

CAUSE NO. 17-11-81926-B

CLAY KOLLE, LACY KOLLE and	§	IN THE DISTRICT COURT OF
LEONA CREEK CATTLE, LLC,	§	
Plaintiffs/Counter-Defendants	§	
	§	
V.	§	VICTORIA COUNTY, TEXAS
	§	
K&K INEZ PROPERTIES, LLC and	§	
DAVID KUCERA,	§	
Defendants/Counter-Plaintiffs	§	135TH JUDICIAL DISTRICT

**BRIEF OF AMICUS NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
IN SUPPORT OF COUNTER-DEFENDANTS'
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS COUNTERCLAIMS UNDER THE TEXAS CITIZENS
PARTICIPATION ACT**

Under Chapter 423, thousands of Texans are permitted by the state to use drones to capture images on a variety of topics. However, for visual journalists documenting matters of public concern, and ordinary citizens like the Plaintiffs, drone photography that includes images of private real property violates Texas law. This is unconstitutional as it is a content-based First Amendment violation. Accordingly, the National Press Photographers Association (NPPA) respectfully submits this amicus brief in support of Plaintiffs/Counter-Defendants Clay and Lacy Kolle and Leona Creek Cattle, LLC (the Kolles), and urges this Court to grant their March 9, 2020, Traditional and No-Evidence Motion for Summary Judgment and Motion to Dismiss Under the Texas Citizens Participation Act. NPPA urges this court to find that the relevant provisions of Texas Government Code Chapter 423—which restrict the capture of images using unmanned aircraft, or drones—violate the First Amendment of the U.S. Constitution.

IDENTITY AND INTEREST OF AMICUS CURIAE¹

NPPA is the nation's leading professional organization for visual journalists. Its membership includes news photographers from print, television, and electronic media. NPPA has approximately 300 members in Texas. NPPA promotes the role of visual journalism as a public service, including by training and advocating for the work of its visual journalists.

This case is of interest to NPPA because, as discussed in more detail below, Chapter 423 has substantially impaired the ability of NPPA members to capture newsworthy aerial images in Texas, and NPPA believes the statute is unconstitutional. *See* Decl. of Alicia Calzada, Ex. A, ¶¶ 2, 6-7. As such, NPPA, as well as several NPPA members, testified against the 2013 passage of Chapter 423 at hearings in the Texas legislature. *Id.* ¶ 5. Since the statute's passage, NPPA has devoted significant resources to addressing the impact of Chapter 423 on its members, including preparing to serve as a legal resource in case a member is charged criminally or sued civilly under the law; counseling photography departments, news organizations, individual photographers, and NPPA members about compliance with the law; and responding to many member inquiries asking about how to use drones to capture the news in light of Chapter 423. *Id.* ¶ 6.

Further, NPPA has brought a federal constitutional challenge to several provisions of Chapter 423—under 42 U.S.C. § 1983—challenging many of the same provisions at issue in this case. *Nat'l Press Photographers Ass'n v. McCraw*, No. 1:19-cv-00946 (W.D. Tex., filed Sept. 26, 2019). In that lawsuit, NPPA, along with the Texas Press Association and visual journalist Joseph Pappalardo, seek a declaration that Texas Government Code §§ 423.002, 423.003, 423.004, and 423.006—the provisions of the statute relating to the prohibition on drone use

¹ The National Press Photographers Association is the only party that has paid any fee for the preparation and filing of this brief.

“with the intent to conduct surveillance”—violate the First Amendment of the U.S. Constitution and are unconstitutionally vague and overbroad, and that §§ 423.0045 and 423.0046—which relate to a prohibition on any drone use over certain types of facilities—are also preempted by federal airspace regulation. NPPA and its co-plaintiffs also seek to enjoin the case’s defendants from enforcing those provisions of the Texas statute. The defendants filed a motion to dismiss, contending both that the plaintiffs lack standing and that their claims fail as a matter of law. NPPA, TPA, and Pappalardo opposed the motion, which has been fully briefed and is pending.²

In short, a ruling by this Court on the constitutionality of Chapter 423 would deeply impact NPPA’s work, the ability of NPPA members to engage in newsgathering, and address many of the same issues NPPA is litigating in pending federal-court proceedings. It would also send a signal to law enforcement, particularly in Victoria County, that Chapter 423 should not be enforced, and that properly licensed drone journalism is protected by the First Amendment. As such, NPPA has a substantial interest in the constitutional questions presented by this case, and NPPA submits this brief to offer the perspective of visual journalists on the question.

ARGUMENT

I. On its face, Chapter 423 is Unconstitutional Because its Restrictions on Capturing Images Via Drone Are Content-Based Restrictions that Do Not Meet Strict Scrutiny.³

Chapter 423’s prohibition on capturing and publishing images obtained by drone with the “intent to conduct surveillance,” Tex. Gov’t Code § 423.003(a), has not only threatened Texans with liability for the activities alleged to have been committed by the plaintiffs here, who

² For the Court’s convenience, a true and correct copy of NPPA, TPA, and Pappalardo’s opposition to the motion to dismiss in *National Press Photographers’ Association v. McCraw* is attached to this brief as Exhibit A-1.

³ NPPA has claimed that the statute is unconstitutionally vague; that specific no-fly provisions not at issue here are unconstitutional; and that Ch. 423 is pre-empted by federal law and FAA regulations. For brevity’s sake, those arguments are not addressed in this brief. Moreover, those arguments are well-briefed in the Kolles’ Traditional and No-Evidence Motion for Summary Judgment and Motion to Dismiss Under the Texas Citizens Participation Act and NPPA adopts those arguments.

submitted the drone footage to the county government in the hopes it could prevent future flooding. The law has substantially circumscribed the ability of professional visual journalists to deliver impactful and informative news to the public. While the statute has more than twenty exceptions to the prohibition on “surveillance,”—which is undefined⁴—for those using drones to take photographs, ranging from real estate agents to professors to engineers, there is no exception for journalists engaged in newsgathering. Tex. Gov’t Code § 423.002. Particularly because of the uncertainty surrounding the meaning of “surveillance,” visual journalists fear using drones to do their jobs, and the decision reached by this Court on the constitutionality of Chapter 423 will have a substantial impact on whether they can exercise their First Amendment rights to use drones to capture newsworthy images.

a. Photography and newsgathering are protected by the First Amendment.

Capturing images via drone is First-Amendment-protected speech. The U.S. Supreme Court has instructed that both “the creation and dissemination of information are speech within the meaning of the First Amendment.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). “If the creation of speech [were not protected] under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech.” *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017). Recording is also a protected First Amendment activity burdened by Chapter 423. The Fifth Circuit has specifically recognized that the “First Amendment protects the act of making film,” because the ability of citizens to “receive information and ideas” requires that they be able to collect and record

⁴ Without a statutory definition, the dictionary definition applies. As generally understood, “surveillance” can include the act of gathering news. See *Black’s Law Dictionary* (10th ed. 2014) (defining surveillance as “[c]lose observation or listening of a person or place in the hope of gathering evidence.”); *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003) (defining surveillance as “close watch kept over someone or something (as by a detective)”).

information. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017); *see also Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (finding “First Amendment right to record police activity in public”); *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding First Amendment right to record matters of public interest); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (same). The Supreme Court does not draw a distinction between the process of creating speech and speech itself, for clearly the essential precursors to speech are integral to exercising the free speech right. *Turner*, 848 F.3d at 689; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010). In other words, the “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.” *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). Without a right to record, the “right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective.” *Id.*

b. Chapter 423 is a content-based restriction on speech.

Chapter 423 restricts speech on the basis of its content, and the Supreme Court has made clear that content-based restrictions on First Amendment-protected activity “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*, 135 S. Ct. 2218, 2226 (2015); *see also Sorrell*, 564 U.S. at 565; *R.A.V. v. St. Paul*, 505 U.S. 377, 394 (1992).

A regulation of speech is content-based if it either (1) “applies to particular speech because of the topic discussed or the idea or message expressed,” *Reed*, 135 S. Ct. at 2227, or (2) discriminates between speakers in a way that “disfavors” certain speakers from exercising their First Amendment rights. *Sorrell*, 564 U.S. at 564. The surveillance provisions do both. The

provisions impose liability on the capture of “images of an individual or privately owned real property,” Tex. Gov’t Code § 423.003(a)—liability based squarely on the content of the image. The provisions also impose liability on only certain individuals—making speaker-based discriminations that disfavor certain speakers, including journalists. Tex. Gov’t Code § 423.002(a).

In addition to the fact that Chapter 423 prohibits certain photography based on what is in the image itself (real property), Chapter 423’s exemptions demonstrate both content-based liability and speaker-based discrimination. For example, Chapter 423 exempts “professional or scholarly research,” “operations and maintenance of utility or telecommunications facilities,” and “mapping” from its restrictions on image capture. Tex. Gov’t Code § 423.002. These categories are all based on the communicative content of the images. Under the statute, the same image, captured in the same way, would be treated differently if used for real estate advertising, engineering, or scholarly research than if used in a news report. Chapter 423’s speaker-based discriminations include exemptions from the restrictions on image capture for speakers such as “professor[s],” “students[s],” “professional engineer[s],” and “employee[s] of an insurance company.” *Id.* These categories are all based on the identity of the speaker, “disfavoring” some and not others. The provisions are thus “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226.

c. Because Chapter 423 is content-based, strict-scrutiny applies, and the statute fails to meet that scrutiny because it not is narrowly tailored to serve compelling state interests.

Content-based prohibitions on speech like Chapter 423 are subject to strict scrutiny, meaning that the defender of the statute’s constitutionality must demonstrate that it is narrowly tailored to serve compelling state interests. The counter-plaintiffs here have not yet attempted to

meet this heavy burden but it is difficult to see how they could. And while the state is not a party to this litigation, Attorney General Ken Paxton attempted to address the state’s strict-scrutiny burden in NPPA’s case. *Nat’l Press Photographers’ Ass’n*, Dkt. No. 19, Defs.’ Mot. to Dismiss (Nov. 5, 2019); *Nat’l Pres Photographers’ Ass’n*, Dkt. No. 25, State Defs.’ Reply to Pls.’ Resp. to Defs.’ Mot. to Dismiss (Dec. 17, 2019). The Texas attorney general, representing defendants—those best positioned to defend the law—failed outright to satisfy strict scrutiny, or even the intermediate scrutiny that the defendants suggested applies (a point on which they are wrong). The state defendants were unable to explain how—given its myriad exceptions permitting thousands of Texas to freely use drone photography—Chapter 423 is narrowly tailored to address a compelling government interest. With zero evidence, the state made generic claims of “safety” and “privacy.” However, the state defendants offered no explanation of why safety and privacy are implicated when a drone is operated by an FAA-licensed journalist, but safety and privacy are not implicated when the drone is operated by a professor or student. Further, the U.S. Supreme Court has made clear that the State must show that its use of “other laws already on the books” or other less restrictive means proved ineffective before it can justify a new law implicating speech. *McCullen v. Coakley*, 573 U.S. 464, 494 (2014); *see also Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). In their pleadings in NPPA’s case, the state defendants never attempted to address the question of why “other laws already on the books” are ineffective, thus requiring more restrictive means. The state defendants never cited even one example of genuine privacy rights that had actually been violated by drone photography. Further, the state defendants never explained why a photograph of real property, shot by a drone, is a safety or privacy violation when the exact same photograph can be made from an airplane or a tall building. The state defendants woefully failed to rebut the presumptive

unconstitutionality of the content-based surveillance provisions, under any level of First Amendment scrutiny.

In short, even the parties best placed to defend the constitutionality of the statute have not been able to come even close to meeting the standard for doing so. This Court should hold Chapter 423's surveillance provisions unconstitutional.

II. Chapter 423 Substantially Interferes with the Ability of Texas Journalists to Report on the News.

As explained in NPPA's complaint in its federal-court case, photojournalists have experienced a chilling effect when it comes to using drones to capture aerial images because of the threat of criminal and civil liability under Chapter 423. That threat isn't an idle one, as demonstrated by both this case and that at least one NPPA member has been threatened with criminal sanctions by local police. In particular, NPPA member Guillermo Calzada, who is employed by the *San Antonio Express-News*, was using a drone to report on the aftermath of a deadly arson fire at a local apartment complex in San Marcos, when he was approached by police officers who informed him he would be subject to Chapter 423's criminal penalties if he continued to use his drone or published any of the images he had captured. Mr. Calzada now fears that using his drone to cover the local news, such as fires, car crashes, infrastructure failures, the impact of disasters—including the current COVID-19 crisis—and other types of news will subject him to liability under Chapter 423.

Mr. Calzada isn't alone. NPPA member Brandon Wade's ability to use his drone to record and publish images has likewise been stymied by Chapter 423. Mr. Wade is a freelance journalist who has published work in outlets throughout Texas and the across the country. While covering several specific stories important to the public interest—including stories involving a water treatment plant that was not working properly and facilities detaining immigrant

children—Mr. Wade had to severely circumscribe the extent to which he used his drone. And when he offered drone-obtained images to the *Dallas Morning News*, it declined to publish them after learning they had been obtained via drone. Mr. Wade has also declined to accept projects that would have arguably involved capturing images in violation of Chapter 423.

And NPPA’s co-plaintiff Mr. Pappalardo, another well-established Texas journalist, has ceased completely using his drone to capture the news because he finds that trying to use it in compliance with Chapter 423 is too restrictive to get the sort of insights and information that would make it worthwhile. Specifically, because of Chapter 423, Mr. Pappalardo has chosen not to use his drone to cover hurricane-related panic, flood and wind damage, house fires, construction projects, urban sprawl, the removal of homeless encampments, the route for a proposed toll road, and dumping sites for dead and abandoned animals—all newsworthy stories that merit comprehensive reporting to the public. Further, there are specific investigative projects he’d like to do in the future, but will not so long as Chapter 423 remains in force.

In addition to these examples, NPPA has been contacted by several other journalists and news organizations who planned to use drone footage as part their investigative reporting, but had to alter their plans after learning about Chapter 423’s restrictions. The alternative—using a plane or helicopter to capture aerial images—is both more dangerous and economically out of reach for the many journalists who work on a freelance basis, as well as many news organizations. As a result, the comprehensive coverage that drone footage provides in many reports is lacking from an unknown number of news stories and investigations because of the statute. And Texans are less-informed than residents of other states that do not have such chilling restrictions on their journalism.

III. Chapter 423 Interferes with Texans’ First Amendment Rights to Petition the Government.

Not only does Chapter 423's prohibition on using drones to capture images violate the First Amendment right to free speech, it also interferes with the First Amendment right to petition—specifically, Texans' right to use drone-captured images to petition their government for redress. This case illustrates that point dramatically in two different ways. First, the Counter-plaintiffs allege that the Counter-defendants violated the statute's prohibition on distribution of drone-captured images by submitting them to the county government in hopes of redress. Second, § 423.005 prohibits the use of drone-captured images as evidence in a lawsuit, evidence that might be very useful to the plaintiffs prevailing on their claims.

The U.S. Supreme Court has held that “the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). The “right to petition [is] one of the most precious of the liberties safeguarded by the Bill of Rights.” *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524 (2002).

The right to petition is integral to the democratic process, and “allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives... Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.” *Borough of Duryea*, 564 U.S. at 388. But the right of free speech and the right to petition are not identical. Rather, the “[i]nterpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, re-requests action by the government to address those concerns.” *Id.* at 388-89.

The two purposes for which the Kolles have used and would likely use the drone-obtained footage fall neatly into the types of activities that have been recognized to implicate the First Amendment right to petition. First, over concerns about her and her neighbors' ability to obtain flood insurance, Ms. Kollé submitted images to the Victoria County Floodplain Administration as well as the Texas Commission on Environmental Quality, urging the government agencies to enforce its own floodplain law. Pls.' Mot. for Summary J., Exh. 1, ¶¶ 7-8 (Affidavit of Lacy Cole). It is well established that filing a grievance with a government's executive branch concerning a matter of public concern, as Ms. Kollé did here, is the type of petitioning activity the petition clause is meant to protect. *See McDonald v. Smith*, 472 U.S. 479, 482-83 (1985) (describing purpose of petition clause to enable citizens to communicate directly with their government officials).

Second, the Kolles may seek use the drone footage as evidence in support of their affirmative claims, which, if the capture of the images was a violation of the surveillance provision, is expressly prohibited by § 423.005. If this Court were to adhere to § 423.005, the right to try the underlying case with all material evidence would be frustrated, and the Kolles would be left with no mechanism to obtain a redress of their grievances in the courts. *See Christopher v. Harbury*, 536 U.S. 403, 413-15 (2002); *see also Borough of Duryea*, 564 U.S. at 387 ("The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." (cleaned up)).

For many of the same reasons that Chapter 423's surveillance provisions fail to meet First-Amendment scrutiny under the free speech clause, they do not meet the requirements under the petition clause either. *Cf. id.* at 389 (given common ground between free speech and petition clause, analyzing petition clause claim under free speech framework). Penalizing the Kolles

under Chapter 423 for approaching their government in an attempt to solve their flooding concerns would violate the right to petition.

CONCLUSION

NPPA urges this Court to hold that Chapter 423's surveillance provisions violate the First Amendment. Not only is the statute facially indefensible, it prevents Texas photojournalists from pursuing newsworthy stories, or renders them incomplete—which, in turn, is detrimental to Texans' ability to stay informed.

Respectfully Submitted,

/s/Alicia Calzada

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CERTIFICATE OF SERVICE

By signature below I certify that a true and correct copy of the foregoing was served via e-service, to all counsel of record on Friday, March 20, 2020.

/s/Alicia Calzada _____

Alicia Calzada