STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP001814

VILLAGE OF DEFOREST,

Plaintiff-Respondent,

vs.

ALEXEI STRELCHENKO,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, BRANCH V, THE HONORABLE JUDGE MCNAMARA, PRESIDING.

Respectfully Submitted,

ALEXEI STRELCHENKO,
Defendant-Appellant

380 Campbell Hill Court,
DeForest, WI 53532
(608) 515-0994

ARGUMENTS

A. REGARDING THE DANGERS OF MONOPOLIZATION OF UAS USE EXCLUSIVELY BY THE GOVERNMENT AND FOR THEIR AGENDA

The late Justice Scalia once wrote that in order to persuade a judge to your cause, you must demonstrate that not doing so will have an even greater adverse effect on individual rights in the future. Our collective civilian right to fly UAS's is being threatened by one's supposed and subjective right to become "disturbed" or "fear for their safety." But the people who enforce those rights will take away the regular citizen's ability to fly, observe, and record law enforcement based on someone being "disturbed" by new and unfamiliar technology.

In other words, if you give police the sole power to decide who will get costly citations for piloting UAS's and who does not; they will ultimately monopolize the technology and use it for their causes when it suits them best. In fact, one such case played itself out before the very circuit court this appeal originated from. This is the case of State of Wisconsin vs. Marquis M I Phiffer (2015CF001339), in which Middleton Police used a UAS to find and locate an innocent black man and flew the drone literally within 10 feet of his head, according to the footage obtained through open records (and can be viewed online here: https://www.youtube.com/watch?v=Nx2NXL2Gmk0). The court did not ask Mr. Phiffer if he was "disturbed" by this flight and no one from Middleton's Police Department was charged with Disorderly Conduct or Unlawful Use of Drone.

What's more, the operator of the UAS was not reported to the FAA through CEDAR or the National Program Tracking and Reporting Subsystem (NPTRS), because those tools are only available to law enforcement to report citizens. Police would never use them (based on their "officer discretion," which is really nothing more than an excuse to hide their own violations of the law) to report another officer of not holding a pilot's license (14 CFR 61.3), not having an airworthiness certificate (14 CFR Part 91.203), or not having their UAS properly registered with the FAA (49 USC § 44101, 49 USC § 44103 and 14 CFR Part 91.203); each violation costing $1,100 per flight (or $3,300 in total fines in this case as soon as their UAS lifts off the ground). This creates a dichotomy in legal usage of aircraft for surveillance since the gatekeepers who decide on enforcement of laws existing on the books want to have their cake and eat it too. Take for example the Supreme Court case of *Florida v. Riley, 488 U.S. 445* (1989) in which police officers used an aircraft to literally look inside of Mr. Riley's home, in the middle of which Mr. Riley had removed two roof panels and built a greenhouse in which he cultivated marijuana plants. According to the US Supreme Court, the police officers did not need a warrant to see into his home because they were in the sky and the sky is a public place, therefore there is no reasonable expectation of privacy in a public place, namely the sky. Police want to use aircraft when it suits their needs, but when aircraft piloted by citizens observe them, they certainly are quick to canvass a neighborhood around an UAS landing spot looking for anyone who may have been "disturbed" by the aircraft's mere presence, as it so seems here. Worse yet is if the courts continue to allow this monopolization of

new technology for police benefit, all citizens, not just UAS pilots, stand to lose the civil liberties of free travel, as well as the civil and Constitutional Rights to observe and survey the government.

It is also interesting to note that the government's standard for what constitutes a "search" is much higher than that of the average citizen's. For example, per *Kyllo v. United States*, 533 U.S. 27 (2001), the police need to secure a search warrant before they use a thermal imaging device on a private residence for detecting heat signatures that are supposedly associated solely with grow lamps being used to grow marijuana, but any private citizen could use a thermal imaging device on their neighbor's house without the violation of any laws. Unless of course that neighbor becomes somehow aware that this new technology is being used to look at their property and becomes "disturbed" by knowing that fact, but I digress... In either case, if the government can (and did) fly an aircraft and look inside a private citizen's house, a citizen should have if not the same but more rights to fly their aircraft and observe whatever it is that they like to observe as permitted by the federal government, which continues to retain exclusive sovereignty of US airspace.

B. REGARDING STATUTORY AND CASE LAW OF FEDERAL PREEMPTION OF LOCAL REGULATION OF AIRCRAFT

By federal statute, "[t]he United States Government has exclusive sovereignty of airspace of the United States" (49 U.S. Code § 40103(a)(1)). The passage of the Federal Aviation Administration Modernization and Reform Act (FMRA) of 2012,

Pub.L. 112-95 confirms the federal government's intent to continue to "occupy the field" of flight through the National Airspace System (NAS), thereby invalidating (through preemption) any state or local laws that purport to regulate it. As such, Wis. State Stat. 942.10 Use of Drone is invalidated by the federal government's intent to occupy the field of flight through the National Airspace System (NAS) as it is a form of regulation on aircraft, and so is DeForest's Ordinance Amending Sec. 10.01 of the DeForest Municipal Code to Prohibit the Unlawful Use of Drones. Out of desperation, the opposing counsel tries to confuse the issue by citing local and state laws that really have nothing to do with aircraft in the NAS, or with flight of aircraft in the NAS. That is why I will cite case law that deals exclusively with aircraft and flight.

Even as far back as in 1944, the US Supreme Court ruled in *Northwest Airlines v. State of Minnesota*, 322 U.S. 292, 303 (1944) that "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive." Jackson goes on to state concurring that "Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

Now what if DeForest residents start complaining about the much larger planes creating too much noise above their houses and in the NAS, would a local law to fine those pilots pass muster before the courts? What about instead of outright prohibition, DeForest passes a law on eligible times during which aircraft can traverse the sky? For example, "not at night," because that is when people sleep and they don't want to be disturbed or fear for their safety when metal objects weighing thousands of pounds

that have been known in the past to crash into houses and kill the occupants of those houses, etc. Would such a law be subject to preemption, according to the Supreme Court? Yes, as seen in *Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973) the court ruled that "If we were to uphold the Burbank ordinance [which placed an 11 p.m. to 7 a.m. curfew on jet flights from the Burbank Airport] and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." Likewise, if one state allowed for the issuance of Disorderly Conduct tickets to UAS pilots who fly their craft "too low," how are Amazon Prime Air pilots working with the federal government to deliver packages to civilian residents supposed to do their job without fear that somebody might be "disturbed" by their work. We are not overly disturbed when a mail carrier or the UPS man delivers to us our neighbor's package by accident, but what if an Amazon Prime pilot delivers a package to an incorrect house, where a poorly educated elderly person is tending to his or her flowerbed in the front lawn – he or she would be mortified, but then again, no actual laws were broken. In the absence of any federal statute, regulation or case law that prohibits a particular activity, such activity is completely legal. That's how the law works. Nothing is illegal solely because a government agency claims that it's illegal (i.e. DeForest Police).

There is also case law within the courts of appeals in various jurisdictions to support my claim of preemption. In *Gustafson v. City of Lake Angeles*, 76 F.3d 778,

792-793 (6th Cir. 1996), the court ruled that "Air traffic must be regulated at the national level. Without uniform equipment specifications, takeoff and landing rules, and safety standards, it would be impossible to operate a national air transportation system." Once again, the court points out that aircraft are to be regulated at the national level, and never by a local government.

This is yet once again reiterated when the court ruled that "The purpose, history, and language of the FAA [Act] lead us to conclude that Congress intended to have a single, uniform system for regulating aviation safety. The catalytic events leading to the enactment of the FAA [Act] helped generate this intent. The FAA [Act] was drafted in response to a series of fatal air crashes between civil and military aircraft operating under separate flight rules .... In discussing the impetus for the FAA [Act], the Supreme Court has also noted that regulating the aviation industry requires a delicate balance between safety and efficiency. It is precisely because of 'the interdependence of these factors' that Congress enacted 'a uniform and exclusive system of federal regulation.'" *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007), citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-39 (1973), a Supreme Court case that I previously mentioned, but it doesn't end there, Montalvo at 472 clearly prohibits local governments from regulating airspace "[W]hen we look to the historical impetus for the FAA, its legislative history, and the language of the [FAA] Act, it is clear that Congress intended to invest the Administrator of the Federal Aviation Administration with the authority to enact exclusive air safety standards. Moreover, the Administrator has chosen to exercise

this authority by issuing such pervasive regulations that we can infer a preemptive intent to displace all state law on the subject of air safety."

Lastly, we have *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989), which states that "[W]e remark the Supreme Court's reasoning regarding the need for uniformity [concerning] the regulation of aviation noise, see *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), and suggest that the same rationale applies here. In Burbank, the Court struck down a municipal anti-noise ordinance placing a curfew on jet flights from a regional airport. Citing the 'pervasive nature of the scheme of federal 7 regulation,' the majority ruled that aircraft noise was wholly subject to federal hegemony, thereby preempting state or local enactments in the field. In our view, the pervasiveness of the federal web is as apparent in the matter of pilot qualification as in the matter of aircraft noise. If we upheld the Rhode Island statute as applied to airline pilots, 'and a significant number of [states] followed suit, it is obvious that fractionalized control ... would severely limit the flexibility of the F.A.A ....' [citing Burbank] Moreover, a patchwork of state laws in this airspace, some in conflict with each other, would create a crazyquilt effect... The regulation of interstate flight-and flyers-must of necessity be monolithic. Its very nature permits no other conclusion. In the area of pilot fitness as in the area of aviation noise, the [FAA] Act as we read it 'leave[s] no room for ... local controls.' [citing Burbank]." Can we imagine the burden that an Amazon Prime Air pilot or a Google Project Wing pilot would have to learn this "crazy quiltwork" of overlapping laws in different towns and villages? He or she might be a-okay flying in Madison to deliver packages but in

DeForest the police track down the pilots and give them tickets? It's nonsense. Therefore, if local and state governments are barred by law from regulating activities that take place in the National Airspace System, it could only stand to reason that they subsequently lack jurisdiction to apply existing umbrella ordinances (such as the overbroad disorderly conduct) over activities in the National Airspace System as well.

The strongest argument the opposing counsel has is the citation of statutory law on how Wisconsin has jurisdiction of the "Superadjacent Airspace," which she defines as airspace that is "non-navigable" by aircraft. However, this concept is self-defeating since an aircraft traversing such airspace becomes *prima facie* that in fact this airspace is indeed navigable! The fact is, what is defined as "navigable airspace" varies not only on the terrain of the airspace itself, but also the type of aircraft traversing it. While a Flirtey UAS piloted by 7-Eleven pilots was able to deliver a customer's order of a chicken sandwich, donuts, candy, Slurpees and hot coffee right into the customer's hands, a Boeing 747 aircraft would be able to do no such thing. Therefore, if an aircraft is flying through or flew through airspace that is navigable, then that airspace is no longer the "Superadjacent Airspace" that the response brief claims would have given a local government jurisdiction; it is instead, navigable airspace controlled solely by the United States Government.

CONCLUSION

In a single sentence, in order to vacate, reverse, or dismiss the two Disorderly Conduct citations remaining against the defendant, Alexei N. Strelchenko, for flying an Unmanned Aerial System (UAS) over private property, the court simply needs to reverse engineer the legal logic that would apply if the defendant piloted a helicopter, or a hot-air balloon over the "victim's" property, since the federal government considers all 3 of these to fit in the broad category of being "aircraft" according to *Michael P. Huerta v. Raphael Pirker* (N.T.S.B. Nov. 17, 2014) (Docket No. CP-217). With that decision, the federal government asserted regulatory control over UAS's as being aircraft; but also with it, gave all the federal protections that "aircraft" have in the National Airspace System (NAS), including the right to traverse navigable airspace as the pilot wishes in the pursuit of freedom, liberty, and happiness. Consider the alternative, every pilot or aeronaut whose aircraft causes a noise disturbance or, as in this case, a disturbance with its mere presence, would be subjected to thousands of dollars in fines by the village – it's simply asinine and bad case precedent for the future of UAS technology. The Supreme Court stated in *Altria Group v. Good*, 555 U.S. 70 (2008), a federal law that conflicts with a state law will trump, or "preempt", that state law. Clearly, the Disorderly Conduct law interferes with a Title 49 U.S. Code § 40103(a)(2)), which states that, "A citizen of the United States has a public right of transit through the navigable airspace," and clearly a county or village court would not have legal jurisdiction to hear these illegally issued citations for aircraft being flown in the federally controlled National Airspace System

since prohibition is the ultimate in regulation and showering a pilot with thousands of dollars of fines is not just a "chilling effect," but an outright prohibitive effect.

Any state or local governments that have passed legislation that purports to regulate drone flight would be considered preempted by the federal government's intent to "occupy the field," and therefore be invalid. By federal statute, "[t]he United States Government has exclusive sovereignty of airspace of the United States" (49 U.S. Code § 40103(a)(1)). The passage of the FMRA confirms the federal government's intent to continue to "occupy the field" of flight, thereby invalidating (through preemption) any state or local laws that claim to regulate it. The citations issued were not by the US Government and therefore should be either dismissed, reversed, or vacated due to a lack of jurisdiction over the matter.

Dated at DeForest, Wisconsin, December 27th, 2016.

Respectfully Submitted,

BY:_____

ALEXEI STRELCHENKO,
Defendant-Appellant

380 Campbell Hill Court,
DeForest, WI 53532
(608) 515-0994

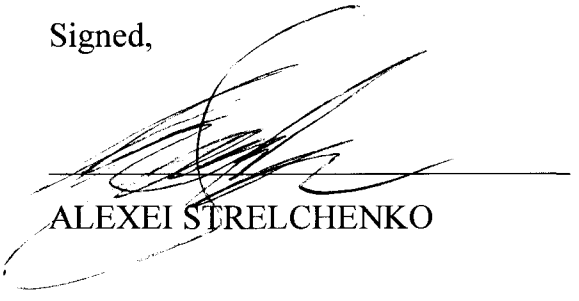
CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.1(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,868 words.

Dated: December 27th, 2016.

Signed,



ALEXEI STRELCHENKO