

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

ELECTRONIC PRIVACY INFORMATION  
CENTER,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

No. 15-1075

**MOTION TO DISMISS**

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## INTRODUCTION

Petitioner seeks review under 49 U.S.C. § 46110 of a notice of proposed rulemaking issued by the Federal Aviation Administration (FAA). But section 46110 requires a *final* order of the Secretary, and a notice of proposed rulemaking is, by definition, not final.

Petitioner also challenges FAA's denial of petitioner's request to initiate a rulemaking. But that challenge is untimely. Under section 46110, a person aggrieved by a final order of the FAA must file a petition for review within 60 days. FAA denied petitioner's request to initiate rulemaking on November 26, 2014; the deadline for seeking review of that denial was therefore January 26, 2015. Yet petitioner did not file a petition for review until March 31. Because neither of petitioners' challenges conforms to the requirements of section 46110, this Court should dismiss the petition for review.

## STATEMENT

1. Congress has vested the FAA with the responsibility of protecting the safety and security of the national airspace system. *See* 49 U.S.C. §§ 40103, 44701. As a safety agency, the FAA is empowered to regulate the operation of aircraft to the extent necessary to ensure the safe operation of aircraft and efficient use of the airspace. *Id.* 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* Pub. L. No. 112-95, § 331(8); *see also*

FAA, Integration of Civil Unmanned Aircraft Systems in the National Airspace System Roadmap (November 7, 2013), at 8.<sup>1</sup> An “unmanned aircraft system” (commonly known as a “drone”) is the term used to describe an unmanned aircraft and the “associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system.” Pub. L. 112-95, § 331(9). These aircraft vary greatly in size: some are the size and weight of small birds, while others have wingspans of hundreds of feet and weigh tens of thousands of pounds. *See* FAA, Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007).

In 2012, Congress enacted the FAA Modernization and Reform Act (Modernization Act). Congress directed the FAA to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system.” Pub. L. No. 112-95, § 332(a)(1). With respect to small unmanned aircraft systems, the Modernization Act directed the FAA to determine “which types of unmanned aircraft systems, if any, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line of sight do not create a hazard to users of the national airspace system or the public or pose a threat to national security.” *Id.* at § 333. The Modernization Act

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<sup>1</sup> Available at [http://www.faa.gov/about/initiatives/uas/media/uas\\_roadmap\\_2013.pdf](http://www.faa.gov/about/initiatives/uas/media/uas_roadmap_2013.pdf).

did not direct the FAA to consider privacy issues when addressing small unmanned aircraft systems.

2. In 2012, following enactment of the Modernization Act, petitioner sent the FAA a letter requesting that the FAA initiate notice-and-comment rulemaking to address “the threat to privacy and civil liberties that will result from the deployment of aerial drones within the United States.” Pet., Ex. 3, at 1, 5. The petition noted the increased use of unmanned aircraft systems by individuals and law enforcement agencies, *id.* at 1-3, and requested that FAA “address the privacy problems associated with the highly intrusive nature of drone aircraft, and the ability of operators to gain access to private areas and to track individuals over large distances,” *id.* at 4.

The FAA denied petitioner’s request on November 26, 2014, under 14 C.F.R. § 11.73. Pet., Ex. 2. The FAA explained that it must prioritize its rulemaking projects and that “after reviewing [petitioner’s] request,” it had concluded that “the issue [petitioner] raised is not an immediate safety concern.” *Id.* at 1. The FAA further explained that it had begun a rulemaking to address small unmanned aircraft systems and that it would consider petitioner’s comments as part of that rulemaking process.

3. In February 2015, the FAA issued a notice of proposed rulemaking entitled “Operation and Certification of Small Unmanned Aircraft Systems,” as part of its effort to safely integrate small unmanned aircraft systems into the national airspace. 80 Fed. Reg. 9544 (Feb. 23, 2015). The proposed rule sets out a number of proposed requirements for small unmanned aircraft systems. *Id.* at 9546. For example,

consistent with the definition in section 331(6) of Public Law 112-95, the FAA proposed to define a small unmanned aircraft as an aircraft weighing less than 55 pounds, including everything on board the aircraft. The FAA also proposed that small unmanned aircraft be operated only during the day. *Id.* at 9561. And the FAA further proposed that operators of small unmanned aircraft systems be required to pass a test demonstrating aeronautical knowledge and be vetted by the Transportation Security Administration. *Id.* at 9572, 9588.

As relevant here, the FAA acknowledged in its notice of proposed rulemaking that privacy concerns had been raised regarding unmanned aircraft operations and noted its ongoing participation in a multi-agency, multi-stakeholder engagement process to address those concerns. *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, <https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>. The FAA explained, however, that it believed such issues were beyond the scope of its proposal to safely integrate small unmanned aircraft systems into the national airspace system. *Id.* at 9552.

The FAA invited a broad range of comments to its proposed rule. Petitioner submitted a comment on April 24, 2015, the day the comment period closed. *See* Dkt. ID FAA-2015-0150-4314.

## ARGUMENT

### I. Petitioner's Challenge to FAA's Notice of Proposed Rulemaking Should Be Dismissed for Lack of Jurisdiction.

Under 49 U.S.C. § 46110, “a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit.” As this Court has explained, jurisdiction under 49 U.S.C. § 46110 is limited to “review of final agency orders.” *Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438–39 (D.C. Cir.1976) (discussing 49 U.S.C. § 1486, the predecessor to section 46110).

To be deemed ‘final’ and thus reviewable as an order under 49 U.S.C. § 46110, “an agency disposition ‘must mark the consummation of the agency’s decisionmaking process,’ and it ‘must determine rights or obligations or give rise to legal consequences.’” *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (quoting *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007)); *see also Village of Benseville v. FAA*, 457 F.3d 52, 68-69 (D.C. Cir. 2006) (holding that letter of intent with respect to funding was not final order under section 46110); *Red River Transp. & Dev. Co. v. FAA*, 630 F.2d 592, 594 (8th Cir.1980) (holding that letter stating that the FAA believed petitioner to have violated the law was not a final order under the predecessor to section 46110, 49 U.S.C. § 1486).

A notice of proposed rulemaking is, by its very nature, not a final order. *See Las Brisas Energy Center, LLC v. E.P.A.*, 2012 WL 10939210 (Dec. 13, 2012) (unpublished) (granting motions to dismiss and explaining that “[t]he challenged proposed rule is not final agency action subject to judicial review. . .”). The FAA’s explanation of the requirements it proposes to implement for small unmanned aircraft systems plainly does not represent the culmination of the agency’s decisionmaking. A notice of proposed rulemaking exists to give the public notice of an agency’s intended course of action and to allow the public to comment on that course in an attempt to inform the agency’s decisionmaking. Such a notice does not affect the legal rights or obligations of any party because the agency may change its mind on particular requirements and the notice has no binding effect in the interim. Petitioner was free to submit its comments regarding privacy concerns to the FAA and has indeed submitted a comment in the course of the rulemaking proceeding. To invoke this Court’s jurisdiction under section 46110, petitioner must wait until the FAA promulgates the final small unmanned aircraft systems rule. Petitioner’s challenge is premature at this point, and this Court should therefore dismiss the portion of the petition for review challenging the FAA’s notice of proposed rulemaking.

## II. The Challenge to FAA's Denial of the Petition To Initiate Rulemaking Should Be Dismissed As Untimely.

Petitioner also seeks to challenge the FAA's denial of its request that the agency initiate a rulemaking proceeding to address privacy concerns and small unmanned aircraft systems. Although the FAA's denial letter constitutes final agency action, petitioner failed to challenge the FAA's denial letter within the 60-day limitation applicable in this case. *See* 49 U.S.C. § 46110. The FAA denied petitioner's request to initiate rulemaking on November 26, 2014. The present petition for review was not filed until March 31 2015, more than three months later.

Petitioner suggests that the FAA's notice of proposed rulemaking was the "final" denial of its rulemaking petition. Pet. 2 (calling the FAA letter the "initial" determination). But the text of the FAA's letter undermines any such claim. The FAA's response to petitioner's letter was not a tentative response; the FAA clearly denied petitioner's request to initiate rulemaking in accordance with 14 CFR §11.73 because the petition did not raise an immediate safety concern. The FAA did not defer a decision on the rulemaking petition to some later date. Petitioner was therefore required to file a petition for review by January 26, 2015. It failed to do so.

In addition to denying the request to initiate rulemaking, the FAA also noted in its denial letter that it would consider petitioner's comments in the course of its rulemaking on small unmanned aircraft systems. Pet., Exh. 2. This was not a deferral of a decision on petitioner's request for rulemaking; it was instead an invitation to



participate in the ongoing rulemaking. Moreover, even if one interpreted the FAA's remarks concerning the consideration of petitioner's comments as delaying a decision on the petition until the conclusion of rulemaking proceedings, petitioner's suit still could not proceed. As explained above, the small unmanned aircraft systems rulemaking is ongoing, and the comment period has recently closed. Petitioner, and any other person substantially affected by FAA's final rule, may petition for review of the FAA's final rule on small unmanned aircraft systems within 60 days of promulgation of the final rule. Petitioner may not attempt to use a denied rulemaking petition to bring an interlocutory challenge to the FAA's proposed requirements for small unmanned aircraft systems.

### CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

Respectfully submitted,

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MAY 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2015, 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**  
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