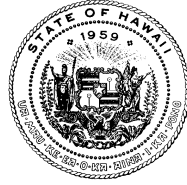


JOSH GREEN, M.D.  
GOVERNOR OF HAWAII  
KE KIA'AINA O KA MOKU'AINA 'O HAWAII



KENNETH S. FINK, MD, MGA, MPH  
DIRECTOR OF HEALTH  
KA LUNA HO'OKELE

STATE OF HAWAII  
DEPARTMENT OF HEALTH  
KA 'OIHANA OLAKINO  
P. O. BOX 3378  
HONOLULU, HI 96801-3378  
[doh.testimony@doh.hawaii.gov](mailto:doh.testimony@doh.hawaii.gov)

In reply, please refer to:  
File:

**Testimony COMMENTING on HB1201  
RELATING TO NOISE POLLUTION**

REPRESENTATIVE DELLA AU BELATTI, CHAIR  
HOUSE COMMITTEE ON Health & Homelessness

Hearing Date: 2/8/2023

Room Number: 329

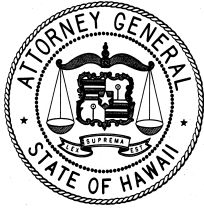
1 **Fiscal Implications:** This measure may impact the priorities identified in the Governor's  
2 Executive Budget Request for the Department of Health's (Department) appropriations and  
3 personnel priorities. Proposed requirements will require additional staff time and effort.  
4 **Department Testimony:** The Department respectfully comments on this measure which  
5 amends Chapter 342F, Hawaii Revised Statutes to address helicopters as a public nuisance due to  
6 noise pollution. The Department understands that this measure may be preempted by the federal  
7 government. The Department defers to testimony of the Department Attorney General.

8  
9

10 Thank you for the opportunity to testify.

11 **Offered Amendments:** None

12



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
KA 'OIHANA O KA LOIO KUHINA  
THIRTY-SECOND LEGISLATURE, 2023**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1201, RELATING TO NOISE POLLUTION.

**BEFORE THE:**

HOUSE COMMITTEE ON HEALTH AND HOMELESSNESS

**DATE:** Wednesday, February 8, 2023      **TIME:** 8:30 a.m.

**LOCATION:** State Capitol, Room 329

**TESTIFIER(S):** Anne E. Lopez, Attorney General, or  
Wade H. Hargrove III, Deputy Attorney General

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Chair Belatti and Members of the Committee:

The Department of the Attorney General provides the following comments.

This purpose of this bill is to add a new section to chapter 342F, Hawaii Revised Statutes (HRS), to make the sound generated by helicopters above a certain decibel level measured on the dBC weighting system a public nuisance and a violation of that chapter. It would allow the Department of Health (DOH) to respond to complaints, take readings of helicopter noise, and collect a fine of no less than \$5,000 for a first offense and \$10,000 for each subsequent offense. It would also create a private cause of action for individuals to seek an injunction and recover damages for violations of this new section.

The bill may be subject to challenge under the Supremacy Clause of the U.S. Constitution, which provides that state law is subordinate to federal law. U.S. Const., Art. VI, Sec. 2. Section 1108(a) of the Federal Aviation Act, as amended, provides that "The United States Government has exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1).

The responsibility of regulating air traffic, and the noise related to that air traffic, belongs exclusively to the federal government and any state or municipal effort to regulate in this area is subject to constitutional challenge and will be preempted by federal law. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). Congress granted to the Federal Aviation Administration (FAA) the obligation to regulate

all things related to aircraft and expressly preempted any state or local efforts to do so. City of Burbank, at 628-29.

Additionally, the United States Supreme Court has declared: “The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly[.]” Id. at 629 (quoting American Airlines v. Hempstead, 272 F. Supp. 226, 230 (E.D.N.Y. 1967)). The Noise Control Act of 1972 requires the FAA to specifically coordinate its adoption of regulations with the recommendations of the United States Environmental Protection Agency, further establishing the federal government’s paramount role in the regulation of noise related to air traffic not only as a flight-management issue but also as a matter of public health and safety (i.e., nuisance). Id. at 630-31. Consequently, the regulation of aircraft noise is the exclusive right of the federal government, and neither the State nor an individual may bring claims against helicopter operators for noise pursuant to the causes of action attempted to be created by this bill.

We appreciate the opportunity to testify on this measure.



February 7, 2023

HAWAII HOUSE OF REPRESENTATIVES  
COMMITTEE ON HEALTH & HOMELESSNESS

Rep. Della Au Belatti, Chair

Rep. Jenna Takenouchi, Vice Chair

Rep. Terez Amato

Rep. John M. Mizuno

Rep. Greggor Ilagan

Rep. Scott Y. Nishimoto

Rep. Bertrand Kobayashi

Rep. Diamond Garcia

Committee Hearing Date: February 8, 2023 @ 8:30AM

Aloha Chair Belatti, Vice Chair Takenouchi, and Committee Members,

Jack Harter Helicopters opposes the proposed changes HB1201 would make to Hawaii Revised Statute 342F.

Although the language in HB1201 is incomplete and missing the decibel level and the distance from an airport at which a violation of this proposed law would occur, it is clear that, if enacted, this bill would make flying a helicopter in the State of Hawaii almost impossible for commercial or personal use and flood our legal system with frivolous legal actions.

The US Congress has granted preemptive authority to the Federal Aviation Administration (FAA) over the operation of aircraft in the National Airspace System (NAS). This was done to provide for a safe and sustainable aviation system across the entire country. This bill would violate the FAA's sole jurisdiction of aircraft operations in the NAS by making the lawful operation of a helicopter in compliance with the Federal Aviation Regulations (FARs) a violation of a noise limit established in the Hawaii Revised Statutes.

The FAA is keenly aware of safety issues related to aviation. The FAA has some authority to establish noise limits in the areas surrounding airports for the sake of the communities surrounding these facilities that are vital to our economy. To the best of my knowledge, there has never been a helicopter that exceeded the FAA's noise limits during operation near an airport or heliport.

A bill similar to HB1201 was recently passed by the New York State Legislature. New York Senate Bill S7493 was vetoed by the governor of New York. A statement from the Helicopter Association International included the following information about the governor's veto,

*“In a statement announcing her decision, Governor Hochul cited preemption as her primary reason for the veto. “Recent federal case law makes clear that nonfederal actors must carefully consider how state and local restrictions interact with federal laws governing aviation and must be attentive to federally mandated processes for enacting policy in this area,” she said. “Certain elements of this legislation run counter to the federal scheme regulating New York’s airports and airspace. Therefore, I am constrained to veto this bill.””*

In a 2021 letter to Suzanne Case, former Chair of the Hawaii Department of Land and Natural Resources Land Board from Raquel Girvin, FAA Regional Administrator for the Western-Pacific Region, Ms Girvin explained in great detail the authorities and duties of the FAA and the authority of the State of Hawaii related to helicopter (aviation in general) noise. I have included that letter in this document and I am hopeful that this letter will help make it clear that the State of Hawaii would be in violation of the FAA’s congressionally-mandated, exclusive authority to regulate the National Airspace System if HB1201 was to be passed through the legislature and signed by the governor.

Thank you for considering our testimony and we urge your committee to **oppose passage of HB1201** through your committee.



Casey Riemer  
Special Project Manager



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

Western-Pacific Region  
Office of the Regional Administrator

777 S. Aviation Blvd., Suite 150  
El Segundo, CA 90245

August 13, 2021

Ms. Suzanne D. Case  
Chair, Hawaii Board of Land  
and Natural Resources  
P.O. Box 621  
Honolulu, HA 96809

**RE: Regulation of Helicopter Air Tour Operations**

Dear Ms. Case:

Thank you for your May 28, 2021 letter raising the issue of regulation of helicopter air tour flight paths throughout Hawaii and alerting us to community concerns in Hawaii regarding helicopter noise in residential neighborhoods, and over natural and cultural areas. You indicate that the Bureau of Land and Natural Resources (BLNR) has jurisdiction over the uses of State land, including the “staging and operation of aircraft in Hawai’i airports...,” and acknowledge that the Federal Aviation Administration (FAA) is the sole regulator of aircraft flight paths. Your letter requests the FAA to address community noise concerns through regulation and to confirm the agency’s position on the permissible scope of State regulation of helicopter flight operations.

Your letters seeks to:

1. Relay community concerns regarding “noise disruption and safety issues” from air tour helicopters, request the FAA to address these concerns through “meaningful regulation to avoid and mitigate these impacts,” and include community input in the process, and
2. Confirm the FAA’s position on the permissible scope of State regulation over helicopter flight regulations. You ask whether BLNR has the authority to condition its approval of leases and revocable permits in state airports for helicopter operations,” and regulate flight paths and “limits such as on altitude, frequency and time of operation, to minimize widespread disruption....”

Community Noise and Safety Concerns

Thank you for sharing community concerns regarding helicopter noise in residential neighborhoods and over natural and cultural areas in Hawaii. The FAA works with State and local government partners, within our respective Constitutional and statutory authorities, as well as operators and local communities to address citizens’ noise concerns through a variety of statutory, regulatory, and voluntary mechanisms. For

example, currently we are serving as a technical advisor to the Hawaii Air Noise and Safety Task Force; which was developed to address safety and noise issues related to rotor and fixed-wing aerial tours in the State of Hawaii. We champion efforts to advance the development and industry adoption of source reduction technologies and noise abatement operations. We have also promulgated informed, well-reasoned and scientifically grounded regulatory standards and noise policies intended to protect the traveling public and those on the ground.

The FAA is required by statute to protect the public health and welfare from aircraft noise by prescribing standards that measure aircraft noise and by promulgating regulations to control and abate aircraft noise (49 U.S.C. § 44715). FAA has fulfilled these requirements by promulgating noise certification standards for helicopters in 14 CFR part 36. Those regulations ensure that new helicopter type designs incorporate noise reduction technologies as needed to comply with lower noise limits. The most recent change in the certification regulations was the reduction to Stage 3 noise limits for newly certificated helicopter models. 79 FR 12040 (Mar. 4, 2014). As operators retire and replace older aircraft with those that meet the newer standards, community noise impacts are expected to improve.

The FAA also works to address helicopter noise with partners in academia through our ASCENT Center of Excellence<sup>1</sup> as well as with industry through collaboration with regional operators and with the Helicopter Association International (HAI) Fly Neighborly training program.<sup>2</sup> These efforts are designed to advance research and adoption of voluntary measures related to scheduling and flying aircraft to minimize the impact of noise on people on the ground. Noise abatement measures developed with input from engaged stakeholders remain one of the most effective approaches to reducing helicopter noise.

The FAA is committed to developing meaningful and equitable solutions to the complex and nuanced issue of aviation noise. We recently announced our plans to conduct a noise policy review that is informed by research and leverages the development of new analytical tools and technologies. This effort will build on our partnerships with academia, industry, and government to better understand, manage, and reduce the environmental impacts of aviation, including but not limited to noise. As a core part of this effort, we are encouraging input from a broad range of stakeholders, including local communities. This will not be a short, simple, or superficial undertaking and the FAA

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<sup>1</sup> Rotorcraft Noise Abatement Procedures <https://ascent.aero/project/rotorcraft-noise-abatement-procedures-development/>

<sup>2</sup> <https://www.rotor.org/initiatives/fly-neighborly>

encourages agency partners and communities to keep abreast of future opportunities to engage in dialogue with our agency.

### Permissible Scope of State Regulation of Helicopter Flight Operations

#### *Federal Statutory and Regulatory Framework*

In your letter, you acknowledge that the State's jurisdiction is "limited to the land disposition itself," and that the "regulation of flight paths is the sole jurisdiction of the FAA." Your understanding is correct: the States lack the authority to regulate aircraft operations, including helicopter flight paths.

Congress enacted an express preemption provision stating that, "a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The Supreme Court has interpreted the statute's "related to" language broadly, holding that it applies to State laws "having a connection with or reference to" prices, routes, and services. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

By statute, the FAA is obligated to regulate for safety; the efficient use of the airspace; protection of people and property on the ground; air traffic control; navigational facilities; and the regulation of aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, and 44701-44735. Congress has directed the FAA to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(b)(1). Other responsibilities of the FAA include prescribing air traffic regulations on the flight of aircraft for navigating, protecting, and identifying aircraft; protecting individuals and property on the ground; using the navigable airspace efficiently; and preventing collision between aircraft and between aircraft and land. 49 U.S.C. § 40103(b)(2). Since 1926, Federal law has provided that a citizen of the United States has a public right of transit through the navigable airspace. 49 U.S.C. § 40103(a)(2).

In furtherance of these statutory commands, the FAA has established a comprehensive regulatory scheme, governing, among other things, the certification of aircraft, airports, pilots and mechanics; aircraft equipage; air traffic control systems; aviation navigation and communication; airspace classifications, and more. The FAA has also promulgated safety regulations addressing commercial air tours nationally (14 CFR part 136, subpart A, *National Air Tour Safety Standards*) and specific regulations imposing special operating rules on air tour aircraft (including helicopters and special minimum flight altitudes for Hawaii) in Hawaii. See 14 CFR part 136, subpart A, *National Air Tour Safety Standards*, and Appendix A, *Special Operating Rules for Air Tour Operators in the State of Hawaii*. Since the 1950s, Federal courts in various circuits have upheld FAA's preemption of aviation safety and the efficiency of the airspace, and, more specifically, the Government's preemption of aircraft flight management, including flight altitude and traffic patterns.



*Permissible Scope of State Regulation of Helicopter Air Tour Operations through Police Powers and Proprietary Powers*

The States may generally protect their citizens through land use planning and development, zoning, and other police power measures not affecting aviation safety, operations, or airspace management. The States have the authority to mitigate the effects of noise independently of source noise control. “Local governments may adopt local noise abatement plans that do not impinge upon aircraft operations.” *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1314 (9th Cir. 1981), *cert denied*, 455 U.S. 1000 (1982).

However, because the State of Hawaii is the *proprietor* of the State’s airports, it has additional authority when acting in a proprietary capacity as an airport owner and operator.<sup>3</sup> In the context of air carrier operations, Congress has codified the ‘proprietor exception’ by providing that the express preemption provision does not limit “a State, political subdivision of a State, or political authority of at least two States that owns or operates an airport served by [federally-certificated air carriers] from carrying out its proprietary powers and rights.” 49 U.S.C. § 41713(b)(3).

Your letter includes two specific questions:

1. Whether the State has authority to condition its approval of leases and revocable permits in state airports in order to regulate helicopter air tour operators’ flight paths, and place “limits such as on altitude, frequency and time of operation, to minimize widespread disruption....”

Through the exercise of its police power authority, the State may not utilize its lease or permit approval system to directly or indirectly<sup>4</sup> regulate aviation safety, the efficient use of the airspace, protection of people and property on the ground, air traffic control, or the regulation of aircraft noise at its source. 49 U.S.C. §§ 40103, 44502, and 44701-44735; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (Court struck down

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<sup>3</sup> See *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991). Proprietary powers generally include the authority to regulate airport noise levels, choose airport sites, acquire land, ensure compatible land use, and control airport design and scheduling.

<sup>4</sup> In *Gianturco*, the State made extension of an airport noise curfew a condition of the variance needed by the Port District to continue to operate Lindbergh Field. The court held that the State action unlawfully impinged on Federal control of airspace management and aircraft noise at its source by restricting the permissible flight times.

an 11 p.m. to 7 a.m. curfew on jet flights imposed by the City in the exercise of its police powers at an airport not owned by it). If the State were to regulate flight paths indirectly through its lease or permit approval process rather than expressly by statute or regulation, the result would be the same – unlawful police power regulation of aircraft flight paths.<sup>5</sup>

Regulation by BLNR of helicopter air tour operators' flight paths and its establishing limits on altitudes, frequency, and time of operation would interfere with the FAA's "delicate balance[ing] between safety and efficiency, and the protection of persons on the ground," where the "interdependence of these factors requires a uniform and exclusive system of federal regulation" if Congress' objectives are to be fulfilled. *Burbank*, 411 U.S. at 638-639. Air traffic, including over the Hawaiian Islands, must be regulated at the national level to ensure safety, efficiency, and uniformity.

2. What specific requirements can the BLNR or other state agency impose on commercial air tour helicopter operations as a condition of use of state lands?

Acting in its role as airport proprietor of the State's airports, Hawaii may promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for its airports and their immediate environs. *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991); *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 153 (2d Cir. 2016). The Second Circuit held that proprietary restrictions must also comply with the Airport Noise and Capacity Act of 1990 (ANCA), 14 CFR part 161, and the Airport Improvement Program grant assurances (if applicable); it also stated that the exercise of proprietary authority may not produce a patchwork of "uncoordinated and inconsistent" airport restrictions that impede the national transportation system...." 841 F.3d at 154, *citing* 136 Cong. Rec. S13619 (Sept. 24, 1990) (statement of Sen. Ford).

Specifically, for example, the State would have proprietary authority at its airports to enact restrictions on time of day, weekday versus weekend, or a reduction in overall operations subject to the above limitations. In 1998, the Second Circuit upheld the following restrictions on New York City-based helicopter air tour operations including (1) a restriction of weekday operations to between 8 a.m. and 8 p.m.; (2) a restriction of weekend operations to between 10 a.m. and 6 p.m.; (3) the phasing out of weekend operations entirely; and (4) the reduction of operations by a minimum of 47 percent overall.<sup>6</sup> In addition, New York City's decision to reduce the number of seaplane air tour

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<sup>5</sup> The Supreme Court stated in *Burbank*:

[i]f we were to uphold the Burbank ordinance 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. 411 U.S. at 639.

See also *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 91-92 (2d Cir. 1998) (the proprietor exception "... gives no authority to local officials to assign or restrict routes.").

<sup>6</sup> *National Helicopter*, 137 F.3d at 90.

flights and prioritize transportation over tourism was upheld as a reasonable means to achieve noise reduction.<sup>7</sup> Again, such restrictions would have to comply with part 161 and the grant assurances, if applicable.

I am hopeful that the above information will be helpful to the BLNR in its management of its public lands.

Sincerely,

A handwritten signature in black ink, appearing to read "Raquel Girvin". The signature is fluid and cursive, with a prominent loop at the end.

Raquel Girvin  
Regional Administrator

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<sup>7</sup> *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183, 187 (2d Cir. 2001).

**HB-1201**

Submitted on: 2/6/2023 9:11:28 AM

Testimony for HLT on 2/8/2023 8:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
cheryl Burghardt	Individual	Support	Written Testimony Only

Comments:

SUPPORT. this bill.

I understand excusing the US Military helicopters from a govt. perspective. I would like to add that they are sometimes a nuisance as they often fly over downtown Honolulu, shaking our entire apartment building. If it's not an emergency, fly outside on the ocean.

**HB-1201**

Submitted on: 2/7/2023 8:57:15 AM

Testimony for HLT on 2/8/2023 8:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
J Ashman	Individual	Support	Written Testimony Only

Comments:

When constant helicopter tours over residential areas destroy the peace and enjoyment of the neighborhood, something should be done. I don't know if this is the best way to limit the intrusion but a solution shouldn't be put off again, especially as tourism increases post-Covid. Thank you.



Committee on Health & Homelessness  
House of Representatives  
Hawaii State Legislature

Wednesday, February 8, 2023

**RE: House Bill 1201**

As representative of the international vertical flight and general aviation industry, the Aircraft Owners and Pilots Association (AOPA) and the Helicopter Association International (HAI), would like to express our serious concerns regarding HB1201. HAI represents more than 1,100 companies and over 16,000 industry professionals in more than 65 countries. Each year, HAI members safely operate more than 3,700 helicopters and remotely piloted aircraft approximately 2.9 million hours. HAI is dedicated to the promotion of vertical flight as a safe, effective method of commerce and to the advancement of the international vertical flight community. AOPA is the world's largest aviation membership organization and represents the general aviation interests of hundreds of thousands of aircraft owners and pilots across the country, including hundreds of members from Hawaii state alone.

HAI and AOPA strongly oppose HB 1201. The bill runs afoul of well-settled federal law and opens the door to frivolous lawsuits. The Federal Aviation Administration (FAA) has exclusive authority over aviation. The state of Hawaii has no legal grounds to set an acceptable or unacceptable noise threshold for helicopter operations, nor does the state have authority to set boundaries where noise violations could be issued. See 49 U.S.C. § 47521 & 41713; Advisory Circular 36-1H (Nov. 15, 2001).

It is important to note that HB1201 replicates the intent of New York SB7493-A; a bill that was vetoed for violating federal preemption. If enacted, NY SB7493-A would have created a right of action against any person generating an unreasonable level of sustained noise at ground level from a helicopter. Although Bill 7493-A managed to pass the New York State Assembly on June 3, 2022, Governor Kathy Hochul vetoed the bill on December 15, 2022. In a letter addressed to the NY Senate, Governor Hochul stated that "regulation of aircraft and airspace is primarily a federal responsibility, and federal law significantly constrains the State's ability to legislate in this area. Recent federal case law makes clear that non-federal actors must carefully consider how state and local restrictions interact with federal laws governing aviation." Therefore, we urge the state of Hawaii to recognize the federally mandated processes for enacting policies within this realm.

The helicopter community strives to be good stewards of the environment and good neighbors to residents who live and work in the Aloha state. While we appreciate the issues that HB1201 intends to address, the proposed bill presents many impractical and unlawful legal and logistical problems. HAI and AOPA remain committed to working with other operators, legislators, leaders, and community members around the state to proactively address concerns and answer questions.



Sincerely,

Cade Clark, Vice President of Government Affairs - HAI

Jared Yoshiki, Western Pacific Regional Manager - AOPA



STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY 12224

VETO # 107

December 15, 2022

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 7493-A, entitled:

“AN ACT to amend the general obligations law, in relation to allowing for compensation for noise pollution by rotorcraft; and to amend chapter 592 of the laws of 1998, constituting the Hudson River Park Act, in relation to the use of certain heliports in the city of New York”

NOT APPROVED

This legislation would establish a cause of action against any person who creates an unreasonable level of sustained noise at ground level from a helicopter. It amends the Hudson River Park Act to ban non-essential helicopter use from the park.

Regulation of aircraft and airspace is primarily a federal responsibility, and federal law significantly constrains the State's ability to legislate in this area. Recent federal case law makes clear that non-federal actors must carefully consider how state and local restrictions interact with federal laws governing aviation and must be attentive to federally mandated processes for enacting policy in this area. Certain elements of this legislation run counter to the federal scheme regulating New York's airports and airspace.

Therefore, I am constrained to veto this bill.

The bill is disapproved.

*Ruth Hochstetler*