

1 of newsgathering activities, in direct violation of their rights under the First and Fourteenth
2 Amendments to the United States Constitution.

3 3. Chapter 423 contains two sets of provisions that place unconstitutional limitations
4 on the right to operate UAVs for the purpose of gathering the news: First, Sections 423.002,
5 423.003, 423.004, and 423.006 (collectively, the “Surveillance Provisions”) impose criminal and
6 civil penalties on speech and newsgathering activity by declaring it unlawful to use a UAV to
7 capture and/or publish an image of an individual or privately owned property with the “intent to
8 conduct surveillance.” Second, Sections 423.0045 and 423.0046 (collectively, the “No-Fly
9 Provisions”) unconstitutionally impose criminal penalties on newsgathering activities by making
10 it unlawful to fly UAVs over a broad range of facilities at less than 400 feet, including over
11 sports arenas, correctional facilities, animal feedlots, oil and gas drilling sites and pipelines, and
12 petroleum and alumina refineries. When read in conjunction with the FAA regulations, which
13 require UAVs to fly below 400 feet, the No-Fly Provisions function as a near absolute ban on the
14 use of UAVs in these locations. These restrictions chill and criminalize speech and
15 newsgathering activity protected by the First and Fourteenth Amendments.

16 4. The Surveillance Provisions’ ban on the use of a drone to capture an image of an
17 individual or privately owned real property “with the intent to conduct surveillance,” Tex. Gov’t
18 Code § 423.003(a), imposes content and speaker based restrictions on protected speech and
19 newsgathering activity. Section 423.002 provides over 21 content and speaker based exemptions
20 from the criminal and civil liability otherwise imposed, but notably *does not* exempt the use of
21 UAVs to capture images for the purpose of visual journalism or newsgathering. This content and
22 speaker based statutory scheme violates the constitutional rights of plaintiffs and their members.

1 5. The Surveillance Provisions are also unconstitutionally vague and overbroad.
2 Section 423.003 prohibits the use of drones with the intent to conduct “surveillance,” but
3 provides no definition for the “surveillance” conduct it proscribes. The lack of any statutory
4 definition leaves journalists, citizens, and law enforcement unable to distinguish legal from
5 illegal conduct, thus exposing those using drones for First Amendment-protected activity to
6 potential prosecution and self-censorship.

7 6. The No-Fly Provisions separately serve to restrict newsgathering activities in
8 violation of the First and Fourteenth Amendments. By restricting the use of UAVs for
9 newsgathering purposes, while permitting the use of UAVs for commercial purposes, the No-Fly
10 Provisions single out photojournalists for disfavored treatment and impose upstream restraints on
11 protected speech, in violation of the First and Fourteenth Amendments.

12 7. The No-Fly Provisions are also unconstitutionally vague and overbroad. These
13 provisions exempt nine classes of UAV users from the statute’s general prohibitions and criminal
14 penalties, including individuals using UAVs for a “commercial purpose.” However, the term
15 “commercial purpose” is undefined in the statute, leaving visual journalists unable to determine
16 if their UAV use is permitted and law enforcement unable to differentiate legal from illegal
17 conduct.

18 8. Finally, the No-Fly Provisions also violate the Supremacy Clause of the United
19 States Constitution, U.S. Const. Art. VI, cl. 2, because they impinge on the federal government’s
20 sole and exclusive authority to regulate the national airspace and aviation safety.

21 9. Plaintiffs seek a judgment (a) declaring that the Surveillance Provisions (Sections
22 423.002, 423.003, 423.004, and 423.006) and the No-Fly Provisions (Sections 423.0045 and
23 423.0046) violate the First and Fourteenth Amendments in multiple respects; (b) declaring that

1 the No-Fly Provisions violate the Supremacy Clause; and (c) enjoining the Director of the Texas
2 Department of Public Safety, the Chief of the Texas Highway Patrol, and the District Attorney of
3 Hays County from enforcing these provisions of Chapter 423.

4 **JURISDICTION AND VENUE**

5 10. This case arises under the United States Constitution and presents a federal
6 question within this Court’s jurisdiction under Article III of the Constitution and 28 U.S.C.
7 § 1331 and § 1343(a)(3). This action is brought pursuant to 42 U.S.C. § 1983.

8 11. This Court has authority to grant declaratory relief pursuant to 28 U.S.C.
9 § 2201(a), § 2202, and injunctive relief pursuant to Federal Rule of Civil Procedure 65.

10 12. Venue is proper under 28 U.S.C. § 1391(b). All defendants reside within the
11 Western District of Texas.

12 **PARTIES**

13 13. Plaintiff National Press Photographers Association (“NPPA”) is the nation’s
14 leading professional organization for visual journalists. Its membership includes news
15 photographers from print, television, and electronic media. NPPA has approximately 300
16 members in the State of Texas. NPPA promotes the role of visual journalism as a public service,
17 including by training and advocating for the work of its visual journalist members. NPPA, as
18 well as several NPPA members, testified against the passage of Chapter 423 at hearings of the
19 Texas legislature.

20 14. Plaintiff Texas Press Association (“TPA”) is one of the nation’s oldest and largest
21 newspaper trade organizations. Its members include the *San Antonio Express-News*, the *Dallas*
22 *Morning News*, the *Austin American-Statesman*, the *Fort Worth Star-Telegram*, and over 400
23 other newspapers across the State. The Texas Press Association testified against the passage of
24 Chapter 423.

1 26. Section 423.004 criminalizes the possession, disclosure, display, distribution, or
2 other use of images by a person who captured those images in violation of Section 423.003. *Id.*
3 § 423.004(a).

4 27. Under Section 423.004, a person who captures an image in violation of Section
5 423.003 commits an additional Class C misdemeanor for the possession of the image and
6 commits a Class B misdemeanor for any subsequent disclosure, display, distribution, or other use
7 of the image. *Id.* § 423.004(b). A Class B misdemeanor is punishable by up to 180 days in jail
8 and a fine of up to \$2,000. Tex. Penal Code § 12.22. Each image constitutes a separate offense.
9 *Id.* § 423.004(c).

10 28. Under Section 423.006, a landowner or tenant may bring a civil action against a
11 person who violates Section 423.003 or 423.004. *Id.* § 423.006(a). That landowner or tenant
12 may seek an injunction, a civil penalty of statutory damages, or actual damages if the
13 photographer acted with specific intent to cause substantial injury or harm, as well as mandatory
14 attorneys fees in addition to any civil penalty awarded.

15 29. Chapter 423 exempts twenty-one specific uses of UAVs from criminal and civil
16 liability under the Surveillance Provisions. *Id.* § 423.002(a). These exemptions permit a wide
17 variety of individuals and organizations to use drones for information-gathering purposes—
18 including individuals in industries such as telecommunications, real estate, surveying,
19 engineering, and insurance, among others. This section does *not* exempt visual journalists or
20 those engaged in gathering and disseminating information on matters of public concern.

21 30. The exemptions in Section 423.002 are content and speaker based. They impose
22 civil and criminal penalties based upon the purpose for which the UAV image was captured; the

1 identity or affiliation of the person capturing or directing the capture of the UAV image; or the
2 content of the image captured:

3 a. The application of nine exemptions in Section 423.002 turns on the purpose for
4 which an image is captured with a UAV. *Id.* § 423.002(a)(1) (academic purposes); (a)(2)
5 (“purpose of integrating [UAVs] into the national airspace”); (a)(4) (“purposes of
6 mapping”); (a)(5) (various telecommunications-related purposes); (a)(8) (various law
7 enforcement purposes); (a)(9) (same); (a)(11) (“purpose of fire suppression”); (a)(12)
8 (“purpose of rescuing a person whose life or well-being is in imminent danger”); (a)(16)
9 (“purpose of inspecting, maintaining, or repairing pipelines or other related facilities”).

10 b. The application of nine exemptions in Section 423.002 turns on the identity or
11 affiliation of the person capturing an image with a UAV or the person who directed the
12 capture of the image. *Id.* § 423.002(a)(1) (professors, employees, students, or those
13 acting under the direction or on behalf of institutions of higher education); (a)(5) (electric
14 or natural gas utility or telecommunications providers); (a)(8) (law enforcement
15 authorities and those acting under their direction or on their behalf); (a)(9) (same); (13)
16 (real estate brokers); (a)(16) (owners or operators of pipelines); (a)(19) (professional land
17 surveyors); (a)(20) (professional engineers); (a)(21) (employees of insurance companies
18 or affiliates of insurance companies).

19 c. The application of four exemptions in Section 423.002 turns on the content of an
20 image captured with a UAV. *Id.* § 423.002(a)(8) (certain private property normally open
21 to the public and real property or persons on real property within 25 miles of the border);
22 (a)(9) (“the scene of a catastrophe or other damage”); (a)(10) (hazardous material spills);
23 (a)(15) (“public real property or a person on that property”).

1 36. Violation of the No-Fly provisions is a Class B misdemeanor, or a Class A
2 misdemeanor if the actor was previously convicted under either Section 423.0045 or Section
3 423.0046. A Class A misdemeanor is punishable by up to one year confinement in jail and a fine
4 of up to \$4,000. Tex. Penal Code § 12.21.

5 37. The No-Fly Provisions contain nine exemptions from the prohibition against
6 UAV use over designated facilities. These include use by a government entity or one under
7 contract with a government entity, use by law enforcement, use with the written consent of the
8 property owner, and use “for a commercial purpose” done in compliance with FAA regulations.
9 *Id.* §§ 423.0045(c), 423.0046(c).

10 38. Chapter 423 contains no definition of “a commercial purpose,” but some common
11 definitions of “commercial,” including the definition of “commercial” commonly understood in
12 the photography industry, do not encompass activities undertaken for the purpose of gathering
13 the news. The vague No-Fly provisions can thus be construed to prohibit drone use for
14 newsgathering purposes within the designated airspace below 400 feet. When read in
15 conjunction with federal law’s requirement that UAVs not fly above 400 feet, *see* 14 C.F.R.
16 § 107.51(b), the No-Fly Provisions operate as a near-complete ban for visual journalists in the
17 locations covered by the No-Fly Provisions. Meanwhile, those who are not visual journalists, but
18 instead gathering information for other commercial purposes, may freely use UAVs.

19 39. The FAA Modernization and Reform Act directed the FAA to “develop a
20 comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into
21 the national airspace system.” Pub. L. No. 112–95 § 332, 126 Stat. 11, 73 (2012) (codified at 49
22 U.S.C. § 40101 note).

1 40. Under this directive, the FAA promulgated 14 C.F.R. Part 107 (“Part 107”),
2 which sets forth the operating, registration, and certification requirements “to allow small
3 unmanned aircraft systems (small UAS) to operate for non-hobby and non-recreational
4 purposes.” 81 Fed. Reg. 42064, 4206 (June 28, 2016); 14 C.F.R. § 107.1(a). Part 107 requires,
5 *inter alia*, that anyone controlling a small unmanned aircraft system register with the FAA, keep
6 the aircraft within a visual line of sight, and fly below an altitude of 400 feet above ground level
7 or within a 400 foot radius of a structure. 14 C.F.R. §§ 107.13, 107.3, 107.31, 107.51(b).

8 41. Newsgathering is a non-recreational activity and therefore subject to Part 107.
9 *See* 14 C.F.R. §§ 101.1, 107.1; U.S. Fed. Aviation Admin., AC No. 107-2, Small Unmanned
10 Aircraft Systems ¶ 4.1 (2016). Part 107 thus prohibits newsgathering drone use above 400 feet
11 from the ground or radius of a structure, 14 C.F.R. § 107.51 (2017), but does not restrict
12 newsgathering drone use below 400 feet or within a 400 foot radius of a structure.

13 42. Part 107 regulates the areas in which UAVs may fly in order to protect national
14 security and public safety. It requires anyone controlling a small unmanned aircraft system to
15 get permission before operating a UAV in a prohibited or restricted area. 14 C.F.R. § 107.45.
16 Part 107 also requires anyone controlling a small unmanned aircraft system to comply with
17 temporary flight restrictions declared by the FAA. 14 C.F.R. § 107.47. The FAA declares
18 temporary flight restrictions near disaster and hazard areas, public figures, space flight
19 operations, sports events, and aerial demonstrations. 14 C.F.R. §§ 91.137, 91.138, 91.141,
20 91.143, 91.145. Even when a temporary flight restriction is in place, however, the FAA permits
21 aircraft carrying news representatives to fly within the restricted zone if a flight plan is filed with
22 the FAA. 14 C.F.R. § 91.137(c). Finally, Part 107 requires anyone controlling a small

1 unmanned aircraft system to comply with FAA special security instructions in areas where
2 national security requires FAA control of aircraft. 14 C.F.R. §§ 99.3, 99.7, 107.47.

3 43. Since the enactment of Part 107, visual journalists throughout the country—
4 including Plaintiff Pappalardo, many of NPPA’s members, and employees of the members of
5 TPA—have obtained Part 107 certifications to enable them to operate drones throughout the
6 country safely and lawfully for newsgathering purposes.

7 44. Section 2209 of the FAA Extension, Safety, and Security Act of 2016 directed the
8 Secretary of Transportation to establish a process by which certain fixed site facilities may
9 petition the FAA to prohibit or restrict the operation of unmanned aircrafts in close proximity to
10 the facility. Pub. L. No. 114–190 § 2209, 130 Stat. 615, 634 (2016) (codified at 49 U.S.C.
11 § 40101 note). The category of fixed site facilities includes “critical infrastructure,” “[o]il
12 refineries and chemical facilities,” “[a]musement parks,” and “[o]ther locations that warrant such
13 restrictions.” Pub. L. No. 114–190 § 2209(b)(C).

14 **Harm to Plaintiffs**

15 45. Since Chapter 423 was enacted, visual journalists have faced great uncertainty
16 about their permitted use of drones to gather the news in Texas. In response to this uncertainty,
17 some visual journalists avoid the use of drones altogether for fear of violating Chapter 423; some
18 use drones in newsgathering in a manner that appears to be prohibited under Chapter 423 but is
19 clearly authorized under FAA regulations; and others attempt to operate in compliance with both
20 Chapter 423 and FAA regulations, but find it nearly impossible to do so.

21 *Plaintiffs National Press Photographers Association and Texas Press Association*

22 46. Members of plaintiff National Press Photographers Association regularly use
23 UAVs in connection with their newsgathering activities as visual journalists across the country.

1 Many of NPPA’s Texas members, as well as NPPA’s members who don’t live in Texas but
2 travel to Texas on assignment, are chilled by the challenged provisions of Chapter 423. Aerial
3 imagery adds significant information and depth to a news story and conveys content in a manner
4 that photography from the ground cannot.

5 47. NPPA’s members, as well as the visual journalists employed or under contract by
6 the members of the TPA, use compelling, unique images to inform their audiences. Strong aerial
7 visuals allow them to tell newsworthy stories on matters of public concern, and to add a level of
8 understanding and information to stories that could not otherwise be conveyed.

9 48. UAVs are the most feasible, least expensive, and safest way to engage in aerial
10 news photography. UAVs can fly at low altitudes, are easily maneuverable, and typically have
11 technology to stabilize their cameras and capture smooth video and high definition still images.
12 UAVs allow visual journalists to capture more informative, more timely, and higher quality
13 images.

14 49. Alternatives to UAVs, such as helicopters, can cost several hundred dollars per
15 hour to operate, often cannot get close enough to the newsworthy activity, and are loud and
16 disruptive to a news scene. Capturing high-quality, stabilized images from a helicopter or
17 airplane also requires additional equipment, which can be prohibitively expensive.

18 50. Helicopters are also inherently risky, which creates another impediment to their
19 use by visual journalists. At least eight journalists have died in helicopter crashes since 2007,
20 and if they crash, helicopters pose a far greater threat to bystanders on the ground than do UAVs.

21 51. Because of their expense, risk, and inherent limitations, the use of helicopters by
22 large news organizations is typically only permitted for major news events. Even so, many such
23 organizations have reduced their use of helicopters in recent years due to budgetary restrictions.

1 Smaller news organizations and individual journalists don't have the budget to use helicopters
2 for news coverage.

3 52. Many news organizations have also reduced their staff due to budgetary concerns.
4 As a result, visual newsgathering increasingly depends on independent visual journalists, who
5 generally cannot afford to use helicopters or airplanes for newsgathering. Many independent
6 visual journalists, understanding the importance of the impact that aerial images have on
7 storytelling, have invested time and money to purchase UAVs and obtain their Part 107
8 certification.

9 53. As such, an ever-increasing number of visual journalists rely on the use of UAVs
10 to capture newsworthy images.

11 *National Press Photographers Association*

12 54. NPPA's attorneys focus their legal efforts on advising the association's leadership
13 and assisting the organization in its mission to support and advocate for visual journalists and
14 promote excellence in the profession. To that end, they promote ethical journalism, and work to
15 advocate for and improve the legal landscape for visual journalists, particularly in the areas of
16 First Amendment and copyright protection. They provide general information on legal issues
17 that face a broad cross-section of NPPA's membership nationwide.

18 55. Since the passage of Chapter 423, many of NPPA's members, including
19 photographers, editors, newsroom leaders, and photographers' clients seeking to use drones,
20 have contacted the organization with specific legal questions about the risks of Chapter 423 and
21 how to properly navigate this law.

22 56. In response to the passage of Chapter 423, NPPA has had to go out of its way to
23 counteract the negative effects of the law, including, but not limited to: researching the ongoing

1 impact of the law; researching First Amendment protections in case a member is charged
2 criminally or sued civilly based on a violation of Chapter 423; meeting with lawmakers in an
3 attempt to revise the law; monitoring amendments to the law; and spending hours counseling the
4 heads of photography departments and news organizations as well as individual photographers
5 and members about Chapter 423 compliance. These actions have diverted resources from
6 NPPA's core activities described in paragraph 85. Chapter 423 has thus prevented NPPA's
7 attorneys from spending time on efforts that further the broader mission and vision of NPPA.

8 *NPPA Member Guillermo Calzada*

9 57. Guillermo Calzada, a Texas resident, is a visual journalist with over 30 years of
10 experience who has covered a wide range of news stories in Texas, including breaking news,
11 natural disasters, and sports. Mr. Calzada is a longtime member of the NPPA and is currently
12 employed by the *San Antonio Express-News*. The *San Antonio Express-News* is a member of the
13 Texas Press Association, and its parent company, the Hearst Corporation, is an associate member
14 of the Texas Press Association.

15 58. Mr. Calzada has an FAA Part 107 Remote Pilot Certificate, which qualifies him
16 to operate UAVs in the national airspace. He owns a GoPro Karma drone that is properly
17 registered with the FAA.

18 59. Mr. Calzada used this UAV on July 24, 2018, to report on the aftermath of a
19 deadly arson fire at the Village Apartments in San Marcos that caused numerous fatalities, an
20 important matter of public concern. As he was finishing his work near the scene, ATF agents
21 stopped Mr. Calzada and called San Marcos police. Two San Marcos police officers then
22 approached Mr. Calzada and one of the officers informed him of the criminal penalties under

1 Chapter 423 if he continued to use his UAV to report on the fire or if he published any of the
2 images he had already captured.

3 60. Mr. Calzada reasonably fears that operating his UAV for the purpose of capturing
4 photographs of newsworthy events, as he is authorized to do by the FAA, will subject him to
5 criminal penalties under Chapter 423.

6 61. In particular, Mr. Calzada is aware that Chapter 423 prohibits photography of an
7 individual or privately owned real property with the intent to conduct surveillance. He is also
8 aware that Chapter 423 does not define “surveillance,” but that the dictionary definition of
9 surveillance is broad enough to apply to his work as a visual journalist.

10 62. Chapter 423’s “surveillance” provisions are particularly detrimental to his ability
11 to use the UAV to take photos of neighborhood fires or accidents, because he fears that he could
12 be civilly and criminally liable under those provisions for photographing homes that are adjacent
13 to the incident without the permission of the homeowners.

14 63. Mr. Calzada also reasonably fears that he could face civil liabilities under Chapter
15 423 should he or his newspaper publish his drone photography.

16 64. Additionally, Chapter 423 has directly chilled Mr. Calzada’s speech by causing
17 him to fear prosecution for photographing the locations enumerated in the “No-Fly” provisions,
18 and Chapter 423 will continue to do so.

19 65. Chapter 423 infringes Mr. Calzada’s rights to gather, record, and disseminate
20 newsworthy information under the First Amendment.

21 66. Chapter 423’s impact on Mr. Calzada’s ability to report newsworthy events of
22 public interest using his UAV also infringes on the First Amendment right of TPA members and

1 the public generally to receive information. Both the members of TPA and the public have been
2 harmed by the curtailed reporting caused by Chapter 423.

3 *NPPA Member Brandon Wade*

4 67. Brandon Wade, a Texas resident, is a member of the NPPA and an experienced
5 freelance news photographer who has covered sports, natural disasters, and other news events for
6 *The Dallas Morning News*, *The Fort Worth Star-Telegram*, The Associated Press, and Getty
7 Images. Mr. Wade has both an FAA private pilot's license and an FAA Part 107 Remote Pilot
8 Certificate with a small unmanned aircraft system rating, which qualifies him to operate
9 airplanes and UAVs, respectively, in the national airspace.

10 68. Mr. Wade owns a state-of-the-art UAV with obstacle-avoidance sensors. He has
11 conducted aerial photography from an airplane, a helicopter, and a UAV, but nearly always finds
12 UAVs to be more dynamic, less expensive, and significantly more flexible than airplanes or
13 helicopters. For example, Mr. Wade was able to capture newsworthy images of the 2016
14 flooding in Granbury, Texas that he would not have been able to capture with a helicopter or
15 airplane, by flying his UAV just above the tree line.

16 69. On August 14, 2017, Mr. Wade used a UAV to capture aerial photographs of a
17 water treatment plant that was not operating properly. These aerial photographs showed how the
18 plant bordered a residential neighborhood, a green space, and a golf course. The plant appeared
19 to Mr. Wade to be surrounded by a fence. Out of fear of violating Chapter 423, Mr. Wade had to
20 limit where he flew his drone, which hampered his ability to capture newsworthy images.

21 70. On March 20, 2018, Mr. Wade used a UAV to capture aerial photographs of a
22 community garden for the *Dallas Morning News*, which is a member of the TPA. After he told

1 the *Dallas Morning News* that he had used a UAV to capture the photos, the *News* declined to
2 publish the photos.

3 71. In May 2018, the *Fort Worth Star-Telegram*, a member of TPA, offered Mr.
4 Wade an assignment documenting the construction of the Texas Rangers' new ballpark, Globe
5 Life Field, by conducting regularly scheduled aerial photography sessions to permit readers to
6 view the progress of the publicly-funded project. Mr. Wade asked a representative from the
7 Rangers organization for permission to use a UAV to capture images of the construction project
8 for the newspaper, as required by Chapter 423, but the Rangers denied his request. Mr. Wade
9 estimates that he has lost at least \$7,200 in income because of his inability to photograph the
10 Globe Life Field construction project with a UAV for his newspaper client. Additionally, TPA
11 member *Star-Telegram* was harmed because the law prevented it from documenting the ongoing
12 progress of a project of public interest.

13 72. The Rangers, however, were willing to grant Mr. Wade permission to photograph
14 the construction of the field for the team's own use. The Rangers hired Mr. Wade under a
15 contract that allows them to selectively release to the press a small portion of Mr. Wade's
16 photography and videography that they alone choose, while Mr. Wade is contractually prohibited
17 from licensing unapproved portions of the photography to members of the news media.

18 73. In another incident, the Center for Investigative Reporting (CIR) hired Mr. Wade
19 to photograph a facility housing immigrant children where CIR reported children had been
20 mistreated. Because of the restrictions and vagueness of Chapter 423, Mr. Wade had to limit
21 where he flew his UAV, which hampered his efforts to capture newsworthy images of the
22 facility. As such, Chapter 423 prevented him from reporting fully and most effectively on this
23 story.

1 74. Mr. Wade is aware that Chapter 423 of the Texas Government Code prohibits
2 UAV photography of an individual or privately owned real property with the intent to conduct
3 surveillance. He is also aware that Chapter 423 does not define “surveillance” but that the
4 dictionary definitions of surveillance are broad enough to apply to his work as a visual journalist.

5 75. Mr. Wade is also aware that Chapter 423 of the Texas Government Code restricts
6 UAV overflight of certain “critical infrastructure facilities.”

7 76. As such, Mr. Wade reasonably fears that operating his UAV, as he is authorized
8 to do by the FAA, for the purpose of capturing photographs of newsworthy events could subject
9 him to criminal penalties under Chapter 423.

10 77. Mr. Wade also reasonably fears that he could face civil liabilities under Chapter
11 423 for capturing or publishing his drone-captured images.

12 78. The uncertainty created by Chapter 423 has chilled Mr. Wade’s speech by causing
13 him to fear criminal and civil penalties should he use his UAV to capture newsworthy images on
14 matters of public concern. Indeed, the uncertainty created by Chapter 423 caused Mr. Wade to
15 lose a valuable long-term assignment, thereby harming his livelihood.

16 79. Chapter 423 infringes Mr. Wade’s rights to gather, record, and disseminate
17 newsworthy information under the First Amendment.

18 80. Additionally, Chapter 423’s impact on Mr. Wade’s ability to report newsworthy
19 events of public interest using his UAV infringes on the First Amendment right of TPA members
20 and the public generally to receive information. Both the members of TPA and the public have
21 been harmed by the restrictions on newsgathering caused by Chapter 423.

1 *Plaintiff Joseph Pappalardo*

2 81. Plaintiff Joseph Pappalardo is a Texas resident and freelance journalist who has
3 worked for newspapers in Texas including the *Dallas Observer* and the *Corpus Christi Caller-*
4 *Times*. He has an FAA Part 107 Remote Pilot’s Certificate, which, when properly renewed and
5 valid, qualifies him to operate UAVs in the national airspace. He owns a UAV registered with
6 the FAA. He is aware that that Chapter 423 does not define “surveillance” but that the dictionary
7 definition of surveillance is broad enough to apply to his work as a visual journalist.

8 82. Mr. Pappalardo reasonably fears that operating his UAV for the purpose of
9 capturing photographs of newsworthy events would subject him to criminal penalties under
10 Chapter 423.

11 83. Mr. Pappalardo also reasonably fears that he could face civil liabilities under
12 Chapter 423 for capturing images with his drone and for publishing such images.

13 84. Chapter 423 has chilled Mr. Pappalardo’s speech. Mr. Pappalardo has done
14 research on Chapter 423 and wrote an article for the *Dallas Observer* about Chapter 423’s effect
15 on journalists in Texas, which won a first place award for Innovation in Aerospace Journalism
16 and Publishing at the 2018 Aerospace Media Awards. After conducting this research, Mr.
17 Pappalardo became concerned that he would risk liability for criminal and civil penalties if he
18 continued to use his drone for journalistic purposes. Mr. Pappalardo also became concerned
19 after officials at Voice Media Group, which owns the *Dallas Observer*, spoke to him and
20 indicated that they would not be able to support him in any legal action alleging that he captured
21 images with his UAV in violation of Chapter 423. After this conversation, in December 2017,
22 Mr. Pappalardo used his UAV to capture images in compliance with Chapter 423 only once.
23 Since that time, Mr. Pappalardo has refrained from using his UAV in Texas for any image

1 capturing for newsgathering purposes, and he has not bothered to renew his Part 107 Remote
2 Pilot's Certificate since he is no longer using his UAV for newsgathering purposes.

3 85. Chapter 423 continues to chill Mr. Pappalardo's speech. Based on his reasonable
4 fear of liability under Chapter 423, Mr. Pappalardo has refrained from using his drone in Texas
5 to take photographs of newsworthy events. Mr. Pappalardo has found that using his drone in
6 compliance with Chapter 423 does not allow him to gain insights and information important to
7 his role as a journalist, or to capture newsworthy images. But for Chapter 423, he would have
8 used his UAV to take aerial photographs to aid in coverage of newsworthy topics like Hurricane
9 Harvey (including a panic at the gasoline pumps that the storm caused); flood and wind damage
10 in other storms; house fires; construction projects; urban sprawl; the removal of homeless
11 encampments; the route a proposed toll road would take; dumping sites for dead and abandoned
12 animals; and the removal of a Confederate statute from a public park. He would also like to
13 cover other, future topics but has refrained from doing so because of Chapter 423. These topics
14 include construction of major infrastructure projects, air quality at various altitudes, illegal
15 poaching in urban areas, and gridlock in the North Texas metroplex

16 86. While Mr. Pappalardo could take images of such events from a helicopter without
17 violating Chapter 423, rather than using his drone, this is not a viable option because the cost
18 would be prohibitive for both Mr. Pappalardo and the news outlets for which he works.

19 87. Mr. Pappalardo's inability to photograph newsworthy events most compellingly
20 harms his professional standing and his livelihood.

21 88. Chapter 423 infringes Mr. Pappalardo's rights to gather, record, and disseminate
22 newsworthy information under the First Amendment.

1 **FIRST CLAIM**

2 **(Surveillance Provisions: First Amendment Violation)**

3 93. Plaintiffs repeat and incorporate by reference herein the allegations of paragraphs
4 1 through 92 of this Complaint as if fully set forth herein.

5 94. The First Amendment to the U.S. Constitution, incorporated and made applicable
6 to the states by the Fourteenth Amendment to the U.S. Constitution, protects plaintiffs' and
7 Plaintiffs' members' rights to gather, record, and disseminate newsworthy information, which
8 includes the right to capture and disseminate images and videos.

9 95. The acts of capturing, disclosing, displaying, and distributing an image as defined
10 in Chapter 423 are protected under the First Amendment.

11 96. Plaintiffs and plaintiffs' members are engaged in capturing, disclosing,
12 displaying, and distributing "images" under the meaning of the statute, and are chilled from
13 doing so using UAVs or face statutory liability if they do so using UAVs.

14 97. The First Amendment prohibits states from regulating speech based on its content,
15 including its purpose or subject matter, unless the state can demonstrate a compelling
16 governmental need for the regulation and that the regulation is narrowly tailored to fulfill that
17 need. Content-based restrictions are presumptively unconstitutional.

18 98. By its own terms, Chapter 423 suppresses First Amendment-protected activities
19 on the basis of content.

20 99. The First Amendment also prohibits states from regulating speech based on the
21 identity of a speaker unless the state can demonstrate a compelling governmental need for the
22 regulation and that the regulation is narrowly tailored to fulfill that need. Speaker-based
23 restrictions are presumptively unconstitutional.

1 understand what conduct the statute prohibited or that are so standardless as to invite arbitrary
2 enforcement.

3 109. A more stringent vagueness test applies where a law “interferes with the right of
4 free speech.” *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). This test demands that
5 statutes affecting speech explain precisely what conduct they are proscribing. *See Edwards v.*
6 *South Carolina*, 372 U.S. 229, 236 (1963). In other words, the government may regulate
7 conduct that affects speech “only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433
8 (1963).

9 110. Section 423.003 does not define the term “surveillance” when it criminalizes the
10 use of UAVs to “capture an image of an individual or privately owned real property in this state
11 with the intent to conduct surveillance on the individual or property contained in the image.”

12 111. There is no limiting principle or definition articulated by a state court to
13 determine what “surveillance” means in this context.

14 112. An ordinary person could not determine how “surveillance” is defined and
15 therefore is not given notice as to when their activity is prohibited. Plaintiffs and plaintiffs’
16 members are chilled from capturing, disclosing, displaying, and distributing “images” using
17 UAVs because of the vague threat of statutory liability.

18 113. Law enforcement has no authoritative guidance as to when to arrest individuals—
19 and prosecutors and judges have no authoritative guidance as to when to prosecute individuals—
20 for capturing images with the intent to conduct “surveillance,” which allows arbitrary and
21 discriminatory enforcement of Section 423.003.

1 121. The No-Fly Provisions also impose an incidental restraint on protected expressive
2 conduct by prohibiting plaintiffs and their members from flying UAVs as a component of their
3 newsgathering activities near critical infrastructure facilities and sports venues.

4 122. A statute that imposes incidental restraints on expressive conduct is only valid if it
5 is within the constitutional power of the government to enact and: (1) it furthers a substantial
6 governmental interest; (2) the governmental interest is unrelated to suppressing free expression;
7 and (3) the incidental restriction on the alleged First Amendment activity is no greater than is
8 essential to furthering that legitimate governmental interest.

9 123. The No-Fly Provisions do not further a substantial governmental interest. The
10 alleged interest in preventing the harm from UAVs flying over critical infrastructure facilities
11 and causing damage to such facilities is not real nor has it ever occurred.

12 124. The government's alleged interest in preventing harm to critical infrastructure
13 facilities is instead directly related to the Texas Legislature's desire to suppress news coverage of
14 potentially dangerous or embarrassing conditions at these sites of public interest, including, for
15 example, the conditions animals are kept in at concentrated feed lots, the deteriorating condition
16 of hydro-electric dams, and the negative environmental impacts of oil, gas, and chemical
17 manufacturing facilities.

18 125. Lastly, the incidental restraints imposed by the No-Fly Provisions are greater than
19 essential to furthering the alleged governmental interest because extant Texas Code provisions
20 already prohibit destruction of property and protect the safety of critical infrastructure and sports
21 venues. As such, the No-Fly Provisions burden far more protected expressive conduct than is
22 necessary to accomplish the alleged government interest.

1 aircraft as well as people and property on the ground. *Burbank v. Lockheed Air Terminal Inc.*
2 411 U.S. 624 (1973); *Singer v. City of Newton*, 2017 WL 4176477 (D. Mass. 2017); 49 U.S.C.
3 § 40103 (2019). The federal government exercises its exclusive authority by, for example,
4 establishing flight restrictions over prohibited areas. Indeed, the federal government has already
5 identified categories of critical infrastructure and directed the FAA to establish processes to
6 prohibit or restrict the operation of drones over such infrastructure.

7 143. While a state may promulgate drone regulations consistent with its traditional
8 police powers, such as to protect privacy or prevent trespass or voyeurism, state drone
9 regulations promulgated to protect aviation safety impermissibly infringe upon a field of
10 exclusive federal regulation.

11 144. By banning drone use within the airspace around critical infrastructure and other
12 facilities, Texas is attempting to regulate aviation safety through its No-Fly Provisions. The No-
13 Fly Provisions are thus preempted by the federal government's exclusive authority to regulate
14 aviation safety.

15 **PRAYER FOR RELIEF**

16 **WHEREFORE**, plaintiffs respectfully request that the Court enter judgment in their favor and:

- 17 (a) Issue a declaratory judgment that Chapter 423 violates plaintiffs' rights under the
18 First and Fourteenth Amendments;
- 19 (b) Permanently enjoin defendants, as well as their officers, agents, employees,
20 attorneys, and all persons in active concert or participation with them, from
21 enforcing the challenged statute;
- 22 (c) Strike down Sections 423.002, 423.003, 423.004, 423.0045, 423.0046, and
23 423.006 of Chapter 423;

1 (d) Award plaintiffs reasonable attorneys' fees, and all other costs allowed pursuant
2 to 42 U.S.C. § 1988(b); and

3 (e) Grant plaintiffs such other and further relief as the Court deems just and proper.
4

5 Dated: September 26, 2019

Respectfully submitted,

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¹ This complaint has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to present the school's institutional views, if any.