No. 23-1105

In the Supreme Court of the United States

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, et al.,

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents' opposition underscores the need for certiorari. It concedes the Fifth Circuit's decision was wrong to impose different standing requirements to challenge a speech-chilling law depending on whether the claim is brought under the First or Fourteenth Amendment. Its cursory defense of the Fifth Circuit's First Amendment holding highlights the growing confusion among the circuits about what constitutes a "content-based" regulation requiring strict scrutiny. And unable to deny the Fifth Circuit's departures from precedent, it offers up illusory vehicle concerns that ignore both the undisputed record and the lower courts' factual findings. None of its arguments diminishes the need for certiorari to resolve the consequential questions presented.

A. The Fifth Circuit's bifurcated standing analysis conflicts with this Court's precedent and creates a circuit split that will sow confusion.

1. Respondents concede that the Fifth Circuit's due process standing analysis conflicts with *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), but mistakenly claim that *Babbitt* is no longer good law. Opp.15-16. This Court has never questioned *Babbitt*'s holding that a credible threat of enforcement of criminal law sufficient to confer standing exists where government officials have "not disavowed any intention of" enforcing the challenged law, 442 U.S. at 302, and to the contrary has repeatedly endorsed it. In *Susan B. Anthony List v. Driehaus*, for example,

the Court cited *Babbitt* in finding a credible threat of enforcement on facts similar to those here, where the government did not "disavow[] enforcement" of a criminal law and administrative proceedings had previously been initiated to determine whether prosecution was warranted. 573 U.S. 149, 164-67 (2014); *accord Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (standing for vagueness and First Amendment challenge where government did not disavow enforcement); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15-16 (2010) (same); *see also* Pet.11-14.

Driehaus did not implicitly overrule this wall of authority by referencing a "substantial" risk of harm as Respondents contend. *See Greenberg v. Lehocky*, 81 F.4th 376, 386 (3d Cir. 2023) (explaining that *Driehaus*, *Holder*, and *Babbitt* all stand for the same refusal-to-disavow requirement); *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 218 (5th Cir. 2023) (equating *Babbitt*'s sufficient threat of enforcement test with *Driehaus* test). Nor did *California v. Texas*, which simply stands for the proposition that the text of a regulation whose violation carried a $0 penalty with "no means of enforcement" is insufficient by itself to establish traceability and redressability. 593 U.S. 659, 668-74 (2021) (citing favorably *Babbitt* and *Am. Booksellers*).

2. Respondents also concede that the Fifth Circuit incorrectly deployed different tests for standing to bring a constitutional challenge against a speech-chilling law depending on whether that challenge is to the law's vagueness or its content discrimination.

Opp.24. When speech rights are demonstrably chilled, this Court has repeatedly applied a single test for standing to bring both due process and First Amendment challenges. *See Babbitt*, 442 U.S. at 298-303; *Holder*, 561 U.S. at 14-16. Left unreviewed, the Fifth Circuit's bifurcated approach will sow confusion among circuits and multiply litigation. *See* Pet.14-16.

3. Respondents do not dispute the Fifth Circuit's departure from the standing requirements of other circuits, but criticize the conflicting decisions as wrongly decided. Opp.15. Even if that were the case, and it is not (*see* Pet.16-18), only this Court can resolve this dispute among the circuits.

4. Respondents say further review is unnecessary because Petitioners lack standing to bring their due process claim, even if the Fifth Circuit got the standard wrong. Opp.21-23. Not so. The undisputed record establishes that (1) Petitioners have "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) this conduct is "proscribed by a statute," and (3) "there exists a credible threat of prosecution," which is all Article III requires. *Driehaus*, 573 U.S. at 159 (citation omitted).

Respondents simply ignore the record in claiming that Petitioners base their standing on the mere fact that Chapter 423 is on the books, Opp.15-16, and "presume" standing because speech rights are implicated, *id.* at 24 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). Undisputed record facts establish both the Hays County District

Attorney's past prosecution of "drone-related activity" under Chapter 423,[1] ROA.606; Pet.App.8a, and his refusal to disavow future enforcement, ROA.592-94; Pet.App.15a-16a; *see also* Pet.13. They also establish the past police warning in Hays County issued to a member of Petitioner NPPA for violating Chapter 423, ROA.650-51; Pet.App.6a-7a, independently demonstrating that Petitioners' concern with enforcement is not "imaginary or speculative." *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The record further establishes Petitioners' intent to conduct drone journalism in Hays County that is being thwarted by fear of prosecution. ROA.649-56.

Respondents equally ignore this record in suggesting that "prospective relief cannot rest entirely on a defendant's allegedly unconstitutional acts in the past." Opp.22 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). The suggestion also disregards this Court's instruction in *Driehaus* that past enforcement is "good evidence" that a threat of enforcement is not "chimerical." 573 U.S. at 149. Nor is traceability an issue here. The district court correctly found that the District Attorney has both the power and duty under state law to enforce Chapter

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[1] That the prior prosecution was brought by Higgins' predecessor is irrelevant as this action is against Higgins in his official capacity as District Attorney. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") (citations omitted).

423, creating a legitimate fear of prosecution beyond "the provision of the law itself." Pet.App.60a-61a; *see Collins v. Yellin*, 594 U.S. 243-44 (2021). [2]

5. Respondents finally deny a need for review by disputing the merits of Petitioners' due process claim, contending that "surveillance" in Chapter 423 is not impermissibly vague. Opp.18-21. Respondents admit, however, that "surveillance" has more than one meaning, Opp.19, acknowledge it may include newsgathering, ROA.945, as the district court found, Pet.App.79a-81a, and have refused to adopt a position on whether Chapter 423 encompasses newsgathering, ROA.580; Pet.App.79a-80a. If Respondents were correct that "surveillance" in Chapter 423 is clearly limited to improper, "clandestine" observation (a limitation absent from the statute's text) and thus excludes ordinary newsgathering, Texas would not have needed to include 21 exceptions for purposes it favors. *See* Pet.4. Nor would Respondents fail to disavow enforcement against journalists or Texas news organizations continue to refrain from capturing and publishing drone photography. Pet.3-5. As this Court has made plain, a law "so vague that men of

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[2] Respondents' argument that the Fifth Circuit wrongly found standing for the First Amendment claim, Opp.24-25, fails for the same reasons. Whether a speech-chilling law is challenged under the First or Fourteenth Amendments, a credible threat of enforcement is sufficient for standing, even absent "actual prosecution." *Am. Booksellers*, 484 U.S. at 393; *Holder*, 561 U.S. at 15-16.

common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

B. The Fifth Circuit's rejection of strict scrutiny conflicts with this Court's precedent, deepens existing circuit conflicts and will sow confusion.

1. Respondents claim that the Fifth Circuit's refusal to apply strict scrutiny to Chapter 423 does not warrant review because the Fifth Circuit found that the law does not regulate based on content. Opp.30-32. To the contrary, that is precisely the First Amendment holding in need of review. The Fifth Circuit's definition of what constitutes a "content-based" law defies this Court's precedent.

In the Fifth Circuit's view, Chapter 423 imposes a content neutral time, place, or manner restriction because it does not prohibit any content *altogether*—the law permits the disfavored content "to be captured with tools other than drones," Opp.26, and prohibits drone photographs of specific content only when a drone is flown above 8 feet, Opp.31. This definition of content neutrality simply blinks away the content-based distinctions that must be made to determine whether Chapter 423's purported time, place, or manner restriction applies in the first place. Chapter 423 imposes criminal sanctions only on images depicting specific content—private property or individuals on private property. *See* Pet.23-25, 27-28.

Under the Fifth Circuit's reasoning, the sign ordinance in *Reed v. Town of Gilbert* would itself be content neutral, because it did not prohibit communicating any content *altogether*—it permitted regulated content to be communicated in any manner other than on a sign, and prohibited regulated content only on signs of certain sizes subject to specific time limits. 576 U.S. 155, 159-61 (2015). The Fifth Circuit squarely rejects *Reed* and the Court's repeated instruction that a law is content based if it targets First Amendment-protected speech because of its communicative content. *See, e.g.*, *Vidal v. Elster*, 602 U.S. 286, 294-95 (2024); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011); *see also* Pet.24, 27-28.

2. Respondents repeat this flawed reasoning to deny the circuit splits identified in the Petition that the Fifth Circuit deepens. Opp.26-28. For example, they find no conflict with the holding in *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021), because there an officer had to "examine the content of the photograph" to know if a law requiring parental consent to photograph a child was violated. Opp.26. An officer must equally "examine the content of a photograph" to know if it contains content prohibited by Chapter 423 but, in conflict with *Ness*, the Fifth Circuit found Chapter 423 *not* content based. *See* Pet.25, 28-29. And Respondents do not even attempt to reconcile the growing circuit conflict about when a need to consider content renders a regulation subject to strict scrutiny after *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022). *See* Pet.26-30.

3. Respondents reject the findings of both the Fifth Circuit and district court that Chapter 423 regulates First Amendment-protected activity, Pet.App.25a-28a, 67a-69a, to argue that the law "does not implicate the First Amendment at all." Opp.29-30. Respondents claim Chapter 423 simply regulates drone flight, but its prohibition on "surveillance" is far more than a flight regulation. It criminalizes both "captur[ing] an image" and publishing it. Pet.3. Both prohibitions plainly trigger First Amendment scrutiny. *See Sorrell*, 564 U.S. at 570 (the "creation and dissemination of information are speech within the meaning of the First Amendment"); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) (First Amendment applies to "creating, distributing, [and] consuming speech"); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022) (filming is entitled to First Amendment protection).

4. Respondents then defend the Fifth Circuit's use of intermediate scrutiny by asserting that Chapter 423 is a regulation of conduct with only incidental effects on speech, citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006) ("*FAIR*") and *United States v. O'Brien*, 391 U.S. 367 (1968). Opp.30. Those cases are entirely inapposite. *FAIR* involved a law that required schools to provide military recruiters equal access to their campuses, a mandate that necessarily required schools to provide some assistance implicating speech (*e.g.*, sending scheduling emails). 547 U.S. at 61-62. But the compelled speech at issue was entirely incidental to the regulation of non-expressive conduct. *Id.* at 62. *O'Brien* upheld a law prohibiting destroying

draft cards, pure conduct that in some contexts could be expressive. 391 U.S. at 375. In stark contrast, the Surveillance Provisions are not "incidental limitations" on the regulation of non-expressive conduct, they directly target expression itself—prohibiting the capture and publication of disfavored images. Indeed, drones' ability to capture images is the reason Texas regulates them.

Chapter 423 fails intermediate scrutiny, even if it applied. While protecting privacy can be a valid governmental interest, Chapter 423's prohibitions apply almost entirely *where no privacy interest exists*. It proscribes images of any private property, even if caught in background while covering a news story from a public space. *See* Pet.App.76a, 80a. Texas has no valid governmental interest in prohibiting photographs of that which is open to the naked eye. *See California v. Ciraolo*, 476 U.S. 207, 213 (1986) (no expectation of privacy in Fourth Amendment context where "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed"). In those situations where privacy interests do exist, privacy from drone photography is *already* adequately protected by existing Texas law. *See, e.g.*, ROA.577-578; Pet.App.74a-75a. Chapter 423 fails even under *FAIR* and *O'Brien*.

5. Respondents fare no better in arguing that review is unwarranted because Chapter 423's speaker preferences are not proxies for content or viewpoint discrimination. Opp.28, 32. Respondents concede that Chapter 423 deprives journalists from using a

"valuable tool," Opp.32, but ignore that virtually all other professionals who rely on drones are *exempted* from the law. *See* Pet.4-5. Even a generally applicable law that more than incidentally limits the press's ability to gather and report the news raises First Amendment concerns, *e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), and Chapter 423 with its 21 exemptions is anything but generally applicable. This differential treatment suggests an intent to suppress expression by the press. *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). A law that directly restricts gathering and publishing information and then exempts others but *not* those performing press functions should necessarily trigger strict scrutiny given the First Amendment's express protection of "the press." *See* Pet.34-36; *cf. Tandon v. Newsom*, 593 U.S. 61, 62-64 (2021) (exemption-riddled regulation failed strict scrutiny in free exercise context).

C. Respondents' vehicle concerns are illusory.

This case presents an ideal vehicle to resolve the questions presented and Respondents' arguments to the contrary, Opp.8-13, are makeweights.

1. This case presents a clean facial challenge to Chapter 423. In arguing otherwise (for the first time), Respondents misrepresent this case as a hybrid facial challenge "but only *as applied to journalists*." Opp.8. This misstates the Complaint, ROA.38-40, Respondents' prior understanding of the case, ROA.1104, 1116, 1176-1177, and the lower courts'

treatment of the case as a routine facial challenge, Pet.App.8a, 37a, 76a-77a. Respondents' argument conflates the nature of Petitioners' challenge to the vague and content-based law with their demonstration, for purposes of Article III standing, of the chilling effect and injury-in-fact the law inflicts on each of them—an association of visual journalists, a trade organization of Texas newspapers, and a freelance journalist.

Respondents argue that *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), precludes review because Chapter 423's unconstitutional applications have not been weighed against its constitutional ones. Opp.8. This, too, misstates the record. Unlike *NetChoice*, a preliminary injunction dispute that reached the Court with an inadequate factual record and "critical issues" that were never briefed below, 144 S. Ct. at 2399, this appeal follows summary judgment entered on an undisputed factual record drawn from discovery. *See* Pet.App.50a-56a. The district court here specifically found that "a substantial number of [Chapter 423's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Pet.App.76a-77a. As the district court explained, the record establishes that Chapter 423 effectively outlaws the use of drones for newsgathering about private property, which "constitut[es] 95 percent of the state," and does so even when drones "indisputably do[] not pose the risk that the State claims." *See* Pet.App.37a, 76a-77a; *see also* ROA.1092-93.

Respondents' further argument that Chapter 423's expansive definition of "image" means Petitioners have failed to "address the full range of activities the law[] covers[]" also fails. Opp. 8. Regardless of the medium of an image, Chapter 423 always discriminates based on its content. *See* Pet.23-24, 27-28. The district court determined that Chapter 423 failed strict scrutiny because under existing Texas laws there is no "interest that is unprotected absent Chapter 423" and Chapter 423 is "not narrowly tailored to any governmental purpose." Pet.App.74a-77a. These failures are "categorical—present in every case." *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (confirming district court's factual findings supporting successful facial challenge to First Amendment-chilling law); *cf. Iancu v. Brunetti*, 588 U.S. 388, 398-99 (2019) (explaining viewpoint-discriminatory laws are not "salvageable by virtue of [their] constitutionally permissible applications").

2. Respondents are equally misdirected in claiming their purported sovereign immunity renders this a poor vehicle. Opp.9-11. The Fifth Circuit and district court correctly held that the District Attorney—a county official—is not entitled to sovereign immunity. Pet.App.22a, 66a. Eleventh Amendment sovereign immunity applies only to states and state officials, not county officials. *N. Ins. Co. of New York v. Chatham Cnty.*, 547 U.S. 189, 193-94 (2006); *see also Crane v. Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (holding that Texas district attorneys are not entitled to sovereign immunity). And even if

Higgins were eligible for sovereign immunity, the *Ex parte Young* exception to immunity would apply because the District Attorney has the authority and duty to prosecute violations of Chapter 423 and has done so. App.18a. *See Ex parte Young,* 209 U.S. 123, 157 (1908) (denying immunity where defendant has "some connection" to enforcement).

D. Chapter 423 inflicts real harm that warrants review.

Respondents' obfuscation of the law cannot hide the undisputed and ongoing harm to Petitioners' constitutional rights caused by Chapter 423. Pet.App.14a-16a, 60a. Drones are an invaluable tool for which no adequate alternative exists for reporting on many of the most important public health and safety stories. *See* ROA.29, 37; Pet.App.55a-56a & n.2. For example, Chapter 423 prevented a TV station from obtaining images that would have "saved lives" by alerting viewers to the imminent threat of a devastating fire as it raged through private land. *See* Br. Amici Curiae Texas Association of Broadcasters at 10-14. The "press fulfill[s] an essential role in our democracy" to "inform the people," and Chapter 423 today is preventing Texas journalists from doing this. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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