ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1075

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Petitioner,

v.

The FEDERAL AVIATION ADMINISTRATION, MICHAEL P. HUERTA, in his official capacity as Administrator of the Federal Aviation Administration, and ANTHONY R. FOXX, in his official capacity as United States Secretary of Transportation,
Respondents.

On Appeal from an Order of the
Federal Aviation Administration

BRIEF FOR PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES
CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rules 27(a)(4) and 28(a)(1)(A), Appellant certifies as follows:

I. Parties and Amici

The principal parties in this case are Petitioner Electronic Privacy Information Center ("EPIC") and Respondents the Federal Aviation Administration ("FAA"), Michael P. Huerta, and Anthony R. Foxx. EPIC is a 501(c)(3) non-profit corporation. EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. The FAA is a subcomponent of the U.S. Department of Transportation. Michael P. Huerta is the Administrator of the FAA. Anthony R. Foxx is the U.S. Secretary of Transportation.

As set forth in the Rulemaking Petition, filed by EPIC with the FAA on February 24, 2012, the following parties joined the petition filed with the agency below:

Organizations

- American Civil Liberties Union
- American Library Association
- Bill of Rights Defense Committee

- Center for Democracy and Technology
- Center for Digital Democracy
- Center for Financial Privacy and Human Rights
- Center for National Security Studies
- Center for the Study of Responsive Law
- The Constitution Project
- Consumer Watchdog
- Council of American-Islamic Relations
- Cyber Privacy Project
- Defending Dissent Foundation
- Demand Progress
- Electronic Frontier Foundation
- Electronic Privacy Information Center
- Essential Information
- Global Justice Clinic (New York University School of Law)
- Government Accountability Project
- Liberty Coalition
- Muslim Public Affairs Council
- National Association of Criminal Defense Lawyers
- National Immigration Project at the National Lawyers Guild

- OneAmerica
- Patient Privacy Rights
- Principled Action in Government
- Privacy Activism
- Privacy Camp
- Privacy Rights Clearinghouse
- Rights Working Group
- Rutherford Institute
- South Asian Americans Leading Together (SAALT)
- TakeBackWashington.org
- U.S. Bill of Rights Foundation
- World Privacy Forum

EPIC Advisory Board Members

- Alessandro Acquisti
- Steven Aftergood
- James Bamford
- Grayson Barber
- Francesca Bignami
- Christine Borgman
- danah boyd

- Addison Fischer
- David Flaherty
- Deborah Hurley
- Jerry Kang
- Ian Kerr
- Chris Larsen
- Rebecca MacKinnon
- Gary Marx
- Mary Minow
- Pablo Molina
- Peter G. Neumann
- Helen Nissenbaum
- Ray Ozzie
- Deborah Peel
- Chip Pitts
- Bruce Schneier
- Robert Ellis Smith
- Sherry Turkle

Individuals

- Nadia Abdullah

- Tim Alten
- Peter Asaro
- Courtney Barclay
- Debra E. Barnard
- David Barnes
- (Former) Rep. Bob Barr
- Margaret Bartley
- Andrew Bashi
- M. Edward Borasky
- Jay Clark Bulgier
- Kathy Brandt
- Charles E. Breitkreutz
- Betty L. Brooks
- Kyle Broom
- Robin Carr
- Chris Casper
- Gary M. Cope
- Catherine Crump
- Vincent Della-Fera
- Shawn Lee Doyel

- Christine Doolittle
- Andrea Ferrari
- Gregory Foster
- Ted Gaudette
- Adam Gilliam
- Glen Goleburn
- Mark Gould
- Chris Graham
- Trevor Griffey
- Mark Griffin
- Mary L. Griffin
- William Griffin
- Theodore Griffiths
- John Hailey
- Eric Hananoki
- Stephen Herbert
- Richard Hernandez
- Keith Huss
- Mark Huss
- Richard W. Hyatt

- Joel Inbody
- Marco Iacoboni
- Fred Jennings
- Joseph R. Jones
- Geoffrey Kirk
- James J. Kisilewicz
- Joseph Labiak
- Douglas Lamb
- Stephanie Lockwood
- Harold Long
- Luis Lugo
- James W. Macey
- Albert Maniscalco
- Rommel Marquez
- James Mattix
- David McKinney
- Bill Michtom
- Jalaine Molina
- Bridgette Moore
- Ralph Nader

- Kimberley Nielsen
- Sharon Goott Nissim
- Wendy Ouellette
- Carl Ronzheimer
- Vern Rose
- Emil Sandmann
- Jeramie D. Scott
- Clara Searcy
- Michael V. Sebastiano
- Anirban Sen
- Gregory Sertic
- Gina Sharbowski
- Daniel Louis Shulman
- Emily Sibitzky
- Lisa Simeone
- Nabiha Syed
- Mariatu Tejan
- John Therman
- Patrick Thronson
- Shawn Tippie

- Saadia Toor
- Brian Tyler
- Jennifer Tyler
- Robb de Vournai
- Rebecca Welch
- James Wiggins
- Ray Withrow
- Annette Woodmark
- Robin Woods
- Eleanor Wynn
- Brian Youngstrom
- David Zawislak
- J. Paul Zoccali

II. Ruling Under Review

Petitioner seeks review of the Order issued on February 23, 2015, by the United States Secretary of Transportation through the Administrator of the FAA in the notice entitled "Operation and Certification of Small Unmanned Aircraft Systems; Notice of Proposed Rulemaking," 80 Fed. Reg. 9544 (the "Order"). In the Order, the FAA finalized its denial of EPIC's March 8, 2012, Petition filed under Section 553(e) of the Administrative Procedure Act ("Rulemaking

Petition"), which requested that the agency "conduct a notice and comment rulemaking on the impact of privacy and civil liberties related to the use of drones in the United States." The Order stated that the "privacy concerns" raised by EPIC and others "are beyond the scope of this rulemaking." Prior to the Order, the FAA had sent a letter responding to EPIC's Rulemaking Petition ("FAA Response Letter"), stating that after reviewing the request, the agency had determined that the issue raised was "not an immediate safety concern" but that the agency would "consider [EPIC's] comments and arguments" as part of its existing "small unmanned aircraft" rulemaking. The Order is reproduced in the Joint Appendix at JA 000014–23. The FAA Response Letter is reproduced at JA 000012–13.

III. Related Cases

Petitioner is not aware of any related cases before this Court.

IV. Corporate Disclosure Statement

EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public.

/s/ Marc Rotenberg
MARC ROTENBERG

Dated: September 28, 2015

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TABLE OF AUTHORITIES[1]

Cases

[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other Authorities

GLOSSARY

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

JURISDICTIONAL STATEMENT

The FAA has jurisdiction to issue rules protecting privacy and civil liberties as part of its rulemaking to implement the Comprehensive Plan to integrate drones into the National Airspace System ("NAS"), pursuant to the FAA Modernization and Reform Act of 2012, Pub. L. 112-95, §§ 331–36, 126 Stat. 11, 72–78 (codified at 49 U.S.C. § 40101 note).

This case is before the Court on EPIC's petition for review of the FAA's denial of EPIC's petition for rulemaking under 5 U.S.C. § 553(e) and 14 C.F.R. § 11.73, which was submitted on March 8, 2012. JA 000001. More than two years later, on November 26, 2014, the FAA responded and stated that the agency would "consider" EPIC's petition "as part of" the agency's "rulemaking addressing civil operation of small unmanned aircraft systems in the national airspace system." JA 000012. The FAA subsequently denied EPIC's petition when it issued the Notice of Proposed Rulemaking regarding small drones on February 23, 2015. JA 000014 (*Operation and Certification of Small Unmanned Aircraft Systems*, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015)) [hereinafter "Small Drone Rulemaking Notice"]. EPIC timely filed the Petition for Review on March 31, 2015.

This Court has jurisdiction to review the Order under 49 U.S.C. § 46110(a) (2012).

STATEMENT OF ISSUE FOR REVIEW

1. Whether the FAA Order that fails to address drone privacy, as requested by Petitioner and mandated by Congress, is arbitrary, capricious, or an abuse of discretion within the meaning of the Administrative Procedure Act;

2. Whether the FAA Order that fails to address drone privacy, as requested by Petitioner and mandated by Congress, is otherwise contrary to law.

PERTINENT STATUTORY PROVISIONS

The full text of the pertinent federal statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE[2]

This case concerns an issue of vital importance to the public: whether the FAA, the federal agency tasked with regulating the national airspace, will establish rules to safeguard the public, as urged by Petitioners and mandated by Congress. Reports of unmanned aircraft systems ("drones") interfering with airplanes, law enforcement investigations, and first responders—as well as reports of surveillance by drones on private property and even "drone stalking"—appear frequently. *See*, *e.g.*, Laura Brown, *Drones Raise Privacy, Safety Concerns*, Kingsburg Rep. (Sept. 9, 2015);[3] Barb Darrow, *California Governor Shoots Down Drone Bill*, Fortune (Sept. 10, 2015);[4] Lynn Kawano, *Drone Hovers Outside Hawaii Kai Woman's Bedroom, But No Crime Was Committed*, Hawaii News Now (Aug. 12, 2015);[5] Ken Kaye, *JetBlue Pilot: Drone in Flight Path at Fort Lauderdale Airport*, Sun Sentinel (Sept. 14, 2015); Patrick McGreevy, *Private Drones Are Putting Firefighters in 'Immediate Danger,' California Fire Official Says*, L.A. Times (Aug. 18, 2015); Alison Morrow, *Couple Accuses Neighbor Of Stalking With*

[2] EPIC Appellate Advocacy Fellow Aimee Thomson and EPIC Consumer Protection Fellow Claire Gartland contributed to the preparation of this brief.
[3] http://hanfordsentinel.com/kingsburg_recorder/news/drones-raise-privacy-safety-concerns/article_3d028638-24c8-55d5-b5e8-90f7b98f8b4f.html.
[4] http://fortune.com/2015/09/10/california-drone-bill/.
[5] http://www.hawaiinewsnow.com/story/29765309/drone-hovers-outside-hawaii-kai-womans-bedroom-but-no-crime-was-committed.

Drone, NBC KING 5 (Dec. 13, 2014);[6] Mary-Ann Russon, *Are Flying Drones a Peeping Tom's Dream Tool?*, Int'l Bus. Times (June 11, 2014);[7] Joseph Serna, *Man Charged with Obstructing Officer After Drone Spotted Near Police Copter*, L.A. Times (Sept. 22, 2015); Laura Sydell, *Now You Can Sign Up To Keep Drones Away From Your Property*, NPR (Jan. 23, 2015);[8] Ray Villeda, *Mysterious Drone Causing Headaches in Mansfield*, NBC 5 DFW (Apr. 21, 2015).[9] The FAA itself is now documenting risks to aviation safety resulting from the increasing deployment of drones in the national airspace. Fed. Aviation Admin., *FAA Releases Pilot UAS Reports* (Aug. 21, 2015).[10] Yet the FAA is facilitating rapid expansion of these devices throughout the country without adequate safeguards.

Congress enacted the FAA Modernization and Reform Act of 2012, Pub. L. 112-95, §§ 331–36, 126 Stat. 11, 72–78 (codified at 49 U.S.C. § 40101 note) [hereinafter "FAA Modernization Act" or "the Act"], commanding the FAA to establish drone regulations. However, the FAA, the agency charged with establishing "comprehensive" standards for drone operation and ensuring the

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[6] http://www.king5.com/story/news/local/federal-way/2014/12/13/federal-way-couple-drone-stalking/20344221/.
[7] http://www.ibtimes.co.uk/are-flying-drones-peeping-toms-dream-tool-1452278.
[8] http://www.npr.org/sections/alltechconsidered/2015/02/23/388503640/now-you-can-sign-up-to-keep-drones-away-from-your-property.
[9] http://www.nbcdfw.com/news/local/Drone-Causing-headaches-in-Mansfield-300737221.html.
[10] http://www.faa.gov/news/updates/?newsId=83544&omniRss=news_updates Aoc&cid=101_N_U.

safety of everyday Americans, has failed to propose any privacy rules governing the use of these devices.

As the agency has determined not to issue these rules, contrary to the FAA Modernization Act and EPIC's Rulemaking Petition, the Court must now order the agency to do so.

I. Drone Use is Rapidly Expanding

In 2008, the U.S. Government Accountability Office lamented that "[b]ecause data on [drone] operations in the national airspace system are scarce and routine operations are many years away, the impact of routine access on the system and the environment remains generally speculative." U.S. Gov't Accountability Office, GAO-08-511, *Unmanned Aircraft Systems: Federal Actions Needed to Ensure Safety and Expand Their Potential Uses within the National Airspace System* 5 (2008). But the landscape has changed significantly in the past few years. According to industry sources, the use of drones in the United States has increased significantly in the past decade. *See* David Rose, *Dudes With Drones*, Atlantic (Nov. 2014) (noting that industry leaders estimate at least 500,000 drones have been sold in the U.S. alone).[11] And the use of drones will only increase as the

[11] http://www.theatlantic.com/magazine/archive/2014/11/dudes-with-drones/380783/.

industry is expected to grow fifteen to twenty percent annually. Clay Dillow, *Get Ready for 'Drone Nation,'* Fortune (Oct. 8, 2014).[12]

The FAA itself is now granting drone operators routine access to the airspace; the agency has issued more than 1,000 such exemptions and has begun granting "blanket" waiver certificates to the exemption holders. Fed. Aviation Admin., *It's (a) Grand! FAA Passes 1,000 UAS Section 333 Exemptions* (Aug. 4, 2015).[13] Under the blanket authorization certificates, the operators can fly drones "anywhere in the country at or below 200 feet except in restricted airspace." *Id*. The agency has already granted authorizations for "aerial filming for uses such as motion picture production, precision agriculture, and real estate photography." *Id*. And the agency has further expedited these authorizations by issuing "summary grants for operations similar to those that it has already approved." *Id*. As of September 28, 2015, the agency has listed 1,732 Section 333 authorizations. Fed. Aviation Admin., *Authorizations Granted Via Section 333 Exemptions* (last modified Sept. 28, 2015, 11:21 AM).[14]

The agency has granted these exemptions at increasing rate while failing to issue baseline regulations to protect the public, as mandated by Congress in the FAA Modernization Act of 2012 and sought by EPIC in the Rulemaking Petition.

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[12] http://fortune.com/2014/10/08/drone-nation-air-droid.
[13] http://www.faa.gov/news/updates/?newsId=83395.
[14] http://www.faa.gov/uas/legislative_programs/section_333/333_authorizations/.

II. Drone Operations Create New and Unique Threats to Privacy

A drone is an "aerial vehicle designed to fly without a human pilot." JA 000002. Drones are routinely equipped with high definition cameras that "greatly increase the capacity for domestic surveillance." JA 000003. Drones carry sophisticated recording devices and "by virtue of their design, their size, and how they can fly, [drones] can operate undetected in urban and rural environments." JA 000004. *See also* A. Michael Froomkin & Zak Colangelo, *Self-defense Against Robots*, 48 Conn. L. Rev. (forthcoming 2015) (manuscript at 32).[15] As of 2012, the year the FAA Modernization Act was enacted, the "[g]igapixel cameras used to outfit drones are among the highest definition camera available," providing "real-time video streams at a rate of 10 frames a second." JA 000003. With these advanced capabilities, drones can be used to track "up to 65 different targets across a distance of 65 square miles" and be used to gather sensitive, personal information using infrared cameras, heat sensors, GPS, automated license plate readers, facial recognition devices, and other sensors. JA 000003–04.

In the three years since EPIC, and more than 100 organizations, legal scholars, and technology experts, petitioned the FAA to establish drone privacy rules, the risks to public safety and personal privacy have only increased. The technology has become more widespread, and use by individuals and corporations

[15] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504325.

has become commonplace. *See* Bruce Schneier, *Is it OK to Shoot Down a Drone Over Your Backyard*?, CNN (Sept. 9, 2015).[16]

Drones are also routinely used to conduct surreptitious surveillance. *See* Joseph Serna, *As Hobby Drone Use Increases, So Do Concerns About Privacy, Security*, L.A. Times (June 21, 2014).[17] Drones allow harassing and stalking of unsuspecting victims, capturing images of them in their homes, places of work, and in public. JA 000004. The advanced surveillance capabilities of drones make them the perfect tools for paparazzi, private detectives, stalkers, and criminals. Froomkin & Colangelo, *supra*, at 33. This is particularly problematic because drones are small, mobile, and can easily be flown over private property. Drones can even be used to facilitate facial recognition, thermal imaging, or behavioral analysis and tracking. JA 000003–04.

In addition to extraordinary privacy risks of increased drone deployment in the United States, the devices also create unique security risks. Drones are equipped with onboard computers enabling remote control through a communications channel; the same remote control features that make drones easy to operate also make them susceptible to cyberattacks. Michael Kushin, *Drones and Cybersecurity part 1: The Challenges We Face And Cybersecurity's Role*,

[16] http://www.cnn.com/2015/09/09/opinions/schneier-shoot-down-drones/.
[17] http://www.latimes.com/local/la-me-drone-hobbyist-20140622-story.html.

Fed. Times (Jan. 6, 2015).[18] Hackers can exploit weaknesses in drone software to gain control of a drone's navigation and other features, including cameras, microphones, and other sensors. Pierluigi Paganini, *Hacking Drones . . . Overview of the Main Threat*, Infosec Inst. (June 24, 2013).[19] When a drone is hacked, it can provide access to pictures, recorded or live feed video, or other sensitive personal information. *Id.* There are already publicly available guides that would enable a novice to hack a drone and gain control midflight. Dan Goodin, *Flying Hacker Contraption Hunts Other Drones, Turns Them Into Zombies*, ArsTechnica (Dec. 3, 2013).[20] *See also* DIY Drones, *Which Is More Dangerous, Drone Hacking Or Unsafe Drone Operation?* (Dec. 26, 2013).[21] These hacks are not complicated or expensive. *See* Paganini, *supra*.

The integration of drones into the NAS poses unique threats to privacy and security, which the FAA has determined not to address in any drone rulemaking. These insecure, airborne, video recording systems are already flying over homes and streets without any clear guidelines, despite the well-documented risks.

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[18] http://www.federaltimes.com/story/government/it/blog/2014/12/15/drones-and-cybersecurity-part-1-the-challenges-we-face-and-cybersecuritys-role/20450227.

[19] http://resources.infosecinstitute.com/hacking-drones-overview-of-the-main-threats/.

[20] http://arstechnica.com/security/2013/12/flying-hacker-contraption-hunts-other-drones- turns-them-into-zombies/.

[21] http://diydrones.com/profiles/blogs/which-is-more-dangerous-drone-hacking-or- unsafe-drone-operation.

III. The FAA Is Responsible for Regulating Drone Operations

The FAA was formed by the Federal Aviation Act of 1958 as the Federal Aviation Agency, with the stated goal "to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft." Pub. L. No. 85-726, Preamble, 72 Stat. 731, 731. The FAA's continuing mission is to provide "the safest, most efficient aerospace system in the world." Fed. Aviation Admin., *Our Mission* (Apr. 23, 2010).[22]

In the FAA Modernization and Reform Act of 2012, Congress ordered the FAA to develop rules governing the integration of drones into the NAS. *Id.* §§ 331–36. Specifically, Section 332 of the Act requires the FAA to develop and implement a "comprehensive plan" to integrate civilian drones into the NAS; Section 333 requires the FAA to expedite the operation of certain drone systems; Section 334 governs the integration of public drones; Section 336 concerns the operation of model drones; and Section 335 outlines the necessary safety studies that the FAA must conduct.[23]

In Section 332, Congress ordered the FAA to, within 270 days, "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." FAA Modernization Act § 332(a)(1).

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[22] http://www.faa.gov/about/mission/.
[23] Section 331 provides definitions.

Congress required that the comprehensive plan include, "at a minimum," specific recommendations that would be subsequently implemented in a rulemaking. *Id*. In particular, Congress required the FAA to articulate "how the rulemaking will define the acceptable standards for operation and certification of civil unmanned aircraft systems." *Id*. § 332(a)(2)(A)(i). Congress also required that the comprehensive plan outline "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." *Id*. § 332(a)(2)(B). Under Section 332, the FAA was required to submit the comprehensive plan to Congress by February 2013. *Id*. § 332(a)(4).

Congress ordered the FAA—"not later than 18 months after" submission of the Comprehensive Plan—to publish "a notice of proposed rulemaking to *implement* the recommendations of the [comprehensive] plan required under subsection (a)(1)." *Id*. § 332(b)(2) (emphasis added). Yet despite this clear congressional command, the FAA has not issued an Notice of Proposed Rulemaking ("NPRM") to implement the Comprehensive Plan ("Congressionally Mandated Rulemaking Notice") as required under the statute. The only rulemaking notices submitted by the agency regarding drones have been test site notices in 2013, JA 000101–120, and the Small Drone Rulemaking Notice, JA 000014–23, neither of which were explicitly required under the FAA Modernization Act.

In addition to completing the Comprehensive Plan and publishing the Congressionally Mandated Rulemaking Notice, the FAA was also ordered to "approve and make available" a "5-year roadmap for the introduction of civil unmanned aircraft systems into the national airspace system," to be updated annually. FAA Modernization Act § 332(a)(5). Since 2012, the FAA has only released one annual roadmap. *See* JA 000026–70.

IV. EPIC Petitioned the FAA to Address Privacy Issues in the Drone Rulemakings and the Agency Has Made Clear That Privacy Is An Important Part of the Comprehensive Plan to Integrate Drones

On February 14, 2012, the FAA Modernization and Reform Act of 2012 was signed into law. On February 24, 2012, EPIC sent to the Acting FAA Administrator a Petition to conduct notice and comment rulemaking related to the privacy and civil liberties impact of drones in the national airspace. JA 000002. The EPIC Rulemaking Petition was signed by over one hundred organizations, experts, and members of the public. JA 000006–09. On March 8, 2012, EPIC also forwarded the Rulemaking Petition to the U.S. Department of Transportation pursuant to 14 C.F.R. § 11.63(a)(2) (2015). JA 000001.

After the submission of EPIC's Rulemaking Petition, the FAA created a new "UAS Integration Office" to coordinate the agency's work on drone regulation. JA 000024. The FAA then published a Request for Comments, pursuant to Section 332(c) of the FAA Modernization Act, on a proposed process for selecting drone

test sites. JA 000101. Administrator Huerta subsequently sent a letter to Representative Howard P. McKeon explaining the status of the test sites and acknowledging that "the increasing use of [drones] in our airspace also raises privacy issues." JA 000024–25. The FAA subsequently addressed privacy issues for the drone test site operations by agency rules first proposed on February 23, 2013. JA 000101–02.

On April 23, 2013, EPIC submitted Comments regarding the agency's draft privacy requirements for the drone test sites. JA 000103–15. EPIC recommended that the FAA require drone test site operators to comply with the Fair Information Practices, require drone operators to disclose their data collection and minimization practices, and subject drone operators to independent audits to ensure compliance with their representations. *Id.* In response to EPIC's Comments, the FAA modified the proposed rule and included additional privacy requirements in the drone test site rules and agreements. JA 000116–20. Specifically, the FAA required that test site operators maintain a record of drone operators at each test site, provide a written use and retention policy for data collected by drones, and perform an annual self-evaluation to assess compliance with policies. *Id.*

The FAA finalized the Comprehensive Plan for drone integration in September 2013, more than six months after the deadline established by Congress in the FAA Modernization Act. *See* JA 000071. In the Comprehensive Plan, the

agency made clear that privacy issues need to "be taken into consideration as [drones] are integrated into the NAS." JA 000078. The agency acknowledged that "concerns" about how drone operations impact privacy will "grow stronger" as "demand for [drones] increases." JA 000079. The FAA specifically identified the work on drone test sites rules as a way to "inform future rulemaking activities and other policy decisions related to safety, *privacy*, and economic growth." JA 000089 (emphasis added). The agency proposed that the "lessons learned and best practices established at the test sites may be applied more generally to protect privacy in [drone] operations throughout the NAS." JA 000081.

On November 7, 2013, the FAA released its Roadmap for integration of drones into the NAS. JA 000026. In the Roadmap, the agency explained that:

> [t]he FAA's chief mission is to ensure the safety and efficiency of the entire aviation system. This includes manned and unmanned aircraft operations. While the expanded use of [drones] presents great opportunities, it also raises questions as to how to accomplish [drone] integration in a manner that is *consistent with privacy and civil liberties considerations*.

JA 000038 (emphasis added). The agency also stressed that:

> [t]he FAA is responsible for developing plans and policy for the safe and efficient use of the United States' navigable airspace. This responsibility includes coordinating efforts with national security and *privacy policies* so that the integration of [drones] into the NAS is done in a manner that supports and maintains the United States Government's ability to secure the airspace and *addresses privacy concerns*.

JA 000036 (emphasis added). Indeed, the FAA introduced the Roadmap with a statement that "[i]ntegration of [drones] into the NAS will require: review of current policies, regulations, environmental impact, *privacy considerations*, standards, and procedures." JA 000034 (emphasis added).

The FAA continues to identify privacy as one of the key "challenges posed by [drone] technology" that the agency "will successfully meet." JA 000121, JA 000127.

V. The FAA Denied EPIC's Petition and Excluded Privacy Issues from the Small Drone Rulemaking

Despite the FAA's own conclusions and repeated promises to address privacy issues related to drone deployment, the agency has denied EPIC's petition for a privacy rulemaking. More than two years after EPIC submitted the Rulemaking Petition to the FAA, the agency sent a response letter on November 26, 2014. JA 000012–13. In the response letter, the FAA stated that the agency "determined that the issue [EPIC had] raised is not an immediate safety concern." JA 000012. The letter also stated that "the FAA has begun a rulemaking addressing civil operation of small unmanned aircraft systems in the national airspace system" and that the agency "will consider [EPIC's] comments and arguments as part of that project." *Id*.

The FAA processes petitions for rulemaking pursuant to 14 C.F.R. § 11.73 (2015), which provides for five possible responses. First, if the FAA determines

that the petition justifies the agency taking the suggested action, then the FAA "may issue an NPRM" or Advanced Notice of Proposed Rulemaking ("ANPRM") "no later than six months after the date we receive your petition." 14 C.F.R. § 11.73(a). Second, if the FAA has *already issued* an ANPRM or NPRM on the subject matter of the petition, then the agency "will consider your arguments for a rule change as a comment in connection with the rulemaking proceeding." *Id.* § 11.73(b). Third, if the FAA has "*begun* a rulemaking project in the subject area of your petition," then the agency "*will consider* your comments and arguments for a rule change as part of that project." *Id.* § 11.73(c) (emphasis added). Fourth, if the FAA has tasked the Aviation Rulemaking Advisory Committee ("ARAC") to study the general subject area of the petition, the agency "will ask ARAC to review and evaluate your proposed action." *Id.* § 11.73(d). Finally, if the FAA determines that the issues identified are meritorious but "do not address an immediate safety concern or cannot be addressed because of other priorities and resource constraints," the agency may dismiss the petition. *Id.* § 11.73(e).

The FAA made clear in its response letter that it was not dismissing EPIC's Rulemaking Petition under Section 11.73(e). Rather, the agency referred EPIC's comments to a relevant and ongoing rulemaking project pursuant to Section 11.73(c). The FAA only identified one rulemaking project relevant to the drone privacy issues that EPIC described in the Rulemaking Petition: the Small Drone

Rulemaking. JA 000012. According to the FAA, the agency is not in the process of issuing the Congressionally Mandated Rulemaking Notice to implement the Comprehensive Plan, which would necessarily be relevant to EPIC's Rulemaking Petition

Following receipt of the FAA response letter, EPIC awaited the consideration of privacy issues in the Small Drone Rulemaking. On February 23, 2015, the FAA published the Small Drone Rulemaking Notice. JA000014–23. However, despite assurances in the FAA Response Letter that EPIC's Rulemaking Petition would be considered in the upcoming rulemaking, the agency did not address privacy and civil liberties issues in Small Drone Rulemaking Notice. JA 000023. In the Small Drone Rulemaking Notice, the FAA found that while "privacy concerns have been raised about unmanned aircraft operations," those issues "are beyond the scope of this rulemaking." *Id.* The issuance of the Small Drone Rulemaking Notice was therefore a denial of EPIC's Rulemaking Petition.

In the Notice, the FAA stated that it had "decided to proceed with multiple incremental [drone] rules rather than a single omnibus rulemaking" as required by FAA Modernization Act § 332(b)(2). *Id.* The Small Drone Rulemaking "will integrate small [drone] operations posing the least amount of risk" and will "treat the entire spectrum of operations that would be subject to this rule in a similar manner by imposing less stringent regulatory burdens." *Id.* The agency also stated

that it would "continue working on integrating [drone] operations that pose greater amounts of risk, and will issue notices of proposed rulemaking for those operations once the pertinent issues have been addressed, consistent with the approach set forth in the [Drone] Comprehensive Plan for Integration and FAA roadmap for integration." *Id.*

SUMMARY OF THE ARGUMENT

The Federal Aviation Administration, the agency charged with protecting Americans from the dangers posed by aerial vehicles, has refused to establish privacy rules governing the use of drones in the national airspace system. The agency's Order denying EPIC's Rulemaking Petition was issued nearly three years after EPIC first alerted the agency that privacy rules are critical to regulating drone operations. The agency's failure to act threatens fundamental privacy rights and is contrary to law.

The FAA denied EPIC's Petition despite the explicit recognition of privacy issues in the agency's Comprehensive Plan and Roadmap for drone integration, developed pursuant to an Act of Congress. The FAA's failure to comply with the plain and unambiguous language of the FAA Modernization Act constitutes a plain error of law. In addition, the FAA denied EPIC's petition with a sparse, conclusory statement that failed to demonstrate reasoned decisionmaking. The FAA's denial lacked any factual or policy basis to support its conclusion that privacy exceeded the scope of the Small Drones Rulemaking. The agency's conclusion also failed to explain the agency's divergence from the clear mandate of the FAA Modernization Act, failed to consider privacy risks relevant to the agency's comprehensive integration of drones, and failed to justify its sudden reversal of position after years of identifying privacy as a critical consideration in drone integration. The FAA

also provided no explanation as to why privacy issues do not present an immediate safety concern. The agency's decision violated a clear congressional mandate and the agency did not offer a reasoned explanation; the order must be overturned.

STANDING

EPIC has the necessary standing to challenge the FAA Order because EPIC was the organization that submitted the Rulemaking Petition to the FAA on March 8, 2012, requesting that the agency conduct a rulemaking on the privacy and civil liberties implications raised by the integration of drones into the national airspace. As a petitioner for a rulemaking, EPIC is adversely affected and substantially aggrieved by the Order wrongfully denying the Petition.

In addition to EPIC's standing to challenge the wrongful denial of the petition, the FAA's failure to conduct a rulemaking on privacy and civil liberties issues presented by drone deployment has caused a "concrete and demonstrable injury to" EPIC's "organizational activities" that constitutes a "programmatic injury" under the standard established by the Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). *See also Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006) (finding that a health advocacy organization had organizational standing under *Havens* to challenge an FDA regulation).

Specifically, the FAA's failure to conduct notice-and-comment rulemaking regarding the privacy and civil liberties impact of drone deployment in the United States directly damages EPIC's mission and activities, which are promoting the establishment of privacy safeguards and "protect[ing] privacy, free expression, democratic values, and [promoting] the Public Voice" regarding the impact of new technologies. *See* EPIC, *About EPIC* (2015)/[24]. The FAA's failure to initiate rulemaking has injured EPIC as an organization because it has made EPIC's "*activities* more difficult" and creates a "direct conflict between the [FAA's] conduct and [EPIC's] mission." *Nat'l Treasury Empls. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). The failure to develop privacy rules while permitting the deployment of drones is directly contrary to EPIC's mission of *promoting* privacy safeguards for new technologies. The FAA's refusal to engage the public on this urgent privacy issue has also made EPIC's work more difficult. Without a federal venue for establishing privacy rules, EPIC has had to develop new advocacy strategies, including drafting model state drone privacy legislation.

EPIC has standing to challenge the FAA's Order both as a petitioner seeking review of the agency's wrongful denial and as an organization committed to promoting privacy and civil liberties protections for emerging technologies.

[24] https://epic.org/about.

ARGUMENT

An agency's denial of a petition for rulemaking is reviewable under Section 706(2)(A) of the Administrative Procedure Act ("APA"). *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1390 (2015). The APA requires the court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). *See Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (adopting the reasoning of *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987) in overturning an agency's denial of a petition for rulemaking).[25]

While a "highly deferential" standard applies when reviewing "[r]efusals to promulgate rules," *id*. at 527–28, the court must overturn an agency denial based on a "plain error of law or a fundamental change in the factual premises previously considered by the agency," *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C.

[25] In *Massachusetts v. EPA*, the plaintiffs brought a petition for rulemaking under, *inter alia*, 5 U.S.C. § 553(e) (2012). Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (October 20, 1999), J.A. *Massachusetts v. EPA*, 2006 WL 2569818, at *5 (U.S. 2006). Neither the EPA nor the Supreme Court questioned the source of the plaintiffs' authority to bring a petition for rulemaking. The Supreme Court reviewed the agency's denial of plaintiffs' petition under 42 U.S.C. § 7607(d)(9)(A) (2012), which requires a court to reverse any actions of the EPA Administer found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Massachusetts*, 549 U.S. at 516. This language is identical to the standard of review set forth in the APA, 5 U.S.C. § 706(2)(A).

Cir. 2014). Courts must also set aside a denial where the agency "has offered no reasoned explanation for its refusal." *Massachusetts v. EPA*, 549 U.S. at 534.

I. The FAA's Refusal to Incorporate Privacy Into Either the Congressionally Mandated Rulemaking or the Small Drone Rulemaking Is a Plain Error of Law

Although agencies are granted substantial discretion in their handling of petitions for rulemaking, an order denying a petition is "susceptible to judicial review." *WildEarth Guardians v. EPA*, 751 F.3d at 653 (internal quotation marks omitted). This Court has held that it must overturn an agency refusal to initiate rulemaking when the refusal constitutes "plain error[] of law suggesting that the agency has been blind to the source of its delegated power." *Am. Horse*, 812 F.2d at 5. In this case the FAA has refused to issue the Congressionally Mandated Rulemaking Notice, JA 000023, and has concluded that privacy issues are "beyond the scope" of the Small Drone Rulemaking and all other drone rulemaking projects, *id.*; JA 000012, even though (1) the agency was ordered by Congress to implement a comprehensive plan for drone integration through notice-and-comment rulemaking under Sections 332(a)(1) and 332(b)(2) of the FAA Modernization Act and (2) the agency has repeatedly stated that privacy considerations are part of the "Comprehensive Plan," *see, e.g.*, JA 000032; JA 000036; JA 000078; JA 000081.

When an agency fails to meet the rulemaking obligations established by Congress, the court must correct the error of law and order the agency to follow Congress's order. *See EPIC v. DHS*, 653 F.3d 1, 5, 8 (D.C. Cir. 2011) (ordering the Department of Homeland Security to conduct a rulemaking requested in a Section 553(e) petition and as required by Congress). This Court has explained that the plain error of law doctrine rests on "the general principle that administrative agencies derive their power from the laws of Congress and have no authority to act inconsistently with their statutory mandate." *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206, 222 (D.C. Cir. 1982), *vacated on other grounds sub nom. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). When an agency fails to conduct a rulemaking in accordance with a "clear statutory command," the denial of a petition will be set aside. *Massachusetts*, 549 U.S. at 533. Deference to an agency interpretation is only appropriate "where Congress has not directly addressed the precise question at issue through the statutory text." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007) (internal quotation omitted). Where "the intent of Congress is clear" the "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. (internal citation omitted).

Courts have repeatedly overturned agency denials of petitions for rulemaking where Congress had ordered the agency to conduct a rulemaking on

the subject of the petition. In *Massachusetts v. EPA*, the Supreme Court held that the Environmental Protection Agency ("EPA") improperly denied a petition for rulemaking based on an incorrect statutory interpretation of the Clean Air Act. 549 U.S. at 532. The Court rejected the EPA's conclusion that it lacked authority to regulate greenhouse gasses because they were not an "air pollutant" as contrary to clear congressional intent. *Id.* at 532. The Court further found that the agency's denial of the petition for rulemaking was improperly based on factors outside Congress's "clear statutory command." *Id.* at 532, 533–34. In *American Horse Protection Association, Inc. v. Lyng*, this Court overturned the Secretary of Agriculture's denial of a petition for rulemaking in part because he erroneously interpreted the Horse Protection Act. 812 F.2d at 6–7. The Court found "nothing ambiguous in the Act's treatment of soring methods" and concluded that the Secretary's contrary interpretation "strongly suggests that he has been blind to the nature of his mandate from Congress." *Id.* at 7.

This Court has overturned other petition denials based on errors of statutory construction, including the Federal Power Commission's mistaken belief that its authorizing statutes did not give it jurisdiction to promulgate regulations relating to employment discrimination by regulatees, *NAACP v. Fed. Power Comm'n*, 520 F.2d 432, 443–44 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976); the Secretary of Labor's continued delay in issuing occupational health and safety standards for

agricultural workers for reasons that "conflict[ed] with clearly articulated premises of the [Occupational Safety and Health] Act," *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 627, 629 (D.C. Cir. 1987), *vacated as moot sub nom. Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987); and the Transportation Security Administration's introduction of new airline passenger screening devices without the notice-and-comment rulemaking mandated by the APA, *EPIC v. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011).

The FAA's failure to address privacy and civil liberties issues in the Small Drone Rulemaking or other drone rulemakings likewise constitutes a violation of Congress's clear statutory mandate in the FAA Modernization Act and is therefore a plain error of law. In the first instance, the FAA has refused to comply with the clear congressional command to, within 18 months of developing the Comprehensive Plan, publish "*a* notice of proposed rulemaking to implement the recommendations of the plan." FAA Modernization Act § 332(b)(2) (emphasis added). In addition, the FAA has failed to "implement" the Comprehensive Plan as mandated by Congress by refusing to include the full range of important considerations identified by the agency. *Id.* Finally, any drone integration rulemakings that exclude privacy and civil liberties issues is necessarily not "comprehensive" as required by the FAA Modernization Act. *Id.* § 332(a)(1). The agency's failure to include privacy and civil liberties in the Congressionally

Mandated Rulemaking or any other drone rulemaking indicates that the FAA "has been blind to the source of its delegated power." *Am. Horse*, 812 F.2d at 5.

The denial of EPIC's Rulemaking Petition should be overturned.

A. The FAA Has Failed to "Implement" the Comprehensive Plan in the Congressionally Mandated Rulemaking

1. The FAA Has Refused to Initiate the Congressionally Mandated Rulemaking

Congress ordered the FAA to, within 18 months of preparing the Comprehensive Plan, "publish in the Federal Register . . . *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." FAA Modernization Act § 332(b)(2) (emphasis added). As of this filing, the FAA has not published the Congressionally Mandated Rulemaking Notice. Instead, the FAA announced in the Small Drone Rulemaking Notice that "the FAA decided to proceed with multiple incremental [drone] rules rather than a single omnibus rulemaking." JA 000023. The FAA will use the Small Drone Rulemaking to "integrate small [drone] operations posing the least amount of risk," and "will issue notices of proposed rulemaking for those operations [posing greater amounts of risk] once pertinent issues have been addressed." *Id*. Therefore, according to the agency's own statement, the FAA refuses to publish the Congressionally Mandated Rulemaking Notice.

Agencies must follow the clear statutory commands set out by Congress, and failure to comply constitutes plain error. See *Massachusetts v. EPA*, 549 U.S. 497, 528, 533 (2007); *Am. Horse Protec. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6–7 (D.C. Cir. 1987). By failing to publish an NPRM implementing the recommendations of the Comprehensive Plan, the FAA has acted directly contrary to a clear congressional command. Therefore, the denial of EPIC's Petition for a rulemaking on the privacy implications of drone integration—and, by extension, the agency's failure to consider the comprehensive set of issues identified by the agency as important for drone integration—should be reversed.

2. The FAA Has Failed to "Implement" the Comprehensive Plan

Even if the FAA were permitted to proceed with drone rulemakings in the piecemeal fashion announced in the Small Drone Rulemaking Notice, JA 000023, the agency would still be violating Congress's explicit order "to *implement* the recommendations of the plan required under subsection (a)(1)," FAA Modernization Act, § 332(b)(2) (emphasis added). The verb "implement" means to "put (a decision, plan, agreement) into effect." *Implement*, New Oxford American Dictionary (3d ed. 2010). Congress's mandate to the FAA is clear and unambiguous: put the Comprehensive Plan into effect through notice-and-comment rulemaking.

The agency's failure to publish in the Federal Register a notice of proposed rulemaking to implement the Comprehensive Plan is a plain error of law.

In accordance with Section 332(a), the FAA published a Comprehensive Plan in November 2013. JA 000071. The same month, FAA released the first Roadmap, JA 000026, which is "aligned to the national goals and objectives" of and "will remain consistent with" the Comprehensive Plan, JA 000077. In both documents, the agency recognized the need to take privacy safeguards into consideration as drones are integrated into the NAS. *See, e.g.*, JA 00078 ("Important non-safety related issues, such as privacy and national security, need to be taken into consideration as [drones] are integrated into the NAS."); JA 000081(same); JA 000036 ("[The FAA's] responsibility includes coordinating efforts with national security and privacy policies so that the integration of [drones] into the NAS is done in a manner that supports and maintains the United States Government's ability to secure the airspace and addresses privacy concerns."). In addition, the FAA stated that it would establish privacy requirements for the drone test sites as part of an "incremental approach" to privacy, and anticipated that "[t]he lessons learned and best practices established at the test sites may be applied more generally to protect privacy in [drone] operations throughout the NAS." JA 000081.

Despite the agency's recognition that risks to privacy must be addressed in

the drone integration scheme, the agency has refused to include privacy issues in the Small Drone Rulemaking, JA 000012, and will not consider privacy issues in any other drone-related rulemaking, JA 000012. The FAA has even gone so far to say that its "mission does not include developing or enforcing policies pertaining to privacy or civil liberties," JA 000038, despite the congressional mandate to develop and implement a "Comprehensive Plan," FAA Modernization Act §§ 332(a)(1), (b)(2).

The FAA's erroneous conclusion that privacy is beyond the agency's mission, and the FAA's consequential failure to establish privacy safeguards in the Small Drone Rulemaking or any other current drone rulemaking projects, mirrors the EPA's erroneous conclusion that it lacked statutory authority to regulate greenhouse gases in *Massachusetts v. EPA*. 549 U.S. 497, 528 (2006). In *Massachusetts*, Congress had ordered the EPA to "prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2012)). Despite the clear mandate to regulate "any air pollutant" meeting the subsequent statutory conditions, the EPA claimed that "Congress did not intend it to regulate substances that contribute to climate change." *Id.* The Supreme Court rejected the

agency's argument, finding instead that the plain statutory text, with its "repeated use of the word 'any,'" embraces "all airborne compounds of whatever stripe." *Id.* at 529. The Court also rejected the agency's alternative rationale, finding that while deference would be granted to the reasons for not regulating greenhouse gases, it must be exercised only "within defined statutory limits." *Id.* at 533.

Similarly, Congress ordered the FAA to develop a "comprehensive plan" and "implement the recommendations of the plan" in a rulemaking. FAA Modernization Act §§ 332(a)(1), (b)(2). The statute, with its deliberate use of the word "comprehensive," requires the FAA to address "all or nearly all elements or aspects" of drone integration, including privacy. *Comprehensive*, New Oxford American Dictionary (3d ed. 2010) [hereinafter "*Comprehensive* NOAD"]; see FAA Modernization Act § 332(a)(1). Moreover, although the FAA has discretion on how to integrate drones into the national airspace, the agency must not stray from the "defined statutory limits," *Massachusetts*, 548 U.S. at 533, which include the incorporation of all important considerations from the Comprehensive Plan in the Congressionally Mandated Rulemaking, FAA Modernization Act § 332(b)(2).

Unlike the statute at issue in *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012), which was complex and open to multiple interpretations, the mandate of the FAA Modernization Act is clear. *Salazar* involved the Fish and Wildlife Service's interpretation of an Endangered Species Act provision that

required the Secretary of the Interior to "develop and implement" a recovery plan for listed endangered species, including "objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list." 16 U.S.C. § 1533(f)(1)(B)(ii) (2012); *see Friends of Blackwater*, 691 F.3d at 432–33. The case turned on whether Congress *required* the Secretary, in implementing the recovery plan, to consult only the recovery plan criteria when delisting a species. *Id.* The *Friends of Blackwater* Court found the relevant language ambiguous, and concluded that the Secretary's interpretation of the delisting criteria provision as non-binding guidance was permissible. *Id.* at 434.

Critically, the *Friends of Blackwater* Court took pains to clarify that it did not dispute the Secretary's clear statutory mandate "to give practical effect" to a recovery plan with the requisite delisting criteria. *Id.* at 436–37 ("Our dissenting colleague labors at length to prove 'shall' indicates an action is mandatory and 'to implement' means to give practical effect, two points we nowhere dispute."). The Court instead found the statute ambiguous with regard to the *weight* the Secretary must give to the criteria. *Id.* at 437. The Court concluded that the Secretary's interpretation of the criteria as a sufficient, but not a necessary, condition of delisting a species to be reasonable. *Id*. In other words, the *Friends of Blackwater* Court found reasonable an interpretation of § 1533(f)(1)(B)(ii) in which meeting

the criteria would require delisting but not meeting the criteria would not bar delisting.

The FAA Modernization Act, by contrast, contains no such ambiguity or complexity: The FAA "*shall develop* a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system," FAA Modernization Act § 332(a)(1) (emphasis added); the Comprehensive Plan "*shall contain*, at a minimum, recommendations or projections on the rulemaking to be conducted under subsection (b)," *id.* § 332(a)(2)(A) (emphasis added); and the FAA "*shall* publish a notice of proposed rulemaking to *implement* the recommendations of the plan required under subsection (a)(1)," *id.* § 332(b)(2) (emphasis added). Congress was unequivocal: develop a comprehensive plan to integrate drones into the NAS and implement that plan in a rulemaking.

This case, therefore, ends well before *Salazar* began. EPIC has simply asked this Court to require the FAA to do what Congress mandated the FAA to do: conduct a public rulemaking to implement a Comprehensive Plan to facilitate the safe integration of drones into the national airspace. The agency's refusal to give effect to the plain meaning of the FAA Modernization Act "suggests that [the FAA] has been blind to the nature of [its] mandate from Congress," *Am. Horse*, 812 F.2d at 7, and constitutes clear error of law.

B. The FAA's Exclusion of Privacy Issues is Inconsistent with Congress's Order to Conduct a "Comprehensive" Drone Rulemaking

In the FAA Modernization Act, Congress ordered the FAA to "develop" and "implement" "a *comprehensive plan* to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." FAA Modernization Act § 332(a)(1) (emphasis added). Interpreting the word "comprehensive," the FAA's Comprehensive Plan provides "the overarching, interagency goals, objectives, and approach to integrating [drones] into the NAS," including public and civil usage, research and development, small drones, and test sites. JA 000076–77. Although the FAA properly identified privacy as a critical component of the Comprehensive Plan, the agency simultaneously sidestepped its statutory obligation to issue privacy-related rules. By failing to address privacy, the agency has failed to comply with the mandate to develop and implement the Comprehensive Plan.

The court reviews agency interpretation of congressional statutes under the two-step *Chevron* framework. *Trumpeter Swan Soc. v. EPA*, 774 F.3d 1037, 1040 (D.C. Cir. 2014) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (invoking the *Chevron* framework to review the Environmental Protection Agency's denial of a petition for rulemaking based on the agency's interpretation of statutory authority); *see Home Care Ass'n of Am. v. Weil*, 2015

WL 4978980, at *4 (D.C. Cir. Aug. 21, 2015). First, if "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* 843 n.9. But "if the statute is silent or ambiguous with respect to the specific issue," the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 844. "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

"Under *Chevron* Step One, the court applies the traditional tools of statutory construction in order to discern whether Congress has spoken directly to the question at issue." *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 552 (D.C. Cir. 2009) (citing *Chevron*, 467 U.S. at 842–43). To determine whether the statute is ambiguous, the court must "employ all the tools of statutory interpretation, including text, structure, purpose, and legislative history." *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (internal citations omitted). Statutory interpretation

"start[s] with the plain meaning of the text, looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Blackman v. District of Columbia*, 456 F.3d 167, 177 (D.C. Cir. 2006) (internal citations omitted).

"Comprehensive" means "complete; including all or nearly all elements or aspects of something." *Comprehensive*, NOAD. In the entire 145-page FAA Modernization Act, Congress inserted the term "comprehensive" only six times, and only once in the section addressing drones. FAA Modernization Act § 320(a)(2) ("comprehensive sampling program" of air toxins in aircraft cabins); *id.* § 332(a) ("comprehensive plan" to integrate civil drones into the NAS); *id.* § 344(b)(1) ("comprehensive solutions" to violations of certain FAA regulations); *id.* § 344(d)(2)(A) ("comprehensive reviews" of voluntary disclosure reports); *id.* § 609(b) ("comprehensive review and evaluation" of facility training); *id.* § 908(a)(4) ("comprehensive assessment" of certain technician certification processes). Congress understood the breadth and depth required by any agency activity modified with the adjective "comprehensive," and chose to use it sparingly. Only when Congress wanted the agency to undertake far-reaching, wide-ranging, across-the board, all-inclusive activity—to "include all or nearly all elements or aspects of something"—did it add the heightened "comprehensive" requirement. *Comprehensive*, NOAD.

The title and headings of Section 332 underscore Congress's clear mandate that the FAA carry out all requisite elements of drone integration into the national airspace. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal citation omitted)). Within Title III, "Safety," and Subtitle B, "Unmanned Aircraft Systems," Section 332 reads "Integration of civil unmanned aircraft systems into national airspace system." FAA Modernization Act § 332. Unlike the other sections of Subtitle B, Section 332 is the only one with the noun "integration" modifying the category of drone addressed. *Compare id.* § 332 ("Integration of civil unmanned aircraft systems into national airspace system") *with id.* § 334 ("Public unmanned aircraft systems") *and id.* § 336 ("Special rules for model aircraft"). With this title Congress intended the FAA to not just take action with regard to civil drones, but to fully integrate them.

As EPIC's Rulemaking Petition emphasized, increased drone operations in the United States pose substantial threats to privacy. JA 000003–05. Widespread drone operations greatly increase governmental and private capacities for surveillance due to the sophisticated imaging and recording technologies drones can carry. *Id.*; EPIC, *Spotlight on Surveillance: DRONES: Eyes in the Sky* (Oct.

2014) (detailing various forms of invasive drone surveillance technology).[26] Moreover, many drones enable their operators to surreptitiously observe, record, or otherwise collect information from individuals without their knowledge or consent, even through walls or from thousands of feet in the air. *See* JA 000003–04. The potential for widespread surveillance and data collection threatens individuals' autonomy, public anonymity, and right to control the collection and use of their personal information. Richard M. Thompson II, Cong. Research Serv., R43965, *Domestic Drones and Privacy: A Primer* 6–8 (2015). The subsequent aggregation, retention, and use of personal data collected via drones further risks undermining the right to privacy. *Id.* at 8–11.

Congress, the President, and an increasing number of states have all recognized the need for substantial privacy protections to accompany increased drone usage. *See, e.g.*, *The Future of Drones in America: Law Enforcement and Privacy Considerations: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) [hereinafter "Senate Judiciary Hearing"]; *Eyes in the Sky: The Domestic Use of Unmanned Aerial Systems: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations of the H. Comm. on the Judiciary*, 113th Cong. (2013); Drone Aircraft Privacy and Transparency Act of 2013, S. 1639, 113th Cong. (2013), H.R. 2868, 113th Cong. (2013); Preserving

[26] https://epic.org/privacy/surveillance/spotlight/1014/drones.html.

Freedom from Unwarranted Surveillance Act of 2013, H.R. 972, 113th Cong. (2013), S. 3287, 112th Cong. (2012); Preserving American Privacy Act of 2013, H.R. 637, 113th Cong. (2013); JA 000133–37 (Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015)); Nat. Conf. of State Legislators, *Current Unmanned Aircraft State Law Landscape* (Sept. 23, 2015).[27]

Therefore, any "comprehensive plan" for the regulation of drones in the United States must address privacy concerns. Even the FAA, which denied EPIC's Rulemaking Petition, recognized the need to take privacy into account. JA 000078. The FAA stated in the Roadmap that the agency's responsibility extends to coordinating efforts with privacy policies so that drone integration "addresses privacy concerns." JA 000036. The FAA has even imposed privacy requirements for the drone test sites, JA 000116, as part of an "incremental approach" to privacy, JA 000081, and anticipated that "[t]he lessons learned and best practices established at the test sites may be applied more generally to protect privacy in [drone] operations throughout the NAS," *id.*

Despite the agency's recognition of the key role privacy protection must play in the integration of drones, the FAA has attempted to cabin its statutory

[27] http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx#1.

mandate to exclude the implementation of privacy safeguards. Despite requiring test sites to establish privacy policies, the agency has claimed that its "mission does not include developing or enforcing policies pertaining to privacy or civil liberties," JA 000038. Despite repeatedly acknowledging that privacy must be "taken into consideration as [drones] are integrated into the NAS," the FAA has refused to make any regulatory proposal to address those issues. *See, e.g.*, JA 000091 ("The [Joint Planning and Development Office] will continue to convene partner agency teams to address such issues as security, privacy, civil rights, and civil liberties as the opportunity is presented, enabling integration across several key policy areas of interest.").

The FAA's decision to relinquish its responsibility over the regulation of drone privacy protections is a clear violation of Congress's mandate that the agency develop a *comprehensive* plan and *implement* the plan in a rulemaking. FAA Modernization Act §§ 332(a)(1), (b)(2).

Such a plain error of law necessitates overturning the denial of EPIC's Rulemaking Petition.

II. The FAA Failed to Provide a Reasoned Explanation for the Denial of EPIC's Petition for Rulemaking

A "fundamental requirement of administrative law is that an agency set forth its reasons for decision; an agency's failure to do so constitutes arbitrary and capricious agency action" and warrants reversal. *Amerijet Intern., Inc. v. Pistole*,

753 F.3d 1343, 1350 (D.C. Cir. 2014) (internal quotation omitted); *accord Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987). When denying a petition, an agency must give "[p]rompt notice . . . accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e) (2012). This Court has recently reaffirmed that a Section 555(e) statement must include, at minimum, an explanation of why the agency "chose to do what it did." *Amerijet*, 753 F.3d at 1350 (internal quotation omitted). The Court must ensure that an agency "has adequately explained the facts and policy concerns it relied on" in the order, and the Court must be satisfied "that those facts have some basis in the record." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008).

Reasoned decisionmaking requires more than a simple statement of an agency's determination. "[C]onclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet*, 753 F.3d at 1350 (internal quotation omitted). Sparse, conclusory statements are "insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking." *Am. Horse*, 812 F.2d at 6. In addition, an agency's "reasons for action or inaction must conform to the authorizing statute." *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). An agency's decision refusing to institute rulemaking is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 97 (D.D.C. 2010) (internal quotation marks omitted)

An agency's decision is also arbitrary and capricious when it "fail[s] to explain its departure from previously expressed views." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002), *opinion modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). "An agency must 'provide reasoned explanation for its action,' which normally requires 'that it display awareness that it is changing position.'" *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 576 (D.C. Cir. 2015).

In denying EPIC's petition, the FAA simply concluded that privacy issues "are beyond the scope" of the Small Drone Rulemaking, JA 000023, and do not constitute "an immediate safety concern," JA 000012. The agency's failure to demonstrate "reasoned decisionmaking" in the rejection of EPIC's Rulemaking Petition was arbitrary and capricious and warrants reversal. *See Amerijet*, 753 F.3d at 1353.

A. The FAA Failed to Provide Any Explanation for Finding Privacy Issues "Beyond the Scope" of the Small Drone Rulemaking

In the Small Drone Rulemaking Notice, the FAA found that the "privacy concerns" raised by EPIC and others "are beyond the scope" of that rulemaking.

JA 000023. The FAA provided no other explanation for the exclusion of privacy issues from the Small Drone Rulemaking or for the denial of EPIC's Rulemaking Petition. The FAA's denial of EPIC's Rulemaking Petition was arbitrary and capricious because (1) the agency provided only a "conclusory statement" that failed to give any indication of why the agency "chose to do what it did," *Amerijet*, 753 F.3d at 1350 (internal quotation marks omitted) and failed to detail "facts or policy concerns it relied on," *Gutierrez*, 532 F.3d at 919; (2) the agency "failed to consider an important aspect of the problem," *Salazar*, 741 F. Supp. 2d at 97; and because (3) the agency "failed to explain its departure from its previously expressed views," *Fox Television Stations, Inc.*, 280 F.3d at 1047. The denial should be set aside because it was not "the product of reasoned decisionmaking," *Am. Horse*, 812 F.2d at 6.

1. The FAA's Determination Was Not Reasoned Because It Was Conclusory and Factually Insufficient

The FAA's conclusory statement that privacy issues are "beyond the scope" of the Small Drone Rulemaking is "insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking." *Am. Horse*, 812 F.2d at 6.

This Court has previously reversed agency orders that included more detail than the FAA provided in the Small Drone Rulemaking Notice. In *American Horse Protection Association v. Lyng*, the Department of Agriculture asserted in two

sentences that the agency had denied a petition upon its review of "studies and other materials" and its conclusion that dismissal of the plaintiffs' petition was "the most effective method of enforcing the Act." *Id.* at 5. The Court rejected the agency's determination as unreasoned because it failed to articulate "the factual and policy bases for the decision," lacked "substance," and did not account for contradictory facts. *Id.* at 6. In *Amerijet Intern., Inc. v. Pistole*, plaintiff petitioned for removal of a certain cargo screening requirement because other factors provided sufficient security, but the Transportation Security Administration denied the petition on the grounds that the requirement was important. 753 F.3d at 1352. The Court rejected the agency's determination as unreasoned because the agency's explanation did "not address the main thrust of Amerijet's request"—*i.e.*, the factors that rendered the requirement unnecessary vis-à-vis the plaintiff. *Id.* at 1353.

The FAA's half-sentence conclusion that privacy is outside the scope of the Small Drone Rulemaking is even less detailed than the explanations this Court found insufficient in *American Horse* and *Amerijet*. As in *American Horse*, the FAA's sparse, conclusory statement failed to articulate any factual or policy basis to explain this conclusion. *See Am. Horse*, 812 F.2d at 6. The FAA has likewise provided no evidence for its conclusion, no mention of any relevant policy considerations that influenced its decision, and no insight into how the FAA

interpreted its congressional mandate to determine that privacy exceeds the rulemaking scope. Moreover, the agency's determination is contradicted by numerous reports warning of the privacy risks posed by drone use. *See, e.g.*, JA 000003–05.

In addition, by concluding that privacy is outside of the scope of the Small Drone Rulemaking, the FAA has not "address[ed] the main thrust of [EPIC's] request." *Amerijet*, 753 F.3d at 1353. Congress charged the FAA with *comprehensively* integrating drones into the national airspace, FAA Modernization Act § 332(a)(1), and the agency itself identified privacy as an important part of the drone integration process, *see, e.g.*, JA 000078; JA 000036. EPIC requested in the Rulemaking Petition that the FAA exercise its statutory authority to address known threats to privacy posed by increased drone use. JA 000004–05. But rather than address the merits of EPIC's proposal in a comprehensive drone rulemaking, the FAA merely referred the matter to the Small Drone Rulemaking, then found that privacy was outside the scope of that project. The FAA's response does not indicate that the agency considered whether comprehensive drone integration can proceed without privacy protections. *See Amerijet*, 753 F.3d at 1353.

Because the FAA has failed to provide a reasoned determination that addresses EPIC's arguments, the FAA's denial of EPIC's Rulemaking Petition should be overturned.

2. The FAA's Determination is Not Reasoned Because It Failed to Consider The Importance of Privacy to Small Drone Integration

In addition, the FAA's refusal to consider privacy issues within the Small Drone Rulemaking is arbitrary and capricious because the FAA has "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The text of the FAA Modernization Act requires the FAA to develop and implement a "*comprehensive plan*" to integrate drones into the national airspace. FAA Modernization Act § 332(a)(1).

By definition, a comprehensive plan must address "all or nearly all elements or aspects" of drone integration. *Comprehensive*, NOAD. In the Small Drone Rulemaking Notice, the FAA announced that the Small Drone Rulemaking "will integrate small [drone] operations posing the least amount of risk" to "people, property, and other aircraft." JA 000022–23. By contrast, the agency stated that future FAA rulemakings would only "work[] on integrating [drone] operations that pose greater amounts of risk." *Id*. By the agency's own admission, the Small Drone Rulemaking will be the *only* rulemaking addressing small, low-risk drone operations. *Id.* Therefore, to "comprehensive[ly]" integrate drones into the NAS as mandated by Congress in the FAA Modernization Act, the FAA must address "all

or nearly all elements or aspects" of small, low-risk drones, *Comprehensive*, NOAD.

The FAA has recognized that small drones will represent a significant percentage, perhaps the largest, of all drones operating in the national airspace. *See* JA 000079 ("For example, according to the Teal Group, the market for government and commercial use of [drones] is expected to grow, with small [drones] having the greatest growth potential."). Moreover, these drones pose greater threats to privacy given their small size and low flight path. In other words, small drones are not only likely to be the most prevalent type of drones, but also the most likely to facilitate surveillance and other privacy invasions. Thus, the FAA's determination that privacy issues are "beyond the scope" of the Small Drone Rulemaking is entirely backward and, as a matter of law, arbitrary and capricious because it "failed to consider an important aspect of the problem." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

3. The FAA's Determination is Not Reasoned Because It Fails to Provide an Explanation For Its Change of Course

The FAA's decision is also unreasoned because the agency has failed to explain or acknowledge the divergence from its prior position recognizing the importance of privacy safeguards in the drone integration scheme. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1124–25 (D.C. Cir. 2003) ("Agencies are free to change course as their expertise and experience may suggest or require, but

when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (internal citation omitted)).

Prior to the February 23, 2015 Order, the FAA repeatedly and consistently recognized the need to address privacy issues. In a November 2012 letter to Representative Howard P. McKeon, FAA Administrator Huerta acknowledged that "the increasing use of [drones] in our airspace also raises *privacy issues*." JA 000025 (emphasis added). He assured the Congressman that "[t]he FAA will complete its statutory obligations to integrate [drones] into the NAS as quickly and efficiently as possible," but cautioned that the agency "must fulfill these obligations in a thoughtful, prudent manner that ensures safety, *addresses privacy issues*, and promotes economic growth." *Id.* (emphasis added).

Privacy was of such a concern to the FAA that in February 2013, the agency deemed it necessary to receive public comment on proposed privacy requirements for drone test sites. JA 000101–02. In its rule detailing the final privacy requirements for the test sites, which apply with equal effect to all drones operating at each site regardless of their size, the FAA explained the program's objectives as follows:

> The FAA will require the Test Site operators to comply with the Final Privacy Requirements. Congress mandated that the FAA establish the Test Sites to further [drone] integration into the national airspace system. The Final Privacy Requirements advance this purpose by

> helping inform the dialogue among policymakers, privacy advocates, and industry regarding the impact of [drone] technologies on privacy.

JA 0000117. The FAA has further acknowledged that the drone test site operations and associated privacy policies are intended to guide future rulemaking. JA 000081.

The FAA's Comprehensive Plan, prepared in September 2013, also states that "[i]mportant non-safety related issues, such as *privacy* and national security, need to be taken into consideration as [drones] are integrated into the NAS." JA 000078 (emphasis added). In the Plan, the agency stated that "as the demand for [drones] increases, concerns regarding how [drones] will impact existing aviation grow stronger, especially in terms of safety, *privacy*, frequency crowding, and airspace congestion." JA 000079 (emphasis added).

In the drone integration Roadmap, prepared in November 2013, the FAA affirmed that the agency is:

> responsible for developing plans and policy for the safe and efficient use of the United States' navigable airspace. This responsibility includes coordinating efforts with national security and privacy policies so that the integration of [drones] into the NAS is done in a manner that supports and maintains the United States Government's ability to secure the airspace and *addresses privacy concerns*.

JA 000036 (emphasis added). The FAA also stated that "[i]ntegration of [drones] into the NAS will require: review of current policies, regulations, environmental impact, *privacy considerations*, standards, and procedures." JA 000034 (emphasis

added). The FAA Roadmap further notes that "[w]hile the expanded use of [drones] presents great opportunities, it also raises questions as to how to accomplish [drone] integration in a manner that is consistent with *privacy and civil liberties considerations*." JA 000038 (emphasis added).

Finally, the FAA has acknowledged the importance of addressing privacy in its published materials made available to the public. "Unmanned Aircraft System" fact sheets prepared by the agency on January 6, 2014 and February 15, 2015—just eight days before the FAA published the Small Drone Rulemaking Notice—inform the public that the FAA will "successfully meet the challenges posed by [drone] technology in a thoughtful, careful manner that ensures safety and *addresses privacy issues* while promoting economic growth." JA 000121 (emphasis added); JA 000127 (emphasis added).

Despite its extended history of acknowledging the importance of privacy in drone integration, the FAA determined on February 23, 2015, that privacy issues "are beyond the scope of this rulemaking." JA 000023. The agency's determination fails to address its own numerous statements that contradict this position and recognize the FAA's responsibility to address drone privacy.

The agency's failure to explain the reversal of its previous position is similar to the decision that this Court found arbitrary and capricious in *Fox Television Stations, Inc. v. FCC*. 280 F.3d 1027 (D.C. Cir. 2002) *opinion modified on reh'g*

on other grounds, 293 F.3d 537 (D.C. Cir. 2002). In *Fox*, the Court considered an FCC's decision not to repeal or modify the national television station ownership rule, despite having determined in a 1984 report that the rule should be repealed. *Id*. at 1044. The Court held that the FCC's decision was arbitrary and capricious because it was contrary to the agency's prior position, and the agency provided no explanation for the change.

> The Commission's failure to address its *1984 Report* in the course of its contrary *1998 Report* is yet another way in which the decision to retain the NTSO Rule was arbitrary and capricious. Recall that in the *1984 Report* the Commission concluded the NTSO Rule should be repealed because it focuses upon national rather than local markets and because even then any need for the Rule had been undermined by competition . . . . To retain the cap in 1998 without explanation of the change in the Commission's view is, therefore, to all appearances, simply arbitrary. The Commission may, of course, change its mind, but it must explain why it is reasonable to do so.

Id. at 1044–45.

Similarly, the FAA has abruptly decided that privacy concerns are "beyond the scope" of the Small Drone Rulemaking, despite the FAA's long history of identifying privacy as a critical consideration. In deciding that privacy issues are outside of scope, the agency did not address, or even mention, the numerous prior statements on the importance of privacy nor did it explain why privacy rules were not an important aspect of regulating small drone operations. The agency's decision is therefore arbitrary and capricious because it failed to provide any

indication that its prior statements are being "deliberately changed, not casually ignored." *Ramaprakash v. FAA,* 346 F.3d 1121, 1124 (D.C. Cir. 2003).

B. The FAA Did Not Provide Any Reason to Support the Conclusion That Privacy Issues Do Not Present an Immediate Safety Concern

Not only has the FAA failed to provide any justification for excluding privacy issues from the Small Drone Rulemaking, the agency also provided no explanation for its conclusion in the Response Letter that privacy issues are not "an immediate safety concern." JA 000012. The FAA's "conclusory statement[]" lacked "reasoning" and failed to "explain why it chose to do what it did." *Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (internal quotations omitted). The agency's decision, provided without any reasoning, must be set aside because by definition it cannot be the product of "reasoned decisionmaking."

The FAA's statement in the Response Letter is entirely conclusory and should be reversed for that reason alone. The agency simply assumed that drone surveillance, stalking, and other privacy issues do not present an immediate safety concern. In other words, the FAA has not provided any reasoning or explanation for why it chose not to initiate a drone privacy rulemaking. *See id.*

Not only was the FAA's conclusion unreasoned, it was entirely wrong because safety and privacy are closely intertwined. Privacy is essential to personal security and integrity, and privacy protections ensure that individuals: (1) are not under constant fear of surreptitious surveillance, (2) are not subject to harassment

and stalking by unknown assailants, and (3) do not create new hazards by retaliating against drones that fly near their person or property.

First, privacy rules serve important safety and security purposes, not the least of which is providing an assurance that individuals will not be subject to surreptitious surveillance. Protecting individuals from the fear caused by threatening and harassing behavior, like stalking and surveillance, is precisely the type of safety issue that the law seeks to limit. For example, common law has "[f]or centuries [permitted] recovery, under the name of assault, for intentionally-induced fear of a contact harmful or offensive." *Clark v. Associated Retail Credit Men of Washington, D.C.*, 105 F.2d 62, 64 (D.C. Cir. 1939). Similarly, the law provides a remedy where "extreme and outrageous conduct" causes an individual to suffer severe emotional distress. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). Many criminal laws governing privacy issues also protect the same kind of safety interests. For example, the federal Video Voyeurism Prevention Act of 2004, which criminalizes photographing or recording an individual's private areas without consent, was enacted in response to privacy threats posed by increasingly miniaturized and surreptitious camera technology. H.R. Rep. No. 108-504, at 2 (2005), *as reprinted in* 2004 U.S.C.C.A.N. 3292, 3293. The fact that such conduct is criminalized reflects an understanding that privacy invasions can—and do—threaten safety.

Second, privacy protections for drones are also necessary to deter dangerous behavior that could be easily conducted remotely and undetectably via drone. Due to drones' ability to travel surreptitiously, operators can use drones for stalking, harassment, video voyeurism, blackmail, and extortion. *See, e.g.*, Lynn Kawano, *Drone Hovers Outside Hawaii Kai Woman's Bedroom, But No Crime Was Committed*, Hawaii News Now (Aug. 12, 2015);[28] Alison Morrow, *Couple Accuses Neighbor Of Stalking With Drone*, NBC KING 5 (Dec. 13, 2014);[29] Mary-Ann Russon, *Are Flying Drones a Peeping Tom's Dream Tool?,* Int'l Business Times (June 11, 2014);[30] Ray Villeda, *Mysterious Drone Causing Headaches in Mansfield*, NBC 5 DFW (Apr. 21, 2015).[31] However, mandatory technological warning systems could alert individuals to the presence of nearby drones and deter dangerous and harassing behavior. *See generally* Jerry Kang & Dana Cuff, *Pervasive Computing*, 62 Wash. & Lee L. Rev. 93, 138 (2005) (proposing transparency standards for identifying surveillance devices). Without established mechanisms to identify drones and prevent abusive uses of the new surveillance

[28] http://www.hawaiinewsnow.com/story/29765309/drone-hovers-outside-hawaii-kai-womans-bedroom-but-no-crime-was-committed.
[29] http://www.king5.com/story/news/local/federal-way/2014/12/13/federal-way-couple-drone-stalking/20344221/.
[30] http://www.ibtimes.co.uk/are-flying-drones-peeping-toms-dream-tool-1452278.
[31] http://www.nbcdfw.com/news/local/Drone-Causing-headaches-in-Mansfield-300737221.html.

technology, individuals will be subject to constant harassment and threats to their bodily and mental integrity.

Third, privacy protections for drones are also necessary because in the absence of rules, individuals may resort to dangerous measures to protect themselves from surveillance when drones fly near their property. Self-help in response to drones will create entirely new risks that could be avoided by setting clear standards for drone operations. Recently, a drone was shot down by a high-powered rifle at a fundraiser for Senator Jim Inhofe (R-Okla.). Elise Viebeck, *Enemy Drone Shot Down over Inhofe Fundraiser*, Wash. Post (Sept. 14, 2015).[32] To the east, a Kentucky father shot down a drone hovering over his property and allegedly filming his sunbathing daughters. Bill Chappell, *Dispute Emerges over Drone Shot Down by Kentucky Man*, NPR (July 31, 2015).[33] Oklahoma has considered a bill to allow homeowners to shoot down drones hovering over their property, Bill Chappell, *'Drone Shoot-Down Bill' Advances in Oklahoma*, NPR (Feb. 10, 2015),[34] while a town in Colorado considered issuing drone-hunting licenses, Katy Steinmetz, *Colorado Town Won't Issue Drone-Hunting Licenses*,

[32] http://www.washingtonpost.com/news/powerpost/wp/2015/09/14/enemy-drone-shot-down-over-inhofe-fundraiser/.
[33] http://www.npr.org/sections/thetwo-way/2015/07/31/428156902/dispute-emerges-over-drone-shot-down-by-kentucky-man.
[34] http://www.npr.org/sections/thetwo-way/2015/02/10/385239519/-drone-shoot-down-bill-advances-in-oklahoma.

Time Mag. (Apr. 2, 2014).[35] Geo-fencing technology can be used to prevent drones from flying over geo-fenced private property, but such interference with the drone's communication systems could cause loss of positive control or even crashes. *See, e.g.*, Laura Sydell, *Now You Can Sign Up To Keep Drones Away From Your Property*, NPR (Feb. 23, 2015);[36] DJI, *No FLY Zones* (2015)[37] (explaining in text and video where drones are restricted from entering and how drones react if they successfully enter the restricted areas). Without meaningful privacy protections for drones, dangerous self-help remedies will only increase as drone use becomes more prevalent.

Furthermore, the FAA itself has acknowledged that operating drones in a safe manner requires considerations for privacy. The FAA safety guidelines for recreational drone users caution: "Do not conduct surveillance or photograph persons in areas where there is an expectation of privacy without the individual's permission." Know Before You Fly, *Recreational Users: What are the Safety Guidelines for sUAS Recreational Users?* (2015).[38] Both the FAA and the drone industry recognize that protecting privacy is an essential element of overall safety concerns. The FAA's reversal on this issue, with no explanation of the change in

[35] http://time.com/46327/drone-hunting-deer-trail/.
[36] http://www.npr.org/blogs/alltechconsidered/2015/02/23/388503640/now-you-can-sign-up-to-keepdrones-away-from-your-property.
[37] http://www.dji.com/fly-safe/category-mc.
[38] http://knowbeforeyoufly.org/for-recreational-users/.

position, is arbitrary and capricious. *See Hermes Consol., LLC v. EPA*, 787 F.3d 568, 576 (D.C. Cir. 2015).

Finally, protection from unwanted surveillance is the foundation of modern privacy law and inextricably intertwined with personal safety. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). *See* Restatement (Second) of Torts § 652 (1965) (Intrusion Upon Seclusion) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."). Brandeis and Warren recognized that "the right to life has come to mean the right to enjoy life, — the right to be let alone." *Id*. at 193. (emphasis added). It is inconceivable that one hundred years later the FAA, with a mandate from Congress and the Rulemaking Petition in hand, could ignore the need to develop a privacy rule as drones with miniature cameras begin to fill our skies. But the agency did, and for that reason this Court must overturn the Order.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e).

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 28th day of September 2015, he caused the foregoing brief to be served by ECF and two hard copies by first-class mail, postage prepaid, on the following:

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