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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

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MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant,

Docket CP-217

v.

RAPHAEL PIRKER,
Respondent

BRIEF OF NEWS MEDIA *AMICI* IN SUPPORT OF
RESPONDENT RAPHAEL PIRKER

The *Amici Curiae* file this brief in support of Respondent Raphael Pirker with the consent of all of the parties, as provided for in 49 C.F.R. § 821.9. The written consent of the parties is attached as Exhibit A.

The *Amici Curiae* are newspaper and magazine publishers, broadcast and cable television companies, wire services, website operators and nonprofit journalists' associations ("News Media *Amici*"), who share an interest in ensuring that United States law provides maximum opportunities, and only narrowly tailored restraints, for the safe and lawful use of unmanned aerial systems ("UAS") for newsgathering purposes. The U.S. Supreme Court, Congress and the Executive Agencies have long recognized that the First Amendment to the U.S. Constitution protects the public's interest in the gathering and dissemination of news and other information. The News Media *Amici* underscore the critical need for the National Transportation Safety Board ("NTSB"), as it reviews the Administrative Law Judge's decision in this case, to safeguard the public's First Amendment interest in the free flow of information.

STATEMENT OF INTEREST AND IDENTITY OF NEWS MEDIA *AMICI*

The following News Media *Amici* have individualized and collective interests in the issues in the pending appeal and its outcome arising from their status as newspaper and magazine publishers, broadcast and cable television companies, wire services, website operators, and nonprofit journalists' associations.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and weekly business journals in over 40 cities throughout the United States. Through its affiliates, Advance also owns numerous digital video channels and Internet sites and has interests in cable systems serving over 2.3 million subscribers.

The Associated Press is the essential global news network, delivering fast, unbiased news from every corner of the world to all media platforms and formats. Founded in 1846, AP today is the most trusted source of independent news and information. On any given day, more than half the world's population sees news from AP.

Cox Media Group, LLC is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 14 broadcast television stations and one local cable channel, 57 radio stations, eight daily newspapers, more than a dozen non-daily publications, and more than 100 digital services.

Gannett Co., Inc. is an international news and information company that publishes hundreds of daily newspapers and non-daily publications in the United States, including USA TODAY. In broadcasting, the company operates dozens of television stations in the U.S. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and

advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

Gray Television, Inc., is a broadcast company that owns or operates television stations and leading digital assets in dozens of markets across the country.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany (N.Y.) Times Union*; nearly 300 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

The McClatchy Company, through its affiliates, is the third-largest newspaper publisher in the United States. It publishes 29 daily newspapers and related websites, as well as numerous community newspapers and niche publications, including *The Sacramento (CA) Bee*, *The Miami Herald*, *The Kansas City (MO) Star* and *The Charlotte (NC) Observer*.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The New York Times Company is the publisher of *The New York Times* and *The International New York Times* and operates the leading news website nytimes.com.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Radio-Television Digital News Association ("RTDNA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTDNA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTDNA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

Scripps Media, Inc. is a news media company and a subsidiary of the E.W. Scripps Company. It operates ten television stations nationwide, which report on matters of local, state, and national interest.

Sinclair Broadcast Group, Inc. is one of the largest and most diversified television broadcasting companies, having affiliations with all of the major broadcast networks.

Tribune Company is one of the country's leading multimedia companies, operating businesses in broadcasting, publishing, and interactive. The company's broadcasting group owns or operates 42 television stations, WGN America on national cable, the national multicast networks Antenna TV and THIS TV, Tribune Studios and Chicago's WGN AM 720 and The Game 87.7 FM. In publishing, Tribune's leading daily newspapers include the *Los Angeles Times*, *Chicago Tribune*, *The Baltimore Sun*, *Sun-Sentinel* (South Florida), *Orlando Sentinel*, *Hartford Courant*, *The Morning Call* and *Daily Press*. Popular news and information websites complement Tribune's broadcast and print properties.

WP Company LLC (d/b/a *The Washington Post*) publishes the leading newspaper in the nation's capital, as well as a website, www.washingtonpost.com, which draws more than 20 million unique visitors per month from around the world.

INTRODUCTION

Since 2007, the Federal Aviation Administration ("FAA"), through *ad hoc* administrative actions rather than through properly enacted and promulgated federal regulation, has applied an overly broad policy prohibiting the unlicensed use of unmanned aerial systems ("UAS") for "business purposes" in the United States national airspace. In applying agency posture in the guise of regulatory rule, the FAA has never distinguished between "business operations" and the use of UAS technology for the First Amendment-protected purpose of gathering and disseminating news and information. Indeed, just last month, the FAA indicated that a newspaper's mere posting on the Internet of photographs provided to it by a non-commercial UAS hobbyist might subject the media company to federal regulatory fines for using a UAS for "business purposes."

The News Media *Amici* remain concerned that—in addition to the deficiencies in enactment and the inconsistencies in application that Administrative Law Judge Patrick G. Geraghty correctly noted in granting Respondent's Motion to Dismiss—the FAA still has not given appropriate consideration to the First Amendment interests at stake. Indeed, despite a 2012 mandate from Congress to issue a comprehensive plan for integrating UAS into the air traffic system by February 2013, the FAA has failed to issue a notice of proposed rulemaking to address the use of even small UAS, or any other segment of the UAS population other than for experimental and public aircraft purposes.¹ The FAA also has taken very little action to grant licenses to private parties to use the technology.² As a result, the almost complete prohibition on the civilian use of UAS for any purpose, including First Amendment purposes, remains the current *de facto* policy.

This overly broad policy, implemented through a patchwork of regulatory and policy statements and an *ad hoc* cease-and-desist enforcement process, has an impermissible chilling effect on the First Amendment newsgathering rights of journalists, including News Media *Amici*. The federal government has deprived its citizens and a free and independent news media of the opportunity to participate in the rulemaking process required under U.S. law when the government seeks to regulate, restrict, or curtail otherwise proper lawful activity. The federal government, through the FAA and with the NTSB's encouragement, should move forward with the development of policies that protect, rather than hinder, freedom of speech and of the press.

¹See FAA, Unmanned Aircraft (UAS), Questions and Answers, available at http://www.faa.gov/about/initiatives/uas/uas_faq/#Qn13 and Fact Sheet—Unmanned Aircraft Systems (UAS), available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153 (noting that the FAA is presently drafting a rule to address small UAS).

²See, e.g. FAA News Update, FAA Opens the Arctic to Commercial Small Unmanned Aircraft (Sept. 23, 2013), available at <http://www.faa.gov/news/updates/?newsId=73981> (discussing the first approval of licenses for Conoco Phillips to assist in pre-drilling research above the Arctic Circle.) The commercial-use certification here was extremely narrow. The FAA granted it pursuant to 14 C.F.R. Part 21.25, which permits certification only for the types of aircraft previously certified by the Department of Defense.

The FAA should develop a rule to regulate small UAS, using appropriate notice-and-comment procedures to provide the news media with input into the development of UAS regulations that will provide carefully tailored safety restraints and maximum First Amendment freedom to lawfully gather news.

For the reasons more fully discussed below, News Media *Amici* respectfully ask that this Board affirm the decision of the Administrative Law Judge. An affirmance will hold the FAA accountable under the law to a proper rulemaking process and also will encourage the well-reasoned development of rules governing small UAS.

ARGUMENT

I. A COMPLETE BAN ON THE USE OF UNMANNED AERIAL SYSTEMS VIOLATES THE FIRST AMENDMENT RIGHT TO GATHER NEWS.

The FAA, in a series of threats of administrative sanction, and in derogation of the First Amendment rights of the public to receive news and information, has flatly banned the use of UAS for newsgathering purposes. The FAA will not approve licenses for UAS use for news operations. It has threatened fines against university-conducted student experimentation with drone journalism. And it has even suggested that a newspaper "err on the side of caution"—a chilling warning of impending punishment—and refrain from lawfully publishing photographs taken independently by a UAS hobbyist and provided after the fact to the newspaper. In each case, the FAA has averred to its restrictions on the use of UAS for "business purposes."

The FAA's position is untenable as it rests on a fundamental misunderstanding about journalism. News gathering is not a "business purpose": It is a First Amendment right. Indeed, contrary to the FAA's complete shutdown of an entirely new means to gather the news, the remainder of the federal government, in legislation, regulation and adjudication, has recognized that, in the eyes of the law, journalism is not like other businesses. The government in a myriad

of measures has long accommodated the bedrock First Amendment principle that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972).

Unlike the FAA, for example, the Supreme Court recognizes that the publication of news is not a "commercial" activity comparable to the sale of goods and services. The First Amendment fully protects both for-profit and non-profit gathering and dissemination of news and information. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (Powell, J., announcing judgment) (newsletter at issue "extends well beyond speech that proposes a business transaction" and thus is fully protected by the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (the fact that "books newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 111 (1943) ("The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge."). The Supreme Court has noted that the First Amendment is implicated whenever a "commercial" regulation encroaches on news gathering and dissemination. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L. Ed. 660 (1936) (tax designed as a device to limit the circulation of information was an unconstitutional abridgment of freedom of the press); *Lovell v. Griffin*, 303 U.S. 444 (1938) (statute requiring license for the distribution of printed matter violated First Amendment).

The FAA has failed entirely to take this First Amendment into account in regulating the use of UAS. Under the FAA's policies, journalists are not eligible for Certificates of Authorization or Waivers. *See* FAA Order 8130.34. Indeed, an FAA spokesperson has made clear to the news media that, under federal policy, "there is no gray area" when it comes to drone journalism. "If you're using it for any sort of commercial purposes, including journalism, that's not allowed."³ Consistent with this policy, no waivers have been granted to professional news organizations. Likewise, forward-thinking faculty at the University of Nebraska and the University of Missouri designed curricula to teach the next generation of journalists to incorporate the new UAS technologies into the practice of journalism. The FAA, however, treated these teaching activities as indistinguishable from the "business purposes" prohibited by FAA Policy Notice 07-01 and sent the faculty cease-and-desist letters. *See* Letter from Christopher L. Grotewohl, Aviation Safety Inspector to the University of Missouri School of Journalism, July 10, 2013; Letter from Christopher L. Grotewohl, Aviation Safety Inspector to University of Nebraska-Lincoln College of Journalism and Mass Communications, July 10, 2013 (both attached as Exhibit B).⁴

Further, when UAS operated by hobbyists in Ohio captured video footage of a recent fire, the FAA cautioned a news publication from airing the footage, stating through a spokesperson that it "would require more legal review to determine if it was a fineable offense to publish the video on [a news] site." *See* Tristan Navera, *Why You Won't See Drone Footage From Downtown Fire on Our Site*, Dayton Biz Blog (April 4, 2014).⁵ The spokesperson also warned the journalists to "err on the side of caution." *Id.* The FAA thus has interrupted the free flow of

³*See* *FAA says drone journalism 'not allowed'*, PBS Newshour (Jan. 6, 2014), available at <http://www.pbs.org/newshour/rundown/faa-says-drone-journalism-not-allowed/>

⁴ Both programs have since sought experimental certifications to use UAS in their curriculum.

⁵ Available at <http://www.bizjournals.com/dayton/blog/2014/04/why-you-won-t-see-drone-footage-from-downtown-fire.html?page=all>

information guaranteed to all U.S. citizens that is so vital to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Indeed, unlike the FAA's current policy on UAS, throughout modern lawmaking the federal government, and even the FAA itself in other contexts, has crafted laws and regulations to accommodate the First Amendment rights of journalists to gather that news and the public's corresponding rights to receive information.⁶ For example:

- When the FAA imposes temporary flight restrictions for disaster relief aircraft or to prevent unsafe congestion above an incident or event that may generate a high degree of public interest, accredited news media are expressly permitted to enter the area. *See* 14 C.F.R. § 91.137(c)(5), (d)(4).
- The United States Post Office, since the enactment of the 1792 Post Office Act, has provided reduced rates for newspapers mailing their publications to subscribers. *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 *Hastings L.J.* 671, 695 (2007).
- In the Investment Advisors Act of 1940, Congress excluded from the definition of an "investment advisor" the publishers of *bona fide* newspapers, news magazines and business or financial publications of general and regular circulation. *See* 15 U.S.C. § 80b-2(a)(11)(F).
- Both the Communications Act of 1934 and the Federal Election Commission's campaign

⁶Of course, journalists must abide by laws of general applicability that pose narrowly tailored, incidental burdens on their First Amendment activities. *See, e.g. Associated Press v. NLRB*, 301 U.S. 103 (1937) (upholding the application of National Labor Relations Act to news organization).

finance regulations include exceptions for news coverage. *See* 47 U.S.C. § 315(a) (exempting newscasts from requirement that broadcast licensee's provide equal opportunities to candidates for public office); 11 C.F.R. § 100.132 (exempting from the definition of campaign expenditures costs incurred in covering or carrying a news story, commentary, or editorial).

- A federal law criminalizing depiction of animal cruelty contained an exemption for depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48. Yet, even with this exemption, the Supreme Court said the law was substantially overbroad, and therefore, invalid under the First Amendment. *See U.S. v. Stevens*, 559 U.S. 460 (2010).
- In 1972, the Department of Justice instituted, and very recently updated and strengthened, special guidelines to address the use of subpoenas to members where the subpoenas may impair the ability of the media to gather and report the news. *See* Department of Justice Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. Parts 50 and 59, AG Order 3420-2014. *See also* SEC Policy Statement: Subpoenas to Members of the News Media, Fed. Sec. L. Rep. P 87528, 2006 WL 6321519 (2006).
- Under the Freedom of Information Act, fees charged to representatives of the news media are limited to reasonable standard charges for document duplication, compared to fees for search, duplication, and review when records are requested for commercial use. *See* 5 U.S.C. § 552 (a)(4)(A).
- The news media is provided special access to the galleries of the United States House of

Representatives and Senate. *See* S.R., Rule XXXIII, 113th Cong.;⁷ H.R.R., Rule VI, cl. 2, 113th Cong.⁸

Like these carve-outs in other federal policies, the NTSB, in adjudicating this appeal, should recognize the public's and the News Media *Amici's* First Amendment interests in news gathering and dissemination. As a constitutionally protected activity, unquestionably the use of UAS for news gathering should receive greater protections than those afforded to hobbyists and commercial users. The NTSB's ruling in this case should acknowledge this First Amendment interest as an example of the harm created by the FAA's unauthorized regulation.

II. THE POTENTIAL PUBLIC BENEFIT OF NEWS MEDIA REPORTING BY UNMANNED AERIAL SYSTEMS COUNSELS IN FAVOR OF RESTRAINED REGULATORY RULINGS

A. Unmanned Aerial Systems Have The Potential To Improve News Coverage

The public stands to benefit enormously from the news media's use of UAS, as many news stories are told best from an aerial perspective. For example, reports on traffic, hurricanes, wildfires, and crop yields could all be told more safely and cost-effectively with the use of UAS. Lower-cost aerial photography would help more newsrooms across the country bring more accurate and useful information to the public.

A recent study by *Amicus Curiae* the National Press Photographers Association illustrates the beneficial uses for which news organizations and individual journalists would deploy UAS in their reporting. *See* Mickey H. Osterreicher, *Charting the Course for the Use of Small Unmanned Aerial Systems in Newsgathering* (2014).⁹ As set forth in this study, survey respondents indicated that UAS will be used to help journalists obtain footage despite

⁷Available at <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>.

⁸Available at <http://clerk.house.gov/legislative/house-rules.pdf>.

⁹Available at <http://www.auvsishow.org/auvsi2014/public/SessionDetails.aspx?FromPage=Sessions.aspx&SessionID=773&SessionDateID=20>.

obstructions, safety concerns, police restrictions, or hazardous environments, improving their ability to report on fires, accidents, weather conditions, natural disasters, and construction sites.

For example:

- One respondent indicated that UAS could have helped his station's reporting on a news story about ice jams in a river and the threat of flooding. News crews were not able to safely get close-ups of the problem, but a UAS could have achieved a clearer picture of the issue from a closer and safer vantage point.
- Other respondents noted that UAS could help cover wildfires, which spread rapidly and also pose safety concerns to news crews.
- Another respondent noted that UAS could be used to obtain better footage of sprawling facilities. In reporting on the anniversary of a GM plant closure, without the ability to use a UAS, the respondent said that the news crew drove by the fence of the closed plant and shot video.
- Another respondent noted that the use of UAS would help address what might be considered a more routine issue, where limited access and roadblocks prevent photographers from capturing images of major news events. This respondent noted that companies with helicopters may be able to capture these types of images, but with shrinking news budgets, this is becoming less likely.¹⁰

Hobbyists have already begun using UAS in some of these circumstances, receiving the approval and accolades of some first responders. Recently, during a fire in Dayton, Ohio, a UAS hobbyist rather than a news organization, obtained an aerial view of the burning building. *See*

¹⁰Other examples of how UAS will improve journalism can be found on the websites of the University of Nebraska and the University of Missouri journalism programs. *See* Drone Journalism Lab, available at <http://journalism.unl.edu/drone-journalism-lab>; The Missouri Drone Journalism Program, available at <http://www.missouridronejournalism.com/category/journalism/>.

Drones Swarm Over Downtown Dayton Fire, Dayton Biz Blog (April 3, 2014).¹¹ According to news reports, the fire chief overseeing the incident noted that ". . . in a case like this, if you can get an aerial view of the burning building, it is very helpful. That's why we have 110-foot ladder trucks. But it's a lot easier if you could fly a drone over." Similarly, other hobbyists flew UAS to obtain coverage of fires in Harlem and Brooklyn. See Bill Hutchinson, *Drone captures scene at East Harlem explosion that flattened two buildings*, New York Daily News (March 13, 2014);¹² *Fire Rips Through Brooklyn Recycling Plant, Drone Captures Flames on Video*, NBC 4 New York (March 19, 2014).¹³ International coverage of protests, like those in Kiev, has likewise benefitted from the use of UAS. See *Aerial Drone Captures Stunning Video of Massive Ukraine Protests*, Huffington Post (December 17, 2013).¹⁴ As these examples demonstrate, UAS have the currently-unrealized potential to facilitate better access to news events at a more reasonable cost, allowing news organizations to continue to report on important stories that they might not be able to cover without these tools.

Integrating UAS into the national airspace also has the potential to improve the safety of reporting under less-than-ideal safety conditions, and UAS by their nature pose less risk than helicopters.¹⁵ Of course, densely-populated regions of the country raise legitimate safety concerns that are not present in more sparsely populated areas, such as agricultural regions. These concerns can and should be appropriately addressed through cooperative pooling

¹¹ Available at <http://www.bizjournals.com/dayton/blog/2014/04/drones-swarm-over-downtown-dayton-fire.html?page=all>.

¹² Available at <http://www.nydailynews.com/new-york/uptown/drone-captures-e-harlem-explosion-scene-video-article-1.1719988>.

¹³ Available at <http://www.nbcnewyork.com/news/local/Brooklyn-Warehouse-Fire-Greenpoint-250886721.html>.

¹⁴ Available at http://www.huffingtonpost.com/2013/12/16/kiev-protest-video-drone-ukraine_n_4455340.html#.

¹⁵ See NTSB Most Wanted List, Critical Changes Needed to Reduce Transportation Accidents and Save Lives: Address Unique Characteristics of Helicopter Operations (2014), available at https://www.nts.gov/safety/mwl2014/01_MWL_HeliOps.pdf (citing "overwhelming growth and demand for emergency medical services, law enforcement support, electronic news gathering, off-shore oil and gas support" as a factor in helicopter accidents).

arrangements by the news media in cooperation with local authorities. The news media already has systems of extensive pooling arrangements in place for covering news worthy events, like speeches by public officials¹⁶ and courtroom proceedings.¹⁷ While proper safety regulation and safety programs may be a necessary adjunct to the use of UAS in densely populated regions, the news media already has an established record of cooperative pooling that would be brought to bear. The National Press Photographers Association survey responses showed a high level of interest in pooling arrangements involving UAS. See Mickey H. Osterreicher, *Charting the Course for the Use of Small Unmanned Aerial Systems in Newsgathering*. Seventy-seven percent of those who had never used a UAS for newsgathering purposes said that they would consider doing so under a pooling arrangement.

The News Media *Amici* and the government can address legitimate safety concerns while protecting First Amendment rights and providing the public with enhanced access to important information. To date, however, the FAA has provided the news media and the public with no opportunity to weigh and balance these interests. A formal rulemaking process would permit open discussion of these issues and transparent rulemaking by the federal government.

¹⁶See Photos of presidential speeches to be captured in real time. Paul Farhi, *Washington Post* (May 31, 2011) (discussing agreement worked out between White House press office and White House Correspondent's Association to allow a single photojournalist to take the president's picture as he addresses the nation).

¹⁷See, e.g. Florida Rule of Judicial Administration 2.450 ("Any 'pooling' arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding."); New Jersey Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey ("Participating members of the electronic media and participating still photographers are to make their own pooling arrangements, including the establishment of necessary procedures, the provision of appropriate pooling equipment as described in these guidelines, and selection of a pool representative without calling upon the court to mediate any dispute as to the appropriate media representative, costs or equipment authorized for a particular proceeding."); South Carolina Pooling Guidelines, available at www.scpres.org/Documents/CameraPoolingGuidelines.pdf

B. Privacy Concerns Involving Journalists' Use of UAS Are Adequately Addressed in State Law and Do Not Warrant Federal Regulatory Oversight

In light of the public benefit UAS may provide in newsgathering, regulatory efforts, including the FAA's small UAS rulemaking and enforcement proceedings like this one, should cautiously approach privacy issues. The Administrative Law Judge wisely avoided privacy issues in adjudicating this dispute. For many reasons, the Board should do the same.

First, the FAA lacks the expertise to develop or enforce policies pertaining to privacy or civil liberties. Instead, the FAA's authority is limited to ensuring safety and efficiency in the aviation system. *See* 49 U.S.C. § 40101(d).¹⁸ Recognizing its specific mission, the FAA pointedly disclaimed authority to regulate based on alleged privacy interests when it released a "roadmap" for integrating unmanned aerial systems into the national airspace. UAS Roadmap 2013, Section 1.4.4. As the FAA itself has recognized, privacy concerns have no bearing on safety enforcement matters like this one.

Second, much of the public debate concerning the domestic use of UAS has centered on law enforcement agencies. Certainly, use of UAS to conduct surveillance for law enforcement purposes raises constitutional privacy issues that may be appropriate for legislation, court review, or even civil litigation. However, constitutional concerns about the appropriate role of law enforcement agencies and their use of developing technologies should play no role in determining how the news media (and other private citizens, including Mr. Pirker) may deploy UAS. The privacy issues inherent in the constitutional limitations on law enforcement present entirely separate issues and should not be considered in this civil penalty dispute.

¹⁸While Congress has asked the FAA to prepare a study on privacy and UAS, its request noted that the FAA's primary mission is to protect the safety of civil aviation and provide an efficient national airspace. Indeed, recognizing the limits of the FAA's experience dealing with privacy, Congress directed the FAA to consult other federal agencies with expertise in privacy protections before submitting its report to Congress. *See* Joint Explanatory Statement, FY 2014 Omnibus Appropriations bill at p. 157, available at <http://docs.house.gov/bills/thisweek/20140113/113-HR3547-JSOM-J-L.pdf>.

Third, any privacy concerns that may arise from the news media's use of UAS already are taken into account in the common law and statutory regimes of the states. Since the Kodak Camera was first introduced in the late 1800s, and future Supreme Court Justice Louis D. Brandeis and co-author Samuel D. Warren raised the fear that "the press is overstepping in every direction the obvious bounds of propriety and of decency," state law has "[grown] to meet the demands of society."¹⁹ State legislatures and courts, as Brandeis and Warren recommended, have developed invasion of privacy laws flexible enough to respond to issues raised by developing technologies. Privacy concerns are best addressed by these existing state tort laws and statutes, which provide sufficient remedies to address allegedly invasive uses of UAS. The types of laws that may address the improper use of UAS include invasion of privacy laws, as well as trespass laws, nuisance laws, state electronic eavesdropping or wiretapping laws, and anti-stalking laws. Through litigation, journalists continue to attempt to help courts strike the appropriate balance between privacy and the First Amendment. The results have not always been favorable for the news media, and obviously each case will turn on its specific facts. The state courts, and legislatures, remain the appropriate place for the resolution of this balance as new technologies emerge.²⁰ Therefore, relying on state laws is favorable to beginning anew with

¹⁹See Samuel Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harvard Law Review 193 (1890). Available at <http://www.law.louisville.edu/library/collections/brandeis/node/225>.

²⁰See, e.g., *Schulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998) (upholding claim for intrusion arising out of remote use of wireless microphone at hillside accident scene); *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723, 727 (Fla. 1977) (holding that statutory prohibition of interception of wire or oral communications was constitutional as applied to news media); *Stephens v. Dolcefino*, 126 S.W. 3d 120 (Tex. Ct. App. 2003) (reversing grant of summary judgment to defendants in claims based on use of "pager-camera" to record a conversation between two city officials in hotel courtyard); *Copeland v. Hubbard Broadcasting*, 526 N.W. 2d 402 (Minn.Ct. App. 1995) (finding actionable trespass where television station employee obtained consent without informing homeowner he was a journalist and was secretly filming the visit); *People v. Schreier*, 5 N.E.3d 985 (N.Y. 2014) (upholding conviction under New York's unlawful surveillance statute where photographer took video from his neighbor's front porch while she was in her second-floor bathroom).

a federal regulatory regime, promulgated by an agency that admits it lacks the necessary experience.²¹

As the FAA recognized in its roadmap, it is critical that policy determinations addressing privacy be based on a discussion among policy makers, privacy advocates and industry. UAS Roadmap 2013, Section 1.4.4. Any dialogue about UAS must include the news media, so that important and practical First Amendment considerations can be taken into account. Moreover, any resulting rules must be based on factual considerations of the public policy issues, rather than generalized theories, fears or concerns about the use of a new technology. Our laws have always been flexible enough to incorporate new technologies—from the printing press, to cameras,²² to radio,²³ to television,²⁴ to the Internet²⁵—without banning them and while still protecting basic rights and freedoms. Likewise, UAS technologies should be integrated into our

²¹ Additionally, journalists have extensive codes of ethics that have evolved over time to take into account the implications on privacy interests of new technologies. For example, the National Press Photographers Association's Code of Ethics provides that visual journalists should "treat all subjects with respect and dignity. Give special consideration to vulnerable subjects and compassion to victims of crime or tragedy. Intrude on private moments of grief only when the public has an overriding and justifiable need to see." See National Press Photographers Association, Code of Ethics, available at https://nppa.org/code_of_ethics. Likewise, the Society of Professional Journalists' Code of Ethics provides that "journalists should recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence, or attention. Only an overriding public need can justify intrusion into anyone's privacy." See Society of Professional Journalists, Code of Ethics, available at <http://www.spj.org/ethicscode.asp>. Online journalists are developing social media ethics policies as well to encourage professionalism in online reporting. See Online News Association, Social newsgathering: Charting an ethical course, available at <http://journalists.org/2014/03/06/social-newsgathering-charting-an-ethical-course/>. In connection with existing state legal codes and the common law, professional efforts like these can help address privacy concerns related to the misuse of UAS technology.

²² See *supra*, Samuel Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harvard Law Review 193 (1890).

²³ See, e.g. *Red Lion Broad Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica*, 438 U.S. 726, 750-51 (1978).

²⁴ See, e.g. *Chandler v. Florida*, 449 U.S. 560, 582 (1981).

²⁵ See, e.g. *Reno v. ACLU*, 521 US 844 (1997). See also *Universal City Studios v. Corley*, 273 F.3d 429, 434 (2d Cir. 2001) ("[T]he Framers of the First Amendment prohibited Congress from making any law 'abridging the freedom of speech,' they were not thinking about computers, computer programs, or the Internet. But neither were they thinking about radio, television, or movies. Just as the inventions at the beginning and middle of the 20th century presented new First Amendment issues, so does the cyber revolution at the end of that century.")

society through reasonable regulations without infringing on the rights and freedoms of citizens, including the rights to gather, disseminate and receive news.

III. THE *AD HOC* CEASE-AND-DESIST PROCESS USED BY THE FAA IS AN INAPPROPRIATE SUBSTITUTE FOR NOTICE-AND-COMMENT RULEMAKING PROCEDURES

The FAA's use of an *ad hoc* cease-and-desist process and inconsistent enforcement regime to regulate UAS is particularly concerning in light of the First Amendment implications of the agency's decisions restricting the use of UAS.

As the ALJ correctly determined, the FAA's "Notice of Policy" prohibiting the use of UAS for "business purposes" without a license is not a proper regulation that can bind the public. *See* Decisional Order at 6. The policy indicates on its face that it is a statement of policy, which cannot establish a rule or enforceable regulation. *Id*; *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant *Chevron*-style deference."); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38-40 (D.C. Cir. 1974) ("When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy."). If, despite its plain language, the FAA intended this statement of policy as a binding regulation, it failed to meet the requirements of the Administrative Procedure Act, which requires advance notice and the opportunity to comment. *See* Decisional Order at 6.

The FAA's alternative theory of regulatory authority is similarly problematic. The basis for this theory is that the FAA may exercise regulatory authority over small UAS and model aircraft operations under general Federal Aviation Regulations. *See* Administrator's Appeal

Brief at 6-7; 9-13. This is based on the definition of the term "aircraft" as a "device that is used or intended to be used for flight in the air." Under this regulatory approach, because Mr. Pirker was operating a device designed for flight in the air, he was subject to the FAA's regulatory authority. *Id.* This policy is inconsistent with the FAA's historical position, which has been that small UAS, like model aircraft, are excluded from the regulatory and statutory definitions. Where an agency's position deviates from its long-standing practice and is announced in an enforcement proceeding, it is entitled only to deference "proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168-69 (2012) (citations omitted).

Here, the FAA's position that its general Federal Aviation Regulations apply to UAS, including model airplanes, is inconsistent with its historical position that model aircraft operations are subject only to voluntary compliance with guidance. See FAA Advisory Circular AC 91-57. Likewise, its position could easily lead to absurd results. As ALJ Geraghty stated, the FAA's position in this matter "would lead to a conclusion that those definitions include as an aircraft all types of devices/contrivances intended for, or used for, flight in the air. The extension of that conclusion would then result in the risible argument that a flight in the air of, *e.g.* a paper aircraft, or a toy balsa wood glider, could subject the 'operator' to the regulatory provisions of FAA Part 91, Section 91.13(a)." Accordingly, ALJ Geraghty correctly concluded that the FAA's position that it could use its pre-existing Federal Aviation Regulations to govern the use of UAS should not be credited.

Yet, despite ALJ Geraghty's ruling that the FAA's policy prohibiting the use of UAS is unenforceable, news organizations and the general public remain at risk that the FAA will pursue

an enforcement action for the allegedly purely commercial use of UAS. Indeed, the day after ALJ Geraghty's decision was announced, the FAA indicated that it was appealing the decision, which has the affect of staying the decision until the Board rules on the appeal. *See* Press Release, FAA Statement (March 7, 2014).²⁶ At the same time, the FAA directed individuals to a web site stating the use of UAS for business purposes is almost entirely prohibited. *See* Busting Myths about the FAA and Unmanned Aircraft-Update.²⁷

Likewise, following the fire in Dayton, Ohio, the FAA indicated to the *Dayton Business Journal* through a spokesperson that it "would require more legal review to determine if it was a fineable offense to publish the video on [a news] site." *See* Tristan Navera, *Why You Won't See Drone Footage From Downtown Fire on Our Site*, Dayton Biz Blog (April 4, 2014). The spokesperson also told the newspaper that she "would err on the side of caution." *Id.* The FAA took this position even though the UAS were operated by hobbyists, who provided the video to the fire department and news media at no charge and as a public service. Moreover, regardless of the enforceability of the FAA policy generally, the Constitution entitled the media to publish UAS footage that it lawfully obtained from the hobbyists. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001). The FAA spokesperson's advice to "err on the side of caution" was intended to chill free speech and, therefore, was flatly unconstitutional.

These anecdotes demonstrate the confusion caused by the FAA's *ad hoc* approach and illustrate why the FAA's actions are inappropriate substitutes for notice-and-comment rulemaking. The FAA's approach is particularly concerning given the First Amendment newsgathering interests involved. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or

²⁶Available at http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15894

²⁷Available at <http://www.faa.gov/news/updates/?newsId=76381>.

required....A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *FCC v. Fox Television Stations*, 132 S.Ct. 2307 (2012) (citations omitted). These due process requirements are applicable in all cases, but, as the Supreme Court has recognized, "when speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill speech." *Id.*

Indeed, as the Supreme Court has noted, specificity in regulation is particularly important so that citizens exercising their First Amendment rights are not forced to "err on the side of caution." "Where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ...than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal citations and quotations omitted). *See also N.A.A.C.P. v. Button*, 371 U.S. 415, 432–33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression....Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *Kolender v. Lawson*, 461 U.S. 352, 358, 371 (1983) (majority and dissenting opinions agree that that a due process vagueness analysis may be more demanding in First Amendment cases).

Consistent with these principles, courts routinely strike down laws and regulations that impermissibly burden First Amendment rights. *See, e.g. FCC v. Fox Television Stations*, 132 S.Ct. 2307 (2012) (striking down FCC indecency regulations that failed to provide fair notice that a fleeting expletive or a brief shot of nudity would violate the agency's indecency regulations); *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727

(1996) (striking down provisions of Cable Television Consumer Protection and Competition Act that were not narrowly tailored to meet a compelling state interest); *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) (striking down an ordinance which banned parked vehicles designed to function as billboards because the ban fell "squarely into that class of statutes that 'impermissibly delegates basic policy matters to police[] ... for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'")(internal citations omitted); *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012) (striking down state law requiring that sex offender registrants disclose information about their Internet use as impermissibly vague under the First Amendment and the Due Process Clause); *Hunt v. City of Los Angeles*, 601 F. Supp. 2d 1158 (C.D. Cal. 2009), *aff'd in part, remanded in part on other grounds*, 638 F.3d 703 (9th Cir. 2011)(striking down ordinance regulating vending on boardwalk, which exempted sale of merchandise carrying or making religious, political, philosophical, or ideological message or statement which was "inextricably intertwined" with the merchandise as was facially void-for-vagueness).

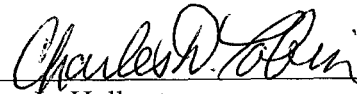
As these cases demonstrate, where First Amendment rights are implicated, it is critical that Congress and regulatory agencies provide clear, constitutional standards that avoid improperly limiting the rights to free speech and a free press. The FAA's *ad hoc* restrictions on the use of UAS do not currently provide clear standards. As a result, media organizations are at risk of facing enforcement actions like that brought against Mr. Pirker. This risk flatly contravenes the First Amendment. The FAA must undertake a proper notice-and-comment rulemaking to establish a workable regulatory framework for the safe and legal use of UAS and to provide clear, constitutional guidance to the public and the media about when UAS may be used.

CONCLUSION

For the reasons discussed above, the News Media *Amici* respectfully ask that this Board affirm ALJ Geraghty's decision granting Respondent's Motion to Dismiss and urge this Board, for a broad range of important societal interests, to dismiss similar enforcement actions until the FAA has properly enacted and promulgated a regulation for the use of small UAS.

Respectfully submitted,

HOLLAND & KNIGHT LLP



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Counsel for News Media Amici


CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2014, a copy of the foregoing was served upon the following by electronic mail and U.S. mail to:

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Charles D. Tobin

Exhibit A

Tobin, Charles D (WAS - X72539)

From: Tobin, Charles D (WAS - X72539)
Sent: Tuesday, April 22, 2014 4:57 PM
To: Schulman, Brendan; brendan.kelly@faa.gov; susan.caron@faa.gov
Cc: Walz, Christine N (WAS - X75113)
Subject: RE: Huerta v. Pirker, NTSB Docket CP-217

On behalf of the amici, we thank you both for your consent.

Charles D. Tobin | Holland & Knight

Partner

800 17th Street, NW Suite 1100 | Washington DC 20006

Phone 202.419.2539 | Fax 202.955.5564

charles.tobin@hklaw.com | www.hklaw.com

[Add to address book](#) | [View professional biography](#)

From: Schulman, Brendan [<mailto:BSchulman@KRAMERLEVIN.com>]
Sent: Tuesday, April 22, 2014 4:45 PM
To: brendan.kelly@faa.gov; Tobin, Charles D (WAS - X72539); susan.caron@faa.gov
Cc: Walz, Christine N (WAS - X75113)
Subject: RE: Huerta v. Pirker, NTSB Docket CP-217

Mr. Tobin:

Respondent Raphael Pirker consents to the submission of your brief and will provide you with the written consent contemplated by the rule.

Regards,
Brendan Schulman

From: brendan.kelly@faa.gov [<mailto:brendan.kelly@faa.gov>]
Sent: Tuesday, April 22, 2014 4:35 PM
To: charles.tobin@hklaw.com; susan.caron@faa.gov
Cc: Schulman, Brendan; Christine.Walz@hklaw.com
Subject: Re: Huerta v. Pirker, NTSB Docket CP-217

Mr. Tobin:

The FAA will not file an opposition to your request to file an amicus brief.

Brendan A. Kelly
Supervisory Attorney
FAA Eastern Region, AEA-7
Tel: 718-553-3269
Fax: 718-995-5699
Email: brendan.kelly@faa.gov

From: <charles.tobin@hklaw.com>
AEA-007, Office of Regional Counsel
To: <BSchulman@KRAMERLEVIN.com>, Brendan Kelly/AEA/FAA@FAA,
Cc: <Christine.Walz@hklaw.com>
Date: 04/21/2014 05:22 PM
Subject: Huerta v. Pirker, NTSB Docket CP-217

Brendan M. Schulman | Special Counsel
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Mr. Schulman and Mr. Kelly:

Our law firm has been retained to prepare an amicus brief in this matter in support of the Respondent, Raphael Pirker.

Our clients include: Advance Publications, Inc.; Gannett Co., Inc.; Gray Television, Inc.; The McClatchy Company; the National Press Club; the National Press Photographers Association; The New York Times Company; the Reporters Committee for Freedom of the Press; Scripps Media; Sinclair Broadcast Group. Other news media companies and journalism nonprofit associations may participate in the brief as well.

Pursuant to 49 C.F.R. § 821.9, we request consent from the Federal Aviation Administration and Mr. Pirker to our clients' filing of the amicus brief. Please let us know if we have your clients' consent.

Thank you.

Charles D. Tobin | Holland & Knight
Partner
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Phone 202.419.2539 | Fax 202.955.5564
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Exhibit B

July 10, 2013

REGULAR and CERTIFIED MAIL- RETURN RECEIPT REQUESTED
Certificate No.7006 0100 0001 7196 2789

University of Nebraska-Lincoln
College of Journalism and Mass Communications
Anderson Hall
200 Centennial Mall North
Lincoln, NE 68588-0443

To whom this may concern:

<http://journalism.unl.edu/drone-journalism-lab> was brought to our attention from the Unmanned Aircraft System (UAS) specialist for the Federal Aviation Administration (FAA) Central Region based in Kansas City, Missouri. The university website features your use of a UAS for journalism educational purposes.

The FAA has taken steps to ensure the public safety regarding all UAS operations. These initial steps take a “do no harm” approach to preserve the world’s safest air transportation system. Currently, the FAA authorizes UAS operations by three means.

1. **Certificate of Authorization (COA).** This authorization allows public entities, i.e., federal, state, and municipal government related organizations, to self-certify their aircraft. The FAA reviews the operation to ensure it is in the public interest, safe, and does not significantly impact the safety of other air traffic or persons on the ground. To issue a COA normally takes about 60 business days.
2. **Experimental Certification.** For civil operators, the FAA can issue an experimental aircraft certificate in accordance with Code of Federal Regulations (CFR) Part 21.191. CFR 21.191 addresses special airworthiness certificates in the experimental category. Experimental certificates are issued to UAS only for the purposes of research and development, crew training and market survey.

You may petition for an exemption to 14 CFR 21.191. You would also need to petition for an exemption to 14 CFR 91.319 because no person may operate an aircraft that has an experimental certificate for compensation or hire. Petition for exemptions can be submitted on-line at <http://www.faa.gov/regulations/policies/rulemaking/petition/>. If you just want to sell your aircraft, you can do this with an experimental under market survey. In this case, you wouldn't need the two exemptions.

Exemption under 14 CFR 21.191 and 14 CFR 91.319 are not easily granted. Please be advised that the application for an experimental certificate will require technical diagrams of your aircraft and radio control equipment. Commercial UAS operations require the operator to hold a FAA pilot certificate with the appropriate ratings. The experimental certificate application

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process is spelled out in FAA Order 8130.34B (www.faa.gov/go/uas - go to the regulations & policies link).

3. Recreational hobbyists. This group is comprised of those individuals who use UAS only for recreational enjoyment in accordance with FAA Advisory Circular 91-57. This generally applies to operations away from airports, persons, and buildings, below 400 feet above ground level, and within visual line of sight.

These requirements are necessary because most of the UAS currently available are not manufactured and maintained to the standards of manned aircraft. Similarly, most operators wishing to fly UASs are not trained, certified, or know the rules of the air to ensure the safety of others both in the air and on the ground.

More information regarding UAS use can be found at the FAA Unmanned Aircraft Program Office's website <http://www.faa.gov/about/initiatives/uas/>.

Based on your university website, you are currently operating a UAS without proper authorization. Operations of this kind may be in violation of the Federal Aviation Regulations and result in legal enforcement action. The options are 1) to cease operations, or 2) to make application for the proper authorization so that the FAA can be assured of the safety of your operation. The instructions for making application can be found at <https://ioeaaa.faa.gov/oeaaa/Portal.do>.

For questions, please do not hesitate to contact me.

Sincerely,

Christopher L. Grotewohl
Aviation Safety Inspector
UAS Specialist
NextGen Branch, ACE-220
816-329-3273



U.S. Department
of Transportation
**Federal Aviation
Administration**

Flight Standards Division
901 Locust, Room 342
Kansas City, MO 64106

July 10, 2013

REGULAR and CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Certificate No. 7006 0100 0001 7196 2772

University of Missouri
Missouri School of Journalism
Administrative Offices
120 Neff Hall
Columbia, MO 65211-1200

To whom this may concern:

<http://www.missouridronejournalism.com/category/drones/> was brought to our attention from the Unmanned Aircraft System (UAS) specialist for the Federal Aviation Administration (FAA) Central Region based in Kansas City, Missouri. Your website features your use of a multicopter UAS for journalism educational purposes.

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For questions, please do not hesitate to contact me.

Sincerely,

Christopher L. Grotewohl
Aviation Safety Inspector
UAS Specialist
NextGen Branch, ACE-220
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