No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Texas Government Code Chapter 423 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. The law does not define "surveillance" but, according to Respondents and dictionary definitions, it may include newsgathering. Chapter 423 exempts from its content-based restrictions twenty-one favored speakers and uses, but does not exempt journalists.

The Fifth Circuit found that the risk of criminal prosecution under Chapter 423 is demonstrably chilling Petitioners' newsgathering and reporting, and that this injury established their Article III standing for a facial First Amendment challenge. It found this same injury insufficient for standing to pursue a void-for-vagueness due process claim because authorities had not prosecuted or arrested a journalist.

On the merits of the First Amendment claim, the Fifth Circuit declined to apply strict scrutiny to the law's content- and speaker-based prohibitions and held that Chapter 423 survives intermediate scrutiny without addressing its vagueness. The questions presented are:

1. Do journalists and news organizations whose First Amendment rights are chilled by an ambiguous criminal law have standing to bring a facial void-for-vagueness due process challenge?

2. What level of scrutiny applies to a law using content- and speaker-based distinctions to prohibit taking and publishing certain drone images?

PARTIES TO THE PROCEEDING

Petitioners are the National Press Photographers Association (NPPA), a nationwide association of visual journalists; the Texas Press Association (TPA), a trade organization of over 400 Texas newspapers; and Joseph Pappalardo, a freelance Texas journalist and FAA-certified drone pilot. They were plaintiffs in the district court and appellees/cross-appellants in the court of appeals.

Respondents are Kelly Higgins, in his official capacity as district attorney of Hays County, Texas, Steven McCraw, in his official capacity as director of the Texas Department of Public Safety, and Dwight Mathis, in his official capacity as chief of the Texas Highway Patrol. They were defendants in the district court and appellants/cross-appellees in the court of appeals.[1]

CORPORATE DISCLOSURE STATEMENT

Petitioner National Press Photographers Association is a 501(c)(6) organization based in Georgia. It has no parent corporation, and no publicly held companies have an ownership interest in it.

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[1] At the district court, the named defendants were Steven McCraw, in his official capacity as Director of the Texas Department of Public Safety; Ron Joy, in his official capacity as Chief of the Texas Highway Patrol (later substituted with his successor, Dwight Mathis); and Wes Mau, in his official capacity as the District Attorney of Hays County, Texas (later substituted with his successor Kelly Higgins).

Petitioner Texas Press Association is a 501(c)(3) nonprofit corporation registered in Texas. It has no parent corporation, and no publicly held companies have an ownership interest in it.

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Nat'l Press Photographers Ass'n v. McCraw, No. 1:19-CV-946 (judgment entered Apr. 13, 2022)

United States Court of Appeals (5th Cir.):

Nat'l Press Photographers Ass'n v. McCraw, No. 22-50337 (judgment entered Jan. 10, 2024)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This petition arises from a pre-enforcement challenge by journalists and news organizations to Texas Government Code Chapter 423, a vague law that can be read to criminalize the use of drones for gathering and publishing newsworthy images.

Drones are cost-effective newsgathering tools that have become vital for 21st-Century journalism, but Texas journalists were forced to stop creating and publishing drone images out of fear of prosecution under the ambiguous law and suffered economic harm as a result. Despite this ongoing injury, the Fifth Circuit refused to consider Petitioners' due process vagueness challenge unless and until a journalist is arrested or prosecuted. Review by this Court is warranted because this restriction on Article III standing imposes a jurisdictional bar that no other circuit imposes and is irreconcilable with this Court's decision in *Holder v. Humanitarian Law Project*.

The Fifth Circuit also rejected Petitioners' First Amendment challenge to Chapter 423's content- and speaker-based prohibitions against taking and publishing certain drone images. This decision warrants review because the Fifth Circuit's refusal to apply strict scrutiny to a law imposing both content- and speaker-based restrictions on the creation and dissemination of speech defies *Reed v. Town of Gilbert*, misapplies *City of Austin v. Reagan National Advertising of Austin*, and conflicts with authoritative rulings by other circuits.

The Fifth Circuit has allowed an ambiguous, content-based criminal law that is chilling First Amendment rights to remain in effect without addressing its admitted vagueness and without applying the scrutiny this Court requires. Certiorari is needed to remedy the ongoing restrictions on gathering and publishing news that the decision permits.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 90 F.4th 770 (5th Cir. 2024) and reprinted at App.1a. The opinion of the district court is reported at 594 F. Supp. 3d 789 (W.D. Tex. 2022) and reprinted at App.49a.

JURISDICTION

The Fifth Circuit entered its initial decision on October 23, 2023. 84 F.4th 632 (5th Cir. 2023). On January 10, 2024, it granted in part and denied in part Petitioners' petition for panel rehearing, denied Petitioners' petition for rehearing *en banc*, issued a substituted decision, and entered judgment. App.46a-48a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Relevant portions of Texas Government Code Chapter 423 appear at App.88a.

STATEMENT OF THE CASE

A. Chapter 423's Prohibition on Capturing or Publishing Certain Drone Images

Chapter 423 of the Texas Government Code criminalizes 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 law also criminalizes publication of any such drone image, *id.* § 423.004(b)-(c), and creates parallel civil liability for taking or publishing drone images, *id.* § 423.006.

Sections 423.002, .003, .004, and .006 (collectively, the "Surveillance Provisions") do not define "surveillance." The district court found that dictionary definitions do not clarify whether newsgathering is a form of "surveillance," App.79a, and Respondents refused to elucidate, saying only that journalism "may or may not constitute 'surveillance.'" ROA.579, 593.[2] Respondents also refused to disavow enforcement of

[2] "ROA.__" refers to the Fifth Circuit's record on appeal.

the law against journalists engaged in routine newsgathering. ROA.592-94.

The state legislature dubbed Chapter 423 the "Texas Privacy Act," but the word "privacy" appears nowhere in the law itself. 2013 Tex. HB 912. The Surveillance Provisions prohibit drone photography without regard to the violation of any recognized privacy right. Whether drone photography is illegal depends upon the content of the image taken. The law 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. Tex. Gov't Code §§ 423.002(a)(15); 423.003(a).

Chapter 423 exempts from this blanket prohibition on the capture or publication of certain images at least twenty-one categories of permitted speakers and purposes. These include professors or students capturing images "for the purpose of professional or scholarly research," real estate brokers "in connection with the marketing of real property," land surveyors, engineers, oil pipeline operators, and insurance underwriters. Tex. Gov't Code § 423.002(a).

The law controls which favored speakers can use drones to capture and disseminate images on many matters of public concern. It permits, for example, law enforcement authorities, professors, and students to capture images of a catastrophic scene, environmental devastation, or a public safety issue, but prohibits

journalists from doing so. The law provides no exception for journalists or for the purpose of reporting the news. An amendment that would have provided such an exception was rejected despite Texas lawmakers' awareness that Chapter 423 would otherwise "hinder free speech and a free press." ROA.814; *see* Conference Committee Report, H.B. 912, 83rd Leg., Reg. Sess., at 18 (Tex. 2013).[3]

B. Chapter 423's Chilling Impact on the Press

Enactment of Chapter 423 had a significant, demonstrable chilling impact on Petitioners' ability to gather and report the news. The threat of prosecution for taking or publishing certain drone images forced news organizations to avoid drone photography even when vital information could only feasibly be captured with a drone. *See* App.7a, 53a-54a; ROA.644, 676-77, 684-85, 652, 671-72, 684.

Chapter 423's menace of criminal liability continues to constrain Petitioners' ability to conduct meaningful reporting on many newsworthy events. *See* ROA.670, 682, 692. For example, *The Dallas Morning News*, a member of Petitioner Texas Press Association (TPA), will not publish newsworthy drone images taken by freelancers and bars drone use by staff photographers, even where alternatives, such as planes or helicopters, are more dangerous and cost prohibitive. App.55a-56a; ROA.684; 676-77, 686-87.

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[3] http://www.lrl.state.tx.us/scanned/83ccrs/hb0912.pdf.

The record validates concerns over Chapter 423's criminalization of newsgathering. San Marcos police threatened a member of Petitioner National Press Photographers Association (NPPA) with arrest for using his drone to cover the remains of an apartment building in Hays County that had burned down days earlier, killing five people—a story he was covering for TPA member *The San Antonio Express-News*. ROA.650-51. Police said he had "violated state law by taking pictures" and would "violat[e] state law again" if he "published the photos." App.6a-7a. The journalist subsequently curtailed his use of drone photography; the *Express-News* continues to report on the fire and wishes to publish the aerial image of the scene without fear of prosecution. ROA.649-55.

TPA and NPPA members continue to report in Hays County and throughout Texas and continue to be chilled by Chapter 423 from publishing newsworthy images. *See* ROA 1058-59; 1067-70. Fearing charges under Chapter 423, Petitioner Pappalardo has been forced to stop using a drone to cover—or not to cover at all—newsworthy stories including natural disasters, urban sprawl, and the clearing of homeless encampments. ROA.20-21.

The potential for prosecution under the Surveillance Provisions also inflicts ongoing economic harm on journalists. The record documents thousands of dollars of lost income to another NPPA member caused by the risk of Chapter 423 liability and the resulting refusal of news organizations to publish drone images. ROA.686-87, 691, 697.

C. Proceedings Below

1. Petitioners filed a facial challenge to the Surveillance Provisions on First Amendment and Fourteenth Amendment due process grounds, pursuant to 42 U.S.C. § 1983.[4] The district court denied a motion to dismiss these claims. App.56a.

On summary judgment, the district court held that Petitioners had demonstrated injury in fact sufficient to establish their Article III standing by showing that a "credible threat of enforcement" of Chapter 423 had chilled their speech. App.59a. On the First Amendment merits, it held that the law's restrictions on the creation and publication of speech imposed through distinctions based on content, speaker, and use were subject to, and failed, strict scrutiny. App.70a-73a. The court also found the provisions "unnecessarily circumscribe protected expression" and thus unconstitutionally overbroad. App.75a-76a.

Turning to the due process claim, the district court found the Surveillance Provisions unconstitutionally vague under the Fourteenth Amendment. The court found that the ambiguous and undefined term "surveillance" was chilling speech and failed to provide reasonable notice of what conduct the law prohibited. App.79a-81a.

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[4] Petitioners also challenged other provisions of Chapter 423 (the "No-Fly Provisions") that barred operation of drones lower than 400 feet above ground level over certain facilities. App.3a-5a. Petitioners do not seek review of the various rulings upholding that provision. *See* App.23a.

The district court enjoined Chapter 423's enforcement with immediate consequences. The Texas press resumed using drone images to report on fires, floods, railroad strikes, and other newsworthy events. App.14a. Respondents appealed.

2. On appeal, a Fifth Circuit panel reversed and vacated the injunction, rejecting the district court's holdings on Fourteenth Amendment standing and First Amendment invalidity. App.45a. The panel also held that Respondents McCraw and Mathis had Eleventh Amendment sovereign immunity as state officials, notwithstanding the *Ex parte Young* exception. App.23a. It found Respondent Higgins, a county prosecutor, not immune. *Id.*

Following Petitioners' request for rehearing, the panel issued a revised opinion upholding its original judgment. App.1a; App.48a. On standing, the Fifth Circuit found that Chapter 423 chilled Petitioners' speech and inflicted economic harm. App.16a. It held that these injuries satisfied Article III for purposes of Petitioners' First Amendment claim, but not for purposes of their due process vagueness claim. The Fifth Circuit held that Petitioners could not bring a pre-enforcement due process challenge to a vague law—even one demonstrably chilling protected speech—absent an arrest or specific threat of enforcement against them. App.12a. A police threat to arrest a journalist for using his drone and a prior Chapter 423 prosecution of a non-journalist by Respondent Higgins' office, App.14a, 18a, were not sufficient. The panel thus never addressed the very vagueness that was chilling Petitioners' speech.

The Fifth Circuit recognized that the penalties Chapter 423 imposes on the creation and publication of drone photographs implicate the First Amendment protections of speech and press, App.28a, but refused to apply strict judicial scrutiny for three reasons.

First, the Fifth Circuit viewed the Surveillance Provisions as imposing a neutral "time, place, or manner" restriction because they apply only to drones flown more than eight feet above ground and, in this respect, are "based not on *what* is in the picture" but rather on "*how* the picture is taken." App.30a. It read *City of Austin v. Reagan National Advertising of Austin, LLC* to permit a court to examine the content of speech in determining whether a speech restriction applies without applying strict scrutiny, and it saw no need to address Chapter 423's discrimination among drone images taken above eight feet based upon their content, speaker, and purpose. App.28a-29a.

Second, the Fifth Circuit found strict scrutiny of Chapter 423's exemptions for favored speakers and purposes unnecessary because it did not consider them proxies for content-based preferences. App.32a.

Finally, the Fifth Circuit held that the substantial burden Chapter 423 imposed on newsgathering provided no basis for strict scrutiny because "[f]rom the beginning of our country the press has operated without constitutional protection for [drones], and [yet] the press has flourished." App.34a (quoting *Branzburg v. Hayes,* 408 U.S. 665, 698-99 (1972)).

The panel instead applied an anemic form of intermediate scrutiny, upholding the Surveillance

Provisions because they further a "substantial interest in protecting the privacy rights of [Texas] citizens," that "would be 'achieved less effectively' absent the Surveillance provisions," and are sufficiently tailored because the law bars "only surveillance that could not be achieved through ordinary means." App.37a. The panel's scrutiny did not address either the uncontroverted evidence that Chapter 423 burdens speech in many situations where there is no expectation of privacy or the extent to which other Texas' laws already prohibit drone surveillance where expectations of privacy do exist. *See* App. 34a-37a.

Petitioners' request for rehearing *en banc* was denied. App.48a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Unique Rejection of Due Process Standing to Challenge a Vague, Speech-Chilling Law Warrants Review

The Fifth Circuit's denial of due process standing warrants review because it applies a heightened standard for Article III injury that is foreclosed by several Court precedents, including *Holder v. Humanitarian Law Project* and *Babbitt v. United Farm Workers Nat'l Union*, and conflicts with rulings of other circuits.

The court of appeals found, as the record required, that the potential punishment of newsgathering under Chapter 423's vague terms was chilling Petitioners' speech and harming them economically. It readily judged these injuries sufficient to establish

Petitioners' standing to bring a facial First Amendment challenge but held them insufficient to establish standing for a pre-enforcement vagueness challenge, App.12a-15a—even though Chapter 423's vagueness is inseparable from the First Amendment injury inflicted by its threatened enforcement. Allowing this ruling to stand will sow confusion among the lower courts about the standing requirements of Article III.

A. The Fifth Circuit decision contravenes this Court's holdings on Article III standing.

1. The Fifth Circuit's denial of journalists' standing to bring a vagueness challenge to Chapter 423 before their arrest or prosecution rejects this Court's clear holding that Article III standing exists to challenge the constitutionality of a speech-repressive law without "an actual arrest, prosecution, or other enforcement action." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). In such pre-enforcement cases, the Court has instructed that the injury-in-fact requirement is satisfied where a plaintiff intends to engage in constitutionally protected activity that the law proscribes and there exists "'a credible threat of prosecution.'" *Id.* at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Standing exists because the mere *threat* of penal sanctions deters the exercise of expressive freedoms "almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding Article

III standing met by plaintiffs' "self-censorship[,] a harm that can be realized even without an actual prosecution").

The Court has further instructed that a "credible threat of prosecution" sufficient to confer standing is simply a threat that's "not imaginary or wholly speculative." *Babbitt*, 442 U.S. at 298, 302. A record of past enforcement magnifies the credible threat of future enforcement, *see Driehaus*, 573 U.S. at 164-65; *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16 (2010), but is not required. Rather, this Court has repeatedly found that a sufficiently credible threat exists to confer standing for a vagueness challenge where a law enforcement official "has not disavowed any intention of" enforcing the challenged restriction. *Babbitt*, 442 U.S. at 302; *Holder*, 561 U.S. at 16 (finding standing for vagueness challenge where government did not represent "that plaintiffs will not be prosecuted"); *cf. Am. Booksellers*, 484 U.S. at 393 (finding standing to challenge speech restriction where state did not disavow enforcement); *Driehaus*, 573 U.S. at 165 (same).

The Fifth Circuit's decision flouts this precedent. It bars standing to bring a facial due process challenge against a vague statute that arguably proscribes constitutionally protected expression until a plaintiff is arrested or prosecuted, despite a demonstrated chill on the plaintiff's expression. App.12a-15a. It denied standing here despite undisputed evidence that journalists fearing prosecution stopped using drones even when they were the only feasible way to capture a newsworthy image, and that newspapers stopped

publishing newsworthy drone photography to avoid potential liability. App.5a-7a, 14a.

The Fifth Circuit acknowledged the chilling impact of the Surveillance Provisions, took note of Respondents' refusal to disavow enforcement, and considered a past prosecution under Chapter 423 by the Hays County District Attorney "'good evidence' that the likelihood of a future prosecution is not 'chimerical.'" App.13a-16a, 18a (citing *Driehaus*, 573 U.S. at 164). It even declared this "substantial threat of future enforcement" sufficient to establish Petitioners' standing to bring a facial First Amendment challenge. App.14a-15a. The Fifth Circuit nevertheless denied standing to challenge the law's vagueness under the Due Process Clause because Petitioners "have never been arrested or prosecuted for violating Chapter 423." App.12a.

The heightened standing test imposed by the Fifth Circuit for a pre-enforcement vagueness challenge to a law that chills First Amendment rights disregards both the failure-to-disavow standard the Court adopted in *Babbitt* and *American Booksellers*, and the importance of a history of past enforcement to the Court's standing analysis in *Holder* and *Driehaus*. Moreover, the Court previously rejected the actual-enforcement standing requirement the Fifth Circuit imposed because "self-censorship" of protected speech is "a harm that can be realized even without an actual prosecution." *Am. Booksellers*, 484 U.S. at 393. The Court has repeatedly held that a plaintiff need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters

the exercise of his constitutional rights." *Driehaus*, 573 U.S. at 158 (citation omitted); *see also, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (a plaintiff need not "expose himself to liability" to challenge the "constitutionality of a law threatened to be enforced").

The Fifth's Circuit's arrest-or-prosecution standard warrants review because it directly contravenes this controlling precedent, under which Petitioners' First Amendment chill and economic injury plainly establishes their standing to pursue a void-for-vagueness challenge to Chapter 423.

2. Review is also warranted of the Fifth Circuit's conclusion that a chill on speech and press caused by a vague law is sufficient to bring a pre-enforcement First Amendment claim but not to bring a pre-enforcement challenge to the vagueness that is causing the harm. The Court has never required *different* injuries to establish standing to assert different constitutional defects in the *same* speech-suppressive law, and the Fifth Circuit's imposition of just such differing tests is irreconcilable with *Holder*.

Holder makes clear that the chill created by potential enforcement of a vague law constitutes the actual injury needed to challenge the constitutionality of that law without regard to the nature of the law's alleged constitutional defect. *See* 561 U.S. at 15-16 (finding plaintiffs' self-censorship sufficient injury to confer standing for both First Amendment and void-for-vagueness due process claims). Just as in this case, the *Holder* plaintiffs showed that (a) government

officials had not disavowed enforcement of the challenged law; (b) they had previously brought prosecutions under that law; and (c) plaintiffs had suppressed their expressive activities for fear of punishment. *Id.* In concluding that the *Holder* plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief," this Court held they had standing to bring *both* a First Amendment challenge *and* a void-for-vagueness due process challenge based on the same actual injury. *Id.* at 14-15.

The Fifth Circuit's disparate approach fundamentally misapplies Article III's injury requirement where a First Amendment right is at stake. Article III simply requires an actual *harm* to the plaintiff caused by fear of punishment under an unlawful statute. *See California v. Texas*, 593 U.S. 659, 670 (2021) (explaining that Article III injury arises from the "likelihood of future enforcement"); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (basing Article III injury on "the putatively illegal conduct of the defendant"). This Court has consistently defined injury in fact as "an invasion of a legally protected interest," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation omitted), and has made similarly clear that "free speech" is one such interest, *id.* at 340. As the record here amply demonstrates, the threat of potential criminal liability from an unconstitutional, speech-suppressive law inflicts the concrete injury of self-censorship regardless of *why* the law is unconstitutional. *See Am. Booksellers*, 484 U.S. at 393.

Vague laws pose special dangers to expressive freedoms, *see infra*, Section I.C, so it is no surprise that courts frequently consider First Amendment and void-for-vagueness due process challenges to a speech-chilling law in parallel. *See, e.g.*, *Holder*, 561 U.S. at 14; *Hill v. Colorado*, 530 U.S. 703, 714, 732 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 629 (1984). If permitted to stand, the Fifth Circuit's disparate injury tests will create confusion about when a demonstrable chill on First Amendment rights confers standing to challenge a vague law and will multiply litigation by divorcing First Amendment and due process challenges to the same speech-chilling laws.

B. The Fifth Circuit decision conflicts with the standing decisions of other circuits.

Petitioners are not aware of any other circuit that requires an arrest or prosecution to challenge the vagueness of a speech-chilling law as did the Fifth Circuit here. Five other circuits have squarely held to the contrary—that a would-be speaker *does* have standing to mount a void-for-vagueness challenge to a speech-suppressing law when responsible officials, as here, do not disavow enforcement. Review is needed because only this Court can resolve the conflict created by the Fifth Circuit's heightened standing requirements and the Article III requirements of other circuits.

The Fifth Circuit's uniquely restrictive requirement of an arrest or prosecution departs from, and is irreconcilable with, the approach of its sister circuits. The Fourth Circuit found that a political

advocacy group had established Article III injury in fact and could proceed with a facial vagueness challenge to a law restricting political advocacy where the local district attorneys provided no indication they would "refrain[] from prosecuting those who appear to violate the plain language of the statute." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999). As Judge Wilkinson concluded, a "credible threat of prosecution" exists when a "non-moribund statute . . . facially restricts expressive activity by the class to which the plaintiff belongs." *Id.* at 710 (cleaned up).

The Seventh Circuit has similarly held that an advocacy group had standing to bring a facial vagueness challenge against a political speech restriction where the defendants "ha[d] not denied" that the challenged law would apply to the plaintiff's desired speech. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012). The refusal to disavow enforcement of the law produced "an objectively reasonable fear" that the plaintiffs would be penalized for their expressive activities. *Id.*

Other circuits are in accord. The Ninth Circuit held that a nonprofit could challenge a speech regulation as unconstitutionally vague even "absent a threat or at least a warning that California might prosecute" it. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003). The court explained that a plaintiff who has censored his own speech "need not show that the authorities have threatened to prosecute him" because "the threat is latent in the existence of the statute." *Id.* at 1095

(citation omitted). The Eleventh Circuit found that a plaintiff's speech was sufficiently chilled to confer standing by an allegedly vague regulation when the defendant evinced an "intent to enforce the rule" merely by "defending the challenged . . . rule in court." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010). The "minimal probability" of enforcement was enough to establish the plaintiff's standing to bring both a First Amendment and a void-for-vagueness due process claim. *Id.* at 1257, 1260. And the D.C. Circuit has explained that the "conventional background expectation that the government will enforce" a speech restriction can result in sufficient self-censorship for a plaintiff to challenge the regulation on vagueness grounds. *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 589 F.3d 433, 435 (D.C. Cir. 2009); *see also Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir. 2020) (plaintiffs had standing to bring pre-enforcement First Amendment and vagueness challenges because government "ha[d] yet to disavow any intention to prosecute").

Contrary to the position adopted by five other circuits, the decision of the Fifth Circuit stands alone. Its "arrest or prosecution" requirement cannot be squared with this Court's refusal-to-disavow standard that other circuits consistently apply in similar circumstances. Nor will this conflict resolve itself, as the Fifth Circuit has already denied rehearing *en banc* on this very issue. App.46a-48a.

C. If permitted to stand, the Fifth Circuit decision will force speakers faced with a vague law to choose between self-censorship or risking prosecution.

Certiorari is particularly warranted because the ruling below dangerously subverts basic First Amendment rights and permits Chapter 423's demonstrated constitutional harms to persist. The ruling also threatens to obstruct future pre-enforcement challenges to other vague laws chilling the exercise of First Amendment rights.

The mere existence of a speech-restrictive law has an obvious and predictable effect: it "place[s] the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). A bedrock principle of this Court's First Amendment jurisprudence is that would-be speakers must have an opportunity to vindicate their expressive freedoms without first subjecting themselves to punishment. *Id.* at 459. Any other rule would permit the pernicious evils of self-censorship to perpetuate. *See Driehaus*, 573 U.S. at 167-68 (explaining that prompt judicial review is needed to avoid the "substantial hardship" of forcing plaintiffs to choose between "refraining from core political speech" or "risking costly . . . proceedings and criminal prosecution"); *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (recognizing that laws with criminal sanctions "may well cause speakers to remain silent

rather than communicate even arguably unlawful words, ideas, and images").

This principle fully applies to vague laws because such restrictions "unquestionably silence[] some speakers whose messages would be entitled to constitutional protection." *Reno*, 521 U.S. at 874. Until a vague law is invalidated or authoritatively narrowed, it necessarily poses a "real and substantial" threat that protected expression will be prosecuted. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). For that reason, this Court has repeatedly mandated "rigorous adherence" to due process requirements when speech is involved "to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

Vague laws also pose dual threats to due process. First, vague laws fail to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, they lend themselves to "arbitrary and discriminatory enforcement." *Id.*; *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (vague statutes have "potential for arbitrarily suppressing First Amendment liberties"); *Reno*, 521 U.S. at 872.[5] These threats aren't

[5] This Court has emphasized time and again the grave threat that vague statutes pose to freedom of expression. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Herndon v. Lowry*, 301 U.S. 242, 258-59 (1937); *Winters v. New York*, 333 U.S. 507, 509-10 (1948); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Keyishian*

speculative here—the record demonstrates that journalists and news organizations have both self-censored and been blocked from newsgathering because of Chapter 423. ROA.641, 647, 650-53, 672, 686-92.

The Fifth Circuit's novel standing test for vague, speech-restricting laws will preclude facial due process challenges to vague laws and thereby violate the principle that would-be speakers must have an opportunity to vindicate their expressive freedoms. Indeed, this case aptly illustrates the constitutional dangers presented by the Fifth Circuit's new due process injury standard. By refusing to address Chapter 423's vagueness, the court of appeals left Petitioners without guidance on whether capturing and publishing newsworthy photos with a drone will trigger criminal penalties. The record vividly demonstrates the consequences of this ambiguity on Petitioners' speech and press rights.

One Petitioner, journalist Joseph Pappalardo, was chilled from creating drone photographs for stories ranging from Hurricane Harvey's impact, to the removal of homeless encampments, to urban sprawl, to the routine dumping of dead and unwanted animals—all stories where, as he testified, drone images would have been critical to presenting the full story. ROA.670-72. Another journalist testified to the chill on his drone photography after being threatened with arrest for using a drone to cover the aftermath of

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v. Bd. of Regents, 385 U.S. 589, 603-04 (1967); *Grayned*, 408 U.S. at 109; *Fox*, 567 U.S. at 253-54.

a deadly fire. App.6a. And a third presented evidence of thousands of dollars in lost income because he could not accept assignments seeking drone photography and news outlets, including *The Dallas Morning News*, refused to print his drone images for fear of liability. App.7a.

Respondents have both refused to define whether Chapter 423 reaches ordinary newsgathering and refused to disavow applying Chapter 423 to journalists. App.79a-80a. The Fifth Circuit's decision allows the chilling impact of Chapter 423 to loom over Petitioners—stopping journalists from documenting newsworthy events, preventing news organizations from publishing newsworthy photos, and depriving Texas residents of impactful journalism. Unless this Court intervenes, the Fifth Circuit decision leaves Petitioners and other future speakers no way to vindicate their First Amendment rights against vague criminal laws without subjecting themselves to the risk of prosecution.

II. The Fifth Circuit's Refusal to Apply Strict Scrutiny to a Content- and Speaker-Based Regulation of Speech Warrants Review

Certiorari should be granted because the Fifth Circuit decision refuses to apply strict scrutiny under circumstances where this Court has unambiguously held it must be applied. It directly contravenes *Reed v. Town of Gilbert* and, if permitted to stand, will sow confusion about when a content-based regulation is subject to strict scrutiny. Review is further needed because the Fifth Circuit's erroneous holdings allow

Chapter 423's well-documented suppression of newsworthy speech to continue.

A. The Fifth Circuit's refusal to apply strict scrutiny to a content-based speech restriction contradicts decisions of this Court and other circuits.

The Fifth Circuit decision rejects this Court's clear and consistent instruction that laws targeting speech "based on its communicative content[ ] are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015); *see also, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991); *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Chapter 423 is precisely such a law. It imposes a ban on capturing or publishing drone images based on the "communicative content" of the image—prohibiting those depicting "an individual or privately owned real property" and permitting those depicting only public property and persons on public property. Tex. Gov't Code §§ 423.002(a)(15); 423.003(a), 423.004.

That the law applies only to drone photography does not alter the First Amendment scrutiny required. The "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when new technologies appear. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (citation

omitted). Whether such a content-based regulation "applies to creating, distributing, or consuming speech," also "makes no difference" to the First Amendment's protections. *Id.* at 790-92 & n.1; *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 464, 468 (2010) (holding "presumptively invalid" a content-based law criminalizing, *inter alia*, the creation of animal cruelty videos); *303 Creative LLC v. Elenis*, 600 U.S. 570, 589 (2023) (explaining that the First Amendment bars compelling a web designer to create websites she finds objectionable).

The Fifth Circuit sidestepped the First Amendment scrutiny *Reed* requires by construing Chapter 423 not to be "content-based." App.30a. The court reasoned that the "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." *Id.* In its view, this does not discriminate based on "*what* is in the picture, but on the basis of *how* the picture is taken." *Id.*

Reed rejected this very reasoning. It struck down a town's regulation of outdoor signs that "identifie[d] various categories of signs based on the type of information they convey, then subject[ed] each category to different restrictions." 576 U.S. at 159. The Court made clear that the town could regulate the size, construction and other attributes of a sign only "*so long as it d[id] so in an evenhanded, content-neutral manner*." *Id.* at 172-73 (emphasis added). Chapter 423 does *not* regulate "on the basis of how a picture is taken" in any "even-handed, content-

neutral manner." Quite to the contrary, it explicitly regulates images based upon their specific content.

In refusing to require Texas to show that Chapter 423 is narrowly tailored to serve a compelling state interest, the Fifth Circuit defied *Reed* and contravened many other consistent holdings of this Court. *See id.*; *see also, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Its rejection of strict scrutiny also conflicts with holdings of other circuits. *See, e.g.*, *Ness v. City of Bloomington*, 11 F.4th 914, 924 (8th Cir. 2021) (content-based restriction on creating photos of children in parks failed strict scrutiny); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (content-based restriction on creating videos of agriculture facility operations failed strict scrutiny). Acknowledging the split it was causing, the Fifth Circuit relied on the *dissenting* opinions from sister circuits. App.26a (citing, *e.g.*, *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 845-47 (4th Cir.) (Rushing, J., dissenting) (dissenting from majority's application of strict scrutiny to speaker- and viewpoint-based recording ban), *cert. denied*, 144 S. Ct. 325 (2023), *and cert. denied sub nom. Stein v. People for the Ethical Treatment of Animals, Inc.*, 144 S. Ct. 326 (2023)).

Review by this Court is plainly warranted.

B. The Fifth Circuit misconstrues *City of Austin* and sows confusion about when a content-based law must be subjected to strict scrutiny.

In *Reed*, the Court resolved a circuit conflict over what constitutes a content-based regulation requiring strict scrutiny and definitively held that a law applying "to particular speech because of the topic discussed or the idea or message expressed" is content based—regardless of the government's justification or motivation for enacting the law. 576 U.S. at 163-64. The Fifth Circuit misreads *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), to limit *Reed*'s holding in a way that authorizes a radical redefinition of "content-based" regulations requiring strict scrutiny. If permitted to stand, the decision here will resurrect the very uncertainty that *Reed* resolved.

1. *City of Austin* held that an ordinance was content neutral when it distinguished between "signs that advertise things that are not located on the same premises as the sign" and "signs that direct people to offsite locations," because the "[t]he message on the sign matter[ed] only to the extent that it inform[ed] the sign's relative location" much like "ordinary time, place, or manner restrictions." *Id.* at 64, 71. In reaching this conclusion, the Court observed that "a law is not content based simply because one must read a sign to determine whether it is lawful under the challenged rule," but carefully distinguished laws that draw "neutral, location-based lines" from those that

apply "to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 69.

The Fifth Circuit invoked *City of Austin* to justify its conclusion that Chapter 423 could be analyzed as a content-neutral regulation of time, place, or manner despite its content-based restrictions because those restrictions apply only when a drone is flown above eight feet. App.31a. In so doing, the Fifth Circuit ignored *City of Austin*'s clear instruction that a law necessarily *is* content based if it "single[s] out any topic or subject matter for differential treatment," as Chapter 423 unambiguously does. *City of Austin*, 596 U.S. at 71.

The Fifth Circuit flouts *City of Austin* just as it does *Reed*. Officials enforcing Chapter 423 do not look at the content of a drone image to ascertain if it was captured by a drone flying above or below eight feet; they look at a drone image to determine if the *content* captured depicts an individual or private property. Chapter 423 fits squarely within *Reed*'s definition of a content-based law.

That Chapter 423's under-eight-feet exception is itself content neutral does not alter the First Amendment scrutiny required of its above-eight-feet content preferences. The Court has long held that a time, place, or manner restriction cannot constitutionally discriminate based upon "either the content or subject matter of speech." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980); *see, e.g.*, *Carey*, 447 U.S. at 460-61 (applying strict scrutiny to picketing regulation that exempted

picketing "a place of employment involved in a labor dispute"); *Mosley*, 408 U.S. at 95 (requiring strict scrutiny of a regulation prohibiting picketing based on "subject matter"). In construing as permissibly content neutral a law that "singles out" certain content for "differential treatment," the Fifth Circuit decision directly contradicts *City of Austin* as well as *Reed*.

2. The Fifth Circuit's decision expands an existing conflict among the circuits about when a need to consider content renders a regulation content based and subject to strict scrutiny under *Reed* and *City of Austin*. Left unreviewed, its reasoning will deepen the existing confusion.

Authoritative holdings of other circuits applying *City of Austin* and *Reed* have required strict scrutiny of laws making content or viewpoint distinctions like the content distinctions in Chapter 423. For example, the Sixth Circuit readily concluded that a sign ordinance was content based because, like Chapter 423, it included exemptions for favored "topic[s]" or "message[s]," including "real-estate signs." *Int'l Outdoor, Inc. v. City of Troy*, 77 F.4th 432, 436 n.1 (6th Cir. 2023). The Seventh Circuit held that a law prohibiting photography of hunters with the intent to interfere with hunting was viewpoint based because it "explicitly discriminate[d] based on the motives of those documenting and monitoring hunting activity" and could not be described as "agnostic as to content." *Brown v. Kemp*, 86 F.4th 745, 781-82 (7th Cir. 2023). And a Ninth Circuit panel found content based a law that restricted audiovisual recording, but exempted

recordings made "during a felony that endangers human life" and recordings of a law enforcement officer performing official duties. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1057 (9th Cir. 2023) *vacated pending en banc review*, 95 F.4th 1152 (9th Cir. 2024). The Fifth Circuit conflicts with each of these.

In contrast to the Sixth, Seventh, and Ninth Circuits, the Second and Third Circuits have read *City of Austin* to preclude application of strict scrutiny in circumstances clearly required under *Reed*, as the Fifth Circuit did here. The Second Circuit relied upon *City of Austin* to hold that a law limiting the practice of mental health counseling was content neutral because it applied "only to speech having a particular purpose, focus, and circumstance." *Brokamp v. James*, 66 F.4th 374, 393 (2d Cir. 2023), *cert. denied*, 2024 WL 1241327 (U.S. Mar. 25, 2024). In so holding, the Second Circuit failed to explain how the purportedly neutral category of speech "addressing a mental disorder or problem" differs from speech addressing "professional anxieties" or "medical challenges" that it deemed content-based categories. *Id.* Like the Fifth Circuit, the court simply noted that *City of Austin* permits laws to consider the "function or purpose" of speech without automatically triggering strict scrutiny. *Id.* at 396.

The Third Circuit in *Mazo v. New Jersey Secretary of State* deemed content neutral a law that prohibits candidates from using the name of a person or New Jersey corporation in their "ballot slogans"—taglines displayed next to candidate names on ballots—without consent of the named party. 54 F.4th 124, 149

(3d Cir. 2022), *cert. denied sub nom. Mazo v. Way*, 144 S. Ct. 76 (2023). The Third Circuit interpreted *City of Austin* as creating a new "category of permissible neutral line-drawing that distinguishes between speech based on extrinsic features." *Id.* In the Third Circuit's view, this permitted consideration of "the communicative content" of a ballot slogan to "determine whether the consent requirement applies." *Id.* But unlike in *City of Austin,* the New Jersey regulation "targets speech based on its communicative content," rather than upon a neutral assessment of the time, place, or manner of its presentation. 596 U.S. at 69 (brackets omitted).

Like the Second and Third Circuits, the Fifth Circuit misapplied *City of Austin* to avoid *Reed*'s core holding: that a law is content based when it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Under its reasoning, "a law banning the use of sound trucks for political speech," *id.* at 169, would be deemed content neutral because one need only determine whether the speech is political for the sake of determining whether the sound truck ban applies. *Reed* rejected this very example. *Id.*

This case presents an excellent vehicle for the Court to dispel the growing confusion about when a content-based distinction demands strict scrutiny following *City of Austin*. The summary judgment record is fully developed and undisputed, and the issue is squarely presented by Chapter 423's multiple content-based provisions.

C. The Fifth Circuit's refusal to apply strict scrutiny to a law that favors some speakers and purposes over journalists and news reporting further conflicts with decisions of this Court and other circuits.

1. This Court has made clear that strict scrutiny applies where discrimination among speakers or purposes serves as a proxy for content discrimination. *Citizens United v. FEC*, for example, struck down limitations on political campaign contributions and expenditures that differentiated among categories of individuals and corporations because the government cannot "tak[e] the right to speak from some and giv[e] it to others." 558 U.S. 310, 340-41 (2010).

The very next year, *Sorrell v. IMS Health Inc.* subjected to heightened scrutiny a law prohibiting pharmaceutical companies from using certain pharmacy records for marketing purposes while permitting a "wide range of other speakers," such as academic organizations, to use those same records to inform their own speech. 564 U.S. 552, 564 (2011). Such scrutiny was necessary because the law "on its face burden[ed] disfavored speech by disfavored speakers." *Id.*; *see also Playboy*, 529 U.S. at 812 (holding that laws restricting "the expression of specific speakers contradict basic First Amendment principles"); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (holding that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference").

Chapter 423 favors some speakers over others in the very same way. It includes myriad exemptions for preferred categories of drone photographers and uses of drone images. For instance, it permits a "professor" at "an institution of higher education" to capture and publish photos of individuals and private property if done for "scholarly research," and allows a "real estate broker" to create and disseminate such images for "marketing . . . of real property." Tex. Gov't Code § 423.002(a)(1), (13). The statute's "speaker preference reflects a content preference," *Turner*, 512 U.S. at 658, and it draws the same speaker-based distinctions this Court held unconstitutional in *Sorrell*, where a law allowed "journalists" and "researchers," but not "marketers," to use pharmaceutical data, 564 U.S. at 563-64, 573 ("marketing" is "speech with a particular content").

Chapter 423's purpose preferences are similarly proxies for content discrimination. It exempts, for example, photos taken for the purpose of the "practice of engineering;" "in connection with oil pipeline safety;" for "assessing vegetation growth" or for "fire suppression." Tex. Gov't Code § 423.002(a)(5)(C), (a)(11). As a result, Chapter 423 does not apply to all content, imposing instead "an obvious subject-matter distinction" on categories of speech that it favors. *City of Austin*, 596 U.S. at 74.

The Fifth Circuit's refusal to apply strict scrutiny simply disregarded the law's speaker discrimination. It described Chapter 423 as distinguishing "among photographers" but "not among *photographs,*" App.32a, thereby blinking away the content

preferences made through the law's speaker-based permissions.

The Fifth Circuit's rejection of strict scrutiny for Chapter 423's speaker-based restrictions conflicts with *Sorrell*, *Citizens United*, and opinions from the Fourth and Seventh Circuits. *See People for the Ethical Treatment of Animals*, 60 F.4th at 831 (applying strict scrutiny to a law banning recording by employees but not non-employees); *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011) (stating that speaker-based restrictions that favor or disfavor speech are also content based). Instead of applying strict scrutiny, the Fifth Circuit aligns with the Ninth Circuit. *See* App.35a; *Doe v. Harris*, 772 F.3d 563, 575-76 (9th Cir. 2014) (applying intermediate scrutiny to a speaker-based law requiring sex offenders to register).

The Fifth Circuit's failure to require Texas to demonstrate that the speaker and purpose distinctions in Chapter 423 are narrowly drawn to achieve a compelling state interest warrants review because it contravenes controlling precedent of this Court and conflicts with authoritative decisions of other circuits.

2. This aspect of the Fifth Circuit decision particularly calls out for review because Chapter 423's speaker-based distinctions favor commercial and academic speech on private matters over speech by the press on matters of public concern. Such laws demand strict and independent judicial scrutiny because a free press is necessary to keep the public

informed, and "an informed public is the essence of working democracy." *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). The First Amendment protects media entities from "hav[ing] their voices diminished" while the government elevates the voices of other speakers. *Citizens United*, 558 U.S. at 352. The Court has thus held that unequal treatment of the press can be unconstitutional even without "evidence of an improper censorial motive." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

The Fifth Circuit diminished the Press Clause concerns raised by Chapter 423 with the observation that "the First Amendment does not guarantee the press a constitutional right of special access to information" and "does not invalidate every incidental burdening of the press." App.33a. While "*generally applicable* laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added), "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression," *Minneapolis Star*, 460 U.S. at 585.

The exemption-riddled Surveillance Provisions upheld by the Fifth Circuit cannot plausibly be deemed "generally applicable" in any meaningful sense. As this Court has explained in another First Amendment context, laws are not "generally applicable, and therefore trigger strict scrutiny under

the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Even if the Press Clause tolerated press-burdening laws with a handful of "isolated exceptions," *Minneapolis Star*, 460 U.S. at 583 n.5, Chapter 423's exemptions for twenty-one favored speakers and uses—excluding the press—make it anything but generally applicable, *cf. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346-47 (2020) (plurality opinion) (robocall ban was subject to strict scrutiny due to single exception).

Nor is the press burden imposed by Chapter 423 merely "incidental." Drones are "a superior method of aerial photography in many circumstances," ROA.685, but the law's enactment chilled journalists from using them and restricted their ability to report on national disasters, homelessness, environmental harms, and other important stories, App.52a. Because no alternative to drone photography exists in many situations, prohibiting their use for newsgathering prevents many newsworthy photos from being captured at all. ROA.672.

Chapter 423's green lighting of nearly every professional use of drone images *except* for reporting the news disproportionately burdens journalists and news organizations and impermissibly burdens press freedom. Review is needed because the Fifth Circuit's holding that strict scrutiny is not required when a speaker-based law advantages others over the press permits "differential treatment [that] cannot be

squared with the First Amendment." *Citizens United*, 558 U.S. at 353.

D. If permitted to stand, the Fifth Circuit decision sanctions an ongoing chill on reporting newsworthy information.

The Fifth Circuit decision also calls out for review because it empowers Texas to burden substantially more newsgathering than necessary to serve the stated government interest of privacy protection. The uncontradicted record shows that the enactment of Chapter 423 has caused journalists to be, among other things, threatened with arrest for photographing the aftermath of a fatal fire from a public sidewalk, barred from documenting a publicly funded construction project, chilled from gathering and publishing newsworthy drone photos, and deprived of income. App.6a-7a, 54a. Allowing Chapter 423 to remain in place will inflict long-term damage to the First Amendment rights of both journalists and their readers.

Chapter 423 forecloses the ability of Texas journalists to gather the news using a key method of modern newsgathering technology for the purported purpose of protecting privacy. Yet the law prohibits a massive amount of drone photography where no reasonable expectation of privacy exists—such as photos of buildings in plain public view, failed infrastructure, (ROA.533, 689), flooding (ROA.689), the winter storm and grid collapse of 2021 (ROA.662, 688), and construction of a publicly funded stadium (ROA.690). No reasonable expectation of privacy

exists for every parcel of private property in Texas, but (save for favored speakers and purposes) Chapter 423 indiscriminately applies to all drone images of private property, even images depicting newsworthy events and implicating no privacy interests. Given the poor fit between the interests the Surveillance Provisions are said to advance and the large swath of speech they burden, the law could not withstand any level of scrutiny, properly applied.

Even if Chapter 423 were content neutral, the variant of intermediate scrutiny the Fifth Circuit used to uphold the law departs dramatically from the meaningful review this Court has defined as intermediate scrutiny—review that demands "a close fit between ends and means" to stop government from silencing speech for the sake of convenience or efficiency. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The Fifth Circuit acknowledged that a regulation survives intermediate scrutiny only if it does not burden substantially more speech than necessary to advance a substantial government interest, App.35a-36a (citing *Turner*, 512 U.S. at 662), but then quickly cast off that principle. The court of appeals merely recited that the law bars "only surveillance that could not be achieved through ordinary means," App.37a, but never assessed whether Texas had simply found "the chosen route . . . easier," *McCullen*, 573 U.S. at 494-95.

The Fifth Circuit required no demonstration that Chapter 423 achieves "a close fit between ends and means" and never considered whether existing Texas laws fail to protect the privacy interests invoked as

justification for the new law. In fact, Texas has a full panoply of privacy protections in its common-law privacy torts, trespass and voyeurism statutes, and other laws. *See, e.g.*, *Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973); Tex. Penal Code §§ 21.17, 30.05. The record shows that such laws have been used by law enforcement to protect against harms flowing from improper drone use. ROA.1240. The Fifth Circuit's anemic version of intermediate scrutiny underscores the need for clarification from this Court on the scrutiny the First Amendment demands for content-based laws that significantly burden the press.

Without this Court's intervention, journalists and news organizations remain chilled from using drones to create and publish newsworthy speech, while favored speakers—such as professors, engineers, pipeline operators, insurance agents, and real estate brokers—use drone photography to advance their commercial interests. The press, the public, and the First Amendment suffer ongoing harm. This situation warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 9, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50337

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; TEXAS PRESS ASSOCIATION; JOSEPH PAPPALARDO,

Plaintiffs—Appellees / Cross-Appellants,

versus

STEVEN MCCRAW, *in his official capacity as Director of the Texas Department of Public Safety*; DWIGHT MATHIS, *in his official capacity as Chief of the Texas Highway Patrol*; KELLY HIGGINS, *in his official capacity as District Attorney of Hays County, Texas*,

Defendants—Appellants / Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-946

Before CLEMENT, ELROD, and WILLETT, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

Our prior panel opinion, *National Press Photographers Association v. McCraw*, 84 F.4th 632 (5th Cir. 2023), is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

Chapter 423 of the Texas Government Code governs the operation of unmanned aerial vehicles—drones—in Texas airspace. In this case, the plaintiffs claim a sweeping First Amendment right to use unmanned aerial drones to film private individuals and property without their consent. They also assert a constitutional right to fly drones at low altitudes over critical infrastructure facilities like prisons and large sports venues.

We disagree. Though we do not foreclose any *as-applied* constitutional defenses to any hypothetical future prosecutions under the drone laws, we hold that these *facial* challenges fail. Accordingly, we REVERSE and REMAND with instructions to enter judgment in the defendants' favor on the constitutional claims. We also reject the plaintiffs' cross-appeal claiming that federal aviation law preempts state drone regulation. Quite the contrary, federal law expressly contemplates concurrent non-federal regulation of drones, especially where privacy and critical infrastructure are concerned. On this issue, we AFFIRM the district court's dismissal of the plaintiffs' preemption claims.

I

A

Roughly a decade ago, the Texas Legislature enacted Chapter 423 as part of its efforts to regulate the use of drones in Texas airspace.[1] Two sets of Chapter 423's provisions are at issue in this lawsuit:

First, we have what the parties have nicknamed the "Surveillance" provisions. These provisions make it

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[1] Texas Privacy Act, 83d Leg., R.S., ch. 1390, §§ 1–2 (2013), 2013 TEX. GEN. LAWS 3691, 3691–3694 (codified at TEX. GOV'T CODE §§ 423.001–423.008).

unlawful to use a drone to "capture an image" of someone or private property with an intent to surveil the subject of the image:

> A person commits an offense if the person uses 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.[2]

Depending on how you count them, there are at least twenty-one statutory exemptions to the Surveillance Provisions.[3] For instance, law enforcement and the military are allowed to conduct aerial surveillance using drones.[4] So can professors and students, if they do it for an "academic purpose."[5] It's also fine to use a drone to capture images from under eight feet—roughly the height of someone holding a camera above his or her head.[6] Importantly—it is lawful to use a drone to capture images of *public* property or persons on *public* property,[7] and one can always take drone images with the consent of the subject.[8] What is not among the twenty-one exceptions, however, is a specific exemption for the press.

Second, we have what the parties have dubbed the "No-Fly Provisions." The No-Fly provisions make it

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[2] TEX. GOV'T CODE § 423.003(a).

[3] *Id.* § 423.002(a)(1)–(21).

[4] *Id.* §§ 423.002(a)(3) & (8).

[5] *Id.* § 423.002(a)(1).

[6] *Id.* § 423.002(a)(14).

[7] *Id.* § 423.002(a)(15).

[8] *Id.* § 423.002(a)(6).

illegal to fly a drone above sensitive sites like critical infrastructure facilities, prisons, and large sports venues:

> A person commits an offense if the person intentionally or knowingly:
>
> (1) operates an unmanned aircraft over a critical infrastructure facility and the unmanned aircraft is not higher than 400 feet above ground level;
>
> (2) allows an unmanned aircraft to make contact with a critical infrastructure facility, including any person or object on the premises of or within the facility; or
>
> (3) allows an unmanned aircraft to come within a distance of a critical infrastructure facility that is close enough to interfere with the operations of or cause a disturbance to the facility.[9]

Critical infrastructure facilities include airports, petroleum refineries, power generators, and military installations, so long as they are enclosed by a fence or barrier, or otherwise indicate that entry is forbidden.[10] There is a nearly identical No-Fly provision barring flights directly above correctional facilities and detention centers,[11] and one that applies to large sports venues:

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[9] *Id.* § 423.0045(b).

[10] *Id.* § 423.0045(a)(1-a).

[11] TEX. PENAL CODE § 38.115(b). The No-Fly provisions relating to correctional facilities and detention centers previously were codified in the same section of the Texas Government Code as the No-Fly provisions relating to critical infrastructure sites. TEX. GOV'T CODE § 423.0045. Effective September 1, 2023, however, the Texas Legislature moved those provisions to the Penal Code. *See Operation of an Unmanned Aircraft Over a Correctional Facility*

> A person commits an offense if the person intentionally or knowingly operates an unmanned aircraft over a sports venue and the unmanned aircraft is not higher than 400 feet above ground level.[12]

Just like the Surveillance provisions, the No-Fly provisions contain several exemptions. Most relevant here is one that allows a drone operator to violate the No-Fly provisions "for a commercial purpose" so long as the operator complies with the applicable Federal Aviation Administration rules and authorizations.[13] Again, though: there is no specific exemption for the press.

Violating the Surveillance or the No-Fly provisions is a criminal offense under Texas law,[14] and it also subjects the violator to the possibility of civil liability.[15]

B

The plaintiffs in this case are one drone-owning journalist and two media-related organizations (Plaintiffs).

Joseph Pappalardo is a self-employed journalist. He owns a small aerial drone and is qualified to operate the drone in the national airspace. He is "concerned that using a [drone] for journalistic purposes would put [him] at risk of criminal penalties and subject

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or Detention Facility; Creating a Criminal Offense, 2023 Tex. Sess. Law Serv. Ch. 591 (H.B. 3075).

[12] TEX. GOV'T CODE § 423.0046(b).

[13] *Id.* §§ 423.0045(c)(5), 423.0046(c)(5). As of September 1, 2023, the provisions relating to correctional facilities and detention centers no longer appear to have a commercial-purpose exception. *See* TEX. PENAL CODE § 38.115(c).

[14] TEX. GOV'T CODE §§ 423.003(b), 423.0045(d), 423.0046(d); TEX. PENAL CODE § 38.115(d).

[15] TEX. GOV'T CODE § 423.006(a).

[him] to liability in a civil lawsuit" in Texas. In 2017, he was informed by one of his "corporate bosses" at the time that, should he take images in violation of Chapter 423, the company would not pay for a legal defense in any resulting court proceedings. After that conversation, he has refrained from using a drone for image capturing in Texas "due to [his] concern about possibly violating Chapter 423." As a result, he has missed out on opportunities to take aerial photographs to include in his reporting, including stories on Hurricane Harvey, house fires, storm damage, removal of homeless encampments, and illegal poaching in urban areas. He believes that Chapter 423 prevents him from being able to do "complete reporting that journalists in other states are able to do." "As a freelancer, being able to provide aerial imagery can be the difference between selling a pitch or being denied."

National Press Photographers Association (NPPA) is a national association that represents the interests of visual journalists, including news photographers in Texas. According to NPPA, drones provide its members with a cheap and safe alternative to renting a helicopter to obtain aerial images. Two NPPA members, both photojournalists, are especially relevant to this appeal.

The first is Guillermo Calzada. In July 2018, he flew his drone near the site of an apartment fire in San Marcos, Texas, to capture images for his employer, the *San Antonio Express-News*. An unnamed federal agent at the scene approached him and told him that he was interfering with a federal investigation. The agent then called the San Marcos police. An unnamed police officer arrived and told Calzada that he had violated state law by taking pictures with his drone and that, if he published them, he would be violating the law

again. The officer also told Calzada that she wouldn't cite him for the incident.

The second is Brandon Wade. He is a freelancer who, though qualified to fly a drone, does not use one for journalism due to the risk of enforcement. He believes the threat of enforcement is costing him "thousands of dollars" because one of his clients, *The Dallas Morning News*, has not given him any drone-photography assignments. In 2018, another client, the *Fort Worth Star-Telegram*, offered Wade an assignment to document the construction of a new ballpark for the Texas Rangers. Although the Rangers refused to grant permission to Wade's client, the Rangers did hire Wade to film the construction for them for public-relations purposes. As a result, Wade says, the Rangers own the copyright to the footage, and he cannot share it with the media. Wade "lost thousands of dollars" due to the Rangers' refusal.

The other organizational plaintiff is the Texas Press Association (TPA). It exists to promote the welfare of Texas newspapers, encourage higher standards of journalism, and advocate for First Amendment liberties. TPA represents approximately 400 member newspapers, and its members include *The Dallas Morning News*, the *San Antonio Express-News*, and the *Fort Worth Star-Telegram*. Some of TPA's member newspapers have enacted policies avoiding the use of drone photography in response to Chapter 423's restrictions. Its members would be able to more cheaply and safely cover the news if drone photography were permitted.

The defendants in this case are high-ranking state- and county-level officials: two Texas heads of law-enforcement agencies and one county district attorney (Defendants).

Steve McCraw is the Director of the Texas Department of Public Safety (DPS). As the "head of the Department of Public Safety," he is "the highest law enforcement official in the state of Texas."[16] The other state official is Dwight Mathis. He is the Chief of the Texas Highway Patrol (THP).[17] The record evidence indicates that, while DPS has issued warnings and citations to drone operators on a few occasions, neither DPS nor THP has ever arrested anybody for violating Chapter 423 specifically.

Kelly Higgins is the district attorney of Hays County, Texas.[18] Unlike the state defendants, the Hays County district attorney's office *has* initiated at least one prosecution "for drone-related activities" The record evidence indicates that this prosecution, which resulted in a deferred disposition, was for violating Chapter 423. Though it is not in the record, at oral argument Higgins's counsel indicated that the prosecution did not involve members of the press but instead an individual who surreptitiously photographed his neighbor.

C

Plaintiffs filed this pre-enforcement facial constitutional challenge to Chapter 423 against Defendants, seeking to enjoin them from enforcing the Surveillance and No-Fly provisions. Plaintiffs asserted five claims, arguing that the Surveillance provisions violate the First Amendment and the Due Process Clause of the

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[16] *Westfall v. Miller*, 77 F.3d 868, 873 n.1 (5th Cir. 1996).

[17] Ron Joy previously was Chief of the Texas Highway Patrol and was the defendant named in the complaint. Mathis has been substituted in this litigation.

[18] Wes Mau previously was the Hays County district attorney and the county-level defendant named in the complaint. Higgins has been substituted in this litigation.

Fourteenth Amendment, and that the No-Fly provisions violate the First Amendment, Due Process, and federal preemption principles. In essence, their position is that Chapter 423 unlawfully infringes on their right to film and gather news, that the statutory prohibitions are so vague that they violate Due Process, and that Texas has no authority to promulgate drone regulations because the federal government has expressly preempted all state and local drone regulations.

The district court ruled on all five claims. In 2020, the court dismissed Plaintiffs' claim that the No-Fly provisions are preempted by federal law.[19] In 2022, ruling on the parties' cross motions for summary judgment, the court entered a final judgment favoring Plaintiffs on all of their remaining theories and enjoined Defendants and all of their subordinates from enforcing Chapter 423.[20] The court held that both challenged provisions violate both the First Amendment and Due Process.

Both sides appealed. Defendants argue that Plaintiffs' claims fail on standing, sovereign immunity, and merits grounds. Plaintiffs, on the other hand, say the district court should have enjoined enforcement of Chapter 423 on the additional ground that it is preempted by federal law.

II

We review summary-judgment rulings de novo, applying the same standard as the district court.[21]

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[19] *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 591 (W.D. Tex. 2020).

[20] *Nat'l Press Photographers Ass'n v. McCraw*, 594 F. Supp. 3d 789, 813 (W.D. Tex. 2022).

[21] *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538 (5th Cir. 2004).

"Cross-motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law."[22] Legal issues, including jurisdictional issues like standing and sovereign immunity, are reviewed de novo.[23]

Our discussion proceeds as follows: (A) Article III standing; (B) the *Ex parte Young* exception to sovereign immunity; (C) the First Amendment; and (D) preemption under the Supremacy Clause.[24]

A

Defendants first argue that Plaintiffs lack standing to bring this pre-enforcement challenge to Chapter 423 against them. We agree—in part.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'"[25] "The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."[26]

To show associational standing, NPPA and TPA must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests

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[22] *Id.* at 538–39.

[23] *Texas All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022).

[24] *See Davis v. Sumlin*, 999 F.3d 278, 279 (5th Cir. 2021) ("[F]ederal courts must do jurisdiction first.").

[25] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting U.S. CoNST., art. III, § 2).

[26] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (alteration accepted) (internal quotation marks omitted).

[each entity] seeks to protect are germane to [each] organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[27] It is undisputed that the second two elements are met, so the only question is the first: whether the individual members would have standing in their own right.[28]

For the individual members and Pappalardo "[t]o have standing, [they] must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision."[29] Primarily at issue here are the injury and traceability elements. As the parties invoking standing, Plaintiffs "bear the burden to demonstrate standing for each claim they seek to press."[30]

We address injury first.

1

"An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."[31]

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[27] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (citation omitted).

[28] *See Speech First*, 979 F.3d at 330 (citing *Lujan v. Def's of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[29] *Id.*

[30] *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011).

[31] *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks and citation omitted).

The parties disagree on whether Plaintiffs have carried their burden to show an injury for standing purposes. After all, no Plaintiff has ever been arrested or prosecuted for violating Chapter 423. Defendants McCraw and Mathis produced evidence showing that they have not arrested or prosecuted anybody for violating Chapter 423. And while the Hays County District Attorney's office prosecuted a claim under Chapter 423, that case resulted in a deferred disposition and did not involve any members of the press. Thus, Defendants say, Plaintiffs have not been injured by any enforcement of Chapter 423 and any future injury is purely hypothetical.

Plaintiffs lack standing to bring their Due Process claims. They have never been arrested or prosecuted for violating Chapter 423. And the available evidence suggests that Defendants have never enforced Chapter 423 against Plaintiffs (or anybody else). The issue of whether the Surveillance and No-Fly provisions are unlawfully vague in their proscriptions is therefore a mere hypothetical dispute lacking the concreteness and imminence required by Article III.[32] In the absence of any imminent or even credible threat of prosecution under Chapter 423, Plaintiffs lack standing to preemptively challenge Chapter 423 under the Due Process

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[32] *See id.* at 158. We note that vagueness may be grounds for a pre-enforcement challenge insofar as it chills protected speech under the First Amendment. *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546–47 (5th Cir. 2008) ("Many times void-forvagueness challenges are successfully made when laws have the capacity to chill constitutionally protected conduct, especially conduct protected by the First Amendment." (internal quotation marks omitted)). But as we explain later, *see infra* § C, Plaintiffs' challenge to the No-Fly provisions do not implicate the First Amendment, so we need not reach this issue.

Clause.[33] We therefore vacate the district court's judgment on the Due Process claims.

The First Amendment claims, however, are another matter. This is because "standing rules are relaxed for First Amendment cases so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief."[34] "In pre-enforcement cases alleging a violation of the First Amendment's Free Speech Clause, the Supreme Court has recognized that chilled speech or self-censorship is an injury sufficient to confer standing."[35] In this context, "[a] plaintiff has suffered an injury in fact if he (1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'"[36] Unlike in other constitutional contexts, in the speech context, we "may *assume* a substantial threat of future enforcement absent compelling contrary evidence."[37] "Controlling precedent thus establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing."[38]

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[33] *See id.* at 159

[34] *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014).

[35] *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021).

[36] *Speech First*, 979 F.3d at 330 (citing *Susan B. Anthony List*, 573 U.S. at 161–64).

[37] *Barilla*, 13 F.4th at 433 (emphasis added).

[38] *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006).

Here, Plaintiffs have evidence that their use of drones (which they call "speech"[39]) was chilled because of Chapter 423. Pappalardo, for instance, violated Chapter 423 but *stopped* using a drone after his boss told him he would not be provided a legal defense for violating the law. NPPA member Calzada, on assignment for the *San Antonio Express-News*, was told by San Marcos police that his use of a drone in July 2018 violated state law. Calzada continues to violate Chapter 423 but does not do so if law enforcement is around. NPPA member and freelance photojournalist Wade testified that he "often [doesn't] use [his] drone because of the risk of enforcement." As a result, he has missed money-making opportunities with *The Dallas Morning News* and the Texas Rangers because of his (and their) unwillingness to violate Chapter 423. TPA member *The Dallas Morning News* enacted policies prohibiting its photographers from using drone photography. Finally, in their briefs, Plaintiffs represent to us that, after the district court enjoined the enforcement of Chapter 423 in this litigation, *The Dallas Morning News* reversed its no-drone policy, and Pappalardo and another NPPA member began to use drones to capture images for news purposes.

The above facts are sufficient to show chill. Plaintiffs have restricted their use of drones for newsgathering purposes due to the threat of Chapter 423's enforcement, which would open them up to criminal and civil liability.[40] The facts speak for themselves. We are therefore justified in our conclusion that a substantial

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[39] "In analyzing standing, we assume that [Plaintiffs are] correct on the merits . . . ." *Young Conservatives of Tex. Found. v. Smatresk*, 73 F.4th 304, 309 (5th Cir. 2023) (citing *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019)).

[40] *See Speech First*, 979 F.3d at 330.

threat of future enforcement exists absent "compelling contrary evidence."[41]

There's more, though. We highlight the monetary injury NPPA member Wade suffered due to his clients' compliance with Chapter 423. In *KVUE, Inc. v. Moore*, we found First Amendment standing when a plaintiff news organization "offered evidence that it suffered actual monetary losses during the time it obeyed the law and that it has in fact violated the statute" upon the challenged law's being enjoined.[42] Here, the evidence confirms that photojournalists like Wade "suffer[] actual monetary losses during the time [they] obey[] the law," and Plaintiffs represent that they have "violated the statute" upon its enjoinment.[43] Our precedent thus holds that they may file suit to challenge Chapter 423 on First Amendment grounds.

In response, Defendants stress that they have never enforced Chapter 423 and that Plaintiffs' chill is therefore a *subjective* self-chill, detached from any *objective* likelihood of the law's enforcement. But their argument does not overcome our precedent, nor does their theory match the evidence here—photojournalists and press organizations are restricting drone photography, to their financial detriment, out of fear of Chapter 423. "That the statute has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy."[44] This is particularly so when, as here, "the State has not disavowed any intention" of invoking the law against

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[41] *Barilla*, 13 F.4th at 433.

[42] 709 F.2d 922, 930 (5th Cir. 1983).

[43] *Id.*

[44] *KVUE, Inc.*, 709 F.2d at 930.

Plaintiffs.[45] While Defendants' point is well taken, it fails in the First Amendment context.

Defendants also argue that Calzada's encounter with the San Marcos police in 2018 is legally insufficient to support standing to seek prospective injunctive relief under *City of Los Angeles v. Lyons*, which held that a single chokehold incident is not enough to confer standing to seek prospective relief against all future chokeholds.[46] Again, under ordinary circumstances, this is likely a winning argument—isolated incidents of *past* unconstitutional acts generally cannot confer standing to seek prospective relief against *future* unconstitutional acts.[47] But Defendants' point falls short in this First Amendment case because Plaintiffs have provided evidence of ongoing chill and financial injury. Indeed, in the speech context, past prosecutions are often "good evidence" that the likelihood of a future prosecution is not "chimerical."[48]

In sum, the injury-in-fact element is satisfied by Plaintiffs' evidence of their chilled drone usage—including lost financial opportunities and their conduct after Chapter 423 was enjoined.

On to traceability.

2

Even if Plaintiffs suffered an injury, Defendants argue that such injury is not fairly traceable to their conduct. After all, Defendants have never enforced

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[45] *Babbitt*, 442 U.S. at 302.

[46] 461 U.S. 95, 105 (1983).

[47] *See id.*

[48] *Susan B. Anthony List*, 573 U.S. at 164.

Chapter 423. Again, we must disagree—with one small exception.

To establish traceability, Plaintiffs must show "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."[49]

Traceability is satisfied with respect to McCraw and Mathis. DPS is required to "enforce the laws protecting the public safety."[50] Any chill from the threat of enforcing Chapter 423 is thus fairly traceable to McCraw, as head of DPS. Indeed, we have on more than one occasion found litigants to have standing to sue Director McCraw in federal district court when Texas statutes or DPS are alleged to have violated the federal Constitution.[51] The Highway Patrol, too, has statewide law-enforcement and arrest authority.[52] As the person in charge of the Texas Highway Patrol, Chief Mathis is thus a proper defendant as well. Neither Director McCraw nor Chief Mathis denies that they have the authority to enforce Chapter 423. Plaintiffs' chilled "speech" is thus fairly traceable to those who would arrest them for violating Chapter

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[49] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up).

[50] TEX. GOV'T CODE § 411.002(a).

[51] *E.g.*, *Fontenot v. McCraw*, 777 F.3d 741, 746–47 (5th Cir. 2015) (approving litigants' standing to bring Due Process claim seeking injunctive relief against Director McCraw as head of DPS, though ultimately dismissing the claims on mootness grounds); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344–45 (5th Cir. 2013) (approving litigants' standing to bring pre-enforcement Second Amendment challenge to Texas firearms law).

[52] TEX. GOV'T CODE § 411.032; *Graf v. State*, 925 S.W.2d 740, 742 (Tex. App. 1996).

423.[53] Calzada, for example, violates the statute only when law-enforcement agents are not around. Therefore, Plaintiffs' chill is fairly traceable to these defendants.

Plaintiffs' chill is also fairly traceable to District Attorney Higgins. As the district attorney, he is charged with prosecuting individuals who violate criminal laws.[54] For this reason, courts have long recognized that prosecutors are "natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law."[55] Indeed, the Hays County DA's office prosecuted at least one drone-related case relating to Chapter 423. An injunction against future enforcement is therefore likely to redress Plaintiffs' claimed injury.

We therefore conclude that Plaintiffs have standing to bring their First Amendment claims—though not their Due Process claims—against all three Defendants. With one exception: Plaintiffs can't sue Defendants to enjoin enforcement of Chapter 423's *civil* penalties because Defendants do not enforce those provisions—only private individuals harmed by a violation of

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[53] *See Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 514 (5th Cir. 2017) (finding traceability satisfied where "state defendants oversee the [challenged] process," reasoning that the "state defendants' oversight" of the challenged program "places state defendants among those who cause [the plaintiff's] injury").

[54] TEX. GOV'T CODE § 44.205(b); *cf. Lewis v. Scott*, 28 F.4th 659, 664 (5th Cir. 2022) ("[I]t is local prosecutors, not the Secretary, who are specifically charged with enforcement of the criminal prohibition on possessing a voter's mail-in ballot.").

[55] *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980).

Chapter 423 may sue to enforce the civil penalties.[56] The district court lacked jurisdiction to order Defendants not to enforce § 423.006, and its order on that front must be vacated.

Satisfied on standing, at least partly, we turn to the next jurisdictional question: whether Defendants are entitled to sovereign immunity.

B

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity."[57] "[S]overeign immunity also prohibits suits against state officials or agencies that are effectively suits against a state."[58] "As an exception to the general rule of state sovereign immunity, *Ex parte Young* permits plaintiffs to sue a state officer in his official capacity for an injunction to stop ongoing violations of federal law."[59] Importantly: "The officer sued must have 'some connection with the enforcement of the [challenged] act.'"[60]

While the "some connection" test is amorphous, we have identified three guideposts to guide the analysis. "First, an official must have more than 'the general duty to see that the laws of the state are imple-

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[56] *See* TEX. GOV'T CODE § 423.006 (civil enforcement provisions); *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 534 (2021) (plaintiffs cannot sue the Texas Attorney General to enjoin civil actions enforced by *private* individuals).

[57] *Whole Woman's Health*, 142 S. Ct. at 532.

[58] *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

[59] *Lewis*, 28 F.4th at 663.

[60] *Id.* (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)).

mented."[61] Second, "the official must have 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'"[62] "Third, 'enforcement' means compulsion or constraint.'"[63]

Two of these considerations are easily met here. As heads of Texas law-enforcement agencies, Director McCraw and Chief Mathis have more than just the general duty to see that the state's laws are implemented—they are *directly* responsible for enforcing Texas's criminal laws, including those set forth in Chapter 423. DPS and THP officers arrest people for violating Texas law, exercising "compulsion or constraint" in service of the law.[64]

But one key component of the analysis is missing—Defendants lack "a demonstrated willingness to exercise [their] duty" to enforce Chapter 423.[65] While the record shows that DPS issued six warnings and one citation for conduct involving drone operators, none of these incidents was for violating Chapter 423 specifically. Thus, in the decade or so that Chapter 423 has been on the books, the record evidence shows that Director McCraw, Chief Mathis, and their respective agencies have *never* enforced it. We have held that even "a scintilla of enforcement by the relevant state official with respect to the challenged law will do,"[66] but here

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[61] *Tex. All. for Retired Americans v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022) (quoting *City of Austin*, 943 F.3d at 999–1000).

[62] *Id.* (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020)).

[63] *Id.* (quoting *City of Austin*, 943 F.3d at 1000).

[64] *Id.*

[65] *Id.*

[66] *Tex. Democratic Party*, 978 F.3d at 179 (quoting *City of Austin*, 943 F.3d at 1002) (internal quotation marks omitted); *see*

there is not even a scintilla of enforcement. Not even an iota of a scintilla. Zilch.

We recognize, of course, that we have already concluded that Plaintiffs sustained an injury for purposes of their First Amendment pre-enforcement challenge because the *assumed* substantial threat of future enforcement has chilled their use of drones.[67] But this conclusion does not necessarily conflict with the fact that Defendants have not shown a demonstrated willingness to exercise their enforcement duties under *Ex parte Young*. To be sure, we have suggested that, in some cases, "an official's 'connection to enforcement' is satisfied when standing has been established,"[68] and we have similarly observed that there can be "significant overlap" between the standing and *Ex parte Young* inquiries.[69] Those inquiries, however, are not completely coterminous,[70] and the mere fact that standing requirements may be relaxed for First Amendment pre-enforcement challenges does not mean that "the requirements of *Ex parte Young* have in any way been relaxed or vitiated."[71] Thus, because Plaintiffs have provided no evidence that Defendants will enforce Chapter 423, we hold that the *Ex parte Young* exception

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Speech First, 979 F.3d at 335 (distinguishing between facial and as-applied challenges for purposes of addressing "pre-enforcement challenges to recently enacted . . . statutes").

[67] *See supra* § II.A.1.

[68] *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

[69] *E.g.*, *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 513–14 (5th Cir. 2017).

[70] *See Paxton*, 943 F.3d at 1002 (stating that they are "not identical").

[71] *Okpalobi v. Foster*, 244 F.3d 405, 417 n.17 (5th Cir. 2001) (en banc).

does not apply to Director McCraw or Chief Mathis and that they are entitled to sovereign immunity.

We cannot, however, extend Eleventh Amendment immunity to Kelly Higgins, the Hays County District Attorney. This is because "state sovereign immunity applies only to states and state officials, not to political subdivisions like counties and county officials."[72] Indeed, we have "held that Texas district attorneys [are] not protected by the Eleventh Amendment" precisely because they are county officials, not state officials.[73] Granted, a couple of unpublished opinions have suggested that a district attorney's entitlement to Eleventh Amendment immunity may depend on whether he or she is performing in a local or state capacity.[74] But we understand our precedent to employ a more categorical

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[72] *Russell v. Jones*, 49 F.4th 507, 512 (5th Cir. 2022).

[73] *Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir. 1999).

[74] *See Spikes v. Phelps*, 131 F. App'x 47, 49 n.1 (5th Cir. 2005) ("Texas district attorneys are shielded by Eleventh Amendment immunity for acts performed as state officers in the scope of criminal prosecution, but they are not so shielded when they act with respect to local policies."); *Quinn v. Roach*, 326 F. App'x 280, 292 (5th Cir. 2009) ("[D]istrict attorneys . . . in Texas are agents of the state when acting in their prosecutorial capacities.").

approach,[75] informed by various factors[76] that Higgins does not otherwise argue support his position that he is protected by the Eleventh Amendment.

Accordingly, while Defendants McCraw and Mathis are entitled to state sovereign immunity, Defendant Higgins is not.

C

Moving to the merits, we now consider whether the Surveillance and No-Fly provisions facially violate the First Amendment. They do not.

1

We start with the No-Fly provisions, which make it unlawful to fly a drone under 400 feet above a correctional facility, detention facility, critical infrastructure facility, or sports venue—subject, of course, to numerous statutory exceptions, such as the one for commercial purposes.[77]

But Plaintiffs' First Amendment challenge to the No-Fly provisions falters because "only conduct that is 'inherently expressive' is entitled to First Amendment

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[75] *E.g.*, *Hudson*, 174 F.3d at 691 ("After carefully weighing these factors against one another, we conclude that the Orleans Parish District Attorney's Office is not an arm of the state."); *Chrissy F. Medley v. Miss. Dep't of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991) (holding that "the Mississippi District Attorney is a state official" for Eleventh Amendment purposes because state law provides that the district attorney's office would be "primarily state-funded" and its authority would extend to "statewide concerns").

[76] *See Clark v. Tarrant Cnty.*, 798 F.2d 736, 744–45 (5th Cir. 1986) (outlining six factors to determine "whether an entity is entitled to Eleventh Amendment immunity").

[77] TEX. GOV'T CODE §§ 423.0045 & 423.0046; TEX. PENAL CODE § 38.115.

protection."[78] The operation of a drone is not inherently expressive—nor is it expressive to fly a drone 400 feet over a prison, sports venue, or critical infrastructure facility. And nothing in the No-Fly provisions has *anything* to do with speech or expression. These are flight restrictions, not speech restrictions.

Plaintiffs attempt to convert the No-Fly provisions into speech regulations by noting that drones are often used for photography. By making it illegal to fly drones over sensitive sites like prisons, they say, Chapter 423 *necessarily* prohibits photojournalists from capturing images from the air directly over those facilities. They claim that this prevents them from capturing newsworthy subjects cheaply and safely. Plaintiffs take issue with the absence of a specific exemption for the press and argue that "Chapter 423 directly targets speech."

We are not persuaded. The Supreme Court put it this way nearly 60 years ago:

> There 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 he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not

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[78] *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)).

> carry with it the unrestrained right to gather information.[79]

Because the No-Fly provisions have nothing to do with speech or even expressive activity, they do not implicate the First Amendment. Accordingly, we reverse the district court's judgment that the No-Fly provisions facially violate the First Amendment.

We turn next to the Surveillance provisions, which, unlike the No-Fly provisions, implicate at least *some* First Amendment protections.

2

To refresh, the Surveillance provisions make it unlawful to use a drone to "capture an image" of private individuals or property, without their consent, "with the intent to conduct surveillance on the individual or property captured in the image."[80] And just like the No-Fly provisions, the Surveillance provisions have several express exceptions that do not include the press.[81] Plaintiffs characterize aerial surveillance as "speech" and assert that, by letting some people use drones to capture images but not others, the Surveillance provisions violate the First Amendment.

Courts have long held that, unlike flight restrictions, restrictions on filming can implicate the First Amendment, at least to some extent. And the extent of constitutional protections for the right to film is subject to ongoing and vigorous debate—particularly when, as in this case, third parties' privacy rights are threatened. For example, the Fourth Circuit recently

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[79] *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

[80] TEX. GOV'T CODE § 423.003(a).

[81] *Id.* § 423.002(a).

held that undercover animal-rights activists have a First Amendment right to infiltrate companies and clandestinely film them notwithstanding a North Carolina property-protection law.[82] JUDGE RUSHING dissented, stressing the point that, even though newsgathering is afforded some First Amendment protection, "an interest in newsworthy information does not confer a First Amendment right to enter private property . . . and secretly record" because "the mere act of recording by itself is not categorically protected speech."[83] In another recent case, the Ninth Circuit held that an Oregon law prohibiting the secret recording of conversations violates the First Amendment, reasoning that, under its clear and binding precedent, the act of recording is itself an inherently expressive activity.[84] JUDGE CHRISTEN dissented, arguing, among other things, that the right to free speech does not necessarily include an unrestrained right to record *others'* speech.[85]

These debates are not new. The Seventh Circuit in *ACLU of Illinois v. Alvarez* held more than a decade ago that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."[86] That court reasoned that the "right to

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[82] *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 824–834 (4th Cir. 2023) (PETA).

[83] *See id.* at 845–47 (Rushing, J., dissenting).

[84] *Project Veritas v. Schmidt*, 72 F.4th 1043, 1055 (9th Cir. 2023) (citing *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018)).

[85] *See id.* at 1069 (Christen, J., dissenting).

[86] 679 F.3d 583, 595 (7th Cir. 2012).

publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected."[87] Following that premise, the Seventh Circuit went on to hold as likely unconstitutional an Illinois anti-eavesdropping statute. JUDGE POSNER dissented, warning that such novel "interpretations" of the First Amendment have no foundation in the text or original understanding of the First Amendment,[88] and urging courts to tread carefully when elevating the right to record private individuals above the privacy rights of those individuals.[89]

In our own circuit, the leading case is *Turner v. Lieutenant Driver*. There, we held that "the First Amendment protects the right to record the police."[90] In reaching that conclusion, we reasoned that the Supreme Court has held that newsgathering and the right to receive information are entitled to First Amendment protection, "even though this right is not absolute."[91] Citing the Seventh Circuit's decision in *Alvarez*, we also suggested that "the First Amendment protects the act of making a film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself.'"[92] Finally, in recognizing a right to film the police in the course of their public duties, we reasoned that the underlying principles of the First Amendment counseled us to safeguard the right of the people to hold government officials

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[87] *Id.*

[88] *Id.* at 610 (Posner, J., dissenting).

[89] *Id.* at 614.

[90] 848 F.3d 678, 690 (5th Cir. 2017).

[91] *Id.* at 688.

[92] *Id.* at 688–89 (quoting *Alvarez*, 679 F.3d at 596).

accountable—filming them in the course of their duties being one way to do that.[93] We emphasized, however, that the right to film the police is not unqualified. The right extends only to filming police performing their public duties in public places.[94] And even then, the right is "subject to reasonable time, place, and manner restrictions."[95] Following *Turner*'s lead, we hold that restrictions on the right to film—not just police but in general—are subject to at least *some* level of First Amendment scrutiny.

The obvious question then becomes: How *much* scrutiny?

"In an abundance of caution," "we apply the intermediate scrutiny test," "which balances the individual's right to speak with the government's power to regulate."[96] While aerial surveillance is not inherently expressive, and even though the non-expressive aspects of the Surveillance provisions predominate over any expressive component, intermediate scrutiny strikes us as appropriate in this context for several reasons.

First, it is the default level of scrutiny applicable to laws like the Surveillance provisions, which do not directly regulate the content of speech and which "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[97] This is particularly appropriate given the reality that the Surveillance provisions do not directly or even primarily regulate

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[93] *Id.* at 699.

[94] *Id.* (citing *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)).

[95] *Id.* (internal quotation marks omitted).

[96] *Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010).

[97] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

speech and expression—nor do they target any particular message, idea, or subject matter—but neither are they pure drone-operating laws. Second, it is the level of scrutiny suggested in our landmark right-to-film case, *Turner v. Lieutenant Driver*.[98] Third, it is the level of scrutiny we applied in an analogous case. In *Peavy v. WFAA-TV, Inc.*, we considered a First Amendment challenge to anti-wiretapping laws prohibiting the disclosure of illegally intercepted telephone conversations.[99] Reasoning that the laws were content-neutral and restricted communication based solely on the means by which it was acquired, we held that intermediate scrutiny applied.[100]

The Surveillance provisions here are similar to the anti-wiretapping laws in *Peavy* in that they regulate not what images can be captured but instead the means by which those images can be captured. They are also similar in that they call for us to balance First Amendment values against third parties' right to privacy. Finally, while the Surveillance provisions no doubt have an incidental effect on speech, they more closely resemble conduct regulations (aerial surveillance), not regulations of expression, or time, place, and manner restrictions (using a drone from a height above eight feet)—both of which fall under the umbrella of intermediate scrutiny.[101] Intermediate

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[98] *See* 848 F.3d at 690.

[99] 221 F.3d 158, 188 (5th Cir. 2000)

[100] *Id.* at 191.

[101] *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that intermediate scrutiny applies to regulations "when 'speech' and 'nonspeech' elements are combined in the same course of conduct"); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 n.17 (1982) ("Of course, limitations on the right of access that resemble 'time, place, and

scrutiny thus respects the First Amendment values attached to photography while remaining cognizant of the obvious fact that recording from the sky—something the average private person cannot avoid and from where the average photographer would not be able to reach—is simply not the same thing as expressing one's views.

Plaintiffs argue that strict scrutiny should apply. So, before we apply intermediate scrutiny, we explain why we disagree with Plaintiffs' position. They offer three "paths" to strict scrutiny, none of which is persuasive.

First, like the district court, they reason the Surveillance provisions are content-based restrictions on speech (filming, more precisely) because they "require the enforcing official to inquire into the contents of the image to determine whether it is prohibited."[102] "An official must first ascertain the subject matter of the drone image to determine whether it is permissible under the statute. Therefore, it is the content of the image that determines its permissibility—the definition of a content-based restriction."[103] But the Surveillance provisions are not content-based. They classify images as lawful or unlawful based not on *what* is in the picture, but on the basis of *how* the picture is taken. The 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. Indeed, the same image could be captured using a drone, so long as the drone is flown at a height below eight feet— roughly the height of a

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manner' restrictions on protected speech would not be subjected to such strict scrutiny." (citation omitted)).

[102] *McCraw*, 594 F. Supp. 3d at 805.

[103] *Id.* at 806.

person standing on the ground holding a camera above his or her head.[104]

Separately, the district court's analysis cannot be upheld in light of recent developments in First Amendment law. At the time it issued its decision in this case, the district court did not have the benefit of *City of Austin v. Reagan National Advertising of Austin, LLC*, which held that a law is not content-based simply because one must read a sign to determine whether it is lawful under the challenged rule.[105] Here, the district court concluded that the Surveillance provisions are content-based simply because one must look at the image to determine whether it violates Chapter 423.[106] That is (now) an incorrect conclusion of law. We thus reject the notion that the Surveillance provisions are content-based restrictions on speech.

Second, Plaintiffs take the position, as did the district court, that the Surveillance provisions discriminate on the basis of content because they are speaker-based, again triggering strict scrutiny.[107] They argue that Chapter 423 impermissibly favors certain speakers—well, drone operators—and disfavors others by excepting some operators from the Surveillance provisions. For instance, despite the blanket no-drone-surveillance rule, the law exempts scholars who use drones for their academic research and the military for its exercises and missions.[108]

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[104] TEX. GOV'T CODE § 423.002(a)(14).

[105] 142 S. Ct. 1464, 1474 (2022).

[106] *Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 805.

[107] *See id.* at 806.

[108] TEX. GOV'T CODE §§ 423.002(a)(1), (3).

While the law certainly favors some drone operators over others, the Surveillance provisions are not for that reason automatically subject to strict scrutiny. The reason that speaker-based distinctions often trigger strict scrutiny is that restricting speakers can be a facially content-neutral loophole to suppress certain content or viewpoints disfavored by the government.[109] But concerns over content and viewpoint discrimination are not present in the Surveillance provisions' preference for certain drone operators. While the law distinguishes among photographers, it does not distinguish among *photographs*—Chapter 423 cares not for the content of the image. For Chapter 423, what's in the photograph is irrelevant. It is not enough to say that the law distinguishes between speakers; to trigger strict scrutiny, the distinction must be based on the speaker's message, not just the manner in which the speaker communicates.[110] The latter situation applies here. "Thus, the fact that the provisions benefit [some photographers] and not [others] does not call for strict scrutiny under our precedents."[111]

Finally, Plaintiffs argue that the Surveillance provisions are subject to strict scrutiny because the law imposes a direct burden on newsgathering and journalism. Drones, they say, "have become quintessential tools for documenting newsworthy events." Indeed, the

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[109] *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015).

[110] *Turner Broad. Sys.*, 512 U.S. at 645 ("It is true that the [challenged] provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry. . . . So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.").

[111] *Id.* at 659.

undisputed record evidence shows that photojournalists like Calzada and Wade find drones to be a very helpful technology in their trade.

But this argument also fails to trigger strict scrutiny. The Supreme Court has stated, in no uncertain terms, that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[112] In *Branzburg*, the High Court refused to create a First Amendment privilege for journalists to keep them from having to participate in grand jury investigations on the ground that revealing confidential informants would hinder the press's ability to gather news. In rejecting that claimed privilege, the Court reasoned that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[113] "The Court has emphasized that" the press "has no special immunity from the application of general laws. . . . no special privilege to invade the rights and liberties of others."[114] "Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune for conviction for such conduct, whatever the impact on the flow of news."[115] And journalists "have no constitutional right of access to the scenes of crime

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[112] *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *see also Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 928 (5th Cir. 1996) ("[T]he news media have no right to discover information that is not available to the public generally.").

[113] *Branzburg*, 408 U.S. at 682.

[114] *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103 (1937)).

[115] *Id.* at 691.

or disaster when the general public is excluded."[116] Thus, while drones are no doubt a helpful tool in the journalist's toolkit, restrictions on drone usage do not trigger strict scrutiny. "From the beginning of our country the press has operated without constitutional protection for [drones], and [yet] the press has flourished."[117]

In short, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[118] While newsgathering is no doubt critical to a free society, the right to gather news affords no right to compel *others* to supply information.[119] Here, Plaintiffs claim a First Amendment right to use aerial drones to conduct "surveillance" on private persons and property without consent.[120] But in light of the authorities above, no such right exists. The press "has no special privilege to invade the rights and liberties of others."[121] We stress that the Surveillance provisions protect only *private* individuals and property.[122] They expressly permit using drones to capture images on "public real property or a person on that property."[123] This makes good sense because there is an important

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[116] *Id.* at 684–85.

[117] *Id.* at 698–99.

[118] *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

[119] *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality op.).

[120] TEX. GOV'T CODE § 423.003(a).

[121] *Branzburg*, 408 U.S. at 683.

[122] TEX. GOV'T CODE § 423.003(a) ("individual or privately owned real property").

[123] *Id.* § 423.002(a)(15).

and obvious "distinction between recording in public spaces and unauthorized recording on private property."[124]

At most, then, intermediate scrutiny applies to the Surveillance provisions. After all, 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).[125] Such an approach comports not just with *Turner* but also with *Peavy v. WFAA-TV, Inc.*, where we held that a First Amendment challenge to anti-wiretapping statutes were subject to intermediate scrutiny by reasoning along similar lines—that the anti-wiretapping laws regulated "the *manner* in which the information is acquired."[126]

We now apply that standard.

Under intermediate scrutiny, "[a] content-neutral regulation will be sustained if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[127] "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests."[128] "Rather, the requirement of narrow tailoring is satisfied

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[124] *PETA*, 60 F.4th at 845 (Rushing, J., dissenting) (collecting cases).

[125] TEX. GOV'T CODE §§ 423.003(a), 423.002(a)(14), 423.002(a)(6).

[126] *Peavy*, 221 F.3d at 188–89 (emphasis added).

[127] *Turner Broad. Sys.*, 512 U.S. at 662 (internal quotation marks omitted).

[128] *Id.*

'so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[129] "Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[130]

Peavy is particularly pertinent. As previously discussed, there we held that anti-wiretapping statutes—laws prohibiting surreptitious surveillance—survived intermediate scrutiny.[131] Relevant here, we held that the government has "a substantial interest in protecting the confidentiality of private wire, oral, and electronic communications," that this privacy interest is "unrelated to the suppression of free expression," and that by making unlawful the interception and disclosure of private wire transmissions, the anti-wiretapping acts were narrowly tailored to the governmental interest in protecting privacy.[132]

We follow *Peavy* here. As that case held, the government has a substantial interest in protecting the privacy rights of its citizens. Indeed, we noted that the privacy interests at stake "are of constitutional dimension."[133] Though most drone operators harbor no harmful intent, drones have singular potential to help individuals invade the privacy rights of others because they are small, silent, and able to capture images from angles and altitudes no ordinary photographer, snoop,

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[129] *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (alteration accepted).

[130] *Id.* (quoting *Ward*, 491 U.S. at 799).

[131] 221 F.3d at 193.

[132] *Id.* at 192–93.

[133] *Id.* at 192.

or voyeur would be able to reach. And as for tailoring—as in *Peavy*, the government's ability to accomplish its goal of protecting privacy rights would be "achieved less effectively" absent the Surveillance provisions.[134] The law is also tailored to bar only surveillance that could not be achieved through ordinary means—the law contains an exception for images captured "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."[135] We therefore conclude that the law survives intermediate scrutiny.

For similar reasons, we reject Plaintiffs' catchall contention that the Surveillance provisions violate the overbreadth doctrine. "To show overbreadth, plaintiffs must establish that [the Surveillance provisions] encompass[] a substantial number of unconstitutional applications 'judged in relation to the statute's plainly legitimate sweep.'"[136] Plaintiffs have not done so. To the contrary, as we have explained, the Surveillance provisions are narrowly tailored to Texas's substantial interest in protecting her citizens' right to privacy. Plaintiffs have identified no unlawful applications of Chapter 423, and their arguments to the contrary simply assume Chapter 423 is unlawful to begin with. We therefore reverse the district court's holding that Chapter 423 is facially overbroad.[137]

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[134] *See id.* at 192–93.

[135] TEX. GOV'T CODE § 423.002(a)(14).

[136] *Seals v. McBee*, 898 F.3d 587, 593 (5th Cir. 2018), *as revised* (Aug. 9, 2018) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

[137] *See Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 808.

In sum, the district court erred in holding that Chapter 423 facially violates the First Amendment. We hasten to emphasize that the Surveillance provisions are geared only toward protecting *private* individuals and property—they expressly permit aerial surveillance and photography of *public* property and persons thereon.[138] This distinction between public and private subjects is critical, because there is a key "distinction between recording in public spaces and unauthorized recording on private property."[139] It is where we drew the line in *Taylor*—there is a qualified right to film public officials performing public duties in public places. And it is why a different outcome exists both in *Peavy* and in this case, where the subject of the surveillance is private. We are more likely to find the government's interest in privacy to be substantial where the subject is private rather than public.

Having resolved Defendants' appeal, we turn now to Plaintiffs' cross-appeal, which challenges the dismissal of their field-preemption claim.

D

Plaintiffs argue that the district court erred in dismissing their claim that the No-Fly provisions are preempted by federal regulation of the national airspace.[140] Plaintiffs offer two theories of preemption: field preemption and obstacle preemption. We find that neither applies here.

Before proceeding to the merits of these claims, though, we must first assure ourselves that Plaintiffs have standing to challenge the No-Fly provisions on

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[138] TEX. GOV'T CODE § 423.002(a)(15).

[139] *PETA*, 60 F.4th at 845 (Rushing, J., dissenting).

[140] *See Nat'l Press Photographers Ass'n*, 504 F. Supp. 3d at 591.

preemption grounds.[141] Ordinarily, Plaintiffs' preemption challenge to Chapter 423's enforcement would meet the same fate as their Due Process challenge: dismissal for lack of any imminent or concrete threat of enforcement or prosecution. In a recent opinion, however, we held that ongoing pecuniary harm—specifically, paying more than others because of the challenged law—can confer standing to challenge a state regulation on preemption grounds, since enjoining the state law "erases" future pecuniary harm resulting from the challenged law.[142]

Here, at least one Plaintiff has an ongoing pecuniary injury similar to that in *Young Conservatives*. NPPA member Wade testified that Chapter 423 is costing him "thousands of dollars" in lost photojournalism opportunities, as his clients are unwilling to violate Chapter 423 or pay for him to do so. Chapter 423 places law-abiding Texas photojournalists like Wade at a disadvantage to competitors from out of state and those who do not know of or do not follow Chapter 423. As Pappalardo testified, for freelance journalists like him, the ability to enhance a story with "aerial imagery can be the difference between selling a pitch or being denied." Plaintiffs' compliance with Chapter 423 is costing them real money. Because this ongoing financial injury is fairly traceable to the likelihood of Chapter 423's enforcement, and because an injunction is likely to redress the injury, we hold that Plaintiffs have standing to raise their preemption claim.[143]

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[141] *See Keyes v. Gunn*, 890 F.3d 232, 235–36 (5th Cir. 2018).

[142] *Smatresk*, 73 F.4th at 310.

[143] *See id.*

Nevertheless, Plaintiffs' preemption claims fail on the merits.

We start with field preemption. "Field preemption occurs when States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[144] "Although the Supreme Court has recognized field-preemption claims, it has indicated that courts should hesitate to infer field preemption unless plaintiffs show that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress."[145] When Congress has not *expressly* preempted state law, as here, field preemption may still "be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[146]

Field preemption of state law is disfavored. Courts should not infer field preemption in "areas that have been traditionally occupied by the states," in which case congressional intent to preempt must be "clear and manifest."[147] States' police powers, including those necessary to safeguard the protection of citizens, fall

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[144] *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (internal quotation marks omitted).

[145] *Id.* (internal quotation marks omitted).

[146] *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (cleaned up).

[147] *Id.* (cleaned up).

into this category.[148] Additionally, "where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, as part of the preemption analysis we must consider whether the *regulations* evidence a desire to occupy a field completely. Preemption should not be inferred, however, simply because the agency's regulations are comprehensive."[149] And importantly, field preemption is not to be found where federal "regulations, while detailed, appear to contemplate some concurrent state regulation."[150]

Here, Plaintiffs have not shown that Congress or the relevant agency, the Federal Aviation Administration,[151] intended to occupy the entire field of drone regulation. They point out—correctly—that there are some federal regulations relating to unmanned aerial vehicles. But as the district court astutely observed, "federal law has not *completely* preempted the field regarding [drones] flying over certain buildings and structures."[152]

In fact, the FAA has expressly declined to preempt all state regulation of drones. In promulgating a final agency rule on drone regulation, the agency stated, "The FAA . . . reviewed the comments and . . . decided that specific regulatory text addressing preemption is

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[148] *Cipollone v. Ligget Grp., Inc.*, 505 U.S. 504, 518 (1992); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) ("[E]fforts to protect public health and safety are clearly within the city's police powers").

[149] *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 149 (1986) (emphasis added) (internal citation omitted).

[150] *Id.*

[151] *See* 49 U.S.C. § 40103.

[152] *Nat'l Press Photographers Ass'n*, 504 F. Supp. 3d at 589 (emphasis added).

not required in the final rule."[153] "The FAA is not persuaded that including a preemption provision in the final rule is warranted at this time. Preemption issues involving small UAS necessitate a case-specific analysis that is not appropriate in a rule of general applicability. Additionally, certain legal aspects concerning small UAS use may be best addressed at the State or local level. For example, State law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person's use of a UAS."[154] These statements unequivocally show that the applicable federal "regulations, while detailed, appear to contemplate some concurrent state regulation."[155] That is sufficient, but there is more.

Shortly before oral argument, the parties alerted the court to a recently issued "Fact Sheet" from the FAA. The fact sheet, though it reasserts federal sovereignty over issues of "aviation safety or airspace efficiency," nonetheless confirms our conclusion today.[156] For in it, the FAA again expressly contemplates concurrent regulation with States and localities. That ends the matter.[157] But even more importantly, as an example of a *permissible* concurrent state regulation, the fact sheet states that "security-related restrictions over

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[153] Operation and Certification of Small Unmanned Aircraft Systems, 81 FR 42064- 01, 42194 (June 28, 2016).

[154] *Id.*

[155] *R.J. Reynolds*, 479 U.S. at 149.

[156] *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, Fed. Aviation Admin. (July 14, 2023), https://www.faa.gov/sites/faa.gov/files/State-LocalRegulation-of-Unmanned-Aircraft-Systems-Fact-Sheet.pdf.

[157] *See R.J. Reynolds*, 479 U.S. at 149.

open-air water treatment facilities or certain types of critical infrastructure" are likely *not* to be preempted, particularly if the restrictions are "limited to the lower altitudes." The No-Fly provisions, which prohibit drone flights less than 400 feet over critical infrastructure, are thus expressly permitted, not preempted, even under the fact sheet.

Plaintiffs' other theory of preemption, that Chapter 423 poses an obstacle to federal objectives,[158] fails for similar reasons.[159] So-called obstacle preemption exists when "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes of and objectives of Congress.'"[160] Plaintiffs contend that Chapter 423 meets that formulation here because it undermines the federal government's twin goals of uniformity and exclusivity in the national airspace. As

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[158] According to Defendants, Plaintiffs forfeited this theory of preemption because it was not raised in their complaint below. Legal theories, however, need not be raised in a complaint to be considered. Plaintiffs raised their obstacle-preemption argument to the district court, and that is sufficient to preserve it for our review. *See Thomas v. Aneritas Life Ins. Corp.*, 34 F.4th 395, 402 (5th Cir. 2022); *see also Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) ("The federal rules effectively abolish the restrictive theory of pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1219, at 277–78 (3d ed. 2004)).

[159] This is perhaps unsurprising given that "the categories of preemption are not rigidly distinct." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000).

[160] *Oneok v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989)). Another way in which obstacle preemption can exist is if "compliance with both state and federal law is impossible." *Id.* Plaintiffs do not argue that compliance with Chapter 423 and FAA regulations is impossible, however, so we do not address it.

we have already observed, however, the FAA expressly contemplates concurrent state regulation of drones. So, as far as we can tell, Chapter 423 cannot pose any obstacle to national uniformity or exclusivity with respect to drone regulation because the FAA has never pursued such goals.[161]

Accordingly, Chapter 423 is not preempted, and we affirm the district court's dismissal of Plaintiffs' preemption claims.

III

Plaintiffs picked an uphill battle by styling this litigation as a facial, pre-enforcement challenge. "A facial challenge . . . is, of course, the most difficult challenge to mount successfully."[162] And the "speech" right they demand is sweeping: an unqualified First Amendment right to conduct aerial surveillance on non-consenting private individuals on private property, and a First Amendment right to fly drones at low altitudes directly over critical infrastructure.

Nothing in the original understanding of the First Amendment or in our binding precedent permits such a result. In fact, nothing in the Constitution permits an individual to film his neighbor in the privacy of her own home—stealthily from the air—for purposes of conducting "surveillance." Under Plaintiffs' novel theory of the First Amendment, laws prohibiting stalking—and even voyeurism—would fall in the name of "free speech."

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[161] *See Skysign Int'l, Inc. v. City & Cnty. of Honolulu*, 276 F.3d 1109, 1117 (9th Cir. 2002) ("[S]tate law cannot by its mere existence stand as such an obstacle when the federal government contemplates coexistence between federal and local regulatory schemes.").

[162] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

We emphasize that our holding today does not foreclose *all* First Amendment and Due Process challenges to Chapter 423. It is possible that, in an as-applied challenge, a plaintiff or defendant may persuasively show that a particular enforcement of Chapter 423 runs afoul of free speech or fairness principles. But it is not this case.

We therefore

- VACATE the portion of the district court's order that enjoins Defendants from enforcing the civil provisions of Chapter 423 and REMAND with instructions to dismiss that portion of Plaintiffs' claim for lack of Article III standing;
- VACATE the portion of the district court's order that enjoins Defendants from enforcing Chapter 423 on Due Process grounds and REMAND with instructions to dismiss the Due Process claims for lack of Article III standing;
- VACATE the portion of the district court's order that enjoins Director McCraw and Chief Mathis from enforcing Chapter 423 on First Amendment grounds and REMAND with instructions to dismiss Plaintiffs' First Amendment claims against them on grounds of sovereign immunity.
- REVERSE the portion of the district court's order that enjoins Defendant Higgins from enforcing Chapter 423 on First Amendment grounds and REMAND with instructions to enter judgment in favor of Defendant Higgins on Plaintiffs' First Amendment claims; and
- AFFIRM the district court's dismissal of Plaintiffs' preemption claims.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50337

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; TEXAS PRESS ASSOCIATION; JOSEPH PAPPALARDO,

Plaintiffs—Appellees / Cross-Appellants,

versus

STEVEN MCCRAW, *in his official capacity as Director of the Texas Department of Public Safety*; DWIGHT MATHIS, *in his official capacity as Chief of the Texas Highway Patrol*; KELLY HIGGINS, *in his official capacity as District Attorney of Hays County, Texas*,

Defendants—Appellants / Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-946

ON PETITION FOR REHEARING EN BANC

Before CLEMENT, ELROD, and WILLETT, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and REVERSED IN PART, and VACATED IN PART, and

the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that appellees/cross-appellants pay to appellants/cross-appellees the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50337

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; TEXAS PRESS ASSOCIATION; JOSEPH PAPPALARDO,

Plaintiffs—Appellees / Cross-Appellants,

versus

STEVEN MCCRAW, *in his official capacity as Director of the Texas Department of Public Safety*; DWIGHT MATHIS, *in his official capacity as Chief of the Texas Highway Patrol*; KELLY HIGGINS, *in his official capacity as District Attorney of Hays County, Texas*,

Defendants—Appellants / Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-946

UNPUBLISHED ORDER

Before CLEMENT, ELROD, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Plaintiffs' petition for panel rehearing is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Defendant Higgins's petition for panel rehearing is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:19-CV-946-RP

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, TEXAS PRESS ASSOCIATION, and JOSEPH PAPPALARDO,

Plaintiffs,

v.

STEVEN MCCRAW, *in his official capacity as Director of Texas Department of Public Safety*; DWIGHT MATHIS, *in his official capacity as Chief of the Texas Highway Patrol*; and WES MAU, *in his official capacity as District Attorney of Hays County, Texas*,

Defendants.

ORDER

Before the Court are cross-motions for summary judgment filed by Plaintiffs National Press Photographers Association ("NPPA"), Texas Press Association ("TPA"), and Joseph Pappalardo's ("Pappalardo") (collectively, "Plaintiffs"), (Pls.' Mot., Dkt. 63); and Defendants Steven McCraw ("McCraw"), Dwight Mathis ("Mathis"),[1] and Wes Mau's ("Mau") (collectively, "Defendants") (Defs.' Mot., Dkt. 65); and the parties' respective responsive briefing. Also before the Court are East Texas Ranch's

[1] In 2020, Mathis replaced predecessor and original Defendant Ron Joy in his role as Chief of Texas Highway Patrol.

("Movant") Motion to Intervene, (Mot. Intervene, Dkt. 60); and Amici Texas Association of Broadcasters ("TAB") and Reporters Committee for Freedom of the Press's ("RCFP") Motion for Leave to File Amicus Brief, (Mot. Leave, Dkt. 71). Having considered the parties' arguments, the evidence, and the relevant law, the Court will grant Plaintiffs' motion for summary judgment, deny Defendants' motion for summary judgment, deny the motion to intervene, and grant the motion for leave to file an amicus brief.

I. BACKGROUND

This case concerns journalists' right under the First Amendment to operate unmanned aerial vehicles ("UAVs"), otherwise known as drones, and publish the resulting images. Plaintiffs challenge the constitutionality of two sets of provisions of Chapter 423 of the Texas Government Code ("Chapter 423"), passed in 2013 and amended in 2015. (Pls.' Mot. Summ. J., Dkt. 63, at 15). Plaintiffs allege that the civil and criminal penalties within the Chapter 423 provisions restrict the First Amendment right to newsgathering and speech and chill Plaintiffs and their members from using UAVs for certain newsgathering activities. (*Id.*).

Texas Government Code Sections 423.002, 423.003, 423.004, and 423.006 (together "Surveillance Provisions") impose civil and criminal penalties on UAV image creation. Section 423.003 imposes criminal and civil penalties by declaring it unlawful to use "an unmanned aircraft to capture an image of an individual or privately owned real property . . . with the intent to conduct surveillance on the individual or property captured in the image." TEX. GOV'T CODE § 423.003(a). Under Section 423.006, a landowner or tenant may bring a civil action against a person who violates Section 423.003 or 423.004. TEX. GOV'T CODE § 423.006(a).

Section 423.002 exempts certain uses of UAVs from liability under the Surveillance Provisions but does not exempt newsgathering. see TEX. GOV'T CODE § 423.002. Exemptions include "professional or scholarly research and development or . . . on behalf of an institution of higher education." TEX. GOV'T CODE § 423.002(a)(1). Plaintiffs argue that the Surveillance Provisions are unconstitutionally content- and speaker-based because the exemptions in Section 423.002 prohibit or allow the use of UAVs based on the purpose for which the image was captured, the identity of the person capturing the image, or the content of the image. (Pls.' Mot. Summ. J., Dkt. 63, at 10). Plaintiffs also argue that the Surveillance Provisions are unconstitutionally vague and overbroad because the term "surveillance" is not defined. (*Id.* at 11).

Texas Government Code Sections 423.0045 and 423.0046 (together "No-Fly Provisions") impose criminal penalties by making it unlawful to fly UAVs over a "Correctional Facility, Detention Facility, or Critical Infrastructure Facility" or "Sports Venue" at less than 400 feet. TEX. GOV'T CODE § 423.0045, § 423.0046. Critical infrastructure facilities are defined to include oil and gas pipelines, petroleum and alumina refineries, water treatment facilities, and natural gas fractionation and chemical manufacturing plants. TEX. GOV'T CODE § 423.0045(a). In 2017, critical infrastructure was expanded though legislative amendments to include animal feeding operations, oil and gas drilling sites, and chemical production facilities, among others. *Id*. The 2017 amendments also defined a "sports venue" to include any arena, stadium, automobile racetrack, coliseum, or any other facility that has seating capacity of more than 30,000 people and is "primarily used" for one or more professional or amateur sport or athletics events. TEX. GOV'T CODE §§ 423.0045 –046; 2017 Tex.

Sess. Law Serv. Ch. 1010 (H.B. 1424) (Vernon's). Plaintiffs contend that when combined with Federal Aviation Administration ("FAA") regulations, which require UAVs to fly below 400 feet, the No-Fly Provisions effectively ban UAVs at the listed locations. (Pls.' Mot. Summ. J., Dkt. 63, at 16); *see* 81 Fed. Reg. 42064, 4206 (June 28, 2016); 14 C.F.R. § 107.1(a).

The No-Fly Provisions exempt certain UAV users, including those with a "commercial purpose." TEX. GOV'T CODE §§ 423.0045(c), 423.0046(c). Plaintiffs argue that allowing UAVs to be used for commercial purposes but not newsgathering purposes constitutes content-based discrimination in violation of the First Amendment. (Pls.' Mot. Summ. J., Dkt. 63, at 11). Plaintiffs allege the No-Fly Provisions are unconstitutionally vague and overbroad because "commercial purpose" is not defined and is understood to exclude newsgathering. (*Id.* at 17). Plaintiffs claim this leaves visual journalists unable to determine if they are permitted to use UAVs under the No-Fly Provisions.

Plaintiffs are one individual journalist and two media organizations. Pappalardo is a Texas reporter who owns a drone and was previously certified to operate a UAV in the national airspace by the FAA. (Pappalardo Decl., Dkt. 63, at 150). Pappalardo states that the Chapter 423 provisions have chilled his newsgathering because he is concerned about liability under its provisions. (*Id.* at 153). Because of the law, he has foregone opportunities to report on "events related to Hurricane Harvey, the removal of homeless encampments, the way gridlock hampers emergency responders, and illegal poaching in urban areas." (Mot. Summ. J., Dkt. 63, at 17; Pappalardo Decl., Pls.' Ex. 5, ¶ 14). He fears that "using a [drone] for journalistic purposes would put [him] at risk of criminal penalties

and subject [him] to liability in a civil lawsuit." (Pappalardo Decl., Dkt. 63, at 150).

NPPA is a national organization that represent the interests of visual journalists, including within Texas. (Ramsess Decl., Dkt. 63, at 157). NPPA members include photographers from print, television, and electronic media, including approximately 300 members in Texas. (*Id.*). NPPA promotes the role of visual journalism as a public service and advocates for the work of its visual journalist members. (*Id.* at 159). Plaintiffs allege that NPPA members regularly use UAVs for newsgathering. (*Id.* at 157). Plaintiffs argue that NPPA members' newsgathering is chilled by the Chapter 423 provisions. (Pls.' Mot. Summ. J., Dkt. 163, at 19). NPPA advises its members on legal issues that face them in their work as journalists. (*Id.* at 18). Since the passage of the Chapter 423 provisions, NPPA has advised its members about the provisions, including researching the law and meeting with lawmakers and communicating with members about compliance. (*Id.*). Plaintiffs contend that NPPA has diverted resources from NPPA's core activities as a result of the Chapter 423 provisions. (*Id.*). TPA is one of the oldest and largest newspaper trade organizations in the country with more than 400 member newspapers across the state of Texas. (Baggett Decl., Dkt. 63, at 122). Plaintiffs allege that Chapter 423 has led some its members "to avoid the use of drone photography" in their publications. (*Id.*).

In addition to the impacts on NPPA and TPA as organizations, individual members have also felt the effects of Chapter 423. NPPA member, employee of TPA member *San Antonio Express-News*, and video journalist Guillermo Calzada ("Calzada") has an FAA Part 107 Remote Pilot Certificate, which qualifies him

to operate UAVs in the national airspace, and he owns a registered drone. (Calzada Decl., Dkt. 63, at 131; Calzada Certificate of Authorization, Dkt. 63, at 145). On July 24, 2018, Calzada used his UAV to report on an arson fire at an apartment complex in San Marcos. (Calzada Decl., Dkt. 63, at 131–32). Agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives stopped Calzada and called San Marcos police. (*Id.* at 132). A San Marcos police officer subsequently informed Calzada of the criminal penalties under Chapter 423 if he continued to use his UAV to report on the fire or published any of the captured images. (*Id.*). Plaintiffs allege that in that instance and going forward, Chapter 423 chilled Calzada's speech by causing him to fear prosecution under Chapter 423 for using UAVs for newsgathering. (*Id.* at 136).

NPPA member and news photographer Brandon Wade ("Wade"), whose clients include TPA members, is also qualified to operate UAVs in the national airspace and owns a UAV. (Wade Decl., Dkt. 63, at 165). Plaintiffs assert that Chapter 423's provisions have affected Wade's use of UAVs on several occasions. (*Id.* at 167–70). On August 14, 2017, Wade limited his UAV use when he photographed a water treatment plant because he feared that some photographs would violate the Chapter 423 provisions. (*Id.* at 171). Additionally, a local newspaper declined to publish photographs he took of a community garden after it learned Wade had used a UAV to capture the photographs. (*Id.* at 168). Another local newspaper declined Wade's request to use a UAV for an assignment, costing Wade thousands of dollars in lost income. (*Id.* at 167). When Wade was hired to photograph a facility that housed immigrant children, Wade limited where he flew his UAV as a result of the Chapter 423 provisions. (*Id.* at 173). On another occasion, Wade was prohibited from using his

drone to record the Texas Rangers ballpark for a newspaper even when the Rangers used same type of photography for their own commercial purposes. (*Id.* at 170–72). Plaintiffs assert that the uncertainty created by the Chapter 423 provisions has chilled Wade's speech. (*Id.* at 167).

Plaintiffs allege facts to demonstrate that UAV images are an increasingly important part of journalism central to communicating the message of the news. Drone photography can "add additional information and important perspective for the reader—particularly where, for example, a story covers a large area that would be difficult to visualize or understand without an aerial perspective." (*Id.* at 165; *see also* Calzada Decl., Dkt. 63, at 133). The unique attributes of drone photography facilitate the gathering and dissemination of the news, according to Plaintiffs. (Pls.' Mot. Summ. J., Dkt. 63, at 12). UAVs' low altitude "can allow for better images to be made and can provide more information to the viewer"; (Wade Decl., Dkt. 63, at 166); their maneuverability "enables better and clearer photography"; their on-board technology "stabilizes the camera to make video footage smoother," (*id.*); they are more economically feasible than helicopters for freelance journalists and news organizations, (Pappalardo Decl., Dkt. 63, at 153; Calzada Decl., Dkt. 63, at 133; Wade Decl., Dkt. 63, at 165); and they allow "journalists to reach the scene more quickly, follow events from an elevated perspective, and inform citizens in more engaging ways." (Amicus Br., Dkt. 72-2, at 4).

UAVs are also a relatively safe option for aerial photography when compared to helicopters, (Wade Decl., Dkt. 63, at 169; Ramsess Decl., Dkt. 63, at 158; Calzada Decl., Dkt. 63, at 131). Defendants note that "drone operation requires extensive and diligent

maintenance, rigorous training, and careful regulation." (Defs.' Resp., Dkt. 68, at 3). Plaintiffs include drone pilots who are licensed by the FAA to fly drones, file their flights, and are still restrained in their use of this technology (*See, e.g.,* Calzada Decl., Dkt. 63, at 131; Calzada Certificate of Authorization, Dkt. 63, at 145; Pappalardo Decl., Dkt. 63, at 150; Wade Decl., Dkt. 63, at 165).[2] As Amici note, although there are risks associated with UAVs, any incidents "represent a miniscule fraction of drone operations," and the risks associated with helicopters "in terms of loss of life, injury and property damage are vastly worse than if the same were to occur with a" UAV. (Amicus Br., Dkt. 72-2, at 7).

Plaintiffs filed this action on Sept. 26, 2019. (Compl., Dkt. 1). Defendants are Steven McCraw, Director of the Texas Department of Public Safety ("DPS"); Dwight Mathis, Chief of the Texas Highway Patrol ("THP"), and Wes Mau, the District Attorney of Hays County. Defendants filed motions to dismiss Plaintiffs' claims, which the Court denied on November 30, 2020 as to all but Plaintiffs' Supremacy Clause claims. (Order, Dkt. 52, at 29). For largely the same reasons expressed there, the Court will grant Plaintiffs' motion for summary judgment and deny Defendants' motion for summary judgment.

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[2] Defendants allege that drones can be dangerous and cite evidence that UAVs "risk of crashes which can endanger persons on the ground or risk property damage." (Fritch Decl., Dkt. 65-2, at 7). But this evidence has no bearing on the safety of UAVs in comparison to other methods of aerial photography—namely helicopters. Defendants produce no evidence to suggest that helicopters are as safe as, or safer than, drones when used for newsgathering.

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

If the moving party does not bear the ultimate burden of proof, after it has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). When the movant bears the burden of proof, she must establish all the essential elements of her claim that warrant judgment in her favor. *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002). In such cases, the burden then shifts to the nonmoving party to establish the existence of a

genuine issue for trial. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017).

Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin All. v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000). Cross-motions for summary judgment "must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538–39 (5th Cir. 2004).

III. DISCUSSION

A. Standing

Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). A key element of the case-or-controversy requirement is that a plaintiff must establish standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To establish Article III standing, a plaintiff

must demonstrate that she has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *See Lujan*, 504 U.S. at 560–61. Only one party is required to demonstrate standing to satisfy Article III's case-or-controversy requirement. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Only one plaintiff must have standing "to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

Plaintiffs claim that Pappalardo meets the requirements for standing as an individual, and that NPPA and TPA have both organizational and associational standing. Defendants argue that each of the Plaintiffs lacks standing and cannot establish any of the required elements. (Defs.' Mot. Summ. J., Dkt. 65, at 12–14). Defendants claim no Plaintiff can establish injury in fact because none has been threatened with or subjected to enforcement, and none has interacted with Defendants regarding Chapter 423. (Defs.' Mot. Summ. J., Dkt. 65, at 14). However, Plaintiffs need not show that they will be punished, only that the challenged law has caused Plaintiffs to reasonably self-censor their speech for fear of being punished. *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014) ("[C]hilling a plaintiffs' speech is a constitutional harm adequate to satisfy the injury-in-fact requirement."). "[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution . . . a credible threat of enforcement is sufficient." *Id*. (quotations omitted). Indeed, the Supreme Court has made clear that plaintiffs who engage in activity "arguably affected with a constitutional interest, but proscribed by a statute," should not "be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v.*

United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979); *see Zimmerman v. City of Austin*, 881 F.3d 378, 388 (5th Cir. 2018); *see Animal Legal Def. Fund v. Vaught,* No. 20-1538, 2021 WL 3482998, at *3 (8th Cir. Aug. 9, 2021) ("A formal threat . . . is not required to establish an injury in fact. The question is whether the plaintiffs have an objectively reasonable fear of legal action that chills their speech.").

Plaintiffs state that Pappalardo has stopped using his UAV for newsgathering "for fear of facing criminal or civil liability." (Pappalardo Decl., Dkt. 63, at 151, 153). The law has chilled him from reporting on "several newsworthy stories." (Pls.' Resp., Dkt. 67, at 21; Pappalardo Decl., Dkt. 63, at 153). NPPA member Wade has "self-censored" his UAV photography in response to the law. (Wade Decl., Dkt. 63, at 173). And NPPA member Calzada has limited his use drone recording after he was approached by San Marcos police and informed he was violating state law. (Calzada Decl., Dkt. 63, at 131–33). TPA's members too have adopted policies against use of UAV images out of fear of violating Chapter 423. (Wade Decl., Dkt. 63, at 167–68). The Court is satisfied that any one of these injuries is sufficient to satisfy the injury-in-fact requirement; the existence of multiple independent injuries is more than sufficient to entitle Plaintiffs to summary judgment on this issue.

As to traceability, they claim that Defendants are law enforcement officers who lack prosecution authority. (*Id.*). Though they concede Mau has prosecution authority, they claim he has never threatened or used his authority against plaintiffs. (*Id.*). Defendants appear to overcomplicate the issue; all three defendants have the power and the duty under state law to enforce Chapter 423, leading Plaintiffs to fear enforcement

and refrain from constitutionally protected activities. (Pls.' Resp., Dkt. 67, at 22).

Regarding redressability, Plaintiffs need not prove that the relief the seek will fully redress the harms they suffer. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). Plaintiffs claim that their requested relief "will, at minimum, permit Plaintiffs to gather the news using drones in Defendants' jurisdictions without fear of arrest or prosecution by Defendants, relieving many of their First Amendment injuries in those locations." (Pls.' Resp., Dkt. 67, at 23). Moreover, a declaratory judgment will have the practical effect of allowing them to exercise their First Amendment rights by removing the fear of prosecution even in jurisdictions not represented here, where they can use this judgment to support their case. (*Id.*, citing *Utah v. Evans*, 536 U.S. 452, 464 (2002) (finding redressability where "the practical consequence of [the declaratory judgment] would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered"). Thus, the Court is satisfied that Plaintiffs have established redressability here.

The Court further finds that NPPA and TPA have met the requirements to establish associational standing.[3]

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[3] Plaintiffs also assert standing on behalf of NPPA and TPA under a theory of organizational standing. (Pls.' Mot. Summ. J., Dkt. 63, 46). Because the Court finds that NPPA and TPA both have associational standing, and Pappalardo has standing as an individual, the Court is satisfied that Plaintiffs have established

"[A]n association has standing to bring suit on behalf of its members when: [1] its members would otherwise have standing to sue in their own right; [2] the interests it seeks to protect are germane to the organization's purpose; and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). As discussed above, NPPA members Wade and Calzada have demonstrated that their speech was chilled by Chapter 423 sufficient to establish standing in their own right. (Wade Decl., Dkt. 63, at 167; 173; Calzada Decl., Dkt. 63, at 132, 136). And TPA member newspaper *The Dallas Morning News* has, as a result of Chapter 423, adopted a policy against using UAV photographs, chilling this form of expression. (Wade Decl., Dkt. 63, at 167–68).

Next, both organizations seek to vindicate interests germane to their purpose—the rights of journalists and newspapers to engage in a form of newsgathering and publication under the First Amendment. (Pls.' Mot. Summ. J., Dkt. 63, at 45–46). "NPPA's mission is supporting and advocating for visual journalists and promoting excellence in the profession." (*Id.* at 46, citing Ramsess Decl., Dkt. 63, at 159). TPA "promotes the welfare of Texas newspapers, encourages higher standards of journalism, and plays an important role in protecting the public's right to know as an advocate of First Amendment liberties." (Baggett Decl., Dkt. 63, at 122). Finally, this lawsuit does not require the participation of individual members of either organi-

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standing and need not address the arguments related to organizational standing.

zation, as a facial challenge to the constitutionality of the law. *See United Food & Commer. Workers Union Local 751*, 517 U.S. at 546 ("'[I]ndividual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members.") (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977)). As such, both NPPA and TPA have associational standing. The Court thus finds that Plaintiffs are entitled to summary judgment on the issue of standing for all three plaintiffs.

B. Immunity

Defendants claim that they are protected by sovereign immunity from the claims here and seek summary judgment on this basis. The Eleventh Amendment typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). However, under the *Ex parte Young* exception to sovereign immunity, lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). "For the [*Ex parte Young*] exception to apply, the state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019) (quoting *Young*, 209 U.S. at 157); *see also In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020) ("*Ex parte Young* allows suits for injunctive or declaratory relief against

state officials, provided they have sufficient 'connection' to enforcing an allegedly unconstitutional law.").

"If the official sued is not 'statutorily tasked with enforcing the challenged law,' then the requisite connection is absent and '[the] *Young* analysis ends.'" *Abbott*, 956 F.3d at 709 (quoting *City of Austin*, 943 F.3d at 998). Where, as here, "no state official or agency is named in the statute in question, [the court] consider[s] whether the state official actually has the authority to enforce the challenged law." *City of Austin*, 943 F.3d at 998. Neither a specific grant of enforcement authority nor a history of enforcement is required to establish a sufficient connection. *City of Austin*, 943 F.3d 993 at 1001; *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). There need be only a "scintilla of enforcement by the relevant state official" for *Ex parte Young* to apply. *City of Austin*, 943 F.3d at 1002 (quotations omitted). Actual threat of or imminent enforcement is "not required." *Air Evac*, 851 F.3d at 519.

Defendants assert that they are immune from suit here because neither DPS nor THP has made an arrest under Chapter 423. (*See* McCraw Answers, Dkt. 65-12, at 8; Mathis Answers, Dkt. 65-12, at 29). And where DPS officers have interacted with drone pilots, they have never issued warnings for violations of Chapter 423. (*See* McCraw Answers, Dkt. 65-12, at 9–10). Further, in his seven years in office, Mau has only charged one person in connection with a drone. (*See* Mau Answers, Dkt. 65-12, at 49 –51). And Plaintiffs themselves have not been directly threatened with enforcement by Defendants themselves. (*See* NPPA Resp., Dkt. 65-12, at 75, 81–82; TPA Resp., Dkt. 65-12, at 92–93, 96–97; Pappalardo Resp., Dkt. 65-12 at 113 –14). Defendants further state that McCraw and

Mathis do not have prosecution authority, though they concede they have authority to make arrests under Chapter 423. (Defs.' Mot. Summ. J., Dkt. 65, at 11). Defendants claim that none of them have made "a specific threat or indicate[d] that enforcement was forthcoming," nor stated that Plaintiffs "had violated a specific law" or "intimated that formal enforcement was on the horizon." *Texas Democratic Party v. Abbott,* 978 F.3d 168, 181 (5th Cir. 2020). They argue that, lacking a connection to the enforcement of the law, sovereign immunity cannot be waived under *Ex parte Young* here.

Plaintiffs respond that Defendants undisputedly have the duty to enforce Texas law, which includes the duty to enforce Chapter 423. (Pls.' Resp., Dkt. 67, at 19). Peace officers have the duty to arrest individuals who violate criminal laws. TEX. CODE CRIM. PROC. arts. 2.13, 14.01. Mathis is the Chief of THP, and therefore a peace officer with the power and duty to enforce Chapter 423. *Id.* at art. 2.12(4); TEX. GOV. CODE § 411.006(a)(5). McCraw is the Director of DPS, where he supervises thousands of peace officers, including "rangers, officers, and members of the reserve officer corps commissioned by the Public Safety Commission and the Director of the Department of Public Safety." TEX. CODE CRIM. PROC. art. 2.12(4). He is "directly responsible . . . for the conduct of the department's affairs." TEX. GOV. CODE § 411.006(a)(1). McCraw is therefore also responsible for enforcing the state's laws. Finally, Mau has "prosecution authority" extending to Chapter 423. (Defs.' Mot. Summ. J., Dkt. 65, at 12).

As to their willingness to enforce the law, "[a] 'scintilla of enforcement by the relevant state official with respect to the challenged law' will do." *Texas Democratic Party*, 978 F.3d at 179 (quoting *City of*

Austin, 943 F.3d at 1002). Here, Mau's office has made an arrest for drone-related conduct under the statute. (Defs.' Mot. Summ. J., Dkt. 65, at 11; *See* Mau Answers, Dkt. 65-12, at 49 –51). A single arrest constitutes a "scintilla of enforcement" here. Moreover, Plaintiffs have no way of knowing whether Defendants will enforce the law moving forward. Defendants have provided no binding assurances, and the Supreme Court has noted that "[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige."); *see KVUE, Inc. v. Moore*, 709 F.2d 922, 930 (5th Cir. 1983) ("That the statute has not been enforced and that there is no certainty that it will be does not establish the lack of a case or controversy. The state has not disavowed enforcement."). Given the possibility of enforcement, and the duty of Defendants to do so if a relevant situation arises, the Court finds that Plaintiffs have established sufficient connection to enforcement for Defendants to fall within the *Ex parte Young* exception to sovereign immunity. Therefore, the Court finds Defendants' motion on this point must fail.

Having found that Plaintiffs have standing, and that Defendants are not immune from suit, the Court moves on to address the parties' motions on the merits.

C. First Amendment

The parties dispute whether Chapter 423's restrictions on drone usage by journalists violates the First Amendment. This issue requires a multi-part inquiry by the Court to determine (1) whether the First Amendment protects the activity at issue here; (2) if so, what level of scrutiny should apply; and (3) whether

the law can survive such scrutiny. The Court will address each question in turn.

1. Whether UAV Photojournalism is Covered by the First Amendment

The Court must first address whether Chapter 423 implicates activity covered by the First Amendment. Plaintiffs claim Chapter 423 violates the First Amendment by restraining their ability to gather and disseminate news. (Pls.'s Mot. Summ. J., Dkt. 63, at 23). Defendants counter that the right Plaintiffs assert "is found nowhere in the First Amendment." (Defs.' Mot. Summ. J., Dkt. 65, at 15). Defendants urge an improperly narrow understanding of the Constitution that is without support in the law. For "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *see Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

As Chapter 423 demonstrates, "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). The protections offered by the First Amendment must extend to each phase of the "speech process" if they are to have any effect at all, as "regulation limiting the creation of [speech] curtails expression as effectively as a regulation limiting its display." *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015). In the analogous context of filmmaking, the Fifth Circuit has noted that "the First Amendment protects the act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself.'" *Turner v.*

Lieutenant Driver, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)). Furthermore, courts have never recognized a "distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. . . . [W]e have not attempted to disconnect the end product from the act of creation." *Id.* (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010)). This reasoning holds just as true for photographs and videos captured by drone: the process of creating the images finds just as much protection in the First Amendment as the images themselves do. Indeed, "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Driver*, 848 F.3d at 689 n.41 (quoting *Am. C.L. Union of Illinois*, 679 F.3d at 595).

Defendants claim that drone photography cannot be entitled to First Amendment protections because it was not contemplated by the Framers when they drafted the protections for expression and the press. (Defs.' Mot. Summ. J., Dkt. 65, at 16). But neither did the Framers anticipate photography in any form, much less video or internet communications, all of which are today covered by the First Amendment. Applying the Constitution's protections to new technological contexts is far from a novel exercise. Indeed, "[c]ourts often must apply the legal rules arising from fixed constitutional rights to new technologies in an evolving world." *United States v. Miller*, 982 F.3d 412, 417 (6th Cir. 2020). The Supreme Court has "emphatically rejected [the] 'startling and dangerous' proposition" that the government "could create new categories of

unprotected speech by applying a 'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Brown*, 564 U.S. at 792 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)). Absent "persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription, a legislature may not revise the 'judgment of the American people,' embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs." *Id.* (quoting *Stevens*, 559 U.S. at 470). Fundamentally, the "First Amendment draws no distinction between the various methods of communicating ideas." *Superior Films, Inc. v. Dep't of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring).

Here, Plaintiffs have established that Chapter 423 restricts their use of drones to record the news, necessarily constraining their ability to disseminate the news. It is uncontested that budgetary and other constraints may make drones the only option for recording certain events. (Pls.' Mot. Summ. J., Dkt. 63, at 2–6). Defendants assert that other options—namely expensive helicopters—can fill the same role in facilitating news production. (Defs.' Mot, Summ. J., Dkt. 65, at 4). Yet they cannot dispute the extreme price and safety differences between these technologies. Furthermore, Pappalardo and the organizational plaintiffs' members have stated that drones are central to their journalistic pursuits, claims which Defendants do not refute. (*See* Pappalardo Decl., Dkt. 63, at 152; Wade Decl., Dkt. 63, at 165). The Court thus finds that Plaintiffs have established that, as a matter of law, use of drones to document the news by journalists is protected expression, and, by regulating this activity, Chapter 423 implicates the First Amendment.

2. What Level of Scrutiny is Appropriate under the First Amendment

Next, the Court addresses the proper level of scrutiny to apply to the restrictions of expressive activity in Chapter 423. Plaintiffs claim that, because it constitutes content and speaker-based restrictions, the law should be subject to strict scrutiny. (Pls.' Mot. Summ. J., Dkt. 63, at 24). The Court agrees.[4]

Laws that regulate expression based on its subject are ordinarily impermissible, as "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Stevens*, 559 U.S. at 468 (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). As such, content-based restrictions are subject to heightened scrutiny. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). A law is content-based, triggering strict scrutiny, if it "'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Sorrell*, 564 U.S. at 565); *see Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 706 (5th Cir. 2020), *cert. granted sub nom. City of Austin, Texas v. Reagan Nat'l Advert. of Texas, Incorporate*, 141 S. Ct. 2849 (2021) (A law "does not need to discriminate against a specific viewpoint

[4] Plaintiffs assert as an independent basis for applying strict scrutiny that newsgathering in itself is protected by the First Amendment, and Chapter 423 substantially burdens this activity. (Pls.'s Mot. Summ. J., Dkt. 63, at 19). The Court is inclined to agree with Plaintiffs and expressed as much in its Order on Defendants' Motion to Dismiss. (Order, Dkt. 52, at 18). Still, having found strict scrutiny appropriate as a content and speaker-based restriction on expression, it need not reach this argument and so declines to do so here.

to be 'content based.'"). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 576 U.S. at 163–64.

The Surveillance and No-Fly Provisions are both content-based restrictions that regulate based on the subject of the expression. The Surveillance Provisions require the enforcing official to inquire into the contents of the image to determine whether it is prohibited. Specifically, the provisions apply to images of individuals and private real property only. TEX. GOV'T CODE § 423.003(a). Drone photography is permitted when the subject is public property, but when the subject is an individual or private property, the possession, disclosure, display, or distribution of the image is prohibited. *Id.* at §§ 423.002(a)(15), 423.004(a). In effect, the statute "identifies various categories" of images based on their content, "then subjects each category to different restrictions." *Reed*, 576 U.S. at 159. An official must first ascertain the subject matter of the drone image to determine whether it is permissible under the statute. Therefore, it is the content of the image that determines its permissibility—the definition of a content-based restriction.

The No-Fly Provisions are also subject to strict scrutiny by conditioning the legality of images based on their purpose. *Reagan*, 972 F.3d at 706 ("[A] distinction can be facially content based if it defines regulated speech by its function or purpose."). "Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny." *Reed*, 576 U.S. at, 156. Under the No-

Fly Provisions, expression that would otherwise be prohibited is permissible if "used for a commercial purpose." TEX. GOV'T CODE § 423.0046(c)(5); *see Price v. Barr*, 514 F. Supp. 3d 171, 188 (D.D.C. 2021) (invalidating a law where applicability "necessarily turns on an assessment of whether the content of a film was meant to appeal to a market audience and generate income."); *Sorrell*, 564 U.S. at 564. Indeed, Calzada and Wade both note that, as journalists, they cannot take drone images of Nelson Wolff Stadium and Globe Life Park, respectively. (Calzada Dec., Dkt. 63, at 135; Wade Dec., Dkt. 63, at 171). But Wade was hired by the Rangers to take the very same images of Globe Life Park "for their own public relations purposes"—that he was "not permitted to share . . . with members of the news media." (*Id.*). Here too, then, the purpose determines the legality of the speech. For both the Surveillance and No-Fly Provisions, the subject or purpose of the drone-captured image is the key to its applicability. Thus, both constitute content-based restrictions and trigger strict scrutiny under the First Amendment.

The Surveillance Provisions are separately subject to strict scrutiny as they discriminate based on the identity of the speaker. A regulation may also constitute a content-based restriction if it discriminates between speakers in a way that "disfavors" certain speakers in exercising their First Amendment rights. *Sorrell*, 564 U.S. at 564. The Supreme Court has admonished that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. Section 423.003 provides an extensive list of individuals whose use of drones is not proscribed. TEX. GOV'T CODE § 423.002(a)(9). Professors, students, employees of insurance companies, and real estate brokers all appear on this list; journalists do not. (*Id.*). As

Plaintiffs note, the same drone image taken legally by a professor would constitute a misdemeanor if captured by a journalist. (Pls.' Mot. Summ. J., Dkt. 63, at 23). The Surveillance Provisions thus discriminate based on the identity of the speaker, and "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United*, 558 U.S. at 340–41. Therefore, the Court finds that strict scrutiny is the proper standard under which to evaluate these provisions.

3. Whether Chapter 423 Survives Strict Scrutiny

Having found that strict scrutiny is appropriate here, the Court moves on to analyze the challenged portions of Chapter 423 under that standard. Statutes that regulate based on content are "presumptively invalid." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000)). Such laws "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also R. A. V. v. St. Paul*, 505 U.S. 377, 395 (1992); S*imon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Reagan Nat'l Advert. of Austin v. City of Austin*, 972 F.3d 696, 709 (5th Cir. 2020). In other words, the restrictions must be "'actually necessary' to achieve" a compelling interest, *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (quoting *Brown*, 564 U.S. at 799), and "narrowly tailored to achieve that interest," *Reed*, 576 U.S. at 171 (2015) (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). This is a "demanding standard"; content-based restrictions on speech are rarely permitted. *Brown*, 564 U.S. at 799 (quoting *Playboy*, 529 U.S. at 818).

a. Actually Necessary

A law restricting speech based on content is not "actually necessary" unless the government establishes that no alternative means would "suffice to achieve its interest." *Alvarez*, 567 U.S. at 726. Accordingly, a state may not regulate speech where it "has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from" activities protected by the First Amendment. *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). Applying this principle, the Fourth Circuit has invalidated a law that "burdens more speech than necessary" where there was an "absence of evidence of a county-wide problem" to justify the law's "county-wide sweep." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015).

Here, Defendants cannot carry their burden to establish that Chapter 423 is "actually necessary" to protect any identified interests. In enacting the law, state legislators claimed the law would protect private property, individual privacy, and the safety of critical infrastructure facilities. House Bill Analysis for HB 912 (May 7, 2013) at 5. (*See* Pls.' Mot. Summ. J., Dkt. 63, at 30). However, Defendants have failed to establish that alternative means are insufficient to sufficiently protect these interests. Plaintiffs note that "Defendants have a variety of tools to protect the privacy and private property of Texans from overly intrusive or dangerous drone use without Chapter 423." (*Id.* at 31). The Texas criminal trespass statute, Texas Penal Code § 30.05(a); Texas Transportation or Administrative Code; recording and voyeurism statutes, TEX. PENAL CODE ANN §§ 21.15–.17 (West 2020); and tort claims including intrusion upon seclusion, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993), all have been or could be used to protect

the privacy of individuals from UAV recordings. (*See* Mathis Answers, Dkt. 63, at 58 –59; McCraw Answers, Dkt. 63, at 72– 73). As to safety of critical facilities, it is already a felony under Texas law to knowingly damage, impair, or interrupt a critical infrastructure facilities. TEX. GOV'T CODE §§ 424.051, 424.052. Having failed to identify any interest that is unprotected absent Chapter 423, Defendants cannot establish that this provision is "actually necessary." Indeed, "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980). As such, the Court finds that Chapter 423 is not actually necessary to achieve any identified interest of the government.

b. Narrowly Tailored

Defendants have also failed to establish that Chapter 423 is narrowly tailored to address the purported interests it asserts. "[I]t is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). The government may only ever infringe rights protected by the First Amendment by "means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805; *see Reynolds*, 779 F.3d at 231 (invalidating ordinance that applied to "all County roads, regardless of location or traffic volume . . . thus "prohibit[ing] *all* [expressive conduct] even where those activities would not be dangerous.). Plaintiffs assert, and the Court agrees, that Chapter 423 is both overinclusive (and overbroad) and underinclusive, and so cannot be narrowly tailored as required by the First Amendment.

The Surveillance and No-Fly Provisions are overinclusive and thus overbroad because they "unnecessarily

circumscribe[s] protected expression," *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002)). Plaintiffs have established that Chapter 423 effectively outlaws the use of UAVs for newsgathering on private property—constituting 95 percent of the state. *See* Inst. Renewable. Nat. Res., Texas Land Trends, Tex. A&M, https://txlandtrends.org/files/lt-2014-factsheet.pdf. TEX. GOV'T CODE § 423.003. As Plaintiffs note, the Surveillance Provisions "prevent[] journalists from using drones to record many scenes that could be recorded from a helicopter, or that anyone standing on public property could easily see and record." (Pls.' Mot. Summ. J., Dkt. 63, at 33). Wade explains that "even if I am physically over public property, I am violating the law by documenting private real property or a person on that property." (Wade Decl., Dkt. 63, at 170). Similarly, the No-Fly Provisions proscribe use of drones even when they "indisputably do[] not pose the risks that the State claims." (Pls.' Mot. Summ. J., Dkt. 63, at 33). In particular, restrictions on recording empty stadiums seem to belie explanation, and Defendants have done nothing to alter this impression. (*Id.* at 33–34). Accordingly, Chapter 423 is unconstitutionally overbroad, as "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

The Surveillance and No-Fly Provisions are also underinclusive based on their carve-outs for uses of UAVs that pose the same risks as would drone journalism. If the interests in privacy and safety were indeed sufficient to uphold the law, the exceptions included in Chapter 423 would "leav[e] appreciable damage to [the government's] interest unprohibited."

Reed, 576 U.S. at 172. The Surveillance Provisions exclude 21 uses of drones, none of which obviate the purported privacy concerns of newsgathering. As such, the exceptions "raise[] serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint," *Brown*, 564 U.S. at 802. As to the No-Fly Provisions, the exemption of drone photography for "commercial purposes" appears divorced from any asserted interest in safety or privacy. TEX. GOV'T CODE § 423.0045(c). Defendants have failed to address the Court's previously raised "questions as to how these government interests could be threatened by newsgathering but not by commercial interests." (Order, Dkt. 52, at 24). As Plaintiffs note, "[t]he government's interests were threatened no more when Wade was hired by the Texas Rangers to take drone images of their new baseball stadium for commercial purposes than when he tried to do the same thing for journalism purposes." (Pls.' Mot. Summ. J., Dkt. 63, at 35; Wade Decl., Dkt. 63, at 170–72). Finding the provisions at issue both overbroad and underinclusive, the Court finds that Chapter 423 is not narrowly tailored to any governmental purpose. Because the Surveillance and No-Fly Provisions are not actually necessary nor narrowly tailored, they cannot withstand strict scrutiny. As such, the Court finds that Chapter 423 violates the First Amendment.

D. Void for Vagueness

Plaintiffs claim that the Surveillance and No-Fly Provisions are unconstitutional for the independent reason that they are void for vagueness. Having found Plaintiffs are entitled to summary judgment on the basis of their First Amendment claim alone, the Court need not address this argument. However, to avoid any

confusion, and given the extensive briefing by the parties on this issue, the Court will briefly address why Chapter 423's vagueness as to the terms "surveillance" and "commercial purposes" separately renders it unconstitutional.

A more stringent vagueness test applies where a law "interferes with the right of free speech." *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). Such laws may be constitutionally infirm where they "encourage arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), or "have the capacity 'to chill constitutionally protected conduct, especially conduct protected by the First Amendment.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (quoting *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir.1988)). "A law is unconstitutionally vague if it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Med. Ctr. of Nw. Haus. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). This test demands that statutes affecting speech explain precisely what conduct they are proscribing. *See Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). "Due Process proscribes laws so vague that persons 'of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.'" *Bell*, 248 F.3d 411 at 421 (alterations in original) (quoting *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974)). In other words, the government may regulate conduct that affects speech "only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). A law must not be so vague that it fails to provide "fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012).

1. Surveillance

Chapter 423 does not provide a definition of "surveillance," nor do Defendants put forth a single definition. (Defs.' Mot. Summ. J., Dkt. 65, at 21). Plaintiffs therefore turn to dictionary definitions, noting the inconsistencies between them. (Pls.' Mot. Summ. J., Dkt. 63, at 39) ("Surveillance can involve 'close observation or listening of a person or place in the hope of gathering evidence.' Surveillance, BLACK'S LAW DICTIONARY (11th ed. 2019). Or it might be as broad as the 'act of observing or the condition of being observed.' Surveillance, AMERICAN HERITAGE DICTIONARY (2019), www.ahdictionary.com. Either might include journalism."). Defendants further provide that surveillance may mean "the careful watching of a person or place, especially by the police or army, because of a crime that has happened or is expected," CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/surveillance (last visited July 9, 2021); "a watch kept over a person, group, etc., especially over a suspect, prisoner, or the like[;] . . . continuous observation of a place, person, group, or ongoing activity in order to gather information," DICTIONARY.COM, https://www.dictionary.com/browse/surveillance (last visited July 9, 2021); or "the process of carefully watching a person or place that may be involved in a criminal activity." MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/surveillance (last visited July 9, 2021). (Defs.' Mot. Summ. J., Dkt. 65, at 21). None of these definitions conclusively includes or excludes journalism, and none is found within the statute.

Defendants themselves double down on their refusal to define the term and its applicability to journalism, stating that "'journalism' . . . may or may not constitute

'surveillance,' . . . depend[ing] on factual determinations by a jury." (Mathis Answers, Dkt. 63, at 60; Mathis Answers, Dkt. 63, at 75). Defendants claim that "surveillance" is distinct from "observation," because it "involves prolonged time periods and/or some degree of surreptitiousness or invasion of one's expectation that they are not being watched. (Defs.' Mot. Summ. J., Dkt. 65, at 21). But this contention only highlights the vagueness in the word's meaning, for it in no way clarifies whether journalism is covered. Defendants further claim that the intent requirement in Chapter 423 is the operative word, and that persons who do not "intend" to surveil, or do not intend to surveil individuals or private property more specifically, are not liable under the statute. (Defs.' Mot. Summ. J., Dkt. 65, at 22). But without knowing what constitutes surveillance it is impossible to know whether one's intention constitutes that prohibited activity. These arguments cannot save a fatally vague statutory term.

Plaintiffs provide uncontroverted evidence that the uncertainty surrounding the term "surveillance" dissuades journalists from engaging in UAV photography, chilling their speech. Pappalardo stated that he is "concerned that using a [drone] for journalistic purpose would put [him] at risk of criminal [or civil] penalties," and so he has "not flown the drone to report any stories in Texas, including many that would have carried great urgency or public importance." (Pappalardo Decl., Dkt. 63, at 152). Wade noted that the definition could be construed "broad[ly] enough to include [his] work as a journalist," leading him to believe his work is prohibited under the law. (Wade Decl., Dkt. 63, at 166–67). Calzada is "very wary when [flying his drone], and choose[s] not to fly if law enforcement is anywhere in the vicinity" for the same reason. (Calzada Decl., Dkt. 63, at 134). He stated that his expression was

"chilled" by Chapter 423 "by causing [him] to be at risk of civil and criminal liability when [he] photograph[s] important scenes related to news stories using [his] UAS." (Calzada Decl., Dkt. 63, at 136). TPA member *The Dallas Morning News* instituted a policy against using any drone photography. (Wade Decl., Dkt. 63, at 167–68). This Court has previously stated that the "multiple possible broad dictionary definitions from Plaintiffs, and no clarity offered from Defendants" leads to the conclusion that the term "surveillance" is unconstitutionally vague. (Order, Dkt. 52, at 21–22). Because Defendants have produced no evidence to alter that impression, the Court finds that Chapter 423 is unconstitutionally vague in its use of the "surveillance" term.

2. Commercial Purposes

Plaintiffs also claim that the No-Fly Provisions' use of the term "commercial purposes" is unconstitutionally vague, leaving journalists unable to discern whether their use of UAV photography will expose them to criminal or civil enforcement. (Pls.' Mot. Summ. J., Dkt. 63, at 41). Chapter 423 exempts from the No-Fly Provisions "unmanned aircraft that [are] being used for a commercial purpose." TEX. GOV'T CODE §§ 423.0045(c)(1)(E); 423.0046(c)(5). The statute does not define the term "commercial," and dictionary definitions do not provide conclusive guidance as to whether photojournalism is included in the definition. As Plaintiffs note, "commercial" may be limited to the "buying or selling of goods." Commercial, BLACK'S LAW DICTIONARY (11th ed. 2019). It may also refer more broadly to any moneymaking pursuit. *See, e.g.*, CAMBRIDGE ACADEMIC CONTENT DICTIONARY; MACMILLAN DICTIONARY. And within the field of journalism, photojournalism is considered "editorial" rather than "commercial." (Ramsess

Decl., Dkt. 63, at 157; Wade Decl., Dkt. 63, at 166). Depending on the definition selected, then, photo-journalism may or may not be included—a prime example of a vague statute.

Defendants attempt to avoid the vagueness challenge on this term by noting that Chapter 423 incorporates Part 107 of the Federal Aviation Regulations, which cover UAV news photography. (Defs.' Mot. Summ. J., Dkt. 65, at 26). Not only does the text of the statute fail to state that it is adopting the definitions from the FAA regulation, but the term "commercial" is used or defined nowhere in that regulation. *See* 14 C.F.R. pt. 107. Therefore, this reference does nothing to reduce the uncertainty surrounding the term. Defendants cite to several webpages, again not referenced in Chapter 423, as examples of what may or may not be included in the meaning of "commercial." (Defs.' Mot. Summ. J., Dkt. 65, at 26). But this multi-step process of implication and guesswork again only underscores the lack of clarity in the statute itself. Defendants are left with the assertions by Mathis and McCraw that journalism "may or may not constitute activity undertaken for a 'commercial purpose' depending on the facts and circumstances of the alleged conduct, including the intent of the alleged actor," (Mathis Answers, Dkt. 63, at 62; McCraw Answers, Dkt 63, at 76), and the similar claim by Mau that he "has never contended one way or the other as to what constitutes a 'commercial purpose' for the purpose of this statute," (Mau Answers, Dkt. 63, at 89). The lack of clarity from enforcing officials lends credence to Plaintiffs' fears of arbitrary enforcement. Thus, the Court finds that the No-Fly Provisions are unconstitutionally vague in their use of the term "commercial purposes."

IV. MOTION TO INTERVENE

East Texas Ranch, L.P. ("Movant") seeks to intervene both by right and permissively. (Mot. Intervene, Dkt. 60, at 1). For the following reasons, the Court finds that Movant is not entitled to intervene by right and declines to exercise its discretion to permit it to intervene.

A. Intervention by Right

Intervention by right is governed by Federal Rule of Civil Procedure 24(a). To intervene by right, the prospective intervenor either must be "given an unconditional right to intervene by a federal statute," Fed. R. Civ. P. 24(a)(1), or must meet each of the four requirements of Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Id*. (citations omitted). "Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir.1994) (internal quotation marks omitted). However, the Fifth Circuit has also cautioned courts to be "circumspect about allowing intervention of right by public-spirited citizens in suits by or against a public entity for simple reasons of

expediency and judicial efficiency." *City of Hous. v. Am. Traffic Sols., Inc.*, 668 F.3d 291, 294 (5th Cir. 2012).

Plaintiffs argue that Movant fails to demonstrate how its ability to protect its interests would be impaired by resolution of this matter, as required by Rule 24(a)(3). (Resp. Mot. Intervene, Dkt. 64, at 2). Because the Court finds that Movant does not meet this prong of Rule 24(a)(3), the Court need not analyze the remaining factors. Rule 24(a)(3) requires that an applicant to intervene "be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest." F. R. Civ. P. 23(a)(3). Impairment "does not demand that the movant be bound by a possible future judgment." *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014). A prospective intervenor "must demonstrate only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Id.* at 344; *see also Grutter*, 188 F.3d at 399.

According to Movant, Chapter 423 "involves current and ongoing unconstitutional takings of his property without due process" by "presum[ing] that [drones] . . . will be flown into privately-owned airspace," thereby creating "*de facto* easements into [its] privately-owned airspace." (Mot. Intervene, Dkt. 60, at 3). In addition, it claims that Chapter 423 "renders trespass lawful" and violates the takings provision of the Texas Constitution. (*Id.* at 4). While Movant may have viable claims as to these issues, they are at best tangentially related to the case at bar. Both the instant action and Movant's claims involve constitutional challenges to Chapter 423, but the similarities end there. Intervention is not required simply by virtue of challenging the same law. The resolution of this action will in no way impact Movant's ability to protect its rights in a separate

action. Thus, the Court finds that Movant is not entitled to intervention by right under Rule 24(a)(3).

B. Permissive Intervention

On a timely motion, a court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention "is wholly discretionary . . . even though there is a common question of law or fact." *NOPSI*, 732 F.2d at 470–71. The relevant factors to consider are whether the motion was timely, whether the would-be intervenor's claim or defense shares a common question of law or fact with the main action, and whether the intervention will cause undue delay or prejudice. Fed. R. Civ. P. 24(b); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185,189 n.2 (5th Cir. 1989).

The Court finds that permissive intervention is inappropriate here. Movant asserts that "its claims and affected interests involve common questions of law or fact with this action." (Mot. Intervene, Dkt. 60, at 5–6). As discussed above, there are no questions of law or fact common to both the main action and Movant's claims. The instant action is a First Amendment challenge to Chapter 423; Movant seeks to bring Fifth and Fourteenth Amendment takings claims. (*See* Compl., Dkt. 1; Mot. Intervene, Dkt. 60). The similarities reach only so far as the law being challenged. The Court agrees with Plaintiffs that their "constitutional challenge is entirely different than that [Movant] wishes to interject in this case." (Resp. Mot. Intervene, Dkt. 64, at 3). Furthermore, Plaintiffs correctly note that Movant waited until after the close of discovery and extensive briefing in this case, and as such was untimely and would prejudice the interests of the parties. (*Id.* at 3–

4). The Court therefore declines to exercise its discretion to permit Movant to intervene under Rule 24(b)(2). Movant's motion to intervene is denied.

V. CONCLUSION

For these reasons, the Court ORDERS as follows.

IT IS ORDERED that Plaintiffs' motion for summary judgment, (Dkt. 63), is GRANTED.

IT IS FURTHER ORDERED that TEX. GOV'T CODE §§ 423.002, 423.003, 423.004, 423.0045, 423.0046, and 423.006 violate the First and Fourteenth Amendments and are therefore unconstitutional.

IT IS FURTHER ORDERED that Defendants, as well as their officers, agents, employees, attorneys, and all persons in active concert or participation with them, are enjoined from enforcing TEX. GOV'T CODE §§ 423.002, 423.003, 423.004, 423.0045, 423.0046, and 423.006.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment, (Dkt. 65), is DENIED.

IT IS FURTHER ORDERED that ETR's motion to intervene, (Dkt. 60), is DENIED.

IT IS FINALLY ORDERD that TAB and RCFP's motion for leave to file amicus brief, (Dkt. 71), is GRANTED. All other relief is denied.[5]

SIGNED on March 28, 2022.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

[5] Plaintiffs also seek attorney's fees. (*See* Pls.' Mot. Summ. J., Dkt. 63, at 47). The Court expresses no opinion as to this issue and will entertain arguments by the parties in further briefing if they wish to pursue this claim.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:19-CV-946-RP

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, TEXAS PRESS ASSOCIATION, and JOSEPH PAPPALARDO,

Plaintiffs,

v.

STEVEN MCCRAW, *in his official capacity as Director of Texas Department of Public Safety*; DWIGHT MATHIS, *in his official capacity as Chief of the Texas Highway Patrol*; and WES MAU, *in his official capacity as District Attorney of Hays County, Texas*,

Defendants.

FINAL JUDGMENT

On March 28, 2022, the Court issued an order granting Plaintiffs' motion for summary judgment. (Dkt. 74). As nothing remains to resolve, the Court renders Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that the case is CLOSED.

IT IS FURTHER ORDERED that Plaintiffs shall file a motion for attorney's fees and a bill of costs, if any, no later than April 27, 2022.

SIGNED on April 13, 2022.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX F

Texas Government Code § 423.001. Definition

In this chapter, "image" means any capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions existing on or about real property in this state or an individual located on that property.

Texas Government Code § 423.002. Nonapplicability

(a) It is lawful to capture an image using an unmanned aircraft in this state:

(1) for the purpose of professional or scholarly research and development or for another academic purpose by a person acting on behalf of an institution of higher education or a private or independent institution of higher education, as those terms are defined by Section 61.003, Education Code, including a person who:

(A) is a professor, employee, or student of the institution; or

(B) is under contract with or otherwise acting under the direction or on behalf of the institution;

(2) in airspace designated as a test site or range authorized by the Federal Aviation Administration for the purpose of integrating unmanned aircraft systems into the national airspace;

(3) as part of an operation, exercise, or mission of any branch of:

(A) the United States military; or

(B) the Texas military forces as defined by Section 437.001;

(4) if the image is captured by a satellite for the purposes of mapping;

(5) if the image is captured by or for an electric or natural gas utility or a telecommunications provider:

(A) for operations and maintenance of utility or telecommunications facilities for the purpose of maintaining utility or telecommunications system reliability and integrity;

(B) for inspecting utility or telecommunications facilities to determine repair, maintenance, or replacement needs during and after construction of such facilities;

(C) for assessing vegetation growth for the purpose of maintaining clearances on utility or telecommunications easements; and

(D) for utility or telecommunications facility routing and siting for the purpose of providing utility or telecommunications service;

(6) with the consent of the individual who owns or lawfully occupies the real property captured in the image;

(7) pursuant to a valid search or arrest warrant;

(8) if the image is captured by a law enforcement authority or a person who is under contract with or otherwise acting under the direction or on behalf of a law enforcement authority:

(A) in immediate pursuit of a person law enforcement officers have reasonable suspicion or probable cause to suspect has committed an offense, not including misdemeanors or offenses punishable by a fine only;

(B) for the purpose of documenting a crime scene where an offense, not including misdemeanors or offenses punishable by a fine only, has been committed;

(C) for the purpose of investigating the scene of:

(i) a human fatality;

(ii) a motor vehicle collision causing death or serious bodily injury to a person; or

(iii) any motor vehicle collision on a state highway or federal interstate or highway;

(D) in connection with the search for a missing person;

(E) for the purpose of conducting a high-risk tactical operation that poses a threat to human life;

(F) of private property that is generally open to the public where the property owner consents to law enforcement public safety responsibilities; or

(G) of real property or a person on real property that is within 25 miles of the United States border for the sole purpose of ensuring border security;

(9) if the image is captured by state or local law enforcement authorities, or a person who is under contract with or otherwise acting under the direction or on behalf of state authorities, for the purpose of:

(A) surveying the scene of a catastrophe or other damage to determine whether a state of emergency should be declared;

(B) preserving public safety, protecting property, or surveying damage or contamination during a lawfully declared state of emergency; or

(C) conducting routine air quality sampling and monitoring, as provided by state or local law;

(10) at the scene of a spill, or a suspected spill, of hazardous materials;

(11) for the purpose of fire suppression;

(12) for the purpose of rescuing a person whose life or well-being is in imminent danger;

(13) if the image is captured by a Texas licensed real estate broker in connection with the marketing, sale, or financing of real property, provided that no individual is identifiable in the image;

(14) 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;

(15) of public real property or a person on that property;

(16) if the image is captured by the owner or operator of an oil, gas, water, or other pipeline for the purpose of inspecting, maintaining, or repairing pipelines or other related facilities, and is captured without the intent to conduct surveillance on an individual or real property located in this state;

(17) in connection with oil pipeline safety and rig protection;

(18) in connection with port authority surveillance and security;

(19) if the image is captured by a registered professional land surveyor in connection with the practice of professional surveying, as those terms are defined by Section 1071.002, Occupations Code,

provided that no individual is identifiable in the image;

(20) if the image is captured by a professional engineer licensed under Subchapter G, Chapter 1001, Occupations Code1, in connection with the practice of engineering, as defined by Section 1001.003, Occupations Code, provided that no individual is identifiable in the image; or

(21) if:

(A) the image is captured by an employee of an insurance company or of an affiliate of the company in connection with the underwriting of an insurance policy, or the rating or adjusting of an insurance claim, regarding real property or a structure on real property; and

(B) the operator of the unmanned aircraft is authorized by the Federal Aviation Administration to conduct operations within the airspace from which the image is captured.

(b) This chapter does not apply to the manufacture, assembly, distribution, or sale of an unmanned aircraft.

Texas Government Code § 423.003. Offense: Illegal Use of Unmanned Aircraft to Capture Image

(a) A person commits an offense if the person uses 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.

(b) An offense under this section is a Class C misdemeanor.

(c) It is a defense to prosecution under this section that the person destroyed the image:

(1) as soon as the person had knowledge that the image was captured in violation of this section; and

(2) without disclosing, displaying, or distributing the image to a third party.

(d) In this section, "intent" has the meaning assigned by Section 6.03, Penal Code.

Texas Government Code § 423.004. Offense: Possession, Disclosure, Display, Distribution, or Use of Image

(a) A person commits an offense if the person:

(1) captures an image in violation of Section 423.003; and

(2) possesses, discloses, displays, distributes, or otherwise uses that image.

(b) An offense under this section for the possession of an image is a Class C misdemeanor. An offense under this section for the disclosure, display, distribution, or other use of an image is a Class B misdemeanor.

(c) Each image a person possesses, discloses, displays, distributes, or otherwise uses in violation of this section is a separate offense.

(d) It is a defense to prosecution under this section for the possession of an image that the person destroyed the image as soon as the person had knowledge that the image was captured in violation of Section 423. 003.

(e) It is a defense to prosecution under this section for the disclosure, display, distribution, or other use of an image that the person stopped disclosing, displaying,

distributing, or otherwise using the image as soon as the person had knowledge that the image was captured in violation of Section 423.003.

Texas Government Code § 423.006. Civil Action

(a) An owner or tenant of privately owned real property located in this state may bring against a person who, in violation of Section 423.003, captured an image of the property or the owner or tenant while on the property an action to:

(1) enjoin a violation or imminent violation of Section 423.003 or 423. 004;

(2) recover a civil penalty of:

(A) $5,000 for all images captured in a single episode in violation of Section 423.003; or

(B) $10,000 for disclosure, display, distribution, or other use of any images captured in a single episode in violation of Section 423.004; or

(3) recover actual damages if the person who captured the image in violation of Section 423.003 discloses, displays, or distributes the image with malice.

(b) For purposes of recovering the civil penalty or actual damages under Subsection (a), all owners of a parcel of real property are considered to be a single owner and all tenants of a parcel of real property are considered to be a single tenant.

(c) In this section, "malice" has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.

(d) In addition to any civil penalties authorized under this section, the court shall award court costs and reasonable attorney's fees to the prevailing party.

(e) Venue for an action under this section is governed by Chapter 15, Civil Practice and Remedies Code.

(f) An action brought under this section must be commenced within two years from the date the image was:

(1) captured in violation of Section 423.003; or

(2) initially disclosed, displayed, distributed, or otherwise used in violation of Section 423.004.

Texas Government Code § 423.0045. Offense: Operation of Unmanned Aircraft over Critical Infrastructure Facility

(a) In this section:

(1) Repealed by Acts 2023, 88th Leg., ch. 591 (H.B. 3075), § 4.

(1-a) "Critical infrastructure facility" means:

(A) one of the following, if completely enclosed by a fence or other physical barrier that is obviously designed to exclude intruders, or if clearly marked with a sign or signs that are posted on the property, are reasonably likely to come to the attention of intruders, and indicate that entry is forbidden:

(i) a petroleum or alumina refinery;

(ii) an electrical power generating facility, substation, switching station, or electrical control center;

(iii) a chemical, polymer, or rubber manufacturing facility;

(iv) a water intake structure, water treatment facility, wastewater treatment plant, or pump station;

(v) a natural gas compressor station;

(vi) a liquid natural gas terminal or storage facility;

(vii) a telecommunications central switching office or any structure used as part of a system to provide wired or wireless telecommunications services;

(viii) a port, a railroad switching yard, a trucking terminal, or any other freight transportation facility;

(ix) a gas processing plant, including a plant used in the processing, treatment, or fractionation of natural gas;

(x) a transmission facility used by a federally licensed radio or television station;

(xi) a steelmaking facility that uses an electric arc furnace to make steel;

(xii) a dam that is classified as a high hazard by the Texas Commission on Environmental Quality; or

(xiii) a concentrated animal feeding operation, as defined by Section 26.048, Water Code; or

(B) if enclosed by a fence or other physical barrier obviously designed to exclude intruders:

(i) any portion of an aboveground oil, gas, or chemical pipeline;

(ii) an oil or gas drilling site;

(iii) a group of tanks used to store crude oil, such as a tank battery;

(iv) an oil, gas, or chemical production facility;

(v) an oil or gas wellhead; or

(vi) any oil and gas facility that has an active flare.

(2) "Dam" means any barrier, including any appurtenant structures, that is constructed for the purpose of permanently or temporarily impounding water.

(3) Repealed by Acts 2023, 88th Leg., ch. 591 (H.B. 3075), § 4.

(b) A person commits an offense if the person intentionally or knowingly:

(1) operates an unmanned aircraft over a critical infrastructure facility and the unmanned aircraft is not higher than 400 feet above ground level;

(2) allows an unmanned aircraft to make contact with a critical infrastructure facility, including any person or object on the premises of or within the facility; or

(3) allows an unmanned aircraft to come within a distance of a critical infrastructure facility that is close enough to interfere with the operations of or cause a disturbance to the facility.

(c) This section does not apply to conduct described by Subsection (b) that is committed by:

(1) the federal government, the state, or a governmental entity;

(2) a person under contract with or otherwise acting under the direction or on behalf of the federal government, the state, or a governmental entity;

(3) a law enforcement agency;

(4) a person under contract with or otherwise acting under the direction or on behalf of a law enforcement agency;

(5) an operator of an unmanned aircraft that is being used for a commercial purpose, if the operation is conducted in compliance with:

(A) each applicable Federal Aviation Administration rule, restriction, or exemption; and

(B) all required Federal Aviation Administration authorizations;

(6) an owner or operator of the critical infrastructure facility;

(7) a person under contract with or otherwise acting under the direction or on behalf of an owner or operator of the critical infrastructure facility;

(8) a person who has the prior written consent of the owner or operator of the critical infrastructure facility; or

(9) the owner or occupant of the property on which the critical infrastructure facility is located or a person who has the prior written consent of the owner or occupant of that property.

(d) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if the actor has previously been convicted under this section or Section 423.0046.

Texas Government Code § 423.0046. Offense: Operation of Unmanned Aircraft over Sports Venue

(a) In this section, "sports venue" means an arena, automobile racetrack, coliseum, stadium, or other type of area or facility that:

(1) has a seating capacity of 30,000 or more people; and

(2) is primarily used for one or more professional or amateur sports or athletics events.

(b) A person commits an offense if the person intentionally or knowingly operates an unmanned aircraft over a sports venue and the unmanned aircraft is not higher than 400 feet above ground level.

(c) This section does not apply to conduct described by Subsection (b) that is committed by:

(1) the federal government, the state, or a governmental entity;

(2) a person under contract with or otherwise acting under the direction or on behalf of the federal government, the state, or a governmental entity;

(3) a law enforcement agency;

(4) a person under contract with or otherwise acting under the direction or on behalf of a law enforcement agency;

(5) an operator of an unmanned aircraft that is being used for a commercial purpose, if the operation is conducted in compliance with:

(A) each applicable Federal Aviation Administration rule, restriction, or exemption; and

(B) all required Federal Aviation Administration authorizations;

(6) an owner or operator of the sports venue;

(7) a person under contract with or otherwise acting under the direction or on behalf of an owner or operator of the sports venue; or

(8) a person who has the prior written consent of the owner or operator of the sports venue.

(d) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if the actor has previously been convicted under this section or Section 423.0045.