

Will Federal Preemption Push Drone Journalism to New Heights? State, Municipal Regulations Suspect Following *Singer v. City of Newton*

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For more than two years, journalists who hold appropriate federal certification have been able to lawfully capture amazing video footage and still images with aerial cameras from unique points of view.¹ The federal rule finalized at the end of summer 2016, which now permits the “commercial”² use of unmanned aircraft systems (UAS, or, as they are commonly referred to, “drones”), launched an entire fleet of drone journalists.

But the federal government’s development of a nationwide regulatory framework, with the ultimate goal of promoting the integration of drone systems into our national airspace, has not grounded the entire public policy debate. Indeed, concerns about drones relating to issues of safety and privacy persist at all levels of government. As a result, many state and municipal governments have passed their own ordinances designed to restrict drone operations within their local airspace.

In September 2017, the dogfight between federal and local regulatory authority yielded the first federal district court decision, in Massachusetts, holding that a local drone ordinance is preempted by the Federal Aviation Administration’s regulatory scheme. In the wake of *Singer v. City of Newton*,³ local ordinances across the country are now vulnerable. Almost none have faced court challenges—yet.

This article breaks down the federal

and local laws governing drone operation in this country, explains how courts in the past have analyzed municipal attempts to regulate aspects of air travel, describes the holding in *Singer*, and articulates which local laws, in the wake of *Singer*, are in danger of conflicting with federal law.

Federal Regulation

In 2012, Congress passed the FAA Modernization and Reform Act.⁴ This legislation was aimed at spurring innovation in a diverse set of applications, including agricultural monitoring, surveillance, criminal investigations, search and rescue, disaster response, and military training.⁵ Among other things, Congress directed the Department of Transportation to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems in to the national airspace.”⁶ The DOT was instructed to publish rules that “will allow for civil operation of [UAS] in the national airspace.”⁷

In August 2016, the Department of Transportation added Part 107 to Title 14 of the Code of Federal Regulations, to allow for the commercial operation of small unmanned aircraft systems in the national airspace and the certification of remote pilots.⁸ Part 107, the FAA’s Small Unmanned Aircraft Systems (sUAS) Rule, supplemented and replaced the FAA’s section 333 regulations—a special waiver process Congress made part of the 2012 law—on August 29, 2016. Part 107 focuses on three categories: (1) operational limitation, (2) remote pilot in command certification and responsibilities for the person flying the drone, and (3) aircraft requirements in the drone flight.

The operational limitations for drone flight provided in Part 107 leave much room for journalists to maneuver, but they are, for the most part,

explicit and strict. Under the regulation, drones

- Must weigh less than 55 pounds;⁹
- Must fly within visual line-of-sight (VLOS);¹⁰
- Must be visible to the operator unaided by any device other than corrective lenses;¹¹
- Cannot travel at more than 100 mph or 400 feet above ground level (AGL);¹²
- May fly up to 400 feet AGL above a structure;¹³
- May not operate from a moving aircraft;¹⁴
- May only operate from a moving vehicle if over a sparsely populated area;¹⁵
- Must have any external load securely attached in a manner that cannot adversely affect the flight characteristics or aircraft controllability;¹⁶
- May fly only with minimum weather visibility of 3 miles from the control station;¹⁷
- Must undergo a preflight inspection;¹⁸
- May only fly without further federal permission in “Class G” airspace—one of many divisions the federal government has made to the national airspace.¹⁹

Part 107 also establishes and includes the qualifications and responsibilities of the “remote pilot in command,” or the person operating the drone.²⁰ This individual must either hold an FAA remote pilot airman certificate with a small drone rating or be under the direct supervision of a person who holds a certificate.²¹

In January 2019, the FAA announced a proposed rulemaking that would expand the ability of drone pilots to operate in the national airspace. As adopted in 2016, Part 107 prohibited flights over persons not directly involved in the operation of the drone, as well as flights at night.

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The January 2019 proposed rulemaking would relax both restrictions.

Under the proposed rule, nighttime drone flight would be allowed, provided that the drone is equipped with anti-collision lighting visible from at least three miles and the pilot completes training specifically addressing nighttime operation.

The proposed rule would further allow flights over persons, provided that the operator and drone met certain performance-based requirements. These are pegged to three categories of risk.

Under Category 1, pilots would be permitted to operate drones weighing less than 0.55 lb. over groups of individuals without any restrictions, beyond those set out generally in Part 107.

Under Category 2, pilots would be permitted to operate drones heavier than 0.55 lb. over people if the manufacturer (or any subsequent modifier of the drone) demonstrates that the drone is designed to limit injury on impact with a person and does not have exposed rotating parts capable of lacerating human skin or any other defect or feature capable of injury above a certain threshold.

Category 3 is similar to Category 2 except that it allows for a somewhat lower threshold for potential injury and limits operation to restricted access areas where those present have been notified of the drone flight.

Pilots would be further required to ensure that any small drone not in Category 1 is visibly marked as compliant with either Category 2 or 3. This requirement would be in addition to current obligations for pilots to conduct preflight checks. Pilots also would be responsible for following a manufacturer's operation instructions specific to the small UAS in question.

In the proposed rulemaking, the FAA has not proposed to tell manufacturers how to demonstrate compliance with the above requirements. Manufacturers would be allowed to propose any means of compliance, subject to the FAA's approval, for Category 2 or 3.

Drones in News Coverage

Since the FAA rule became final in 2016, drones have become an important tool for photojournalists, allowing

them to secure previously unavailable footage and perspective. Major television networks such as CNN, ABC, and NBC; national newspapers including the *New York Times*, *Washington Post*, and *USA TODAY*; and local broadcasting companies such as Sinclair Broadcasting, TEGNA, and Capitol Broadcasting now incorporate drone footage into their coverage. Hundreds of journalists have passed the FAA tests to earn their remote pilot certificates.

Drones allow for the collection of images, video, and data that would otherwise be impossible, or at least extremely difficult. They can be particularly useful in the context of reporting on manmade or natural disasters by providing detailed coverage, while not putting the journalist in harm's way.²² Likewise, drones can provide journalists the ability to report on ecological disasters, like oil spills or deforestation, even when private corporations or local authorities restrict access to the area.²³

CNN Air, the dedicated drone journalism unit of CNN, has been a trailblazer in this space. Since 2016, when the FAA implemented the new rule, CNN Air has completed more than 3300 flights, for a total of more than 450 hours in the air, supporting CNN's newsgathering mission. Of note, CNN Air paved the way and successfully obtained the very first Part 107 waiver for operations over people. It also holds waivers for daylight operation, minimum flight visibility, and minimum distance from clouds. CNN Air has two full-time staff pilots and near three dozen trained and equipped part-time staff pilots. Each is uniquely trained and equipped to meet his or her particular mission. CNN's commitment to drone journalism demonstrates just how valuable UAS have become in a newsgathering context. Greg Agvent, senior director of CNN Air and a veteran journalist, calls drones the single most important new tool in a journalist's tool kit.

Perhaps the best example to date of the power of aerial imagery is the news coverage of the back-to-back-to-back hurricanes in 2017, and CNN Air's coverage of the same. Hurricanes Harvey, Irma, and Maria devastated portions of Texas, Florida, and Puerto Rico and the Caribbean over

a six-week period in 2017. CNN Air deployed five "drone" teams to each of the storms. The news footage created showed the breadth, depth, and scope of the damage in a way not technically or budgetarily feasible before. In addition to providing CNN viewers with greater context and understanding of the impact, the drone provided news teams on the ground with situational awareness and allowed them to accomplish their mission without endangering themselves.

Beyond natural disasters, drones enable content creators to produce unique views of the world around them. Aerial imagery can enhance production value and allow for more creative and engaging storytelling. With this new "power" comes responsibility. CNN has created a culture of safety similar to that of manned aviation. The commitment to safe, professional, responsible operation of a drone is not a goal but a requirement for CNN Air.

In 2016, the *New York Times* compiled a list of additional news stories that relied on drone journalism.²⁴ These stories included reporting on China's expanding deserts, construction of a new Panama Canal, effects of climate change in Bolivia, and burial of New York City's unclaimed dead on Hart Island in Long Island Sound.

Drones can also be highly informative when reporting on protests, for example, providing an accurate basis to document crowd sizes of protests or other events.²⁵ They also have been used successfully in the past to bring to light police abuses—for example, during the Standing Rock Protests opposing the Dakota Access Pipeline in November 2016.²⁶ The steps local authorities took to restrict drone flights is, in some way, a testament to the power of this new news tool—both at Standing Rock, as well as during the 2014 protests in Ferguson, MI, local police requested that airspace be closed off from drones.²⁷

While federal law seeks to carry out Congress's mandate and encourages greater use of drones in the national airspace, it seems likely that, if allowed, local authorities will continue to seek to restrict drone flight. That will further limit the expansion of drone journalism. The question,

therefore, is whether local authorities are permitted to unilaterally restrict drone flights.

Preemption

“The preemption doctrine is based on the Supremacy Clause, which provides that ‘the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”²⁸ “Congress may consequently pre-empt, i.e., invalidate, a state law through federal legislation.”²⁹ It may do so either expressly in the statute or implicitly, “either through ‘field’ pre-emption or ‘conflict’ pre-emption.”³⁰

Congress engages in field preemption when it has intended to foreclose any state regulation in the area, regardless of any inconsistency between the state regulation and federal standards. Conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.³¹

Courts have held that local and state laws, addressing a wide array of topics, are preempted under federal law. These include laws regulating pharmaceuticals,³² intellectual property,³³ nuclear power,³⁴ immigration,³⁵ and, most relevant to the immediate issue, the national airspace.³⁶

Preemption of Municipal Regulations Affecting Air Traffic

The application of the preemption doctrine to aircraft operations is not a new idea. For decades, various federal courts, including the U.S. Supreme Court, have evaluated whether local attempts to regulate aircraft operation are preempted under federal law. While federal courts have not held that the entire field of aviation, or that of air safety, is preempted by the Federal Aviation Act³⁷ or other federal law, courts have held that attempts by local municipalities to regulate flights over local airspace do conflict with federal law.

The leading preemption case on this subject is the Supreme Court’s decision in *City of Burbank v. Lockheed Air Terminal*.³⁸ The owner of the

Hollywood-Burbank Airport brought suit asking for an injunction against the enforcement of a “curfew” ordinance adopted by the City Council of Burbank, prohibiting flights taking off or landing at the local airport between 11 pm and 7 am. The district court held that the ordinance was unconstitutional on the basis of the Supremacy Clause. The Supreme Court affirmed on this basis. The Court recognized:

Section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a), provides in part, “The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . .” By §§ 307(a), (c) of the Act, 49 U.S.C. §§ 1348(a), (c), the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of the navigable airspace, “in order to insure the safety of aircraft and the efficient utilization of such airspace . . .” and “for the protection of persons and property on the ground . . .”³⁹

The Court further considered the impact of the “curfew” ordinance on “airspace management,” which it explained is the exclusive province of the FAA. The Court recognized that noise control is a typical police power. But the Court reasoned that the impact of allowing the imposition of *curfew* ordinances on a nationwide basis would result in “bunching of flights” in the hours immediately before curfew, which would increase congestion and noise and reduce efficiency of the nationwide air traffic system. This “could create critically serious problems to all air transportation patterns.”⁴⁰

Other federal courts, considering local regulations that impact flight operations, have held similarly.⁴¹

Recently, the Third Circuit Court of Appeals provided additional clarification to the scope of federal preemption in the area of aviation safety.⁴² In *Sik-kelee v. Precision Airmotive Corp.*, the plaintiff alleged manufacturing and design defects in a Cessna 172N aircraft that crashed while being piloted by the plaintiff’s husband. The plaintiff’s amended complaint asserted state law claims of defective design and failure to warn but incorporated federal standards of care, alleging violations of numerous FAA regulations.⁴³ In

denying a dispositive defense motion, the court concluded that the Federal Aviation Act did not indicate a clear and manifest intent to preempt state law products liability claims.⁴⁴

In reaching this conclusion, the Third Circuit analyzed its prior holding in *Abdullah v. American Airlines, Inc.*⁴⁵ There the court considered the preemptive effect of federal in-flight seatbelt regulations on state law negligence claims involving a flight crew’s failure to warn passengers of severe turbulence. The court concluded that the Federal Aviation Act and federal regulations “establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions.”⁴⁶ The Third Circuit reviewed “several cases from the Supreme Court and our sister Circuits that had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise, pilot regulation, and control of flights through navigable airspace.”⁴⁷

The court held that, by contrast, the regulation of product liability did not conflict with federal law. The court’s reasoning was based upon the distinction between the product liability claims and “regulations governing in-flight operations” or regulations that “on their face prescribe rules governing the operation of aircraft.”⁴⁸ The federal regulations governing in-flight operations provide a “comprehensive standard of care,” analogous to common law tort, rendering existing state law standards of care “duplicative (if not conflicting [] outright).”⁴⁹

1. *Singer v. City of Newton*

To date, only one federal district court has addressed the preemption of a local drone ordinance.⁵⁰ In a case closely watched by the entire drone community, the District of Massachusetts in *Singer v. City of Newton* held that four provisions of a city ordinance, restricting drone flights over the City of Newton, Massachusetts, were preempted by federal law. The city appealed, but the appeal was voluntarily dismissed by stipulation on December 7, 2017.

Judge William Young’s opinion in *Singer* analyzed the interaction between Part 107 and the municipal

ordinance, which sought to restrict drone operations in the airspace over the city. The court based its holding on conflict preemption, as opposed to field preemption.⁵¹ This has left open the possibility that a municipality may pass a law regulating local drone operations that does not conflict with federal law. Nevertheless, the court's reasoning, applying principles of conflict preemption to the analysis of four separate provisions of the Newton ordinance, does support limitations on local municipalities' ability to regulate drones and in-flight operations. It also provides useful guidance to other courts analyzing similar ordinances in the future.

The factual background of this case is as follows: In December 2016, the City of Newton passed an ordinance that sought to regulate the operation of drones within the city limits.⁵² The city council resolved that, while it is important to allow beneficial uses of drones, "[i]n order to prevent nuisances and other disturbances of the enjoyment of both public and private space, regulation of pilotless aircraft is required."⁵³ The city government, however, likely anticipating a preemption challenge, also provided that it is "intended to be read and interpreted in harmony with all relevant rules and regulations of the Federal Aviation Administration, and any other federal state and local laws and regulations."⁵⁴

In February 2017, Dr. Michael Singer, a resident of Newton, filed a complaint, seeking declaratory and injunctive relief against enforcement of the Newton ordinance. Dr. Singer alleged that he was "certified as a small unmanned aircraft pilot, pursuant to 14 C.F.R. Part 107."⁵⁵ He pled that he was the owner of "two commercial-grade sUAS rotorcraft weighting over .55 pounds," and that he "has operated sUAS over public and private lands in Newton and Needham, Massachusetts, in accordance with 14 C.F.R. § 101 or § 107."⁵⁶

Dr. Singer challenged four separate provisions of the Newton ordinance:

- Section (b), which required all operators of pilotless aircraft to register their pilotless aircraft with the City Clerk's Office, either individually or as a member of a club.⁵⁷

- Section (c)(1)(a), which prohibited pilotless aircraft flight below an altitude of 400 feet over any private property without the express permission of the property owner.⁵⁸
- Section (c)(1)(e), which prohibited pilotless aircraft flight over public property without prior permission from Newton.⁵⁹
- Section (c)(1)(b), which states that no pilotless aircraft may be operated "at a distance beyond the visual line of sight of the Operator."⁶⁰

The court found that federal law preempted each of these restrictions in the Newton ordinance.⁶¹

As to section (b), the registration requirement, the court held that the FAA has explicitly "indicated its intent to be the exclusive regulatory authority for regulation of pilotless aircraft," and, consequently, "no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval."⁶²

As to sections (c)(1)(a) and (e), which require permission for flights over both public and private property, the court held that these sections "certainly reach[] into navigable airspace" and "this alone is grounds for preemption."⁶³ The court went on to explain that these two provisions together operated as a complete "ban on drone use within the limits of Newton."⁶⁴ The court found this conflicted with the FAA's general obligation to "use navigable airspace efficiently"⁶⁵ as well as the specific directive from Congress to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft system into the national airspace system."⁶⁶

Finally, the court reasoned that Newton's "visual observer" rule seeks to regulate "the method of operating of drones, necessarily implicate the safe operation of aircraft. Courts have recognized that aviation safety is an area of exclusive federal control."⁶⁷

Ultimately, *Singer* stands for the principle that even if a municipality may regulate certain aspects of drone operations, it cannot do so in such a way that affects operation in the national airspace.⁶⁸ The national

airspace remains the sole province of the federal regulatory system and Congress.

Decisions Post-Singer

No federal court since *Singer* has evaluated the district court's analysis of how 14 C.F.R. § 101 or § 107 operates to preempt local drone regulating ordinances. A recent decision by a district court in Puerto Rico evaluated a San Juan drone regulation and cited *Singer* approvingly, but ultimately resolved the issue without reaching the issue of preemption.

In *Pan Am v. Municipality of San Juan*,⁶⁹ the plaintiffs challenged a city ordinance that regulated the operations of businesses in Old San Juan during the 2018 San Sebastian Street Festivities. Among other things, this ordinance prohibited "the use of flying items, equipment or objects such as helicopters and drones during the Festivities, except those authorized by government agencies with authority in law, and those belonging to the Municipality, sponsors and parties responsible for production."⁷⁰ The plaintiffs argued that the ordinance was preempted by federal law.⁷¹ The court noted that the plaintiffs represented to the court that they were working with drone operators who had secured remote pilot certificates, under Part 107. For that reason, the court concluded the plaintiffs' proposed flights would comply with the ordinance because they would be "authorized by government agencies with authority in law," as the ordinance permits.⁷² The court therefore declined to enjoin the city from enforcing that aspect of the ordinance.

The court nevertheless noted in dicta that "there is authority to support" a preemption challenge to local drone laws, and cited *Singer v. City of Newton*.⁷³

Potential Impact of Singer

Singer expressly held that four categories of municipal regulation regarding drone flight conflicted with, and were therefore preempted by, federal law. While this is a single district court decision, Judge Young's analysis is clear and compelling. It seems likely

that any future court grappling with a similar municipal regulation would find *Singer* persuasive.

That said, *Singer* also left open the possibility that state and local authorities may regulate some aspects of drone operation. The court expressly refused to find that the FAA occupies the entire “field” of drone regulation; *Singer* holds that “federal regulations explicitly grant local authorities the power to co-regulate unmanned aircraft.”⁷⁴ Citing the FAA’s guidance, the court provides, as an example, that “State law or other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person’s use of a UAS.”⁷⁵

Ultimately, what *Singer* provides is guidance for courts analyzing preemption of municipal drone laws in the future. The question of preemption as to specific local laws will be decided based upon the specific character of the local restrictions imposed.

Proposed Uniform Law

In July 2018, the Uniform Law

Commission, which proposes uniform laws for individual state legislatures to consider, released a draft trespass law that would create a new tort targeted exclusively at drones and drone photography.⁷⁶ This law, if passed in the states, would create a cause of action under a per se, strict liability standard, for unconsented drone entry into private airspace up to 200 feet above ground level. The draft uniform law also provides a separate cause of action where a drone-equipped camera (1) captures a “person depicting private facts or a trade secret”; (2) is “acquired in a manner that is highly offensive to a reasonable person”; and (3) “is not otherwise protected by the First Amendment.” The drone-photography section would provide for rebuttable presumptions against the drone operator if the images were “not capable of being acquired from ground level or structures where an observer has a legal right to be” or were acquired by a drone committing a per se physical trespass.

In October 2018, a group of news organizations submitted a letter in

opposition to the current draft of the proposed uniform law.⁷⁷ The group noted that this new drone-tort law, if adopted by states, would further complicate the patchwork of state and local laws that already have emerged and put journalists at greater risk of litigation. The news organizations further noted that the law has token references to the First Amendment; it does not adequately protect journalists from liability for capturing images that would be entirely lawful for ground-based photography. Finally, they explained that if this uniform law were adopted, it would be challenged on the basis of preemption by federal law.

Local Drone Laws

Bard College’s Center for the Study of the Drone tracks local and state drone laws. As of March 2017, the Center has found 131 localities in 31 states that have enacted drone rules.⁷⁸ Many of these laws prohibit flying drones over public property and private property without the property owner’s consent.⁷⁹

Of these, we have identified several

Municipality	Ordinance	Basis of Challenge
East Goshen, PA	<p>Ordinance No. 129-B-2015: “An Ordinance of East Goshen Township Regulating the Use and Operation of Model Aircraft and Amateur Rockets in the Township.”</p> <p>While using the term “Model Aircraft,” the definition of the term, under the Ordinance, includes UAS: “Any unmanned aerial vehicle, including without limitation, model airplanes, remote controlled aircraft and drones and the equipment associated with such unmanned aerial vehicle.”</p> <p>This Ordinance prohibits operation of any Model Aircraft “at an elevation of less than two hundred (200) feet over property not owned by the Operator without the permission of the Property Owner.”</p> <p>The Ordinance further prohibits operation of a Model Aircraft “on all Township Property and within Township and Penn DOT road right-of-ways, unless specifically approved by the Board of Supervisors.”</p>	<p>As in <i>Singer</i>, the East Goshen Ordinance limits drone operation in navigable airspace above both private and public property in the town. In addition, collectively, this regulation prevents any drone operation without prior permission. These flight restrictions are analogous to the restrictions imposed by Newton, Massachusetts, in <i>Singer</i>.</p>
Willistown, PA	<p>Ordinance No. 8 of 2016: “An Ordinance Amending the Code of Willistown Township by Adding a New Chapter to Part II, General Legislation, Regulating the Use and Operation of Model Aircraft, Amateur Rockets, Unmanned Aircraft Systems and Flying Objects of a Similar Nature in the Township.”</p> <p>The Ordinance prohibits the operation of UAS “at an elevation of less than two hundred (200) feet over property not owned by the Operator without the permission of the Property Owner.”</p> <p>The Ordinance further prohibits operation of UAS “on all Township Property and within Township and Penn DOT road right-of-ways, unless specifically approved by the Board of Supervisors.”</p> <p>This Ordinance also contains a “savings clause,” which states that “The operation of an Unmanned Aircraft System, as that term is defined herein, shall be in compliance with the requirements set forth in Subtitle B of the FAA Modernization and Reform Act of 2012 (‘FMRA’) as such regulations may be amended from time to time.”</p>	<p>The language in the Willistown Ordinance tracks that used in East Goshen, and would be preempted, pursuant to the analysis presented in <i>Singer</i>.</p> <p>While this ordinance contains a savings clause, which provides that drone operation shall be in compliance with federal law, the court in <i>Singer</i> did not find a savings clause persuasive in light of the direct conflict between the ordinance’s prohibitive effects and federal law.</p>

Municipality	Ordinance	Basis of Challenge
Hempstead, NY	<p>Chapter 77, Section 77-8: "Regulation of Use of Unmanned Aircraft in the Vicinity of Town Facilities."</p> <p>This ordinance prohibits the "operation of any UAS on, near, or above any property maintained, occupied, controlled, or owned by the Town of Hempstead or any of the Town departments by any private, commercial, or business person or entity without having first sought and received approval of such use from the Town of Hempstead."</p>	<p>As in <i>Singer</i>, this ordinance restricts drone operation in airspace above the municipality. Unlike <i>Singer</i>, however, it only applies to flights over public property and does not propound restrictions of flights over private land. Nevertheless, the court in <i>Singer</i> noted that any local attempt to regulate drone operation in "navigable airspace" is alone grounds for preemption. Here the regulation necessarily regulates navigable airspace, as the regulation provides no limiting bounds.</p>
Narragansett, RI	<p>Section 46-16: "Unmanned aircraft systems, commonly known as drones; public safety, personal privacy."</p> <p>"This section is intended to promote personal privacy, public safety, and protecting people who patronize Narragansett municipal venues and attend large public events from the flying of unmanned aircraft systems ('UAS') in and over such large gatherings of people. The town council wishes to regulate the use of UAS, commonly known as drones, within a thousand-foot radius around the town beach during beach season and over other large venue special events in public parks, public facilities, streets, plazas, open spaces and the like that will attract large groups of people. All restrictions are intended to protect persons gathered in groups where a UAS incident would cause greater harm and risk of injury due to a greater number of people gathered in a close proximity."</p> <p>Section 46-16(c)(1): "UAS are prohibited from being deployed, launched or flown in any airspace within 500 feet or over the town beach during beach season, any large venue special event in the Town of Narragansett, and over public parks, roads and public facilities during large venue special events."</p> <p>Section 46-16(c)(2)b: "UAS over five pounds may be operated only by a registered member of the Academy of Model Aeronautics (AMA), if the operator is subjected to and compliant with AMA rules. Notwithstanding the weight limit, all other provisions of this section shall apply."</p> <p>Section 46-16(d)(1): "An event principal, or their designee, may apply for a permit to operate a UAS in conjunction with a permit to organize a large venue special event. Such permit will be issued at the sole discretion of the town, based on considerations of the type of activities which would tend to damage private/public property, endanger the public or event attendees, or which are likely to create an atmosphere which would discourage use of town-owned property, other locations or venues for their intended purpose."</p>	<p>This regulation prohibits the operation of drones in any airspace within 500 feet to the town beach during beach season. It further restricts operation over public events. Both seek to regulate navigable airspace, which, under <i>Singer</i>, would result in preemption.</p> <p>This regulation is more specific to certain events and appears intended to be an exercise of the municipalities' police powers. Courts, however, have reasoned that, when evaluating preemption, the relevant inquiry is the effect of the local regulation, and not the intent.⁸⁰ Here the effect is clearly the restriction of drone flights in navigable airspace.</p> <p>In addition to attempting to regulate flight above the town, this regulation also imposes a specific registration requirement upon drone pilots. In <i>Singer</i>, the Court stated that "The FAA [] explicitly has indicated its intent to be the exclusive regulatory authority for registration of pilotless aircraft."⁸¹ Consequently, this provision appears susceptible to challenge.</p>
Kennebunk, ME	<p>Kennebunk Town Ordinances Section 20.19: "Drones"</p> <p>"Drones shall not be allowed for use in Town parks or facilities without authorization from the Parks & Recreation Director or his/her designee except at such places as may be established for such purposes as per Town policy."</p>	<p>This ordinance would have the effect of restricting drone operation in navigable airspace above the town, and therefore would be preempted, pursuant to <i>Singer</i>.</p>

Municipality	Ordinance	Basis of Challenge
Barnstable, MA	Town of Barnstable Code § 401A-6(C): “Prohibited activities” This ordinance prohibits “[u]sing, launching, landing or operating an unmanned aircraft from or on land or waters associated with any of the Town of Barnstable bathing beaches . . . except as approved in writing by the Town Manager.”	This ordinance is susceptible to challenge for the same reason identified above.
Chicopee, MA	City Ordinance Chapter 186: “Drones; Regulation of Unmanned Aircraft Systems” § 186-4(B): “A drone and/or aircraft shall only take off and land on private property owned by the operator or where written permission is granted by the landowner.”	This ordinance is susceptible to challenge for the same reason identified above.
Holyoke, MA	Sec. 54-22: “Regulation of unmanned aircraft systems (drones)” “A drone may take off from . . . such private and public property after having received the prior written consent of that property owner.”	This ordinance is susceptible to challenge for the same reason identified above.
Lebanon, CT	Lebanon Zoning Regulations, Article IV: Use District Regulations” 4.1.1 “Prohibited Uses” Section 4.1.1(a)(3) prohibits the use of “Drones or unmanned aircraft” in any “Use District” of the City.	This ordinance is susceptible to challenge for the same reason identified above.

regulations that seem particularly analogous to the ordinance considered in *Singer*, and therefore run the risk of being found preempted by federal law. The table identifies these municipalities, excerpts the relevant statutory text, and provides a description of the basis, upon which this ordinance may be challenged.

Federal UAS Integration Pilot Program

A month after *Singer*, the Trump administration released a Presidential Memorandum that suggests the federal government is eager—in the minds of some, too eager—to find a clear path for state and local governments to navigate their drone ordinances through the turbulent issues of federal preemption.

The Presidential Memorandum calls for state, local, and tribal governments to partner with industry “to test within their jurisdictions the integration of civil and public UAS operations into the NAS below 200 feet,” or up to 400 feet if the Secretary of Transportation decides to adjust the parameters.⁸² The DOT and FAA are further directed to enter into agreements with “selected governments to establish the terms of their involvement in the UAS operations within their jurisdictions” and “to grant exception, authorizations and waivers from FAA drone regulation to conduct

the testing.”⁸³

The FAA, following the memorandum, launched a website to permit interested governments to submit proposals for experimental programs with private entities, and for private entities to register their interest in participating.⁸⁴ Prior to its launch, some who have closely watched the federal government’s drone policy evolve over the past few years expressed concern that the program may lead to further freedom for local drone regulation.⁸⁵

To date the FAA has chosen ten lead municipal organizations to participate in the program. CNN Air is a partner in three of those. Each has submitted a proposal identifying certain goals for the program, including evaluating night operations, flights over people and beyond the pilot’s line of sight, package delivery, detect-and-avoid technologies, and the reliability and security of data links between pilot and aircraft.

Conclusion

While the issue has not been extensively litigated, the holding in *Singer*—and the prior decisions rejecting municipal attempts to legislate air traffic in other contexts—indicate that courts are predisposed to reject local attempts to encroach on the exclusive province of the federal government to regulate the national airspace. The proposal for

a new uniform tort law raises continuing concerns regarding how state legislatures may seek to treat drone operators in the future. Nevertheless, local “drone-free” ordinances are not likely to appear on nearby horizons, if the evolving drone community stands willing to ask courts to enforce the preemption doctrine. ■

Endnotes

1. Drones were used extensively in the coverage of the 2017 Hurricanes Harvey, Irma, and Maria; the devastation caused by Hurricane Michael in Mexico Beach, FL, in 2018; continuing news coverage along the southern U.S. border; the migrant caravans traveling in Central America; the existence and expansion of I.C.E. detention facilities near the southern border; and catastrophic flooding in the Carolinas.

2. The FAA’s regulations apply to “commercial” drone operations, which the agency considers any use of a drone for remuneration. Of course, the U.S. Supreme Court long has recognized that the First Amendment fully protects the gathering and dissemination of news, even for money. *See 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. Commw. 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.”; *Lovell v. Griffin*, 303 U.S. 444 (1938) (statute requiring license for the distribution of printed matter violated First Amendment); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (tax designed to limit circulation of information was an unconstitutional abridgment of freedom of the press).

3. 2017 WL 4176477 (D. Mass. Sept. 21, 2017); see also *Pan Am v. Municipality of San Juan*, No. 18-1017 (PAD), 2018 U.S. Dist. LEXIS 208014, at *69 (D.P.R. Dec. 10, 2018) (citing *Singer*, without deciding, as support for a preemption argument).

4. FAA Modernization and Reform Act, Pub. L. No. 112-95, 126 Stat. 11 (2012).

5. JOINT PLANNING & DEV. OFFICE, FED. AVIATION ADMIN., UNMANNED AIRCRAFT SYSTEMS (UAS) COMPREHENSIVE PLAN at 5 (Sept. 2013), available at https://www.faa.gov/about/plans_reports/congress/medial/uas_comprehensive_plan.pdf?

6. FAA Modernization and Reform Act, § 332(a)(1), 126 Stat. at 73.

7. *Id.* § 332(b)(1).

8. 14 C.F.R. § 107 et seq.

9. *Id.* § 107.3.

10. *Id.* § 107.31.

11. *Id.* § 107.31(a).

12. *Id.* § 107.51.

13. *Id.* § 107.51(b)(1).

14. *Id.* § 107.25(a).

15. *Id.* § 107.25(b).

16. *Id.* § 107.51.

17. *Id.*

18. *Id.* § 107.49.

19. See *id.* § 107.41.

20. *Id.* § 107.12.

21. *Id.*

22. Ayesha Shakya, *Drones Help Journalists Gain a New Perspective*, NEWS LITERACY 2017 (Mar. 2, 2017), <http://projects.nyujournalism.org/newsliteracy2017/topics/drone-journalism/>.

23. *Id.*

24. Josh Haner & Larry Buchanan, *5 Times Drones Told the Story*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/world/5-times-drones-told-the-story.html>.

25. Janus Kopfstein, *Police Are Making It Impossible to Use Drones to Document Protests*, VOCATIV (Jan. 27, 2017), <http://www.vocativ.com/396662/police-drone-journalists-protests/>.

26. *Id.*

27. *Id.*; *Here’s How Drones Are Transforming News Media*, BUS. INSIDER (Jan. 3, 2017), <http://www.businessinsider.com/heres-how-drones-are-transforming-news-media-2017-1>.

28. *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 83 (3d Cir.), *as amended* (Jan. 25, 2017), *cert. denied sub nom.* Alban v. Nippon Yusen Kabushiki Kaisha, 138 S. Ct. 114, 199 L. Ed. 2d 31 (2017) (citing U.S. CONST. art. VI, cl. 2); see also *Freedman v. Redstone*, 753 F.3d 416, 429–30 (3d Cir. 2014) (citing *Hillsborough Cty., Fla., v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, (1985); *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010)).

29. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015).

30. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 605 (4th Cir. 2017) (citing *Oneok*, 135 S. Ct. at 1595).

31. *Id.* (citations omitted); *accord Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012); *Soo Line R.R. Co. v. Werner Enters.*, 825 F.3d 413, 420 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1224, 197 L. Ed. 2d 477 (2017).

32. See *Guilbeau v. Pfizer Inc.*, 880 F.3d 304, 318 (7th Cir. 2018).

33. See *Amgen Inc. v. Sandoz Inc.*, 877 F.3d 1315, 1327 (Fed. Cir. 2017).

34. See *Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983); see also *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004); *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008).

35. See *Arizona v. United States*, 567 U.S. 387 (2012).

36. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

37. See *Federal Aviation Act of 1958*, Pub. L. No. 85-726, 72 Stat. 731.

38. 411 U.S. 624, 626 (1973).

39. *Id.* at 626–27.

40. *Id.* at 640.

41. See *Am. Airlines v. Town of Hempstead*, 398 F.2d 369, 376 (2d Cir. 1968) (holding that a municipal noise ordinance improperly regulated flight paths); *Am. Airlines v. City of Audubon Park*, 407 F.2d 1306 (6th Cir. 1969) (holding ordinance prohibiting flights over municipality below 750 feet was unconstitutionally preempted). Collectively, these decisions establish that a municipality cannot constitutionally regulate the operation of aircraft in the nation’s navigable airspace. See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 688–89 (3d Cir. 2016) (noting

federal preemption of municipal laws seeking to regulate “in-air operations”) (citing *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 369–71 (3d Cir. 1999)). See also *Good-speed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 208 (2d Cir. 2011) (“Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field.”); *US Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (“[F]ederal regulation occupies the field of aviation safety to the exclusion of state regulations.”); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007) (“Congress has indicated its intent to occupy the field of aviation safety.”). *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989) (“Congress intended to occupy the field of pilot regulation related to air safety.”).

42. See *Sikkelee*, 822 F.3d at 688–89.

43. *Id.* at 686.

44. *Id.* at 696.

45. 181 F.3d 363.

46. *Id.* at 365.

47. *Sikkelee*, 822 F.3d at 689 (citing *Abdullah*, 181 F.3d at 369–71).

48. *Id.* at 695.

49. *Id.*

50. See *Singer v. City of Newton*, 2017 WL 4176477 (D. Mass. Sept. 21, 2017).

51. The question of preemption is one of congressional intent. *Amgen Inc. v. Sandoz Inc.*, 877 F.3d 1315, 1326 (Fed. Cir. 2017); *accord Singer*, 2017 WL 4176477, at *3. Consequently, Congress may expressly state that it is preempting state law in a particular area. This is the easy case. More complex, however, is implied preemption, which can occur through either “field” preemption or “conflict” preemption. “Under field preemption, ‘state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.’” *Amgen*, 877 F.3d at 1326 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990)). To find field preemption, the court determines if the relevant “‘scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Conflict preemption, on the other hand, occurs “where it is impossible for a private

party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (citing *English*, 496 U.S. at 79). “When these state and federal duties create an actual conflict between state and federal law such that it is impossible for a person to obey both, federal law controls and the state-law tort claims must be dismissed.” *Guilbeau v. Pfizer Inc.*, 880 F.3d 304, 310 (7th Cir. 2018).

52. *See* Newton Ordinances § 20-64 (Dec. 19, 2016) [hereinafter Newton Ordinances].

53. *Singer*, 2017 WL 4176477.

54. *Id.*

55. First Amended Complaint for Declaratory & Injunctive Relief ¶ 25, *Singer v. City of Newton*, No. 17-10071 (D. Mass. Feb. 10, 2017).

56. *Id.*

57. Newton Ordinances § 20-64(b).

58. *Id.* § 20-64(c)(1)(a).

59. *Id.* § 20-64(c)(1)(e).

60. *Id.* § 20-64(c)(1)(b).

61. *Singer v. City of Newton*, 2017 WL 4176477, at *4–6 (D. Mass. Sept. 21, 2017). Although the court held that the Newton ordinance was preempted based upon its conflicts with federal law, the court also considered, and rejected, the plaintiff’s argument regarding “field preemption.” “Field preemption occurs where federal regulation is so pervasive and dominant that one can infer Congressional intent to occupy the field.” *Id.* at *3 (citing *Mass. Ass’n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999)). The court in *Singer* stated that “federal regulation explicitly grants local authorities the power to co-regulate unmanned aircraft.” *Id.*

Certain legal aspects concerning small

UAS use may be best addressed at the State or local level. For example, State law and other legal protection for individual privacy may provide reoccurs for a person whose privacy maybe affected through another person’s use of a UAS. *Id.* (citing 81 Fed. Reg. 42063, 42194, § III(K)(6)).

62. *Id.* at *4.

63. *Id.* at *5 (citing 49 U.S.C. § 40102(a)(32) (defining “navigable airspace” as “airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft”).

64. *Id.*

65. *Id.* (citing 49 U.S.C. § 40103(b)(2)) (The FAA is charged with “prescribing air traffic regulation on the flight of aircraft for – (A) navigating, protecting and identifying aircraft; (B) protecting individuals and property on the ground; [and] (C) using the navigable airspace efficiently.”).

66. *Id.* (citing FAA Modernization and Reform Act, Pub. L. No. 112-95, § 332 (2012)).

67. *Id.* (collecting cases).

68. *See id.* at *3.

69. No. 18-1017 (PAD), 2018 U.S. Dist. LEXIS 208014 (D.P.R. Dec. 10, 2018).

70. *Id.* at *69.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Singer v. City of Newton*, 2017 WL 4176477, at *3–4 (D. Mass. Sept. 21, 2017).

75. *Id.* at *4 (citing 81 Fed. Reg. 42063, 42194 § III(K)(6)).

76. TORT LAW RELATING TO DRONES ACT (NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, Draft June 19, 2018).

77. Letter from Charles D. Tobin,

on behalf of the News Media Coal., to Anita Ramasastry, for the Uniform Law Comm’n (Oct. 1, 2018), <https://my.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0d27c1f7-ff43-1122-f632-d8d55b148970&forceDialog=0>.

78. Arthur Holland Michel, *Local and State Drone Laws*, DRONES AT HOME (Ctr. for the Study of the Drone at Bard Coll., Mar. 2017), available at <http://dronecenter.bard.edu/state-and-local-drone-laws/>.

79. *Id.*

80. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 107 (1992) (“Whatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field.”).

81. *Singer v. City of Newton*, 2017 WL 4176477, at *4 (D. Mass. Sept. 21, 2017).

82. Presidential Memorandum for the Sec’y of Transp. (Oct. 25, 2017), available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-transportation/>.

83. *Id.*

84. *UAS Integration Pilot Program*, FED. AVIATION ADMIN., https://www.faa.gov/uas/programs_partnerships/integration_pilot_program/.

85. Media & Entm’t Law Grp., *White House Announces Possible Precursor to Stricter Local Regulation for Drone Journalism*, BALLARD SPARH (Oct. 26, 2017), <http://www.ballardspahr.com/alertspublications/legalalerts/2017-10-26-white-house-announces-possible-precursor-stricter-local-regulation-drone-journalism.aspx>.