agency will fail to consider his observations about the burden of data collection and thus, in the end, run afoul of the Paperwork Reduction Act.

Indeed, the FAA considered the issue of application of the Paperwork Reduction Act to the rulemaking, in the context of pilot certification for civil (*i.e.*, commercial) operators,[15] but failed to apply that analysis to the airport notification requirement of the Rule despite specific public comment on the burdens.

Rather than considering the comments regarding burden, or considering the burden independently, the FAA simply, and quite erroneously, concluded that the 5-mile airport notice was already a statutory requirement. *See* FAA Brief p.15-16, 47.

Had the FAA taken proper responsibility for imposing the 5-mile notice requirement, and considered the burdens associated therewith (as requested by the commenters), the FAA would have at least satisfied the requirement of the Paperwork Reduction Act that it, "…consider the impact of paperwork and other information collection burdens imposed on the public." 81 Fed. Reg. at 42204; *See* 5 C.F.R. § 1320.8(a)(4). It did not.[16] Rather, it concluded, "the FAA declines to address these issues here as they are currently the subject of a separate regulatory

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[15] 81 Fed. Reg. at 42204.

[16] Its failure to do so also renders the rulemaking arbitrary and capricious. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203, 191 L. Ed. 2d 186 (2015).

action." 81 Fed. Reg. at 42082.[17] An agency cannot ignore a statutory mandate governing its rulemaking process under the excuse that it will deal with it later, in another regulation, at some indeterminate future date.

Moreover, even if no one had commented upon the burdens created by the 5-mile notice requirement, the FAA's exhaustion argument would fail.

The reason for the exhaustion requirement "…is to ensure an agency has had 'an opportunity to consider the matter, make its ruling, and state the reasons for its action,'" *Oklahoma Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 192 (D.C. Cir. 2014), *quoting*, *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946). "Unfair surprise, however, is not a concern [where the agency] has a preexisting "…'duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule' and therefore ... 'must justify that assumption even if no one objects to it during the comment period.' " *Id., quoting, Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C.Cir.1998).

[17] Again, the FAA places itself in a logical dilemma. If, "[t]hat requirement stems directly from the Modernization Act…," as the FAA argues in its brief (p.16), what is left for it to address in the other rulemaking?

The Paperwork Reduction Act established such a preexisting duty and put the FAA on notice to address it. The FAA was required to address the data collection burdens independent of the numerous requests to do so by commenters.

In any event, the FAA acknowledges, "…no person shall be subject to any penalty for failing to comply with a collection of information…" unless the requisite procedure [sic] are followed." *See* FAA Brief, p.47, quoting 44 U.S.C. 3512(a). Even if the notice requirement survives this rulemaking challenge, it will be unenforceable – something one would think the FAA would want to remedy.

44 U.S.C. 3512(b) provides "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." While the FAA's violation may be used in the future as a defense, it is similarly appropriate to challenge it in rulemaking and in this judicial review of that rulemaking.

The FAA also attempts to dodge application of the Paperwork Reduction Act to airport notification by claiming the, "… final rule does not impose any such requirement; rather it excepts from Part 107 any operation so conducted."

However, because the Paperwork Reduction Act applies to any collection of information, required or not, it is irrelevant whether the airport notification provision is viewed as a "requirement" or merely an "option."[18]

II. The Rule is Beyond the Scope of the FAA's Statutory Authority:

A. The FAA has Long Acknowledged that Recreational Model Aircraft are Not Under FAA Authority as "Aircraft":

As set forth at length in Petitioner's Brief, the FAA has always taken the position that recreational model aircraft are not true "aircraft" subject to its regulation. *See* Petitioner's Brief, pp.11-22, 29-34.

In its Brief, the FAA contends that, "[i]t has long been FAA's position that the statutory term 'aircraft' includes unmanned aircraft, whether operated recreationally or commercially." *See* FAA Brief, p.43.

That assertion is simply, and blatantly, untrue – as supported by the history provided in Petitioner's Brief.

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[18] The FAA seems indecisive whether airport notification was a requirement created by Congress in § 336(a), or part of an FAA-created alternative to Part 107 requirements. *See* FAA Brief, pp.15-17, 46-47. It makes no difference. Whether we call it is an FAA requirement, or an FAA conditional alternative requirement to a requirement, it is undeniably the subject of the Rule, and it is both a violation of the Paperwork Reduction Act and arbitrary and capricious.

In sole support of its contention, the FAA quotes from an undated Federal Register entry (published in 2014)[19] which made no attempt to regulate model aircraft as "aircraft," and a 2007 entry which simply does not support the FAA's contention.[20] On the contrary, the 2007 entry draws the FAA's dichotomy between commercial unmanned aircraft, which are subject to "aircraft" regulation as civil aircraft, and recreational model aircraft, which are not.[21] It was this dichotomy that Congress sought to codify in Pub. L. 112-95, § 332-336.

The FAA has a novel notion of what constitutes "long" and "historic." The inescapable truth is that the FAA did not claim to consider recreational model aircraft to be "aircraft" prior to 2014, and made no attempt to regulate them until

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[19] Interpretation of the Special Rule for Model Aircraft, 79 Fed. Reg. 36172 (June 25, 2014).

[20] Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007).

[21] In the cited Federal Register entry, the FAA references an ***advisory circular*** that "encourages voluntary compliance" with safety standards as applicable to recreational model aircraft. (AC 91-57 - Model Aircraft Operating Standards (June 9, 1981)). 72 Fed. Reg. at 6690. Recreational model aircraft were not the subject of ***any*** regulation prior to the 2015 Registration Regulation. 80 Fed. Reg. 78593.

the Registration Regulation in late 2015 (subject to challenge on this and other grounds in Case No. 15-1495).[22]

Now that Congress has, however inartfully, adopted the FAA's dichotomy between commercial unmanned devices as civil "aircraft" and recreation model aircraft as non-aircraft,[23] the FAA has reversed its position: 1) without statutory authority; 2) without acknowledging the change in position;[24] and without subjecting this radical change to notice and comment.

In general, the FAA reads § 336 as something that it is not. § 336 is a prohibition on regulation, subject to certain conditions, with a caveat that it does not limit pursuit of enforcement actions against people who endanger the airspace (§ 336).

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[22] 80 Fed. Reg. 78593.

[23] The most reasonable construction of § 332 through § 336 of Pub. L. 112-95 is that Congress was adopting the FAA's then-current distinctions – not that it was upturning decades of regulatory interpretations by mandating that every flying contrivance is now deemed an "aircraft."

[24] *See, e.g., Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). "…[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio…" F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009). "

The FAA reads § 336 as a grant of authority. It is not. There is nothing in § 336 that gives the FAA any authority that it did not already have.

B. Part 107 Regulates Operation of Recreational Model Aircraft that are not in Air Commerce and do not Endanger Airspace:

The FAA argues that, "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.'" (FAA Brief, p.41).

The issue, however, is a factual rather than a legal one, and the logic is clear.

The FAA has made no finding that recreational model aircraft inherently affect navigable airspace or air commerce.

Activities that do not meet those criteria (which include the vast majority of recreational model activities) are not within the FAA's authority.

What logic supports the notion that a child playing with a small toy that fits in the child's pocket affects navigable airspace or air commerce?[25] The FAA dismisses the Petitioner's reasoning as illogical, without offering anything in

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[25] *See, e.g.,* EX39. Indeed, such childhood play would fall within Part 107 (requiring a pilot's licenses under 14 C.F.R. 107.53), unless the child complies with non-existent rules regarding CBO programming (14 C.F.R. 101.41(b)), and pointlessly notifies local airports (14 C.F.R. 101.41(e)).

defense of its absurd position that this harmless play is within the FAA's authority to regulate. It certainly has made no finding that it meets the criteria for authorized regulation.[26]

The FAA may only regulate within its authority. Regulating activity that does not affect air commerce or navigable airspace is both outside of its authority, and arbitrary and capricious as it has no reasoned explanation.

The FAA dismisses *Causby*[27] as a takings case (FAA Brief, p.41), but the holding and rationale of that case remain the defining law regarding ownership and control of the airspace immediately above private property. Property owners have "exclusive control of the immediate reaches of the enveloping atmosphere."[28] This principle will doubtless be of increasing significance as commercial use of small unmanned aircraft increases.

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[26] While Petitioner admittedly uses the example of a small child and very small devices for effect, other model aircraft activities that occur at extremely low altitudes, above private property, and out of the navigable airspace are similarly well outside of the FAA's authority.

[27] *United States v. Causby*, 328 U.S. 256, 264, 66 S. Ct. 1062, 1067, 90 L. Ed. 1206 (1946).

[28] *Id.*

While the question here is whether the FAA has the authority to ban Petitioner from flying a teacup-sized toy below the tree line in his back yard, the answer to that question also dictates whether the FAA has the authority to allow others to fly there. Has the air above out lawns, and outside our windows, now become "navigable airspace" and part of the "public highway" described in *Causby*[29] - without legislation to acquire it, and without compensation to the citizenry who own it? May the FAA allow a helicopter to hover five feet off the ground in our back yards whenever the operator pleases? May anyone send anything at eye-level through the air above our yards, as part of his, "…public right of transit through the navigable airspace?" 49 U.S.C. § 40103(a)(2).

The implication of the FAA's position is that they currently can, and that such is the proper state of affairs.

Petitioner submits that *Causby* remains valid, and that private property owners retain "exclusive control of the immediate reaches of the enveloping atmosphere" – absent a taking and compensation by the government. *Id.*

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[29] 328 U.S. 256, 264, 66 S. Ct. 1062, 1067.

Petitioner playing with flying toys at eye level in his back yard is not a federal issue, and the federal government has no right to give the privilege to traverse that space to others as part of the nation's navigable airspace.

III. The Rule is Arbitrary and Capricious:

A. The Application of "Aircraft" Laws to Recreational Model Aircraft is Arbitrary and Capricious:

1. Laws Applicable to Aircraft have no Rational Application to Model Aircraft and Defy Compliance:

In its Brief, the FAA contends, "The fact that recreationally operated unmanned aircraft are "aircraft" does not conflict with other regulatory provisions." (p.44).

However, the FAA also states that, "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." *Id.*

Because the FAA's latter statement is true, the former statement is not.[30]

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[30] In his Brief, Petitioner set forth a sampling of aircraft regulations that are nonsensical when applied to recreational model aircraft. *See* Petitioner's Brief, pp. 45-47. There are also various statutes as well - which are not subject to FAA revision, and cannot be reconciled by that agency through further regulation.

Nor does the FAA inform us which regulations fall into that category, or what they want us to do about them. We are left to guess whether our activities are lawful, or an incarcerable offense.[31] If it was lawful for the FAA to bring model aircraft under the regulations applicable to traditional "aircraft," then it was incumbent upon them, at that time, to make such amendments as were necessary to make the regulatory system work – not put it off to some uncertain future date.

The FAA contends that providing some reconciliation was, "… the reason for the Part 107 rule." FAA Brief, p.44. Part 107, however, has no application to recreational model aircraft use that meets the criteria of § 336(a)/14 C.F.R. 101.41, so no clarity whatsoever has been provided to Petitioner and other hobbyists. Nor does Part 107 address all of the regulatory conflicts for those operations to which it applies.

The FAA contends that, "…as to Part 101 model aircraft, FAA has explained in interpretive guidance what regulations could apply. *See, e.g.*,

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That the FAA has so many "aircraft" regulations on the books that cannot work with recreational model aircraft debunks the FAA's assertion that it has "historically" treated recreational model aircraft as "aircraft" within its regulatory framework. *See* FAA Brief, p.43. It clearly has not. Those regulations would have reconciled model aircraft during rulemaking, or they would have been amended in the intervening years, but that was not done.

[31] 49 U.S.C. § 46307.

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)."

The cited interpretive guidance merely provides "examples" of some rules that "could" apply. It is not comprehensive, and it does not carry the force and effect of law. *Id.*

The FAA contends that, "The rule precisely copies the statutory requirements to explain which aircraft part 107 does *not* apply to." *See* FAA Brief, p.39. That an activity does not fall under the protections of § 336(a) does not, *per se*, make all regulation of that activity reasonable – and certainly not regulation as "aircraft." Congress prohibited § 336(a) activities from being regulated. It did not mandate that all other activities be regulated. A reasoned explanation to justify the rulemaking must still be provided.[32] The FAA provides no justification for its distinctions and various other aspects of its rulemaking in that regard.

2. **The Rule Places Arbitrary and Capricious Airport Notification Requirements Upon Recreational Model Aircraft Operators:**

[32] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009).

The FAA does not argue that the airport notification requirement has a reasoned basis. Rather, it denies having made the requirement.

Having documented that requiring operators to notify airports is not beneficial,[33] the FAA is left with only one strategic option – blame it on Congress and claim that it is a statutory requirement, rather than a regulatory one.[34] However, Congress did not mandate that hobbyists notify airports. Rather, it left it to the FAA to determine if those who did not should be subject to regulation.

§ 336(a) creates no mandate regarding notice, only a limitation on exemptions to regulation. The Rule, however, creates an affirmative requirement if operators are to avoid Part 107 application.[35]

In effect, the FAA reads, "You are not allowed to regulate people who notify airports" as "You are mandated to require people to notify airports." They are not

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[33] 81 Fed. Reg. at 42149.

[34] "That requirement stems directly from the Modernization Act, and no order addressing the final rule could redress petitioner's complaint." *See* FAA Brief, pp. 15-16, 40.

[35] Whether the Rule makes airport notification a "requirement" *per se*, or a criterion for an exemption to a requirement, is really irrelevant. *See* FAA Brief, p.46. Either way it has no rational basis and is arbitrary and capricious. Functionally, it is a *de facto* requirement if nothing else. The hypothetical child playing in the back yard must either pointlessly notify local airports or comply with the pilot license and other complex requirements of Part 107.

the same. Presumably, Congress thought the FAA, prior to regulating such operations, would give the issue some thought and use sound discretion in determining whether, and when, to avail itself of the broad caveats to § 336(a).

That an activity falls outside of the protections of § 336(a) does not create open season for the FAA to promulgate rules that are arbitrary and capricious regarding such activities.

That is true of airport notification, and of the other criteria for § 336(a) protection. If an activity does not fall under the protections of § 336(a), the FAA must still justify its regulation, which it has not done in promulgating the Rule. Rather, the FAA has cut-and-pasted § 336(a) into the Rule, and made all activities outside of those protections, however slightly, subject to complex and authoritarian regulation – including the requirement of pilot licensure.[36]

Further, the FAA's failure to apply consideration and judgment in its creation of the 5-mile notification rule brings into question whether the FAA gave actual consideration to its use of ***any*** of the other criteria outlined in 14 C.F.R. 101.41.

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[36] *See* 14 C.F.R. 107.53, *et seq.*

3. The FAA's Failure to Address What Recreational Activities are allowed Renders the Rule Arbitrary and Capricious and Unconstitutionally Vague:

The FAA acknowledges, as it must, that the Rule provides no meaningful direction as to what constitutes operations "…in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization" – a standard required by the Rule to qualify as recreation model aircraft activity. *See* 14 C.F.R. § 101.41(b). 81 Fed. Reg. at 42208.

The FAA, quoting from its rulemaking, notes that it has, "…explained that it was 'currently considering the issues raised by these commenters'" and plans to address them in other rulemaking. *See* FAA Brief, p.13. The FAA claims that to, "…consider these issues in the final rule would therefore be 'duplicative' of those efforts." (*Id.*, at pp.13-14).

As with addressing the pointless 5-mile airport notice requirement, the FAA wants to leave the new requirement in place, while deferring reasoned analysis to future rulemaking.

The FAA argues that the confusion it has created is, "… redressable by an order directing the agency to engage in an interpretive model aircraft rulemaking within the section 333 rulemaking."[37] *See* FAA Brief, p.39.

However, the proper solution is not to leave model aircraft operations in a state of confusion, where hobbyists cannot know if their activities are subjecting them to incarceration, while giving the FAA yet another a opportunity (and probably a series of opportunities, stretching over many years) at coming up with a regulation that can be followed.[38]

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[37] § 333 allowed the FAA, "…not later than 180 days after the date of enactment of this [2012] Act…" to come up with interim regulations pending comprehensive regulations under § 332, which were due from the FAA, "[n]ot later than 270 days after the date of enactment of…" Pub. L. 112-95. § 332, and therefore § 333, apply only to civil (*i.e.,* commercial in the FAA's parlance) aircraft. § 333 had a window of viability of 90 days, some five years ago. It has no application here.

The FAA has wasted its time regulating that which it was prohibited from regulating, while failing to address commercial unmanned aircraft regulation, as mandated by Congress.

[38] The FAA has an abysmal track record when it comes to timely rulemaking, even when given statutory mandates. Five years after passage of Pub. L. 112-95 we do not have regulations, or even guidance, that can be followed. The FAA has yet to adopt regulations mandated by Congress in § 332, despite that statute specifying a time from for such rulemaking - preferring to approach the issues "incrementally." 81 Fed. Reg. at 42067, 42071, 42073.

The government cannot tell its citizens that it is illegal now to possess a widget, but that it is still working on defining what constitutes a widget, and will let us know in future rulemaking. If the FAA is authorized to regulate in this area, it must do so in a manner that makes sense and can be followed by the citizenry. It cannot leave them hanging in a way that they cannot know what activities are compliant and what are criminal. It cannot simply defer well-reasoned integrated regulation to some future indeterminate date.[39]

Nor is there anything that would suggest that promulgating fractured and incomplete regulation, some four years after enactment of the Modernization Act, is somehow compelled by events. Though judgment regarding air safety is the exclusive province of the FAA, Petitioner feels compelled to note that the hobby continues to have a stellar safety record when it comes to any serious injury – as it always has. Those few who create dangers remain subject to enforcement under § 336(b).

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[39] Petitioner is loath to speculate on the FAA's motives. However, it is not unreasonable to note that the confusion and vagueness of the regulation, combined with draconian penalties, has a tendency to discourage participation in the hobby – a hobby that Congress has chosen specifically to protect from oppressive FAA regulation.

While the FAA can point to various "possible drone sightings" by aircraft pilots, it has also been unable to confirm a single physical encounter with aircraft, despite numerous reports that such collisions occurred.[40] Given that ***none*** of the reports of direct contact proved to be valid, Petitioner questions how much credence should be given to reports of possible sightings, arising from peripheral and brief glances, often over great distances and at implausible altitudes.[41]

If the FAA is truly empowered to regulate recreational model aircraft, the solution is to strike 14 C.F.R. 101.41 and the inclusion of hobby activities in Part 107 via 14 C.F.R. 107.1(a) until the FAA has adopted regulations that work in a manner to provide the citizenry with reasonable notice of what is expected of them

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[40] "Although the data contain several reports of pilots claiming drone strikes on their aircraft, to date the FAA has not verified any collision between a civil aircraft and a civil drone. Every investigation has found the reported collisions were either birds, impact with other items such as wires and posts, or structural failure not related to colliding with an unmanned aircraft." SUPP EX 53.

[41] Petitioner suspects that, as with any type of UFO report, sightings are far easier to come by than other forms of evidence. The FAA reports 1,274 drone sighting reports from February through September, 2016. *Id.* Meanwhile, The National UFO Reporting Center, to whom pilots are directed by the FAA to report UFO sightings (*See* SUPP EX 55), reported 3,833 UFO sightings during that same period. SUPP EX 59. We may conclude from this that: 1) people have active imaginations; and 2) many of the sightings in the former category should properly be placed in the latter.

under penalty of incarceration, and integrates model aircraft into the existing body of regulations controlling aircraft and their operations.

CONCLUSION & RELIEF SOUGHT

Petitioner requests this Honorable Court to hold unlawful:

1. The FAA's adoption of 14 C.F.R. § 101.41.
2. The FAA's inclusion of recreational model aircraft under its regulation of civil small unmanned aircraft systems in 14 C.F.R. § 107.1(a).

AFFIDAVIT

The undersigned confirms, under penalty of perjury, that the representations of fact contained herein are true and correct, and the documents submitted herewith are authentic to the best of his knowledge, information and belief.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that I electronically filed the foregoing Reply Brief, along with referenced Addenda, 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/ *John A. Taylor*
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