ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1241

IN THE

United States Court of Appeals for the District of Columbia Circuit

NATIONAL BUSINESS AVIATION ASSOCIATION AND AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition for Review from the Federal Aviation Administration

[PROOF] OPENING BRIEF FOR PETITIONERS

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August 29, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel hereby certifies the following:

A. PARTIES AND AMICI

1. The following are parties in this Court:

   a. Petitioners: National Business Aviation Association (NBAA);
   Aircraft Owners and Pilots Association (AOPA)

   b. Respondent: Federal Aviation Administration

   c. Amicus: Experimental Aircraft Association

2. Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Petitioner NBAA states that it is a not-for-profit organization that represents the business aviation industry's interests. It has no publicly owned parent corporation, subsidiary, or affiliate, nor has it issued shares or debt securities to the public. Accordingly, no publicly held company owns 10 percent or more of any stock in NBAA.

Petitioner AOPA states that it is a not-for-profit organization dedicated to general aviation. It has no publicly owned parent corporation, subsidiary, or affiliate, nor has it issued shares or debt securities to the public. Accordingly, no publicly held company owns 10 percent or more of any stock in AOPA.

B. RULINGS UNDER REVIEW

Petitioners challenge a final order of the FAA, which is set forth at 76 Fed. Reg. 32,258 (June 3, 2011). The agency arbitrarily and capriciously reversed longstanding FAA practice and precedent by fundamentally recalibrating its BARR Program without providing any rational explanation for its newly minted policy.

C. RELATED CASES

There are no related cases of which undersigned counsel is aware currently pending in this Court or in any other court involving substantially the same parties or the same or similar issues.

/s/ Christopher T. Handman
Christopher T. Handman

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GLOSSARY

Agency:	Federal Aviation Administration
APA:	Administrative Procedure Act
AOPA:	Aircraft Owners and Pilots Association
ASDD:	Aircraft Situational Display Data
ASDI:	Aircraft Situation Display to Industry
BARR:	Block Aviation Registration Request
FOIA:	Freedom of Information Act
GAMA:	General Aviation Manufacturers Association
IFR:	Instrument Flight Rules
MOA:	Memorandum of Agreement
NAS:	National Airspace
NATA:	National Air Transportation Association
NBAA:	National Business Aviation Association
OMB:	Office of Management and Budget

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the challenged agency decision under 49 U.S.C. § 46110(a). The Federal Aviation Administration (FAA) published its final order in the Federal Register on June 3, 2011. Petitioners National Business Aviation Association (NBAA) and Aircraft Owners and Pilots Association (AOPA) timely filed their request for review within 60 days of that publication, on June 22, 2011.

INTRODUCTION

This case is about an order from the Federal Aviation Administration that—as the agency concedes—implements a "change to FAA policy." 76 Fed. Reg. 32,258, 32,263-64 (June 3, 2011). And a bold one it is. Since 1997, the FAA has had the ability to track in real time the location, altitude, speed, destination, and estimated time of arrival of all private aircraft whenever they fly using navigational instruments (as most always do). But FAA is not the only one watching. Thanks to an agreement with private industry, the agency has shared this sensitive information with the public at large, allowing anyone with an Internet connection to track in virtual real-time the whereabouts of private citizens while in their planes. For private aircraft owners and operators, this informational exchange poses a colossal risk to personal privacy, confidentiality, and security. After all, it is no different than if the government tracked private citizens using their cellphones and then posted their real-time location on the Internet.

The FAA understood that. From the outset, it recognized that "public knowledge of the flight information of general aviation operators could compromise the privacy and/or security of individuals." 76 Fed Reg. at 32,259 n.1. It therefore "develop[ed] a system to protect the personal privacy, as well as the security, of the" members of the general aviation community. *Id.* at 32,259. Under that system, private operators could request that their flight data be blocked from

the near-real-time public feed. That commonsense regime remained in place for well over a decade.

Until now. Without citing any abuses in the program, inefficiencies, administrative burdens, undue costs, or any other pragmatic rationale, the FAA has done a complete 180-degree pivot. Under the agency's new policy, privacy concerns—categorically—can never justify a request a request to have private flight information blocked from near-real-time public displays. But basic rules of administrative law demand that, if an agency is going to chart a new course, "it must explain why it is reasonable to do so." *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002).

The FAA has failed to do that. The agency's one and only rationale for its abrupt shift in policy is that the "change is justified by disclosure and openness requirements set forth in Federal law, executive branch directives and policies, and court decisions." 76 Fed. Reg. at 32,260. But none of those sources of "Federal law" declare that disclosure-and-openness requirements categorically render concerns for personal privacy irrelevant. Just the opposite. Every source of "Federal law" cited by the FAA explicitly cautions that personal privacy must always be weighed against the public's interests in government openness and disclosure.

The FAA's only answer is to assert—without explanation—that individual aircraft owners do not have a "valid" privacy interest in blocking from public scrutiny their near-real-time data. *See* 76 Fed. Reg. at 32,261. But that explanation squarely conflicts with the agency's longstanding policy that revealing this data "could compromise the privacy and/or security of individuals." 76 Fed. Reg. at 32,259 n.1. Despite that glaring inconsistency (or perhaps because of it) the agency makes no effort in its order to harmonize its position *du jour* with the position it hewed to for more than a decade. But that sort of "failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process." *PG&E Gas Transmission, N.W. Corp.* v. *FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003). Either revealing sensitive real-time data about private citizens' locations and headings poses a threat to their privacy or it doesn't. But if the agency is going to stake out that latter position, it has an affirmative obligation to explain why its former view is no longer accurate.

Problems with the agency's order run deeper still, for it also fails to explain how disclosing purely private flight data will advance its asserted interest in *government* "disclosure and openness." 76 Fed. Reg. at 32,261. Although the FAA invokes FOIA and its kin to justify its new disclosure policy, the Supreme Court has held that "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about

private citizens that happens to be in the warehouse of the Government be so disclosed." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989) (emphases in original). Revealing the near-real-time flight data of private citizens will do nothing to promote government openness. While the public surely has an interest in knowing about how the FAA is managing the national airspace (NAS), the public has no legitimate need to know the identities, location, destination, and altitude of the individual pilots who happen to be using the NAS at any given minute during the day.

ISSUE PRESENTED FOR REVIEW

Whether the FAA acted arbitrarily and capriciously when it abandoned its decade-long policy of protecting the privacy interests of the general aviation community without any rational explanation for its break from prior policy and practice.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the addendum to this brief.

STATEMENT OF FACTS

Creation Of The BARR Program. One of the tools used by the FAA to manage the national airspace (NAS) is the Aircraft Situation Display. Developed in the early 1990s, this tool allows FAA to track in real time the location, altitude, airspeed, destination, estimated time of arrival, and aircraft identification number

of all commercial and many private general aviation aircraft. *See* 76 Fed. Reg. at 32,259.

Not long after the FAA implemented the Aircraft Situation Display, the agency allowed private industry to tap into this data. That regime, known as the Aircraft Situation Display to Industry (ASDI) program, allows commercial third-party vendors (ASDI subscribers) to receive and to publish in near-real-time information about where a plane is, where it is going, and when it will get there.[1] In other words, the data "allows tracking of individual flights through the conclusion of each flight." *Id.* That obviously presents no problems—indeed it is quite useful—when it comes to the scheduled flights of commercial airlines. But it poses obvious threats to privacy, confidentiality, and security for the many individual members of the general aviation community.

The FAA recognized as much. In 1997, the agency adopted the Block Aircraft Registration Request (BARR) Program, which, as its name suggests, gives private owners and operators a way "to prevent the tracking of their private flight itineraries by unknown members of the public at large." J.A. ___ [R. 410, NBAA cmt., at 2]. The way the program works is straightforward. Private owners and

[1] The agency's repeated assertion in its final order that the data is "time delayed" and "not in real-time" is misleading. *See* J.A. __, __, __ [76 Fed. Reg. at 32,259 (col. 3), 32,262 (cols. 1, 2), 32,264 (col. 3)]. The ASDI data is in near-real-time—delayed only by a matter of a few minutes.

operators who wish to preserve their privacy submit a request to petitioner National Business Aviation Association (NBAA); NBAA then "aggregates the requests and forwards them to the FAA and certain ASDI subscribers on a monthly basis." *Id.* As NBAA explained in its comments, "[n]either the NBAA nor the FAA has ever required any specific reason or justification for the request, and all such requests are routinely honored." *Id.* Although a BARR will prevent the public from peering in on private flight information, the ASDI data remains available to government agencies at all times, including the FAA and law enforcement authorities. *Id.*

The Memorandum Of Understanding. In 2000, Congress recognized that, because the FAA's ASDI program made tracking data available to and through commercial vendors, it was important to ensure that private aircraft owners and operators could opt out of having their flight information displayed by these digital purveyors. Accordingly, it enacted a provision requiring ASDI subscribers to demonstrate an ability to "selectively block[] the display of any aircraft-situation-display-to-industry derived data related to any identified aircraft registration number" and to "agree to block selectively the aircraft registration numbers of any aircraft owner or operator upon the [FAA's] request." Pub. L. 106-181, § 729(a) (2000), *codified at* 49 U.S.C. § 44103 note. Congress further directed the FAA to

conform all existing "memoranda of agreement" (MOAs) with such subscribers to these requirements. *Id.* § 729(b).

The FAA did just that. Under Section 9 of the MOA between the agency and ASDI subscribers, the FAA expressly recognized: "It is possible that public knowledge of the flight information of general aviation operators could compromise the privacy and/or security of individuals." 76 Fed. Reg. at 32259 n.1. The MOA therefore obligated the subscribers "to respect the privacy and security interests of the general aviation aircraft owners or operators * * *." 76 Fed. Reg. at 32259. Through the MOA, the FAA thus accommodated "industry initiatives"—i.e., the BARR Program—"for purposes of protecting the privacy and security interests of [general aviation] aircraft owners." 76 Fed. Reg. at 12,210.

The FAA Radically Changes Policy. The BARR Program worked flawlessly for more than a decade. But then FAA announced it was pulling the rug out. It tentatively announced in a Notice of Proposed Modification to the MOA and Request for Comments that, from now on, privacy concerns—categorically—would no longer justify blocking the near-real-time flight data of private individuals. Nor would any concerns about confidentiality suffice. Instead, the only way a private individual or business could keep its planes off the public's radar would be if they could demonstrate a "Valid Security Concern," which was defined so stringently that even operators who have genuine concerns would not

qualify. *See* 76 Fed. Reg. at 12,210 ("it is in the best interests of the United States Government and the general public for the FAA to exclude general aviation aircraft identification numbers from ASDI * * * data-feeds available to the public only upon certification by the aircraft owner or operator of a Valid Security Concern").

The general aviation community cried foul. Nearly 700 comments poured into FAA, complaining about serious flaws in the agency's proposal, the most significant of which was that FAA never once explained *why* it was suddenly reversing course. Petitioner NBAA, for example, noted that the announcement was "utterly devoid * * * of any attempt to articulate an affirmative public policy objective that would be furthered by the proposal." J.A. ___ [*Id.* at 11]. It was, in short, "a classic example of a solution in search of a problem." J.A. ___ [*Id.* at 12].

Petitioner AOPA likewise filed comments opposing the proposal. It noted that the agency offered the proposed modification "without due regard for the adverse impact it may have on private individual citizens because of the unnecessary release of personal information." J.A. ___ [R. 591, AOPA cmt., at 1]. AOPA further observed that "the Notice makes little to no attempt to articulate a public policy justification in making available to the general public and other non-governmental entities real time or near real-time tracking data on the location and identity of private aircraft." *Id.* Rather, AOPA explained, "[t]he FAA's newly

proposed limitation seemingly disregards the legitimate need and justification for the BARR Program, and it runs directly counter to long-established assumptions about government's role in the protection of privacy." J.A. ___ [*Id.* at 2].[2]

In the final rule, responding to the chorus of complaints that the FAA had failed to offer any reason for repudiating its decade-long policy, the FAA at last offered a single rationale: "today's change is justified by disclosure and openness requirements set forth in Federal law * * *." 76 Fed. Reg. at 32260 (col. 2). But the agency never once explained why those "disclosure and openness requirements"—many of which, like FOIA, had been on the books throughout the BARR Program's existence—justified the agency's radical change in policy. None of the sources of "Federal law" cited by the agency, for example, suggests that agencies can categorically ignore privacy concerns when making disclosure decisions. To the contrary, they all recognize that "disclosure and openness requirements" are not absolute. As one of the sources cited by the FAA emphasizes, "nothing in this Directive shall be construed to suggest that the

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[2] The views of NBAA and AOPA concerning the proposed modification's unjustified intrusion into the privacy and confidentiality interests of general aviation owners and operators were shared by numerous commenters. *See, e.g.*, J.A. __-__ [R. 488, National Air Transportation Association (NATA) cmt., at 2-3], J.A. __-__ [R. 501, General Aviation Manufacturers Association (GAMA) cmt., at 2-3]. Commenters also expressed concern with the high standard set to establish a "Valid Security Concern." NBAA, for instance, explained how the standard was unclear and unjustifiably restrictive. J.A. __-__ [R. 410, NBAA cmt., at 13-16]. *See also* J.A. ___ [R. 591, AOPA cmt., at 3]; J.A. __-__ [R. 488, NATA cmt., at 3-4]; J.A. __-__ [R. 501, GAMA cmt., at 3-4].

presumption of openness precludes the legitimate protection of information whose release would * * * invade personal privacy[.]" OMB Directive at 6.

The agency, however, ignored these caveats. Instead, it simply double-downed on its new categorical rule with the ipse dixit that disclosing the near-real-time whereabouts and heading of private individuals does not—ever—implicate "valid" privacy concerns. 76 Fed. Reg. at 32,262. But the FAA never explained how that new premise could be harmonized with the agency's longstanding view that "public knowledge of the flight information of general aviation operators could compromise the privacy and/or security of individuals." 76 Fed. Reg. at 32,259 n.1 (quoting the original MOA).

NBAA and AOPA timely petitioned for review. Both petitioners sought an emergency stay to prevent the FAA's order from going into effect on August 2, 2011, but a motions panel of this Court denied the motion, finding that it did not satisfy the "stringent requirements" reserved for such an "extraordinary remedy." J.A. __ [Order at 1] (citing *Winter* v. *Natural Resources Def. Council*, 555 U.S. 7, 23 (2008) (noting stringent requirement for demonstrating irreparable harm).

STANDING

NBAA and AOPA bring this lawsuit on behalf of their many members who wish to keep their general aviation travel private, confidential, and as secure as possible. Individual members of NBAA and AOPA have submitted declarations

explaining how the FAA's decision invades their interests in privacy, confidentiality, and personal safety. *See* Michael Harris Decl. ¶¶8-16 [Ex. 3 to Emergency Motion]; John & Martha King Decl. ¶¶ 5-8 [Ex. 4 to Emergency Motion]; Arthur Rosen Decl. ¶¶ 4-9 [Ex. 5 to Emergency Motion]. That invasion of privacy constitutes injury-in-fact; it is traceable directly to the FAA's order under review; and it can be redressed by this Court by granting the petition and vacating the rule. Petitioners therefore have standing. *See Clark County* v. *FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008).

SUMMARY OF ARGUMENT

The FAA's conceded "change in policy" is arbitrary and capricious. For 13 years, the FAA's BARR Program consistently applied the same basic opt-out rule; it allowed any private aircraft owner to ask to have his or her flight information blocked from public display. That commonsense rule was based on a commonsense rationale: that disclosing near-real-time flight data about private individuals—including their final destination, their estimated time of arrival, and their current altitude and location—"could compromise the[ir] privacy and/or security." 76 Fed. Reg. at 32,259 n.1. But under its new rule, the FAA has declared that privacy is *never* implicated by disclosing this sort of flight data—and therefore cannot justify blocking the public from seeing it.

The agency's about-face is arbitrary because it never "come to grips with [its] conflicting precedent." *Ramaprakash* v. *FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003). The agency's one and only rationale for its reversal is that the "change is justified by disclosure and openness requirements set forth in Federal law." 76 Fed. Reg. at 32,260. But that "Federal law" does not support the agency's privacy-never-matters rule. To the contrary, all sources of law cited by the FAA in its order acknowledge that agency disclosures must always yield to valid privacy concerns. Having recognized for more than a decade that revealing near-real-time data on individuals "could compromise the[ir] privacy," 76 Fed. Reg. at 32,259 n.1, the FAA cannot justify a new disclosure policy by invoking "Federal law" that expressly cautions that information should not be disclosed if it could compromise privacy. Because that basic "failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process," *PG&E*, 315 F.3d at, the order should be vacated.

The FAA's order is also unreasonable because it fails to explain how releasing private flight data will promote its asserted interest in government "openness and disclosure." *Id.* at 32,262. "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Reporters Comm. for Freedom of Press*, 489 U.S. at

774 (emphases in original). Disclosing to the public the current location and destination of private citizens says nothing about how the government operates. But more to the point, the FAA has failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Shieldalloy Metallurgical Corp.* v. *NRC*, 624 F.3d 489, 492 (D.C. Cir. 2010). Although the agency's litigation counsel attempted to back-fill for the order's shortcomings during briefing on the emergency motion for a stay, those post hoc rationales will not do. Only a rationale proffered by the agency—not its lawyers—"can provide a legitimate basis for sustaining agency action." *LeMoyne-Owen College* v. *NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Robert, J.).

STANDARD OF REVIEW

This Court will set aside agency action under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To withstand that scrutiny, the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). As a matter of law, "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision

making.' " *Ramaprakash* v. *FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (quoting *Columbia Broad. Sys.* v. *FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)).

ARGUMENT

THE FAA ACTED ARBITRARILY AND CAPRICIOUSLY BY REVERSING A 13-YEAR-OLD POLICY WITHOUT PROVIDING ANY RATIONAL EXPLANATION FOR THE CHANGE.

A. The FAA Has Failed To Offer Any Explanation For Rejecting Its Longstanding Policy Recognizing That Privacy Concerns Justify Blocking Near-Real-Time Private Flight Data.

1. The FAA acknowledges that its order announces "a change to FAA policy" under the BARR Program. 76 Fed. Reg. at 32,263-64. For 13 years—since the inception of the BARR Program itself—the FAA recognized that "public knowledge of the flight information of general aviation operators could compromise the privacy and/or security of individuals." *Id.* at 32,259 n.1 (quoting MOA § 9). It therefore "accommodate[d]" requests from private aircraft owners to have their near-real-time flight data blocked from public displays in order to respect "privacy and security interests." *Id.* at 32,259 n.1 (quoting original MOA § 9). But under the new policy, privacy is now categorically irrelevant; the agency has decreed that it "will no longer accommodate *any* [blocking requests based on] privacy." *Id.* at 32,258 (emphasis added).

The fatal flaw with this new policy is not that it repudiates more than a decade of consistent agency practice; we recognize that "[a]n agency's view of

what is in the public interest may change, either with or without a change in circumstances." *State Farm*, 463 U.S. at 29. The flaw instead is that the agency has radically changed course without doing what the APA demands: "supply a reasoned analysis" for the switch. *Id.* Although the FAA's decision promises in multiple places that its reasoning will be "explained below," 76 Fed. Reg. at 32,260, and then later proclaims that its reasoning was "set forth above," *id.* at 32,261, what lies in between—spanning less than a page—offers nothing in the way of rational explanation.

2. The FAA identifies one—and only one—"Justification for Change in Policy." 76 Fed. Reg. at 32,260. According to the agency, the "change is justified by disclosure and openness requirements set forth in Federal law, executive branch directives and policies, and court decisions." *Id.* Never mind that "disclosure and openness requirements" are nothing new and that many of the sources of "Federal law" cited by the FAA—like the Freedom of Information Act—were on the books throughout the 13-year lifespan of the original BARR Program. Although that alone raises troubling questions about agency consistency, the FAA's new rule—that privacy concerns no longer justify "any" flight-blocking request—wilts under APA review for a more fundamental reason: None of these "Federal law" sources allows an agency to entirely disregard privacy when formulating disclosure policies.

While the FAA's cited sources all emphasize the importance of government openness and disclosure, they also emphasize—repeatedly—that disclosure should never trump other important interests, privacy being among the more important. Take, for instance, the Open Government Plan of the Department of Transportation (DOT), cited by the FAA in its order. It states right up front that the goal of the agency should be to "continu[e] to release DOT data in a timely manner by proactively making it available online in consistent, open formats, while assuring accuracy and *protecting privacy*, security, and confidentiality." DOT Open Government Plan 2010-2012 at viii (emphasis added). Indeed, DOT described "security, privacy and confidentiality interests" as "*fundamental issues* that *must be considered* in order to provide access to high-value transportation data." *Id.* at 19 (emphases added). That is why the DOT Plan emphasizes the careful balance that agency officials must strike between disclosure and privacy on more than a dozen different pages. *See id.* at 11, 14, 17, 22, 24, 45, 46, 49, 58, 62, 63, 64, 69.

So too with the Open Government Directive of the Office of Management and Budget (OMB). This Directive recognizes the need for "a presumption * * * in favor of openness," but only "to the extent permitted by law and subject to valid *privacy, confidentiality, security, or other restrictions*." OMB Directive at 2 (emphasis added). *See also id.* at 8 ("data should be in an open format and as granular as possible, consistent with statutory responsibilities and subject to valid

privacy, confidentiality, security, or other restrictions"). Lest any agency mistake the OMB's new disclosure policies as a mandate for indiscriminate disclosure, OMB cautioned that "nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, *invade personal privacy*, breach confidentiality, or damage other genuinely compelling interests." *Id.* at 6 (emphasis added).

And the same is true with the Attorney Generals' FOIA Memorandum, also cited by the FAA. *See* 76 Fed. Reg. at 32,261. The Memorandum recognizes that "the disclosure obligation under * * * FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests." Att'y Gen. Memo. at 2.

The important point is that the "Executive Branch policies and directives" cited by the agency to justify its new privacy-never-matters policy actually say just the opposite: that an agency *must* evaluate privacy interests and then carefully balance those interests against whatever interests favor disclosure. The agency never takes that analytic step. Nowhere does the FAA examine the blow to privacy that private individuals might suffer if near-real-time flight data about their location and destination is unveiled for all to see—whether stalkers, paparazzi, voyeurs, or just the plain curious. Nor, of course, does the agency then engage in

any delicate balancing to determine whether these personal privacy interests outweigh any interest the public might have in knowing the real-time location, heading, and destination of a purely private citizen. Instead, the FAA just asserts that *any* privacy interest that *any* individual might have in blocking this data is—as a categorical matter—not "valid." *See* 76 Fed. Reg. 32,261; *see also id.* at 32,262-63.

Agency ipse dixit of this sort is never permissible, but here it is particularly fatal. That is because the FAA's conclusion—that there is no valid privacy interest in having sensitive flight data blocked from public view—roundly conflicts with its own longstanding precedents. After all, the whole reason the FAA established the BARR Program 13 years ago was because the agency recognized that "public knowledge of the flight information of general aviation operators could compromise the privacy * * * of individuals." 76 Fed. Reg. at 32,259 n.1 (quoting MOA § 9); *see also id.* at 32,259 ("In 1997, the NBAA began working with the FAA and ASDI Subscribers to develop a system to protect the personal privacy * * * of the NBAA members."). What the FAA never explains in its new rule is how those "personal privacy" interests it once recognized and vindicated have now vanished entirely.

3. That refusal to join issue and at least try to harmonize its position *du jour* with its longstanding view that public disclosure of flight data implicates "personal

privacy" is fatal. As this Court has held, "[a]n agency's failure to come to grips with conflicting precedent constitutes an 'inexcusable departure from the essential requirement of reasoned decision making.' " *Manin* v. *NTSB*, 627 F.3d 1239, 1243 (D.C. Cir. 2011) (quoting *Jicarilla*, 613 F.3d at 1120); *see Ramaprakash*, 346 F.3d at 1124 ("agency action is arbitrary and capricious if it departs from agency precedent without explanation"). Having once recognized the obvious—that revealing the near-real-time location and destination of general aviation operators risks invading their privacy interests—the agency had an obligation to explain why those privacy concerns no longer exist or no longer qualify as "valid" under the "Federal law" sources it cites to justify its policy reversal.

The FAA's "[s]ilence in the face of inconvenient precedent is not acceptable." *Jicarilla*, 613 F.3d at 1120. As this Court has emphasized time and again, "[r]easoned decision making * * * necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent." *Dillmon* v. *NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). By insisting on that "reasoned analysis," the Court ensures that the agency's "prior policies and standards are being deliberately changed, not casually ignored." *Airmark Corp.* v. *FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985).

The FAA here took the "casually ignored" route. Simply comparing the text of the former MOA with the revised MOA underscores the FAA's almost comical

refusal to confront its past policies. Whereas the former MOA recognized that disclosing near-real-time flight data "could compromise the privacy and/or security of individuals," the new version simply strikes the word "privacy," so that it now reads: "could compromise the security of individuals." *Compare* 76 Fed. Reg. at 32,259 n.1 (existing MOA § 9), *with id.* at 32,264 (amended MOA § 9). But agencies cannot airbrush out of their books inconvenient precedents without explanation. If the FAA is going to insist now that disclosing private flight data in near-real-time implicates only security interests—instead of security *and* privacy interests—then it must offer some explanation for that change. While the FAA need not pen a magnum opus, its silence "crosse[s] the line from the tolerably terse to the intolerably mute." *PG&E*, 315 F.3d at 390.[3]

4. Although the agency never acknowledges that it has a duty to "come to grips with [its] conflicting precedent," *Ramaprakash*, 346 F.3d at 1125, it seems to suggest that two recent court decisions have relieved it of that duty. According to the agency, these "[c]ourts rejected the privacy concerns raised by commenters in

[3] Although the FAA did articulate at least *some* rationale for why it was adopting a new test for measuring "security" claims under the Program, the FAA set an unreasonably high bar. The bar is so high that, according to the agency, an advisory from the Transportation Security Administration warning about "an Arabic web forum message explaining how to identify private American jets and urging Muslims to destroy all such aircraft" would not be sufficiently concrete. 76 Fed. Reg. at 32,262. The FAA's refusal to block flight information unless aircraft operators can prove a "*verifiable* threat to person, property or company" is not only arbitrary and capricious; it is irresponsible. *Id.* at 32,259 (emphasis added).

the analogous FOIA context[.]" 76 Fed. Reg. at 32,262. But the agency's description of both cases confirms that they did no such thing. As the FAA itself explains, the Supreme Court in *FCC* v. *AT&T, Inc.*, 131 S. Ct. 1177 (2011), simply held that FOIA Exemption 7—which protects "against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of *personal* privacy," *id.* at 1185—does "not protect a business' privacy because the term 'personal privacy' does not extend to corporations." 76 Fed. Reg. at 32,261. But, of course, it does extend to *individuals*. *See AT&T*, 131 S. Ct. at 1184 ("we have regularly referred to [Exemption 6] as involving an individual's right to privacy"). And individuals make up much of the petitioners' membership. Indeed, many of our members are private individuals who own aircraft registered in their own name. The *AT&T* decision thus does nothing to explain why the FAA was free to reverse its longstanding views on privacy for this sizeable segment of the general aviation community. That is particulalry true, given that the agency's views had long been tailored precisely to address the unique concerns of "individuals." *See* 76 Fed. Reg. at 32, 259 n.1 ("public knowledge of the flight information of general aviation operators could compromise the privacy and/or security of *individuals*") (emphasis added).

The only other case cited by the FAA is even further afield. *See National Business Aviation Association* v. *FAA*, 686 F. Supp. 2d 80 (D.D.C. 2010)

(hereinafter *NBAA*). The principal question in *NBAA* was whether *corporations* could invoke FOIA Exemptions 4 and 6 to prevent the FAA from disclosing a list of aircraft-registration numbers that had asked to be blocked under the BARR Program (the Block List). *See id.* at 83. The district court's holding was simply *AT&T* all over again; it held that the numbers "were not protected under FOIA Exemption 4 as '*commercial*' information; nor were they protected under Exemption 6, which does not reach the privacy interests of *businesses or corporations*." 76 Fed. Reg. at 32,261 (emphases added).

But the *NBAA* decision is irrelevant for yet another far more important reason: The district court carefully refused to reach any question involving the privacy interests bound up in the transmission of near-real-time flight information. As the court emphasized, any privacy interests in that case were attenuated because "the Block List is a list of numbers only, unaccompanied by narrative," and therefore "[t]he release of Block List information would *not provide the requester with any real-time or near real-time data* regarding aircraft location." *Id.* at 86 (emphasis added). Given that the district court refused to rule on the key question at issue here, the FAA cannot reasonably rely on this decision to support its sweeping new rule that near-real-time flight data must now be indiscriminately sprayed across the Internet for public consumption.

5. The agency, in short, has pointed to no law or court decision that justifies the silent-treatment it gives its prior policies. For the agency to adopt a new rule that categorically discounts the privacy concerns of individual aircraft owners "without explanation of the change in the [agency's] view is, therefore, to all appearances, simply arbitrary." *Fox Television*, 280 F.3d at 1045. Indeed, the FAA's approach here is largely the same flawed approach that the FCC took in *Fox Television*. There, the FCC had adopted a new rule that conflicted with an earlier 1984 Report from the commission that articulated a different rationale; the commission insisted that changes in federal law excused it from having to explain its about-face. *See id.* But this Court held that that law had done "nothing to preclude the Commission from considering certain arguments * * * —including the arguments the Commission had embraced in 1984." *Id.* Thus, "[s]o long as the reasoning in the 1984 Report stands unrebutted, the Commission ha[d] not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision." *Id.*

So too here. None of the sources of "Federal law" cited by the FAA "preclude [it] from considering * * * the arguments the [agency] had embraced" when it initially adopted the BARR Program 13 years ago. Because the commonsense premise of that Program—that disclosing near-real-time flight data about private individuals "could compromise the[ir] privacy," 76 Fed. Reg. at

32,259 n.1—"stands unrebutted, the [FAA] has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision." *Fox Television*, 280 F.3d at 1045.

6. It is bad enough that, to justify its radical policy change, the FAA points to "Federal law" sources that do not, in fact, repudiate its longstanding views on personal privacy. But the FAA compounds that error by then ignoring the rich trove of "Federal law" sources that reinforces the continuing wisdom of the BARR Program's original premise: that digital information about purely private individuals should rarely, if ever, be deemed fair game for public disclosure. The U.S. Code is practically bulging with statutes designed to defend personal privacy against the threats posed by an increasingly digital era. Today, federal privacy legislation protects Americans in, among other areas, the Internet,[4] telecommunications,[5] education,[6] health,[7] and banking and financial[8] sectors. And

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[4] *See, e.g.*, Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506 (prohibiting the knowing collection of online data from children under 13).

[5] *See, e.g.*, Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (prohibiting robo-calling, or calling a residence with pre-recorded messages without the consent of the called party and using a fax, computer, or other device to send unsolicited advertisements to a fax machine).

[6] *See, e.g.*, The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (restricting disclosure of student records).

[7] *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 (HIPPA), 42 U.S.C. § 1320d *et seq.* (protecting health information from unauthorized disclosure).

federal agencies have been no less vigilant. The Federal Trade Commission and the Federal Communications Commission jointly maintain a Do Not Call Registry for individuals who seek respite from intrusive telemarketing calls.[9]

The FAA brushed all this aside because, among the scores of federal statutes and regulatory regimes protecting personal privacy, none specifically "pertain[s] to * * * the FAA's ASDI/NASSI database program." 76 Fed. Reg. at 32,263. Well, of course. But that misses the point. What this pervasive body of law demonstrates is that protecting personal privacy has become a mainstream (and prevailing) objective of government. Because "[t]here is no comprehensive federal law in the United States that protects individual privacy or security," Congress and federal agencies have consistently worked to fill in the gaps as new technologies emerge and threaten to intrude on personal privacy in new and unanticipated ways. ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 69 (2009). The BARR Program itself was an early example of this. Precisely because the FAA recognized that disclosing near-real-time flight data "could compromise the privacy * * * of individuals," the agency created a program to accommodate those important concerns. 76 Fed. Reg. at 32,259 n.1 (recognizing

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[8] *See, e.g.*, Fair Credit Act of 1970, 15 U.S.C. § 1681 *et seq.* (restricting manner in which credit records can be accessed).

[9] *See* 16 C.F.R. § 310.1, *et seq.*, promulgated pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.

that "public knowledge of general aviation operators could compromise the privacy and/or security of individuals" and that "protection of such information is not covered under the Privacy Act") (quoting MOA § 9).

The FAA forgets all this history in its new order. And by focusing exclusively on pro-disclosure sources of "Federal law"—and then ignoring the key privacy protections reflected even in those sources—the agency fundamentally breached its "obligation * * * to explain any important changes of policy or legal interpretation." *Shieldalloy Metallurgical Corp.* v. *NRC*, 624 F.3d 489, 492 (D.C. Cir. 2010). Its order should be vacated.

B. The FAA's Invocation Of Government Openness And Transparency Is Arbitrary And Capricious Because The Agency's New Policy Will Promote Neither Government Openness Nor Transparency.

The FAA's order should also be vacated for an independent reason: It unreasonably fails to explain how its change in policy actually advances the "public interest" it identifies. *See Shieldalloy*, 624 F.3d at 492 (agency must " 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made' ") (quoting *State Farm*, 463 U.S. at 43). The agency insists that its "change is justified by disclosure and openness requirements set forth in Federal law." 76 Fed. Reg. at 32,260. But the near-real-time whereabouts of private individuals while

flying would only undermine, not advance, the interests recognized by FOIA and the other "Federal law" cited by the agency.

The FAA simplistically assumes that the more agencies disclose, the better FOIA is served; its new pro-disclosure policy must be rational; Q.E.D. But, of course, "no legislation pursues its purposes at all costs." *Dolan* v. *United States*, 130 S. Ct. 2533, 2547 (2010) (citation omitted). "Deciding what competing value will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simply to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* (emphasis in original); *accord Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990)).

The FAA's absolutist view not only betrays the nuanced way legislation works, but it also squarely conflicts with how the Supreme Court itself has described FOIA. As the Court has emphasized, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989). But it is only information about private citizens—and sensitive information at that—that the FAA's new policy reveals.

The agency does not dispute this. Nowhere in its order does it ever explain how disclosing near-real-time information about private citizens' flight plans and locations will promote " 'the basic purpose of the Freedom of Information Act[:] to open agency action to the light of public scrutiny.' " *Id.* at 772 (quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 372 (1974)). Nor could it. While cyberstalkers and their ilk would no doubt appreciate the new font of private data, those purely private disclosures would "tell us nothing about matters of substantive [FAA] policy that are properly the subject of public concern." *Id.* at 766 n.18.

The closest the agency comes to an explanation of its government openness justification is the remarkable claim that "Government disclosure *of information it collects* is an integral part of a constitutional democracy and an informed public." *Id.* But no court—certainly none cited by the FAA—has ever suggested that our constitutional democracy hinges on government disclosing everyone's personal income when it process tax returns or everyone's personal medical histories when it processes Medicare payments. And for good reason. The Supreme Court has emphasized that there is a grave " 'threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.' " *Reporters Comm.*, 489 U.S. at 770 (quoting *Whalen* v. *Rose*, 429 U.S. 589, 605) (1977)). Although the public arguably has an interest in knowing the *type* of information the government collects on its citizens (in part so

that they may take appropriate action to safeguard their privacy), it surely does not have an interest in knowing the specific *personal* information collected from fellow citizens.

2. In responding to Petitioners' Emergency Motion for a Stay Pending Review, appellate counsel for the FAA offered a new explanation for the agency's government-openness justification. Counsel contended that "[m]ore complete access to ASDI data will permit citizens to monitor and to gain a better understanding of FAA's management of that system, a core federal government function." Opp. at 12. *See also id.* ("By providing a more complete and detailed picture of air traffic in the United States, FAA's new policy will provide the public with greater ability to observe and evaluate the agency's own activities in managing the National Airspace System."). But this newly minted theory of government openness appears *nowhere* in the agency's decision. And it is well established that a court "cannot accept appellate counsel's post hoc rationalizations for agency action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *LePage's 2000, Inc.* v. *Postal Regulatory Comm'n*, 642 F.3d 225, 231 (D.C. Cir. 2011) (citation and internal quotation marks omitted); *accord Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

Counsel's "post hoc rationalizations" therefore cannot be used to support the agency's otherwise lacking decision.

Even had the FAA articulated in its order the litigation position of counsel, it still would wilt under arbitrary-and-capricious review. As the Supreme Court emphasized in *Reporters Committee*, FOIA's purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773. To make the point, the Court provided several examples that bear striking resemblance to the facts of this case. It noted that although "it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs, [] it is not necessary that the identity of any person so affected be made public." *Id.* at 766 n.18 (quoting S. Rep. No. 89-813, at 7 (1965)). Likewise, the Court explained that the public surely would want to know "the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public," *id.* (quoting H.R. Rep. No. 89-1497, at 8 (1966)). And like the criminal "rap sheet" itself at issue in *Reporters Committee*, the Court stressed that "rap sheets reveal only the dry, chronological, personal history of individuals who have had brushes with the law, and tell us nothing about matters of

substantive law enforcement policy that are properly the subject of public concern." *Id.*

The same holds true here. Flight tracking data for private aircraft in near-real-time may provide rich fodder for cyberstalking, but it "tell[s] us nothing about matters of substantive [FAA] policy that are properly the subject of public concern." *See id.* The FAA's release of purely private information does not promote government openness—it instead invades the right of a general aviation aircraft owner or operator to "be secure in his personal affairs which have no bearing or effect on the general public." *Id.*

3. Finally, the post hoc rationale offered by the agency's appellate counsel cannot save the FAA's change in policy because it suffers from the same logical flaws that pervade the entire modification decision. The FAA's counsel would have the Court believe that, to evaluate how well the agency managed the NAS, the public must be able to track—in near real time—the flights of every general aviation aircraft in the sky and *identify* each of those individual flights by tail number. But the tail numbers are no more relevant to assessing how well the FAA is managing the NAS than license plates are to evaluating how well the government is managing traffic on a highway or how efficiently the National Park Service is controlling access to parks. Under the government's logic, states should start releasing real-time E-ZPass data on individually identified cars in order to

allow the public to "monitor" the government's management of the highways. But certainly all would agree that this is absurd.

Further undermining counsel's theory, virtually all historical flight data that actually could allow the public to assess the FAA's performance in a meaningful way—data that is *not* at issue here—is already available through requests under FOIA. *See* J.A. ___ [76 Fed. Reg. at 32,260 (col. 1)]. More importantly, the data is available to the public through the FAA's website. *See* FAA, *Operations and Performance Data*, http://aspm.faa.gov/ (last visited Aug. 18, 2011) ("FAA Operations and Performance Data provides access to historical traffic counts, forecasts of aviation activity, and delay statistics."). Rather than open the door to the key "Aviation System Performance Metrics (ASPM)" database, however, FAA declares it is "confidential and access is restricted by password." FAA, *About ASPM*, http://aspm.faa.gov/information.asp (last visited Aug. 18, 2011). So much for the FAA's "commitment to an unprecedented level of openness in Government." Opp. 13.

Agency counsel's post hoc rationalization, in short, is anything but rational. Because FAA has failed to explain why releasing real-time data on individual private planes will advance the lone objective it identified in its rule—government openness—this Court must set aside the agency's change in policy. *See Ramaprakash*, 346 F.3d at 1130.

CONCLUSION

For the foregoing reasons, the petition for review should be granted and the FAA's decision modifying the FAA/Subscriber Memorandum of Agreement should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains _____ words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

/s/ Christopher T. Handman
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2011, I filed the foregoing Brief for Petitioners through the CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused to be delivered to the Court by messenger five copies of the Brief, pursuant to Circuit Rule 31(b) for briefs utilizing a deferred appendix. I further certify that copies of the Brief were sent via first-class, postage-prepaid U.S. mail to the following:

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ADDENDUM

PERTINENT STATUTES AND REGULATIONS