Paul M. Kurtz
Chair, Uniform Tort Law Relating to Drones Act Drafting Committee
362 W. Cloverhurst Ave.
Athens, GA 30606

Dear Chairman Kurtz and the Members of the Uniform Tort Law Relating to Drones Act Drafting Committee,

As the Senior State Affairs Counsel of the American Association for Justice (AAJ) and an observer on this drafting committee, I am writing to ask the committee to make certain changes necessary to improve the bill. AAJ, with members in the United States, Canada, and abroad, works to preserve the constitutional right to trial by jury and to make sure people have access to justice through the legal system when their rights are violated. Members of AAJ's Aviation Law Section represent people injured by a myriad of airplane and helicopter crashes as well as both physical and reputational harm caused by drones.

AAJ commends the committee on removing Sections 9(c) in the latest draft. We had planned to object to this subsection because it explicitly invites federal preemption over state common law standards of care. Whether there should be a national standard of care for unmanned aircraft operations is an open question and this language is completely unnecessary to accomplish the committee's goals. We believe the committee has made the right decision by removing these sections and we would oppose reinserting them into the model act.

In addition, AAJ has objections to the committee's approach in Section 5(e). This section, in practice, will immunize a trespass based on the trespasser's subjective purpose for committing the trespass. The latest draft reinforces the reasons why we find this section problematic and we would urge the committee to remove the entire subsection.

First, the impact of a "rebuttable presumption" in this context is difficult to predict and potentially impossible to overcome. Rebuttable presumptions are typically used to shift a burden of proof, but the plaintiff bears the burden of proving the aerial trespass in the first place. Given that, the effect of this would appear to establish a double burden that would require some sort of unknown and undeterminable "extra proof" whenever the trespasser offers a motive that the legislature chooses to privilege. This "extra proof," in the context of what is already a weak trespass rule, amounts to a *de facto* immunity. The committee's desire to provide trespasser immunity for privileged interest groups is understandable, but the protections already in place both in other parts of this act and in existing law are more than adequate to provide protections for legitimate practices.

To that point, the groups identified for trespasser privileges already have special protections in existing law and elsewhere in Section 5. There are existing "public necessity" exceptions for trespassers that can already be found at law that act as a complete defense to liability. Law enforcement and other government actors are generally afforded an affirmative defense of qualified immunity for their operations even when they are, in fact, unlawful. Those same officers would be offered the same protections here if they were alleged to have committed an aerial trespass. This proposed law would only extend those additional immunities by blurring the line on what they can and cannot do. Those who qualify for protections under

the First Amendment would still qualify for those same protections without this language. Further, the committee has already listed that the "operator's purpose" should be taken into consideration in determining whether the activity constitutes an aerial trespass. Presumably that would include consideration of the operator's public safety or protected First Amendment activity.

Further, there is a distinct possibility that the protections for law enforcement and First Amendment activities may in fact be curtailed *outside the context of drones* because of this statute. For example, First Amendment protections for photography may be curtailed because finding such protections would effectively allow a trespass by drone so long as the purpose is photography. Courts may be persuaded to issue stronger rulings extending Fourth Amendment protections against surveillance because such rulings would be necessary to prevent pervasive governmental drone surveillance. Judges alerted to the "extra proof" requirement in this statute would be forced to consider whether the practice being given protection should still be protected if done using a trespassing drone. Statutorily locking in these "protections" for special interest trespasser immunity—rather than allowing appropriate practices to be clarified in case law—may actually undermine those very protections.

Finally, the list of purposes given trespasser immunity has expanded from one, to two, to three different groups in less than two weeks. Other special interest groups will undoubtedly seek to add their names to this list of immunized trespassers at the state level. The inevitable result will be the gradual forfeit of all property rights to the legislature. I caution the committee as to the consequences of creating this unnecessary immunity in an already weak aerial trespass statute.

For the above reasons we ask that the committee remove Section 5(e) and refrain from reinserting Section 9(c) into the model act.

Sincerely,
Daniel Hinkle

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