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5 UNITED STATES OF AMERICA
6 NATIONAL TRANSPORTATION SAFETY BOARD
7 WASHINGTON, D.C.

8 MICHAEL P. HUERTA, ADMINISTRATOR,
9 FEDERAL AVIATION ADMINISTRATION,
10 COMPLAINANT

11 vs.

12 RAPHAEL PIRKER,
13 RESPONDENT

14 DOCKET #CP-217

15 *AMICUS* BRIEF
16 IN SUPPORT OF THE ALJ'S
17 DECISIONAL ORDER

18 PURSUANT TO 49 C.F.R. 821.9
19 (WITH E-MAIL PERMISSION OF ATTORNEYS CARON AND SCHULMAN)

20 INTRODUCTION

21 The undersigned *amicus* submits the following memorandum in
22 support of the Administrative Law Judge's order dated the 16th of
23 March 2014. The decisional order was correct in its analysis
24 that FAA regulations, its non-regulatory level advisory opinions,
25 and current law preclude the imposition of liability for alleged
26 improper operation of a model aircraft device.

27 First, the decision accurately summarized FAA administrative
28 authority, the clear lack of statutory definition as to "model"
aircraft *not* being within the scope of oversight, and that the
imposition of a \$10,000 civil penalty was therefore improper.

1 Secondly, while all agree that the Congress, through the
2 regulatory power of the FAA has a valid interest in maintaining
3 safe and responsible use of the federal and navigable air space,
4 the process must be accomplished in accordance with law. In the
5 *Pirker* case, the FAA overreached its jurisdictional authority.

6
7 Thirdly, in particular, the FAA has potentially created
8 arbitrary and irrational distinctions with regard to amateur and
9 "commercial" use aspects of model or drone equipment that leave
10 the entire scope of "aircraft" regulation and proper
11 administration subject to doubt and confusion. The remedy is
12 not, as in *Pirker*, an improper attempt by the FAA to impose
13 prohibitions or restrictions absent clear guidelines and due
14 process compliance with the rule making procedure. Instead,
15 until the area of model and commercial use (much of which is
16 entirely benign) is clearly regulated, with un-impeded access to
17 all safe users, the FAA's piecemeal approach should be rejected.
18 For these same reasons, no *Chevron* deference should be accorded
19 the FAA interpretations at this time.

20
21 Fourth, whether Mr. Pirker's actions were risky, improper,
22 and subject to sanction under other applicable law is a separate
23 question. The air space, and navigable air space in particular,
24 should always be safe for all users. The FAA should not be
25 allowed to extend its definitions *ultra vires* to these facts.
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[INCORPORATED HEREIN: CONSENTS OF BOTH PARTIES, AS SEPARATE DOCUMENT.]

1 **1. *AMICUS OVERVIEW.***

2 For the reasons that follow, it is a matter of national
3 import that not all air space be constrained by a
4 regulatory process with a permit system. Such
5 regulation will stifle contemporaneous and timely
6 creative processes, news and information gathering and
7 disseminating, and otherwise be unattainable to the
8 average person, and likely to almost all young people
9 starting out in business or otherwise developing their
10 foundations. Individuals and companies nationwide use
11 the airspace immediately above ground for many
12 activities, including play of every type, climbing
13 ladders, acrobatic feats on wires, engaging in
14 photography and videography, and otherwise.

15 There would be negative and unnecessary negative impact
16 nationally were the FAA permitted authority to shut down
17 every use of airspace, even non-navigable airspace, for
18 which it does not grant pre-approval as a result of this
19 case and of any regulatory framework that might follow
20 the NTSB Board's decision.

21 This *amicus* brief is submitted to protect the interests of an
22 undisclosed young entrepreneur's worthwhile photographic and
23 videographic endeavors to express himself artistically,
24 creatively, and freely, in a responsible manner. The young person
25 is well known within his spheres for his creative work product, is
26 universally well-respected for his professionalism and talent, is
27 community and charitably minded, is a multi-time academic
28 scholarship recipient and certificated graduate in media
29 productions, has been featured twice on live television and twice
30 on live radio, and is representative of what all our youth are
31 encouraged to be -- thoughtful, responsible, conscientious, 21st
32 century thinkers.

33 For decades, the FAA has permitted the very same activities
34 in which the entrepreneur wishes to engage. The distinctions
35 today seem to be a reach into airspace not navigable by major

1 carriers (low lying to the ground) and also that the FAA asserts
2 that all flight activity must be "non-commercial" based on its
3 advisory circular seeking voluntary compliance of some years ago.
4 Its spokesperson stated to the below author that an aerial
5 photograph taken from a remote control device by this author for
6 fun such as over homes is not violative of law. The spokesperson
7 relayed, however, that the FAA takes a position that if this
8 author then sells the very same photograph to her spouse later,
9 *after* the flight, that she will have violated law. In the
10 hypothetical, the flight and photography were unaffected, but \$5
11 would have been paid. There is no nexus between the air safety
12 hypothetical question and the FAA representative's telephonic
13 reply.
14

15 Photographic and videographic endeavors should be without
16 fear of whether the FAA will look at the bookkeeping to see
17 whether a picture taken for a non-profit or for fun was later
18 sold, whether the picture was intended for a paying client, or
19 whether a paying client is actually a non-profit. The FAA is,
20 respectfully, weaving a tapestry of interpretation and stifling
21 limitation without air safety impact that will unwind and that is
22 without sound foundation when it inserts "commercial" into its
23 analysis. The FAA's regulatory scheme as it develops should be
24 strictly limited to safety issues.

25 Further, the FAA's regulatory authority should not be
26 construed as providing police powers under the guise of privacy.
27 It is virtually impossible for the FAA to regulate human behavior
28

1 and incursions to such degree as to stop, for instance, a high
2 definition camera user from a regulated airplane or balloon flight
3 or a child simply standing on a brick wall or ladder and reaching
4 up with a camera pointed down to the play area next door.
5 Invasion of privacy is not going to end by air regulation. The
6 cause of action is an individual's right to assert no matter how
7 it may occur. Individuals have recourse under case law to address
8 such invasion. Again, the FAA's regulatory purview should be as
9 the weight of history demonstrates that Congress intended; a
10 safety agency and nothing more.

11 The NTSB should find that the FAA lacks legal authority to
12 regulate flying devices within the immediate vicinity of the
13 operator when those devices may consume memory (such as by taking
14 pictures) but do not deliver goods or people between two
15 geographical points.
16

17
18 **2. *Chevron Deference Should Not Be Accorded.***

19 Simply, for today's purpose, it is noted that the FAA's
20 citation is *ultra vires*. Accordingly, *Chevron* deference does not
21 apply to the question presented.
22

23 *"Pursuant to Chevron Step One, if the intent of*
24 *Congress is clear, the reviewing court must give effect*
25 *to that unambiguously expressed intent. If Congress*
26 *has not directly addressed the precise question at*
27 *issue, the reviewing court proceeds to Chevron Step*
28 *Two. Under Step Two, '[i]f Congress has explicitly*
left a gap for the agency to fill, there is an express
delegation of authority to the agency to elucidate a
specific provision of the statute by regulation. .."

1 *Association of Private Sector Colleges and Universities v. Arne*
2 *Duncan and the US Dept of Education*, pg.15 (US App., DC Circuit,
3 2012), citing *Chevron*, 467 U.S. at 843-44.

4 While broadly authorizing air safety, including prescribing
5 regulations on aircraft flight, and safe altitudes, and so as to
6 "protect[] individuals and property on the ground" Congress did
7 **not** explicitly leave a gap to be filled by the agency regarding
8 every aspect of air use. For instance, Congress did not assign
9 its role to regulate **the very same activity** if by a business that
10 a hobbyist or non-profit organization may do without regulation.
11 As cited by Mr. Pirker, in 1958 the Congressional intention was to
12 regulate and protect passenger safety in air traffic. (See
13 "Respondent's Reply Brief" @ pg.15).

14 In any event, *Chevron* deference is inapplicable because the
15 FAA's interpretation of its authority is overly broad, and news
16 reports alone demonstrate that its interpretation has been
17 imposing upon artistic speech of photographers and videographers.
18 The FAA's delegated authority should be that of safety and only
19 safety. "Public right of transit" is reserved to the people as
20 individuals and is undefined, but with a wide brush prohibiting
21 all but the hobbyist or certificate holder, the congressional
22 mandate is left meaningless and with no citizens retaining such
23 right.

24 The FAA's practices and history regarding remote controls and
25 drones have failed, as expressed in other *amici*, to focus on
26 safety and appear to the public at least to be focused on the
27 operator or use.
28

1 3. ***The Arguments of the FAA's Brief Are Inapposite and***
2 ***Misstate the Issues Presented.*** The FAA will have many

3 examples of unsafe behaviors it **will** wish properly to regulate.
4 Those will include the frightful story appearing as a May 10th,
5 2014 Internet headline of a drone almost encountering with a
6 U.S.Air flight. This *amicus* acknowledges and agrees that **safety**
7 regulation **should** be developed, but respectfully suggests that
8 regulation of photographers and others based upon use or
9 "commercial" interpretation is *ultra vires* to the FAA and thus,
10 not within the congressional mandate.

11 The FAA focuses to large extent on what it deems incorrectly
12 to be the Administrative Law Judge's alleged misuse of the term
13 "model aircraft," including stating that the ALJ
14

15 *"fails to cite to any previous interpretation that the*
16 *FAA has made or advanced, either directly or*
17 *indirectly, that would support that the FAA informed*
18 *the class of 'model aircraft' operators (as he uses the*
19 *term) that the aircraft they operate are not 'aircraft'*
20 *under the statutory and regulatory definitions of the*
word, and that their flight operations are not subject
to regulation under the Federal Aviation Regulations."
(Administrator's Appeal Brief, Conclusion, pg.16).

21 The FAA's statement is confusing to this reader and thus
22 would inspire confusion among the NTSB Board and public members
23 who own remote control devices. The FAA's statement minimizes the
24 technical import of whether one is or is not "aircraft" when it
25 carves out an exception for an entire non-commercial area engaged
26 in flying outside the operator's immediate sphere.

1 The FAA has carved out exception for "modelers" in several
2 writings. For example, in year 2007, the FAA issued the following
3 overly broad policy statement:

4
5 *"The current FAA policy for UAS operations is that no
6 person may operate a UAS in the National Airspace
7 System without specific authority. For UAS operating
8 as public aircraft the authority is the COA, for UAS
9 operating as civil aircraft the authority is special
10 airworthiness certificates, and for model aircraft the
11 authority is AC91-57. The FAA recognizes that people
12 and companies other than modelers might be flying UAS
13 with the mistaken understanding that they are legally
14 operating under the authority of AC91-57. AC 91-57
15 only applies to modelers, and thus specifically
16 excludes its use by persons or companies for business
17 purposes."*

18 Rules and Regulations, "Unmanned Aircraft Operations in the
19 National Airspace System" 6690 Federal Register, vol.72, #29
20 (Febr.13, 2007).

21 Further, FAA publication specifies

22
23 *"a. Types and Authority. Current FAA policy for UAS
24 operations is that no person may operate a UAS in the
25 NAS without specific authority. ... (3)(a) Hobbyists
26 should follow the guidance contained in Advisory
27 Circular (AC)91-57. (b) For model aircraft, the
28 authority is AC 91-57."* 7210.846 UAS in the NAS par.7
Operations.

29 Earlier this year the FAA spokesperson for the Arizona region
30 wrote, following telephonic inquiry:

31
32 *"Probably the most frequently misused application is
33 AC91-57. I get two to three calls a month of people
34 who want to use AC91-57 for Commercial/Business UAS
35 applications. They can't. AC91-57 is for modelers and
36 hobbyists for sports and recreation only."*

37 E-mail, Mart CTR Dillon/ANM/CNTR/FAA, AJV-W2, Western Operations
38 Support Group, January 28th, 2014 to the undersigned.

1 4. **"Aircraft"?** The FAA Modernization and Reform Act of 2012,
2 Pub.L.No.112-95 defines "aircraft," as cited by the FAA
3 (Administrator's Appeal Brief, FN2). There are distinctions among
4 the equipment that may project upwards from earth into the sky or
5 that might leave the ground, including those of height, weight,
6 function, design, speed, and so on that should be considered. For
7 instance, a gas-powered remote control jet is not a platform
8 carrying a camera.
9

10
11 4.1. **The Need to Avoid an Inhibiting Effect on Valid**
12 **Business Activities.** The FAA now takes the position that any
13 "commercial" flight of any machinery is prohibited without
14 licensure. It is a "slippery slope" to define when someone else is
15 engaged in commercial activity to fit a widely cast advisory about
16 public safety based upon who s/he is or why s/he engages in an
17 activity. "Commercial" is subjective. When an attorney writes a
18 brief *pro bono*, is s/he engaged in "commercial activity"? If s/he
19 writes the same brief but is paid by a client who earns income
20 related to the topic? If I or a colleague write the same brief for
21 remuneration but the client is a non-profit engaged in political
22 debate, social services, or the arts? This chain of questions
23 applies equally to any field, including a photographer or
24 videographer who flies a remote control platform device overhead.
25 "Commercial" is a subjective and un-defined term. In any event,
26 it is a *non sequiter* to conclude regulatory application, fee,
27 inspection, *criteria*, and approval causes greater safety to the
28

1 public because and whenever the regulated party is an
2 entrepreneur who may a business purpose, who may speculate about
3 developing a concept for future business, or has a potential
4 profit-making motive.

5 The Arizona Model Pilots Society is, like others, an
6 Academy of Model Aeronautics, or AMA, Chartered Flying Club. In
7 the greater metropolitan Phoenix area, with several airports
8 nearby, it operates a flying field in the expansive and otherwise
9 low density area known as Adobe Dam Recreation. The FAA's prior
10 advisory set forth guidelines for amateur use, and the AMA has a
11 National Model Airport Safety Code effective January 1st, 2014.
12 In fact, the FAA released its "*FAA, AMA Work Together on Model
13 Aircraft / UAS Safety*" (January 13, 2014).
14

15 The child or any other enthusiast who is uniquely involved in
16 activity for the thrill of it will likely be un-restrained and
17 excited by using a remote control plane, and maybe there will be a
18 camera on some of those units. S/he is unregulated because s/he
19 is engaged in "sport." In Arizona as in other locations there are
20 clubs of such enthusiasts. They may take off on airfields in
21 devices that are the width and length of a small car or golf cart.
22 They go up to 400 feet high, twirl overhead, zoom up and down, and
23 otherwise provide great pleasure to the crowd at an air show
24 scenario, all in accordance with the FAA's Circular (AC) 91-57.

25 The "professional" user, the one who may have a customer now
26 or later for a resulting picture, will keep tight control and
27 zealously set parameters over the customer's home, business, or
28

1 visual field of interest. It is this latter user, the one whose
2 flight is tightly controlled and safe, whom the FAA will wish to
3 stop but it is the former user, the AMA member abiding by the
4 guidance of a circular, who gets to zoom loudly and far away in
5 circles. Will the FAA endorse then that the commercial user avoid
6 the interpretation if s/he spends time and money on application
7 and renewal to join the AMA? What of the youth who can't afford
8 it? Are they precluded but others similarly situated are not?

9
10 The FAA's current efforts to regulate pursuant to a year 2012
11 Congressional mandate to develop comprehensive regulations for
12 drones to fly safely should be just that; a safety issue. Profit-
13 making, not safety, is the cornerstone when there is decades-long
14 acceptance of loud, freely operating acrobatic flight under 400
15 feet for an AMA member while excluding the same privilege for non-
16 AMA members merely because the latter are deemed (and without
17 clear definition equally applied) to be operating "commercially."

18 **4.2. The FAA's Interpretation Does Not Rationally**
19 **Regulate Devices or Risky Flight.** There are many ways to
20 leave the ground, from *Cirque de Soleil's* "flying" people from
21 rung to rung or from rope to rope and the kite operated by a
22 child.

23 The FAA has permitted certain hobbyist remote control flight.
24 This has endorsed for years the concept that it is beyond the
25 FAA's scope to regulate the user who is stationary on the ground
26 and flying a small remote control machine and that remains within
27 his visual field, not too high to passenger or military traffic,
28

1 using a single flying device at a time that will land or return to
2 the user as a default in case of catastrophic failure or
3 malfunction.

4 Contrast such operator to a second scenario; an operator who
5 sends the device out of his field of vision based upon a flight
6 plan programmed into the device. Historically, if that user joins
7 the AMA, the FAA deems the flight acceptable. It should be
8 equally appropriate or not to regulate remote control planes which
9 leave the user's direct and proximate field of vision and control
10 to ensure safety, regardless of whether the operator is an AMA
11 member, an amateur, a professional, or other. Typically, such
12 latter user, however, has a permit process that is appropriate to
13 the size, air usage, and specifications because those users are
14 generally likely to be shipping companies, a large Boeing or
15 Lockheed Martin type of corporation involved in drone technology
16 for large-scale operation to remote distances, or the military
17 such as here in the greater Tucson area flying overseas' equipment
18 from its station.

19
20 4.2.A. ***Distinguishing Features.*** One can look to
21 many easily found examples of "amateurs" flying "aircraft" for
22 "fun" whose breadth and scope and speed are far in excess of the
23 stationery user employing a remote control device to ascend,
24 photograph, and return. At the NAB trade show in Las Vegas in
25 April 2014, there were plenty of examples of companies selling
26 Quadcopters for aerial photographical use. The industry is
27 rampant with such users. The trade show users were not discussing
28

1 the nebulous concept of whether the FAA will regulate the use of
2 the purchases; regulation overreaching into commerce.

3 4.2.B. **Commercial Product Examples.** Examples
4 are freely seen of varying innovative and well-developed concepts
5 demonstrating obviously significant planning and investment. Here
6 are but a few of the businesses marketing innovation and "drone"
7 technology at the recent trade show:
8

9 at www.dji.com (Phantom 2 Vision +, "Your Flying Camera"),
10 which touts "Ready to Fly. The Phantom 2 Vision+ is simple
11 to set up and super easy to fly, making it the first aerial
12 filmmaking system for everyone. Now you can shoot fully
13 stabilized video from the sky, right out of the box."

14 at www.cv-support.com, one can purchase a job including
15 control system and tripod;

16 The Aerigon Series by Intuitive Appeal, offering aerial
17 shoots with products "designed and manufactured in Sweden.;"
18 and

19 Yuneec Aviation Technology from Ontario, Canada
20 (www.yuneec.com) offering the "total aerial photography
21 solution."

22 Professional photographers will by definition be more
23 responsible and aware, as they purchase the same or more expensive
24 equipment than the amateur in a club and they will wish to
25 safeguard their livelihood and reputation.

26 5. **Air Safety is the FAA's Mission.** The FAA's
27 congressionally mandated mission is based upon air safety.
28 Quadcopters are easier to fly than remote control Unmanned Aerial
Vehicles that fly out a non-visual distance from the operator.
The difference is whether a vehicle flies autonomously or with

1 direct control of the operator who is dedicated to that singular
2 flight and no others in a given time. Congress specifically
3 provided that the

4

5 "Secretary of Transportation may exempt from subpart II
6 of this part [certification requirements] (A) an air
7 carrier not engaged directly in operating aircraft in
8 air transportation; or .." re foreign carriers, "to the
9 extent and for periods that the Secretary decides are
10 in the public interest." 49 U.S.C. 40109.

11 *It is in the public interest to permit unregulated use of remote control
12 devices with a camera platform if such remains in direct view and control of
13 the ground operator, under four hundred feet not delivering cargo, and
14 perhaps with a limitation of distance from the operator as a reasonable time,
15 place, and manner restriction that is appropriate in the public safety interest
16 without requiring the user to apply for a permit nor otherwise to seek
17 approval each "flight."*

18 **5.1. Permit Based Upon Use/User, Not Upon Safety.**

19 Congress did not delegate to the FAA the task of regulating
20 whether its subject earns money or pleases a client. "Drones" as
21 a group are in all shapes and sizes. They are as high tech as
22 those used by the military, and the versions purchased by amateurs
23 flying with the AMPS or other AMA chapters have GPS control, auto
24 pilot features to return to the launch position. In clubs, as
25 with professional photographers, protocol provides for a spotter
26 next to the operator is on hand in case the pilot becomes
27 incapable of handling the machine. These systems have first
28 person video often, for the person next to the operator to see the

1 flying area in real time, including that a large television screen
2 might be programmed to accept a signal and allow ground viewing,
3 as if riding along to see the camera's view. At AMPS, as an
4 example, at its recent open house on April 19th the pilot flew a
5 distance far away, on such a television screen, with an operator
6 and spotter demonstrating. The snapshots (ever changing) included
7 being 150 feet away, at an altitude of 144 feet and travelling 31
8 miles per hour. There was demonstration of the same vehicle as
9 Mr. Pirker flew; yet in this club environment of non-profit
10 organization, there is no FAA violation.

11 5.2. **FAA's Distinction of "Commercial."** Is it
12 commercial? The FAA released a Fact Sheet dated January 6, 2014,
13 and stated that "*Safety is the FAA's top mission,..*" [Fact Sheet -
14 Unmanned Aircraft Systems (UAS)] Indeed, as a nation, we must
15 encourage air safety. This author concurs with that top mission.
16 The mission of safety is not synonymous, however, with the mission
17 of the aviation agency regulating what qualifies or not as
18 commerce.

19
20 5.2.A. **The Need to Respect First Amendment**
21 **Values.** One photographer in the Phoenix area was quoted as
22 saying he does not charge for photography; rather, for editing.
23 (*Arizona Republic*, January 21, 2014, pg.1;A4). The FAA is
24 threatening to impede upon free press, attempting to shut down
25 journalists, as reported by the Associated Press on February 12,
26 2004 regarding the Hartford car crash incident. Deference is
27 given to the other *amici* in the instant case on behalf of many
28

1 news agencies addressing this point in great detail. For this
2 writer's purpose, however, it is noted that videographers and
3 photographers are certainly wishing to report of current and
4 important events and also express their first amendment protected
5 rights in so doing.

6 5.2.B. **Permits Unattainable to Young**
7 **Entrepreneurs.** There is no existing permit for a young
8 entrepreneur, or for that matter, any non-hobbyist aerial
9 photographer.

10 Indeed, 7210.846 UAS in the NAS par.7 Operations includes:

11
12 *"a. Types and Authority. Current FAA policy for UAS*
13 *operations is that no person may operate a UAS in the*
14 *NAS without specific authority. ... (1)(a) FAA policy*
15 *restricts COAs [certificate of authority] to public*
16 *aircraft operations as defined in title 14, Code of*
17 *Federal Regulations (CFR), Part 1, Definitions &*
Abbreviations. (b) For UAS operating as public
aircraft, the authority is the COA. ... (2)(A) Civil
applicants must apply for a Special Airworthiness
Certificate -- Experimental Category."

18 *Id.* COAs and SACs are not available to the general public and
19 neither is any other mechanism of FAA permission for immediate and
20 either one-time or sustained small business or commercial use
21 outside of major corporations and universities, governmental
22 entities, and governmental contractor entities. The COA and SAC
23 processes are cost-prohibitive and lengthy, data-filled processes.

24 In effect, an entire industry of manufacturing, distribution,
25 and usage of many types has evolved in recent years with no FAA
26 enforcement claimed or publicized-at-large. Yet now the FAA
27 asserts under its "current" policy with no public notice and no
28

1 reasonable time, place, and manner mechanism that it may shut the
2 same artist's work down. Further, the FAA now asserts that the
3 exact same flight overhead with a platform and camera in a remote
4 control device turns itself from lawful to unlawful after-the-fact
5 if that artist promotes the resulting picture after editing or
6 footage after production for a business purpose. What fine line
7 in today's electronic age even can be drawn as to whether the
8 artistic process is a hobby when for the non-profit but commercial
9 if it enhances the user's skills to do business? Again, an
10 unnecessary and subjective slippery slope. The idea of the FAA
11 regulating based upon web presence, sales, profit, or any
12 remuneration category is anathema to the entirety of safety
13 analysis.
14

15 5.3. ***The FAA's Purported Privacy Concern is not a***
16 ***Valid Safety Issue.*** While the FAA's meaningful role in safety
17 can not be gainsaid, the issue of privacy is a separate matter.
18 Nor is the FAA tasked with regulating whether one invades his
19 neighbor's privacy in flight nearby. The reader could take a
20 picture today by reaching up over a fence and pointing a camera
21 into her neighbor's yard or she might use sophisticated equipment
22 to zoom in on that neighbor from a helicopter, hot air balloon, or
23 any airplane as a passenger. Infringements on privacy rights of
24 third parties could be many, and could be improper, unlawful, and
25 actionable under federal or state constitutions or common law
26 theories.
27

28

1 Broad interpretation of powers suggesting that the FAA should
2 stop breaches of privacy would suggest that the FAA impose
3 nationwide bans on photography or videography from any highrise
4 building, from any hill or mountain-top with a town or village or
5 backyard below, or otherwise from any vantage point.

6 There are existing laws in the bulk of privacy law, including
7 for instance the rights of publicity, false light in the public
8 eye, public disclosure of private facts, unreasonable intrusion,
9 and appropriation now known as the right of publicity. It is
10 beyond the FAA's scope to regulate an entire country's use of
11 images and data which use are unrelated to flight safety.
12

13
14 **6. Proper FAA Regulatory Scope?** Air traffic is a proper FAA
15 concern, and there would be safety issues related to flying
16 remotely in a product or people delivery system. What seems
17 inherently *not* within the Congressional mandate is, respectfully,
18 mandating based upon whether one earns a living or even charges
19 for a picture and whether someone with a camera invades personal
20 privacy. The FAA has accepted 400 foot flight for non-profit
21 groups for years, not ever shutting down the high and sometimes
22 acrobatic flight of "hobby" vehicles that look and sound from the
23 ground nearby like small versions of actual airplanes.

24 **6.1. The Congressional Mandate -- Safety.** The analogy
25 is that of *Regan v. Time*, 468 U.S. 641 (1984). *Regan* was,
26 generally speaking, about use of a reproduction mechanism
27 prohibited by a federal statute which criminalized photograph of
28

1 currency without alteration. The analogous point was that
2 regarding the scrutiny of the content.

3

4 "A determination as to the newsworthiness or
5 educational value of a photograph cannot help but be
6 based on the content of the photograph and the message
7 it delivers. Under section 504, one photographic
8 reproduction will be allowed and another disallowed
9 solely because the Government determines that the
10 message in one is newsworthy or educational but the
11 message in the other is not." (Id. Syllabus, citing
12 pgs. 648-9).

9

10 The Regan court reviewed constitutionally permitted
11 restrictions in that context.

11

12 "In order to be constitutional, a time, place, and
13 manner regulation must meet three requirements. First,
14 it 'may not be based upon either the content or subject
15 matter of speech. ... Second, it must 'serve a
16 significant governmental interest.' .. And third, it
17 must 'leave open ample alternative channels for
18 communication of the information.' " Id. @ 648
19 (citations omitted in quoted passages).

17

18 The FAA's spokesperson indicated, again, a distinction of
19 "commercial = prohibited" and "hobby = not regulated" based upon a
20 hypothetical of identical usage, operator, and equipment. Sale
21 after the flight was over was the *only* difference in the
22 conclusion. Such sweeping interpretation should invoke analogy to
23 regulating content of first amendment and artistic speech, and the
24 distinction serves no safety purpose. Further, were the FAA
25 permitted such interpretation, it could merely chill the
26 photographer's expression of his craft by devising a third permit
27 for individuals or small business, entangling every such person or

28

1 business in an application process with forms, fees, wait times,
2 need for scrutiny and explanation, and so forth.

3 The more credentialed the professional photographer, unlike
4 amateurs in a non-profit club, the more technical education s/he
5 likely has. A professional photographer will have been through
6 telecommunications blocks of higher education, pre-production,
7 production, and post-production classes, shoots on location, and
8 necessarily through all the training, safety protocols required by
9 the entirety of industry standards. The professional photographer
10 or videographer using a flying device overhead has a tremendous
11 investment and incentive to be safe.

12 6.2 ***Risk of Overbreadth in a Future Permit Process.***

13 Currently, the FAA has two permitting procedures; both cumbersome
14 but a system that is designed for military and large industry
15 needs. There are no other options for private small business no
16 matter the business entity form (sole proprietor, LLC,
17 corporation, etc.), such as young entrepreneurs taking real estate
18 photography for a client. Were the FAA to require and then make
19 such a small business license possible, most likely it will be a
20 costly and cumbersome process not available to the non-wealthy.
21 Were the FAA's assertion of authority upheld as reflective of the
22 Congressional mandate, that statute might best be interpreted as
23 unconstitutional *as applied* with respect to the entire class of
24 remote control device users who remain in control of one RC within
25 the traditional limit of 400 feet and within one's visual field
26
27

28

1 and immediate control, i.e., not within air passenger, or
2 "navigable," airspace.

3 6.3. **The Lack of Notice of the FAA's Position on**
4 **UAS.** As is evident by a walk through the NAB trade show, vendors
5 do not indicate any notice of restriction on the right nationally
6 to use equipment they sell. The brochures show sophisticated
7 systems and marketing; a sign that most likely, the larger
8 community nationwide does not question private person and private
9 business use of remote controls within the visual control of the
10 operator. The introductory remarks, *supra*, raised the due process
11 concern that it appears rule making protocol has not been properly
12 and publicly occurred. Typically that might include including
13 widespread dissemination of information, "buy-in" by non-
14 sophisticated users, by hobbyists, and by business people.
15

16
17 **Conclusion**

18 Like most citizens or residents, like each of you, this author
19 expects and desires that the FAA indeed regulate all **safety**
20 aspects of the skies.

21 It is respectfully urged that the NTSB Board find that
22 Congress did not delegate unbounded authority to the FAA to
23 regulate remote control devices complying with the
24 specifications which the FAA itself has exempted in the
25 Advisory Circular, regardless of the user's identity,
26 commercial or non-commercial use, nor intention and reality of
27 what image may result therefrom.

28 Respectfully submitted this 16th day of May 2014.

 /s/ Debbie Weecks

26 *Included Herewith Electronically:*

27 Written consents of both parties
28 (through e-mail of counsel Caron and Schulman)

Certificate of Service

I hereby certify that I am e-mailing copies simultaneously to each of the following:

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16 May 2014