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REVISED

DATE: June 27, 2019

TO: Commissioners of the Uniform Law Conference

FROM: Jo-Ann Marzullo, Section Chair-Elect

Re: Proposed Uniform Tort Law Relating to Drones Act

The Real Property, Trust and Estate Law Section of the American Bar Association ("RPTE") has over 21,500 members. One of RPTE's missions is to address the needs of the public concerning real estate law.

In furtherance of this mission, RPTE has reviewed the proposed Uniform Tort Law Relating to Drones Act (the "Act"). The RPTE Executive Committee and Council have voted to oppose the Act in its current form, including, but not limited to, the sending this letter of opposition to the Commissioners of the Uniform Law Conference.

RPTE was unaware until April of this year that the approach for the Act was drastically changed earlier this year. RPTE has attempted to let our misgivings with the Act be known, but only relatively minor changes were made in the Act in response to comments made as to real estate interests that need to be protected.

RPTE sought input from both the Joint Editorial Board for Real Property Acts and also from one of RPTE's members, Professor Steven Eagle. The comments from both JEB and Steve Eagle are attached.
RPTE's primary objections can be summed up as follows:

1. The Act is contrary to present real estate law and, therefore, the expectations of most landowners. By taking action to protect themselves, their family, and their property (home) from intrusions, an average homeowner could be treated as the wrongful party.

2. The Act allows images of people and places not visible at street level and the public way line to be obtained and retained. This is a violation of the natural privacy that land owners possess by

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topography, fencing, landscaping or conducting activities or locating structures beyond what the natural eye can see.

3. The Act applies an unworkable balancing test to determine the liability of a drone operator. A landowner will have no reasonable means to identify the drone operator against whose operation it objects and the bringing of a lawsuit is an unreasonable requirement. A landowner should be able to prohibit a trespass onto its land and the near reaches above it.

4. There needs to be a zone into which a land owner may prohibit any entry by drones and a means to identify the particular drone operator for any drone operating outside the "no fly area".

Unless the Act is modified to the extent that RPTE may support it, RPTE is prepared to oppose the Act if and when it comes before the House of Delegates of the American Bar Association for a vote.

These Comments are presented on behalf of the RPTE alone. They have not been approved by the House of Delegates or the Board of the Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association as a whole.

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UNIFORM REAL PROPERTY ACTS

June 5, 2019

To: Commissioners of the Uniform Law Conference

Re: Uniform Tort Law Relating to Drones Act

The JEBURPA is an advisory group comprised of representatives from the American Bar Association Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission (ULC), with liaison relationships with the American College of Mortgage Attorneys, the Community Associations Institute, and the American Land Title Association. The JEBURPA's purpose is to provide informed advice to the ULC with regard to uniform and model laws as they relate to real estate.

In carrying out this responsibility, members of the JEBURPA have significant concerns regarding a number of provisions of the Uniform Tort Law Relating to Drones Act (the "Act") as those provisions impact the rights of real property owners. **The JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.** The purpose of this letter is to highlight the JEBURPA's primary concerns regarding the Act, focusing specifically on its impact on the rights and obligations of real property owners.

The Act Restricts a Landowner's Control of the "Immediate Reaches" of the Airspace in a Fashion Inconsistent with Present Law and the Expectations of Most Landowners

Advances in technology have created incentives for individuals, companies and institutions to use drones to facilitate a range of activities, such as package delivery, aerial photography, and surveillance. These advances have also exposed a tension—to what extent may a landowner prevent the operation of a drone in the airspace immediately and directly above the owner's land?

Under existing trespass law in all American states, *A* can prevent *X* from traversing the surface of *A*'s land to deliver a package to *A*'s neighbor, *B*, without *A*'s prior consent. Furthermore, it is largely irrelevant to the trespass determination whether *X*'s actions would cause actual economic harm or damage to *A*. See, e.g., *Jacque v. Steenburg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (upholding award of punitive damages against company that traversed farmer's land to deliver mobile home to neighbor over farmer's prior objection, despite absence of physical harm/damage). Can *A* likewise prevent *X* from flying a drone across *A*'s land at a height of 15 feet to deliver that same package?

Most American landowners would answer this question with an unequivocal "yes." Under existing trespass law, if my neighbor builds a structure that "overhangs" my land without my consent, a trespass has occurred. Likewise, if the branches of my neighbor's tree grow into the airspace above my property, a trespass has also occurred.

By giving the landowner the exclusive right to prevent third-party use of this low-altitude airspace, trespass law has created an expectation among landowners that they can likewise exclude third persons from engaging in drone overflights at very low altitudes. In this way, trespass law advances the landowner's expectations of safety (e.g., that a drone would not collide with a person or structure and cause injury to persons or property) and privacy (e.g., that a drone would not be taking images of the owner or the owner's family or property).

The Prefatory Note states that the Act "clearly adopts the 'aerial trespass' doctrine in relation to unmanned aircraft in the airspace above private land," and further states that the Act "clarifies that intentional unmanned aircraft intrusions on land are trespasses to land." In fact, however, the Act would create substantial doubt about the ability of a landowner to exclude drone overflights at low altitudes. This is because § 5(a) of the Act provides that "[a] person is liable for aerial trespass if the person intentionally and without the consent of the land possessor operates an unmanned aircraft in the airspace over the land possessor's real property ***and causes substantial interference with the use and enjoyment of the property***" (emphasis added).

Under § 5(a), a court may not simply conclude that an unconsented-to drone overflight at an altitude of six feet is *per se* a trespass. Instead, to establish a trespass, the surface owner would have to demonstrate (1) that the overflight was "intentional" and (2) that it caused a "substantial interference" with the landowner's use and enjoyment of the land. To meet this latter standard, the landowner would have to demonstrate "substantial interference" through a complicated analysis of the factors articulated in § 5(b) of the Act. Under this approach, a court could conclude that an unconsented-to overflight at an altitude of six feet was not a substantial interference—and thus not an excludable trespass—for potentially any of the following reasons:

- because it occurred at night [§ 5(b)(9)];
- because it occurred while the owner was not physically present on the land [§ 5(b)(10)];
- because the owner did not see or hear the drone during the overflight [§ 5(b)(11)];
- because the drone did not cause physical damage to person or property [§ 5(b)(7), (8)]; or
- because the drone overflight occurred only once [§ 5(b)(5)].

By contrast, none of these factors would negate a surface trespass (although they might be relevant to the calculation of the landowner's damages).

Furthermore, while the Prefatory Note suggests that the Act is a straightforward application of the principles of *United States v. Causby*, 328 U.S. 256 (1946), it is instead a dramatic overextension of that case. In *Causby*, the Court did reject the notion that a landowner's exclusive control of the surface

extended to the farthest reaches of the heavens, recognizing that a farmer could not use trespass law to prevent military aircraft overflights in navigable airspace (which is part of the public domain).

Nevertheless, the *Causby* court recognized that the surface owner did have a legitimate expectation of exclusive control of very low-altitude space:

> We have said that the airspace is a public highway. ***Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere***. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.
>
> The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.
>
> The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. ***We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*** [*Causby*, 328 U.S. at 264-265 (citations omitted; emphasis added).]

Causby plainly stands for the proposition that use of the airspace in the "immediate reaches of the enveloping atmosphere" is subject to the landowner's exclusive control; at these low altitudes, it does not mandate a complex balancing of burdens and benefits to landowners vis-à-vis drone operators. By requiring such balancing in all drone overflight cases—all the way to ground level—the Act as presently drafted substantially overextends *Causby*, and in the process significantly limits the rights customarily associated with land ownership.

At a minimum, a landowner may reasonably expect that she or he can prevent someone from operating a drone over their land at an altitude where the drone could come into contact with people or structures on the land. If an operator flew a drone across an owner's land at an altitude of six feet without the consent of the landowner, we are confident that any judge today would treat that as a trespass—without regard to whether it was day or night, whether the landowner was at home, or whether the overflight caused no actual physical or economic harm. But § 5(b)'s required multi-factor analysis would render

such a determination less likely; that is the very nature of factor analysis. Thus, we question whether the Act is providing greater "clarity" or instead changing existing state trespass law.

We are of the view that if the Act is not going to treat overflights below a certain altitude as a *per se* trespass, then at a minimum the Act should create a rebuttable presumption of substantial interference in favor of the landowner below a specific height threshold. At a minimum, that threshold should be no less than the height of any structure on the land.[1] In our view, this is necessary and appropriate to permit the development of case law defining "substantial interference." As drafted, the UTLRDA and its "substantial interference" standard place a heavy thumb on the scale in favor of the drone operator. As such, it seems unlikely that all but the wealthiest or most litigious of landowners will bring an action to vindicate their expectations. Creating a rebuttable presumption in favor of the landowner below a certain threshold would be more likely to result in litigation when overflights occur at very low altitudes (if not to simply discourage overflights at such altitudes)—and this is appropriate because this is precisely the situation in which overflights pose the most obvious potential risk of harm.

The Act Creates a Dubious Rebuttable Presumption for "Conduct Protected by the First Amendment"

The comments to § 5 acknowledge that there is no first amendment privilege to trespass. While a speaker may wish to engage in protected speech or protected conduct, that speaker generally may not do so in my front yard, at least without my consent. But § 5(e) creates a rebuttable presumption that conduct protected by the First Amendment does not constitute "substantial interference." As noted above, the factor analysis required by § 5(b) already makes it extremely challenging for a landowner to meet the "substantial interference" threshold; this challenge will become effectively impossible with an additional thumb on the scales in the drone operator's favor.

Properly understood, if a non-media drone operator's conduct was a "substantial interference" under the circumstances, then so should be the same conduct committed by a media drone operator. Anything else creates—or profoundly encourages—a first amendment license to trespass.

The Act Imposes on the Landowner an Unclear and Unjustifiable Duty of Reasonable Care to Drone Operators

§ 7(a) requires that "[a] landowner or land possessor shall act with reasonable care in relation to known unmanned aircraft operating in the airspace over the landowner's or land possessor's property." The comments state that this section "makes clear that a land possessor owes the same duties to unmanned aircraft operating over his or her property as are owed to persons who are on their property."

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[1] To address the situation in which there is only one extremely tall structure on a large parcel of otherwise-unimproved land (e.g., a silo on a large farm), the Act could provide a lateral distance requirement (e.g., an overflight at 100 feet would not trigger a rebuttable presumption of "substantial interference" just because the parcel's tallest structure is 150 feet in height, as long as the drone was no closer than xx feet from that structure).

This simply is not true. If a particular state has, by judicial decision or statute, already imposed on a landowner a duty of reasonable care to all persons (including trespassers), then § 7(a) would merely codify existing law. By contrast, if a state has not imposed such a duty as to trespassers, or has specific limitations on the landowner's duties, this Act would impose a greater duty of care to drones and drone operators than the landowner would owe to surface trespassers.

While the scope of a landowner's duties to trespassers is debatable, it is not a subject on which there is a compelling need for uniformity. If Section 7(a) is truly intended to have landowners owe the same duties to drone operators as they owe to persons physically on the surface under other law of the state, then the text should say so explicitly.

The Act Does Not Preclude an Implication of Consent from a Landowner's Prior Silence

As noted above, the Act stacks the deck too highly in favor of drone operators. Landowners will have to meet a considerable—if not practically insurmountable—evidentiary burden to establish that an unconsented-to, low-altitude overflight constitutes a trespass. Faced with this burden, many landowners may not be inclined to pursue legal action to challenge unconsented-to, low-altitude overflights. Unfortunately, the Act does not preclude the possibility that a court might treat a landowner's prior silence as implicit consent to future overflights.

Section 5(d) does make clear that repeated overflights over a long period of time cannot result in the acquisition of a prescriptive easement. Unfortunately, nothing in the Act would prevent a drone operator from arguing—or a court from accepting the argument—that a landowner's silence in the face of prior overflights constituted consent to a later overflight. In fact, by permitting the court to consider "any other factor relevant to the determination of substantial interference," the Act plainly invites drone operators to make a "waiver by prior silence" argument.

Conclusion

For the reasons discussed above, the JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.

This letter reflects the position of the members of the JEBURPA, and does not reflect the official position of the JEBURPA's constituent and liaison organizations. The American Bar Association Real Property, Trust and Estate Law Section will separately issue its own concerns regarding the Act.

MEMORANDUM

To: RPTE Executive Committee

From: Steven J. Eagle, Professor Emeritus of Law
Antonin Scalia Law School at George Mason University

Date: June 6, 2019

Re: ULC 2019 Draft "Uniform Tort Law Relating to Drones Act"

This memorandum calls the Executive Committee's attention to the substantial diminution of private property rights inherent in the "Uniform Tort Law Relating to Drones Act" ("Act"), which will be considered for approval by the Uniform Law Commission (ULC) at its Annual Meeting next month.[1] It is intended to assist the Executive Committee in formulating RPTE's position regarding an ABA recommendation to ULC, and possibly regarding enactment by the states.

The proposed uniform act, which uses the term "drones" in its title only,[2] attempts to facilitate the development of the commercial unmanned aircraft industry.[3] The Act focuses almost exclusively on tort law, with only one incidental reference to "property law."[4] It would conflate on a massive scale property rights and tort remedies with respect to physical intrusions by unmanned aircraft in airspace immediately above private lands and structures. In essence, the Act replaces traditional protections of property against encroachment, through common law trespass and injunctive relief, with an amorphous and subjective balancing of the interests of property owners with those of encroachers. The ultimate effect would be to destroy much of the subjective value of property owners, and to transfer without compensation substantial pecuniary value from property owners to commercial drone operators.

I. The Act's Principal Purposes

The Act's "Prefatory Note" sets forth its principal purposes: "The Uniform Tort Law Relating to Drones Act provides a uniform state-level response to the development and utilization of unmanned aircraft in a variety of circumstances within the context of federal control over aviation as well as the importance of the advances promised by unmanned aircraft use."[5] Indeed, the Prefatory Note highlights that the Federal Aviation Administration (FAA) predicts that by 2022 there will

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[1] References to "the Act," are to the ULC Drafting Committee's "Draft for Approval" of May 30, 2019, which will be reviewed at the ULC annual meeting, July 12–18, 2019.

[2] "Unmanned aircraft" is the exclusive term used in the body of the Act, following federal legislative and regulatory terminology. "Drones" is used instead in the title assertedly because it is "lay terminology" that is more "transparent." *See* Act §1, Comment. "Drones" also perhaps focuses attention on the small devices used by hobbyists rather than unmanned aircraft used by commercial enterprises.

[3] *See* Act, Prefatory Note (stating that an unwieldy regulatory system may "inhibit the appropriate and beneficial development of unmanned aircraft systems for the variety of uses to which such technologies are suited.").

[4] Draft § 2, Comment (defining "land possessor").

[5] Act, Prefatory Note.

be between 1.96 7 million and 3.17 million small unmanned aircraft operating in the national airspace."[6] In the coming decades, the rapid development of unmanned aircraft of all sizes could be expected to have numerous benefits, many of which remain to be imagined. Yet history teaches that substantial technical advances can be put to uses that create harm as well as good, and that even technologies that produce net benefits can result in harm to many. That suggests restraint in overthrowing long-settled property law. Furthermore, it is reasonable to assume that guidance for unmanned aircraft would soon become at least as precise as that for the new generation of driverless automobiles. Just as these motor vehicles would be expected to stick to public roads and not cut across private lands, so could low-level unmanned aircraft would stick to corridors above public roads and turn off only at authorized locations. This likelihood also suggests restraint, as opposed to entrenchment of legal rights for unmanned aircraft operators.

The "context of federal control over aviation," as the Prefatory Note further sets forth, is "[t]hat the federal government has exclusive authority over aircraft operations in the national air space, as well as other attendant operational concerns, is well settled law."[7] "However, the power of Congress and the FAA to declare navigable airspace does not give anyone, including pilots, the right to trespass, create nuisances, unconstitutionally take private property, invade privacy, commit crimes, or commit state law torts."[8]

In delineating the interface of navigable airspace and private property rights, the Act in its present form would establish broad rights for unmanned aircraft operators, while curtailing the traditional rights and legitimate expectations of property owners.

II. The Act Relegates Aboveground Property Ownership Largely to Nuisance Remedies

Section 5 of the Act, "Aerial Trespass by Unmanned Aircraft," defines trespass as an overflight without consent that "causes substantial interference with the use and enjoyment of the property."[9] While conceding that it is "contentious," the Comment avers that "[t]his section establishes the cause of action for aerial trespass as the *exclusive cause of action* for intrusions of unmanned aircraft into the airspace over land."[10] As justifications for its position, the Comment cites the Supreme Court's seminal opinion in *United States v. Causby* (1946).[11]

A. The Act Misleadingly Recasts the Contours of Property Ownership

In *Causby*, the Court repudiated the ancient doctrine that ownership of parcels of land extends from the center of the Earth to the heavens (*ad coelum*).[12] As the Court observed, the *ad coelum* doctrine "has no place in the modern world."[13] Although it served as a useful reminder of the importance of property, and that fee ownership extends above the Earth's surface, before modern

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[6] *Id*.
[7] *Id*. (citing *Braniff v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954)).
[8] Wendie L. Kellington, *Drones*, 49 URB. LAW. 667, 669 (2017) (citing regulations and cases).
[9] Act §5(a).
[10] Act §5(a), Comment (emphasis added).
[11] Act § 5, Comment (discussing *United States v. Causby*, 328 U.S. 256, 260–61 (1946).
[12] *Causby*, 328 U.S. at 260–61 (discussing the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe – *Cujus est solum ejus est usque ad coelum*.").
[13] *Id*.

flight the conceit of *ad coelum* was grandiose—but also was harmless. Lying on one's hammock on a dark night and imaging that swarths of the full moon successively fall under one's dominion is but a romantic conceit. However, by effectively recasting the Court's repudiation of *ad coelum* so as generally to limit ownership protections to the surface *only*, the Act is equally grandiose—and quite harmful. To lie on one's hammock and not have *per se* rights regarding the several feet above it can create great harm, and great uncertainty. As the Court said in *Causby*, "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[14]

The Act does violence to two basic concepts of property law. The first is that property must be clearly delineated. What distinguishes property rights from privileges of various sorts is that property is *in rem*, *i.e.*, valid against the world. A stranger should not be concerned with title; it is enough to know that it is not vested in him or her. While the rights of contracting parties may be as complex as they wish, the rights of owners must be objectively clear, so that strangers could quickly understand them.[15] As I will discuss shortly, the Act's attempt at multifactor balancing fails that test.

The second basic concept that the Act violates is the inviolability of property. In a seminal article,[16] Guido Calabresi (later Yale law dean and Second Circuit Judge) and Douglas Melamed pointed out the essential difference between holdings protected by "property rules" and those protected only by "liability rules." The property rule approach means that owners are protected through injunctive relief against harm and through trespass. There is no balancing of interests. A stranger desiring an easement or license for use would have to bargain to obtain the owner's consent.

Under a liability rule, however, the stranger to title may unilaterally take attributes of ownership and would be liable only for money damages. That approach is instantiated in the Act, so that even in the unlikely event that a landowner prevails, tort damages is the only remedy.

The Act explicitly rejects an alternative more consistent with property rights protection, under which "landowners hold title to some either undetermined or predetermined amount of airspace over their land," such as 500 feet above the surface, as suggested by Professor Troy Rule.[17] The only small island of certainty provided property owners with respect to areas above the land's surface involves "intentional . . . physical contact with a structure or plant."[18] Strangely, the Act does not provide for operator liability where an unmanned aircraft's contact with a structure is unintentional.

B. The Act's Multifactor Balancing Test for Aerial Trespass Gravely Lacks Clarity

The Act justifies denial of property owners *per se* dominion over *any* airspace by augmenting the repudiation of the *ad coelum* doctrine in *Causby* with the "additional clarity [that] comes from the

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[14] *Causby*, 328 U.S. at 264.
[15] This is why the common law has been very resistant to the creation of novel property rights. *See* Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 119 YALE L.J. 1 (2000).
[16] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
[17] Act § 5, Comment (contrasting Troy Rule, *Airspace in an Age of Drones*, 95 BOS. U. L. REV. 155, 159 (2015)).
[18] Act § 6 (a) and 6 (a)(2).

explicit identification of a non-exclusive list of potential factors for courts to consider when it is necessary to decide whether a trespass by unmanned aircraft has occurred." The list is "extensive, but not exhaustive."[19] The Comment further admonishes: "None of the factors listed should be viewed as determinative. Instead, they should be weighed and evaluated holistically."[20]

The coupling of a long, but not exclusive, list of factors to be judged "holistically" with "clarity" is oxymoronic. The vague regulation of low-level flights by unmanned aircraft incorporated in the Act will have important consequences for land use and development regulation, which is crucial in facilitating or thwarting the needs and aspirations of individuals, and the development of their communities.

The Supreme Court has observed that regulation without clear standards gives officials unchecked discretion.[21] When considering the many spillover effects of the Act well beyond the commercial deployment of unmanned aircraft, regulators and judges would be tempted to substitute for traditional property law concepts their own personal values, since "the act of balancing remains obscure,"[22] and an analysis based on the totality of the circumstances, as the Act requires, "masks intellectual bankruptcy."[23]

C. The Act's Sweeping Provision Favoring Unmanned Aircraft Operators' Exercise of First Amendment Rights Particularly Burdens Property Rights

Act Section 5 provides for a "rebuttable presumption" in favor of unmanned aircraft operations for "purposes protected by the First Amendment."[24] While the Comment declares that this presumption "is not intended to create or imply the existence of a journalistic or First Amendment privilege to trespass," and cites cases involving reporters, the Amendment is for more sweeping.[25] With respect to the First Amendment's free speech, free exercise of religion, and redress of grievances provisions, unmanned flights might be concentrated in areas close to large public gatherings, or to the residences of disfavored individuals, groups and officials. The Supreme Court has upheld the creation in a few states of what amount to free expression servitudes within shopping centers.[26] However, in those situations, owners have welcomed entry by the general public and historically encouraged them to regard the centers somewhat as public squares in addition to strictly venues for shopping. In the case of a presumption for exercise of First Amendment rights over private businesses generally, and especially residences, there is no such invitation.

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[19] Act § 5, Comment

[20] *Id*.

[21] *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (holding requirement that a criminal suspect provide "credible and reliable" identification unconstitutionally vague).

[22] *Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession* 349 (1993).

[23] Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 93 (1986).

[24] Act §§ 5(e) and 5(e)(2) "There shall be a rebuttable presumption that the operation of an unmanned aircraft does not substantially interfere with the use and enjoyment of property … if the unmanned aircraft was being operated for: (2) purposes protected by the First Amendment …"

[25] U.S. CONST., amend. I (Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

[26] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

While Section 7 (d)(2) allows that the presumption could be overcome by owners proving that unmanned aircraft at low altitudes overhead "substantially interfere with the use and enjoyment of property," it is difficult to imagine that the owners could establish an aggregate of substantial interference, much less that a court would then meter the overflights of particular aircraft operators or groups espousing one cause or another. The much more likely result would be that the rights of property owners would be vindicated only in the most egregious situations.

D. The Act Facilitates the Growth and Entrenchment of an Industry Bereft of Individual Privacy Protections

Act Section 8, titled "Unmanned Aircraft and Violations of Privacy," declares in its totality: "An unmanned aircraft is an instrumentality by which a tort in violation of privacy rights may be committed under federal or state law." The Comment notes that some states have laws regarding privacy that might be applicable to unmanned aircraft, and the Act tries to avoid "introducing duplicative or conflicting provisions into state law." The Comment continues:

> This does not diminish concerns raised by specific characteristics of unmanned aircraft operation, namely the low-level flights of unmanned aircraft, the ability to acquire and record images and other data that would otherwise be unavailable, and the perceived anonymity of their operation. This explicit clarification of the application of privacy principles to the operation of unmanned aircraft thus serves a signaling function for the public and the industry and makes clear that the state takes privacy concerns seriously, a reassurance citizens may seek in relation to the act.[27]

The Comment illustrates the Act's "reassurance" with illustrative parallels about peering through a bedroom window with a telephoto lens and climbing a tree to peer over a privacy fence.[28] But these homey examples do not begin to comprehend the uses to which massive amounts of aerially-obtained data, together with other huge data sets, might be employed in the future. The point here is not to suggest that the Act should contain detailed provisions protecting privacy. Rather, the brushing off of legitimate privacy concerns in the rush to ensconce interests of unmanned aircraft operators over property rights further illustrates that the priorities of the Act are misplaced. Similar concerns about the misuse of aerial surveillance and of data aggregation exist in other areas, such as civil rights and criminal justice, that are beyond the scope of this memorandum.

E. The Act Imposes Perilous Affirmative Duties on Property Owners

Section 7 of the Act spells out the "Duty and Liability of Land Possessors." It requires that owners act with "reasonable care in relation to known unmanned aircraft,"[29] have tort liability for "active counter-measures in response to the operation of unmanned aircraft,"[30] but do not have a duty to ensure that the airspace above the land … is free from obstructions."[31] The Act does not specify whether "known unmanned aircraft" includes those of which the property owner arguably should have knowledge. The Comment says that "active counter-measures" should be interpreted as

[27] Act § 8 Comment.
[28] *Id.*
[29] Act § 7 (a).
[30] Act § 7 (b).
[31] Act § 7 (c).

"direct active counter-measures that are aimed at an unmanned aircraft, such as would occur with the firing of projectile weapons or the use of radio frequency devices."[32]

What is the relationship between the imposition of liability for owners' affirmative "direct active counter-measures" and the owners' lack of duty to ensure that the airspace is "free from obstructions"? For instance, if an owner wishes serenity on a patio built between his or her home and garage, and small unmanned aircraft traverse that space, how would a new privacy fence along the front of the patio be treated? Is that "obstruction" a normal facilitation of enjoyment of one's family living space, or is it an actionable "counter-measure?" The disclaimer of an owner's duty to keep the unmanned aircraft "free from" obstructions suggests the latter. But the effect is to provide that pre-existing ("known") drone transits receive the very "prescriptive right" that the Act purports to disclaim.[33] The effect is a dramatic denigration of property rights that most Americans take for granted.

Furthermore, the Act makes no provision for property owners fending off unmanned aircraft that menace their families, animals, and structures with immanent harm. They may attempt to protect themselves only at the peril of defending against subsequent tort actions alleging that their self-defense constituted prohibited active counter-measure.

III. The Practical Effect of the Act Greatly Favors Unmanned Aircraft Commerce Over Private Property Rights

The Act does not require unmanned aircraft operators to notify property owners of overflights. What the Prefatory Note refers to as a "a perceived element of anonymity to their operation"[34] is more than a perception. It would be difficult for property owners to identify the identity of unmanned aircraft operators in most instances. Also, operators would typically be better financed and have more individually at stake than home- or small-business owners. Combined with the "substantial interference" standard, this makes the unmanned aircraft industry almost impregnable to challenge.

These facts, together with its considered refusal to provide a zone in which property owners could exclude unmanned aircraft, or even in which in which there would be a presumption in owners' favor, suggest that RPTE should decline to support the Act in its present form. The Executive Committee might want to go further and consider actively opposing the Act as drafted, a position that I would favor.

[32] Act § 7 Comment.
[33] Act § 5(d) ("Repeated or continual operation of unmanned aircraft over a land possessor's property does not create a prescriptive right in the airspace.").
[34] Act, Prefatory Note