ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

USCA Case Nos. 15-1495, 16-1008, 16-1011 Consolidated Cases

JOHN A. TAYLOR,

Petitioner,

vs.

MICHAEL P. HUERTA, and
FEDERAL AVIATION
ADMINISTRATION,

Respondents.

PETITION FOR REVIEW FROM
THE FEDERAL AVIATION ADMINISTRATION

REPLY BRIEF OF PETITIONER JOHN A. TAYLOR

August 18, 2016

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CERTIFICATE OF COMPLAINCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word v.14.0 in 14 point Times New Roman.

/s/ *John A. Taylor*
John A. Taylor, Petitioner
Dated: August 18, 2016

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Cases:

Statutes:

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GLOSSARY OF ABBREVIATIONS

DC-FRZ	The Washington, DC Metropolitan Area Flight Restricted Zone. *See* 14 C.F.R. § 93.335.
DC-SFRA	The Washington, DC Metropolitan Area Special Flight Rules Area. *See* 14 C.F.R. § 93.335.
EX	Petitioner's Addendum of Exhibits.
FAA	The Federal Aviation Administration.
JA	Joint Appendix.
Supp. EX	Petitioner's Supplemental Addendum of Exhibits (attached).

STATUTES AND REGULATIONS

Cited statutes and regulations were contained in a separate addendum to Petitioner's Brief.

PETITIONER'S SUMMARY OF ARGUMENT

The FAA's brief does little more than recite black-letter law, and repeat its conclusory positions. It simply fails to address most of the issues raised in Petitioner's brief.

The Interim Final Rule is clearly the adoption of a rule or regulation. Characterizing it as a modification of an existing process, to the degree that argument has any validity, in no way saves it from violating § 336(a).

Extending Part 47 to apply to recreational model aircraft is similarly the adoption of a rule. This rule: 1) violated § 336(a); 2) required acknowledgement and justification for the change; and 3) required notice and comment.

There was no "emergency" to justify the creation of a registration process in the absence of notice and comment. There were no urgent circumstances and the FAA's solution had no meaningful connection to the alleged emergency, either in theory or in practice.

The DC-SFRA was created to address concerns related to full-size aircraft attacking the nation's capital. The FAA has provided no justification for extending it to recreational model aircraft. AC91-57A changed substantive rights without notice and comment, and in violation of § 336(a).

In addition, the FAA ignores the following issues raised by Petitioner's brief:

1. The FAA fails to explain almost a century of consistent treatment of recreational model aircraft as non-aircraft, outside of the FAA's regulatory control.
2. The FAA failed to acknowledge or provide justification to any change in that position, rendering the change arbitrary and capricious.
3. There is no evidence whatsoever of the FAA's claimed "enforcement discretion."
4. The FAA fails to explain its dichotomy, starting in 2007, between "civil aircraft" and "recreational model aircraft."
5. Congress adopted the FAA's own distinction between civil aircraft and recreational model aircraft, mirroring it in Pub. L. 112-95.
6. The registry is clearly a registry of people, and not of "aircraft." A registrant need not own a device to register.
7. Paper airplanes, Frisbees and other small "contrivances" that "fly" would undeniably be "aircraft" under the FAA's definition.
8. Their owners/operators must comply with Part 47 registration under the statute, as well as the FAA's own regulations.

9. Their owners/operators must also comply with other "aircraft" regulations or be felons, shielded only by unwritten FAA "enforcement discretions."
10. Model aircraft operators have no way to know what "aircraft" laws apply, and how they can reconcile them with practical reality.
11. If reckless use by some model aircraft operators indeed created an "emergency," the FAA would not have stalled the effective date for registration by those operators for months.
12. Registration does not address the "emergency" claimed by the FAA.
13. The FAA did not apply the DC-SFRA to model aircraft, as evidenced by the FAA's own website (EX18) and its failure of enforcement until after the filing of this action. *See* EX11-17.
14. The FAA engaged in no consideration of a rationale for applying the DC-SFRA or the DC-FRZ to recreational model aircraft, and other small flying devices, and has provided no rational connection to any need or danger. These flight zones were designed to prevent an attack by full-sized traditional aircraft. That rationale has no possible relationship to small flying toys flown over private property in the far-flung rural areas surrounding Washington, D.C.

ARGUMENT

I. Part 48 Registration:

A. The FAA Offers No Credible Argument that the Creation of Part 48 is a not a Violation of § 336(a):

1. Part 48 is a Regulation, Regardless of its Supposed Revisory Nature:

The FAA's only defense to Petitioner's § 336(a) challenge to the creation of Part 48 is the specious claim that Part 48 is merely a modification of existing aviation regulations. The FAA argues that it is therefore not a "new" regulation and thus evades the prohibitions of § 336(a). FAA Br. 23.

However, within the Interim Final Rule itself, the FAA characterizes that document as creating a "new" process, system or Part of the Federal Aviation Regulations no less than seventeen (17) times, and specifically identifies it as creating a "new requirement."[1]

The Part 48 process established by the Interim Final Rule is not merely an "alternative" to Part 47 registration. *See* FAA Br. 21; 80 Fed. Reg. at 78594. While Part 47 applies to all "aircraft," Part 48 creates a unique process applicable only to: 1) model aircraft within a defined weight range (14 C.F.R. § 48.15(b); 14

[1] Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78593, 78632 (Dec.16, 2015) ("the Interim Final Rule") (JA48); *See, also, Id.* at 78595, 78596, 78602, 78604, 78621, 78632, 78634, 78640, 78641.

C.F.R. § 1.1[2]); 2)capable of sustained flight (14 C.F.R. § 1.1[3]); 3) operated recreationally (*Id.*); 4) flown within visual line of sight of the person operating the aircraft (*Id.*); and 5) which are part of an "aircraft system," which includes "communication links and the components that control the small unmanned aircraft." (14 C.F.R. § 48.1(a); 14 C.F.R. § 1.1).[4]

Moreover, the term "new" is imposed by the FAA. It appears nowhere in § 336(a). Congress presumably omitted the word "new" because: 1) adopted regulations are inherently "new," regardless of their scope of and impact; and 2) there were no existing regulations regarding recreational model aircraft at the time.

Were this but the change of a single word in an existing regulation, replacing one synonym for another, it would nonetheless be the adoption of a rule or regulation in violation of § 336(a).

The Interim Final Rule, however, is no simple tweak. In this case, the FAA has created an entirely new Part of the Federal Aviation Regulations, consisting of fifteen separately-numbered sections, within three separately-denominate subparts. These provisions are not amendments of existing provisions, but whole new regulations. In addition, the Interim Final Rule

[2] Definition of "small unmanned aircraft."
[3] Definition of "model aircraft."
[4] Relatively small wooden gliders and other non-radio controlled devices must therefore be registered under the Part 47 process.

amends one section of Part 45, three sections of Part 47, a section of Part 91 and two sections of Part 375. *See* JA61-64.

If this were merely the cessation of an "enforcement discretion" regarding existing law, the FAA would not need "good cause" to bypass notice and comment - a process only applicable to legislative rules. *See* 5 U.S.C. § 553(b). In acknowledging the need for good cause, the FAA acknowledges the Interim Final Rule is indeed a legislative rule. FAA Br. 26-31; 80 Fed. Reg. 78593, 78596-99.

There can be no reasonable question that the Interim Final Rule is a "…rule or regulation regarding a model aircraft…" which violates § 336(a).

2. <u>The FAA's Speculation as to Petitioner's Best Interests is not a Defense:</u>

Rather than attempting to counter Petitioner's legal arguments regarding the lawfulness of Part 48 registration, the FAA opines that Petitioner "…has no reason…" to make that argument, and that it, "…would be counter to the interests of both petitioner and amicus..." as it would create "… a ***more*** intrusive registration process." [emphasis in original] (FAA Br. 23-24).

It is not the FAA's place, nor does it constitute legal argument, for the FAA to speculate on what should be in Petitioner's interests.

Whatever may be Petitioner's hobbies, and whatever burdens those hobbies may carry, Petitioner's strongest interest is that the rule of law be followed.

As a practical matter, since both the creation of Part 48 registration and the new application of Part 47 registration are unlawful, Petitioner should not face the dilemma suggested by the FAA.

3. The FAA's Inability to Segregate § 336(a)-conforming Recreational Model Aircraft does not Justify Violating § 336(a):

The FAA makes a convoluted argument that it must register all recreational model aircraft, because it cannot, in advance of operation, tell which ones fall under § 336(a) and which do not. FAA Br. 22.

The FAA's challenges in this regard, such as they may be, do not warrant violating § 336(a) as to those owners whose operations meet the criteria of the statute.

Moreover, the FAA's argument is simply disingenuous. Just as a newly purchased or constructed model aircraft may ultimately be used to fly outside of the protections of § 336(a), it may also be used commercially. The FAA has no way to know how the device will be used. Yet the FAA does not require all owners to comply with Part 47 registration and other requirements applicable to commercial flight.

II. Part 47 Registration:

A. The FAA Attempts to Rewrite its Historical Treatment of Recreational Model Aircraft to Justify Application of Part 47:

For the reasons stated above, Part 48 registration is clearly prohibited by § 336(a).

New interpretations of 49 U.S.C. § 40102(a)(6) and 49 U.S.C. §44101(a) , to justify registration of recreational model aircraft as "aircraft" under the existing Part 47 paper process, is similarly prohibited. This change alters the substantive rights and obligations of a multitude of owners. It is the adoption of a rule or regulation in violation of § 336(a).

In addition, the FAA failed to recognize or to justify that it was making such a change, rendering it arbitrary and capricious. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009); *Farmers Union Cent. Exch., Inc. v. F.E.R.C.*, 734 F.2d 1486, 1500 (D.C. Cir. 1984).

The FAA also failed to follow APA notice and comment procedures regarding that change.

At its core, Part 47 registration is inapplicable, even in the absence of § 336(a), because Recreational model aircraft are not "aircraft": 1) under the statute; 2) under the FAA's interpretation of the statute; and 3) under Congress' adoption of that interpretation in enacting Pub. L. 112-95.

In its brief, the FAA simply ignores the history of Congressional and FAA treatment of recreational model aircraft, told largely through its own documents. *See* Pet. Br.11-14.

For almost a century, common sense and an understanding of Congress' intent prevailed without anyone feeling the need to parse the statutory definition of "aircraft." Model aircraft were recognized as not falling within the definition of aircraft, and aircraft regulations were adopted which clearly could not be intended to apply to them.

As the FAA's Program Director for Air Traffic Planning and Procedures explained in 2001, "[m]odel aircraft do not require a type certificate, airworthiness certificate, or registration. ***Federal Aviation regulations do not apply to them***." [emphasis supplied] Pet. Br. 14, EX4.

In 2007, without seeking Congressional action, the FAA began drawing a distinction between model aircraft used commercially, which it then designated as a type of "civil aircraft" and model aircraft used recreationally, which were not civil aircraft, and therefore remained non-aircraft. *See* Pet. Br.14-16.

The FAA declared that separate authorities existed for the flight of model aircraft operating as civil (i.e., all non-government) aircraft and recreational model aircraft – stating that "…for UAS operating as civil aircraft the authority is special airworthiness certificates, and for model

aircraft the authority is AC91-57."[5] Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689, 6690 (Feb. 13, 2007).

If recreational model aircraft were indeed "aircraft," then they would also be civil aircraft and the distinction drawn by the FAA would be incongruous.

> Under FAA policy, operators who wish to fly an unmanned aircraft for civil use must obtain an FAA airworthiness certificate the same as any other type aircraft. * * * AC91-57 only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes.

Id. at 6689-90.

In 2008 the FAA issued Interim Operational Approval Guidance for Unmanned Aircraft Systems Operations in the U. S. National Airspace System, which is consistent with the civil aircraft/recreational model aircraft distinction. It included the following:

> ***Notes:***
>
> - ***This document and the processes prescribed do not apply to hobbyists and amateur model aircraft users when operating systems for sport and recreation. Those individuals should seek guidance under Advisory Circular (AC) 91-57, Model Aircraft Operating Standards, which is currently under revision.***

[5] By its own terms, AC91-57 was, of course, only a set of "voluntary … safety standards," rather than a grant of authority as later claimed by the FAA. No reasonable read of AC91-57 would interpret it as the latter. The FAA's 2007 re-characterization of AC91-57 was its attempt to begin to undo its prior recognition that it indeed had no lawful authority over flying toys that do not endanger the national airspace.

> • ***Civil UAS operations require a special airworthiness certificate and should follow the process as specified in this document.***
>
> • ***AC 91-57 shall not be used as a basis of approval for UAS operations and is applicable to recreational and hobbyists use only.***

Interim Operational Approval Guidance 08-01 (2008) (§ 4, p.5) (EX39-40 (excerpt)).

In 2014, the FAA summarized its position as follows:

> The FAA then stated its current policy regarding UAS based on the following three categories: (1) UAS used as public aircraft; (2) UAS used as civil aircraft; and (3) UAS used as model aircraft.

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

The FAA has consistently maintained this position, even after the enactment of Pub. L. 112-95.[6]

The FAA does not deny or even address its lengthy history of treating recreational model aircraft as non-aircraft. Rather, it simply ignores it.

Despite overwhelming evidence to the contrary, the FAA maintains the fiction that "[h]istorically, the FAA has considered model aircraft to be aircraft…" (FAA Br. 15), and that its absolute failure to regulate recreational model aircraft as such was an "enforcement discretion" (FAA Br. 6, 20).

[6] FAA Order JO 7210.873 (July 11, 2014) (§ 7(a), p. 3). EX48 (excerpt); FAA Order JO 7210.882 (July 11, 2015) (§ 7(a), p. 3). EX51 (excerpt); FAA Order JO 7210.891 (Nov. 25, 2015) (§ 8(b), (c), p. 2-3) EX53-54 (excerpt); EX5-8.

The FAA cites not a scrap of evidence for the existence of this alleged "enforcement discretion" prior to 2015 (FAA Br. 6) and Petitioner is aware of none. The "enforcement discretion" has been invented by the FAA, from whole cloth, in an attempt to apply retrospective continuity to its radical shift in what it considered to be "aircraft" and why.

The FAA argues that it is Petitioner who is creating and imposing this dichotomy of model aircraft upon Pub. L. 112-95. FAA Br. 12. However, it was the FAA that first created this distinction and then maintained it – not Petitioner or Congress.[7]

The FAA now tries to undo what the FAA itself led Congress to do, and revise the now-codified definitions through regulation.

However, now that Congress has accepted and codified those distinctions, it is beyond the FAA's authority to revisit them. Commercial model aircraft are to be regulated as civil aircraft, while recreational model aircraft are to be left alone – so long as they meet the criteria of § 336(a), and do not actually endanger the National Air Space. *See* § 336(b).

[7] Petitioner acknowledges that distinguishing when the definition of "civil aircraft" should apply solely by the commercial or recreational function of the devices seems a dubious undertaking, but it is unquestionably what the FAA did. Congress then simply codified those labels and distinctions in Pub. L. 112-95.

Assuming, *arguendo*, that finding recreational model aircraft to be "aircraft" was within the FAA's discretion under *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), and assuming, *arguendo*, that Congress had not prohibited such a change in regulatory position under § 336(a), that change would still require APA rulemaking with notice and comment as it would change the substantive rights and obligations of recreational model aircraft owners. Understanding that, the FAA blithely denies its change in position, so clearly evident from the record, ever occurred. Failing to acknowledge and explain such change renders it arbitrary and capricious. *See* Pet. Br.46-48 and cases cited therein.

B. The FAA Ignores the Ramifications of its Expanded Definition of "Aircraft":

1. Any Flying Contrivance would Require Registration:

The FAA argues that registration does not apply to paper airplanes, Frisbees and the like, because they do not meet the weight and system requirements of the FAA's new regulation. FAA Br. 17-18.

Regardless of any exemption under Part 48, the underlying ***statute*** would still require their registration. 49 U.S.C. §44101(a). If paper airplanes and all other flying contrivances are indeed aircraft, then they must, by statute, be registered.

In addition, the FAA's own regulations would require registration of these tiny toys. While they are not required to be registered under the online registration process, they would be required to register under the paper-based Part 47 process, pursuant to 14 C.F.R. § 48.1(b). That regulation provides:

> Small unmanned aircraft eligible for registration in the United States must be registered and identified in accordance with either:
>
> > (1) The registration and identification requirements in this part; or
> >
> > (2) The registration requirements in part 47 and the identification and registration marking requirements in subparts A and C of part 45.

2. <u>Myriad Other Aviation Laws would Apply to Recreational Model Aircraft, Paper Airplanes, Frisbees and the Like:</u>

Aside from the registration issue, the FAA wholly ignores the many other ramifications of labeling as "aircraft" all small flying toys merely because they are contrivances that fly.

The FAA has unlawfully shoehorned recreational model aircraft into the voluminous and complex body of aircraft and aviation regulations. Understandably, the FAA does not now want to go through the burdensome

but necessary task of rewriting those regulations, and seeking Congressional action regarding statutes, to make those laws consistent.

Under current law, people operating these new "aircraft" must, *inter alia*:

- Fly them at least 500 feet above the ground in most areas. 14 C.F.R. § 91.119(c).
- Figure out a way to carry "***within***" their toys a current airworthiness certificate, and registration certificates. 14 C.F.R. § 91.203(a); 49 U.S.C. § 44711(a)(1).
- Have the above documents, "…displayed at the cabin or cockpit entrance so that it is legible to ***passengers or crew***." [emphasis supplied] 14 C.F.R. § 91.203(b).
- Have in them, "…a current approved Airplane or Rotorcraft Flight Manual, approved manual material, markings, and placards, or any combination thereof." 14 C.F.R. § 91.9(b)(2)
- Have pilots' licenses. 49 U.S.C. § 44711(a)(2)(A); 14 C.F.R. § 61.3(a)(1).
- Abstain from using any kind of flying toy within 30 miles of Washington Reagan National Airport. 14 C.F.R. § 93.339.

The FAA acknowledges that some unidentified subset of its regulations for manned aircraft, "… would be overly burdensome to apply to unmanned aircraft." FAA Br. 17.

Does the FAA mean overly burdensome to itself, or to the citizen? No list is provided. How is one to know which codified laws the FAA may choose to ignore on this basis?

The FAA acknowledges that other unidentified aircraft regulations, "… cannot apply by their terms to unmanned aircraft…" *Id.* If model aircraft operators must, on the one hand, conform to FAA regulations regarding aircraft, but on the other hand simply cannot conform, then the entire hobby is illegal. Certainly, that was not Congress' intent in enacting § 336(a).

Are we simply to ignore the written law, and hope the FAA will exercise one of its capricious and silent "enforcement discretions?" How are we to know what are the illegal but tolerated practices, and what are the felonies, *du jour*?

Given the FAA-threatened possibility of massive fines and incarceration (*See* FAA FAQ no.7, EX9-10), citizens are forced to minimize their behavior that might be deemed to offend, and compulsively struggle to avoid getting on the FAA's bad side. Many hobbyists have quit the hobby

entirely, while others ignore the law (or whatever may be the law), cross their fingers, and just hope to stay off the FAA's proverbial radar.

Put in its simplest terms, this is not how the laws of our government are supposed to work, and it is not how they should be allowed to work. The government is expected it issue laws that are reasonably clear, and the people are then expected to follow the laws the government issues.

People should not have to rely on unspoken "enforcement discretions," real or imagined, of indeterminate scope and duration, while accepting that they are unindicted felons.

3. The FAA's Treatment of Ultralights Demonstrates the Arbitrary Nature of its Distinctions Among Devices that Fly:

The FAA offers no explanation for its arbitrary disparate application of statutory registration requirements to recreational model aircraft but not to large, manned, and gasoline-carrying ultralight aircraft. FAA Br. 18. The FAA simply restates the obvious: it does require it of one, and does not require it of the other.

Ironically, on the very next page of its brief, the FAA argues that there cannot be distinctions among different types of "aircraft," (in this context between civil/commercial model aircraft and recreational model aircraft)

because the underlying registration statute applies to all aircraft. FAA Br. 19.

Apparently, based on the FAA's treatment of ultralights, there certainly ***can*** be such distinctions. They have been made by the FAA regarding ultralights, and they have, until quite recently, been made regarding recreational model aircraft. Whether these distinctions are internally consistent or constitute sound policy is not Petitioner's burden to prove.

Petitioner acknowledges that any "unified theory" reconciling the various past actions of the FAA and Congress in this context is elusive. What is clear is that Congress adopted the FAA's longstanding commercial/recreational dichotomy and stated that the latter are not subject to FAA regulation.

The FAA is in no position to argue that its own distinctions, now codified, are inconsistent.

4. The Unmanned Aircraft Systems Subtitle of Pub. L. 112-95 does not Give the FAA General Authority Over Recreational Model Aircraft:

The FAA argues that various sections of the Unmanned Aircraft Systems subtitle of Pub. L. 112-95 (§§ 331-36) are consistent with registration of recreational model aircraft. FAA Br. 21-22.

They are not. Rather, they support Petitioner's argument that Congress sought to incorporate the FAA's own civil (i.e., commercial)/recreational model aircraft dichotomy.

The FAA cites § 332 and § 333 as authority for its recreational model aircraft registration requirement. *Id.*

However, the § 332(a)(1) integration mandate specifies that it applies only to "civil" unmanned aircraft – applying the FAA's long-established civil/recreational dichotomy.

The FAA's arguments regarding § 333 are similarly disingenuous. *Id.* § 333(a) specifies that it applies only as a precursor to the "…the plan and rulemaking required by section 332 of this Act or the guidance required by section 334 of this Act." It has no application whatsoever to § 336 recreational model aircraft.

Consistent with Petitioner's analysis above, § 333 exemptions constitute a process that has been both widely and exclusively used by ***commercial*** model aircraft operators and the FAA. The FAA's website describes the § 333 exemption process as applicable for devices used for "…purposes other than for recreation or

hobby."[8] It was not intended, and has not been used, to apply to recreational model aircraft.

Thus, the cited portions of the subtitle give the FAA no authority over recreational model aircraft, only those commercial model aircraft that the FAA has, since 2007, labeled as "civil."

Even if the aforesaid other sections of Pub. L. 112-95 would otherwise be applicable, § 336(a) states in no uncertain terms that its prohibitions apply, "[n]otwithstanding any other provision of law relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies, including this subtitle…"

Congress not only declined to include recreational model aircraft in the coverage of the other sections, it ***specifically*** carved them out in § 336(a).

III. The Administrative Procedure Act:

A. The FAA's Actions did not Address Emergency Circumstances to Justify the FAA's Failure to Comply with the APA:

The cases cited by the FAA where good cause was found involved rapidly-arising circumstances, where agencies imposed solutions that

[8] *See* Supp. EX. 1; http://www.faa.gov/uas/beyond_the_basics/section_333/how_to_file_a_petition/

narrowly targeted the emergency – often addressing unique or short-lived circumstances.

The circumstances of the instant case arose gradually over time. The FAA imposed a delayed and permanent nationwide process that only has a spurious relationship to the perceived problem.

Months before its adoption of the Interim Final Rule, the FAA saw the growth of the model aircraft hobby and the increase in reported incidents,[9] and knew that Christmas would come at the same time it comes every year. The FAA had more than sufficient time to follow the statutory requirements of notice and comment.

"…[I]nsofar as the FAA's own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke the need for expeditious action as 'good cause' to avoid the obligations of section 553(b)." *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated*, 498 U.S. 1077, 111 S. Ct. 944, 112 L. Ed. 2d 1033 (1991), and *vacated* (on grounds of mootness), 933 F.2d 1043 (D.C. Cir. 1991), *citing National Ass'n of Farmworkers v. Marshall*, 628 F.2d 604, 622 (D.C.Cir.1980).

> …[G]ood cause to suspend notice and comment must be supported by more than the bare need to have regulations. Especially in the context of health risks, notice and comment procedures assure the dialogue

[9] The precipitating incidents cited by the FAA occurred between three and six months prior to adoption of the Interim Final Rule. FAA Br. 28-29.

> necessary to the creation of reasonable rules. The government concedes that the challenged regulations are its first attempt to set protective standards for children employed under the agriculture waiver provision. This is exactly the kind of standard which especially needs the utmost care in its development and exposure to public and expert criticism.

Farmworkers, at 621.

The FAA argues that, "…registration is a critical enforcement tool, providing FAA with a means to link a small unmanned aircraft system to its owner…" FAA Br. 25. It argues that it was, "necessary to prevent a possible imminent hazard to aircraft, persons and property within the United States." FAA Br. 27, *quoting Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C.Cir.2004).

Those representations, illogical even in theory, have proved to themselves empirically to be untrue.

We are no longer talking about a proposed rule or hypothetical. The registration process, instituted on an emergency basis, has been in effect for over seven months at this writing. Yet the FAA identifies not even a single example where it has actually been used in a manner that is in any way related to this purpose. Petitioner is aware of none.

Petitioner submitted a FOIA request to the FAA asking it to identify all examples of such use. Supp. EX. 2-3.

No such incidents have been identified by the FAA, either in response to Petitioner's FOIA request, or in its brief. *See* Pet. Br. 60.

The lack of actual use of the registration process for its supposed purpose belies the FAA's assertion that there was some sort of, "emergency situation, where delay could result in serious harm." FAA Br. 27, *citing Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006). "…[N]otice and comment procedures should be waived only when 'delay would do real harm.'" *Hawaii Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 214 (9th Cir. 1995), *quoting Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir.1982).

Registration is not, "…necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States." FAA Br. 27, *quoting Jifry* at 1179. Its potential to ***ever*** have positive impact in that regard is speculative and remote at best.

The sad fact is that the FAA has done nothing more than to create a huge, functionless and ever-expanding database of law abiding toy owners – in direct violation of Congressional prohibition.

In the unlikely event that a lawful registrant decides to fly recklessly, he need only remove the registration number from his craft.

In the vast majority of reported incidents a device is never recovered. Therefore, it is impossible to determine: 1) whether the reported incident occurred at all; 2) whether it involved a model aircraft; 3) whether any such

model aircraft was registered; 4) what the registration number was, if it was on or within the device; or 5) the identity of the operator.

The FAA notes that it has used the registration process to educate operators. FAA Br. 8.[10] However, operators are not required to participate in the registration process. It is the ***owner***, rather than the ***operator***, who registers. The operator need not ever visit the FAA website or be in any way involved in this educational process, so long as someone else owns and registered the device being flown.

This was never really about identifying model aircraft. Rather it was a feel-good measure by the FAA to demonstrate that it was doing "something" in response to an exaggerated fear of the "drone" subset of model aircraft. It never had any real potential to address the issue, and it has not.

Some small minority of model aircraft operators continue to operate recklessly, dubious reports from airline pilots continue to drift in,[11] and nothing is affected by the registration requirement.

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[10] The FAA has, since the filing of this action, apparently abandoned its clearly-unlawful practice of ***requiring*** registrants to ***commit*** to specific operational criteria (not "asked to agree" as characterized by the FAA). FAA Br. 24; *See* Pet. Br. 40; EX19.

[11] *E.g.*, the reported drone-aircraft collision near Heathrow airport that, "…may have been even a plastic bag or something," according to the U.K. Transport Minister. https://www.theguardian.com/technology/2016/apr/28/heathrow-ba-plane-strike-not-a-drone-incident

Where an agency foregoes notice and comment under the APA using a good cause defense, its solution should be reasonably tailored to address the perceived harm. Not every emergency, where such emergency exists, justifies every immediate response.

B. The FAA's Assertion that there Was an "Emergency" is Inconsistent with its Two-Month Delayed Effective Date:

The FAA attempts to reconcile its assertion of "good cause" to bypass notice and comment with the two-month delay in application of the rule to pre-existing model aircraft owners. *See* FAA Br. 30; 14 C.F.R. § 48.5(a).

The FAA does so by arguing that, "…new owners … were the most likely to lack an understanding of safe operation…" That assertion, offered with no support, provides no explanation for delaying registration of existing owners.

Of course, it was only the ***existing*** owners whose actions gave rise to the specific alleged incidents upon which the Interim Final Rule was based. There is no reason to believe that newer operators posed a significantly greater risk than any operators who started flying prior to December 21, 2015, whose experience level varied widely. The FAA provides no basis for its conclusion.[12]

[12] Since Part 48 is ostensibly a registration process for device identification, the experience level of the operator is irrelevant. The FAA's desire to apply the

To justify its sudden and unlawful action, without notice and comment, the FAA argues that it, "…has been diligently working to integrate unmanned aircraft systems into the national airspace…" FAA Br. 31.

Petitioner begs to differ on that point as well.

In § 332 of Pub. L. 112-95, Congress mandated the Secretary of Transportation to "…develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system."

The deadline for that plan was 270 days from the enactment of the legislation, which occurred on February 14, 2012. § 332(a)(1). Full integration under the plan was to occur, "…not later than September 30, 2015." § 332(a)(3).

Rather than following Congress' mandate to integrate civil (i.e., commercial in the FAA's parlance at the time) unmanned aircraft systems into the national airspace system, the FAA embarked on a frolic to regulate recreational model aircraft – which Congress had specifically prohibited in § 336(a).[13]

The FAA did not work diligently on that which it was required to do, and instead regulated that which it was prohibited from regulating.

Interim Final Rule to new owners did not provide good cause for ignoring the notice and comment requirements of the APA. *See* 5 U.S.C. § 553(b) and (c).

[13] The FAA only recently adopted a plan, which will not go into effect until August 29, 2016. Operation and Certification of Small Unmanned Aircraft Systems; Final Rule, 81Fed. Reg. 42064 (June 28, 2016).

IV. AC91-57A – The FAA's Application of the DC-SFRA and DC-FRZ to Recreational Model Aircraft:

A. AC91-57A is a Legislative Rule that Required Notice and Comment:

The FAA argues that AC91-57A "… does not alter any legal obligations and is therefore not a final agency action." FAA Br. 33. It also asserts that the restrictions date back to 2003. FAA Br.13.

On the contrary, mandatory language of AC91-57A creates prohibitions, directly affecting the legal obligations of a multitude of people, that did not previously exist.

As with its history regarding recreational model aircraft generally, the FAA simply ignores its prior treatment of the DC-SFRA as applied to recreational model aircraft.

Immediately prior to issuance of AC91-57A, the FAA claimed a flight restriction around Washington, D.C. of only 15 nautical miles. EX18. The FAA did not claim a 30-mile limit until the adoption of AC91-57A, and did not enforce that asserted no-fly zone until months later - subsequent to the filing of this suit. *See* Pet. Br. 68-69; *e.g.*, EX11-17.

AC91-57A was a change, "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S. Ct. 1705, 1718, 60 L. Ed. 2d 208 (1979). Establishing new prohibitions for hobbyists,

it had the force and effect of law. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1201, 191 L. Ed. 2d 186 (2015), *citing Chrysler*.

It was a legislative rule, and it required notice and comment.[14]

B. **The FAA's Application of the DC-FRZ and DC-SFRA are Unsupported by the Cited Statute:**

The FAA cites to 49 U.S.C. § 40103(b)(3) as its authority for applying the DC-FRZ and DC-SFRA to recreational model aircraft. FAA Br. 9.

However, as noted by Petitioner, 49 U.S.C. § 40103(b)(3)(B) allows the FAA to "…restrict or prohibit flight of ***civil aircraft***…" [emphasis supplied] Pet. Br. 41. Applying even the FAA's expanded definition of "aircraft" the statute would apply only to commercial model aircraft. It would have no application to recreational model aircraft.

For many years prior to the issuance of AC91-57A, and for several months thereafter, the FAA's treatment of the 30-mile DC-SFRA was consistent with Petitioner's analysis: the FAA applied it to traditional civil aircraft, but not to recreational model aircraft.

[14] Given that the "aircraft" label had never been applied to their devices, together with the "civil aircraft" nature of the prohibition, model aircraft hobbyists had no reason to comment on the establishment of the DC-FRZ and the DC-SFRA when those zones were created. Identifying AC91-57A as a mere interpretive rule would effectively deny hobbyists any reasonable opportunity and right of comment. More significantly, it would endorse a process by which agencies may manipulate the use of what they claim to be interpretive rules to radically change substantive rights and obligations, while evading the mandates of the APA.

C. **The FAA's Notice Regarding AC91-57A was Defective:**

The hyperlink referenced by the FAA does not meet the notice standard, cited by the FAA, because it did not constitute the filing of the document in question. *See* 44 U.S.C. § 1507. Nor did it link to the document.

The FAA notes that the "filing of a document [in the Federal Register] … is sufficient to give notice of the contents of the document to a person subject to or affected by it." FAA Br. 32, citing 44 U.S.C. § 1507. That did not occur in the instant case.

The FAA cites no authority for the use of a hyperlink to substitute for the filing of the actual document – let alone a hyperlink that does not link to the referenced document, which is the case here.

Petitioner respectfully invites the Court to attempt to derive the significance of AC91-57A from its Federal Register notice. *See* 80 Fed. Reg. 54367 (Sept. 9, 2015) (JA2).

Petitioner does not argue that the Federal Register notice was defective solely because it "… provided the web address of the advisory circular." FAA Br. 32.

Assuming, *arguendo*, that a hyperlink to a document met the standards of 44 U.S.C. § 1507, the FAA failed to meet even that test. The FAA ***failed*** to provide the web address of the advisory circular or any other

representation of its contents from which any reasonable person could be said to have notice. Pet. Br. 67.

Rather than linking to the notice itself, the FAA linked to the agency's entire voluminous body of advisory circulars - which should not contain legislative rules in any event.

Had appropriate notice and comment procedures been followed, that process would have provided the potential for additional notice and substantial time for Petitioner to have acted to contest the unlawful provisions of AC91-57A.

D. **The FAA Provides No Rational Connection for Application of the No-Fly Zones to Small Flying Toys:**

The FAA makes no attempt to justify the application of the 30-mile DC-SFRA, or even the 15-nautical mile DC-FRZ, to recreational model aircraft and other small flying toys.

None was provided at the adoption of those zones, none was provided at the issuance of AC91-57A, and none was provided in the FAA's brief.

E. **Causby Established Ownership and Authority Over the National Airspace Among Private Property Owners, the Federal Government Generally, and the FAA:**

The FAA dismisses *Causby* and its progeny entirely, on the ground that they are cases brought under the Takings Clause. FAA Br. 37; *See United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946); *Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

Causby, however, is significant to understanding ownership of the airspace, and who may rightfully control it. An understanding of *Causby* is relevant to this case, and is bound to be critical to future cases involving low altitude air traffic.

Causby stands for the proposition that the federal government acquired, from the owners of private property below, public ownership of the high-altitude navigable airspace by a legislative taking.

Congress then ceded control of that navigable airspace, and only that navigable airspace, to the FAA – to control air commerce.

Ownership of the lower reaches of the airspace remains with private property owners, who retain "exclusive control of the immediate reaches of the enveloping atmosphere." *Causby*, at 264.

"The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). However it is only the ***navigable*** airspace that hast been acquired and dedicated to the public. 49 U.S.C. § 40103(a)(2); *Causby*. It is only the navigable airspace which Congress has authorized the FAA to control. 49 U.S.C. § 40103(b)(1).

That *Causby* is a Takings Clause case has significance in one regard. Congress has exercised no taking, and paid no compensation, to bring the lower reaches of airspace usable by private property owners, into public use.

If Congress, or the FAA, wishes to bring those lower reaches of the national airspace within the "public highway" of navigable airspace, an action under the Takings Clause, and just compensation, will be required. In the absence of such an action, this private property is not part of the navigable airspace and not subject to FAA control as such.

CONCLUSION

A core question to be answered by this case is whether Congress, in enacting § 336(a), sought to:

1. Adopt the FAA's longstanding position that recreational model aircraft were not civil aircraft and were therefore outside of the FAA's regulatory authority; or

2. Abandon the FAA's then-current position, and force the FAA to impose the full weight of aircraft regulation onto recreational model aircraft.

The answer to that question is clear from any fair reading of the statute.

The FAA has used a regulatory approach reminiscent of Humpty Dumpty –shifting labels and meanings in a way that is both arbitrary and capricious, in every sense of those terms.[15]

Petitioner does not suggest recreational model aircraft should be flown in close proximity to buildings that create a threat to national security. Nor does Petitioner condone any sort of reckless flight. However, Petitioner submits that these issues must be addressed by a lawful regulatory scheme within authority established by Congress, having rational connection to the interests being served.

[15] "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." LEWIS CARROLL (Charles L. Dodgson), *Through the Looking-Glass,* chapter 6, p. 205 (1934). First published in 1872.

Certainly, neither personal nor national security requires that adults and children in the rural far-flung suburbs of Maryland and Virginia be prohibited from playing with small flying toys in their own back yards.

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 Brief, along with referenced Addenda and the Joint Appendix, 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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