

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

JOHN A. TAYLOR,

Petitioner,

v.

MICHAEL P. HUERTA,

Respondent.

**Nos. 15-1495, 16-1008,
16-1011**

**OPPOSITION TO PETITIONER'S MOTION
FOR SUMMARY DISPOSITION**

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INTRODUCTION AND SUMMARY

On December 16, 2015, the Federal Aviation Administration (FAA) issued an interim final rule providing for a streamlined, web-based registration system for small unmanned aircraft systems weighing more than 0.55 pounds. Petitioner contends that the FAA could not permissibly require operators of model aircraft to use this registration system. Petitioner previously asked this Court to enjoin the final rule pending disposition of this petition for review. The Court denied that motion without requiring the FAA to respond. Petitioner now asks the Court to summarily reverse the final rule without the benefit of briefing or oral argument.

A party seeking summary disposition bears the “heavy burden,” *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987), of demonstrating that “the merits of his claim so clearly warrant relief as to justify expedited action,” *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969). As explained below, petitioner has established no legal error by the agency and has certainly not satisfied the stringent standards for summary reversal.

STATEMENT

1. This case concerns the operation of “unmanned aircraft,” which are defined as “aircraft that [are] operated without the possibility of direct human intervention from within or on the aircraft.” *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(8) (Act). In the past two decades, the number of unmanned aircraft has increased rapidly, creating significant concerns about the safety of the

national airspace system, as well as the safety of persons and property on the ground. This is especially true given that many, if not most, owners of unmanned aircraft have no prior aviation experience and lack an understanding of the requirements for safe operation of their unmanned aircraft. 80 Fed. Reg. at 78,598.

2. Congress has directed the FAA to “promote safe flight of civil aircraft in air commerce by prescribing” standards that govern the operation of “aircraft” in the United States. 49 U.S.C. § 44701. Subtitle VII of Title 49 of the U.S. Code and implementing regulations define “aircraft” as “any contrivance invented, used, or designed to navigate, or fly, in the air.” *See* 49 U.S.C. § 40102(a)(6); *see also* 14 C.F.R. § 1.1 (defining “aircraft” as “a device that is used or intended to be used for flight in the air”).

In 2012, Congress enacted the FAA Modernization Act, which addressed, *inter alia*, “unmanned aircraft systems.” Section 331 of the Act expressly defines the term “unmanned aircraft” as a type of “aircraft.” Act § 331(8). Section 336 of the Modernization Act delineates a narrow class of unmanned aircraft referred to as “model aircraft,” which it expressly defines as “unmanned aircraft” that are (1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes. Act § 336(c). Section 336(a) further provides that the FAA cannot promulgate future regulations with regard to model aircraft so long as the model aircraft, as defined in section 336(c), are operated in accordance with the limitations set forth in section

336(a). However, the FAA retained the authority to pursue enforcement action against persons operating model aircraft in a manner that endangers the safety of the national airspace system. Act § 336(b).

In the Modernization Act, Congress also directed the Secretary of Transportation to determine which unmanned aircraft systems “do not create a hazard to users of the national airspace system or the public or pose a threat to national security.” Act § 333(a), (b). To this end, in February 2015, the Secretary and the Administrator of the FAA issued a notice of proposed rulemaking entitled “Operation and Certification of Small Unmanned Aircraft Systems.” 80 Fed. Reg. 9544 (Feb. 23, 2015).

3. By statute, all aircraft must be registered prior to operation. 49 U.S.C. §§ 44101, 44103. The existing aircraft registration system depends upon a cumbersome paper-based process. *See* 80 Fed. Reg. at 78,600.

On October 22, 2015, the FAA requested information from the public regarding registration for small unmanned aircraft systems and how best to streamline the process. 80 Fed. Reg. 63,912. The FAA also established a Registration Task Force to develop recommendations in three areas: (1) the minimum requirements for unmanned aircraft systems to be registered; (2) the registration process; and (3) the means of proving registration and marking the aircraft. 80 Fed. Reg. at 78,601.

The FAA received over 4500 comments, which it carefully considered. *See* 80 Fed. Reg. at 78,601. On December 16, 2015, the FAA issued an interim final rule

providing “an alternative, streamlined and simple, web-based aircraft registration process for the registration of small unmanned aircraft, including small unmanned aircraft operated as model aircraft, to facilitate compliance with the statutory requirement that all aircraft register prior to operation.” *Id.* at 78,594. The rule adopted regulations to provide for the new web-based registration process.

The registration rule requires all aircraft weighing between 0.55 pounds and 55 pounds to be registered prior to operation, and provides a “simpler method for marking small unmanned aircraft.” 80 Fed. Reg. at 78,594; 14 C.F.R. § 48.15; 80 Fed. Reg. at 78,595, 78,638. Individuals operating unmanned aircraft solely as model aircraft need only register once, even for multiple aircraft. 14 C.F.R. § 48.115(a). To register a model aircraft, an individual must supply his name, address, and email address. *Id.* § 48.100(b). The fee to register is \$5, regardless of the number of aircraft. *Id.* § 48.30(b).¹ At the end of the registration process, the registrant is asked to acknowledge that he has read, understood, and intends to follow certain safety guidance.² The rule requires that aircraft be registered before operation. For aircraft operated before December 21, 2015, the FAA provided a grace period allowing those aircraft to continue to be operated without registration, as long as registration is completed on or before February 19, 2016. *Id.* § 48.5.

¹ The FAA provided a rebate for the full amount of the registration cost for thirty days from the effective date of the rule.

² This is the “oath” to which petitioner refers in his motion. Mot. 6-7.

The FAA explained in the final rule that registration and marking “provide a means by which to quickly identify . . . small unmanned aircraft in the event of an incident or accident.” 80 Fed. Reg. at 78,595. Registration also provides the FAA with “an immediate and direct opportunity for the agency to educate” the hundreds of thousands of operators of unmanned aircraft systems. *Id.*

ARGUMENT

Summary reversal “is rarely granted and is appropriate only where the merits are ‘so clear [that] plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court’s] decision.’” Handbook of Practice and Internal Procedures: United States Court of Appeals for the District of Columbia Circuit 36 (current through June 1, 2015) (quoting *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)). Such extraordinary relief is plainly not appropriate here.

1. Petitioner challenges a major regulatory action, which was the product of extensive deliberation. During the rulemaking, the FAA convened a Registration Task Force and carefully considered its recommendations, along with more than 4500 comments from the public. The FAA is currently in the process of compiling the voluminous administrative record in support of the rulemaking, and the certified index has not yet been filed in this Court. And, because this suit was brought under a statute providing for direct review in this Court, no other court has considered the administrative record, and the parties have not previously briefed the issues to be

decided by this Court. Petitioner asks this Court to summarily vacate the FAA's rulemaking on the basis of a nine-page motion, which does nothing more than recite the requirements for summary reversal and aver that they are met in this case.

Mot. 8-9, ¶¶ 13-15. Petitioner has fallen far short of meeting his "heavy burden."

Taxpayers Watchdog Inc. v. Stanley, 819 F.2d 294, 297-98 (D.C. Cir. 1987).

2. As in his earlier motion for an injunction pending review, petitioner urges that "[s]ignificant harm will occur if the order is not reversed expeditiously." Mot. 6. As an initial matter, the rule does not impose an obligation to register, but creates a streamlined web-based registration system and makes clear that the FAA is no longer exercising enforcement discretion as to certain model aircraft. And the rule imposes only minimal burdens on petitioner. An individual wishing to operate an unmanned aircraft for recreational purposes must pay \$5, spend a few minutes on a website, affirm that he has read and understood the FAA's safety guidance, and mark his unmanned aircraft. To date, more than 300,000 small unmanned aircraft owners have registered their small unmanned aircraft since the web-based registration system became available on December 21, 2015. The critical public-safety interests furthered by the FAA's rule amply justify the imposition of these registration requirements.³

³ Petitioner references a technical issue that briefly affected the online system. Mot. 8 n.13. But that issue was rectified by the afternoon of December 22, 2015. No credit card information was disclosed.

3a. Contrary to petitioner's assertion, "model aircraft" are "aircraft" within the meaning of Subtitle VII of Title 49 of the U.S. Code. That Act defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly, in the air." *See* 49 U.S.C. § 40102(a)(6). And, in 2012, Congress defined "model aircraft" as an "unmanned aircraft that is—(1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes." Act § 336; *see also id.* § 331(8) (defining "unmanned aircraft" as "aircraft that is operated without the possibility of direct human intervention from within or on the aircraft"); *Huerta v. Pirker*, NTSB Order No. EA-5730, at 12 (affirming that model aircraft are "aircraft").

Moreover, the FAA has long recognized that unmanned aircraft fall within the statutory and regulatory definition of "aircraft," and are thus subject to FAA regulation and oversight. *See* 79 Fed. Reg. 36,172, 36,172 (June 24, 2015) ("Historically, the FAA has considered model aircraft to be aircraft that fall within the statutory and regulatory definitions of an aircraft, as they are contrivances or devices that are 'invented, used, or designed to navigate, or fly in, the air.'").

The federal definition of "aircraft" does not mean, as petitioner suggests (Mot. 4 n.5), that "toys," "paper airplanes," and "Frisbees" must be registered. As the FAA has explained to the public, almost all children's toys that cost less than \$100 will be exempted from the rule by virtue of the provision's minimum weight limit (equivalent to approximately two sticks of butter). In addition, paper airplanes, toy

balloons, Frisbees, and similar items are not subject to registration because they are not part of a small “unmanned aircraft system,” which includes associated elements that are required for the safe and efficient operation of the small unmanned aircraft in the national airspace system (including communication links for controlling the aircraft). *See* 14 C.F.R. § 1.1; <http://www.faa.gov/uas/registration/faqs/#cov> (last visited Jan. 28, 2016).

b. Petitioner’s status as an operator of model aircraft does not alter the analysis. Petitioner errs in asserting that the FAA’s interim final rule violated section 336 of the Modernization Act. That provision states that the agency “may not promulgate any rule or regulation regarding a model aircraft” operated “in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization.” Act § 336.

As the FAA explained in its final rule, “the prohibition against future rulemaking is not a complete bar on rulemaking and does not exempt model aircraft from complying with existing statutory and regulatory requirements.” 80 Fed. Reg. 78,634. As noted, model aircraft are “aircraft” and by statute must be registered. The interim final rule “simply provides a burden-relieving alternative” for model aircraft operators to use to register. *Id.* The rule therefore imposes no new regulatory requirements on the operators of model aircraft.

Petitioner’s position also misapprehends the nature of a “model aircraft.” An unmanned aircraft fits the Modernization Act’s definition of “model aircraft” based

on how it is *operated*, not based on its inherent features. An unmanned aircraft can fit within the definition of “model aircraft” only if it is operated solely for hobby or recreational purposes, solely within the visual line of sight of the operator, and solely within community standards. Modernization Act § 336 (quoted at Mot. 2-3). There is thus no way for FAA to know in advance of registration whether an aircraft will qualify as a “model aircraft.”

Moreover, the important safety purposes of registration would be undermined if individuals could decline to register by asserting that they planned to operate their aircraft as model aircraft. As previously noted, the FAA is responsible for ensuring the safe flight of aircraft, including unmanned aircraft systems, in the national airspace system. If such an operator were to engage in unsafe practices with respect to an unmanned aircraft system, or to operate outside the bounds of “model aircraft,” the FAA would have no direct way of identifying the owner of the unmanned aircraft system, leading to the serious safety concerns outlined in FAA’s final rule. *See* 80 Fed. Reg. at 78,595. And if operators of model aircraft were not required to register, the FAA would be hampered in its goal of educating operators of unmanned aircraft on safe practices before potentially catastrophic accidents occur.

CONCLUSION

For the foregoing reasons, the Court should deny petitioner's motion for summary disposition.

Respectfully submitted,

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FEBRUARY 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2016, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright

ABBY C. WRIGHT