ORAL ARGUMENT NOT YET SCHEDULED

Case No. 15-1495 and Consolidated Cases

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

JOHN A. TAYLOR,

Petitioner,

v.

MICHAEL P. HUERTA, and
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Review of an Interim Final Rule
of the Federal Aviation Administration

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF PETITIONER JOHN A. TAYLOR

R. BEN SPERRY
THOMAS W. STRUBLE
BERIN M. SZOKA
TECHFREEDOM
110 Maryland Ave. NE, Suite 409
Washington, DC 20002
202-803-2867
bszoka@techfreedom.org

Counsel for Amici

June 21, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND CASES

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 12(f), and 15(c)(6), the undersigned counsel certifies as follows:

(A) Parties and Amici. All parties, intervenors, and amici appearing before this Court are listed in the Brief for Petitioner John A. Taylor. All parties have consented to TechFreedom filing this amicus curiae brief.

(B) Ruling Under Review.

Case No. 15-1495: Registration and Marking Requirements for Small Unmanned Aircraft, *Interim Final Rule*. 80 Fed. Reg. 78594 (Dec. 16, 2015) (JA 6–66).

(C) Related Cases. Other than the related challenges that have been consolidated with this case, TechFreedom is not aware of any other cases related to the John A. Taylor's Petition for Review.

/s/ R. Ben Sperry
June 21, 2016 R. Ben Sperry

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 28(a)(1), TechFreedom makes the following disclosure:

Founded in 2010, TechFreedom is a non-profit, non-partisan 501(c)(3) tax-exempt think tank incorporated under the laws of the District of Columbia. TechFreedom has no parent corporation. It issues no stock.

/s/ R. Ben Sperry
June 21, 2016 R. Ben Sperry

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STATEMENT OF IDENTITY

Founded in 2010, TechFreedom is a non-profit, non-partisan 501(c)(3) tax-exempt think tank dedicated to educating policymakers, the media and the public about tech policy. We defend the freedom to tinker and innovate, as well as freedom of expression, which includes the use of new technologies such as "drones," i.e., unmanned aircraft vehicles ("UAVs"). We regularly participate in regulatory proceedings involving such technologies, and thus view the notice-and-comment process as a vitally important tool to ensure that regulation does not stifle the development of beneficial technologies.

TechFreedom has purchased a drone that it wishes to operate in the national airspace system. However, because this drone weighs more than 250 grams, TechFreedom is prohibited from operating this drone unless it abides by the Interim Final Rule's registration requirement and pays a $5.00 fee. *See* Registration and Marking Requirements for Small Unmanned Aircraft, *Interim Final Rule*, 80 Fed. Reg. 78594, 78645–648 (Dec. 16, 2015) [hereinafter "Interim Final Rule" or "IFR"] (JA 61–64).

TechFreedom and its counsel authored this brief in whole, and no other party or party's counsel has contributed money to help fund preparation and submission of this brief.

SUMMARY OF ARGUMENT

The FAA's Interim Final Rule is unlawful. In Section 336(a) of the FAA Modernization and Reform Act of 2012, Congress ordered the FAA not to "promulgate any rule or regulation regarding a model aircraft" if (among other things) it is operated for recreational purposes. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336(a), 126 Stat. 11, 77 (2012) [hereinafter "the Act" or "FMRA"].

The FAA concedes that certain unmanned aircraft vehicles ("UAVs") are such model aircraft, yet has attempted to regulate them anyway. *See* IFR at 78634 (JA 50). The FAA claims it is merely exercising its discretion to enforce a requirement (registration) that it had, in its "agency discretion," chosen not to apply to model aircraft in the past. *Id.* at 78640 (JA 56). Yet, recognizing the impracticality (if not impossibility) of applying that (*paper* registration) requirement to model aircraft, it decided to promulgate a new rule to require online registration of all UAVs weighing over 250 grams, including model aircraft. Thus did the agency put its thumb in the eye of a Congress that clearly told it *not* to "promulgate any rule or regulation regarding a model aircraft." FMRA, § 336(a), 126 Stat. 77.

Additionally, in rushing to issue registration and marking regulations for UAVs to curb the threat posed by the looming holiday shopping season, the

FAA felt justified in bypassing the typical notice-and-comment rulemaking procedures required by the Administrative Procedure Act ("APA"). IFR at 78596–599 (JA 12–15). The FAA's attempt to invoke the "good cause" exception here, while pointing to insufficient evidence of impending harm and nearly four years after passage of the Act, should not be permitted.

Finally, the FAA's IFR should be invalidated because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA. 5 U.S.C. § 706. The IFR cites merely to anecdotal reports of the potential harms posed by certain UAVs in justifying its decision to bypass APA rulemaking requirements. Arbitrary and capricious reasoning is also manifest in the FAA's decision to regulate drones weighing as little as 250 grams — while other countries that have addressed this have set the bar substantially higher, at 1 kg or more — without evidence that this lower threshold is needed, much less justified by a thorough cost-benefit analysis. Likewise, the FAA's decision to change its mind from an earlier interpretation to, in the IFR, impose regulations on model aircraft, without providing adequate justification for this change in policy, renders the IFR unlawful.

ARGUMENT

I. The FAA violated Section 336 of the *FAA Modernization and Reform Act of 2012* by promulgating the Interim Final Rule.

Petitioner's request for declaratory and equitable relief, enjoining enforcement of provisions of the Interim Final Rule, should be granted because the the FAA has exceeded its statutory authority as limited by Section 336 of the FMRA, § 336, 126 Stat. 77–78. This conflict is clear from the plain meaning of the language in Section 336, as well as the FAA's past practices regarding regulation of model aircraft.

A. *Chevron* does not apply to the FAA's interpretation of Section 336(a).

The Supreme Court has recently been carefully limiting the application of *Chevron* at "Step Zero" — that is, in deciding whether the doctrine even applies *before* engaging in the familiar two-step analysis of ambiguity and reasonableness. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, No. 15-415, slip op. (June 20, 2016); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). Most recently, the Court declined to apply *Chevron* in *Navarro*, where the agency had reinterpreted a long-standing statutory exemption. "*Chevron* deference is not warranted where the regulation is 'procedurally defective' — that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Navarro*, slip. op. at 8.

While the procedural failing is different here, the same general point applies: the FAA may not circumvent the most basic procedural requirements of administrative law — providing an opportunity for affected parties to comment upon regulation — then claim *Chevron* deference for that interpretation.

The Supreme Court noted one caveat to this rule: "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Id*. Here, the FAA's decision to bypass the notice-and-comment rulemaking process entirely before issuing a final rule deprived commenters of the ability even to object to the failure in the FAA's process. In sum, because the FAA bypassed the requirements of notice and comment without meeting the good cause exemption, *Chevron* deference does not apply, and the Court should engage in a more searching analysis into the permissibility of the FAA's interpretation of Section 336(a).

B. The plain meaning of Section 336(a) unambiguously bars the FAA from promulgating such a rule regulating model aircraft.

The FAA exceeded its statutory authority by ignoring a regulatory exemption that Congress had written into the Act. The Act, through Section 336(a), establishes a Special Rule for Model Aircraft, stating that "the Administrator of the Federal Aviation Administration may not promulgate

any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft." FMRA, § 336(a), 126 Stat. 77 (2012). The plain, unambiguous meaning of this provision serves as the starting point for statutory analysis. *Conn. Nat'l Bank v. Gemain*, 503 U.S. 249, 253–54 (1992). Here, Section 336 places limits on administrative authority, clearly defining the party to be barred (the Administrator of the FAA), the action to be barred (promulgation of a rule or regulation), and the scope of the exemption by outlining eight combined characteristics that trigger the special rule. FMRA, § 336(a)(1)–(5), (c)(1)–(3).

Despite this limitation, the FAA attempts to justify the Interim Final Rule by interpreting Section 336 to bar only new rules and regulations that apply *only* to model aircrafts. IFR at 78634 (JA 50). Therefore, the argument goes, since a "model aircraft" is a type of unmanned aircraft, the Interim Final Rule's expanded registration requirements, under Parts 47 and 48 of Title 14 of the Code of Federal Regulations, apply to model aircrafts merely as "existing statutory and regulatory requirements." *Id.*

Such an interpretation is inconsistent with the plain meaning of "regarding" as used in the Section 336(a) prohibition. "Regarding" means "[i]n reference to; with respect to; concerning" or "relating to" and would encompass a rule or regulation which targets a model aircraft, *as well as other*

unmanned aircrafts not utilized for hobby or recreational use. *Regarding*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2015); *accord Regarding*, MERRIAM-WEBSTER'S LEARNER'S DICTIONARY ONLINE (last visited June 21, 2016), *available at* http://goo.gl/dC7D1y. Given the unambiguously clear meaning of Section 336(a), the Court should not defer to the strained statutory interpretation the FAA has adopted to the contrary. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

C. Congress intended Section 336(a) to extend the FAA's past practice of exempting model aircraft from regulatory oversight.

By creating a special rule specifically for model aircraft, Congress intended to continue the FAA's past practice of exempting such aircraft from extensive regulation. As early as 1981, the FAA encouraged "*voluntary compliance* with, safety standards for model aircraft operators" through Advisory Circular 91-57, highlighting that the agency traditionally did not directly regulate aircraft utilized solely for recreational use. Model Aircraft Operating Standards, AC 91-57, ¶ 1 (June 9, 1981) (emphasis added) (JA 1–2). Through the Section 336(a) prohibition, Congress reaffirmed the agency's past practice of exempting model aircraft from burdensome regulations so long as they were used for purely for hobbyist and recreational purposes. Indeed, the

Congressional record reflects the purpose of this amendment was "[t]o provide for use of model aircraft for recreational and other purposes." CONG. REC. S.832 (daily ed. Feb. 17, 2011). The FAA's current interpretation of Section 336 changes its long-standing policy and subjects Petitioner and other recreational drone users to unlawful registration and marking requirements.

The structure of Section 336 further supports the assertion that the IFR exceeds the FAA's statutory authority. Congress's exemption for model aircraft is limited by Section 336(b), which allows the FAA to continue "pursu[ing] enforcement action[s] against persons operating model aircraft who endanger the safety of the airspace system." FMRA, § 336(b). The FAA released Advisory Circular (91-57A) to reflect Section 336(b)'s clarification of the FAA's ability to bring enforcement actions against hobbyists and recreationists who pose safety concerns. Model Aircraft Operating Standards, AC 91-57A (Sept. 2, 2015) (JA 3–5). This limitation on Section 336(a) highlights the absence of other statutory limitations that would allow the FAA to regulate model aircraft. *Contra* IFR at 78634.

The FAA's earlier interpretation of Section 336(a) suggests that a certification rule, common among UAS aircraft, would not survive the exemption when applied to model aircraft. Interpretation of the Special Rule for Model Aircraft, No. FAA-2014-0396, at 7–8 (June 18, 2014). This prior

interpretation, as compared to the FAA's current justification for the Interim Final Rule, is consistent with the structure of Section 336 and accurately reflects Congressional intent to limit the scope of the FAA's regulations.

Congress did not intend to create a gap in Section 336 that would permit FAA regulation of model aircraft. The plain language of the exemption, enacted against the backdrop of past FAA practice, and the structure of the provision demonstrate that the Interim Final Rule exceeds the FAA's statutory authority.

D. The FAA's interpretation should fail whether or not *Chevron* is applied.

If, contrary to what we argue above, the Court does apply *Chevron*, the above analysis indicates both why the court should find that the statute is unambiguous (at Step One), in protecting recreational unmanned aerial systems from regulation as a species of model aircraft, or, failing that, that the FAA's contrary interpretation is unreasonable (at Step Two).

II. The FAA Incorrectly Invoked the "Good Cause" Exception to the Notice-and-Comment Requirement

The FAA asserted that further notice and comment to its proposed rule was "impracticable and contrary to the public interest." IFR at 78599 (JA 17). To justify this position, the FAA implemented the registry requirement as an "interim final rule" *id.* at 78594 (JA 10), under the "good cause exception" to

Section 553 of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553; *see also* Michael Asimov, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707–08 (1999). This allows agencies to avoid delays caused by compliance with the statutory requirements of the APA. 51 ADMIN. L. REV. 703, 707–08. While use of this exception has become more common, it sacrifices public input, low-cost information, and accountability. *Id.* Full notice-and-comment rulemaking leads to more effective, intelligible, and enforceable regulations. *Id.* Such democratic and pragmatic concerns should not be quickly dismissed. While the regulations at issue here are understandable — perhaps even advisable[1] — the sort of exigent circumstance required to justify bypassing notice and comment is not present.

In this context, a finding of exigent circumstances requires a departure from the general requirements of the APA — when regular compliance would frustrate the agency's ability to carry out its mission. *See* Michael A. Rosenhouse, Annotation, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA) 5 U.S.C.A. § 553(b)(B)*, 26 A.L.R. FED. 2D 97 (2015). The agency has the burden

[1] For an excellent analysis of the potential threats posed by UAS, see Eli Dourado & Samuel Hammond, *Do Consumer Drones Endanger the National Airspace? Evidence from Wildlife Strike Data*, MERCATUS CENTER OF GEORGE MASON UNIVERSITY (Mar. 2016).

of showing good cause due to an emergency. *Id.* Courts have held that this exception should be construed narrowly, so as not to swallow the rule. *Smoking & Health v. C.A.B.*, 713 F.2d 795, 801 (D.C. Cir. 1983); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). Furthermore, if an agency has long been pondering a problem — and, in this case, the agency had been aware of its duties under the Act for nearly four years — this indicates that there is no urgent emergency.

While safety in the aviation industry in particular has been invoked as an exigent circumstance, those circumstances were far more exigent. Terrorism and public safety have been invoked as rationales for exigent circumstances in the aviation industry. For example, following the September 11th attacks, revocations of the pilot licenses of non-resident aliens were upheld when made pursuant to new regulations implemented as an interim final rule. *See Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004). The rising incidence of plane hijackings in the 1970s led to emergency enactment of a rule requiring law enforcement officers at screening points. *See Airport Operators Council Intern v. Shaffer*, 354 F. Supp. 79 (D.D.C. 1973). Another interim final rule occurred in the midst of an increasing number of helicopter tour accidents. *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212 (9th Cir. 1995). These accidents resulted in twenty-four deaths and occurred in a concentrated geographic area. *Id.*

These are the sort of true exigencies that can justify bypassing the requirement of notice and comment in rulemaking. Absent such exigent circumstances, courts conclude that the public interest in following procedure outweighs an agency's desire for expediency.

Frequently, agencies attempt to justify an interim final rule through impending statutory deadlines. Courts have rejected these attempts, noting the lack of both a true emergency and a legislative demand for the action taken. *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998); *see also Buschmann*, 676 F. 2d at 357–58 (finding inadequate showing of emergency); *Texas Food Indus. Ass'n v. USDA*, 842 F. Supp. 254, 261 (W.D. Tex. 1993) (noting the lack of legislative demand for expedited action).

It is easy to distinguish acceptable exigent circumstances from the specific reasons cited by the FAA. The FAA essentially rests the basis for its agency action on the increase of unsafe UAS operations, with resultant risk to people and property. *See* IFR at 78597 (JA 13). The agency cites interference with airports and wildfire operations, and references incidents occurring in 2015, which supposedly indicate the immediacy of this danger. *Id.* at 78598 (JA 14).

Despite waving the banner of airport safety, the purported danger has not manifested any flight changes or cancellations. The prior rule already

regulated UAS operations within five miles of an airport, removing the FAA's best argument for exigency in issuing *this* rule without public comment. While the FAA has noted several accidents in the past year, ranging in location from California to New York, Kentucky, and Washington, DC, these incidents caused only minor injuries and inconvenience, and little or no property damage. *Id.* This is a far cry from the dozens of deaths caused in exigent circumstances that the court has found adequate in the past to justify an exception to the notice-and-comment requirements. Finally, there has been no attempt to analogize the UAS hazard to terrorism related threats, as this might be tantamount to labeling a flock of birds as an ISIS sleeper cell.

In sum, however useful a drone registry might be, there are no exigent circumstances to justify exemption from the full notice-and-comment process. Courts should not allow expediency to trump integrity and procedure of the law. The statute at issue was enacted in 2012. This hazard is not novel, severe, or abundant — similar threats to aviation have existed for decades. Since the agency has been considering the problem for some time, and it is manageable, the agency has no reason not to *follow the letter of the law* under the APA, as the issue is not so dire as to significantly enhance any danger or frustrate the FAA's ability to carry out its mission.

III. The FAA's IFR is Arbitrary and Capricious

Upon issuing its IFR on December 16, 2015, the FAA swept unmanned aircraft hobbyists into its registration requirements on grounds that were arbitrary and capricious. According to the APA, a court shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2015). By relying on anecdotal reports and misreading Congress's prohibition on regulations of hobby aircraft, the FAA acted in an arbitrary and capricious manner and imposed its will upon model aircraft enthusiasts nationwide.

In determining whether agency action is arbitrary or capricious, the reviewing court must determine if the agency considered relevant factors in making its decision or whether there was a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). While the scope of judicial review for arbitrary and capricious action is narrow, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation" for its decision. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

As the primary reason for its IFR, the FAA points to dangers posed by unmanned aircraft hobbyists: "Since February 2015, reports of potentially unsafe UAS operations have more than doubled, and many of these reports

indicated that the risk to manned aviation or people and property on the ground was immediate." IFR at 78597 (JA 13). As proof of this grave threat, the agency points to anecdotes, such as reports of unmanned aircraft flying "between eight and thirteen miles" from the approaches to New York area airports, reports of unmanned aircraft interfering with firefighting efforts, and various crashes that resulted in no serious injuries. *Id.* at 78597–598 (JA 13–4). It uses these anecdotal reports of potential incidents caused by devices that may or may not be owned by hobbyists as justification for a sweeping new rule. If these are the relevant data, they do not provide FAA with a "satisfactory explanation" for action that the FAA admits will cause hobbyists to incur costs in the range of millions of dollars. *Id.* at 78596 (JA 12).

To meet the "arbitrary and capricious" standard, an agency must provide an explanation for its decision that is grounded in reason and is ultimately plausible: "Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Here, however, the FAA claims that model aircraft can be included in registration requirements through a misinterpretation of Section 336 the FMRA. Citing an expected increase in the number of small, unmanned aircraft owned by inexperience and dangerous

users, the FAA extended the registration requirement, against Congress's will, to unmanned aircraft used for hobby and recreational purposes.

Per Section 336, the FAA Administrator may not "promulgate any rule or regulation regarding a model aircraft . . . if the aircraft is flown strictly for hobby or recreational use" and also meets other requirements, such as size and operation according to community-based guidelines. FMRA, § 336, 126 Stat. 77. Yet the agency interpreted this as a prohibition merely on "new rules or regulations that apply *only* to model aircraft" and thus the FAA found that it is not barred from applying regulations to model aircraft when such regulations apply to all aircraft. IFR at 78634 (emphasis added) (JA 50).

While courts are generally supposed to defer to agencies in their interpretations of ambiguous statutes, *Chevron*, 467 U.S. 837, 844 (1984); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) ("The weight of [an Administrator's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."), there is no ambiguity here. Congress intended a prohibition on "any" regulation "regarding" hobby model aircraft — not merely regulations that directly target them. FMRA, § 336, 126 Stat. 77. Congress's intentions regarding hobby and recreational

model aircraft are clearly "relevant factors" that the FAA should have considered in adopting its mandatory registration position. While mentioning Section 336, the FAA provides little explanation for why the provision does not apply, and it adopts highly implausible reasoning for the basis of its decision. "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). While the FAA was not completely silent in its dereliction of model aircraft under Section 336, the FAA effectively disregarded it in issuing the IFR and gave inadequate justification for why this change in policy was warranted. Therefore, the FAA's Interim Final Rule should be held unlawful and set aside for being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court grant the petition for review and vacate the FAA's Order.

Respectfully submitted,

R. BEN SPERRY
THOMAS W. STRUBLE
BERIN M. SZOKA
TECHFREEDOM
110 Maryland Avenue, Suite 409
Washington, DC 20002
202-803-2867

June 21, 2016

Counsel for Amici

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains 3,770 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Calisto MT 14-point font.

June 21, 2016

/s/ R. Ben Sperry
R. Ben Sperry

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

June 21, 2016

/s/ R. Ben Sperry
R. Ben Sperry