UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. RAPHAEL PIRKER, Respondent.	:	Docket No. CP-217 Appeal from March 6, 2014 Decisional Order of Judge Patrick G. Geraghty

RESPONDENT'S REPLY BRIEF

KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 AVENUE OF THE AMERICAS NEW YORK NY 10036

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Pursuant to 49 C.F.R. § 821.48(c), Respondent Raphael Pirker respectfully submits this Reply Brief in response to the Administrator's Appeal of the March 6, 2014 decisional order dismissing the Complaint in its entirety with prejudice (the "Decision").[1]

INTRODUCTION

This proceeding represents a moment unprecedented in American aviation history: an attempt to penalize the operator of a model aircraft in the absence of any regulation, and despite decades of FAA statements confirming the lack of regulation. Although one would never know it from reading the Administrator's Appeal, the impetus for this historic case is not that Mr. Pirker's five-pound styrofoam model aircraft hurt anyone or damaged any property, but that he operated it for a commercial purpose, in violation of a non-binding FAA policy. Having been caught trying to enforce the unenforceable, the FAA resorts to an absurd *post hoc* interpretation of the definition of "aircraft." This new interpretation poses intractable conflicts with countless regulations and, if adopted, would place the NTSB in the awkward position of being viewed as having failed to fulfill its investigatory obligations. Moreover, this new interpretation, clearly concocted for litigation, contradicts not only the plain language of the definition but also the considered conclusions of the FAA's own researchers. All of these strained efforts are undertaken for a single purpose: to obscure the agency's decade-long delay in issuing proposed unmanned aircraft regulations pursuant to the required notice and comment process required by 5 U.S.C. § 553. Neither *Chevron* nor any other legal doctrine saves the FAA from its failure to issue those regulations. The dismissal should be affirmed.

[1] The Decision is provided as Exhibit A in Respondent's Appendix of Exhibits, submitted together with other materials in the public record for the Board's ease of reference.

THE DECISIONAL ORDER

The Administrator's Appeal Brief obfuscates the core holding of Judge Geraghty's Decision, which was a simple and unassailable conclusion: "at the time of Respondent's model aircraft operation, as alleged herein, there was no enforceable FAA rule or FAR Regulation applicable to model aircraft or for classifying model aircraft as a UAS." Decision at 8.

Judge Geraghty also concluded that the FAA's 2007 Policy Notice 07-01, which contains the FAA's definition of an "unmanned aircraft system" and purports to impose regulations upon model aircraft (including a prohibition on operations for "business purposes") is "non-binding" or an "invalid attempt of legislative rulemaking, which fails for non-compliance with the requirement of 5 U.S.C. Section 553 Rulemaking." *Id.*

The Decision also rejected the Administrator's last-ditch "overreaching" litigating position about the definition of the word "aircraft." Judge Geraghty concluded that the argument is "risible," results in "*reductio ad absurdum*" assertions of regulatory authority, and completely contradicts decades of clear FAA pronouncements, official guidance and interpretations to the contrary. Decision at 3, 7 n.24. Judge Geraghty rejected any possible application of *Chevron* or similar doctrines concerning deference to agency interpretation, by finding that the interpretation offered by the Administrator was not only clearly erroneous, but completely absurd, and that the imposition of such a significant change upon the public would, even if warranted, require Section 553 rulemaking under *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), and progeny. Decision p. 8 n. 25.

QUESTIONS PRESENTED

1. Whether Respondent may be assessed an aviation civil penalty for his model aircraft operation notwithstanding the complete lack of any federal aviation regulation concerning model aircraft, and a decades-long history of agency confirmation of non-regulation.

2. Whether the Administrator's interpretation of a statutory and regulatory definition, advanced only as a *post hoc* litigating position, should receive any deference, notwithstanding the contrary plain meaning of the statutory and regulatory text, the absurd and contradictory consequences of the proposed interpretation, and numerous prior agency interpretations to the contrary.

On an appeal of an initial decision, the Board is to consider only the following issues: "Are conclusions made in accordance with law, precedent and policy?" and "Have any prejudicial errors occurred?" 49 C.F.R. § 821.49(2) & (4). As set out below, Judge Geraghty's Decision is in accordance with law and he committed no prejudicial errors in finding that this penalty proceeding must be dismissed as a matter of law.

ARGUMENT

I. Judge Geraghty Appropriately Recognized That This Proceeding Concerns the Improper Enforcement of a Non-Binding Policy Statement

The Administrator's entire Appeal Brief ignores the elephant in the room: the FAA's unprecedented regulation-by-policy of a previously unregulated device so as to impose an unprecedented (and unenforceable) ban on "business" use of that technology. Out of the likely one billion model aircraft operations in United States history,[2] why did the FAA pursue enforcement only against this one, involving a five-pound styrofoam model which caused no injury or property damage? Why has the FAA bent over backwards to call into question the very meaning of an obvious term it has freely used for decades, "model aircraft"? Because the alleged purpose of Mr. Pirker's model aircraft operation was *commercial.*

It is undisputed that the FAA has never expressly regulated model aircraft or unmanned aircraft systems. In 1981, the agency confirmed this lack of model aircraft regulation by issuing Advisory Circular AC 91-57, requesting only "*voluntary compliance*" with safety standards "for

[2] One could roughly estimate the number of model aircraft operations since 1981 by multiplying the number of Academy of Model Aeronautics members (160,000), double it to include the many model aircraft enthusiasts who are not AMA members, multiplied by an estimated average 10 model aircraft operations per month, to arrive at an estimated *1.3 billion operations* since 1981.

model aircraft operators." Decision at Attachment 1. These standards, such as a request that models be flown below 400 feet AGL, do not specifically align with any actual federal aviation regulations, such as altitude restrictions or airspace classifications. AC 91-57 makes no distinction between model aircraft flown for commercial purposes and those flown for recreation. Nor does it distinguish between public and civil operators. It applies to any "model aircraft operators." Nowhere does the FAA indicate the possibility of an aviation penalty. Indeed, that notion is "incompatible" with standards that are "voluntary." Decision at 4.

In 2007, the FAA sought to prohibit the use of model aircraft for "business purposes," despite their longstanding use for various profitable purposes.[3] This "ban," the first time the agency has ever suggested model aircraft may be subject to *any* federal regulation (without indicating which ones), was issued as a "Notice of policy" in the Federal Register. *See* "Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714; Notice No. 07-01, 72 Fed. Reg. 29 at 6689 (Feb. 13, 2007). Exhibit B ("Notice 07-01"). Notice 07-01 defines a new class of device referred to as "unmanned aircraft system" and includes in that class "remotely controlled model aircraft" of any size and weight. The policy reads in pertinent part:

> The current FAA policy for UAS operations is that no person may operate a UAS in the National Airspace System without specific authority. For UAS operating as public aircraft the authority is the COA, for UAS operating as civil aircraft the authority is special airworthiness certificates, and for model aircraft the authority is AC 91–57.
>
> The FAA recognizes that people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority

[3] As just one of many examples in the public record, model aircraft were used in the making of the 2004 hit film *The Aviator,* starring Leonardo DiCaprio, which grossed $100 million at the domestic box office. Model aircraft were operated to create the movie's special effects, including a 25-foot wingspan model of the Spruce Goose that "took off and flew and landed under its own power right out of the Long Beach Harbor in the exact location where the real one did." *See* http://www.youtube.com/watch?v=X1izBmi_D5U .

of AC 91–57. AC 91–57 only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes.

Id. at 6690

After issuance of Notice 07-01, the FAA engaged in a campaign of intimidation against companies and individuals who were using model aircraft for business purposes, issuing cease and desist letters in an attempt to enforce this policy as if it were a binding regulation. Exhibit C (seventeen letters parroting the policy in Notice 07-01 and variously declaring that "failure to cease using a UAS for compensation or hire . . . . could subject you or [your company] to enforcement action by our agency.").

A significant portion of Judge Geraghty's decision examined the import of Notice 07-01. Decision at 5-6. Judge Geraghty noted the remarkable similarity between the policy statement and the allegations in the Complaint that Mr. Pirker operated an "unmanned aircraft system . . . . for compensation" and was "being paid" by an advertising agency. Compl. ¶¶ 2, 5, 6. It goes well beyond a mere similarity, however. In the FAA's Investigative Report concerning Mr. Pirker's operation, it is abundantly clear that Notice 07-01 was the reason the FAA pursued a penalty. Exhibit D (the "Report").[4] The Report *twice* asserts that Mr. Pirker engaged in "commercial photo flights under 14 CFR Part 91." *Id.* It indicates that when Mr. Pirker

[4] The NTSB ALJ, guided by the Federal Rules of Civil Procedure (*see* 49 C.F.R. § 821.5), may on a motion to dismiss consider matters of which judicial notice may be taken. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). A Court may take judicial notice of a fact "not subject to reasonable dispute" in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540 (S.D.N.Y. 2000). *See also Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 276 (S.D.N.Y. 2002) ("A court may take judicial notice of records and reports of administrative bodies") (citation and quotation marks omitted). This appeal brief refers to undisputed matters of public record in order to provide full context, but does not rely on any of them to argue for dismissal *as a matter of law*. Moreover, by arguing that its enforcement here is based on an interpretation of statutes and regulations, the FAA has made fair game its prior statements and communications on the point. The Report submitted herewith has been redacted in two places to protect a home address and an individual's identity.

communicated with the investigator about the applicability of AC 91-57, the investigator's response was a regurgitation of Notice 07-01 concerning prohibited commercial operations:

> Mr. Pirker['s] opinion is incorrect and ignores the [2007] Policy Statement on page 5 and 6 which clearly excludes Mr. Pirker's civil commercial operations from the authority of Advisory Circular (AC) 91-57. The Notice of Policy was issued to clarify the FAA's current policy concerning operations of unmanned aircraft in the National Airspace System. The FAA Policy Statement requires that no person may operate a UAS in the National Airspace System without specific authority, which for public aircraft is a Certificate of Authorization (COA), for UAS operating as civil aircraft the authority is a special airworthiness certificate, and for model aircraft the authority is Advisory Circular (AC) 91-57. The FAA recognizes that people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority of AC 91-57. AC 91-57 only applies to modelers, and thus specifically excludes its use by persons of companies for business purposes. For UAS operating as civil aircraft the authority is special airworthiness certificates.
>
> *Id* at 3.

This text is lifted practically verbatim from Notice 07-01. Tellingly, in the half-page section of the Report designated to list the regulations allegedly violated by Mr. Pirker, there is a *large blank space*. *Id.* at 2. It is clear what this case was always about: an alleged *policy* violation in search of a regulation. It is disingenuous for the Administrator to now act as though this penalty proceeding has nothing to do with enforcing its purported ban on commercial model aircraft operations, to intentionally ignore the whole issue in his Appeal, and to turn this adjudication into an absurd philosophical debate about the definition of "aircraft."

Notwithstanding the key role of Notice 07-01, the Administrator does not even bother to refute that it is merely a policy statement issued without notice and comment rulemaking and that it is in no way binding on the public. *See, e.g., Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) ("a statement of policy may not have a present effect: a general statement of policy is one that does not impose any rights and obligations"); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("[P]olicy statements are binding on neither the public nor the agency.") (internal citation omitted). Alternatively, if Notice 07-01

was intended to be binding new rule (as it surely purports to be), it fails for lack of the required *Administrative Procedures Act* § 553 notice and comment rulemaking. *See Electronic Privacy Info. Ctr. v. United States Dep't of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011); *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). By failing to refute this point on appeal, the Administrator has conceded that Notice 07-01 is invalid and not binding on the public, and has waived any objection to the contrary. *See* 49 C.F.R. § 821.48(b)(3) ("Any error contained in the initial decision which is not objected to in the appeal brief may be deemed waived."). This portion of Judge Geraghty's Decision at 8 ¶ 4, must be affirmed.

The agency's desire to avoid any discussion of this point is transparent; it has spent the past seven years sending intimidating cease-and-desist letters to the nation's pioneering entrepreneurs, photographers, real estate brokers, journalists, search and rescue volunteers, and even universities -- even though the assertion of illegality is belied by history and is found in no regulation. Evidently, the FAA originally hoped to use the civil penalty it seeks here, levied *against a foreign citizen* in contradiction of its own internal Order 2150.3B,[5] as a dire warning to others about the "illegality" of commercial model aircraft operations.

II. A Decades-Long History Confirms the Lack of Any Regulation

Judge Geraghty aptly observed that for decades upon decades, the FAA "has not issued an enforceable FAR regulatory rule governing model aircraft operation." Decision at 4.

[5] "[V]iolations committed by foreign persons, except Canadian persons, are referred to the appropriate foreign aviation authority through the Department of State."

A. *For Three Decades, the FAA Expressly and Repeatedly Confirmed That Model Aircraft Are Not Regulated*

Model aircraft have been operated in the United States for nearly a century.[6] Yet no aviation regulation refers to a "model aircraft," or "unmanned aircraft system" (UAS) or to a "drone." The word "unmanned" scarcely appears in the Administrator's Brief, even though that concept is central here, and the term used at the very beginning of his Complaint: "The [Ritewing Zephyr] is an Unmanned Aircraft System (UAS)." Compl. ¶ 2. That term is defined only in the Notice 07-01, not in any of the federal aviation regulations ("FARs").[7]

The Administrator's attempt to refute the proposition that AC 91-57 "constitutes a waiver" is merely a straw man argument. Appeal at 11. There *never was* such a regulation in the first place. The FAA is quite capable of creating a regulation that makes clear each type of device being regulated. For example, "unmanned rockets," "moored balloons," "unmanned free balloons" and "kites" each have specific regulations. 14 C.F.R. §§ 101.11-19, 101.21-25, 101.31-39. Judge Geraghty noted as a further "illustration" the category of Ultralight Vehicles. Decision 4. If any FAR included a model airplane or other type of flying device, it would say so expressly, just as these other specific FARs do.[8]

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[6] The first National Aeromodeling Championship was held 91 years ago in 1923. Exhibit E.

[7] A definition of this term appears in Public Law 112-95, but that statute post-dates Mr. Pirker's conduct. Moreover, the Section concerns regulations that Congress has directed the FAA to create in the future. Judge Geraghty correctly observed that this statute *confirms* that there were no regulations concerning UAS or model aircraft at the relevant time. Decision at 7.

[8] As a further example, *compare* NOTAM FDC 0/8326 (specifically prohibiting by name "model aircraft operations" and "unmanned aircraft systems" in the Washington D.C. area for security reasons) *with* NOTAM FDC 3/0459 (stating only that "[n]o pilots may operate an aircraft" over the east side of Vieques, Puerto Rico, due to the hazard posed by ordinance disposal). Although the Administrator now feigns confusion over what the words "model aircraft" mean, he has no trouble issuing these plain-language NOTAMs using that term.

The absence of any enforceable regulation concerning model aircraft operation is confirmed by the complete historical absence of FAA (or NTSB) involvement in those very rare instances where model aircraft caused property damage, injury, or even death. For example, neither the FAA nor NTSB investigated when a girl in a park was injured by a model helicopter near McDill Air Force base,[9] nor did they investigate the fatal accident involving a large-scale model helicopter in Brooklyn last September.[10] These incidents were handled by local police. Notably, model aircraft have an extraordinary safety record, and such incidents remain extremely rare.[11]

The lack of regulation is further illustrated by an incident that took place in August 2010, at Van-Aire Estates Airport located in Brighton, Colorado. During an event involving demonstrations of both model airplanes and manned aircraft, a large model aircraft flying over a runway collided with a manned biplane buzzing the runway unannounced.[12] The model airplane was destroyed and the biplane suffered wing damage but landed safely. The FAA and NTSB investigated this incident, because it involved a *manned aircraft* in flight, directly over an airport runway. In incident report CEN10LA487, the NTSB *did not refer to any FAR*. Exhibit F. Instead, it referred to the Academy of Model Aeronautics Safety Code provision that "model aircraft pilots should yield right of way to all man carrying aircraft." It also cited AC 91-57,

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[9] "Girl Injured By Mini Helicopter," FOX13 News, April 21, 2010, available at http://www.youtube.com/watch?v=HNZwYHI9xS4 .

[10] "Remote-Controlled Model Helicopter Fatally Strikes Its Operator," *The New York Times*, Sept. 5, 2013 at A19, available at http://www.nytimes.com/2013/09/06/nyregion/remote-controlled-copter-fatally-strikes-pilot-at-park.html .

[11] There appear to be only two reported fatalities in United States history.

[12] A video of the collision is available at http://www.youtube.com/watch?v=rvcN-0PikEU

which states that "operators should give right of way to, and avoid flying in the proximity of, full-scale aircraft" and noted that AC 91-57 "encourages operators to use observers to help."

The NTSB issued a probable cause determination on May 19, 2011. Exhibit G. "The radio-controlled airplane operator's decision to maneuver his airplane outside of the designated operating area, resulting in a collision with a bi-plane." Despite the NTSB's attribution of blame to the model aircraft operator, there was no civil penalty imposed upon him.

The National Aeronautics and Space Administration (NASA) Aviation Safety Reporting System (ASRS) database contains reports read by a minimum of two analysts in the aviation field, and their comments are incorporated into the report on the database.[13] Reports in this database involving close-calls with manned aircraft similarly confirm that there are no regulations applicable to model aircraft. *See, e.g.*, Report ACN 326359 (analysts responded to report of model airplane flown within 100 horizontal feet of a helicopter: "THERE ARE NO FARS COVERING MODEL ACFT OP."); ACN 411378 (concerning a model aircraft spotted at 700 feet AGL near an airport approach: "RPTR HAS BEEN TO THE FSDO AND THE RESPONSE IS THAT THE FARS DO NOT ADDRESS THIS AREA OF CONCERN."). Exhibits H & I.

This extensive historical record confirming the non-regulation of model aircraft is further confirmed by several prominent and official FAA statements that belie the Administrator's assertion that "the FAA has never interpreted the FAA's statute or regulations as the ALJ suggests in his decision." Appeal at 12.

In August 2001, a company inquired about use of "radio controlled blimps and aircraft" up to 22 feet in length operated in Class B airspace for purposes of commercial aerial

[13] *See* http://asrs.arc.nasa.gov/overview/report.html

photography.[14] Exhibit J. The request for a "ruling" was escalated from the Dallas-Ft. Worth Tower to the Manager of the Air Traffic Division and then escalated again to Michael A. Cirillo, Program Director for Air Traffic Planning and Procedures in the FAA's Washington D.C office. In November 2001 (notably, only two months after the 9/11 terrorist attacks), Mr. Cirillo responded in a formal memorandum addressing "radio controlled airships and aircraft [that would] operate in Class B airspace." Exhibit K. That memorandum confirms:

> The aircraft described and pictured in the attachments to your memorandum appear to be ***model aircraft that do not require compliance with Federal Aviation Regulations***. Model aircraft do not require a type certificate, airworthiness certificate, or registration. ***Federal Aviation regulations do not apply to them***. Specifically, 14 Code of Federal Regulations (CFR) Part 21, Certification Procedures for Products and Parts; 14 CFR Part 43, Maintenance, Preventative Maintenance, Rebuilding and Alteration; and ***14 CFR 91, General Operating and Flight Rules, do not apply to model aircraft.*** Model aircraft may operate in controlled airspace without air traffic control authorization, transponders, or altitude reporting equipment.

Id. (emphasis added). This same guidance was reiterated to the business owner again in 2004. Exhibit L.

The lack of regulation has even been confirmed to a *Member of Congress*. On October 30, 2009, FAA Director of Flight Standards Service John M. Allen wrote a letter to Congresswoman Doris O. Matsui concerning the "[a]pplicability of current regulations to RC [radio control model aircraft] and UAS operations." Exhibit M. Mr. Allen admits that, historically, the FARs have never applied:

> In 2004, the FAA began reevaluating its previous RC and UAS policies in response to the increasing number of operation and technical capabilities of these systems. *Prior to this*, most of these activities were recreational in nature and conducted in remote locations, while commercial activities were few in number and relatively obscure. Although *earlier policies sufficiently addressed safety concerns through voluntary compliance* with safety minimums, the FAA

[14] Class B airspace is defined as "that airspace from the surface to 10,000 feet MSL surrounding the nation's busiest airports in terms of IFR operations or passenger enplanements." *See* FAA Aeronautical Information Manual, Section 3-2-1, *available at* https://www.faa.gov/air_traffic/publications/atpubs/aim/aim0302.html .

determined *a more stringent regulatory approach* was necessary.

Id. at p. 2 (emphasis added)

This "more stringent regulatory approach" has never been proposed or implemented by the FAA through Section 553 rulemaking or the interpretation of definitions. Rather, as the letter goes on to explain:

> In 2005, the FAA addressed the developing safety concerns by providing *internal guidance* to FAA personnel regarding the assessment of future operations. In early 2007, the FAA *published formal policy* on UAS and RC modeling outlining the issues and rationale, as well as general safety parameters and procedures for continued operations. . . . These policies and procedures are consistent with broader aviation regulations in *requiring nonrecreational activities to comply with higher standards*. As such, *nonrecreational UASs must obtain appropriate airworthiness certification.*

Id. (emphasis added)

Thus, it is the 2007 "policy" published by the FAA that is the source of "higher standards" and that new policy seeks to subject "nonrecreational" operation of model aircraft to the FARs for the very first time after decades of "*voluntary compliance*." Nowhere in this letter to Congress did the FAA suggest that model aircraft were already subject to regulation under the definition of "aircraft." The Administrator now strains to suggest that only statements by its lawyers have any binding effect, Appeal at 13 n. 14, and that, apparently, FAA Director Allen was speaking out of turn to a Member of Congress.

The Administrator buries in a footnote the notion that the past 50 years of non-regulation are simply a form of selective enforcement based on "prioritizing safety risk." Appeal at 12 n. 13. In fact, there was never any enforcement to "select" from because there is no regulation. Flying "within approximately 50 feet of numerous individuals," Appeal p. 2, has been one of the *intended* operations of these devices for 91 years.[15] The FAA's newfound concern for the harm that could be inflicted upon a university statue or railroad tracks by a 5-pound piece of styrofoam

[15] A video of the 1936 National Model Airplane Meet shows operations in close proximity to people who take "evasive maneuvers." *See* http://www.youtube.com/watch?v=JvQ2ieKo5E0

is not credible. The FAA's "priority" since 2007 has been to prohibit commercial model aircraft operations, regardless of any actual safety risk. There is no other way to explain why recreational operations that have resulted in actual injuries and even (very rarely) death have received no FAA or NTSB attention, while Mr. Pirker's operation that caused no injury or property damage is now so important to the FAA as to demand the attention of the full NTSB Board. This is not selective enforcement; it is abuse of discretion. All the more so because the FAA in this very proceeding strains to avoid even whispering to the Board the actual criterion that caused it to pursue this case: not that the foam model was dangerous, but that its flight was *commercial*. Mr. Pirker should not have to pay arbitrary surprise fines out of his own pocket for the agency's failure to issue actual regulations.

III. The Administrator's "Interpretation" of the Definition of "Aircraft" Is Entitled to No Deference, Leads to Absurd Consequences, and Was Properly Rejected

Judge Geraghty ruled that "Neither the Part 1, Section 1.1, or the 49 U.S.C. Section 40102(a)(6) definitions of "aircraft" are applicable to, or include a model aircraft within their respective definition." Decision at 7. Indeed, he deemed such an interpretation "risible" and absurd ("*reductio ad absurdum*"). Decision at 3, 7 n.24. Nearly the entirety of the Administrator's Appeal Brief consists of a sharp attack on Judge Geraghty's ability to understand and apply the English language. *See, e.g.*, Appeal at 6 (arguing that "he opines without any support that his action is justified").

The FAA has for decades comfortably used the term "model aircraft" to refer to flying devices that are controlled remotely by people on the ground using radio systems. Moreover, Judge Geraghty annexed to his Decision a photograph of the Ritewing Zephyr model aircraft at issue -- being *held by a person*. Decision at Attachment 2. As Justice Potter Stewart famously said, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 196 (Stewart, J., concurring).

It is self-evident that a device that can be held by a person, rather than transport one, is a "model aircraft" as that term has been understood by anyone in the world during the past century. Judge Geraghty, who has been an NTSB administrative law judge since 1975, and who was a senior trial lawyer with the FAA before that, surely knows what an "aircraft" is for purposes of federal regulation. Indeed, his conclusion about the meaning of "aircraft" is the only possible outcome under applicable legal doctrines, including the *Chevron* doctrine, which the Administrator did not even bother to argue below except in a footnote in his sur-reply brief.

The Administrator suggests as justification for his absurd interpretation that "there is no evidence . . . . that the FAA will abuse its enforcement authority" if the definition is accepted. Appeal at 6-7. Of course, the penalty herein pursued against the operator of a styrofoam model, who injured no one and damaged no property, shows that the agency's enforcement authority has *already* been abused. No one can predict what regulations the agency will seek to enforce by surprise against model aircraft operators if the definition of "aircraft" is made as absurdly broad as the agency now insists. As set out below, the Administrator is not saved from the absence of specific regulation of model aircraft by advancing a convenient but absurd litigation position as to the meaning and interpretation of the word "aircraft."

A. The Plain Language of the Statute and Regulation Contradict the Administrator's Argument

The Administrator repeatedly insists that "the wording of the statute and regulation are plain and not subject to interpretation." Appeal at 5; *see also id.* at 4 ("plain meaning"); 5 ("[t]he plain wording of the statute and the regulation, however, are not ambiguous"); 6 ("plain wording"); 7 ("plain wording"); 16 ("ignored the plain wording"). But if the plain wording of the statute and regulation apply, then there is no deference whatsoever owed to agency interpretation. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) ("if the text of a

regulation is unambiguous, a conflicting agency interpretation ... will necessarily be 'plainly erroneous or inconsistent with the regulation' in question."). The problem is that the Administrator has not actually presented the Board with the plain wording of the statute and regulation.

The existing definition of "aircraft" plainly refers only to *manned* aircraft, in light of legislative and executive intent as well as the text of the definition itself. When President Eisenhower signed the 1958 Federal Aviation Act, Public Law 85-726, creating the Federal Aviation Agency, his written message to Congress expressed concern about "midair collisions of aircraft, occasioning tragic losses of human life," and his aviation study group had reported to him on "aeronautical developments and the needs of *our mobile population.*" 104 Cong. Rec. Part 8, June 13, 1958 at 11149. (Emphasis added.) The President's focus was squarely on passenger aircraft safety.

The original Federal Aviation Act of 1958 reflected the intent to regulate passenger transportation. It started off with a declaration of policy titled: "Factors for interstate, overseas, and foreign air *transportation.*" Pub. L. 85-726 (Aug. 23, 1958) § 102 (heading) (emphasis added). The Act reiterated a fundamental counter-balance to the new rulemaking: a "public right of *freedom of transit* through the navigable airspace of the United States." *Id.* § 104 (emphasis added). Congress, too, was concerned about passenger transportation.

The historic and present statutory language both plainly reflect this intent. In 1958, the definition of "Aircraft" was: "any contrivance now known or hereafter invented, *used*, or designed *for navigation* of or *flight in* the air." 49 U.S.C. § 1301(5) (1958) (emphasis added). Today, "Aircraft" is similarly defined as "any contrivance invented, *used*, or designed *to navigate, or fly in*, the air." 49 U.S.C. § 40102(a)(6). The Administrator has not faithfully

presented to the Board the plain meaning of this text, but has stuck it in a footnote without explanation. Appeal 5 n. 4. This definition is written in passive voice; grammatically, the unstated subject of "navigate, or fly in" is a *person* -- at a minimum, the pilot-in-command, and perhaps passengers. It is a *person* who uses an "aircraft" to "navigate" or "fly in" the air. The Administrator relies upon a misreading of the plain language that makes the "contrivance" itself the grammatical subject of "flight." This distortion ignores the operation of basic grammar and, as a consequence, would capture countless devices whose intended use involves the flight of the contrivance in the air, but that are clearly not regulated by the FAA, such as frisbees, golf balls, boomerangs, bullets, and children's toys. To be sure, all of these airborne contrivances pose at least minor safety issues, but none pose in any way the type of danger of carrying a human being thousands of feet in the air, none were the concern of Congress in 1958 when enacting the Federal Aviation Act, and none are contemplated by the properly read plain language of the statute. If the intent were to capture all such objects capable of their own flight, the plain language would read instead: "a device that flies in the air." It does not. An "aircraft" is a device *used* for flight -- by a person.

When the first set of FAA regulations emerged in 1963, their scope matched the legislative mandate concerning the regulation of manned passenger aircraft. 14 C.F.R. § 1.1 defines "Aircraft" as "a device that is used or intended to be *used for flight* in the air" (emphasis added). As with the 1958 and current Acts, the definition is in the passive voice, and it is clear that the grammatical subject -- the one who "uses" the device to take "flight" -- is a person.

There is also clear confirmation of this plain meaning from Part 91 itself. Its applicability clause precludes the application of 91.13 to a model aircraft operator: "This part applies to *each person on board an aircraft* being operated under this part, unless otherwise specified." 14

C.F.R. § 91.1(c) (emphasis added). The Administrator offers no discussion on this point, which establishes that section 91.13 could not possibly apply to Mr. Pirker, who was never on board his model aircraft.

The analysis really ought to end here. As the Supreme Court recent reiterated in *City of Arlington v. F.C.C.*, 133 S.Ct 1863 (2013), with respect to the review of an agency's statutory construction, "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." The *Chevron* doctrine concerning deference to agency interpretations simply does not apply here.

B. The FAA's "Interpretation" Is so Clearly Erroneous that It Hopelessly Conflicts With, Contradicts and Renders Absurd Countless Regulations

Even if the Board accepts that this entire proceeding is actually driven by a new agency interpretation of an ambiguous statutory or regulatory definition, the dismissal must be affirmed. The Administrator completely fails to address how to reconcile his proposed interpretation with the fundamental contradictions in the regulatory scheme that it creates. These contradictions and inconsistencies preclude the Board from accepting the Administrator's interpretation.

It must first be noted that the agency has not actually advanced an interpretation of the definition prior to this proceeding. The purpose of Notice 07-01 was to announce a new "FAA policy for UAS operations," a newly-defined technology, not to interpret any specific regulation that the FAA viewed as ambiguous at the time. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (agency publication deemed not to be an interpretative rule when it "does not purport to construe any language in a relevant statute or regulation"); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (agency notice deemed not to be an interpretative rule when "[i]t defines no ambiguous term," and "[i]t gives no officer's opinion

about the meaning of the statute or regulations."). The Administrator points to no other document or agency statement that contains the interpretation advanced in this proceeding.[16]

The interpretation, advanced only in this litigation, leads to countless absurdities. If a model aircraft is considered an "aircraft" for regulatory purposes, there is no altitude at which the FAA permits one to be operated. The *minimum* safe altitude for an "aircraft" is 500 feet AGL. *See* 14 C.F.R. § 91.119. However, AC-91-57 sets a (voluntary) *maximum* of 400 feet AGL for model aircraft. These cannot be reconciled. Nor can the Administrator explain why the operation of a model aircraft has never required a pilot's certificate or a certificate of airworthiness under Parts 21 and 61. Countless other regulations, such as 14 C.F.R. § 91.107, become nonsensical if "aircraft" is interpreted to include radio-controlled models: "No pilot may take off a U.S.-registered civil aircraft . . . . unless the pilot in command of that aircraft ensures that each person on board is briefed on how to fasten and unfasten that person's safety belt and, if installed, shoulder harness."

The Board also ought to be alarmed by the Administrator's proposed interpretation, because it would mandate a finding that the NTSB has for decades abdicated its express responsibility under 49 C.F.R. § 831 to investigate aircraft accidents and incidents. The NTSB "is responsible for the organization, conduct, and control of all accident and incident investigations . . . where the accident or incident involves any civil aircraft." 49 C.F.R. § 831.2. "Civil aircraft means any aircraft other than a public aircraft." 49 C.F.R. § 830.2. An "[i]ncident means an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations." *Id.* An "aircraft accident" includes an

[16] This is curious, because the Appeal in various places stresses the importance of a formal opinion issued by the Chief Counsel. Where can one find the agency's formal interpretation of "aircraft" that includes model aircraft?

occurrence in which any person "suffers death or serious injury." *Id.* Both "incidents" and "accidents" involving model aircraft are rare, but they do occur. Yet they are never investigated by the NTSB.[17] These regulations also require aircraft operators to notify the nearest NTSB office when there is a flight control malfunction, a collision in flight, or release of a portion of a propeller blade from an aircraft, among other occurrences. *See* 49 C.F.R. § 830.5. Model aircraft operators would be surprised to learn that they must contact a federal agency when any of these problems occur in their backyards. Of course, the NTSB does not investigate these accidents or incidents because these devices are not "aircraft" as defined in the regulations.

The FAA's overreaching definition would also have the unintended consequence of apparently criminalizing relatively trivial conduct. 18 U.S.C. § 31 contains the definition of "aircraft" for purposes of various federal crimes, and it mimics the one found in the aviation statutes and regulations: "a civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel in the air." The sections of Title 18 that follow criminalize the disabling of, destruction of, or pointing a laser pointer at, an "aircraft." 18 U.S.C. §§ 32, 39A. These provisions clearly are intended to criminalize actions that threaten passenger airplanes, and use the same passive-voice definition of "aircraft." That definition surely does not apply to model aircraft, but under the Administrator's conception, the destruction of a model aircraft would be a federal crime.

The expansive definition of "aircraft" to include model airplanes would also have the unintended effect of replacing established state tort law standards nationwide. Courts have recognized that state negligence standards concerning aircraft safety have been preempted by the FAA's standards in the FARs, including 91.13. *See, e.g., Abdullah v. American Airlines, Inc.,*

[17] The only known exception is the incident in Colorado described above which involved a manned biplane.

181 F.3d 363, 371 (3d Cir. 1999) (holding that "[b]ecause the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federally regulate aviation safety, we find that *any* state or territorial standards of care relating to aviation safety are federally preempted"). It would come as quite a surprise to litigants, insurers, the Academy of Model Aeronautics, and courts throughout the country to learn that the state law that they have applied to tort cases involving *model aircraft* was actually preempted in 1958. It would undermine decades of existing case law. *See, e.g., Rowe v. Striker*, 2008 Ohio 5928 (Ct. App. 9th Dist. 2008) (applying state negligence principles to a personal injury claim involving a model aircraft). The FAA's sweeping new position would prevent such state courts from applying settled tort principles, and substitute that law with a completely undefined set of federal standards.

Indeed, the FAA's approach could ironically have the effect of making it more difficult for plaintiffs to pursue claims against negligent model aircraft operators.[18] The courts have found that "91.13(a) is reserved only for egregious misconduct where the potential for harm is incontestably high." *Allen v. American Airlines, Inc.*, 301 F. Supp. 2d 370, 376 (E.D. Pa. 2003) (dismissing negligence claim). Such danger is often inherent for manned aircraft operations -- when a person is traveling at least 500 feet in the air, at a speed capable of sustaining flight, and on an aircraft weighing thousands of pounds and loaded with fuel. A five-pound battery-powered styrofoam model poses no threat of "dire physical injury" in its ordinary use. Many of these devices are launched by hand and may be safely caught by a person in mid-flight for landing purposes, unlike any regulated "aircraft." The suggestion that it is reckless under the 91.13 standard to operate these devices in proximity to persons on the ground (which is precisely

[18] The dismissal of this case does not in any way place model aircraft operators "above the law." These operators remain subject to state tort law for negligent or reckless acts that cause injury or damage. This proceeding considers whether a model aircraft operator who has not caused harm may be assessed a federal aviation penalty.

how they are designed to be operated) would expose tens of thousands of model aircraft operators whose activities are actually very safe, to arbitrary and capricious federal investigations and penalties based on safety standards that the FAA has never articulated.

When a proposed agency interpretation conflicts with the unambiguous meaning of countless regulations, it must be rejected. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) ("if the text of a regulation is unambiguous, a conflicting agency interpretation ... will necessarily be 'plainly erroneous or inconsistent with the regulation' in question."). Such an interpretation here would create new regulations, not interpret existing ones. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court reviewed the context of surrounding provisions to determine the meaning and application of "compensatory time" in a provision of the Fair Labor Standards Act. *Id.* at 582-86. The Court reached its own interpretation and refused to defer to the Department of Labor's interpretation issued in an opinion letter. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 588. As Congress and the Department of Transportation have recognized by establishing a timetable for new proposed regulations, including a notice-and-comment period, the existing regulations cannot be merely "interpreted" to apply to model airplanes.

Deference to agency interpretation under the *Chevron* doctrine is far from absolute. As even the Administrator's brief acknowledges, agency interpretations receive deference only when "what the agency does is rational." Appeal at 7. Indeed, an agency's interpretation must be rejected if it is inconsistent with regulatory language or if the interpretation is unreasonable. *See, e.g., Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotations marks omitted); *Kaiser Found. Hosps. v.*

Sebelius, 708 F.3d 226, 230-31 (D.C. Cir. 2013) ("deference is unmerited where the interpretation is 'plainly erroneous or inconsistent with the regulation'") (citation omitted); *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012) (agency interpretation "cannot survive even with the aid of Chevron deference" because it was unreasonable); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc) ("Not every agency interpretation of its governing statute is entitled to Chevron deference."); *Albemarle Corp. v. Herman*, 221 F.3d 782 (5th Cir. 2000) (interpretation inconsistent with plain language).

A Court will consider a wide range of factors in determining whether an agency's interpretation is permissible. For example, a court may look to "intent at the time of the regulation's promulgation," *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988), principles of statutory construction, *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (presumption that a specific meaning trumps general provisions), and related statutory or regulatory language and its purpose, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (considering structure and purposes of authorizing statute). As set out above, every one of these factors weighs against the Administrator's supposed "interpretation" of the definition.

C. *The FAA's "Interpretation" Must Be Rejected Because It Is Merely a Litigating Position that Does Not Reflect the Agency's Considered Judgment*

An agency's interpretation is also subject to challenge when "there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 984-85 (9th Cir. 2012). "Indicia of inadequate consideration include conflicts between the agency's current and previous interpretations . . . signs that the agency's interpretation amounts to no more than a convenient litigating position; or an appearance that the agency's interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack."

Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 830 n.4 (9th Cir. 2012) (*en banc*) (internal quotation marks and citations omitted). *See also Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (courts will not defer to "post hoc rationalizations"); *National Wildlife Federation v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997) ("litigating positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action."); *Nation v. United States DOI*, 892 F. Supp. 2d 285, 290 (D.D.C. 2012) (court will not defer to an agency's "post hoc rationalizations," as indicated by an agency's prior conflicting interpretations of its regulations); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

As set out in detail above, there has been no considered judgment on these matters by the FAA, nor even a single expression in writing, prior to this litigation, of an actual interpretation of the definition of "aircraft" that remotely resembles the overbroad one the Administrator now relies upon.

In contrast, when the FAA has actually engaged in *considered* judgment on this very point, its own researchers followed the logical and reasonable interpretation of the definition of "aircraft" that aligns with Congressional intent, and found that model aircraft are excluded from regulation. In September 2009, the FAA sponsored and published an "Unmanned Aircraft System Regulation Review" study performed by the Center for General Aviation Research (CGAR). *See* Final Report No. DOT/FAA/AR-09/7, available at www.tc.faa.gov/its/worldpac/techrpt/ar097.pdf . Exhibit N (the "Report"). The study was completed in March 2007 but the Report was published two years later. It was intended to assess the applicability of Title 14 regulations to UAS operating in the NAS "based on their face values,

i.e. not the intent of the rule, rather a direct understanding of the text." *Id.* at vii. "The objective of this study was to provide a systematic regulatory review to identify top-level gaps in existing regulations to facilitate the requirements of the FAA's decision- and rulemaking processes." *Id.* at 1.

The report indicates that:

> 14 C.F.R. 1.1 is a list of definitions but does not provide a definition of a UA or a UAS. As the remainder of 14 C.F.R. is examined, it is clear either that there is no guidance for the current or future UAS developer or operator or that such individuals or entities are governed by all current and applicable regulations. The latter option fails to consider whether the aircraft or rotorcraft is piloted by an onboard human being or is operated remotely by a human being using a form of data link and communications technology."

Id. at 5.

Of particular interest to the researchers was how model aircraft fit into this undefined regulatory scheme. They revisited this point several times in the Report, each time reiterating a lack of regulation:

- Model aircraft, "having a long history of self-regulation, fell outside the FAA's area of interest." *Id.* at vii.
- On a chart concerning the definition of "aircraft" the Report asks, "Does size, weight, speed, intended use, or navigation/communication capability have any bearing on the definition? *What about model aircraft*?" *Id.* at 6 (emphasis added).
- Radio controlled model aircraft are "unregulated flying devices" that were "not contemplated by the authors of [the] regulations," and they "remain an unregulated UA." *Id.*
- With respect to the text of AC 91-57: "This publication and the *lack of a regulatory definition for either a model aircraft or UA and UAS*, blurs the line between what has been acceptable *self-regulation* of the model aircraft community and the growing pressure for, as yet *undefined*, UA operations." *Id.* 13 (emphasis added).
- The Report notes that "the framers of the regulatory scheme and their successors *clearly never envisioned* the inclusion of UA or unmanned rotorcraft in the NAS." *Id.* at 17.
- The Report identifies "challenges to the FAA in regulating UAS operations," one of which is to "define those UAs conventionally known as model aircraft and to

> determine if they are to be allowed *continued self-regulation.*" *Id.* at 17 (emphasis added).

The Report pervasively reaffirms the principle that model aircraft are not subject to regulation, and do not fall within the existing FAR definition of "aircraft."[19] The Report concludes:

> Due to the sheer number of existing regulations that clearly apply or could apply by interpretation or amendment, the burden that falls on the rulemakers is either (1) to go through every regulation and statute and appropriately amend each one to resolve any ambiguity as to whether and how it applies to UAS design, manufacture, and operation, or (2) to create an entirely new subpart of 14 C.F.R. that specifically addresses the particular issues that arise from UAS operations.

Id. at 18.

The FAA has utterly failed to fulfill this burden. In 2007, the same year this research was completed, the agency instead took the approach of articulating a policy purportedly banning commercial model aircraft operations outright, and implicitly subjecting these "unregulated flying devices" to an unknown number of FARs for the very first time. Now, over seven years later, the exact same regulatory framework remains in place and no notice of proposed rulemaking has been issued concerning UAS. The FAA's definition of "aircraft" proposed here is not only a *post hoc* rationalization for seeking an unprecedented and inappropriate penalty, but it directly contradicts the FAA researchers' prior considered judgment in 2009 that model aircraft were never governed by the existing FARs or covered by the definitions in Section 1.1.

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[19] The Technical Report Documentation Page indicates that "[o]n February 6, 2007, the Federal Aviation Administration (FAA) issued a notice in the Federal Register clarifying that an unmanned aircraft system falls in the definition of aircraft." This qualification unfortunately taints the researchers' mission to report on the "face value" and "direct understanding" of the regulations' text. It is also incorrect. Notice 07-01 actually *does not* address or even cite the section 1.1 definition of "aircraft." Rather, it announces a new policy that *commercial* model aircraft operations are regulated, and it reaffirms that recreational model aircraft operations are subject only to the voluntary standards in AC 91-57. It is telling that, even after being unduly influenced by Notice 07-01, the report's authors repeatedly reaffirm that model aircraft are "unregulated flying devices."

IV. This Is Not a Permitted Instance of Adjudicatory Rulemaking

The Administrator raises an additional argument he did not raise below, that "the FAA was free to use the adjudicatory process to advance that a UAS may not be operated in a careless or reckless manner so as to endanger the persons or property of another." Appeal at 14. This argument fails because an agency is not permitted to change its prior interpretation without notice and comment rulemaking, and the imposition of such a penalty here is arbitrary and capricious and lacked the requisite fair notice.

A. The FAA May Not Use Adjudicatory Rulemaking to Change a Prior Interpretation

The FAA argues that it was free to use adjudication to enforce FAR 91.13(a) for the first time against the operator of a model airplane because agencies are not precluded from announcing new principles in an adjudicatory proceeding under the Supreme Court's *Chenery II* line of cases. Appeal at 14-5. The Administrator cites two Fifth Circuit runway taxiing cases in support: *Miranda v. Nat'l Transp. Safety Bd.*, 866 F.2d 805 (5th Cir. 1989) and *Tearney v. Nat'l Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir. 1989). Yet, as the Appeal brief readily acknowledges, these cases reaffirm that it is an abuse of discretion to "us[e] the adjudicatory process to advance an interpretation . . . . when the interpretation is 'such a new departure that [it] cannot reasonably be foreseen.'" Appeal at 15-16, citing *Tearney, citing Nicholson v. Brown*, 599 F.2d 639, 649 (5th Cir. 1979).

The FAA's citations of the runway taxiing cases are distinguishable for precisely this reason. As the *Tearney* Court stated, "[t]he taxiing rule is not a departure from the general safety requirements set forth in section 91.9, but is, rather, *a specific articulation of what is required by that section.*" 868 F.2d at 1453 (emphasis added). The use of the adjudicative process to articulate whether taxiing, an act where a pilot operates an aircraft filled with passengers, is

covered by existing safety regulations, is fundamentally different from radically altering the definition of the term "aircraft" to include a new class of device.

The FAA's reliance on 5th Circuit case law is also a transparent end-run around the straightforward application of the controlling D.C. Circuit doctrine articulated in *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-4 (D.C. Cir. 1999). It is well established that an agency is only permitted to change an existing interpretation of a regulation through notice and comment rulemaking. "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* (citing *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997). As Chief Judge Emeritus Edwards recently confirmed, the *Alaska Professional Hunters* doctrine still governs. *See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 1006 (D.C. Cir. 2013) (Edwards, J., concurring) (an agency must amend interpretation of existing regulation "pursuant to notice-and-comment rulemaking, not by fiat in an adjudicatory action"); *see also Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 475 (D.C. Cir. 2007) ("[A]n agency cannot significantly change its position, cannot flip-flop, even between two interpretive rules, without prior notice and comment.").

The Administrator does not dispute that the *Alaska Professional Hunters* doctrine applies. Rather, he claims that the FAA has never before interpreted the statute or regulations at issue. Appeal at 12.[20] As we have shown in Sections II and V, the FAA has repeatedly and expressly

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[20] The FAA also cites to *Gorman v. Nat'l Transp. Safety Bd.*, 558 F.3d 580, 582, 587-89 (D.C. Cir.), *cert. denied*, 558 U.S. 580 (2009), but that case is clearly distinguishable. In *Gorman*, the petitioner received a letter from FAA counsel who had *never even consulted the FAR in question* when he offered his initial interpretation. 558 F. 3d at 589. He subsequently became aware of the pertinent FAR and issued a revised memorandum. In contrast, in our case there is a long record of the agency issuing interpretations of the FAR at issue. Furthermore, as the D.C. Circuit states in in its opinion, "the precedent [petitioner] cites requires that an agency explain a

treated model aircraft as not being subject to any aviation regulations, much in the same way that the Alaska Region personnel for 30 years "advised guide pilots that they were not governed by regulations dealing with commercial pilots." *Alaska Prof. Hunters*, 177 F.3d at 1031.

The Administrator next awkwardly argues that documents that "reflect the opinions or beliefs of individual employees or contractors ... are not validly adopted interpretations advanced by the Administrator of the FAA" or the "Office of Chief Counsel." Appeal at 13 n.14. But in *Alaska Professional Hunters*, the original interpretations were simply issued by "personnel" in the "Alaskan Region" office, not by the FAA's lawyers in Washington or its Administrator personally. *Id.*, 177 F.3d at 1031-32. This distinction among agency personnel does not exist in the law. As sole authority for the proposition that employee interpretations are not subject to the *Alaska* doctrine, the Administrator cites to NTSB Order No. EA-4692 (1998) ("Order 4692"). *Id.* But Order 4692 concerns an unidentified *internal* FAA memo that the Petitioner produced at a hearing to support his position, that memo "registere[d] uncertainty about the course to take in this situation," and the NTSB found that the new FAA interpretation advanced in that proceeding was "not inconsistent with any other agency policy of which we have been made aware." *Id.* at 4. Our situation is quite distinguishable. There are decades of consistent, external communications from the highest levels in the agency confirming that model aircraft are not regulated, there is no uncertainty expressed in any of them, and the interpretation now being advanced by the FAA is in direct contradiction. The *Alaska* doctrine is squarely applicable here, and precludes the new interpretation the Administrator offers.

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deviation from its 'precedent and previous practices' ... and not from a position adopted by an agency official early in the course of the *same* proceeding." *Gorman*, 558 F.3d at 589 (citation omitted). Deviation from longtime agency "precedent and previous practices" is precisely what the record shows in the instant case involving model aircraft.

B. The FAA's Enforcement was Arbitrary and Capricious and Lacked Fair Notice

By introducing a novel interpretation of a longstanding definition in adjudication and using it to enforce a civil penalty, the FAA also acted arbitrarily and capriciously and abused its discretion in excess of the agency's statutory jurisdiction. The FAA's decision is governed by the judicial review provisions of the APA, which direct courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). In *NLRB v. Bell Aerospace Co.*, the Supreme Court limited agencies' authority to announce new principles in adjudication, stating that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion." 416 U.S. 267, 294 (1974). The D.C. Circuit has held that an unexplained departure from agency precedent is arbitrary and capricious. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. United States DOE,* 680 F.3d 819, 825 (D.C. Cir. 2012) (agency action that is an "unexplained departure from long-standing Department policy [is] arbitrary and capricious"); *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (agency action is arbitrary and capricious if "the agency offers insufficient reasons for treating similar situations differently.").

Courts will also reject the imposition of administrative penalties when a party was not provided fair notice of the agency's interpretation. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("In the absence of notice … an agency may not deprive a party of property by imposing civil or criminal liability."); *Affum v. United States*, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (agencies precluded "from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule") (citation omitted). The Supreme Court recently reinforced this doctrine, holding that an agency is obliged to "provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). Accordingly, an agency cannot

change its interpretation of a regulation so as to cause "unfair surprise." *Id.*; *see also*, *Comcast Cable Commc'ns,* 717 F.3d at 1007 (Edwards, J., concurring) (FCC's failure to provide any notice to regulated party of new interpretation of regulation constituted "unfair surprise").

As the Court explained in *General Electric*, a party is put on notice of an agency's interpretation "in the most obvious way of all: by reading the regulations." 53 F.3d at 1329. "[O]ther public statements" and published agency guidance may also serve as evidence of fair notice. *Id.*; *Star Wireless, LLC v. FCC,* 522 F.3d 469, 474 (D.C. Cir. 2008). *See also Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649 , 652 n.2 (D.C. Cir.1991) (["A] regulation carrying penal sanctions must give fair warning of the conduct it prohibits or requires.") (citation omitted). The FAA has pointed to nothing that could have put Mr. Pirker on fair notice of the new application of the definition of "aircraft" to every object that flies through the air. As Judge Geraghaty observed, that notion contradicts the notion of "voluntary guidelines" issued by the agency in 1981 that were reiterated in Notice 07-01 as continuing to apply to model aircraft operations.

V. The FAA's Statutory Authority Over Activity Is Limited To The Navigable Airspace

Judge Geraghty declined to decide the issue of the scope of the FAA's authority, Decision at 8 n. 26, because he did not need to reach it. However, the dismissal should be affirmed on that basis as well because the FAA's statutory authority is limited, by statute, to regulation of conduct in navigable airspace.

This limitation on the FAA's jurisdiction is best understood by examining the origin of the agency's authority vis-à-vis the common law of property and its relation to private airspace. From the founding of the United States and for nearly two centuries thereafter, the nation's skies were considered under the common law to belong to the land owners below under the principle *cujus est solum ejus est usque ad coelom* – the land owner owns the skies "to the heavens." *See*

generally, Stuart Banner, *Who Owns the Sky?,* Harvard Univ. Press (2008) at 167-202. The advent of airplanes flying through that property in the 1920s posed a serious conflict with this doctrine, because every flight was technically an actionable trespass.

In 1926, Congress addressed this legal dilemma in the Air Commerce Act, by permitting the public to travel through the "navigable airspace," defined as the minimum altitude established by the Department of Commerce. Pub. L. No. 69-254, 44 Stat. 568. At higher altitudes, the public was effectively granted an easement to travel in what previously was considered private property. Section 3 of the Civil Aeronautics Act of 1938 provided "a public right or freedom of transit in air commerce through the navigable airspace of the United States."

Jurisdiction over, and control of, activity in the *lower* airspace remained unsettled, however, until the United States Supreme Court addressed the issue in *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, North Carolina farmers claimed that very low overflights by U.S. military planes on approach to an adjacent airfield resulted in livestock deaths and constituted a property taking under the Fifth Amendment of the United States Constitution. *Id.* at 258-59. The Supreme Court acknowledged that the airspace had become a "public highway," but placed an important limit on public airspace: "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* at 264.

As to the demarcation between private and public airspace, the Supreme Court held that "[t]he navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. § 180." *Causby*, 328 U.S. at 263. Because the over-flights in *Causby* were very low to the ground,

they were found to be below public airspace, and were deemed a Fifth Amendment taking requiring just compensation to the Causbys. The fact that the FAA's predecessor, the Civil Aeronautics Authority, regulated the flight's operation "does not change the result." On the contrary, the Supreme Court wrote that "[i]f that agency prescribed 83 feet as the minimum safe altitude, then *we would have presented the question of the validity of the regulation.*" *Id.* at 263 (emphasis added).[21]

This legal distinction between navigable airspace and the airspace adjacent to land and buildings continues into the modern era. For example, in *Air Pegasus of D.C. Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), the Federal Circuit Court of Appeals cited *Causby* and recognized the distinction between "non-navigable airspace immediately above [a heliport's] leasehold" and the "navigable airspace" that was at issue in the case. *Id.* at 1217. The two types of airspace remain legally distinct, and that distinction is key to understanding the statutory limit of the FAA's authority.

It is well-settled that agencies do not possess inherent powers, but instead derive authority only as delegated by Congress. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). It is therefore a fallacy to suggest that the FAA controls what people are permitted to do in every cubic inch of airspace above American soil simply by virtue of being the nation's federal "aviation" agency. The fundamental airspace distinction identified in *Causby* continues to be reflected in the language of the current Federal Aviation Act. In the Federal Aviation Act, the section relating to Safety Considerations in Public Interest indicates that the

[21] In response to the *Causby* decision, Congress modified the definition to include approach and departure glideslopes: "airspace needed to insure safety in the take-off and landing of aircraft." 72 Stat. 739. In *Griggs v. Allegheny County*, 369 U.S. 84 (1962), the Supreme Court took note of this amendment but reiterated its framework in *Causby* that "the use of land presupposes the use of some of the airspace above it" and "[a]n invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'" *Id.* at 89 (citation omitted).

FAA is authorized to "control[] the use of the *navigable airspace* and regulat[e] civil and military operations *in that airspace* in the interest of the safety and efficiency of both of those operations." 49 U.S.C. § 40101(d)(4) (emphasis added). The statute also provides that with respect to "Use of Airspace[,] The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the *navigable airspace*." 49 U.S.C. § 40103(b)(1) (emphasis added).[22] As the Administrator acknowledged in the full briefing on this issue before Judge Geraghty, navigable airspace generally begins 500 feet above ground level, as defined in 49 U.S.C. 40102(32) and prescribed in 14 C.F.R. § 91.119. Thus, even if Congress *could* authorize FAA regulation of activity in airspace below 500 feet without violating the principles in *Causby*, *it has not done so*. Rather, the FAA's organic statue empowers the agency to regulate *only* the activity in "navigable airspace." A broader grant of statutory authority to the FAA would require the nation to revisit the property rights demarcation addressed in the 1926 Air Commerce Act and *Causby*.[23]

Nearly the entirety of the FAA's complaint concerns operation "at low altitudes," Appeal at 1, in proximity to buildings, vehicles, trees, sidewalks, railroad tracks, and even *inside a tunnel* -- locations that are not in navigable airspace.[24] The FAA's ban on commercial operations

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[22] Other sections of the statute reinforce this limited scope. *See, e.g.*, 49 U.S.C. § 44718 (authorizing the FAA to intervene when structures "result in an obstruction of the navigable airspace"); 49 U.S.C. § 44501 (requiring the FAA to make "long range plans" for the "use of the navigable airspace").

[23] A simple analogy is the automobile, whose operation is licensed and regulated by states on public roads but unregulated by those agencies when operated on private lands such as farms.

[24] The only exception is paragraph 10 vaguely alleging that Mr. Pirker operated at altitudes between 10 and 1500 feet when manned aircraft "may have been flying within the vicinity." Because there is no allegation that a manned aircraft actually was flying in the vicinity, this claim must be dismissed as well, for all the reasons set out in our other sections, but also for failure to allege that this aspect of the flight "endangered the life or property of another." The maximum altitude specified in AC 91-57 is "voluntary."

in these spaces, and its concomitant attempt to assess a civil penalty, exceed the scope of its statutory authority. Even if the FAA regulations could be read to apply to model aircraft operations, the FAA currently lacks jurisdiction to control or prohibit what people do with those devices at altitudes below 500 feet. The FAA's assertions to the contrary erase the fundamental 68-year-old property law distinction between public navigable airspace and the immediate reaches above private land, ignore United States Supreme Court jurisprudence, and represent an *ultra vires* foray outside the scope of the agency's statutory authority.

CONCLUSION

For the foregoing reasons and those set out in the Decision, Respondent Raphael Pirker respectfully requests that the Board affirm the dismissal of the Complaint in its entirety and with prejudice, and grant such other and further relief as the Board may deem just and proper.

Dated: May 12, 2014

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: 

Brendan M. Schulman
1177 Avenue of the Americas
New York, New York 10036
Phone: (212) 715-9100
Fax: (212) 715-8220

bschulman@kramerlevin.com

Attorneys for Respondent Raphael Pirker

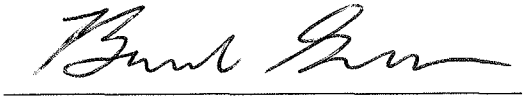
CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by United States certified mail, postage pre-paid, return-receipt requested, a copy of the Respondent's Reply Brief and Appendix of Exhibits in the appeal of a March 6, 2014 decision order in *Administrator v. Pirker*, Docket No. CP-217, addressed to:

Susan S. Caron, Esq.
Federal Aviation Administration
Enforcement Division, AGC-300
Office of the Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

In addition, I hereby certify that on this date I have sent by United States certified mail, postage prepaid, return-receipt requested, an original and one copy of the foregoing documents to:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594



Brendan M. Schulman
Counsel for Respondent Raphael Pirker

Dated: May 12, 2014