

No. 23-1105

IN THE
Supreme Court of the United States

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,
Petitioners,

v.

KELLY HIGGINS, IN HIS OFFICIAL CAPACITY AS
DISTRICT ATTORNEY OF HAYS COUNTY, TEXAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF OF *AMICI CURIAE* TEXAS
ASSOCIATION OF BROADCASTERS AND 17
MEDIA ORGANIZATIONS IN SUPPORT OF
PETITIONERS**

Joel Reese
Counsel of Record
Bret Rosenthal
Margaret Terwey
REESE MARKETOS LLP
750 N. St. Paul Street
Suite 600
Dallas, TX 75201
Tel.: (214) 382-9810
joel.reese@rm-firm.com

Thomas S.
Leatherbury
THOMAS S.
LEATHERBURY LAW,
PLLC
Cumberland Hill
School Building
1901 N. Akard St
Dallas, TX 75201
*Counsel for Amici
Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
INTERESTS OF AMICI CURIAE.....	1
I. SUMMARY OF THE ARGUMENT.....	7
II. ARGUMENT	10
A. The use of image capturing drones is essential to fulfilling broadcasters’ mission to timely communicate life- saving information to the public	10
B. Chapter 432 has chilled the speech of TAB’s station members because members choose self-censorship over the risk of prosecution	15
C. Using helicopters to capture aerial images is not a viable alternative to drone use for Texas broadcasters.....	22
III. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>NAACP v. Button</i> , 371 U.S.415 (1963)	21
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974)	16
<i>Virginia v. Am. Booksellers Ass'n, Inc.</i> , 484 U.S. 383 (1988)	21

Rules

Tex. Gov't Code § 423	6-10, 13, 15-22
-----------------------------	-----------------

INTERESTS OF AMICI CURIAE

Amici Texas Association of Broadcasters along with 17 media organizations file this amicus brief in support of Petitioners.¹

The Texas Association of Broadcasters (“TAB”) is a nonpartisan, not-for-profit, 501(c)(3) organization that represents the interests of over 1,200 free, over-the-air radio and television stations in Texas. TAB was formed in 1953 to promote and protect a favorable economic and regulatory climate for broadcasting and to educate both its members and the public about the public benefit and importance of free, over-the-air broadcast operations. TAB works with non-profits and government agencies to distribute public service messages. TAB also partners with the Federal Communications Commission to supply inspectors who review stations for compliance with FCC regulations. TAB and its members frequently collaborate with local governments and other members of their community to provide essential information, including AMBER alerts, emergency warnings, and spearhead efforts to raise money for charities and disaster relief. This uniquely positions TAB as an organization that works with its station members to promote public good and coordinate with local government agencies to distribute life-saving

¹ Counsel for amici curiae certify, pursuant to Rule 37.6, that this brief was not authored in whole or part by counsel for any of the parties; no party or party’s counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief. Counsel for amici provided notice to counsel of record on May 3, 2024, pursuant to S. Ct. R. 37.2.

information rapidly to its members and then to the public.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Center for Investigative Reporting ("CIR") is a not-for-profit, 501(c)(3) organization. It is the nation's oldest nonprofit investigative newsroom in the country that runs the brands Mother Jones, Reveal, and CIR Studios. Mother Jones is a reader-supported news magazine and website known for ground-breaking investigative and in-depth journalism on issues of national and global significance. Reveal produces investigative journalism for the Reveal national public radio show and podcast, and CIR Studios produces feature length documentaries distributed on Netflix, Hulu and other streaming channels. Reveal often works in collaboration with other newsrooms across the country. CIR has received multiple awards for its reporting. In the past several years, CIR has been a Pulitzer Prize finalist, received three Edward R. Murrow Awards, a duPont Award and a Peabody for its journalism under the Reveal brand.

The Media Institute is a 501(c)(3) nonprofit foundation specializing in communications policy

issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications. It is a subsidiary of Syracuse University.

The California Broadcasters Association (“CBA”) is an incorporated nonprofit trade association representing the interests of the over 1000 radio and television stations in our state. The CBA advocates on state and federal legislative issues, provides seminars for member education and offers scholarship

opportunities to students in the communication majors.

National Newspaper Association is a 2,000 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

Gannett is the largest local newspaper company in the United States. Our more than 200 local daily brands in 43 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

Dow Jones & Company is the world's leading provider of news and business information. Through The Wall Street Journal, Barron's, MarketWatch, Dow Jones Newswires, and its other publications, Dow Jones has produced journalism of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones's professional information services, including the Factiva news database and Dow Jones Risk & Compliance, ensure that businesses worldwide have the data and facts they need to make intelligent decisions. Dow Jones is a News Corp company.

Association for Uncrewed Vehicle Systems International (“AUVSI”) is the world’s largest nonprofit organization dedicated to the advancement of unmanned systems and robotics and represents corporations and professionals from more than 60 countries involved in industry, government, and academia. AUVSI members work in the defense, civil, and commercial markets.

Radio Television Digital News Association (“RTDNA”) defends the First Amendment rights of citizens, honors outstanding work through the Edward R. Murrow Awards and provides journalists with training to encourage ethical standards, newsroom leadership and industry innovation.

Getty Images (US), Inc. (“Getty Images”) is a leading source for visual content around the world, including a comprehensive editorial offering. Through our brands Getty Images, iStock and Unsplash, we provide a platform that enables customers to lawfully license editorial and creative work from content creators who are able to monetize their work. We support these endeavors by advocating for the rights of creative professionals and journalists.

The News/Media Alliance represents over 2,200 diverse publishers in the U.S. and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. Its membership creates quality journalistic content that accounts for nearly 90 percent of daily newspaper circulation in the U.S., over 500 individual magazine brands, and dozens of digital-only properties. The Alliance diligently advocates for newspapers, magazine, and digital publishers, on issues that affect them today.

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 64 television stations in 52 markets.

American Society of Media Photographers, Inc. (“ASMP”) is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers and all visual creators who earn their living by making works intended for publication, display, and every avenue of art and commerce. With thousands of members across 38 chapters and in 22 countries, working in every genre of photography, videography, content creation, and media, ASMP is a leading trade organization representing professional creators’ interests.

The Student Press Law Center (“SPLC”) is a national, non-profit, non-partisan organization established in 1974 that works to promote, support, and defend the press freedom and freedom of information rights of high school and college journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the school-sponsored and independent student press, SPLC collects information on student press cases nationwide and produces a number of publications on student press law, including its book, *LAW OF THE STUDENT PRESS* (4th ed. 2014).

Amici have a strong interest in preserving the ability of journalists to gather and distribute life-saving information and other information of public importance and concern to their readers and viewers and to protect journalists from the fear of retaliation when they do so. *Amici* submit this brief to highlight the ways in which Texas Government Code Chapter 423, which prohibits capturing with a drone any “image of an individual or privately owned real

property” with the intent to “conduct surveillance” and bars publication of such images without defining “surveillance” and without excepting journalists from the statute, stifles free speech and prevents journalists from fulfilling their mission to the public. Drones are a particularly useful tool because they allow journalists to capture images that would be difficult or impossible for a person to obtain otherwise. Drone images communicate to the public the scope and danger of these events and can aid in securing disaster areas by delivering time-sensitive messages to the public and by showing the public *why* they must avoid certain areas. However, journalists are fearful of using drones to obtain this often life-saving footage due to the ambiguity of Texas’s drone statute. *Amici* respectfully ask the Court to grant the National Press Photographers Association (“NPPA”) and other Petitioners’ petition for writ of certiorari and review the decision of the Fifth Circuit.

I. SUMMARY OF ARGUMENT

The Texas Association of Broadcasters and 17 media organizations respectfully submit this brief to describe the impact of the Fifth Circuit’s decision rejecting Petitioners’ First Amendment challenge to the Surveillance Provisions in Chapter 423 and refusing to consider their due process vagueness challenge for lack of standing.

This brief focuses on the ways in which journalists use drones to report on important stories that have significant benefit to the public and to first responders—and how the specter of criminal prosecution for drone usage under Texas Government Code Chapter 423 has caused Texas broadcasters to

drastically reduce or halt their drone programs. Because there is no viable alternative to drone footage for most broadcast stations and publishers in Texas, Chapter 423 not only chills journalistic speech but also prevents journalists from fulfilling their mission to the public: to distribute lifesaving and timely information about natural disasters and other major events to their communities.

The district court's decision finding Chapter 423 unconstitutional under the First Amendment granted journalists a brief reprieve, but the Fifth Circuit's opinion, which held that Chapter 423's Surveillance Provisions survive intermediate scrutiny without addressing the statute's vagueness, leaves the ambiguity of the statute unresolved and thus leaves TAB's members and other journalists unsure and fearful to use drone technology despite its importance for news gathering and the life-saving potential of those stories. Leaving the Fifth Circuit's decision intact would block many news outlets from acquiring or airing any aerial footage, making it impossible for them to adequately convey the gravity and scope of significant events, like natural disasters.

This amicus brief contains firsthand accounts from directors at TAB's member stations and other journalists about how they have used or would use drones for reporting and how the threat of criminal prosecution under Chapter 423 has made collecting images via drones next to impossible.² These

² Except as otherwise noted, all of the accounts presented in this amicus brief were provided to TAB by the individuals quoted, who are TAB members. The sworn statement of D. Victoria Baranetsky, general counsel of CIR, was filed in the

individuals note numerous occasions on which drone footage would have better communicated the scope and gravity of an emergency situation to viewers,³ helping viewers to understand the urgency of evacuation and convincing them not to reenter the area. In particularly tragic circumstances, evacuees even turn to the news to discover whether their homes still stand—yet, under Chapter 423, news stations face criminal prosecution if they try to give viewers those answers. Although privacy concerns have been used to justify Chapter 423’s restrictions on speech, those privacy concerns are undermined by the fact that the law exempts many other uses—including commercial uses—that offer less immediate benefit to the public than broadcast journalism, and a broadcaster can collect the very same images by helicopter that he may face jailtime for if collected by drone. These narratives illustrate the important role that drones have in modern journalism and the losses the public will face if news organizations cannot use them for newsgathering.

district court. *See* Decl. of D. Victoria Baranetsky, ECF No. 63, Civil Action No. 1:19-CV-00946-RP (W.D. Tex. Filed July 9, 2021). Counsel has identified individuals by name where permitted. Some of the individuals have requested that their names be withheld, and counsel has respected that request where made.

³ This brief focuses on emergency situations, but the same principles hold true for myriad other situations where the public interest and matters of public concern are involved.

II. ARGUMENT

A. The use of image-capturing drones is essential to fulfilling journalists' mission to timely communicate life-saving information to the public.

As Petitioners described in their Petition for Writ of Certiorari, “[d]rones are cost-effective newsgathering tools that have become vital for 21st-Century journalism....” Petition at 1. Drones allow journalists to show viewers what life is like on the ground during major events, such as environmental disasters, without putting humans in harm’s way. These images not only communicate the gravity or scale of an event, but they also are an efficient way to distribute life-saving information to the public quickly. The experience of TAB and its members demonstrate the enormous value drones have for newsrooms and the public. The news directors of TAB’s member stations provided numerous accounts of how they have used drones—or situations in which they would have used drones, but for Chapter 423.

Many of these uses involve gathering images to communicate time-sensitive and life-saving information to the public about disaster events in their communities. For example, several news directors of Texas broadcasting stations reported that they would have liked to have used drones to gather footage of major floods, tornadoes, or fires so that the public could be fully aware of the gravity of those disasters. Blaise Labbe, a Group News Director at Sinclair Broadcast Group, which, through its subsidiaries, owns and operates news stations in Abilene, Amarillo, Austin, Beaumont, El Paso, and

San Antonio, described several recent disasters in which drone footage would have had a significant public benefit and saved lives:

The Smokehouse Creek Fire[, the largest wildfire in state history,] burned 1.1 million acres over the course of three weeks. It also killed two people, destroyed hundreds of homes and killed [hundreds] of thousands of cattle. While most of the fire burned in “open country,” it was still on land owned by ranchers which prevented us from shooting it. The law kept KVII[, the local Amarillo station,] from showing viewers the sheer magnitude of the fire and the threat it presented, even amid emergency evacuations.

An EF 3 tornado hit Perryton[, another city in the Texas Panhandle near Amarillo,] in June 2023. The twister killed three and injured more than 100 others. We strongly believe being able to show damage from an aerial perspective can help in several ways. Most importantly, it can save lives by changing the minds of people who don't think they need to have a plan, know where the safe place is in their home and have multiple ways to get warnings in the event of severe weather. It can help with the recovery process by providing a more accurate picture of the damage. It can also aid researchers with efforts to design and build homes that are more storm resistant.

Amarillo had historic flooding in Spring 2023 that forced people to evacuate. People were constantly asking about the status of their

business, homes and neighborhoods. Aerial video of the flooding would have allowed KVII to keep viewers better informed with what parts of town were still under water and what areas were safe to return to. It could have helped the city re-evaluate stormwater draining plans. Like the Perryton tornado, it would have also helped with recovery efforts.

The Beaumont area had severe weather that tore through the market, which included an EF-2 tornado that leveled a church in Port Arthur on Wednesday[, April 10, 2024]. There was also severe flooding which impacted a major highway north of Beaumont. Had KFDM been able to fly with their drone, they could have captured images that would illustrated the severity of the flooding over the highway to give the viewers a sense of how long it would take for the waters to recede and for the trapped residents to expect relief. They would have also been able to better show viewers the impact of the devastation caused by the tornado which would have reinforced the importance of heeding weather warnings to the public.

Another news director of a Texas broadcast station, who spoke on the condition of anonymity, reported that the station used drone footage to report on instances in which vehicles drove into a body of water, including one instance when an ambulance went into a body of water. In both stories, the footage was essential to communicating “how difficult and dangerous the scenes were for first responders and

those involved,” and to discouraging the public from entering the area.

Texas is a large state, with many remote and rural areas that have fewer resources than the major metropolitan areas. Although law enforcement is permitted to use drones to capture images under Chapter 423, they do not always have the resources, time, or manpower to maintain drones or gather that footage while at the same time responding to an emergency. Mr. Labbe described several occasions on which drone footage would not only have benefited the public but also would have significantly aided law enforcement:

On March 22, 2024 – a school bus from Hays CISD[, a school district near Austin,] was bringing Pre-K students back to school after a field trip – when it was hit by a concrete pumper truck on a rural two-lane highway. CBS Austin had to wait more than an hour for the helicopter from their sister station in San Antonio to arrive on the scene to get video. This is the same video they could have gotten with a drone... [a]t a much faster speed. This could have also helped first responders – by giving them a unique look at the crash scene from the air quicker.

In addition, drones can help cover severe flooding. For example, when the Llano bridge collapsed due to unprecedented rain back in October 2018 – there was concern about safety around the scene. If the station could fly a drone[,] they could have helped first responders/engineers assess the situation

without having to get close to the area. Further downstream[,] water was rushing over dams. If they could have flown a drone over the area[,] it could have helped determine whether a breach was possible – as that was a concern early on.

Many news stations provide updates about traffic and alternate routes to the public but cannot gather this information or fully communicate the scope to the public without aerial images. For example, a news director in San Antonio who spoke on the condition of anonymity, reported several instances in which drone footage would have more effectively communicated information about traffic accidents and construction:

Earlier this month, a woman was killed in an accident with a tractor-trailer, which completely shut down I-37. This is one of the state's major highways, and people were stuck in traffic for hours. Utilization of drone images would have helped contextualize this for viewers, by showcasing the extent of the problem for commuters. Instead, we resorted to using ground video and Transguide cameras, which had limited ability to illustrate the story.

The continuing construction of Loop 1604 is an ongoing saga for San Antonians, and there are numerous stories we've done about closures and construction updates. To date, the best images we have been able to provide our viewers is traffic maps or graphics that explain the issue. Being able to use drone footage would give us the ability to enhance our

coverage by providing aerial perspectives and visual updates for the public. Currently, we are unable to look at the project from a before-and-after perspective, and monitor the progress visually to strengthen our reporting.

As these uses demonstrate, drones allow journalists to safely gather information about major events that would be difficult or impossible to cover in person—information that may even have life-saving potential.

B. Chapter 423 has chilled the speech of TAB’s station members and other journalists because they choose self-censorship over the risk of prosecution.

Despite the significant public benefit of drone-captured imagery for journalists, many news organizations in Texas have drastically reduced or halted their drone programs due to fear of prosecution under Chapter 423. Chapter 423 imposes criminal liability for using a drone “to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image.” Tex. Gov’t Code § 423.003(a). The statute does not define what constitutes “surveillance,” and there is no exception for journalism—even for journalism with a demonstrable and significant public benefit. *Id.* §§ 423.002, .003, .004, .006. As Petitioners describe, Chapter 423 allows images that show public property and persons on public property but flatly prohibits any image that depicts ‘an individual or privately owned real property’—even the incidental depiction of private property captured by a drone flying above

public property is a crime.” Petition at 4 (citing Tex. Gov’t Code §§ 423.002(a)(15); 423.003(a)).

Drone usage brings tremendous benefits to journalists and the public because it allows journalists to safely collect and communicate information about large-scale events, natural disasters, and traffic incidents. But these stories may involve the collection of images of individuals and privately owned property, even when that is not the intent or purpose of the story. Aerial footage showing the scope of a wildfire or flood or traffic jam necessarily includes images of the private property and individuals affected, and it is often not feasible to get the permission of each individual or landowner before the time-sensitive information needs to be shared with the public. Thus, any time a broadcaster seeks to use drone footage to demonstrate to the public the scope of a public emergency, he may find himself caught “between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be a constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.” *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Fearful of criminal prosecution under Chapter 423, TAB’s members have tacked toward Charybdis and engaged in preemptive self-censorship to avoid liability. As described in greater detail, *supra* Section A, TAB’s members reported many specific incidents in which they had to compromise coverage of a story for fear of prosecution under Chapter 423. For example, Mr. Labbe reported that a local Amarillo station was unable to collect and show footage of the Smokehouse Creek Fire because much of the fire raged on private

land owned by ranchers. Mr. Labbe reported that the station was also unable to collect drone footage of homes around the Amarillo area that were impacted by historic flooding in 2023, even though information about private property was precisely the type of information the viewers desperately sought. Mr. Labbe reported that residents who had fled their homes “were constantly asking about the status of their business, homes, and neighborhoods,” and “[a]erial video of the flooding would have allowed KVII to keep viewers better informed with what parts of town were still under water and what areas were safe to return to.”

Likewise, CIR’s General Counsel D. Victoria Baranetsky described how CIR’s *Reveal* scaled back its coverage of an important story about abuse at a private children’s shelter housing immigrant unaccompanied minors due to CIR’s concerns around potential criminal prosecution under Chapter 423:

In June 2018, *Reveal* reporters covering the immigration beat were investigating the private shelters contracted by the U.S. Department of Health and Human Services and the Office of Refugee Resettlement to hold immigrant unaccompanied minors. In particular, one of *Reveal*’s stories was about the Shiloh Treatment Center, a residential child care center in Manvel, Texas that has been widely cited for various violations, including abuse and nonconsensual administration of medications to children occupants. The reporting revealed that despite a history of physical and sexual abuse, the Shiloh

Treatment Center continued to receive millions in federal tax dollars to house immigrant children.⁴

In connection with its reporting of the Shiloh Treatment Center, Reveal hired Brandon Wade, a Texas-based freelance photojournalist, to capture aerial images showing readers what the Shiloh Treatment Center looked like, how remote it was, as well as the layout of its buildings. Reveal's editors determined it was important to include these images in our reporting for the public to have a holistic understanding of where the children were, as the images reveal a large compound, without many buildings, in a somewhat remote area.

On June 28, once the editors notified me of their decision to use the drone, I immediately asked the editors to put a hold on the assignment until I had time to review the potential risks under the state law and federal law given the factual circumstances....

After reviewing the FAA's federal regulations, I researched Texas' law, Chapter 423, which prohibits various types of drone use. I determined that federal regulations do not restrict these actions and other states do not restrict journalists using drones like Texas does. But I was concerned about how the Texas' statute applied to journalists using drones, and

⁴ The lead article in the series is available at <https://revealnews.org/article/federal-agency-sent-immigrant-kids-to-dangerous-youth-facility-despite-serious-warning-signs/>.

what the possible consequences would be for Mr. Wade as well as CIR....

To reduce the chance that CIR or Mr. Wade would face a legal challenge, I asked Mr. Wade to be careful to only stand on public property while flying his drone and to ensure the drone only flew over public property. I also asked that Mr. Wade ensure he was in the air for the shortest period of time possible and that he confirm when the project started and was complete. I told Mr. Wade that if any authorities came, he should stop immediately and contact me directly.

Reveal paid Mr. Wade for his images and video of the Shiloh Treatment Center. I further advised Reveal's editors to publish only still photos of the Shiloh Treatment Center to decrease the likelihood of a challenge under Chapter 423, since the video would have made it more obvious that the recordings were taken with a drone.

If Mr. Wade had not been restricted, more comprehensive images likely could have been taken. Similarly, if Reveal had published the video, readers of Reveal would have obtained a better understanding of where the shelter was located and how remote it is.

Given the lack of parity with other state laws as well as the practical prohibitions it creates on reporting, Chapter 423 seems to me to be a method of preventing reporting on important matters of public interest. It is especially

troubling that the statute’s criminalization of drone use opens the door to selective prosecutions of . . . journalists who produce stories to benefit the public. In this way . . . Chapter 423 poses a substantial risk of criminalizing lawful—and constitutionally protected—newsgathering activity and chilling the very type of investigative journalism that has previously led to positive reforms and important changes in our society.

In a survey conducted by TAB, several of its members reported drastically cutting back or eliminating their drone programs because of Chapter 423. Sinclair Broadcast Group, which, through its subsidiaries, owns and operates several stations across Texas, reported that it halted its drone program after Chapter 423 was enacted, partially reinstated the program following the District Court’s decision enjoining Chapter 423’s enforcement,⁵ and then again halted its drone program once the Fifth Circuit reversed.⁶ Cody Marcom, the Director of Photography for WFAA in Dallas-Fort Worth, reported that his station has implemented stringent guidelines in an effort to comply with Chapter 423 following the Fifth Circuit’s reinstatement of the law, but the effect is that the station has reduced its drone usage by 99 percent. Several other stations reported to TAB that they did not employ drones at all due to the potential liability concerns. Some stations even reported that they ceased using past footage collected

⁵ App.87a.

⁶ App.1a.

when Chapter 423 was not in effect because they cannot be sure whether it violates the statute.

Petitioners report several other instances in which Chapter 423—and specifically, the ambiguity around what precisely constitutes “surveillance”—has chilled journalists’ speech. Petition at 5-6. As these accounts demonstrate, broadcasters specifically cite the specter of criminal prosecution under Chapter 423—and uncertainty of how to avoid criminal prosecution—as the reason their stations have reduced or halted their drone programs, to the detriment of both the journalists themselves and the public at large. The record demonstrates that these broadcasters are already engaging in self-censorship because of Chapter 423, and this harm has already been “realized even without an actual prosecution.” *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988); *see also NAACP v. Button*, 371 U.S.415, 433 (1963).

While journalists operate in fear of criminal prosecution from using drone footage, speakers in other industries are exempt from Chapter 423’s blanket prohibition against drone surveillance. In addition to academic or military uses, the statute exempts numerous private, commercial uses with limited benefit to the public. For example, the statute exempts real estate brokers, land surveyors, engineers, oil pipeline operators, and insurance underwriters. Tex. Gov’t Code § 423.002(a). These exemptions are so broad, it is difficult to imagine a principled basis for permitting these commercial uses while prohibiting journalistic ones, particularly given both the significant and obvious public benefit from

broadcasting aerial footage during natural disasters and other large-scale events and the other Texas laws that could apply to invasions of privacy.

C. Using helicopters to capture aerial images is not a viable alternative to drone use for Texas broadcasters.

One of the ironies of Chapter 423's ban on drone footage of individuals and private property is that the very same images may be captured legally by helicopter. Although Chapter 423 constrains the ability of broadcasters to use drones to capture images, it does not limit helicopters from gathering the same aerial footage that a drone could. To the extent Chapter 423's restrictions on free speech are justified by a stated government interest in privacy, App. 37a, the statute does not accomplish that goal because the same images can be legally obtained in other ways.

While the fact that helicopters can legally capture the same images as a drone undermines the government's stated privacy justification for Chapter 423's restrictions on free speech, it does not, however, make helicopters a viable alternative to drones for most broadcast stations and publishers in Texas. Although some (but not all) stations in major metropolitan areas have access to a helicopter, most local broadcast stations in smaller cities or rural areas, such as Austin, Midland-Odessa, McAllen, or Amarillo, do not and thus have no alternative to drone footage for gathering images of major disasters and other large-scale events in their area. Even in major cities, helicopters are too costly for stations to maintain. Mr. Labbe reported that only one station in

San Antonio currently has a helicopter contract, but the “economics are questionable that they retain it,” which would leave a major metropolitan area home to almost 2.7 million people⁷ without a legally sanctioned method to gather aerial footage during large-scale events or major disasters.

Even for stations that do have access to helicopters, they do not provide a reasonable alternative to drones. Mr. Marcom reported that helicopters require significant lead time before they can fly, making them less able to respond quickly to an emergency or developing situation. To use a helicopter at his station, a journalist must request it, the station must find a pilot and fuel and prepare the helicopter for take-off, and the helicopter must then travel to the destination. In comparison, it takes just a few minutes to request and prepare a drone to fly. Additionally, news station helicopters generally are limited to covering a local area. A news director in Dallas-Fort Worth who spoke on the condition of anonymity, reported that, when her station has reported on a disaster in another part of the state, such as the devastating wildfires in the Panhandle, flying the helicopter to that distant location was cost-prohibitive. As described *supra* Section A, Mr. Labbe recalled a specific incident—a tragic bus accident involving Pre-K students—in which journalists trying to comply with Chapter 423 by using helicopter footage instead of drone footage had to wait more than an hour for a helicopter to arrive from San Antonio to get the video, which meant that first responders,

⁷ <https://www.axios.com/local/san-antonio/2024/03/18/bexar-county-texas-population-growth-census> (last accessed May 6, 2024).

parents, and the community also had to wait for that footage.

Helicopters also present other practical problems that drones do not. TAB's members reported that they face more flight restrictions with a helicopter that do not exist for drones. And those TAB stations with helicopters reported that they receive many complaints about noise and disturbances from helicopter use, while they receive almost no complaints about the use of drones. Mr. Marcom reported receiving noise complaints when helicopters hovered over an area for a longer period of time. He noted that sometimes local police or fire departments ask helicopters to fly higher to reduce the level of noise on the ground, which compromises the detail and quality of the images those helicopters can obtain.

Thus, while journalists can acquire the very same images via helicopter that are prohibited if taken by drone, helicopters are not a viable alternative to drones for most newsrooms in Texas.

III. CONCLUSION

For the foregoing reasons, TAB and 17 media organizations respectfully ask the Court to reverse the decision of the Fifth Circuit.

Dated: May 13, 2024

Respectfully submitted,

Joel Reese

Counsel of Record

Bret Rosenthal

Margaret Terwey

REESE MARKETOS LLP

750 N. St. Paul Street

Suite 600

Dallas, TX 75201

Tel.: (214) 382-9810

joel.reese@rm-firm.com

Thomas S. Leatherbury

THOMAS S. LEATHERBURY LAW, PLLC

Cumberland Hill School Building

1901 N. Akard St

Dallas, TX 75201

Counsel for Amici Curiae

Texas Association of Broadcasters and 17

Media Organizations