No. 23-1105

In the Supreme Court of the United States

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,
PETITIONER

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

More than three-quarters of a million drones are registered in the United States. Although no one disputes that these inexpensive, lightweight aircraft can be a valuable tool to journalists—as well as many other professionals—it is indisputable that their small size and quiet propulsion systems enable them to operate in a manner that is virtually undetectable to ordinary citizens.

For nearly a decade, the Texas Privacy Act, which is currently codified at Chapter 423 of the Texas Government Code (the "Act" or "Chapter 423") has protected Texans from abuse of this technology by prohibiting the use of drones to capture images of private persons or private property without consent or other statutory exception. And Petitioners have offered no evidence that any of the named Respondents have applied the Act to prevent or impede legitimate journalistic activity at any point in the last decade. Nevertheless, Petitioners insist that it is vital to the Republic that this Court uphold a putative First Amendment Right to snoop, stalk, and invade the privacy of one's neighbors. The questions presented are:

1. Whether Petitioners, who have never been threatened with enforcement of Chapter 423 for journalistic activity, nonetheless have standing to challenge Chapter 423 as facially vague when applied to journalists.

2. Whether the First Amendment prohibits a State from regulating where, when, and how a private citizen can fly a drone just because the drone is capable of taking photographs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases (ctd.):

Cases (ctd.):

Cases (ctd.):

Cases (ctd.):

Constitutional Provisions and Statutes:

Constitutional Provisions and Statutes (ctd.):

Other Authorities:

INTRODUCTION

In 2013, the Texas Legislature passed Chapter 423 to address what was then an emerging technology: unmanned aircraft systems—also commonly referred to as "unmanned aerial vehicles" or "drones."[1] Because drones were still largely the domain of law enforcement or hobbyists, another two years would pass before the Federal Aviation Administration "proposed a framework of regulation that would allow routine commercial use of certain small [drones] in today's aviation system."[2] To fill this gap, the Texas Legislature passed the Act to prohibit the use of drones to surveil private Texans in certain circumstances, Tex. Gov't Code § 423.003, or to distribute any resulting photographs without their consent, *id.* § 423.004(a).

In 2019, a freelance photographer and two trade groups asserted that Chapter 423 was facially unconstitutional *as applied to journalists* based on a putatively "unqualified First Amendment right to conduct aerial surveillance on non-consenting private individuals on private property." Pet.App.44a. Given the facial paradox of a facial-as-applied challenge, this case should have been dismissed at the outset. Instead, Petitioners proceeded to summary judgment where they offered no evidence of any instance where Respondents had enforced Chapter 423 against a journalist in the intervening decade.

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[1] To avoid confusion, Respondents refer to these aircraft as "drones" except when quoting statutory language.

[2] Office of the Chief Counsel, *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet* at 2, Fed. Aviation Admin. (Dec. 17, 2015), https://www.faa.gov/sites/faa.gov/files/uas/public_safety_gov/public_safety_toolkit/UAS_Fact_Sheet_Final.pdf.

Although its reasoning is imperfect, the Fifth Circuit judgment in favor of Respondents does not merit this Court's attention. To start, the petition does not challenge the Fifth Circuit's conclusion that two of the three defendants were entitled to judgment because sovereign immunity does not permit a pre-enforcement facial challenge to a statute that a state defendant has never threatened to enforce against the plaintiff. Thus, this Court can *only* issue relief against District Attorney Higgins. But even if the Court granted review, the appropriate remedy would merely be to change the judgment from dismissal with prejudice to dismissal without prejudice because as a state official, Higgins is entitled to immunity for the same reasons. Such tinkering with the lower court's judgment is hardly worth this Court's time.

Even if the Court overlooked this glaring vehicle problem, neither question presented is cert-worthy. The circuit splits to which Petitioners point are illusory because they rely on a mischaracterization of the Fifth Circuit's holding, superseded case law, or cases applying the same law to different facts. Petitioners also lack standing to sue the District Attorney for much the same reason he should have been found to have sovereign immunity: They have not shown a substantial likelihood that he will enforce the Act against them. Moreover, Petitioners' claims fail on the merits because the word "surveillance" is not unconstitutionally vague, and the First Amendment does not protect the alleged right to fly a drone with a camera to surreptitiously surveil private property.

STATEMENT

I. The Ability of Drones to Invade Privacy

Drones are a relatively new, versatile, and increasingly popular technology. For "the price of a flat-screen TV," anyone "can go online and purchase a commercial model heavy enough to deliver a small package"—or carry a sophisticated camera. ROA.750.[3] This presents both unique opportunities as compared to conventional aircraft but also unique regulatory challenges—particularly as they apply to privacy: Put simply, "[h]elicopters and airplanes are noisy and difficult to miss," ROA.813, but "[d]ue to the relatively small size of the average drone and the very large search area in which it can operate, drones are difficult to detect" by the average person, ROA.755.

Drone technology is also subject to abuse. As FBI Director Christopher Wray warned a Senate committee: "[G]iven their retail availability, lack of verified identification requirement to procure, general ease of use, and prior use overseas," drones can and likely "will be used to facilitate an attack in the United States against a vulnerable target, such as a mass gathering." ROA.749. Director Wray proved prescient. *E.g.*, Jaroslav Lukiv, *Trump Shooter Flew Drone Above Rally Site Ahead of Time - US Media*, BBC (July 21, 2024), https://www.bbc.com/news/articles/c0xj5w3nx7yo.

II. The Texas Privacy Act

Passed in 2013, the Texas Privacy Act, Tex. Gov't Code §§ 423.001-.009, aims to prevent such abuse. It provides that it is "lawful to capture an image" using a drone

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[3] "ROA." refers to the record on appeal in *National Press Photographers Association v. McCraw*, No. 22-50337 (5th Cir.).

in any of 21 statutory circumstances. Tex. Gov't Code § 423.002(a)(1)-(21). Relevant here, it permits images to be captured "with the consent of the individual who owns or lawfully occupies the real property captured in the image." *Id.* § 423.002(a)(6). It is also lawful to capture an image with a drone "from a height no more than eight feet above ground level in a public place, if the image was captured without using any electronic, mechanical, or other means to amplify the image beyond normal human perception." *Id.* § 423.002(a)(14). Similarly, one may capture an image with a drone "of public real property or a person on that property." *Id.* § 423.002(a)(15).[4]

Where the Act does apply, section 423.003 makes it a Class C misdemeanor to "use[] an unmanned aircraft 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." *Id.* § 423.003(a)-(b). Section 423.004 makes it a separate offense to capture such an image and possess, disclose, display, distribute, or otherwise use it. *Id.* § 423.004(a). Finally, section 423.006 provides a private cause of action against those who violate the Privacy Act.

III. Procedural History

A. Petitioners are two trade associations, namely, the National Press Photographers Association and the Texas Press Association, and Joseph Pappalardo, a Texas journalist and drone pilot. Pet.ii. Relevant here, the NPPA alleged that in 2018, a *federal* agent stopped one of its members, Guillermo Calzada, from taking

[4] Together with section 423.002, Petitioners denominate sections 423.003-.004 and .006 the "Surveillance Provisions." Respondents do not necessarily agree with this characterization but will use this terminology to avoid confusion.

further photographs of the scene of a "deadly arson fire" that ATF was investigating in San Marcos, Texas. ROA.31; *see also* ROA.650-53. At ATF's request, two San Marcos police officers "approached Mr. Calzada[,] and one of the officers informed him of the criminal penalties under Chapter 423" if he were to continue using a drone to take pictures. ROA.31; *see also* ROA.651. Notwithstanding this warning, Calzada was not prosecuted even after the *San Antonio Express-News* published one of the photographs. ROA.651-53, 1007, 1026.

In their operative complaint, Petitioners alleged several claims. Relevant here, they alleged that the Surveillance Provisions violate the First Amendment rights to free speech and freedom of the press by restricting the ability of the press to photograph events that they deem newsworthy. ROA.38-40. They also asserted that the term "surveillance" is impermissibly vague under the Due Process Clause of the Fourteenth Amendment. ROA.40-41, 44-45.

Instead of suing the San Marcos police or ATF, Petitioners sued the director of the Texas Department of Public Safety, the Chief of the Texas Highway Patrol, and the District Attorney of Hays County, all in their official capacities. ROA.21.[5] None of those officials is alleged to have sought to arrest or prosecute—or even to have interacted with—either Petitioners or their members. Relevant here, the District Attorney was sued expressly because of the "past threat of San Marcos police officers" to bring a prosecution in Hays County for violation of the Surveillance Provisions. ROA.21.

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[5] Ron Joy was Chief of the Texas Highway Patrol, and Wes Mau was District Attorney of Hays County at the time of the complaint. ROA.17. Their successors were subsequently substituted as defendants. Pet.App.8a (at nn.17-18).

B. After dismissing a claim no longer at issue on the pleadings, ROA.424, the district court granted summary judgment to Petitioners, ROA.1250. It held the Surveillance Provisions violated the First and Fourteenth Amendments and enjoined Respondents from enforcing them. ROA.1250. The parties cross-appealed. ROA.1388, 1397, 1400.

C. A Fifth Circuit panel reversed in relevant part. *See* Pet.App.1a. It held that Petitioners lacked standing to bring their vagueness claims because there was no imminent or credible threat that Respondents would enforce the Privacy Act against them. Pet.App.12a. But it determined that Petitioners had standing to bring their First Amendment claims because "[u]nlike in other constitutional contexts, in the speech context," binding Fifth Circuit precedent required the court to "*assume* a substantial threat of future enforcement absent compelling contrary evidence." Pet.App.13a.

Having found standing for a subset of claims, the court held that sovereign immunity barred Petitioners' suit against Director McCraw and Chief Mathis who had never demonstrated a willingness to enforce the Privacy Act against Petitioners, and thus the claim did not fall within the *Ex parte Young* exception to sovereign immunity. Pet.App.20a-21a. But it held that DA Higgins never had immunity because as a District Attorney, he is a county rather than a state official. Pet.App.22a.

The court ultimately held for DA Higgins on the merits because the Surveillance Provisions may implicate but do not violate the First Amendment. Pet.App.28a. It concluded that intermediate scrutiny applied because "the Surveillance Provisions regulate not *what* image is captured, but *where* it is taken from (above eight feet in the air) and *how* it is taken (from a drone, without

permission, and with the intent to conduct surveillance)." Pet.App.35a. The Fifth Circuit also rejected Petitioners' argument that strict scrutiny should apply because the surveillance provisions are "speaker-based." Pet.App.31a. "While the law certainly favors some drone operators over others," the court noted, "the Surveillance provisions are not for that reason automatically subject to strict scrutiny" because "[w]hile the law distinguishes among photographers, it does not distinguish among *photographs*." Pet.App.32a. As the Fifth Circuit explained, "[t]he very same aerial image can be *unlawfully* captured using a drone but *lawfully* captured using a helicopter, a tall ladder, a high building, or even a really big trampoline." Pet.App.30a. "Indeed, the same image could be captured using a drone, so long as the drone is flown at a height below eight feet." Pet.App.30a.

The court further concluded that the Surveillance Provisions passed intermediate scrutiny based on the State's "substantial interest in protecting the privacy rights of its citizens," which drones "have singular potential" to harm because "they are small, silent, and able to capture images from angles and altitudes no ordinary photographer, snoop, or voyeur would be able to reach." Pet.App.36a-37a. The Court concluded the law was adequately tailored to meet that interest because it "bar[s] only surveillance that could not be achieved through ordinary means." Pet.App.37a.

The Fifth Circuit denied Petitioners' request for rehearing en banc. *See* Pet.App.48a. This petition followed.

REASONS FOR DENYING THE PETITION

I. This Case Presents a Poor Vehicle to Review Either Question Presented.

A. Petitioners have brought a type of facial challenge that does not exist.

To start, the petition should be denied because Petitioners pursue a claim that does not exist: They challenge Chapter 423 facially but only *as applied to journalists*. *See* ROA.529, 542, 547; Pet.7. As the Fifth Circuit noted, Petitioners "picked an uphill battle by styling this litigation as a facial, pre-enforcement challenge." Pet.App.44a. But this Court's recent decision in *Moody v. Netchoice, LLC*, 144 S. Ct. 2383 (2024), demonstrates why it isn't a facial challenge at all—and if it were, it would fail. That case emphasized that Petitioners must show that the Privacy Act's alleged "unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 2397.

By framing their entire case about how Chapter 423 applies to photos taken by journalists, Petitioners have entirely failed to "address the full range of activities the law[] covers[], and measure[d] the constitutional against the unconstitutional applications." *Id.* at 2397-98. For example, where the Act applies, it prohibits using a drone to "capture an image," Tex. Gov't Code § 423.003(a), which includes "*any* capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions," *id.* § 423.001 (emphasis added). That covers far more than photographs, let alone photographs taken for journalistic purposes. Because Petitioners have not *tried* to meet the required burden of proof, this is a poor vehicle to resolve their questions.

B. Respondents are entitled to sovereign immunity.

Nor would this be an appropriate vehicle to resolve the questions presented even if the Court were to construe Petitioners' claims to be as-applied challenges because all three Respondents enjoy sovereign immunity. Petitioners have not challenged the Fifth Circuit's sovereign immunity holding for Director McCraw or Chief Mathis, rendering them improper Respondents. Pet.i. If the Court were to grant review, DA Higgins would be entitled to argue that the claims against him should have been dismissed for the same reason rather than on the merits. *Cf.* STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 492 (10th ed. 2013) ("Merely attacking the reasoning of the lower court requires no cross-appeal."). Because sovereign immunity is a jurisdictional question, it renders any answer to even Petitioners' standing question superfluous: Petitioners' claims will be dismissed before the Court ever reaches their First Amendment merits question. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

1. Prosecutors are arms of the State entitled to immunity.

The Fifth Circuit erred in concluding that DA Higgins, Hays County's elected district attorney, did not share in the State's sovereign immunity. "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). A "consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that . . . arms of the State possess immunity from suits authorized by federal law." *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 193

(2006). As a district attorney, DA Higgins is an arm of the State when serving in his prosecutorial capacity.

When determining "whether a state instrumentality may invoke the State's immunity" the Court has "inquired into the relationship between the State and the entity in question" by examining "the essential nature and effect of the proceeding" as well as the "nature of the entity" and whether a monetary judgment would run against the State. *Regents of the Univ. of Ca. v. Doe*, 519 U.S. 425, 429-30 (1997). "When indicators of immunity point in different directions," sovereign immunity's "reasons for being remain [the] prime guide": protection of the State's fisc and "the integrity retained by each State in our federal system." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39, 47 (1994). In recent years, the second purpose—"accord[ing] States the dignity that is consistent with their status as sovereign entities"—has come to be seen as "preeminent" in that calculus. *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

Although Higgins is locally elected, he nonetheless exercises the core police power of the State. The State of Texas has no unitary executive or statewide official who controls prosecutorial power. Instead, to prevent the abuse of executive power, it is divided among separately elected officials, Tex. Const. art. IV, §§ 1-2, including district attorneys who are actually deemed part of the statewide judicial branch and subject to the Texas Legislature's direct regulation, *id.* art. V, § 21. In Hays County, the district attorney "shall exclusively represent the state in all criminal matters pending before" the courts of that county, Tex. Gov't Code § 44.205(b)—an authority that cannot be exercised by *any* statewide official absent the DA's request, *see State v. Stephens*,

663 S.W.3d 45, 55 (Tex. Crim. App. 2021). Accordingly, when exercising their exclusive power to bring criminal prosecutions, district attorneys represent the "state," not any locality, in doing so. Tex. Const. art. V, § 21; Tex. Gov't Code § 44.205(b).

Excluding such officials from the scope of state sovereign immunity is a direct affront to the State's dignity as a sovereign. It is "[b]eyond question" that "the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). And its ability to protect people and property is "a fundamental aspect of a State's sovereign power." *New York v. New Jersey*, 598 U.S. 218, 225 (2023). It would most certainly offend the dignity of the State if the *only officials* in Texas capable of exercising the prosecutorial power of the State were not considered an arm of the State when exercising that function. That analysis is dispositive here. Because of the importance of prosecutors in enforcing criminal law, DA Higgins is absolutely immune from monetary damages, *Burns v. Reed*, 500 U.S. 478, 486 (1991)—as Petitioners seem to recognize, *see* ROA.46. Accordingly, the State's fisc is not a relevant factor.

2. The *Ex parte Young* exception to sovereign immunity does not apply to Higgins.

For the same reasoning the Fifth Circuit applied to Director McCraw and Chief Mathis, *Ex parte Young* does not provide a route around immunity for Petitioners' claims against DA Higgins. That doctrine rests on the fiction "that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). But if the state officer has no

"connection with the enforcement of the act," there is nothing to enjoin, and "making him a party as representative of the state" is no different than "attempting to make the state a party." *Ex parte Young*, 209 U.S. 123, 157 (1908). After all, a federal court cannot enjoin a defendant from enforcing a law he is already not enforcing—for multiple reasons. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020) ("the state officials must have taken some step to enforce" the challenged law for *Ex parte Young* to apply); *cf. Steffel v. Thompson*, 415 U.S. 452, 458 (1974) (applying the same rule under the rubric of standing).

Here, Petitioners admit they have never interacted with anyone in the Hays County DA's office regarding the Privacy Act. *See* ROA.1009, 1016, 1026-27, 1031, 1048, 1065. Thus, the complaint has precisely one connection to Hays County: the 2018 incident in which Calzada, a NPPA member, used his drone to photograph an apartment fire in San Marcos, Texas, which is located in Hays County. ROA.649-51. As he was *finishing,* he was approached first by a federal agent, ROA.651, and then by two San Marcos police officers at the request of that agent, ROA.651. True, one of those officers told Calzada that he had violated state law by taking pictures and would do so again if he published the photos. ROA.651. But the San Marcos Police Department is a department of the City of San Marcos, not Hays County, and thus not under the control of DA Higgins. *See Departments*, City of San Marcos, https://www.sanmarcostx.gov/35/Departments. Moreover, Calzada was neither cited at the time or prosecuted even after the photograph was published and "republished many times." ROA.651-52. And the statute of limitations for misdemeanors, such as violations of the Privacy Act, has long since expired. *See* Tex.

Code Crim. Proc. art. 12.02(a)(1)-(2); Tex. Gov't Code §§ 423.003(b), 423.004(b).

Even beyond the complaint, the record reflects that "there has only been one arrest and prosecution for drone-related activities in Hays County" since the Privacy Act was passed in 2013, ROA.606, which Petitioners admit did not involve a journalist, *see* Pet.8. And even that prosecution occurred seven years ago, *see* Brief for Plaintiffs-Appellees/Cross-Appellants at 28 n.15, No. 22-50337 (5th Cir. Nov. 16, 2022), before DA Higgins took office in 2023, *see* ROA.606; Pet.ii n.1. Because Petitioners have never shown that *Higgins* has any intention to enforce the statute against journalists, granting review would afford Petitioners no help: the Court would simply need to dismiss based on sovereign immunity rather than on standing or the merits.

II. The First Question Presented Does Not Warrant Review.

Apart from these vehicle problems, there is no need for this Court to review Petitioners' contention that the Fifth Circuit "fundamentally misapplie[d] Article III's injury requirement" regarding their vagueness claim. Pet.15. Leaving aside that this Court does not typically grant review to correct *misapplications* of existing law, SHAPIRO, *supra* at 508-09, their assertions that the Fifth Circuit took the wrong side of a circuit split are based on outdated caselaw. This case is also a poor vehicle to review whether Petitioners have standing because they will only lose on the merits as the term "surveillance" is not unconstitutionally vague.

A. The first question presented does not implicate a circuit split.

Petitioners contend that the Fifth Circuit's standing holding contradicts the decisions of five other circuits. Pet.18. But that argument is based on both a misreading of the Fifth Circuit's holding and outdated cases from other circuits.

1. The Fifth Circuit never required an arrest to establish standing.

To start, Petitioners' alleged circuit split is based on mischaracterizing the decision below. The Fifth Circuit did not require a plaintiff to be arrested or prosecuted to show standing for a vagueness claim. *Contra* Pet.16-18. Rather, it considered the fact that Petitioners "have never been arrested or prosecuted for violating Chapter 423" as part of "the available evidence suggest[ing] that Defendants have never enforced Chapter 423 against Plaintiffs." Pet.App.12a. The Fifth Circuit defines enforcement as exercising "compulsion or constraint." Pet.App.20a. It is blackletter law in the Fifth Circuit that "enforcement" includes acts far less than an actual arrest, such as sending a letter threatening enforcement, *City of Austin v. Paxton*, 943 F.3d 993, 1001 (5th Cir. 2019), or any other "'scintilla' of affirmative action by the state official" that can be considered a "step" *toward* enforcement, *Tex. Democratic Party*, 961 F.3d at 401. Because Petitioners offered no evidence of such a "step" toward enforcement, *compare id.*, *with* Pet.App.12a, the Fifth Circuit found no "imminent or even credible threat of prosecution under Chapter 423" against Petitioners, and thus no justiciable case or controversy, Pet.App.12a.

2. Petitioners' alleged circuit split is based on outdated caselaw.

Petitioners' alleged circuit split is also based on outdated cases holding that the existence of a statute itself creates a credible fear of future enforcement or that self-censorship is an injury fairly traceable to a statute itself. The Court has since clarified that the existence of a statute is not itself an Article III injury.

a. Decades ago, the Court stated that a plaintiff could demonstrate standing to bring a pre-enforcement challenge to a statute when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). And it suggested such a threat exists *any time* "[t]he State has not suggested that the newly enacted law will not be enforced." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Petitioners suggest that *Babbitt* and *American Booksellers* combine to announce a "failure-to-disavow" standard in First Amendment cases. Pet.13.

Even if that were the law decades ago, it is decades outdated.

More recently, this Court has clarified that because a plaintiff must sue a person, not a statute, he "need[s] to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future." *California v. Texas*, 593 U.S. 659, 670 (2021) (emphasis added) (citing *Babbitt*, 442 U.S. at 298). "In the absence of contemporary enforcement, [the Court has] said that a plaintiff claiming standing must show that the likelihood of future enforcement is substantial." *Id.* (quotation marks omitted). Similarly, the Court has clarified that

the "relevant inquiry" regarding traceability—which overlaps to a certain extent with injury in the pre-enforcement context—"is whether the plaintiffs' injury can be traced to allegedly unlawful conduct of the defendant, not to the provision of law that is challenged." *Collins v. Yellen*, 594 U.S. 220, 243 (2021). So too with redressability. *California*, 593 U.S. at 671 ("[T]he statutory language is not sufficient.").

The rule is no different when the First Amendment is involved. To the contrary, it was in a First Amendment case that the Court first started to clarify that the third element of the *Babbitt* test requires a "threat of future enforcement of the . . . statute" that "is substantial." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (leaving the first two elements effectively unchanged). Far from resting on the *existence* of a statute, the Court did not find "past enforcement against the same conduct" dispositive but only "good evidence that the threat of enforcement is not chimerical." *Id.* As authority, it pointed, *id.* at 160, to *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In *Holder*, the Court noted that the federal government had not disclaimed prosecuting the plaintiffs for their planned action, but it found a "credible threat of prosecution" only when that fact was combined with the federal government's past prosecution of 150 defendants, "several" of whom had violated the "statutory terms at issue." *Id.* at 16.

b. In asserting a circuit split (at 17-18), Petitioners entirely ignore this evolution in the Court's caselaw, relying largely on cases that are many years old, based on the faulty premise that the existence of a statute establishes standing, or both. Two expressly held that a "nonmoribund statute that facially restrict[s] expressive activity by the class to which the plaintiff belongs" presents

a "credible threat" of prosecution. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) ("[T]he threat is latent in the existence of the statute."). Two more relied entirely on the fact that state officials had "not denied" that the plaintiff's past actions could fall within the scope of the challenged statute—even if they had not sought to enforce it against the plaintiffs. *Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012); *see Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373-74 (D.C. Cir. 2020).

c. Petitioners misread the last two cases on which they rely to allege a circuit split. Contrary to Petitioners' contention (at 18), *Harrell v. Fla. Bar*, 608 F.3d 1241 (11th Cir. 2010), does not stand for the proposition that a state actor demonstrates an intent to enforce the rule at issue "merely" by defending the rule in court—a deeply troubling proposition given that government officials are generally expected to "defend state statutes against constitutional challenges." Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 524 (2015). Rather, like the cases discussed above, it relied in part on the fact that the law "was recently enacted." *Harrell*, 608 F.3d at 1257. Critically, it also explained that the state defendant "explicitly warned" the plaintiff that engaging in certain conduct "may subject him to discipline." *Id.* Finding "sufficient evidence of an intent to enforce the rules" where such a warning was made, *id.*, is entirely consistent with the law of the Fifth Circuit. *City of Austin*, 943 F.3d at 1001.[6] There simply was no such warning here.

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[6] If the age of a statute *could* offer evidence that the State would enforce it (and it cannot), that would not help Petitioners because the Privacy Act has been the law in Texas for over a decade, and

Nor was standing in *Act Now to Stop War & End Racism Coal. v. Dist. of Columbia*, 589 F.3d 433 (D.C. Cir. 2009), based on a "conventional background expectation that the government will enforce" a given law. *Contra* Pet.18. Rather, the D.C. Circuit, in reconciling its own cases with *Babbitt*, explained that it had "implied" that standing required "only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law." *Id.* at 435. But it found standing in that case because the District of Columbia had "in fact brought an enforcement action against" one of the plaintiffs. *Id.* at 435-36. As the Fifth Circuit would have found standing based on less than that, *e.g.*, *Tex. Democratic Party,* 961 F.3d at 401, there is no circuit split.

B. Resolving Petitioners' standing question will not alter the outcome of the case.

Even if there were a circuit split, this would be a poor vehicle to resolve it because finding that Petitioners had standing would not alter the outcome of the case: Petitioners cannot show that the Privacy Act's use of the term "surveillance" is unconstitutionally vague under the prevailing standard, ROA.40-41, which only "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict

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Petitioners still found no evidence that Respondents have enforced it against a journalist. Act of May 27, 2013, 83d Leg., R.S., ch. 1390, 2013 Tex. Gen. Laws 3691 (H.B. 912).

expressive activity." *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 21 (2018).

The so-called Surveillance Provisions are not vague under this standard. Once again, the Privacy Act prohibits the use of an "unmanned aircraft to capture an image of an individual or privately owned real property . . . with the intent to conduct surveillance." Tex. Gov't Code § 423.003(a). Petitioners have argued that "surveillance" is vague because it can mean both "close observation or listening of a person or place in the hope of gathering evidence" or simply the "act of observing or the condition of being observed"—either of which might include journalism. Brief for Plaintiffs-Appellees/Cross-Appellants at 59 (quoting dictionaries).

It is true that the term "surveillance" *can* have more than one meaning. Surveillance can mean "close observation of a person or group, especially one under suspicion" or "the act of observing or the condition of being observed." *Surveillance*, American Heritage Dictionary of the English Language 1755 (5th ed. 2016); *see Surveillance*, Black's Law Dictionary 1746 (11th ed. 2019) (defining the term as "close observation or listening of a person or place in the hope of gathering evidence.").

But courts "interpret criminal statutes, like other statutes, in a manner consistent with ordinary English usage." *Nichols v. United States*, 578 U.S. 104, 111 (2016). And ordinary speakers of the English language do not use the word "surveillance" to mean simply observation. Rather, the word is ordinarily used to mean "close watch kept over one or more persons: continuous observation of a person or area (as to detect developments, movements, or activities)" or "close and continuous observation for the purpose of direction, supervision, or control." *Surveillance*, Webster's Third New

International Dictionary Unabridged 2302 (1961). For example, ordinary speakers do not say "I am surveilling the park," when they walk their dog through Central Park and use a smartphone camera to take a picture of one of its many statues. Rather, ordinary speakers use the term surveillance, for example, when a police officer conceals himself across the street from a building to determine whether a suspected criminal will arrive.

And if there were any doubt, the canon of constitutional avoidance could narrow the scope of the term. *See United States v. Davis*, 588 U.S. 445, 463-65 (2019); *Lebo v. State*, 90 S.W.3d 324, 326 (Tex. Crim. App. 2002). Such a limiting construction is easy to find because "surveillance" as used in the Privacy Act also suggests a clandestine element. The Texas Legislature named the statute the Texas Privacy Act, *see supra* n.6, suggesting that it wanted to prevent drones from being used to spy where the Act applies. *See Gulf Ins. Co. v. James*, 185 S.W.2d 966, 970 (Tex. 1945) (explaining that Texas allows a court to draw some meaning from an act's title). Indeed, "close observation of a person or group, especially one under suspicion," *Surveillance*, American Heritage Dictionary of the English Language 1755 (5th ed. 2016), or "close observation or listening of a person or place in the hope of gathering evidence," *Surveillance*, Black's Law Dictionary 1746 (11th ed. 2019), are activities commonly done secretly—as amply demonstrated by the use of the term in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(f), and the federal statute criminalizing stalking, 18 U.S.C. § 2261A.

Accordingly, as used in the Privacy Act, the most ordinary meaning of surveillance—or at least an imminently reasonable reading—is close and continuous observation, typically clandestinely, but not simply the act

of observing. That hardly "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961).

C. Petitioners lack standing to sue Higgins.

Even if there were a circuit split and this were an appropriate vehicle to resolve it, there is no need to do so because Petitioners demonstrably have not alleged—let alone offered adequate evidence to survive summary judgment—that they have received "threats of prosecution," sufficient to demonstrate that their "concern with arrest has not been 'chimerical.'" *Steffel*, 415 U.S. at 459. At most they have made "[a]llegations of a subjective 'chill,'" which this Court has held for half a century "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). This is true for three reasons.

First, the facts as demonstrated at summary judgment do not show "that the likelihood of future enforcement is 'substantial.'" *California*, 593 U.S. at 670. Petitioners admit they have never interacted with *anyone* in the Hays County DA's office regarding the Privacy Act. *See* ROA.1009, 1016, 1026-27, 1031, 1048, 1065. To the contrary, though this case proceeded to summary judgment, the only interaction between a journalist and law enforcement in Hays County reflected in the record is the incident recited in the complaint between Calzada and the San Marcos police, which did not result in a citation or an arrest. *See supra* 12-13. If anything, that Calzada was not arrested even though law enforcement knew that his photograph that had been published several times—once on the front page of a local

newspaper—was taken using a drone, ROA.651-52, indicates that "the likelihood of future enforcement" in Hays County is *not* "substantial," *California*, 593 U.S. at 670.

True, the record does reflect that "there has . . . been one arrest and prosecution for drone-related activities in Hays County" since the Privacy Act was passed in 2013. ROA.606. But that prosecution occurred seven years ago, before Higgins took office, and Petitioners admit it had nothing to do with journalists. Pet.8. Moreover, because Petitioners only learned of that prosecution in discovery, ROA.605-06, 993, it can hardly be deemed sufficient evidence of credible fear to establish standing, which is assessed at the time the action commences, *see Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

Second, even if the past actions of the San Marcos Police Department or a past District Attorney could be attributable to DA Higgins, that is insufficient because Petitioners seek prospective relief. ROA.46. This Court held more than four decades ago that standing for prospective relief cannot rest entirely on a defendant's allegedly unconstitutional acts in the past because they "do[] nothing to establish a real and immediate threat" of future injury remediable by an injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Here, it is not even clear that Petitioners have shown "[p]ast exposure to illegal conduct," *id.*, since the one prosecution to which they point did not involve a journalist and thus falls outside the scope of their legal theory, *supra* Part I.A. But even if it did, that past prosecution would not "show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Since Petitioners can point to no such ongoing

effects, the Fifth Circuit was entirely correct to hold that they lack standing to seek prospective relief.

Third, Petitioners cannot trace any prospective injury to DA Higgins. As noted above, under current caselaw, "for purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to allegedly unlawful conduct of the defendant, not to the provision of law that is challenged." *Collins*, 594 U.S. at 243. "In the absence of contemporary enforcement, [this Court has] said that a plaintiff claiming standing must show that the likelihood of future enforcement is 'substantial.'" *California,* 593 U.S. at 670. Because Petitioners have not shown that DA Higgins is substantially likely to enforce the Privacy Act against them for the reasons discussed above, *see supra* 12-13, there is no need to grant this case merely to hold that the Fifth Circuit correctly applied current precedent on the first question presented.

III. The Second Question Presented Does Not Warrant Review.

For many of the same reasons, there is also no need to review the Fifth Circuit's conclusion that the Surveillance Provisions are subject to—and survive—intermediate scrutiny. This case is a poor vehicle to resolve any dispute regarding the standard of scrutiny that should be applied to the Surveillance Provisions because Petitioners' First Amendment challenge should have been dismissed under the same standing analysis that doomed their vagueness claims. *Supra* Part II.C. Moreover, because the so-called Surveillance Provisions are (at most) content-neutral regulations of speech incidental to conduct, the Fifth Circuit was entirely in line with other circuits in applying intermediate scrutiny. And the court

was entirely correct that the Surveillance Provisions easily pass that test.

A. A lack of standing renders this a poor vehicle to resolve any dispute regarding Petitioners' First Amendment claims.

To start, the parties do agree on one thing: The same standing analysis that governed Petitioners' due process claims should have governed the First Amendment claims. Pet.16. The Fifth Circuit should have dismissed both because under this Court's recent precedent, *see*, *e.g.*, *Driehaus*, 573 U.S. at 161-64, the Fifth Circuit was wrong to hold based on its own precedent that "[u]nlike in other constitutional contexts, in the speech context, [a court] may *assume* a substantial threat of future enforcement absent compelling contrary evidence." Pet.App.13a. Because further review in this Court will only result in a dismissal without prejudice (for lack of standing) instead of a dismissal with prejudice (for lack of merit), this is a poor vehicle to resolve any conflict that may (but does not, *infra* Part III.B) exist regarding the standard of First Amendment scrutiny that applies to the Surveillance Provisions.

As noted above, *supra* 15-16, this Court's recent precedent does not allow a court to presume standing any time the First Amendment is involved. For example, in *Clapper v. Amnesty International USA*, the Court held that a plaintiff did *not* have standing to assert a First Amendment challenge to a provision of FISA based on the plaintiffs' belief—or presumption—that their communications would be intercepted. 568 U.S. 398, 410 (2013). To the contrary, the Court chided the plaintiffs because they "merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired" rather than provide evidence

of "specific facts" demonstrating that the relevant communications would be intercepted. *Id.* at 412.

Clapper is irreconcilable with any notion that a court may "*assume*" a substantial threat of enforcement, in the First Amendment context or otherwise. Pet.App.13a. And its reasoning extends to any law that "*authorizes*" but does not "*mandate*" the actions a plaintiff claims to fear. *Clapper*, 568 U.S. at 412. Under such circumstances, a plaintiff's allegation that he will be subject to impermissible enforcement is "necessarily conjectural." *Id.* Such plaintiffs can "only speculate" as to how a particular government actor will "exercise [his] discretion in determining which [regulated actions] to target." *Id.* And it is never the government's "burden to disprove standing by revealing details" of how it intends to enforce the statute. *Id.* at 412 n.4.

The Fifth Circuit's standing analysis falls apart beyond this problem. In particular, the court relied on the same single seven-year-old prosecution of a non-journalist brought by Higgins' predecessor to establish traceability as to Higgins. *See supra* 13. That is insufficient to connect Petitioners' (nonexistent) injury to him for the reasons discussed above, *see supra* 9-13—particularly when Petitioners have not shown concrete plans to return to Hays County and use drones to take photographs there. *See Lujan*, 504 U.S. at 564.

B. The second question presented does not implicate a circuit split.

Even if Petitioners did have standing to assert their First Amendment claim, they are wrong that the Fifth Circuit's decision to apply intermediate instead of strict scrutiny to the Surveillance Provisions implicates a circuit split. Pet.25, 28, 33. Rather, the cases that

Petitioners cite involve different courts interpreting different state laws. *See* Pet.25, 28, 33.

1. Most of the cases upon which petitioners rely facially discriminate based on the content—or even the ideological purpose behind—the photographs being captured. The Privacy Act does not.

Ness v. City of Bloomington involved a city ordinance providing that "[n]o person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." 11 F.4th 914, 922 (8th Cir. 2021). The court held the ordinance was content-based and subject to strict scrutiny because an official "must examine the content of the photograph or video recording to determine whether a child's image is captured." *Id.* at 924. That ordinance is different from the Privacy Act because the former forbade the capture of images of children. *Id.* By contrast, as the Fifth Circuit ably explained, the Privacy Act would permit the same images to be captured with tools other than drones—or even drones flown under a certain altitude. Pet.App.30a.

Like the now-vacated decision in *Project Veritas v. Schmidt*, 95 F.4th 1152 (9th Cir. 2024), *Animal Legal Defense Fund v. Wasden*, involved a content-based law, specifically, a statute forbidding individuals from entering "an agricultural production facility that is not open to the public and, without the facility owner's express consent . . . mak[ing] audio or video recordings of the conduct of an agricultural production facility's operations." 878 F.3d 1184, 1191 (9th Cir. 2018). The Ninth Circuit held that statute content-based and subject to strict scrutiny because it "prohibits the filming of agricultural operations but nothing else," such that "its application explicitly pivots on the content of the recording." *Id.* at 1204. But again, the statute at issue did not turn on the

device by which the image was captured, nor did it permit certain devices in certain circumstances.

Next, *International Outdoor, Inc. v. City of Troy*, involved a city ordinance that required the payment of a fee to place certain types of signs but not others. 77 F.4th 432, 434 (6th Cir. 2023). One had to seek a permit and pay a fee to place several types of signs but did not have to do so for "real-estate signs," "political signs," "holiday signs," and other exempted categories. *Id.*; *see id.* at 436 n.1 The court held that at least some of the exceptions in the ordinance were content based "because they discriminated based on the topic discussed or the idea or message expressed." *Id.* at 436 n.1. But again, the Privacy Act turns not on the content of any photograph but where and "how" it is captured. Pet.App.30a.

Brown v. Kemp involved a Wisconsin statute that prohibited acts "intended to impede or obstruct a person who is engaged in lawful hunting, fishing, or trapping," including "[p]hotographing, videotaping, audiotaping, or through other electronic means, monitoring or recording the activities of the person." 86 F.4th 745, 757 (7th Cir. 2023). True, the statute also prohibited using a drone to capture such recordings, but that was not the reason the Seventh Circuit found the law impermissible. *Id.* at 757. Instead, the court held that because the statute "cannot be justified without reference to the underlying content of the expression, it is not content-neutral and is subject to strict scrutiny." *Id.* at 782. In fact, it was even worse than that: The statute was found to discriminate based on viewpoint because it "applies only to expressive activities that are 'intended to impede or obstruct' hunters or hunting activities." *Id.* at 781.

The Privacy Act contains no comparable discriminatory language. Instead, as the Fifth Circuit explained, it

"distinguishes among photographers." Pet.App.32. It thus does not break with cases addressing laws that distinguish "among *photographs*." Pet.App.32a; *contra* Pet.33.

2. Nor did the Fifth Circuit contribute to a circuit split by holding that strict scrutiny should not apply even though the Privacy Act favors some drone operators over others. *Contra* Pet.33. Petitioners' argument to the contrary mischaracterizes the cases upon which they rely.

People for Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation did not hold that "restrictions distinguishing among different speakers, allowing speech by some but not others" are always subject to strict scrutiny because they "are as repugnant to the First Amendment as are restrictions distinguishing among viewpoints." 60 F.4th 815, 831 (4th Cir. 2023); *contra* Pet.33. Rather, it observed that "as instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *PETA*, 60 F.4th at 831. The Fourth Circuit ultimately held that the challenged provision was subject to strict scrutiny because the speaker-based distinction served as a proxy for viewpoint discrimination by excluding those more likely to speak favorably on the subject at issue. *See id.*

Surita v. Hyde, 665 F.3d 860 (7th Cir. 2011), is even more off point because it did not involve a challenge to a statute at all. Instead, it involved a mayor who prevented the plaintiff from speaking before the city council in retaliation for how the plaintiff spoke to a city employee. "The content-based nature of [the mayor's] restriction on [plaintiff] is highlighted by [the mayor's] demand that [plaintiff] apologize regarding statements attributed to him by a city employee." *Id.* at 870. The mayor argued

that his restriction on plaintiff's speech was "justified as a sanction" which the court rejected because the mayor "used [plaintiff's] prior speech to prohibit subsequent protected speech." *Id.* at 871-72. Because this case involves nothing of the sort, the Fifth Circuit hardly created a circuit split worthy of this Court's review.

C. The Surveillance Provisions are not subject to strict scrutiny.[7]

Finally, although the Fifth Circuit's reasoning was slightly off, review is unnecessary because its *judgment* was correct on the merits. Specifically, the Fifth Circuit should have awarded judgment to Respondents because the First Amendment has nothing to say about regulating drone flight. But having concluded that using a drone to take a picture mixes speech and conduct, the Fifth Circuit was entirely correct to subject the Privacy Act to intermediate scrutiny.

1. The First Amendment does not protect the right to fly a drone.

The Fifth Circuit should have held this case does not implicate the First Amendment at all because this Court has squarely "rejected the view that 'conduct can be labeled 'speech' whenever the person engaging in the conduct thereby intends to express an idea.'" *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 65-66 (2006) ("*FAIR*") (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, the First Amendment protects only conduct that is "inherently expressive." *Id.* at

[7] Respondents reserve the right to make additional arguments regarding why the Surveillance Provisions are not subject to strict scrutiny, and more broadly, do not violate the First Amendment.

66. There is nothing inherently expressive about flying a drone, nearly all of which carry some form of camera.

Though the Privacy Act might prohibit a specific means of gathering information that may ripen into expressive activity, such as publishing a photograph, the "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). As this Court held over half a century ago, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information . . . but that does not make entry into the White House a First Amendment right." *Id.* at 16-17. The same reasoning applies here.

2. The Surveillance Provisions are at most subject to intermediate scrutiny.

Assuming the Fifth Circuit was correct that flying a drone specifically for newsgathering even implicates the First Amendment, it correctly applied intermediate scrutiny for three reasons.

First, the Surveillance Provisions at most regulate the combination of speech and conduct. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it," or by photographing it. *FAIR*, 547 U.S. at 66. Instead, under *O'Brien*, and its progeny, "when 'speech' and 'nonspeech' elements are united in a course of conduct, a valid governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010); *see Clark v. Cmty. for*

Creative Non-Violence, 468 U.S. 288, 293 (1984). Because flying a drone with a camera is at most combining speech and conduct, the intermediate scrutiny test in *O'Brien* should apply.

Second, as the Fifth Circuit explained, because the Surveillance Provisions "classify images as lawful or unlawful based not on *what* is in the picture, but on the basis of *how* the picture is taken," they can be read as content-neutral time, place, and manner restrictions. Pet.App.30a. That is because far from prohibiting the capture of an image of "an individual or privately owned real property," *contra* Pet.23, they prohibit the use of an "unmanned aircraft" to capture such an image "with the intent to conduct surveillance," Tex. Gov't Code § 423.003(a). On its face, that is a manner restriction because the same image can be captured with the consent of the person whose privacy is at issue, *id.* 423.002(a)(6), or even without that consent subject to limitations, *id.* § 423.002(a)(14).

Reed v. Town of Gilbert, 576 U.S. 155 (2015), and *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), are not to the contrary. *Reed* held only that even without viewpoint discrimination, a government cannot "ban[] the use of sound trucks for political speech" because it is not regulating all speech "in an evenhanded, content-neutral manner." 576 U.S. at 169, 173. The Privacy Act does not purport to do so. It permits photographers to take any picture they like. It merely requires that when a drone photographer surveils "an individual or privately owned real property," *id.* § 423.003(a), he can only take photographs from a public place and below a certain height, *id.* § 423.002(a)(14), obtain consent, *id.* § 423.002(a)(6), or fit another statutory exception.

Reagan is also off point because it involved a challenge to a city ordinance restricting speech on a person's own property. *See Reagan*, 596 U.S. at 66-67. As the Fifth Circuit correctly observed, "there is an important and obvious distinction between recording in public spaces and unauthorized recording on private property" of *someone else*. Pet.App.34a-35a (internal quotation marks omitted). And this Court "categorically reject[ed] the argument that a vendor has a right under the Constitution . . . to send unwanted material into the home of another" more than 50 years ago. *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970). Just as "the asserted right of a mailer . . . stops at the outer boundary of every person's domain," *id.*, so does the right of a drone pilot—even if he seeks to "gather news," *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality op.).

Third, that the Privacy Act favors some drone operators over others does not make it content-based. A statute that distinguishes based "only upon the manner in which speakers transmit their messages" and "not upon the messages they carry" is not content-based so long as the distinction is not employed as "a subtle means of exercising a content preference." *Turner Broad. Sys., Inc., v. F.C.C.*, 512 U.S. 622, 645 (1994). Under the Privacy Act, any speaker may engage in drone photography if done from a public place and below a certain height, Tex. Gov't Code § 423.002(a)(14), or with the consent of the private property owner, *id.* § 423.002(a)(6). And the Surveillance Provisions apply to no one if the drone operator lacks the intent to surveil. *Id.* § 423.003(a). Accordingly, any speaker-based distinction turns on the speaker's intent, not the content of his message, and the Fifth Circuit was right to subject the Privacy Act to intermediate scrutiny.

3. The Fifth Circuit's *application* of intermediate scrutiny does not merit review.

Though the petition complains that the Fifth Circuit applied an "anemic version of intermediate scrutiny" that "departs dramatically from the meaningful review this Court has" applied in other cases, such an argument does not justify review. Pet.37-38. This Court exists "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—not to review findings of fact or correct the misapplication of law by lower courts, *see Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). Petitioners' gripes about how the Fifth Circuit *applied* the intermediate-scrutiny standard are precisely the sort of fact-bound requests for error correction that this Court routinely declines. SHAPIRO, *supra* at 508-09. The Court should do so again here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2024