SMALL UAV COALITION
A Partnership for Safety & Innovation

April 5, 2021

Honorable John Cyrier
Member, House of Representatives
State of Texas
1000 Congress Avenue
Capitol Extension
Room E2.318
Austin, TX 78701

Re: Small UAV Coalition opposition to HB 3403

Dear Representative Cyrier:

The Small UAV Coalition ("Coalition" or "we")[1] opposes HB 3402 in its current form.[2] The bill includes several provisions that are preempted by Federal law and would risk endangering the safety of the national airspace. If enacted and then challenged in court, it would be struck down by any court faithfully applying the Supremacy Clause of the United States Constitution and the preemption jurisprudence developed under the Federal Aviation Act of 1958, as amended. Apart from its legal infirmity, the bill also would set back efforts to establish Texas as a leader in technological innovation. In particular, would frustrate the development of drone operations in Texas, while drone operations around the world have already begun to provide immeasurable benefits to business and consumers, saving lives, money, and time, while reducing transportation's carbon footprint.

HB 3403 would make it a crime for an unmanned aircraft ("UA") to operate beyond the visual line of sight ("BVLOS") of the UA remote pilot other than through an avigation easement established by the Texas Department of Transportation ("Texas DOT"). The

[1] Members of the Small UAV Coalition are listed on the Coalition's website, www.smalluavcoalition.org.

[2] These comments address the bill as revised on March 31, 2021.

bill would also permit Texas DOT to regulate operations within an easement and impose a fee for such operations. Texas DOT would establish easements over highways and other public roads, state-owned land, land under the jurisdiction of a political subdivision of the State, navigable water in the State, and over any "property or ground easement," which presumably includes private property.

By creating aviation easements up to 400 ft. Above Ground Level ("AGL"), this bill seeks to regulate the navigable airspace. Under 14 C.F.R. Part 107, the FAA's "Operation and Certification of Unmanned Aircraft Systems" final rule, UAs must operate below 400 feet AGL, subject to exceptions and as may be authorized by waiver. Thus, the bill regulates the very airspace in which UAs are generally required to operate under Federal law. Fragmenting the airspace, as HB 3403 would do, would make valuable UAS operations infeasible while increasing safety risks in that airspace.

Moreover, under this bill, a UA BVLOS operation over 400 feet AGL would constitute a crime, even if authorized by Part 107 or by a waiver granted therefrom. Part 107 permits the operation of a small UA up to 400 feet above a structure. See 14 C.F.R. 107.51(b)(1) and (2).

A state may not so regulate. This is clear from the case law cited in the FAA's 2015 Fact Sheet on state and local regulation of unmanned aircraft.[3] While the Fact Sheet urges state and local governments to consult with the FAA before enacting laws regulating airspace (among other subjects), this does not suggest that the FAA or U.S. Department of Transportation ("DOT") would allow such regulation. The United States, like other countries, entrusts airspace regulation to a single regulatory body that is vested with the expertise and ability to regulate the entire airspace as a single cohesive unit. The Consumer Technology Association's letter to you dated March 24, 2021, at page 2 n.7, lists a number of occasions in which the FAA has told local governments that a law or bill under consideration is preempted by Federal law. The Coalition urges you to seek guidance from the FAA or DOT before proceeding further with this bill.

Section 27.002(b) of the bill states that the "department may seek appropriate authorization or waivers from the Federal Aviation Administration to administer this chapter." The FAA does not and cannot "authorize" or "waive" provisions of state law. Rather than including this section in the bill, which would be effective only upon and after enactment, the Coalition reiterates its suggestion that you seek the opinion of the FAA or DOT before this bill is set for a vote.

The bill as revised no longer includes a provision expressly allowing a private person to seek the establishment of an easement, but nothing in the bill would preclude a private property owner from seeking an easement over the owner's private property. Indeed, in place of a geo-fencing provision that was legally suspect, the revised bill would allow an owner of private property that is the subject of an easement to ask the Texas DOT to prohibit a UA from operating below 200 feet above the property. Such line in the sky

[3] Federal Aviation Administration, Office of Chief Counsel, "State and Local Regulation of Unmanned Aircraft Systems Fact Sheet," (Dec. 7, 2015).

drawn by a state or local government -- whether to create an avigation easement or simply to prohibit UA operations below that line -- would intrude on the FAA's plenary authority over the navigable airspace.

Section 27.007 states the requirements to operate in an aviation easement. We appreciate that the revised bill no longer includes transponder or facial-obscuring requirements. The revised bill would require a UA to be equipped with remote identification. The FAA's remote ID final rule gives UAS operators until September 2023 to comply, so attempts to enforce the equipage requirement in this bill before that date would likely be preempted. Also, the bill would require remote identification "that allows the department to monitor the operations of the aircraft. This provision should be read to allow the department only such access to remote ID data as allowed in the FAA's final rule.

Another provision would require the UA to operate at least 50 feet above any obstruction that is in the aircraft's path. Apart from the significant challenges in enforcing such a requirement, the FAA's Part 107 rule does not include this operational constraint, and thus a state or local government may not require it. UAs may need to operate closer than 50 feet to an obstruction for inspection, monitoring, package delivery, search and rescue, or for safe navigation in consideration of other aircraft and objects in the vicinity.

While the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946), recognized an avigation easement interest held by Causby in the "immediate reaches" above his property, this property right was taken by the *United States Government* as operator of the airport. *Causby* is a Takings Clause decision, and does not support a state legislature's establishment of an easement law that is not a restraint on government but on private actors, as HB 3403 would do. Congress could withdraw or reduce the FAA's jurisdiction over aircraft operations below a certain altitude, but it wisely has not done so. The FAA must have sole authority over the safety of aircraft. Any state regulation of the airspace in which aircraft are permitted by the FAA to operate is preempted. Were the law otherwise, the nation's airspace would quickly become a patchwork of varying and inconsistent laws, which would not only impose an undue burden on interstate commerce, but would also pose safety risks.

With respect to UA takeoffs and landings, the FAA recognizes the authority of state and local governments to regulate. However, this authority may not be used to deny a reasonable opportunity for UAs to operate within a jurisdiction. Section 27.009, as revised, prohibits a UA from taking off or landing unless it is (1) on property owned or leased by the UA operator; (2) with the consent of the property owner or lessee; or (3) on property subject to an avigation easement, other than an avigation easement established under Section 27.005(b)(5)." The last category is unclear, as the revised bill does not include a paragraph (b)(5) under 27.005 or 27.006. Moreover, this section appears so restrictive as to be an undue burden on interstate commerce and thus be invalid under the Dormant Commerce Clause.

The bill authorizes the imposition of a fee for a UA operation within an easement. Any fee imposed solely for a UA operation in certain airspace, with no reference to any benefit, service, or privilege conferred, would face a similar fate under the Dormant Commerce Clause as applied to commercial operations.

Finally, new subsection 27.016(c) would authorize Texas DOT to enter into an agreement with a private entity "to design, develop, finance or maintain the necessary system authorizing and regulating the operation of unmanned aircraft." This provision is not explicitly confined to UA operations within an easement, but even if it were so confined, it would nonetheless be preempted. State and local governments have no authority to regulate the operation of UA, and what a state may not do itself it may not delegate or assign to a private party to do.

For the reasons stated above, the Small UAV Coalition opposes HB 3403 in its current form. We would be happy to meet with your office to discuss our concerns in greater depth.

Sincerely,

Gregory S. Walden
Aviation Counsel
Small UAV Coalition