



March 31, 2023

Honorable Kelly Hancock
Chair, Senate Committee on Veterans Affairs

Honorable Todd Hunter
Chair, House Committee on State Affairs

Honorable Abel Herrero
Chair, House Committee on Corrections

Dear Senator Hancock, Representative Hunter, and Representative Herrero:

On behalf of the Small UAV Coalition, the Consumer Technology Association (CTA), the Association of Uncrewed Vehicle Systems International (AUVSI), and the Commercial Drone Alliance (CDA), we write in opposition to several bills under consideration that would intrude on the Federal Aviation Administration's role as the single, exclusive authority over the safety of operations of aircraft in the National Airspace System (NAS). Current Texas Government Code Section 423.0045 prohibits: (1) the operation of a drone over a correctional facility, detention facility, or critical infrastructure facility under 400 feet above ground level (AGL); (2) the operation of a drone that makes contact with such a facility or a person on the premises; and (3) the operation of a drone that comes within a distance close enough to interfere with the operations of or cause a disturbance to the facility. "Critical infrastructure facility" is defined to include an airport and a military facility. Section 423.0045(c) provides that these prohibitions do not apply to a drone used for commercial purposes in compliance with Federal Aviation Administration (FAA) rules, exemptions, and authorizations.

H.B. 2159 would remove this exception from prohibitions on operating a drone within the vicinity of a correction, detention, or critical infrastructure facility. H.B. 2365 and S.B. 1308 would amend the Texas Penal Code to prohibit the (1) the operation of a drone over an airport or military facility under 400 feet above ground level (AGL); (2) the operation of a drone that makes contact with

such an airport or military facility or a person on the premises; and (3) the operation of a drone that comes within a distance close enough to interfere with the operations of or cause a disturbance to the airport or military facility. Neither of these bills includes the exception for commercial operations in compliance with FAA rules and authorizations. H.B. 3075 applies the same prohibitions to operations of a drone over a correctional or detention facility, without any exception for commercial operations.

We understand that legislators may be reluctant to include an exception for commercial drone operations in compliance with FAA rules in the wake of the decision in *National Press Photographers Association v. McGraw*, 594 F. Supp. 3d 789 (W.D. Tex. 2022) (appeal pending), which enjoined Texas from enforcing Chapter 423 against the NPAA and its members. We note that in the context of NPAA’s First Amendment challenge, the district court found that “Chapter 423 is not actually necessary to achieve any identified interest of the government.” *Id.* at 808. We also note that the appeal pending now in the U.S. Court of Appeals for the Fifth Circuit includes the arguments set forth below why airspace restrictions are preempted by Federal law.

The growth of the drone industry has prompted legislators in many states and localities to propose legislation to address potential concerns related to drones. Before considering new legislation, however, lawmakers should evaluate whether (i) any proposed legislation is federally preempted, (ii) the conduct at issue may already be addressed by existing federal or state laws, and (iii) drone-specific legislation is warranted.

In attempting to prohibit the operation of drones within a certain distance from an airport or a military, correctional and detention facility, these bills seek to regulate airspace, which is the jurisdiction of the FAA. Title 49, Part A, Section 1 of the U.S. Code, states: “The United States Government has exclusive sovereignty of airspace of the United States.” Federal control of the airspace—delegated by Congress under the Commerce Clause of the Constitution – is a bedrock principle of aviation law that dates back well over 50 years and is one of the reasons that the United States maintains an aviation safety record that is the envy of the rest of the world. Additionally, the FAA has released a UAS Fact Sheet reminding state and local jurisdictions that they lack authority to regulate airspace.¹ FAA pronouncements have made clear that regulations imposing operational bans or otherwise regulating navigable airspace are in contravention of established federal law.²

Prohibition of drone operations in the NAS has the potential to create a complicated patchwork of laws that may erode, rather than enhance, safety. In *Singer v. City of Newton* (D. Mass. 2017), a federal court affirmed the FAA’s regulatory authority over all altitudes within the NAS, holding that “aviation safety is an area of exclusive federal control,” and “Congress has given the FAA responsibility of regulating the use of airspace for aircraft navigation and to protect individuals and property on the ground,” along with the mandate to safely integrate UAS into the national airspace. The UAS Fact Sheet states that “[s]ubstantial air safety issues are raised when state and local governments attempt to regulate the operation or flight of aircraft” and “[a] navigable

¹ State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation of the United States to the FAA, Office of the Chief Counsel (Dec. 17, 2015) (“UAS Fact Sheet”) https://www.faa.gov/sites/faa.gov/files/uas/resources/policy_library/UAS_Fact_Sheet_Final.pdf.

² UAS Fact Sheet at 3.

airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system.”³

The prohibition on operations within a certain distance from an airport or “close enough” to result in interference is also preempted by Federal law because the FAA already regulates drone operations near airports. Section 107.43 of Title 14, Code of Federal Regulations, provides:

No person may operate a small unmanned aircraft in a manner that interferes with operations and traffic patterns at any airport, heliport, or seaplane base.

Section 107.41 provides:

No person may operate a small unmanned aircraft in Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace designated for an airport unless that person has prior authorization from Air Traffic Control (ATC).

Drones that receive exemption authority from the FAA under 49 U.S.C. § 44807, outside of Part 107 – for example, to operate a drone over 55 lbs., or to carry packages beyond the visual line of sight of the pilot for compensation or hire – are subject to conditions and limitations set by the FAA to protect against interference with airport operations.

Prohibiting operations under 400 ft. AGL conflicts with the requirement in section 107.51(b) that commercial operations under Part 107 generally must remain under 400 ft. AGL.

With respect to operations of drones over or near critical infrastructure more generally, Congress has directed the FAA to establish a process to restrict drone operations over designated critical infrastructure facilities. Section 2209 of the FAA Extension, Safety, and Security Act of 2016, Public Law 114-90, as amended by section 369 of the FAA Reauthorization Act of 2018, Public Law 115-254. Thus, Congress has vested the FAA, not state or local governments, with this authority.

In sum, these bills conflict with the FAA’s plenary statutory authority over aircraft operations in the NAS and rules promulgated under that authority, and therefore would be preempted under the Supremacy Clause of the Constitution of the United States, which provides that “the Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.”⁴ Federal rules, such as Part 107, promulgated under the Federal Aviation Act, have the same preemptive effect as a provision of the Federal Aviation Act. Moreover, they would substantially limit, if not preclude, drone operators from providing the countless benefits of drone operations to the American public.

If these bills advance over these objections, we recommend that they be revised to provide that FAA-regulated operations are exempt from the scope of each bill.

³ UAS Fact Sheet at 2.

⁴ U.S. Const., Art. VI, Cl 2.

Sincerely,

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