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

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, TEXAS PRESS ASSOCIATION, and JOSEPH PAPPALARDO,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION No. 1:19-cv-00946-RP
STEVEN MCCRAW, in his official capacity as Director of Texas Department of Public Safety, RON JOY, 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.	§	

THE STATE DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

If Plaintiffs are successful in this litigation, anyone will be able to use a drone to conduct surreptitious aerial surveillance of private citizens on their own private property, or to fly a drone low over a critical infrastructure facility such as a stadium, prison, or power plant. The right to and expectation of privacy on one's own property would be completely eviscerated, and the safety and security of critical facilities would be in the hands of every drone pilot, regardless of their intentions. But Plaintiffs tell this Court that the First Amendment requires the compromise of Texans' privacy and safety because those rights must yield to the convenience of photojournalists who would prefer to use drones in their work. The Constitution requires no such result.

Plaintiffs do not seriously dispute that the State has the right to protect its citizens' privacy

and to protect the critical infrastructure of the State.[1] They merely seek to denude that right by holding that such interests are irrelevant when they conflict with a journalist's desire to record a private citizens' activities, or to endanger critical infrastructure with drone interference. The challenged statutes are reasonable, narrowly tailored, and practical solutions to the problems posed by cutting edge drone technology in service of important state interests, and Plaintiffs are not prohibited from using any other lawful means, such as a helicopter, to make the recordings that they seek. Plaintiffs both lack standing to bring their claims against the State Defendants and have failed to state claims upon which relief may be granted. Accordingly, as explained in Defendants' Motion to Dismiss,[2] all of Plaintiffs' claims should be dismissed.

I. Plaintiffs Lack Standing.

Standing is "an indispensable part of the plaintiff's case" which Plaintiffs bear the burden of establishing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs must allege facts in their complaint sufficient to demonstrate each element: (1) injury-in-fact, (2) traceability, and (3) redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 585-86 (5th Cir. 2006). But Plaintiffs fail to seriously address elements because they apparently believe they are entitled to bring First Amendment claims against any defendant they wish. Plaintiffs are wrong. "The [standing] requirements apply in First Amendment cases no less than in other cases, including cases in which a plaintiff challenges an enactment on its face." *Henderson v. Stalder*, 287 F.3d 374, 384 (5th Cir. 2002) (Jones, J., concurring) (footnote omitted).

Plaintiffs virtually ignore their burden to plead facts sufficient to establish standing against

[1] *See* Opp. at 1-2, 19 (noting the State's interest in safeguarding privacy and safety interests and making clear that Plaintiffs do not challenge other statutes that support these interests).
[2] Defendants' Motion to Dismiss, ECF No. 19, is expressly incorporated herein as if restated in full.

these Defendants. As explained in Defendants' Motion to Dismiss, other than naming Defendants as parties, *see* Compl. ¶¶ 16-17, there is no mention whatsoever of Director McCraw, Chief Joy, or District Attorney Mau anywhere in the complaint. Plaintiffs fail to respond to or correct this obvious omission, ignoring the fact that they have named individuals—not a statute—as their defendants. Because Plaintiffs have failed to allege facts sufficient to support their allegation of standing, their claims fail.

With respect to injury, Plaintiffs' choice to ground their drones is not based on a *reasonable* fear of prosecution. "[S]tanding is not created by a declaration in court pleadings," *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008), and there has been no "credible threat of enforcement"—a "critical" aspect of Plaintiffs' claims. *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018); *see also Speech First, Inc. v. Fenves*, 384 F. Supp. 3d 732, 738-41 (W.D. Tex. 2019). The sole allegation in the Complaint of any statement from law enforcement authorities regarding the challenged statutes' effect on journalists comes from NPPA member Calzada's interaction with an unidentified San Marcos police officer. *See* Compl. ¶ 59. But no San Marcos police officer is named in the Complaint, as a party or otherwise; Defendants have no alleged (or actual) authority over or responsibility for this anonymous officer's statements; and Defendants are not alleged to have taken any action whatsoever, either with respect to Plaintiffs or the challenged statutes. Plaintiffs simply misunderstand their burden when they generally assert that this incident shows "that law enforcement authorities intend to enforce Chapter 423." Opp. at 10-11. In a suit against *the State Defendants*, the comments by a single anonymous officer from another jurisdiction have no weight.

With respect to traceability and redressability, Plaintiffs virtually ignore their burden. They have not explained, much less alleged, how the State Defendants are in any way responsible for

their injuries. The State Defendants are law enforcement officers, with no prosecution authority of their own. They are not alleged to have ever investigated anyone for a violation of one of the challenged statutes or to have threatened any journalists who were engaged in legitimate newsgathering activity. None of the cases cited by Plaintiffs support the notion that they can establish these indispensable elements of their case against the State Defendants without making any substantive factual allegations against them. *See* Opp. at 6-7.

Simply naming a State official as a party cannot be enough to establish standing. Accordingly, Plaintiffs' claims should be dismissed.

II. The Challenged Statutes Are Constitutional.

Plaintiffs' position is that the First Amendment protects the right of journalists to conduct unrestricted aerial surveillance of anyone, at any time, and at any place, under the auspices of the First Amendment's protections on newsgathering. But "neither the First Amendment right to receive speech nor the First Amendment right to gather news is absolute." *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 928 (5th Cir. 1996). "Nor does [the First Amendment] guarantee journalists access to sources of information not available to the public generally." *In re Express-News Corp.*, 695 F.2d 807, 809-10 (5th Cir. 1982) (citing *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)). And others' rights "to privacy and to protection against harassment" can justify a restriction on newsgathering activity. *Id.* at 810 (noting that jurors are entitled to protection from journalistic intrusion after completing their duty, despite obvious newsworthiness).

Plaintiffs' position cannot be squared with these holdings. It is hard to imagine a more absolute right than allowing Plaintiffs to use drones to conduct unlimited surveillance of anything or anyone that they unilaterally deem to be of sufficient newsworthiness. Accordingly, Plaintiffs' claims against the challenged statutes fail.

A. The Surveillance Provisions Are Constitutional.

1. Strict scrutiny does not apply, and the Surveillance Provisions are constitutional under intermediate scrutiny.

Plaintiffs wrongly contend that the Surveillance Provisions are both content- and speaker-based restrictions on speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 125 S. Ct. 2218, 2227 (2015). But Plaintiffs themselves *admit* that the content of an image is *irrelevant* under the Surveillance Provisions. *See* Opp. at 20 ("Under the statute, *the same image, captured in the same way*, would be treated differently if used for mapping or research than if used in a news report.") (emphasis added). If the exact *same* image can be treated in *different* ways under the statute—as Plaintiffs concede—then the content of that image *cannot* have been at issue when applying the statute.

Similarly, Plaintiffs wrongly contend that there are speaker-based discriminations in the Surveillance Provisions, but they fail to acknowledge that the *same* person can capture the *same* images in ways that may or may not violate the statute. A person could capture an image permissibly under the statute, such as while conducting scholarly research, *see* Tex. Gov't Code § 423.002(a)(1), and then later capture the same image in a way that violates the law, such as for personal use without authorization. Because the *same* person capturing the *same* image can be treated differently by the Surveillance Provisions—for reasons that have nothing to do with what image is captured or the person's identity—the Surveillance Provisions are content-neutral.

As the Supreme Court has held, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)). "Government regulation of expressive activity is

content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Id.* (quoting *Clark*, 468 U.S. at 293). At most, Plaintiffs have alleged that there is an incidental effect on some speakers or messages but not others, which is not sufficient to justify the imposition of strict scrutiny. Moreover, Plaintiffs have admitted that the content of an image is irrelevant under the Surveillance Provisions, *see* Opp. at 20, and they do not seriously dispute that the State has a legitimate interest in protecting privacy and safety, *see* Opp. at 1-2, 19. Accordingly, strict scrutiny does not apply,[3] and the Surveillance Provisions are constitutional under the appropriate standard as explained in Defendants' Motion to Dismiss.

2. The Surveillance Provisions are neither vague nor overbroad.

The Fifth Circuit has "rejected that a law 'must delineate the exact actions a [person] would have to take to avoid liability.'" *Doe I v. Landry*, 909 F.3d 99, 118 (5th Cir. 2018) (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552 (5th Cir. 2008)). "'[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (quoting *Ward*, 491 U.S. at 794) (alteration in original). But this is exactly what Plaintiffs require of the Surveillance Provisions. Plaintiffs baselessly argue that any and all of their legitimate journalistic activities could constitute illegal "surveillance," contorting into an overly expansive definition of a common word—a definition that no Defendant is alleged to have advanced. *See* Opp. at 22-23. But Plaintiffs offer nothing other than their own factually unsupported legal conclusions in making this assertion.

A person of common intelligence need not guess at the meaning of the word "surveillance,"

[3] Even if the Court were to apply this heightened standard—which it should not—the challenged statutes are still constitutional under that test, for the reasons explained herein and in Defendants' Motion to Dismiss.

Plaintiffs also argue that the challenged statutes are not narrowly tailored because they have "myriad exceptions." Opp. at 21. This argument is illogical. Because the exceptions are *exceptions*, they *limit* the amount of expressive conduct that is incidentally burdened by the challenge statutes, thus narrowly tailoring the laws at issue to address only the compelling governmental interests: protecting privacy, private property, safety, and security.

which is far from an arcane term of art. *See Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). "'[O]nly a reasonable degree of certainty is required'" for a statute to survive a vagueness challenge. *Roark & Hardee*, 522 F.3d 552-53 (quoting *United States v. Tansley*, 986 F.2d 880, 885 (5th Cir. 1993)) (emphasis and internal quotation marks omitted). The Surveillance Provisions provide that reasonable degree of certainty, so Plaintiffs' vagueness challenge fails.

Likewise, Plaintiffs are wrong when they contend that the Surveillance Provisions are overbroad. The Surveillance Provisions prohibit only the use of drones to conduct surveillance of private real property and individuals on private property without authorization and outside of the nearly two-dozen other exceptions provided by statute. No person is restrained by the Surveillance Provisions from saying whatever they wish or photographing whatever they wish using any other lawful means. The Court need not credit the bare legal conclusions alleged in Plaintiffs' Complaint, *cf.* Opp. at 25, and Plaintiffs are unhelped by facile observations such as the percentage of privately owned property in the State, which has no bearing on the constitutional question.[4] The Surveillance Provisions simply do not criminalize a substantial amount of protected expressive activity, *see United States v. Williams*, 553 U.S. 285, 297 (2008), and the Court need not engage in brainstorming hypotheticals because "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Id.* at 303 (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Accordingly, Plaintiffs' overbreadth challenge also fails.

[4] *See* Opp. at 24. Moreover, such observations are outside the scope of Plaintiffs' Complaint and must be disregarded by the Court when considering Defendants' Rule 12(b)(6) challenge.

B. The No-Fly Provisions Are Constitutional.

1. Plaintiffs' First Amendment challenge fails.

Unlike the Surveillance Provisions, the No-Fly Provisions only regulate where a drone may be flown. They make no mention of expressive activities such as recording that arguably would implicate the First Amendment. It is therefore wholly implausible for Plaintiffs to assert that the No-Fly Provisions "single out journalists for disfavored treatment." *See* Opp. at 32 (quoting Compl. ¶ 119). Plaintiffs' First Amendment claims fail at the outset.

To the extent that these provisions incidentally burden speech—which is the most that Plaintiffs can arguably be said to have alleged—they easily pass constitutional scrutiny. Plaintiffs do not seriously dispute either the State's power or interest in enacting regulations which protect privacy, private property, safety, and security,[5] *see* Opp. at 1-2, 19, such as the No-Fly Provisions. As explained, the No-Fly Provisions are not at all related to suppressing speech, and the restrictions are no greater than necessary to further these interests, as evidenced by the law's exceptions which allow drone activity where it does not undermine the purpose of the statute. Accordingly, the No-Fly Provisions satisfy all four aspects of the applicable standard. *See Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010) (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

Plaintiffs' claims of vagueness and overbreadth also fail for the same reasons that such claims fail in relation to the Surveillance Provisions. Persons of ordinary intelligence are not

[5] Plaintiffs criticize the No-Fly Provisions for failing to protect *each* of these interests under *every* scenario. *See* Opp. at 33. But the No-Fly Provisions are no less valid because they protect safety and security interests at a stadium or prison and protect privacy interests at a privately-owned critical infrastructure facility. Different interests are implicated in different situations. Plaintiffs also criticize Defendants for failure to "show[] a *single* instance of drone-related damage to critical infrastructure or sports venues." Opp. at 33. But this argument is inappropriate at the Rule 12(b)(6) stage, where Defendants have not yet had an opportunity to "show" anything, and it is also illogical, as Plaintiffs are apparently suggesting that the State legislature must allow a tragedy to happen before it can permissibly regulate to protect against an obvious safety and security risk.

confused by the use of the word "commercial," notwithstanding Plaintiffs' hypertechnical parsing of various dictionaries, and the No-Fly Provisions provide a "reasonable degree of certainty" about what conduct is prohibited. *See Roark & Hardee*, 522 F.3d at 552-53. Likewise, the No-Fly Provisions cannot be overbroad where they criminalize virtually no protected expressive activity, much less a "substantial amount." *See Williams*, 553 U.S. at 297. Accordingly, Plaintiffs' claims against the No-Fly Provisions should be dismissed.

2. Plaintiffs' preemption challenge fails.

Under any theory of preemption, Plaintiffs' claims challenging the No-Fly Provisions fail. As explained in Defendants' Motion to Dismiss, Plaintiffs' alleged claim of "field preemption" fails because "[n]either the Supreme Court nor the Fifth Circuit have held that the Federal Aviation Act preempts the entire field of aviation safety." *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 828 (E.D. Tex. 2006). Indeed, as Plaintiffs' own authority demonstrates, the Federal Aviation Administration has stated that "[c]ertain legal aspects concerning [drone] use may be best addressed at the State or local level." *Singer v. City of Newton*, 284 F. Supp. 3d 125, 130 (D. Mass. 2017), *cited in* Opp. at 29.[6] Plaintiffs' recitation of examples of statutes that that do fall within the federal regulatory sphere does nothing to undermine the FAA's own statements, as described in Plaintiffs' authority, that "laws traditionally related to State and local police power—including land use, zoning, privacy, trespass, and law enforcement operations—generally are not subject to Federal regulation." *Id.* Simply put, the No-Fly Provisions protect the privacy, safety, and security interests of the State, and are not preempted.

Plaintiffs' assertion of "obstacle preemption" fares no better. *See* Opp. at 30-31. "Under the doctrine of conflict preemption, state law is preempted when 'it actually conflicts with federal

[6] *See also Singer*, 284 F. Supp. at 130 ("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 [drone].").

law.'" *Univ. of Tex. Sys. v. Alliantgroup LP*, 400 F. Supp. 3d 610, 616 (S.D. Tex. 2019) (quoting *English. v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). "Conflict preemption may take one of two forms: (1) compliance with both federal and state law is impossible (the 'Impossibility Form'); or (2) state law presents an obstacle to federal law (the 'Obstacle Form')." *Id.* (citing *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016)).

The "Impossibility Form" is inapplicable to Plaintiffs' claims, as they both fail to brief this argument, and they allege in their Complaint that federal regulations only restrict drones to flight below 400 feet and 400 feet away from structures. *See* Compl. ¶¶ 3, 38, 40, 41. Because the No-Fly Provisions do not require or permit drone flight within these federally restricted areas—and indeed mimic the federal restrictions—impossibility preemption is not applicable.

The "Obstacle Form" is likewise inapplicable because state law does not stand in the way of the accomplishment of any federal policy. *See Zadeh*, 820 F.3d at 751 (holding that obstacle preemption is "when a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Plaintiffs allege that federal policy is to keep drones (1) away from structures that they might crash into and (2) below 400 feet, above which they could pose a threat to passenger aircraft. *See* Compl. ¶¶ 3, 38, 40, 41. The No-Fly Provisions present no obstacle to the federal restrictions about distance from buildings—indeed, State law mimics these alleged regulations—and Plaintiffs fail to articulate how the No-Fly Provisions could present an obstacle to the federal policy of keeping drones below 400 feet. As demonstrated in Plaintiffs' cited authority, "the FAA explicitly contemplates state or local regulation of pilotless aircraft." *See Singer*, 284 F. Supp. at 130. Plaintiffs are thus wrong when they assert that "[a]llowing states to impose their own regulations necessarily impedes uniformity and exclusivity." Opp. at 31. Accordingly, Plaintiffs' obstacle

preemption argument also fails.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via the Court's CM/ECF system on December 17, 2019, to all counsel of record.

/s/ Christopher D. Hilton
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