Attachment – Brief of *Amicus Curiae*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, TEXAS PRESS ASSOCIATION, and JOSEPH PAPPALARDO	§	
Plaintiffs,	§	CIVIL ACTION No. 1:19-cv-00946-RP
v.	§	
STEVEN MCCRAW, in his official capacity as Director of Texas Department of Public Safety, RON JOY, in his official capacity as Chief of the Texas Highway Patrol, and WES MAU, in his official capacity as District Attorney of Hays County, Texas,	§	
Defendants.	§	

BRIEF OF AMICUS CURIAE ASSOCIATION FOR UNMANNED VEHICLE SYSTEMS INTERNATIONAL AND THE CONSUMER TECHNOLOGY ASSOCIATION

Amici Association for Unmanned Vehicle Systems International ("AUVSI") and the Consumer Technology Association ("CTA") file this brief in support of Plaintiffs' preemption claims. AUVSI is the world's largest nonprofit organization dedicated to the advancement of unmanned systems and robotics and represents corporations and professionals from more than 60 countries involved in industry, government, and academia. AUVSI members work in the defense, civil, and commercial markets. CTA is North America's largest technology trade association, and its members are the world's leading innovators – from startups to global brands – helping to support more than 18 million American jobs. CTA educates U.S. policymakers to ensure the innovation economy is protected from laws and regulations that delay, restrict, or ban the development of technologies in all consumer technology sectors.

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SUMMARY OF ARGUMENT

This case raises important issues about the intersection of state and local authority in the federally-occupied fields of aviation safety and air navigation. It presents an opportunity to address a significant threat to the burgeoning unmanned aircraft systems ("UAS") industry in the state of Texas by invalidating a restrictive law that unlawfully intrudes upon federal sovereignty over the national airspace.

Plaintiffs challenge Chapter 423 of the Texas Government Code, which regulates multiple aspects of UAS navigation and operation, including (1) making unlawful capturing images via UAS "with the intent to conduct surveillance," Tex. Gov't Code § 423.003(a) ("Surveillance Provisions"), and (2) altogether prohibiting UAS operations over certain critical infrastructure facilities within the state, *see* Tex. Gov't Code § 423.0045(b) ("No-Fly Provisions"). Plaintiffs ask this Court to declare invalid and enjoin the enforcement of Chapter 423 on multiple legal grounds, including First Amendment and preemption claims. *See generally* Pls.' Compl. for Declaratory and Injunctive Relief ("Compl.") [ECF No. 1]. The state Defendants now move to dismiss. *See generally* Defendants' Motion to Dismiss ("MTD") [ECF No. 19].

Amici curiae AUVSI and CTA agree with Plaintiffs that they have standing to bring this suit and have stated a claim for relief on each of their five claims. However, *amici* write separately to emphasize the importance of federal sovereignty over the airspace and the extent to which the No-Fly Provisions in Chapter 423 intrude upon that sovereignty. Because the No-Fly Provisions are preempted by federal law, they must be set aside.

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ARGUMENT

I. THE NO-FLY PROVISIONS ARE PREEMPTED BY FEDERAL LAW.

As the Complaint sets forth, "the No-Fly Provisions . . . violate the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2, because they impinge on the federal government's sole and exclusive authority to regulate the national airspace and aviation safety." Compl. ¶ 8. Plaintiffs have adequately stated a claim for relief based on both field and conflict preemption under the Supremacy Clause.

The No-Fly Provisions can be understood as presenting either an issue of field preemption or conflict preemption. Both field and conflict preemption are within the broad category of implied preemption and thus turn on Congressional intent. *See Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 384 (5th Cir. 2004). Field preemption occurs where "Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme[.]" *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 n.1 (5th Cir. 1995) (citations omitted). Conflict preemption occurs where "state law conflicts with federal law or interferes with the achievement of federal objectives." *Id.* (citations omitted). In many cases—as in this one—"field preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of federal regulation, and the imposition of state standards would conflict with federal law and interfere with federal objectives." *Witty*, 366 F.3d at 384. While *amici* analyze each form of preemption separately, where (as in this case) a state law interferes with a comprehensive set of federal regulations, the question of whether to apply field preemption or conflict preemption is largely academic. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) ("[T]he categories of preemption are not rigidly distinct." (citation and quotation omitted)).

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A. The No-Fly Provisions Are Field-Preempted.

Field preemption involves a two-step inquiry. ***First***, a court must determine whether Congress intended to preempt a given field by evaluating whether "federal law is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation or the federal interest in the field is so dominant that it precludes enforcement of state laws on the same subject." *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 200 (5th Cir. 2013) (cleaned up). ***Second***, the court must ascertain whether the state law at issue falls within the scope of the preempted field. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)) ("When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'"); *see also Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019) (explaining that second "inquiry is whether the [challenged statute] falls within the scope of that preemption," which is determined by asking "at what point [does] the state regulation sufficiently interfere with the federal regulation that it should be deemed pre-empted" (citation and quotation omitted)). Here, Congress has intended to preempt a given field—aviation safety—and the No-Fly Provisions fall within the scope of that field.

1. *Whether Congress Intended to Preempt a Given Field.* As Plaintiffs correctly explain in their Complaint, "[i]t is well established that the federal government has exclusive authority over regulating the national airspace and aviation safety[.]" Compl. ¶ 142. Congress enacted the Federal Aviation Act "in response to a series of 'fatal air crashes between civil and military aircraft ***operating under separate flight rules***.'" *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d

Cir. 1999) (quoting *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir.1969) (emphasis in original). To address this problem, "Congress found the creation of a ***single, uniform system*** of regulation vital to increasing air safety." *Id.* (citations omitted, emphasis added); *see also City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973) (explaining the need for "a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled"). Congress thus asserted "exclusive sovereignty" over the "airspace of the United States." 49 U.S.C. § 40103(a)(1). It vested the Federal Aviation Administration ("FAA") with broad authority to implement the Federal Aviation Act "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. § 44701(c); *see also Abdullah*, 181 F.3d at 369 ("Congress intended the Administrator, on behalf of the Federal Aviation Administration, to exercise sole discretion in regulating air safety."). The agency has used this broad authority to enact "a pervasive regulatory scheme covering air safety concerns," *Witty*, 366 F.3d at 385, in order to carry out the clear intent of Congress to establish a single, centralized regime for aviation safety.

As a result of both the pervasive air safety regulatory scheme and the strong federal interest in uniformity of aviation laws, federal courts have consistently found that the federal government has occupied the field of federal aviation safety. Plaintiffs correctly note that the "pervasive scheme of federal regulation" in the area of aviation safety "has led six Circuit Courts to conclude that the Federal Aviation Act preempts the entire field of aviation safety regulation." Pl.'s Resp. in Opp. to Def.'s Mot. to Dismiss at 27 (citations omitted) ("Opp.") [ECF No. 23]; *see also Singer v. City of Newton*, 284 F. Supp. 3d 125, 132 (D. Mass. 2017) (citations omitted) ("Courts have recognized that aviation safety is an area of exclusive federal regulation."). Indeed, Judge Yeakel of this Court observed that "[n]umerous circuit courts of appeals have concluded that, in passing

the Federal Aviation Act, Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field." *Prokaski v. Frontier Airlines, Inc.*, No. 12-CA-512-LY, 2012 WL 12892285, at *2 (W.D. Tex. Aug. 29, 2012) (citing *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses*, 634 F.3d 206, 210 (2d Cir. 2011) (collecting cases)). Judge Yeakel's analysis implicitly adopted this conclusion. *Cf. id.* at *2–*4.

Defendants cite a single case that—they erroneously contend—contradicts this phalanx of case law: *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 828 (E.D. Tex. 2006) ("Neither the Supreme Court nor the Fifth Circuit have held that the Federal Aviation Act preempts the entire field of aviation safety."). MTD at 31. But Defendants read more into *Monroe*'s holding than it can bear. Plaintiffs do not and need not allege that ***every*** law conceivably touching aviation safety is preempted. *See Singer*, 284 F. Supp. at 129 ("[Exclusive federal sovereignty of the airspace] does not preclude states or municipalities from passing ***any*** valid aviation regulations, but courts generally recognize that Congress extensively controls much of the field." (citation and quotation omitted) (emphasis in original)). Rather, they allege that "state drone regulations promulgated to protect aviation safety impermissibly infringe upon a field of exclusive federal regulation." Compl. ¶ 143.

Monroe in no way contradicts Plaintiffs' argument. In fact, *Monroe* recognized that the Fifth Circuit in *Witty* preempted "federal regulatory requirements for passenger safety warnings and instructions" because "Congress enacted a pervasive regulatory scheme covering air safety concerns that includes regulation of the warnings and instructions that must be given airline passengers." *Monroe*, 417 F. Supp. 2d at 828 (citing *Witty*, 366 F.3d at 385). The court then subsequently noted that *Witty*'s holding addressed only "the precise issue before" it, not every conceivable aviation safety law. *Id.* at 829. Thus, in context, *Monroe*'s statement about field

preemption is less about whether there is a federally occupied field, which the Fifth Circuit has held there is, and more about whether the scope of that field reached the provision in question.

Given this understanding of *Witty*, the best reading of *Monroe*'s conclusion that "aviation safety is not preempted by the Federal Aviation Act," *Monroe*, 417 F. Supp. at 836, is that product liability claims against a model aircraft manufacturer—the claim at issue in that case—do not fall within the field that the Federal Aviation Act preempts. A contrary reading would clearly conflict with *Witty*'s field preemption holding. *Witty*, 366 F.3d at 385. And *Monroe*'s finding that a state tort products liability claim does not fall within the preempted field of aviation safety has no bearing on this case, where the state is trying to directly regulate aircraft operations in the national airspace. *See US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (preempting application of New Mexico Liquor Control Act ("NMLCA") to in-flight beverage service because "in contrast to [a previous case where the court did not find preemption], NMLCA does not involve state tort remedies and instead imposes substantive requirements"); *see also Prokaski*, 2012 WL 12892285, at *3 (distinguishing personal-injury claims from the specific "federal regulations [that] govern[ed] the warnings and instructions which must be given to airline passengers" in *Witty*).[1]

2. *Whether the No-Fly Provisions Fall Within the Preempted Field*. In this case, the No-Fly Provisions fall well within the preempted field of aviation safety because they purport to directly limit the operations of UAS in the national airspace—a subject that is in the heartland of aviation safety and explicitly governed by pervasive federal regulation. Operational restrictions

[1] This is not to say that state tort claims always fall outside the scope of preemption. *See, e.g.*, *Witty*, 366 F.3d at 385 (preempting "state claim for failure to warn passengers of air travel risks" without deciding whether such claims were "entirely preempted" or "preempted to the extent that a federal standard must be used but that state remedies are available"). But the Court need not delve into where this line is drawn because—as explained in the next section—operational restrictions on use of the national airspace clearly fall within the scope of the preempted field.

that control how aircraft use the national airspace are not only essential to ensuring safety, they are the paradigmatic case where federal control is strongest. *See City of Burbank*, 411 U.S. at 633–34 (quoting *Nw. Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."). Indeed, the Federal Aviation Act was passed precisely in order to vest exclusive control over air navigation with a federal authority, and to avoid the disastrous consequences that arose when multiple jurisdictions attempted to control movement through the same airspace. *See Abdullah*, 181 F.3d at 368–69.

Acting pursuant to that authority, Congress has enacted a pervasive regulatory scheme governing the regulation of airspace use and air navigation. Congress vested with the FAA broad authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1). Congress required the FAA to "prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for (A) navigating, protecting, and identifying aircraft; (B) protecting individuals and property on the ground; [and] (C) using the airspace efficiently." *Id.* § 40103(b)(2)(A)–(C).

The pervasive scheme regulating airspace use and air navigation extends to UAS. Congress defined the operative term in the Federal Aviation Act—"aircraft"—broadly to include "***any*** contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. § 40102(a)(6) (emphasis added); *see also* 14 C.F.R. § 1.1. Congress has specifically defined UAS

as a subset of aircraft. 49 U.S.C. § 44801(11); 14 C.F.R. § 107.3. And in the FAA Modernization and Reform Act of 2012, Congress instructed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." 49 U.S.C. § 44802(a)(1). Because the statute requires "safe[]" "integration" of UAS "into the ***national*** airspace system," the UAS provisions are part and parcel of the "uniform and exclusive system of federal regulation," *City of Burbank*, 411 U.S. at 639, governing aviation safety, which includes airspace use and air navigation. *See Collins v. Mnuchin*, 938 F.3d 553, 570 (5th Cir. 2019) ("Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." (citation and internal quotation omitted)).

Indeed, Congress and the FAA have adopted a comprehensive and specific system of rules specifically governing UAS use of the national airspace. *See, e.g.*, 49 U.S.C. § 44809(a)(5) (for UAS operated as model aircraft, requiring the operator to obtain prior authorization from the Administrator to operate in Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace); *id.* § 44809(a)(6) (for UAS operated as model aircraft, requiring that the aircraft remain below 400 feet above ground level ("AGL") to operate without prior FAA authorization); 14 C.F.R. § 107.39 (prohibiting operations of civil, non-recreational UAS over persons); *id.* § 107.41 (requiring prior authorization from Air Traffic Control ("ATC") to operate civil, non-recreational UAS in Class B, Class C, or Class D airspace or within the lateral boundaries of the surface area of Class E airspace); *id.* § 107.43 (restricting operation of civil, non-recreational UAS near airports); *id.* § 107.45 (restricting operation of civil, non-recreational UAS in prohibited or restricted areas); *id.* § 107.47 (imposing restrictions on operations of civil, non-

recreational UAS in proximity of certain areas designated by notice to airman); *id*. § 107.51(a)(b) (restricting civil, non-recreational UAS operations to 400 feet AGL or 400 feet above a structure).

There is no basis for claiming that Congress intended to leave flight restrictions over state-designated "critical" sites to individual state control. In fact, as the complaint points out, the opposite is true: The pervasive control of the airspace expressly covers UAS navigation over critical sites—the exact subject matter the No-Fly Provisions seek to regulate. *See* Compl. ¶ 44. Congress explicitly mandated in 2016 that the FAA establish a process to designate critical sites and restrict UAS operations over such sites. *Id.* (citing Pub. L. No. 114–190 § 2209, 130 Stat. 615, 634 (2016) (codified at § 40101 note)). This mandate was subsequently renewed again with amendments and additional requirements in the FAA Reauthorization Act of 2018. Pub. L. No. 115–254 § 369, 132 Stat. 3186, 3311 (2018)).[2]

The No-Fly Provisions thus fall within the preempted field. Just as the passenger safety warning and instruction provisions at issue in *Witty* were preempted by the "pervasive regulatory scheme covering air safety concerns that includes regulation of the warnings and instructions," *Witty*, 366 F.3d at 385, the No-Fly provisions at issue here are preempted by the pervasive regulatory scheme covering air safety concerns that includes regulation of airspace use and air navigation. Indeed, that pervasive regulatory scheme covers the precise subject matter of the No-Fly Provisions, removing any doubt that the No-Fly Provisions are field-preempted. *See Pac. Gas*

[2] That the FAA has not yet adopted regulations governing the designation of critical infrastructure makes no difference to the preemption analysis. Given the limited scope of authorized UAS operations to date, the FAA may well have rationally concluded that the agency's resources are better focused elsewhere, such as on developing remote identification rules that will eventually allow expanded, beyond visual line-of-site operations. The intent of Congress—that there should be federal control over the designation of critical infrastructure, to avoid a patchwork of contradictory state regulation—is clear from the text of the statute. Moreover, the FAA can and does impose Temporary Flight Restrictions ("TFRs"), which include restrictions on drone operations, in appropriate circumstances.

& Elec. Co., 461 U.S. at 212–13 ("When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" (citation omitted)); *see also O'Donnell*, 627 F.3d at 1327 (citations omitted) (finding it "significant[]" that the FAA "promulgated a regulation pursuant to the [Federal Aviation Act] specifically addressing" the preempted subject matter). And, as explained *infra*, the No-Fly Provisions frustrate important federal interests implicated by federal occupation of the aviation safety field, including Congress's desire to safely accelerate integration of UAS into the national airspace, 49 U.S.C. § 44802(a)(1), and the Federal Aviation Act's "objective of establishing a 'uniform and exclusive system of federal regulation' in the field of air safety." *Tweed-New Haven Airport Auth.*, 930 F.3d at 74 (citations omitted).

Defendants erroneously cite *Singer v. City of Newton*, 284 F. Supp. 3d 125 (D. Mass. 2017) for the proposition that the Federal Aviation Act "***does not*** preempt non-federal regulations in the field of regulation unmanned aircraft [sic]." *See* MTD at 31–32 (emphasis in original). As with the holding in *Monroe*, the *Singer* court's decision speaks not to the existence of a federally preempted field, but rather to its scope. Plaintiffs have not pled that *all* state regulation of UAS is preempted. Rather, Plaintiffs have asserted that "state drone regulations promulgated to protect aviation safety impermissibly infringe upon a field of exclusive federal regulation." Compl. ¶ 143. The *Singer* court's holding as to field preemption is thus inapplicable because the court was simply rejecting an overly broad formulation of the field articulated by the plaintiff in that case. *See Singer*, 284 F. Supp. at 130 ("[T]he FAA explicitly contemplates ***state or local regulation of pilotless aircraft***, defeating Singer's argument that the whole field is exclusive to the federal government." (emphasis added)). And in fact, the *Singer* court held that a "ban on drone use within

the [city's] limits" was conflict-preempted because it "thwart[ed] not only the FAA's objectives, but also those of Congress for the FAA to integrate drones into the national airspace." *Id.* at 131–32. This holding strongly suggests that the court would have found field preemption had Singer more narrowly defined the field, as Plaintiffs have done here. In any event, *Singer* found that a law functionally indistinguishable from the No-Fly Provisions was ***conflict***-preempted, dooming the No-Fly Provisions regardless of that court's disposition on ***field*** preemption.

B. The No-Fly Provisions Are Conflict-Preempted.

The No-Fly Provisions fatally conflict with Congress's purposes in (1) asserting federal and exclusive sovereignty over the national airspace, and (2) accelerating UAS integration into the national airspace.[3] With regard to conflict preemption, *Singer* is directly on point. There, the court found that a city policy that "restrict[ed] any drone use below [400 feet] . . . thwart[ed] not only the FAA's objectives [in regulating use of the national airspace by requiring operation of drones below an altitude of 400 feet], but also those of Congress for the FAA to integrate drones into the national airspace." *Singer*, 284 F. Supp. at 132. Just as in *Singer*, the Texas legislature seeks to directly and specifically regulate where UAS may operate by prohibiting operations in certain locations at altitudes below 400 feet. And in fact, the No-Fly Provisions are even more problematic than the regulations in *Singer* because they directly conflict with not only the 400-foot operational regulations but also Congress's mandate that the FAA develop a process to designate and restrict

[3] Plaintiffs are correct that they are not precluded from making this argument merely because they did not specifically mention conflict preemption in their preemption cause of action. *See* Opp. at 30 n.14; *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (3d ed. 2019) ("[A] complaint is sufficient against a motion to dismiss under Rule 12(b)(6), if it appears from the complaint that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate.").

flights over fixed-site facilities, including critical infrastructure. *See* Pub. L. No. 115–254 § 369, 132 Stat. 3186, 3311 (2018).

Defendants erroneously contend that the No-Fly Provisions "do[] not stand in the way of the accomplishment of any federal policy." Def.'s Reply to Pl.'s Resp. to Def's Mot. to Dismiss ("Reply") at 10 [ECF No. 25]. This contention is not only belied by *Singer*'s direct holding to the contrary, it is meritless on its face. For one, the No-Fly Provisions present an obstacle to Congress' policy of "develop[ing] a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system," 49 U.S.C. § 44802(a), because the No-Fly Provisions effectively prohibit all UAS use above state-designated "critical infrastructure facilit[ies]." *See* Tex. Gov't Code § 423.0045(a), (b). State regulations that limit where UAS may fly and at what altitude (1) undermine the "comprehensive" nature of the federal scheme, *see Comprehensive*, Merriam-Webster, https://www.merriam-webster.com/dictionary/comprehensive (last visited Jan. 10, 2020) ("covering completely or broadly"), and (2) present an additional compliance challenge for UAS operators, thus undermining Congress's goal of "***accelerat[ing]*** the integration of [UAS] into the national airspace system," 49 U.S.C. § 44802(a)(1) (emphasis added).

The No-Fly Provisions also present an obstacle to Congress's goal of uniformity in aviation safety regulations by adding altitude requirements that diverge from the federal scheme. *See, e.g.*, *Witty*, 366 F.3d at 385 ("The interdependence of [safety and efficiency goals] requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled. . . . Allowing courts and juries to decide under state law that warnings should be given in addition to those required by the Federal Aviation Administration would necessarily conflict with the federal regulations."); *Tweed-New Haven Airport Auth.*, 930

F.3d at 74 ("If every state were free to control the lengths of runways within its boundaries, th[e] Congressional objective [of uniformity] could never be achieved."). Federal regulations ***require*** operation of small UAS below 400 feet, 14 C.F.R. § 107.51(b), whereas the No-Fly Provisions ***prohibit*** operation of UAS below 400 feet in certain areas, Tex. Gov't Code § 423.0045(b). The No-Fly Provisions thus plainly undermine the uniformity of federal altitude regulations.

This obstacle to federal uniformity is particularly problematic in the realm of the altitude regulations. For one, the Federal Aviation Act explicitly gives the FAA authority to promulgate "regulations on safe altitudes." 49 U.S.C. § 40103(b)(2). And the FAA's decision to limit UAS operations to altitudes below 400 feet was specifically designed to reduce the risk of collision with manned aircraft, furthering the dominant federal interest in aviation safety. *See* Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42063, 42117 (June 28, 2016) (to be codified at 14 C.F.R. pts. 21, 43, 61, 91, 101, 107, 119, 133, and 183) ("[A] 400-foot ceiling will allow for a significant number of applications for the small UAS community, while providing an added level of safety for manned-aircraft operations. A ceiling of 400 feet AGL will provide an additional 100-foot margin of safety between small UAS operations and a majority of aircraft operations in the NAS."); *cf.* 14 C.F.R. § 91.119(c) (allowing helicopters to fly at an altitude of 500 feet when not over congested areas).

Defendants' argument to the contrary is unavailing. Defendants cite *Singer* for the proposition that "the FAA explicitly contemplates state or local regulation of pilotless aircraft," Reply at 10 (citation and quotation omitted), but ignore that *Singer* explicitly addressed this point when it preempted a municipality's sub-400-foot UAS operation ban. *See Singer*, 284 F. Supp. at 132 ("Although Congress and the FAA may have contemplated co-regulation of drones to a certain extent, this hardly permits an interpretation that essentially constitutes a wholesale ban on drone

use in Newton. Accordingly, subsections (c)(1)(a) and (c)(1)(e) are preempted."). Indeed, the FAA has made clear that operational restrictions on overflight are not the kind of regulations that fall within state and local government authority. *See* 81 Fed. Reg. 42063, 42194 (June 28, 2016) ("Substantial air safety issues are implicated when State or local governments attempt to regulate the operation of aircraft in the national airspace. The Fact Sheet provides examples of State and local laws affecting UAS for which consultation with the FAA is recommended and those that are likely to fall within State and local government authority. For example, consultation with FAA is recommended when State or local governments enact operational UAS restrictions on flight altitude, flight paths; operational bans; or any regulation of the navigable airspace.").

In sum, Plaintiffs are correct that the No-Fly Provisions "violate the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2, because they impinge on the federal government's sole and exclusive authority to regulate the national airspace and aviation safety." Compl. ¶ 8; *see also id.* ¶ 142. The Complaint supports relief on either a conflict or field preemption theory, to the extent this Court sees a meaningful difference between the two theories in this case.

II. THE "COMMERCIAL EXEMPTION" DOES NOT SAVE THE NO-FLY PROVISIONS FROM PREEMPTION.

As set forth above, the No-Fly Provisions are plainly preempted by federal law. Defendants' pleadings focus heavily on the gating question of whether a federally-occupied field exists and do not suggest that the state law's inclusion of a commercial exemption is relevant to this analysis. However, for the sake of clarity, *amici* emphasize that the state legislature's inclusion of a commercial exemption does not allow state and federal law to coexist.

FAA occupation of the field of aviation safety—and Congress's purpose in directing the FAA to regulate in that field and integrate UAS into the national airspace—is not limited to

"commercial" operations. *See, e.g.*, 49 U.S.C. § 40102(a)(6) (defining "aircraft" broadly to include "any contrivance invented, used, or designed to navigate, or fly in, the air."). Indeed, the FAA's mandate to integrate UAS into the national airspace extends to all "civil" UAS, *see* 49 U.S.C. § 44802(a)(1)—a category that includes all aircraft that are not government-owned or operated and thus extends more broadly than commercial UAS. *See* 49 U.S.C. § 40102(a)(16), (41); 14 C.F.R. § 1.1. Similarly, while FAA regulations governing small UAS operations exclude certain UAS operated for hobby or recreational purposes, *see* 49 U.S.C. § 44809, they are not limited to "commercial" UAS. For example, they apply to non-recreational operations by non-profit organizations and hobbyists that operate outside the programming of a nationwide community-based organization. *See id.*, § 44809(a)(2). And Section 2209—which directs the FAA to regulate UAS operations over critical facilities—is not limited to commercial or even civil UAS. *See* Pub. L. No. 114–190 § 2209, 130 Stat. 615, 634 (2016). Accordingly, the inclusion of a commercial exemption does not alter the preemption analysis. The No-Fly Provisions are thus preempted by federal law and must be set aside.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Dated: January 10, 2020

Attachment – Brief of *Amicus Curiae*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on January 10, 2020, to all counsel of record.

/s/ *Terry L. Scarborough*
Terry L. Scarborough