

2023

The Drone Star State: How a Challenge to Texas Drone Law Became the Latest Battleground Between the First Amendment and the Right to Privacy

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Recommended Citation

Edward W. "Ted" Tooley, *The Drone Star State: How a Challenge to Texas Drone Law Became the Latest Battleground Between the First Amendment and the Right to Privacy*, 88 J. AIR L. & COM. 315 (2023)
<https://scholar.smu.edu/jalc/vol88/iss1/11>

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**THE DRONE STAR STATE:
HOW A CHALLENGE TO TEXAS DRONE LAW BECAME
THE LATEST BATTLEGROUND BETWEEN THE FIRST
AMENDMENT AND THE RIGHT TO PRIVACY**

EDWARD W. “TED” TOOLEY*

ABSTRACT

Texas is unconstitutionally infringing upon the First Amendment in the form of its overly restrictive drone regulations. While the state originally set out to create a robust privacy law providing maximum protection to its citizens, its overbroad statute instead produced the latest constitutional conflict between two of our nation’s oldest and most sacred rights. For almost a decade, Texas drone law stood unchallenged, garnering the state a reputation as arguably the least friendly jurisdiction for drone journalism. These regulations, however, have never been more vulnerable. There is a constitutional challenge unfolding in federal district court that, if successful, will redefine the scope of freedom of the press in Texas. While the state’s goal of safeguarding Texans’ privacy is admirable, there are better ways to accomplish that goal than what is currently employed. The First Amendment protects perhaps the most inalienable right of American citizens. If that is to remain the case, Texas drone law must be changed.

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DOI: <https://doi.org/10.25172/jalc.88.1.11>

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I. INTRODUCTION

THERE IS A CONSTITUTIONAL CONFLICT currently underway in the State of Texas. While drones are commonly seen as either a convenient, faster way of receiving an order or a fun toy to play with, Texas takes them much more seriously. Chapter 423 of the Texas Government Code is considered among the strictest of unmanned aerial vehicle (UAV) regula-

tions in the United States.¹ However, it was originally enacted in 2013 as part of a broader state privacy law.² As this Comment will show, there are indeed legitimate privacy concerns brought about by the prevalence of drones in Texas skies. But the state's UAV regulations cross a fine line into the realm of impermissible restriction of the freedom of the press and violate the First Amendment.³

Part I of this Comment will provide an overview of drone law in the United States. After a primer on the general characteristics of drones, it will review the history of federal UAV regulation. Underscoring this is the constitutional conflict at issue: the right to privacy versus the freedom of speech. Understanding the origin of these rights, the historical development of this constitutional conflict, and the different forms it has taken over time will shape this Comment's viewpoint on Texas UAV regulation.

Part II will supply a similar overview of UAV regulation at the state level. Following a look into the differing histories and policies, it will then survey the state regulatory schemes that stand out, both for positive and negative reasons. This Comment will also dive deep into the Texas Privacy Act. For nearly a decade, this controversial statute has earned its fair share of ardent supporters and fierce critics. It also has a noteworthy origin story. Finally, a comparison with its peer states frames Texas's place in the drone law field.

Part III will discuss the principal litigation with the greatest probability of affecting change in Texas UAV regulation: *National Press Photographers Ass'n v. McCraw*.⁴ Judge Robert Pitman's decision to uphold the plaintiffs' challenge to six provisions of the Texas Privacy Act on freedom of the press grounds marked the most significant win to date for First Amendment activists in the battle to overturn Texas's strict UAV regulations.⁵ However, Judge Pitman did grant part of the defendants' Motion to Dismiss pertaining to two of these six controversial provisions of the

¹ TEX. GOV'T CODE ANN. §§ 423.001–.009; Will Weissert, *Texas Law Gets Tough on Public, Private Drone Use*, NBC DFW, <https://www.nbcdfw.com/news/local/texas-law-gets-tough-on-public-private-drone-use/1957249/> [https://perma.cc/DB75-T23Q] (Sept. 16, 2013, 8:57 AM).

² TEX. GOV'T CODE ANN. §§ 423.001–.009; Weissert, *supra* note 1.

³ U.S. CONST. amend. I.

⁴ *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568 (W.D. Tex. 2020).

⁵ *Id.* at 574.

Texas Privacy Act.⁶ Though this Comment ultimately sides with the plaintiffs, there is no denying the defendants have a compelling case of their own that is supported by convincing constitutional arguments.⁷ And even though this case is still pending in the U.S. District Court for the Western District of Texas (Austin Division), it provides crucial legal analysis of the prospective paths Texans could soon be headed down.⁸ Drone usage and First Amendment rights in Texas will feel the effects of Judge Pitman's eventual verdict.

Part IV puts forth a mutually beneficial proposal for UAV regulations in Texas that not only respects the sanctity of the First Amendment but also satisfies the privacy concerns of the Texas government and its citizens. Utilization of the surrounding state UAV regulatory schemes proves to be a key component to this task. And by drawing upon the earlier constitutional precedent from both the First Amendment and privacy rights, this Comment attempts to strike a balance between opposites "in [o]rder to form a more perfect [u]nion."⁹

In the end, the Conclusion reemphasizes the criticality of Texas getting this drone law right. Otherwise, we run the risk of one of our country's greatest states outwardly disregarding one of our country's most indispensable rights.

A. WHAT IS A "DRONE"?

According to the dictionary, a drone is simply an "uncrewed aircraft or ship guided by remote control or onboard computers."¹⁰ The type of drone discussed throughout this Comment is referred to as an "unmanned aerial vehicle" (UAV) or "unmanned aerial systems" (UAS).¹¹ There is also the drone subcategory "small unmanned aerial systems" (sUAS), which weigh less than fifty-five pounds and are frequently used by journalists.¹² The modern drone is akin to "a flying robot" that is either controlled remotely or can "fly autonomously using

⁶ *Id.*

⁷ *See, e.g., id.* at 583–89.

⁸ *See id.*

⁹ U.S. CONST. pmbl.

¹⁰ *Drone*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/drone> [<https://perma.cc/MG6L-2R3L>].

¹¹ Leah Marie Davis, *Without a Pilot: Navigating the Space Between the First Amendment and State and Federal Directives Affecting Drone Journalism*, 49 GA. L. REV. 1159, 1163 (2015).

¹² *Id.*

software-controlled flight plans . . . work[ing] in conjunction with onboard sensors and a [GPS].”¹³

Though the modern drone became prevalent around 2010, the concept of aerial photography has roots as far back as the mid-nineteenth century.¹⁴ The ancestry of the drone stemmed from Gaspar Félix Tournachon’s first successful aerial photograph from a hot air balloon in 1858, just outside of Paris.¹⁵ Technology progressed—from George Lawrence’s kite photograph of the 1906 San Francisco earthquake, to wartime advances in aerial reconnaissance brought about by World War I and World War II, to the first known photo of Earth produced by the Space Race of 1946.¹⁶ The late twentieth to early twenty-first century integration of the *MQ-1B Predator* and *MQ-9 Reaper* into the U.S. military, along with the hand-launched *RQ-11 Raven*, revolutionized warfare on a global scale and solidified the UAV’s status in military arsenals.¹⁷ The current commercial availability of drones, unthinkable just a handful of years ago, shows that despite “the technology [changing] dramatically over time, the human desire to see the world from above has been a constant.”¹⁸

Anointed as the “Golden Age” of drones, the last decade has seen an explosion in the popularity of this technology.¹⁹ Drones are now used as local law enforcement aids, delivery vehicles, personal entertainment, and, of course, newsgathering de-

¹³ Ben Lutkevich & Alan R. Earls, *Drone (UAV)*, INTERNET THINGS AGENDA, <https://internetofthingsagenda.techtarget.com/definition/drone> [https://perma.cc/B3KE-ZPW3] (Dec. 2021).

¹⁴ See Kashyap Vyas, *A Brief History of Drones: The Remote Controlled Unmanned Aerial Vehicles (UAVs)*, INTERESTING ENG’G (June 29, 2020, 10:55 AM), <https://interestingengineering.com/a-brief-history-of-drones-the-remote-controlled-unmanned-aerial-vehicles-uavs> [https://perma.cc/C4MR-F9YN]; Olivia B. Waxman, *Aerial Photography Has Changed the World. Drones Are Just the Latest Example*, TIME (May 30, 2018, 4:12 PM), <https://time.com/5281295/aerial-photography-history-drones/> [https://perma.cc/X9NC-RF65].

¹⁵ Waxman, *supra* note 14.

¹⁶ *Id.*

¹⁷ *Id.*; see also *MQ-1B Predator*, AIR FORCE, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator/> [https://perma.cc/EUB7-VDHY] (Sept. 2015); *MQ-9 Reaper*, AIR FORCE, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/> [https://perma.cc/FZU7-ETTA] (Mar. 2021); Mark Thompson, *Army Air War Over Afghanistan: RQ-11 Raven Drone*, TIME (June 29, 2011), http://content.time.com/time/specials/packages/article/0,28804,2074830_2080103_2080115,00.html [https://perma.cc/9VTR-FXSR].

¹⁸ Waxman, *supra* note 14.

¹⁹ Vyas, *supra* note 14.

vices.²⁰ The modern drone's typical multirotor design allows for stability and significant freedom of movement.²¹ It boasts photography and videography capabilities that resemble a floating smartphone.²² And from an aesthetics perspective, they continue to get smaller and quieter.²³ It is no wonder that global shipments of drones are expected "to reach 2.4 million in 2023—increasing at a 66.8% compound annual growth rate."²⁴

B. SOCIETAL ATTITUDE TOWARD MEDIA DRONE USAGE

In August of 2021, football fans around the country were talking about a viral video from HBO's third episode of *Hard Knocks: The Dallas Cowboys*.²⁵ As the episode opened, audiences were treated to a three-minute drone tour of The Star, the Dallas Cowboys' practice facility and corporate headquarters located in Frisco, Texas.²⁶ The drone started far outside the facility, flying through statues and pedestrians on its way inside to the Cowboys' practice field, office hallways, film auditorium, locker room, and weight-training area, before coming back outside for a final look at the facility.²⁷ "There's nothing like it in all of American sport," Liev Schrieber narrated during the incredible feat completed in a single take.²⁸ The shot was met with resounding critical acclaim, serving as a highlight to what the media can accomplish via the modern drone.²⁹

²⁰ *See id.*

²¹ *Id.*

²² *Id.*

²³ *See U.S. Army Orders of the Pocket-Sized Drones Top \$85 Million*, INTERESTING ENGINEERING, https://interestingengineering.com/us-army-awards-pocket-sized-drones-206-million-contract?utm_source=Facebook&utm_medium=Article&utm_campaign=Organic&utm_content=Jun23&fbclid=IWAR1Z2PqSE7pSGitAwPKZCpgoHeULQOwN5Fkxfxs01SzS7o4hSh-Ui2yu2HU [<https://perma.cc/W6FG-EN52>] (Sept. 20, 2021, 5:07 AM).

²⁴ *Drone Market Outlook in 2023: Industry Growth Trends, Market Stats and Forecast*, INSIDER INTEL. (Jan. 7, 2023), <https://www.insiderintelligence.com/insights/drone-industry-analysis-market-trends-growth-forecasts> [<https://perma.cc/6NLM-UKWE>].

²⁵ Matt Howerton, *Did You See That Impressive Drone Shot on 'Hard Knocks'? Producer Shares How It Was Done*, WFAA, <https://www.wfaa.com/article/sports/how-hbo-film-awesome-drone-shot-star-nfl-films-explains-cowboys-hard-knocks/287-3c5f3e7f-edc2-418c-b235-3b2cfd835a5> [<https://perma.cc/7PSV-VE8U>] (Aug. 26, 2021, 10:12 PM).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.*

Yet merely one month later, media drone usage dominated the conversation for an entirely different reason. “We’ve learned that the FAA just implemented a two week TFR (Temporary Flight Restrictions) over the international bridge in Del Rio, TX, meaning we can no longer fly our FOX drone over it to show images of the thousands of migrants,” Fox News reporter Bill Melugin tweeted that evening.³⁰ Fox News used a drone to film over 8,000 people congregated at the Texas–Mexico border and had been doing so for months without issue.³¹ Though Fox News was able to gain the Federal Aviation Administration’s (FAA’s) clearance and resume operating the next day, the damage was done.³² The FAA’s decision ignited politically charged reactions, culminating in Senator Ted Cruz declaring the restriction “ridiculous” and that he had “never seen anything like that.”³³ The situation was reminiscent of a previous border exposé a few years prior. In June of 2018, the British Broadcasting Corporation (BBC) published footage of a “tent city” in Tornillo, Texas, housing hundreds of migrant children, despite the federal government restricting journalists’ access to the detention facilities.³⁴ The public outcry that followed fueled a hasty closure of the camp.³⁵

³⁰ Andrew Mark Miller & Bill Melugin, *Fox News Cleared to Fly After Biden FAA Temporarily Bans Drones Over Bridge Packed With Illegal Immigrants*, FOX NEWS (Sept. 17, 2021, 1:59 PM), <https://www.foxnews.com/politics/bidens-faa-places-temporary-ban-on-drones-flying-over-bridge-packed-with-illegal-immigrants> [https://perma.cc/Y8UV-45SP] (quoting Bill Melugin (@BillFOXLA), TWITTER (Sept. 16, 2021, 7:10 PM), https://twitter.com/BillFOXLA/status/1438656531550068740?ref_src=Twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1438656531550068740%7Ctwgr%5Ebd18de1f02df6d473052653becfd2134a7ce4ca9%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.foxnews.com%2Fpolitics%2Fbidens-faa-places-temporary-ban-on-drones-flying-over-bridge-packed-with-illegal-immigrants [https://perma.cc/T93Q-7TG5]).

³¹ *Id.*

³² *Id.*

³³ Samuel Chamberlain, *FAA Grounds Fox News Drones Near Where Thousands of Migrants Are Sheltering Under a Bridge*, N.Y. POST, <https://nypost.com/2021/09/17/faa-grounds-fox-news-drones-in-texas-near-sheltering-migrants/> [https://perma.cc/39WD-AKW4] (Sept. 17, 2021, 12:34 AM).

³⁴ Aleem Maqbool (@AleemMaqbool), TWITTER (June 22, 2018, 12:25 AM), <https://twitter.com/AleemMaqbool/status/1010030904742371328> [https://perma.cc/J55M-WAEN]; Aleem Maqbool (@AleemMaqbool), TWITTER (June 21, 2018, 11:40 PM), <https://twitter.com/AleemMaqbool/status/1010019549595385858> [https://perma.cc/4P96-RWNS]; David A. Fischer, *Dron’t Stop Me Now: Prioritizing Drone Journalism in Commercial Drone Regulation*, 43 COLUM. J.L. & ARTS 107, 108 (2019).

³⁵ Mimi Dwyer, *Inside the Teardown of Trump’s Infamous Tent City for Migrant Kids*, VICE NEWS (Jan. 8, 2019, 10:32 AM), <https://www.vice.com/en/article/yw78vw/>

Notice that each event described above involved (1) a drone (2) gathering footage of property not generally accessible to the public (3) for use by the media (4) in the State of Texas.³⁶ They represent the mixed societal attitudes toward drone usage—especially by the media—not just in Texas, but in the entire country.³⁷ America appears to be split on whether prevalence of drones in newsgathering is good, bad, or maybe a little of both. This is emblematic of the competing constitutional freedoms at the heart of the issue.

II. FEDERAL DRONE REGULATION AND ITS CONSTITUTIONAL INFLUENCES

A. HISTORICAL DEVELOPMENT OF THE CONSTITUTIONAL CONFLICT

Drone usage by the media represents the intersection of the freedom of the press and the right to privacy. Despite their place as two of our nation's oldest and most valued rights, these rights have a history of conflict. Drones are merely the latest battleground in a constitutional back-and-forth spanning near a century.

The freedom of the press originated from the First Amendment, where the Constitution immortalized the famous words, “Congress shall make no law . . . abridging the freedom of speech, or of the press”³⁸ Somewhat ironically, Congress passed the Sedition Act of 1798 just after the First Amendment's ratification, criminalizing arguably the most important function of the press—criticizing the government.³⁹ It took the next 160 years for the U.S. Supreme Court to formally decide the Act is “unconstitutional, a negative precedent, and an example of what government must not do.”⁴⁰ In *New York Times Co. v. Sullivan*, the Court established a foundation of freedom of the press in holding that criticism of government actions could not be li-

inside-the-teardown-of-trumps-infamous-tent-city-for-migrant-kids [https://perma.cc/AKQ9-NPZJ].

³⁶ *Id.*; Howerton, *supra* note 25; Chamberlain, *supra* note 33.

³⁷ *See, e.g.*, Chamberlain, *supra* note 33.

³⁸ U.S. CONST. amend. I.

³⁹ An Act for Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798); Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 TEX. TECH L. REV. 89, 96–97 (2011).

⁴⁰ Curtis, *supra* note 39, at 124.

bel.⁴¹ The Court added that “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”⁴²

Less than a decade later, the Supreme Court further strengthened freedom of the press in *New York Times Co. v. United States*, holding the government did not satisfy its “heavy burden” to justify enjoining the publishing of the infamous Pentagon Papers.⁴³ Concurring, Justice Black added: “In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors.”⁴⁴

Then in 1988, the Court both narrowed and broadened First Amendment press protection.⁴⁵ First, in *Hazelwood School District v. Kuhlmeier*, the Court restricted speech from a student newspaper and ruled that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁴⁶ But a month afterward in *Hustler Magazine, Inc. v. Falwell*, the Court unanimously held that public figures and public officials could not recover on intentional infliction of emotional distress claims without showing the publication at issue made false statements of fact with “actual malice.”⁴⁷ The Court added that the “State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive . . . when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved.”⁴⁸

In modern freedom of the press jurisprudence, the Supreme Court has clarified that “[l]aws enacted to control or suppress speech may operate at different points in the speech process.”⁴⁹ The Court noted that it previously invalidated restrictions at dif-

⁴¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

⁴² *Id.* at 291 (internal quotations omitted) (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)).

⁴³ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

⁴⁴ *Id.* at 717 (Black, J., concurring).

⁴⁵ See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 46–47 (1988); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

⁴⁶ *Hazelwood Sch. Dist.*, 484 U.S. at 273.

⁴⁷ *Hustler Mag., Inc.*, 485 U.S. at 56.

⁴⁸ *Id.* at 50.

⁴⁹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010).

ferent stages of the speech process.⁵⁰ These included requiring a permit at the outset, imposing a burden via impounding proceeds, attempting to exact costs after the speech occurs, and subjecting the speaker to criminal penalties.⁵¹ There is no test of “ad hoc balancing of relative social costs and benefits” within the First Amendment’s guarantee of free speech.⁵² Rather, any government regulation of “content based” speech, which includes “visual [and] auditory depiction[s], such as photographs, videos, or sound recordings,” is subject to strict scrutiny.⁵³ Content-based speech laws are “presumptively unconstitutional,” justified only if the government proves those laws are narrowly tailored to serve compelling state interests.⁵⁴

Today, the government can restrict speech if it falls into one of three categories. First, if the Supreme Court has previously declared the speech has only low First Amendment value such as defamation (with actual malice required for public figures), true threats, and obscenity.⁵⁵ Second, if the government and the speaker in question are in a special relationship such as that of a public employee.⁵⁶ And finally, when the government restricts speech *without regard to its content or message*.⁵⁷ Of particular importance to the last category is the determination that the government restriction is not “based on hostility—or favoritism—towards the underlying message expressed.”⁵⁸

Unlike freedom of the press, the right to privacy is not explicitly mentioned in the Constitution but is rather a fruit of the common law. The Supreme Court first recognized it in *Griswold v. Connecticut*, striking down a state statute prohibiting married couples from using contraceptives.⁵⁹ The majority opinion es-

⁵⁰ *Id.* at 336–37.

⁵¹ *Id.* (citing *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam)).

⁵² *United States v. Stevens*, 559 U.S. 460, 470 (2010).

⁵³ *Id.* at 468 (internal quotations omitted); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (“Those laws, like those that are content based on their face, must also satisfy strict scrutiny.”).

⁵⁴ *Reed*, 576 U.S. at 163.

⁵⁵ *Sullivan*, 376 U.S. at 292; *Watts v. United States*, 394 U.S. 705, 708 (1969); *Roth v. United States*, 354 U.S. 476, 484–85 (1957).

⁵⁶ *Garcetti v. Ceballos*, 547 U.S. 410, 417–20 (2006) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968)).

⁵⁷ *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994).

⁵⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

⁵⁹ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

established a “zone of privacy created by several fundamental constitutional guarantees,” naming five amendments as support for its Bill of Rights “penumbras” reasoning.⁶⁰ But Justice Harlan’s concurrence, grounded in the Fourteenth Amendment’s Due Process clause, carried the right to privacy forward.⁶¹

Subsequently, the Court extended the right to privacy involving contraceptive choices to nonmarried couples with its decision in *Eisenstadt v. Baird*.⁶² If the right to privacy was to mean anything, the Court ruled, it should stand for “the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶³ Less than a year later, the Court broadened the right to privacy to cover a woman’s decision whether or not to terminate her pregnancy in the landmark case of *Roe v. Wade*.⁶⁴ And finally with *Lawrence v. Texas*, the Court brought the right to privacy into the twenty-first century by striking down a state statute criminalizing homosexual sodomy.⁶⁵ Relying once again on the Due Process Clause, the Court established the outermost boundary of the right to privacy in holding that “two adults” have “the full right to engage in private conduct without government intervention.”⁶⁶

The right to privacy and freedom of the press most often conflict during invasion of privacy cases. Common law invasion of privacy is not a cause of action per se, but rather a collection of torts that includes (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of likeness or identity of another; (3) unreasonable public disclosure of private facts, or unreasonable publicity given to the private life of another; and (4) unreasonable portrayal of another in a false light before the public.⁶⁷ As invasion of privacy developed, these four distinct wrongs were held together by the tentative nexus of “interfer-

⁶⁰ *Id.* at 484–85.

⁶¹ *Id.* at 500 (Harlan, J., concurring).

⁶² *Eisenstadt v. Baird*, 405 U.S. 438, 438–39 (1972).

⁶³ *Id.* at 453 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–29 (1905)).

⁶⁴ *Roe v. Wade*, 410 U.S. 113, 114 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2244–85 (2022).

⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

⁶⁶ *Id.* at 560.

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977); *Invasion of Privacy*, CORNELL L. SCH., https://www.law.cornell.edu/wex/invasion_of_privacy [<https://perma.cc/7VX5-W3SV>].

ence with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others.”⁶⁸

The Supreme Court held in *Time, Inc. v. Hill* that the “constitutional protections for speech and press” precluded application of a New York invasion of privacy statute to a magazine article.⁶⁹ Absent proof the defendant magazine “published the report with [actual] knowledge of its falsity or in reckless disregard of the truth,” the First Amendment protected the article’s misrepresentations.⁷⁰ The majority provided analysis of the constitutional conflict that still resonates today:

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for *the benefit of all of us*. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer wider of the unlawful zone . . . and thus create the danger that the *legitimate* utterance will be penalized.⁷¹

Even with controversial subject matter, the Supreme Court has drawn conservative boundaries on invasion of privacy suits attacking freedom of the press.⁷² In *Cox Broadcasting Corp. v. Cohn*, the Court struck down a Georgia privacy statute imposing sanctions on a television station for broadcasting a rape victim’s name as a violation of the First and Fourteenth Amendments.⁷³ The decision turned on the information’s availability in judicial records, which are open to the public.⁷⁴ The Court did concede that the invasion of privacy claim was “not without force, for powerful arguments can be made, and have been made, that . . . there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977).

⁶⁹ *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

⁷⁰ *Id.* at 388.

⁷¹ *Id.* at 389 (emphasis added) (internal quotations omitted) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Smith v. California*, 361 U.S. 147, 153–54 (1959)).

⁷² *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975).

⁷³ *Id.*

⁷⁴ *Id.*

press.”⁷⁵ It even invoked a foundational article, coauthored almost 100 years earlier by Justice Brandeis, specifically calling attention to the need for a remedy of the press abusing its freedom by publishing private information.⁷⁶ But despite the right to privacy’s noted importance, the Court ultimately concluded that freedom of the press prevailed because of its important functions of observing government operations, informing voters, guaranteeing fairness of trials, and “bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice.”⁷⁷

Technology has been the traditional arena for this constitutional conflict, with scholars arguing that the First Amendment “protects freedom of the ‘press-as-technology’ rather than freedom of the ‘press-as-industry.’”⁷⁸ Early freedom of the press discourse identified its beneficiaries as “the daily newspapers and other established news media,” or “newspapers, television networks, and magazines.”⁷⁹ But the Supreme Court went on to apply the same protections to the internet, ruling that the government censorship of words and images online is no more permissible than restricting the books one can read in a library or the statues one can observe at a museum.⁸⁰ Even the modern idea that freedom of the press “was designed to protect speech technology” lines up with traditional Supreme Court jurisprudence.⁸¹ Thus, the conflict between the freedom of the press and the right to privacy wages on with drones as its latest battleground.

⁷⁵ *Id.* at 487.

⁷⁶ *Id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890)).

⁷⁷ *Cox Broad. Corp.*, 420 U.S. at 492.

⁷⁸ Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 158 (2013) (citing Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47, 446 n.90 (2002); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 315–16, 339–56 (2008)).

⁷⁹ Anderson, *supra* note 78, at 436 (internal citations omitted).

⁸⁰ See *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 845–47, 872, 880 (1997); see also *Technology and Liberty: Internet Free Speech*, ACLU, <https://www.aclu.org/other/technology-and-liberty-internet-free-speech> [https://perma.cc/MV33-XYLD].

⁸¹ Lee, *supra* note 78, at 345; see also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 800 n.5 (1978) (Burger, C.J., concurring) (“It is not strange that ‘press,’ the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience.”).

B. FEDERAL UAV REGULATION

The history of UAV regulation at the federal level is relatively thin. It starts with the FAA, a subagency within the U.S. Department of Transportation whose mission is “to provide the safest, most efficient aerospace system in the world.”⁸² As recently as 1981, the most government regulation that existed was a set of guidelines not requiring FAA approval to fly a hobbyist drone, so long as the operator followed prescribed parameters.⁸³ These included a 400-foot flight ceiling and prohibition of drone flights near spectators until successful tests of airworthiness.⁸⁴

Federal UAV regulation took a step forward via the FAA’s 2007 policy advisory.⁸⁵ The underlying motivation included concern “not only that unmanned aircraft operations might interfere with commercial and general aviation aircraft operations, but that they could also pose a safety problem for other airborne vehicles, and persons or property on the ground.”⁸⁶ Clarifying the current policy concerning UAVs operating in the National Airspace System, the FAA separated its guidelines into three usage categories: public aircraft (by federal and state government entities), civil aircraft (by the press and businesses), or model aircraft (by hobbyists).⁸⁷ The advisory outlined specific FAA airworthiness criteria and processes for the first two categories, but reiterated its 1981 operating standards for “persons interested in flying model aircraft as a hobby or for recreational use” regarding the third category.⁸⁸ The FAA then acknowledged that “people and companies other than modelers might be flying UAS with the mistaken understanding that they are legally operating under the authority of [the 1981 operating standards],” but clarified that drone usage “by persons or companies for business purposes” was specifically excluded from those standards.⁸⁹ The advisory not only failed to define “business purposes,” but it also

⁸² *About FAA*, FAA, <https://www.faa.gov/about> [<https://perma.cc/A887-LZ94>]; see also Clay Calvert, Charles D. Tobin & Matthew D. Bunker, *Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use*, 26 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 535, 543 (2016).

⁸³ Calvert et al., *supra* note 82, at 543.

⁸⁴ *Id.*

⁸⁵ Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007) (to be codified at 14 C.F.R. pt. 91).

⁸⁶ *Id.*

⁸⁷ *Id.* at 6689–90; Davis, *supra* note 11, at 1165.

⁸⁸ Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. at 6690.

⁸⁹ *Id.*

categorized sUAS as “aircraft” to fit them into the stricter set of regulations.⁹⁰ Due to their common usage for newsgathering, journalists challenged this decision before the National Transportation Safety Board (NTSB) but were unsuccessful.⁹¹

The penultimate set of major federal drone regulations came in Subtitle B of the FAA Modernization and Reform Act of 2012.⁹² In a relatively small subsection of the overall legislation, the Act charged the Secretary of Transportation and the FAA with developing a comprehensive plan to “safely accelerate the integration of civil unmanned aircraft systems into the national airspace system.”⁹³ While Congress mandated a copy of the plan a year after enactment, it established the overall UAS integration deadline “as soon as practicable, but not later than September 30, 2015.”⁹⁴ In the interim, Congress endowed the Secretary of Transportation with the authority to determine operability of certain exempted UAS before the final integration deadline.⁹⁵ Section 333 was readily utilized during this time, with the FAA granting more than 3,000 exemptions for commercial drone operations through the end of 2015.⁹⁶ Finally, Congress maintained protections for model aircraft like those previously discussed.⁹⁷ The Act forbade the FAA from promulgating rules for model aircraft in accordance with established criteria, such as if the aircraft “is flown strictly for hobby or recreational use” and is “operated in a manner that does not interfere with and gives way to any manned aircraft.”⁹⁸

Current federal drone laws are codified in the FAA Reauthorization Act of 2018.⁹⁹ This legislation primarily built upon its predecessors and expanded the scope of its provisions on state drone regulation.¹⁰⁰ Perhaps its most important addition was Section 348, which authorized the FAA to develop a rule allowing “the carriage of property by operators of small un-

⁹⁰ Calvert et al., *supra* note 82, at 544; Davis, *supra* note 11, at 1165.

⁹¹ Davis, *supra* note 11, at 1165.

⁹² FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, 126 Stat. 11, 12–13.

⁹³ *Id.* § 332(a)(1).

⁹⁴ *Id.* § 332(a)(3)–(4).

⁹⁵ *Id.* § 333.

⁹⁶ Calvert et al., *supra* note 82, at 544.

⁹⁷ FAA Modernization and Reform Act of 2012 § 336.

⁹⁸ *Id.* § 336(a)(1), (4).

⁹⁹ FAA Reauthorization Act of 2018, Pub. L. No. 115–254, 132 Stat. 3186.

¹⁰⁰ *See id.* §§ 341–84.

manned aircraft systems for compensation or hire.”¹⁰¹ Because any drones covered under this Section are required to be “air carriers,” this created an interesting tension among states’ ability to regulate them; states are currently preempted from regulating the “route” of an “air carrier” thanks to the Airline Deregulation Act.¹⁰² Similarly, Section 349 repealed Section 336 of the 2012 Act and greatly increased the FAA’s regulatory power over recreational drones.¹⁰³ New recreational drone operation rules mandate registration of the drone, passing an aeronautical safety and knowledge test, and adherence to “the programming of a community-based organization’s set of safety guidelines that are developed in coordination with the [FAA].”¹⁰⁴ Finally, Section 373 directed the U.S. Comptroller General to “conduct a study on the relative roles of the Federal Government, State, local and Tribal governments in the regulation and oversight of low-altitude operations of unmanned aircraft systems in the national airspace system,” and submit its report to Congress.¹⁰⁵ The study must review the “degree of regulatory consistency” among the various state and local governments with the federal government “for the safe and financially viable growth and development of the unmanned aircraft industry,” where the state and local governments are likely to invoke federalism concerns in future drone regulation.¹⁰⁶

An excerpt from the National Conference of State Legislatures (NCSL) provides the latest statement on drone regulation as it pertains to journalists:

Currently, non-recreational operations of drones weighing less than 55 pounds are regulated under what is commonly referred to as “part 107,” of federal regulations. It requires the operator to hold a remote pilot certificate, and the drone to remain within the visual line of sight of the operator or a visual observer, as well as prevents operations from taking place either over people, who are not participating in the operation of the drone or at nighttime. Nighttime is defined as “between the end of evening civil

¹⁰¹ *Id.* § 348.

¹⁰² *Id.*; *Current Unmanned Aircraft State Law Landscape*, NAT’L CONF. STATE LEGS. (NCSL), <https://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx> [<https://perma.cc/39VK-WQ2R>] (Oct. 26, 2022).

¹⁰³ FAA Reauthorization Act of 2018 § 349.

¹⁰⁴ *Id.* § 349(a)(2).

¹⁰⁵ *Id.* § 373(a)(1)–(2).

¹⁰⁶ *Id.* § 373(b)(4).

twilight and the beginning of morning civil twilight, as published in the Air Almanac, converted to local time.”¹⁰⁷

As new federal UAV rules continue to pass, such as the remote ID capability requirement, they are organized on the FAA’s official site in a (relatively) digestible format based on answers given to the query, “What Kind of Drone Flyer Are You?”¹⁰⁸

The FAA is typically more reactive than proactive when it comes to UAV regulation. Indeed, the court of public opinion rarely sides with the government if the government is caught “slapping a twelve-year-old with a hefty fine for flying his or her birthday present too close to people in the local park.”¹⁰⁹ Somewhat amusingly, the FAA in 2010 predicted the United States would be up to 15,000 drones purchased annually by 2020.¹¹⁰ The country wound up at 616,000 drones *registered* in 2016, prompting the FAA to revise its prediction up to 7 million drones purchased annually by 2020.¹¹¹ Though it does not appear that the country caught up to that high number, the FAA’s most recent report lists almost 1.14 million recreational operators registered.¹¹² It also estimates about 1.44 million UAVs distinctly identified as recreational aircraft, but concludes that the grand total of recreational aircraft is “almost 30% higher than ownership registration.”¹¹³

Two opposing usages of drones represent the competing policy choices beneath federal UAV regulation concerning newsgathering. On the one hand, there have been multiple examples of journalists employing drones to capture footage of large-scale natural disasters such as tornados, flash floods, fires, and ice jams.¹¹⁴ Through drones, journalists are able to avoid two of the primary obstacles to reporting on these matters of

¹⁰⁷ *Current Unmanned Aircraft State Law Landscape*, *supra* note 102.

¹⁰⁸ See *What Kind of Drone Flyer Are You?*, FAA, https://www.faa.gov/uas/getting_started/user_identification_tool [<https://perma.cc/3GK8-BENU>]; see also 14 C.F.R. § 89.105 (2023) (setting forth the remote identification requirement as “no person may operate an unmanned aircraft within the airspace of the United States unless the operation meets the requirements of § 89.110 or § 89.115.”); 14 C.F.R. § 89.110 (2023); 14 C.F.R. § 89.115 (2023).

¹⁰⁹ Calvert et al., *supra* note 82, at 543.

¹¹⁰ Rebecca L. Scharf, *Game of Drones: Rolling the Dice with Unmanned Aerial Vehicles and Privacy*, 2018 UTAH L. REV. 457, 468.

¹¹¹ *Id.*

¹¹² *FAA Aerospace Forecast: Fiscal Years 2021–2041*, FAA 41, 46 (2021), https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/Unmanned_Aircraft_Systems.pdf [<https://perma.cc/J7JF-HEAR>].

¹¹³ *Id.*

¹¹⁴ See Davis, *supra* note 11, at 1179–81.

public interest: safety and cost.¹¹⁵ Drone technology “provides a safer alternative to press helicopters or ground recording,” as well as an affordable alternative to those financially burdensome methods of newsgathering.¹¹⁶ This positive contribution to society is emblematic of the vocation of the press that “distinguish[es] their use of drones from that of hobbyists or even commercial users”; reporting public interest is vital and functions as a check on the actions of the government.¹¹⁷ But on the other hand, there is the trial of journalist Pedro Rivera who used his drone to record a traffic accident within a crime scene.¹¹⁸ Despite his assertion that he was exercising his First Amendment rights, “U.S. District Court Judge Vanessa Bryant held . . . that Pedro Rivera failed to state a claim against the police for forcing him to bring down the drone.”¹¹⁹ Accepting the officers’ qualified immunity defense, the court ruled that there was no clearly established right in its jurisdiction to record police activity and that even if there was, Rivera’s conduct would have still been beyond its scope because he did not use “a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue.”¹²⁰ Rivera’s situation gained notoriety, showcasing the federal government’s traditionally hostile attitude toward drone journalism.¹²¹

¹¹⁵ See *id.* at 1181.

¹¹⁶ See *id.* at 1178, 1181.

¹¹⁷ *Id.* at 1178; see also *Am. Civ. Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 599 (7th Cir.) (“To the founding generation, the liberties of speech and press were intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government.”), *cert. denied*, 133 S. Ct. 651 (2012).

¹¹⁸ Calvert et al., *supra* note 82, at 536; *Rivera v. Foley*, No. 14-CV-00196, 2015 WL 1296258, at *1 (D. Conn. Mar. 23, 2015).

¹¹⁹ Calvert et al., *supra* note 82, at 537; *Rivera*, 2015 WL 1296258, at *9.

¹²⁰ See *Rivera*, 2015 WL 1296258, at *9–10 (“[N]o Second Circuit case has directly addressed the constitutionality of the recording of officers engaged in official conduct.”).

¹²¹ See Eugene Volokh, *No Drone Surveillance of Crime Scene (Even From 150 Feet Above)*, *Police Say*, WASH. POST (Mar. 30, 2015, 9:34 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/no-drone-surveillance-of-crime-scene-even-from-150-feet-above-police-say/> [<https://perma.cc/9STV-AYVL>]; Jason Koebler, *A Journalist Almost Lost His Job for Droning a Deadly Car Crash*, VICE (Feb. 7, 2014, 4:44 PM), <https://www.vice.com/en/article/gyby4y/a-journalist-almost-lost-his-job-for-droning-a-deadly-car-crash> [<https://perma.cc/A4QU-G5FN>].

III. THE GENESIS OF TEXAS DRONES LAWS AND WHERE THEY FIT IN THE STATE UAV REGULATORY PICTURE

A. STATE UAV REGULATION

The current state drone regulatory landscape consists of forty-four states that have enacted legislation, with another three that have adopted resolutions.¹²² Most states have taken the piecemeal approach to passing legislation as opposed to constructing a comprehensive UAV regulatory regime.¹²³ And the laws continue to be revisited, with at least eight states passing new drone laws in 2020 alone.¹²⁴ These state laws tend to address the definition of a drone, their use by state law enforcement and agencies, their use by the public (including the media), and their use in hunting.¹²⁵ The table below illustrates a summary of existing state drone legislation.

¹²² *Current Unmanned Aircraft State Law Landscape*, *supra* note 102. In addition, Washington, D.C. has its own set of drone laws, while the remaining three states that do not have drone laws are Alabama, Massachusetts, and Nebraska. *Drone Laws and Regulations in the USA*, 911 SEC., <https://www.911security.com/learn/airspace-security/drone-laws-rules-and-regulations> [https://perma.cc/N4C5-QACT].

¹²³ *See Current Unmanned Aircraft State Law Landscape*, *supra* note 102.

¹²⁴ *Id.* The Texas laws were limited to law enforcement's use of force via drone and expanding the definition of "critical infrastructure" to include airports and military installations. *Texas UAS Laws*, 911 SEC., <https://www.911security.com/learn/airspace-security/drone-laws-rules-and-regulations/texas> [https://perma.cc/58UH-NQKP].

¹²⁵ *Drone Laws and Regulations in the USA*, *supra* note 122.

Table 1: Key Features of State UAV Regulations¹²⁶

State	Privacy Provision	Newsgathering Exemption	Warrant Requirement	Prisons/Critical Infrastructure/Stadiums
Alaska	Yes	N/A	Yes	N/A
Arizona	No	N/A	No	Prisons & Critical Infrastructure
Arkansas	Yes	NO	No	Prisons & Critical Infrastructure
California	Yes	NO	No	Prisons
Colorado	No	N/A	No	N/A
Connecticut	No	YES	No	N/A
Delaware	No	N/A	No	All
Florida	Yes	NO	Yes	Prisons & Critical Infrastructure
Georgia	No	N/A	No	Prisons
Hawaii	No	N/A	No	No
Idaho	Yes	NO	Yes	N/A
Illinois	Yes	N/A	Yes	N/A
Indiana	Yes	N/A	Yes	N/A
Iowa	Yes	N/A	Yes	Prisons
Kansas	Yes	NO	No	N/A
Kentucky	No	N/A	No	Prisons
Louisiana	Yes	NO	No	Prisons & Critical Infrastructure
Maine	Yes	N/A	Yes	N/A
Maryland	No	N/A	No	N/A
Michigan	Yes	NO	No	N/A
Minnesota	No	N/A	No	Prisons & Stadiums
Mississippi	Yes	N/A	No	N/A
Missouri	No	N/A	No	Prisons & Stadiums
Montana	Yes	N/A	Yes	N/A
Nevada	Yes	N/A	Yes	Prisons & Critical Infrastructure
New Hampshire	No	N/A	No	N/A
New Jersey	No	N/A	No	Prisons
New Mexico	No	N/A	No	N/A
New York	No	N/A	No	N/A

¹²⁶ *Id.* The Table displays a compilation of information from this website, updated as of March 4, 2022.

State	Privacy Provision	Newsgathering Exemption	Warrant Requirement	Prisons/Critical Infrastructure/Stadiums
North Carolina	Yes	YES	Yes	Prisons
North Dakota	Yes	NO	Yes	N/A
Ohio	No	N/A	No	N/A
Oklahoma	No	N/A	No	Critical Infrastructure
Oregon	Yes	N/A	Yes	Prisons & Critical Infrastructure
Pennsylvania	Yes	NO	No	Prisons
Rhode Island	No	YES	No	N/A
South Carolina	No	N/A	No	Prisons
South Dakota	Yes	NO	No	Prisons
Tennessee	Yes	NO	Yes	All
<i>Texas</i>	<i>Yes</i>	<i>NO</i>	<i>Yes</i>	<i>All</i>
Utah	Yes	YES	Yes	Prisons
Vermont	Yes	N/A	Yes	N/A
Virginia	Yes	NO	Yes	N/A
Washington	No	N/A	No	N/A
West Virginia	Yes	NO	No	N/A
Wisconsin	Yes	NO	Yes	Prisons
Wyoming	No	N/A	No	N/A
Washington, D.C.	The capital is governed by a Special Flight Rules Area (SFRA) within a 30-mile radius of Ronald Reagan Airport, restricting all flights in the greater DC area. The SFRA establishes a 15-mile radius inner ring and a 30-mile radius outer ring. Within the 15-mile radius inner ring, all unmanned aircraft are prohibited without specific FAA authorization. Within the 30-mile radius outer ring and beyond, UAS flight is allowed under certain operating conditions regulating weight, registration, weather conditions, and proximity to other aircraft.			

In 2015, a drone journalism scholar wrote that the “growing number of drone-related issues to be addressed by state legislatures and the sluggish rate at which drone legislation is being enacted in the states, leaves drone journalists in a position of

uncertainty.”¹²⁷ The chart above confirms that uncertainty remains.¹²⁸ Though at least twenty-four of the states have some sort of privacy provision built-in to their drone legislation, most of them do not even mention “newsgathering” in any of their enacted legislation.¹²⁹ And despite half of the states expressly prohibiting some version of UAV operation over areas such as prisons, critical infrastructure, or stadiums (or a combination thereof), those portions of state drone law mostly fail to provide any further clarity to the press.¹³⁰ An overview of the state UAV regulatory picture reveals merely four states that include some form of newsgathering among their exemptions to drone operation penalties, in stark contrast to the fifteen-plus states that have omitted such relief for drone journalists.¹³¹

Although present state and local UAV regulations have been declared “too complex for an average journalist to understand [them] easily,” that has not prevented certain states from standing out for positive reasons.¹³² For example, Maine’s law aims its privacy provision “solely at law enforcement, providing detailed requirements for issuance of warrants for drone surveillance, a ban on police use of biometric technology, and a right for citizens to sue a [] police agency for violations.”¹³³ The states of Arkansas, Louisiana, Mississippi, and Virginia all modified existing privacy statutes to account for drones, but did so while maintaining a focus on “lewd purpose” and combating voyeurism.¹³⁴ Expressly limiting the application of drone privacy statutes in this way is a positive for drone journalism with a legitimately newsworthy purpose.¹³⁵ And although appearing to get tough by expanding its criminal harassment laws to apply to drones, Kansas limited that application to “two or more separate

¹²⁷ Davis, *supra* note 11, at 1173.

¹²⁸ *Drone Laws and Regulations in the USA*, *supra* note 122.

¹²⁹ *Id.* The “N/A” designation in the chart is used to signal a lack of express/implied exception or restriction of the use of drones for newsgathering purposes.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Fischer, *supra* note 34, at 112.

¹³³ Calvert et al., *supra* note 82, at 549–50.

¹³⁴ Fischer, *supra* note 34, at 124; ARK. CODE ANN. § 5-16-101(b)(1) (West 2021); LA. STAT. ANN. § 14:283(1)(a) (2021); MISS. CODE. ANN. § 97-29-61(1)(b) (West 2022); VA. CODE ANN. § 18.2-130.1 (West 2017).

¹³⁵ See Fischer, *supra* note 34, at 124.

acts over a period of time.”¹³⁶ It expressly provides that the law does not prohibit “[c]onstitutionally protected activity.”¹³⁷

The friendliest state toward journalistic use of UAVs is North Carolina.¹³⁸ Since 2015, the state has had an express exception to its authorized UAS photography law for “newsgathering, newsworthy events, or events or places to which the general public is invited.”¹³⁹ In comparison to other state drone laws, specifically excepting newsgathering in the plain text of the statute goes a long way toward ensuring proper clarity and respect for freedom of the press.¹⁴⁰

More than a few states have taken the opposite approach. Michigan’s privacy statute broadly prohibits drone photos, videos, or audio recordings “that would invade the individual’s reasonable expectation of privacy.”¹⁴¹ Florida similarly provides a private right of action against drone operators that “record an image of privately owned real property or of the owner . . . with the intent to conduct surveillance . . . in violation of [their] reasonable expectation of privacy without [their] written consent.”¹⁴² In a state where many reporters cover hurricane damage, this presents an uncertainty of significant legal risk.¹⁴³ And while garnering deserved praise for its voyeurism law above, Arkansas prescribes criminal penalties for the use of “an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record critical infrastructure without the prior written consent of the owner of the critical infrastructure,” if done so knowingly.¹⁴⁴ The state not prohibiting the actual flight of the UAV itself over critical infrastructure signals hostility toward its use for journalistic purposes.¹⁴⁵

¹³⁶ KAN. STAT. ANN. § 60-31a02(d)(2) (West 2018).

¹³⁷ *Id.*

¹³⁸ See N.C. GEN. STAT. ANN. § 15A-300.1 (West 2017).

¹³⁹ *Id.* § 15A-300.1(b)(2).

¹⁴⁰ Compare *id.*, with CONN. GEN. STAT. ANN. § 7-149b (West 2017) (where a newsgathering exemption to state law governing “use” of commercial UAVs can only be inferred by the exclusion of any mention of “news,” “newsgathering,” “newsworthy,” or like terms from the plain text). The Author stresses this is a significantly weaker defense to potential liability for drone journalists, as what they are left with is essentially an application of the *expressio unius* canon of construction.

¹⁴¹ MICH. COMP. LAWS ANN. § 259.322(3) (West 2017).

¹⁴² FLA. STAT. ANN. § 934.50(3)(b) (West 2022).

¹⁴³ Calvert et al., *supra* note 82, at 550.

¹⁴⁴ ARK. CODE ANN. § 5-60-103(b) (West 2021).

¹⁴⁵ See *id.*; Fischer, *supra* note 34, at 120.

In California, there is a provision granting emergency responders immunity from all liability for damaging a UAV “if that damage was caused while the emergency responder was providing . . . emergency services.”¹⁴⁶ The potentially expansive use of this discretion could open the door to the slippery slope of “infring[ing] on a journalist’s ability to document police misconduct.”¹⁴⁷ But the strictest state on the journalistic use of UAVs (outside of Texas) is Tennessee, which has a privacy scheme that specifically exempts certain drone usage.¹⁴⁸ While failing to define “surveillance,” the statute exempts twenty-two different types of drone usage from criminal penalties, including professional or scholarly research, fire suppression, military, land surveying, and even licensed real estate marketing.¹⁴⁹ There is no exemption for journalists.¹⁵⁰ This type of narrow legislation “potentially criminalizes a journalist publishing drone footage obtained by someone else.”¹⁵¹

B. THE TEXAS PRIVACY ACT OF 2013

On September 1, 2013, the Texas Legislature passed the Texas Privacy Act, codified as Chapter 423 of the Texas Government Code.¹⁵² The following is an excerpt from one of the most widely referenced new articles reacting to the new legislation:

A hobbyist using a remote-control airplane mounted with a digital camera just happened to capture images last year of a Dallas creek running red with pig’s blood. It led to a nearby meatpacking plant being fined for illegal dumping and two of its leaders being indicted on water pollution charges. Yet, a Texas law that took effect Sept. 1 tightened rules not on polluters but on taking such photographs, an effort to better protect private property from drone surveillance. More than 40 state legislatures have debated the increasing presence of unmanned aircraft in civilian airspace, with most of the proposals focused on protecting people from overly intrusive surveillance by law enforcement. But Texas’ law tips the scales in police favor — giving them broad freedoms to use drones during investigations and allowing them to bypass a required search warrant if they have suspicions of illegal activity — while also limiting use of small drones by ordinary

¹⁴⁶ CAL. CIV. CODE § 43.101(a) (West 2017).

¹⁴⁷ See Fischer, *supra* note 34, at 126.

¹⁴⁸ *Id.* at 122; TENN. CODE ANN. § 39-13-902 (West 2022).

¹⁴⁹ TENN. CODE ANN. § 39-13-902(a)(1)–(22) (West 2022).

¹⁵⁰ See *id.*

¹⁵¹ Fischer, *supra* note 34, at 122.

¹⁵² TEX. GOV’T CODE ANN. § 423.001 (“Use of Unmanned Aircraft”).

residents. “Texas is really the outlier,” said Allie Bohm, an advocacy and policy strategist at the American Civil Liberties Union.¹⁵³

The Texas Privacy Act was originally sold as a proactive measure by the state legislature in advance of the FAA’s 2015 UAV regulations integrating public airspace for commercial drone use.¹⁵⁴ As recreational drone use was still allowed during that time, this law represented Texas’s boundaries of “a particular recreational use of drones: image capturing.”¹⁵⁵ The Act defines images as “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.”¹⁵⁶ It then provides three principal offenses. First, Section 423.003 declares the use of drones 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” a misdemeanor offense.¹⁵⁷ The Act does not define “surveillance.”¹⁵⁸ Second, Section 423.004 prohibits the possession, disclosure, display, distribution, or other use of an image captured in violation of Section 423.003.¹⁵⁹ And finally, Sections 423.0045 and 423.0046 make it an offense to fly a drone over a prison, critical infrastructure facility, or a sports venue.¹⁶⁰

Just prior to the Act’s enactment, First Amendment advocates from the National Press Photographer’s Association (NPPA) voiced their concerns in advance to the Texas Legislature.¹⁶¹ The legislature responded to these concerns by pointing out the “legitimate drone image capturing” allowed under the Act.¹⁶² Currently, there are twenty-one different listed exceptions com-

¹⁵³ Weissert, *supra* note 1.

¹⁵⁴ Colin Norman, *The Texas Privacy Act: Tall Enough Fences to Keep out Nosy Drones?*, TEX. MUN. CTS. EDUC. CTR. 1, 1 https://www.tmcec.com/files/2514/2350/6905/00_-_Turner_BINDER_Drones.pdf [<https://perma.cc/XAP4-9QWR>].

¹⁵⁵ *Id.*

¹⁵⁶ TEX. GOV’T CODE ANN. § 423.001.

¹⁵⁷ *Id.* § 423.003(a)–(b).

¹⁵⁸ *See id.* § 423.001.

¹⁵⁹ *Id.* § 423.004(a).

¹⁶⁰ *Id.* §§ 423.0045–.0046. Both Sections allow for an FAA waiver to permit UAV flight over prisons; critical infrastructure facilities (e.g., petroleum refineries, water treatment facilities, telecommunications structure, and airports); and sports venues. *Id.*

¹⁶¹ Norman, *supra* note 154, at 1.

¹⁶² *Id.* at 151 n.18.

prising the lawful capture of an image via UAV in Texas, including for professional or scholarly research, military, mapping, law enforcement, fire suppression, and engineering.¹⁶³ There is even an express exception for images 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.”¹⁶⁴ There is no exception, however, for journalists or newsgathering activity.¹⁶⁵

C. TEXAS’S PLACE WITHIN BROADER STATE DRONE LAW

Merely three years postenactment, drone journalism scholars declared the Texas Privacy Act “perhaps the most hostile statute for drone journalism.”¹⁶⁶ This continues to describe Texas’s place when it comes to UAV regulation in general. Because Texas has enacted a combination of safety and privacy legislation, it provides an example of a more “comprehensive state drone regulatory regime” than many of its peer states employing an ad-hoc approach.¹⁶⁷

Texas provides increased certainty and simplicity for the drone regulatory picture via its preemption of local laws, with the sole exception of during “special events.”¹⁶⁸ However, its privacy provisions have been described as “very similar . . . to Tennessee’s.”¹⁶⁹ Unfortunately for journalists, Texas laws go even further, “with the potential jailing of broadcasters for violations.”¹⁷⁰ Additionally, Texas supplies the “owner or tenant of privately owned real property” a private right of action to bring against a person who captures an image with a drone in violation of Section 423.003.¹⁷¹ Recoverable damages include \$5,000 per image captured, as well as \$10,000 for each instance of “disclosure, display, distribution, or other use” of that image.¹⁷²

¹⁶³ TEX. GOV’T CODE ANN. § 423.002(a)(1)–(21).

¹⁶⁴ *Id.* § 423.002(a)(8)(G).

¹⁶⁵ *See id.*

¹⁶⁶ Calvert et al., *supra* note 82, at 550.

¹⁶⁷ Fischer, *supra* note 34, at 126.

¹⁶⁸ *Id.*; TEX. GOV’T CODE ANN. § 423.009(a)(2) (defining “special event” to mean “a festival, celebration, or other gathering” that involves the reservation and temporary use of a public space, entertainment, and significant coordination of a county’s services).

¹⁶⁹ Fischer, *supra* note 34, at 126.

¹⁷⁰ Calvert et al., *supra* note 82, at 550.

¹⁷¹ TEX. GOV’T CODE ANN. § 423.006(a).

¹⁷² *Id.* § 423.006(a)(2).

As NBC DFW's original news story alluded to, the passage of the Texas Privacy Act has intriguing roots.¹⁷³ On a Friday afternoon in December 2011, David Mimplitch flew his radio-controlled model airplane on his lunchbreak.¹⁷⁴ Modified to hold a Canon Rebel XS camera, he had developed a hobby of aerial photography.¹⁷⁵ But that day, his 606 photos taken just so happened to capture evidence of the Columbia Packing Company dumping pig blood into the Cedar Creek tributary of the Trinity River.¹⁷⁶ Despite Mimplitch sharing this information with Dallas County Health and Human Services, the outcome was unexpected:

Columbia was hit with 15 felony charges, and its executives faced jail time. Then in May came a surprise: the charges were dropped, and Columbia got off with a \$100,000 misdemeanor fine. The cases had been compromised by a Dallas County Health and Human Services investigator who had trespassed to take pictures of the pig blood discharge.¹⁷⁷

Although he was left disappointed from the corporation's de facto slap on the wrist, Mimplitch took solace in the pig-blood pollution having stopped.¹⁷⁸ The Texas Privacy Act was enacted less than two years later, leaving Texans to speculate along the same lines as Will Weissert's news article regarding the true rationale behind its passage.¹⁷⁹ The motivation resembles the criminalization of undercover reporting of animal abuses in "so-called 'ag-gag' statutes," which several courts have struck down.¹⁸⁰

Up until late 2019, the State of Texas's UAV regulations remained largely static. Though drone journalism scholars posited First Amendment constitutional questions for the strict drone laws of Texas (and Tennessee), no further action was taken.¹⁸¹ Yet uncertainty remained. "I'm a lawyer, and I can't figure out what the laws are in a lot of places," a former FAA official once

¹⁷³ See Weissert, *supra* note 1.

¹⁷⁴ Tim Rogers, *The Man Who Stopped the Pig Blood*, D MAG. (June 23, 2014, 12:00 AM), <https://www.dmagazine.com/publications/d-magazine/2014/july/the-man-who-stopped-the-trinity-river-pig-blood/> [https://perma.cc/XD33-CLCD].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Weissert, *supra* note 1.

¹⁸⁰ Fischer, *supra* note 34, at 129.

¹⁸¹ See *id.* at 143.

joked.¹⁸² Despite arguing that overbroad local laws conflicting with federal regulations should be changed, that former FAA official opined that “[t]he problem is there really haven’t been a lot of people willing to challenge [the laws].”¹⁸³

IV. NATIONAL PRESS PHOTOGRAPHERS ASS’N V. MCCRAW—THE MOST SIGNIFICANT VICTORY FOR FREEDOM OF THE PRESS IN TEXAS UAV REGULATION TO DATE

A. FOUNDATION OF THE LEGAL CHALLENGE

The roots of this litigation are seen within the experience of Joseph Pappalardo.¹⁸⁴ One of three plaintiffs in *McCraw*, Pappalardo is a Texas resident and freelance journalist who has worked for multiple Texas newspapers.¹⁸⁵ An owner of an FAA-registered UAV, Pappalardo also secured an FAA Part 107 Remote Pilot’s Certificate, permitting him to operate his UAV in the national airspace so long as the certificate remains valid.¹⁸⁶ In 2017, Pappalardo endeavored to bring attention to Texas’s UAV regulations through an article he wrote for the *Dallas Observer*.¹⁸⁷ He described his first flight of the drone his wife bought him for Christmas, *Observer-1*:

My plan is to fly the drone with its mounted camera in service of the *Dallas Observer*. But there are a slate of laws, state and federal, arrayed against this ambition. Flying the quadcopter in entirely harmless ways can bring thousands of dollars in civil fines and criminal penalties, including jail time, and there’s no worse state in the union than Texas to turn this toy into a tool. Learning to fly *Observer-1* turns out to be the easy part. Breaking free of the red tape binding the drone will be something else entirely.¹⁸⁸

¹⁸² Travis Fox, *Drone Journalism’s Battle for Airspace*, COLUM. JOURNALISM REV. (Oct. 9, 2018), <https://www.cjr.org/innovations/drones-faa-journalists-air-space.php> [<https://perma.cc/2VK6-VTRM>].

¹⁸³ *Id.*

¹⁸⁴ Plaintiffs’ Complaint for Declaratory and Injunctive Relief at para. 81, Nat’l Press Photographers Ass’n v. McCraw, 504 F. Supp. 3d 568 (2020) (No. 19-CV-00946).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Joe Pappalardo, *What You Need to Conquer to Be a Drone Journalist in Texas: An Airman’s Test, Privacy Laws and Gravity*, DALL. OBSERVER (Mar. 21, 2017, 4:00 AM), <https://www.dallasobserver.com/news/texas-anti-drone-privacy-laws-are-hampering-journalists-and-citizens-9272138> [<https://perma.cc/QV9U-DQBX>].

¹⁸⁸ *Id.*

Pappalardo wrote about his journey to properly register his drone and himself as its pilot.¹⁸⁹ But even after taking care of all the federal requirements, Pappalardo then flew “straight into the headwinds of the Texas Privacy Act.”¹⁹⁰ He outlined the strict criminal penalties of the Act, along with its extensive exemption list that failed to include journalists.¹⁹¹ He also called attention to how the Act would not punish him if he “rented a helicopter numerous times to take photos of ongoing illegal dumping on private property,” but he would be criminally liable if he conducted the exact same activity with his drone.¹⁹² Pappalardo even secured an interview with then Texas State Representative Lance Gooden, sponsor of the Texas Privacy Act in 2013.¹⁹³ Gooden gave a surprisingly “reasonable and rational rundown of the law’s intent as he saw it,” including lawmakers’ genuine concern of the average Texas citizen’s inability to see or hear a small drone as compared to a helicopter “or even a guy on a ladder.”¹⁹⁴ But Gooden also admitted that the legislation may have aged poorly due to the since-created FAA regulations and acknowledged that “[i]f we need to adjust the law, I definitely wouldn’t be a hard ‘no.’”¹⁹⁵ Surprised by Pappalardo’s suggestion of the Act’s newsgathering restrictions, Gooden concluded by saying that “he never intended to stop media from covering breaking news with a drone.”¹⁹⁶

Pappalardo devoted a significant portion of his *Dallas Observer* article to exploring the counterarguments defending the Texas Privacy Act.¹⁹⁷ He met with a Texas defense attorney for further legal background and was reminded of the difficulties of crafting a newsgathering exemption.¹⁹⁸ The attorney asked how Pappalardo would propose “a legislator define the exception in such a way that everyone does not claim they are a journalist?”¹⁹⁹ But that same attorney noticed another weakness in the Act in terms of how airspace has traditionally been controlled at the federal level: “Regulations to ban operation, restrict flight plans,

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

or flight altitude generally need to get federal approval or risk a challenge in court based on federal preemption.”²⁰⁰

The *Dallas Observer* article earned Pappalardo an award for “Innovation in Aerospace Journalism and Publishing” from the Aerospace Media Awards, and less than three years following publication, the principal legal action behind this Comment was filed.²⁰¹ In addition to Pappalardo, the plaintiffs are the NPPA and the Texas Press Association (TPA).²⁰² The NPPA is “the nation’s leading professional organization for visual journalists” and it “promotes the role of visual journalism as a public service, including by training and advocating for the work of its . . . members.”²⁰³ The TPA is another journalism advocacy group, composed of over 400 Texas newspapers such as the *Dallas Morning News*, the *Austin American-Statesman*, and the *Fort Worth Star-Telegram*.²⁰⁴ The defendants are (1) Steven McCraw, in his official capacity as the Director of the Texas Department of Public Safety; (2) Ron Joy, in his official capacity as the Chief of the Texas Highway Patrol; and (3) Wes Mau, in his official capacity as the Hays County District Attorney.²⁰⁵

B. THE PLAINTIFFS’ ARGUMENT

The case came to Judge Robert Pitman of the U.S. District Court for the Western District of Texas due to federal question jurisdiction.²⁰⁶ As characterized in the original complaint, the lawsuit is “a civil rights action challenging the constitutionality of certain sections of Texas Government Code Chapter 423 [the Texas Privacy Act] . . . which regulates the use of unmanned aerial vehicles . . . by imposing civil and criminal penalties on newsgathering and speech protected by the First Amendment.”²⁰⁷ The action breaks down into two main prongs. It first focuses on Chapter 423’s ban of drone use for “surveillance” of

²⁰⁰ *Id.*

²⁰¹ 2020 Award Winners, AEROSPACE MEDIA AWARDS, <https://www.aerospacemediadinner.com/2020-award-winners> [<https://perma.cc/J9Q4-P8GX>]; Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *supra* note 185, at 84.

²⁰² Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *supra* note 185, at paras. 13–14.

²⁰³ *Id.* at para. 13.

²⁰⁴ *Id.* at para. 14.

²⁰⁵ *Id.* at paras. 16–18. Hays County is located just southwest of Austin, Texas.

²⁰⁶ *Id.* at para. 10; 28 U.S.C. § 1331 (“[D]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution . . .”).

²⁰⁷ Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *supra* note 185, at para. 1.

individuals and private property and its failure to “exempt journalists or newsgathering activities.”²⁰⁸ Then, it attacks the provisions banning UAV usage over correctional facilities, detention facilities, critical infrastructure facilities, and sports venues.²⁰⁹

In the first prong of their argument, the plaintiffs group Texas Government Code Sections 423.002, 423.003, 423.004, and 423.006 together as the “Surveillance Provisions” and challenge their collective constitutionality under the First Amendment.²¹⁰ They argue that the Surveillance Provisions are unconstitutional content-based and speaker-based restrictions because their exemptions “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.”²¹¹ They also argue that the lack of definition provided for “surveillance” in the Act leaves these provisions “unconstitutionally vague and overbroad.”²¹²

In the second prong of their argument, the plaintiffs group Texas Government Code Sections 423.0045 and 423.0046 together as the “No-Fly Provisions” and also challenge their constitutionality.²¹³ They argue that by combining these provisions with FAA regulations requiring UAVs to fly below 400 feet, drones are effectively banned at the listed locations in Texas.²¹⁴ Further, they again assert that a key exemption to the No-Fly Provisions for “commercial purpose” is left undefined, working to the detriment of freedom of the press and “singl[ing] out photojournalists for disfavored treatment” in violation of the First and Fourteenth Amendments.²¹⁵ Finally, the plaintiffs allege that the No-Fly Provisions should be preempted by the Supremacy Clause as they unconstitutionally infringe upon “the federal government’s sole and exclusive authority to regulate the national airspace and aviation safety.”²¹⁶

²⁰⁸ *Id.* at paras. 3, 20.

²⁰⁹ *Id.* at para. 3.

²¹⁰ *See Nat’l Press Photographers Ass’n v. McCraw*, 504 F. Supp. 3d 568, 574 (W.D. Tex. 2020).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 575.

²¹⁴ *Id.*

²¹⁵ *Id.* (internal quotations omitted).

²¹⁶ *Id.* (internal quotations omitted).

There is similar reasoning behind both prongs of the plaintiffs' argument.²¹⁷ They allege that the Surveillance Provisions conflict with the First Amendment prohibition on state regulation of "speech based on the identity of the speaker," restrictions they point out as "presumptively unconstitutional."²¹⁸ Arguing for strict scrutiny, they add that Texas fails to justify the provisions with the requisite demonstration of "a compelling governmental need for the regulation and that the regulation is narrowly tailored to fulfill that need."²¹⁹ They also allege that the No-Fly Provisions implicate the First Amendment because the use of a drone "to record images for newsgathering purposes has a significant expressive element."²²⁰ Accordingly, the provisions violate the First Amendment because they impose an incidental restraint on journalists exhibiting this protected expressive conduct while failing to further a substantial government interest.²²¹ The plaintiffs argue that the government's alleged interest in "preventing the harm from UAVs flying over critical infrastructure facilities and causing damage to such facilities" is neither real nor based on any past occurrence.²²²

The plaintiffs also mount a Fourteenth Amendment challenge to both the Surveillance Provisions and the No-Fly Provisions, focusing on their collective vagueness.²²³ They assert that the Due Process Clause prohibits the impermissible vague uses of "surveillance" in the Surveillance Provisions and "commercial purpose" in the No-Fly Provisions.²²⁴ Since both key terms are left undefined, the plaintiffs argue that these provisions invite arbitrary enforcement of the Texas Privacy Act, as "an ordinary person would not understand what conduct the statute prohibited."²²⁵

Finally, the plaintiffs invoke the Constitution's Supremacy Clause in a claim of field preemption of the No-Fly Provisions.²²⁶ They submit that because the federal government's exclusive authority in the realm of national airspace and aviation safety "in-

²¹⁷ See Plaintiffs' Complaint for Declaratory and Injunctive Relief, *supra* note 185, at paras. 5–6.

²¹⁸ *Id.* at para. 99.

²¹⁹ *Id.*

²²⁰ *Id.* at para.117.

²²¹ *Id.* at para. 118.

²²² *Id.* at para. 123.

²²³ *Id.* at paras. 131–38.

²²⁴ *Id.* at paras. 133–35.

²²⁵ *Id.* at para. 132.

²²⁶ *Id.* at paras. 139–44; U.S. CONST. art. IV, § 2.

cludes protecting the safety of aircraft as well as people and property on the ground,” the No-Fly Provisions “impermissibly infringe upon a field of exclusive federal regulation.”²²⁷ The plaintiffs conclude by requesting relief in the form of a declaratory judgment of Chapter 423’s unconstitutionality under the First and Fourteenth Amendments, permanent enjoinder of the defendants’ enforcement of the challenged provisions, and an order striking down Sections 423.002, 423.003, 423.004, 423.0045, 423.0046, and 423.006 of Chapter 423.²²⁸

C. THE DEFENSE

The defendants in *McCraw* filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, as well as for the court’s lack of subject matter jurisdiction.²²⁹ The motion supplies its underlying rationale in its opening paragraph:

Plaintiffs ask the Court to rule that drone technology may be used to capture video or images of any private property or citizen, and at any time or place, across the entire State of Texas. They claim a right to conduct surveillance of any subject they deem sufficiently newsworthy, no matter who or what that might be, thereby ushering in an era of unrestricted aerial spying that would subject every Texan to prying eyes from above. The First Amendment does not demand such an Orwellian result.²³⁰

Additionally, the defendants point to the general justification of the Texas Privacy Act as described in its legislative history.²³¹ This is the “privacy and public safety concerns specific to drones” in that they “can be nearly impossible to see unless a person was looking for them,” in contrast to the sheer noticeability of helicopters and airplanes.²³² The motion also points toward the lawful use of a drone under the Act “to capture images ‘of public real property or a person on that property,’” along with its multitude of applicable exemptions.²³³

²²⁷ Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *supra* note 185, at paras. 142–43.

²²⁸ *Id.* at Prayer for Relief.

²²⁹ Defendants’ Motion to Dismiss, *Nat’l Press Photographers Ass’n v. McCraw*, 504 F. Supp. 3d 568 (2020) (No. 19-CV-00946-RP); FED. R. CIV. P. 12(b)(1), (b)(6).

²³⁰ Defendants’ Motion to Dismiss, *supra* note 229.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* (quoting TEX. GOV’T CODE ANN. § 423.002(a)(15)).

After making a procedural argument against the plaintiffs' standing to sue, the defendants' motion spends a significant amount of time defending the constitutionality of the Surveillance Provisions.²³⁴ They contend that because the provisions allow drone use to capture images of public property or people on that property, the First Amendment's "right to record" does not apply to the plaintiffs' claims.²³⁵ And because the Surveillance Provisions only prohibit drones conducting "surveillance," First Amendment case law protecting photography as an element of expression also has no application.²³⁶ They maintain that the plaintiffs believe themselves entitled to an exception solely because they are members of the press, "seek[ing] nothing less than unrestricted information gathering on any private citizen, anywhere, at any time, by anyone."²³⁷ Shifting to the standard of review, the defendants assert that intermediate scrutiny—not strict scrutiny—is the correct test because the regulated conduct at issue is "not inherently expressive."²³⁸ Because the purpose of the Texas Privacy Act is not to discriminate against drone operators or journalists, but rather to protect the compelling rights and interests of privacy, the defendants state that the Surveillance Provisions easily meet the applicable constitutional standard.²³⁹ The Surveillance Provisions "are content neutral, narrowly tailored, and leave open myriad alternatives for Plaintiffs."²⁴⁰

Next, going after the vagueness allegations surrounding "surveillance," the defendants counter that the plaintiffs undermined their own position by providing a generally understood definition.²⁴¹ This proves that the plaintiffs all possess a "reasonable degree of certainty" regarding what the Act prohibits, which is all that is required by the Due Process Clause.²⁴² Further, they assert that just because the laws fail to provide "perfect clarity" and "precise guidance" does not render them unconstitutional under the Fourteenth Amendment.²⁴³ The defendants

²³⁴ *Id.*

²³⁵ *Id.* (internal quotations omitted).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552–53 (5th Cir. 2008)).

²⁴³ *Id.* (internal quotations omitted).

maintain that because “[o]rdinary persons are perfectly capable of understanding the meaning of the word ‘surveillance,’” the Surveillance Provisions do not allow for arbitrary enforcement.²⁴⁴

Turning to the No-Fly Provisions, the defendants argue that they do not implicate the First Amendment at all because they are merely safety regulations, rather than regulations of “photography, journalism, expression, or any other type of expressive activity.”²⁴⁵ And in advocating for the same intermediate scrutiny review if they did implicate First Amendment concerns, the defendants suggest that the No-Fly Provisions advance important and substantial governmental interests in not just protecting privacy, but also in preventing “extreme threats to public safety, such as smuggling contraband into correctional facilities, accidental or intentional damage to critical infrastructure, or disruption and potential harm to spectators at sporting events.”²⁴⁶ As with the vagueness allegations concerning the Surveillance Provisions, the defendants similarly posit that the plaintiffs “feign confusion” regarding the meaning of “commercial purposes.”²⁴⁷ They respond to the allegations that whether journalistic activity is done with a “commercial purpose” is a fact-based inquiry dependent on particular conduct at issue, rather than specific evidence of vagueness in the No-Fly Provisions.²⁴⁸

Finally, the Motion to Dismiss declares the plaintiffs’ Supremacy Clause challenge to be meritless.²⁴⁹ Despite their field preemption contention, the defendants remind the court that “[n]either the Supreme Court nor the Fifth Circuit have held that the Federal Aviation Act preempts the entire field of aviation safety.”²⁵⁰ They also point toward the Complaint itself, where the plaintiffs admitted that “a state may promulgate drone regulations consistent with its traditional police powers, such as to protect privacy or prevent trespass or voyeurism,” as evidence of the law’s clear exercise of Texas’s police power.²⁵¹

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* (quoting *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 828 (E.D. Tex. 2006)).

²⁵¹ *Id.* (internal quotations omitted).

Accordingly, the defendants conclude by requesting dismissal of all five of the plaintiffs' claims.²⁵²

D. JUDGE PITMAN'S ORDER AND POTENTIAL OUTCOMES

On November 30, 2020, Judge Pitman denied in part the defendants' Motion to Dismiss, signaling the most significant victory for drone journalism in the State of Texas to date.²⁵³ After confirming each plaintiff's standing, Judge Pitman moved to the Surveillance Provisions and ruled that the plaintiffs sufficiently pleaded that they "are burdening expressive conduct—taking photos and video for newsgathering purposes," therefore implicating the First Amendment.²⁵⁴ Not defeated by the fact that one person can simultaneously fall into multiple categories of speakers under the Surveillance Provisions, plaintiffs plausibly alleged that they "apply speaker-based discrimination and are thus content-based."²⁵⁵ And because content-based First Amendment restrictions are "presumptively unconstitutional," the court decided that strict scrutiny was the appropriate standard of review.²⁵⁶ Judge Pitman agreed with the plaintiffs that the Surveillance Provisions could potentially not be narrowly tailored, as "government interests in privacy and public safety are implicated for journalists using UAVs, but not for other individuals exempted."²⁵⁷ The court also took issue with the defendants' inability to define "surveillance" or point out "any authority or evidence that outlines what type of UAV use is prohibited" by the term.²⁵⁸ Because the defendants offered no clarity on what interpretation of the Surveillance Provisions should be used, coupled with the multiple potential definitions of "surveillance" provided by the plaintiffs, the court found that the plaintiffs "have plausibly pled that the Surveillance Provisions are unconstitutionally vague."²⁵⁹

For the No-Fly Provisions, Judge Pitman held that the plaintiffs successfully alleged their unconstitutionality under interme-

²⁵² *Id.*

²⁵³ *See Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 574 (W.D. Tex. 2020).

²⁵⁴ *Id.* at 582, 584.

²⁵⁵ *Id.* at 584.

²⁵⁶ *Id.* at 584–85.

²⁵⁷ *Id.* at 585.

²⁵⁸ *Id.* at 586.

²⁵⁹ *Id.*

diate scrutiny.²⁶⁰ First, plausible questions regarding the statute being narrowly tailored were raised as to “how these government interests could be threatened by newsgathering but not by commercial activities.”²⁶¹ Second, their inherent inconsistency concerning UAV prohibition indicated that the No-Fly Provisions “are restricting more speech than necessary to achieve the government’s alleged interests.”²⁶² And finally, the court suggested that the sheer absence of guidance from the defendants to interpret “commercial purpose” signaled an “unanswered legal question” about whether journalistic conduct was outlawed by the No-Fly Provisions.²⁶³ Thus, the plaintiffs again plausibly pleaded a First Amendment violation.²⁶⁴

However, it was not a complete triumph for the plaintiffs. Judge Pitman dismissed the No-Fly Provisions preemption claim with prejudice.²⁶⁵ Here, the court held that federal law had not “completely preempted . . . UAVs flying over certain buildings and structures.”²⁶⁶ The plaintiffs had not demonstrated Congressional intent “to prohibit states from passing additional regulations related to UAVs, even ones related to existing FAA regulations.”²⁶⁷ They also failed to show that the same concerns involving “fatal air crashes between civil and military aircraft” that underscore the federal prohibition on UAV flight over 400 feet applied to UAV flight under 400 feet or, for these provisions specifically, not flying UAVs in certain areas.²⁶⁸ Because the No-Fly Provisions do not purport to regulate “such a broad area of Texas airspace, but . . . instead only certain structures,” the court concluded that the plaintiffs failed to state a plausible preemption claim.²⁶⁹

This decision was immediately hailed as “a victory for the First Amendment, and for tenacious and innovative visual journalism.”²⁷⁰ But the NPPA, TPA, and Pappalardo still face a long road toward their ultimate goal of overturning these Texas

²⁶⁰ *Id.* at 587.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 587–88.

²⁶⁴ *Id.* at 588.

²⁶⁵ *Id.* at 591.

²⁶⁶ *Id.* at 589.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 590 (internal quotations omitted).

²⁶⁹ *Id.* at 590–91.

²⁷⁰ Leah Ferentinos, *Federal Judge Allows MFIA Lawsuit Challenging Texas Drone Law to Proceed*, YALE L. SCH. (Dec. 3, 2020), <https://law.yale.edu/yls-today/news/>

drone laws. Despite over a year having elapsed since Judge Pitman's Order, there appears to be no end in sight to this litigation. The most recent proceeding on the docket was an order canceling the parties' previously scheduled bench trial on October 25, 2021, entered just ten days prior to the scheduled trial date.²⁷¹ From the context of the previously discussed proceedings alone, the two sides are far apart on what they each believe is the appropriate solution for Texans going forward. An effective compromise is needed to ensure a constitutionally unbridged freedom of the press can coexist with the protection of reasonable privacy interests in this state.

V. A PROPOSAL FOR UAV REGULATIONS THAT PROTECT TEXANS' PRIVACY AND RESPECT THE FIRST AMENDMENT

A. THE TEXAS LEGISLATURE'S MISSED OPPORTUNITY TO GET OUT IN FRONT

Between Judge Pitman's decision on the defendants' Motion to Dismiss and present day, the Texas Legislature had a chance to amend the challenged provisions of the Texas Privacy Act in its 87th Session.²⁷² Unfortunately for the *McCraw* plaintiffs—and frankly, for the defendants as well—the Legislature passed on this opportunity. A grand total of four amendments to Chapter

federal-judge-allows-mfia-lawsuit-challenging-texas-drone-law-proceed [https://perma.cc/PWN9-EQCN] (internal quotations omitted).

²⁷¹ Order Cancelling Bench Trial, Nat'l Press Photographers Ass'n v. McCraw, 504 F. Supp.3d 568 (2020) (No. 19-CV-00946).

²⁷² See *Texas Legislative Sessions and Years*, LEGIS. REFERENCE LIBR. TEX., https://lrl.texas.gov/sessions/sessionYears.cfm [https://perma.cc/9P9K-24WQ].

423 were proposed; none were enacted.²⁷³ Only two were of any consequence to *McCraw*.²⁷⁴

Texas House Bill 3251 proposed additional definitions for Section 423.001.²⁷⁵ Accompanying “image” would be a definition for “capture” as “the actual care, custody, control, or management of any physical or electronic representation of an image that is capable of being copied or destroyed.”²⁷⁶ More notably, the amendment purported to define “surveillance” as “the intentional and continuous close observation of an individual or property.”²⁷⁷ While this definition alone likely would not have been dispositive in *McCraw*, it would have at least been a starting point.²⁷⁸ It also would have supplied the defendants with something to address Judge Pitman’s prior contention of their inability to define “surveillance.”²⁷⁹ Finally, the amendment would have eliminated Section 423.002’s exemption for UAV image capturing “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.”²⁸⁰

Texas House Bill 2957 proposed the addition of a twenty-second exemption to Section 423.002.²⁸¹ It would have allowed UAV image capture for “the Railroad Commission of Texas or an agent . . . or employee of the commission” to inspect or ex-

²⁷³ See *Bills Effective Immediately*, TEX. LEGIS. ONLINE (Feb. 20, 2023), <https://capitol.texas.gov/Reports/Report.aspx?LegSess=87R&IDfectiveimmed> [<https://perma.cc/DX93-3F8Z>] (showing the absence of the four proposed amendments to Chapter 423: HB 3251, HB 1945, HB 2957, and HB 1583); see also *87(R) Bill Stages for HB 3251*, TEX. LEG. ONLINE, <https://capitol.texas.gov/BillLookup/BillStages.aspx?LegSess=87R&Bill=HB3251> [<https://perma.cc/9JV5-8LH7>]; *87(R) Bill Stages for HB 1945*, TEX. LEG. ONLINE, <https://capitol.texas.gov/BillLookup/BillStages.aspx?LegSess=87R&Bill=HB1945> [<https://perma.cc/CXB8-9C2U>]; *87(R) Bill Stages for HB 2957*, TEX. LEG. ONLINE, <https://capitol.texas.gov/BillLookup/BillStages.aspx?LegSess=87R&Bill=HB2957> [<https://perma.cc/RBD9-7BX8>]; *87(R) Bill Stages: HB 1583*, TEX. LEG. ONLINE, <https://capitol.texas.gov/BillLookup/BillStages.aspx?LegSess=87R&Bill=HB1583> [<https://perma.cc/5BHZ-KA4U>].

²⁷⁴ See *87(R) Bill Stages for HB 3251*, *supra* note 273; *87(R) Bill Stages for HB 2957*, *supra* note 273.

²⁷⁵ Tex. H.B. 3251, 87th Leg., R.S. (2021).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See *Nat’l Press Photographers Ass’n v. McCraw*, 504 F. Supp. 3d 568, 585 (W.D. Tex. 2020).

²⁷⁹ *Id.* at 586.

²⁸⁰ Tex. H.B. 3251, 87th Leg., R.S. (2021).

²⁸¹ Tex. H.B. 2957, 87th Leg., R.S. (2021).

amine various oil and gas facilities, as well as surface mining sites.²⁸² Even though it was not enacted, this Bill represents the Texas Legislature's continued lack of consideration for a newsgathering exemption to Chapter 423.²⁸³

B. ENSURING TEXAS UAV REGULATION COEXISTS WITH
FREEDOM OF THE PRESS

In defense of Chapter 423, the *McCraw* defendants were right to focus on the slippery slope counterargument.²⁸⁴ Simply repealing the UAV regulations in the Texas Privacy Act, with nothing else, would be akin to opening the floodgates for “an era of unrestricted aerial spying” and “an Orwellian result.”²⁸⁵ But there still exist intermediate measures that Texas can implement to reconcile its potentially unconstitutional drone laws with the First Amendment.

First, a popular and practical method of regulation that could be applied to UAV newsgathering is the creation of a drone journalist press pool.²⁸⁶ Premised on the theory that “one journalist is better than no news coverage at all,” press pooling is employed today by traditional news media covering high-profile events, such as political speeches and courtroom proceedings.²⁸⁷ The use of a handful of pool drones to cover a potentially volatile, yet newsworthy event would supply a safe solution for both citizens and journalists alike, as opposed to massive press conglomerates operating on the ground or multiple news helicopters.²⁸⁸ The NPPA even conducted a study that found “journalists who intend to use drones for newsgathering would be interested in participating in pooling arrangements.”²⁸⁹ The combination of historical feasibility and support positions drone-journalist press pooling as “an ideal model to allow the press more leniency in reporting while resolving many safety concerns.”²⁹⁰

²⁸² *Id.*

²⁸³ *See id.*; 87(R) Bill Stages for HB 2957, *supra* note 273.

²⁸⁴ *See* Defendants' Motion to Dismiss, *supra* note 229.

²⁸⁵ *Id.*

²⁸⁶ Davis, *supra* note 11, at 1186.

²⁸⁷ *Id.* at 1186–87.

²⁸⁸ *See id.* at 1188.

²⁸⁹ *Id.*; MICKEY H. OSTERREICHER, NAT'L PRESS PHOTOGRAPHERS ASS'N, CHARTING THE COURSE FOR USE OF SMALL UNMANNED AERIAL SYSTEMS IN NEWSGATHERING 13 (2014), <https://nppa.org/sites/default/files/AUVSI%20Paper%2004-11-14.pdf> [<https://perma.cc/PC9A-2DZ3>].

²⁹⁰ Davis, *supra* note 11, at 1188.

A second, related solution for Texas comes in the form of a media credential system specific to drone journalists.²⁹¹ The method of press regulation derives from the current process for the application and granting of press passes to report on government affairs.²⁹² The practical limitations of press credentialing, namely enabling the dissemination of news to the public via a privilege not readily obtainable by the public themselves, seems to fit with the privacy interests the *McCraw* defendants protect.²⁹³ By facilitating UAV newsgathering while limiting volatility and impracticality, a Texas drone law with this type of press carve out could “gauge and limit membership as necessary to promote safety and privacy.”²⁹⁴

A final proposal is for Texas lawmakers to add a newsworthiness exemption to Section 423.002.²⁹⁵ This finds its roots in the traditional balancing of newsworthiness and privacy at common law.²⁹⁶ The standard of newsworthiness “examines whether a disclosed fact concerns a matter of legitimate public concern.”²⁹⁷ And a disclosure of private information, as long as it is newsworthy, is not a tortious one.²⁹⁸ It therefore follows that because the Supreme Court has so often considered newsworthiness a defense to the disclosure of private and sensitive information, this precedent “set[s] out principles for state and local governments to draw from when crafting their regulations.”²⁹⁹ Texas has already shown a proclivity toward exemptions to its current UAV regulations.³⁰⁰ If it were to add an explicit exemption for newsworthy disclosures, it could avoid becoming yet another ex-

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *See id.*; *see also* Defendants’ Motion to Dismiss, *supra* note 229. (Criticizing plaintiffs for “seek[ing] nothing less than unrestricted information gathering on any private citizen, anywhere, at any time, by anyone.”).

²⁹⁴ Davis, *supra* note 11, at 1189.

²⁹⁵ TEX. GOV’T CODE ANN. § 423.002.

²⁹⁶ *See* Fischer, *supra* note 34, at 143.

²⁹⁷ *Id.* at 142.

²⁹⁸ *Id.*; RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. L. INST. 1977) (citing *Cox Broad. Co. v. Cohn*, 420 U.S. 469 (1975)).

²⁹⁹ Fischer, *supra* note 34, at 143; *see also* *Cox Broad. Corp.*, 420 U.S. at 494–96; *Okla. Publ’g Co. v. Dist. Ct. Okla. Cnty.*, 430 U.S. 308, 308–12 (1977); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105–06 (1979); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

³⁰⁰ *See* TEX. GOV’T CODE ANN. § 423.002(a)(1)–(21) (total of 21 different exemptions).

ample of the Supreme Court's clear belief that legitimate newsworthiness can overcome privacy expectations.³⁰¹

C. CREATING DRONE LAWS TEXANS CAN BE PROUD OF: A
SELECTION FROM STATE UAV REGULATORY SCHEMES

Drone journalism scholars have suggested that rather than operating in a vacuum, "governments can draw on guidelines stemming from a body of common and constitutional law that balances privacy and newsgathering interests."³⁰² This Comment proposes that Texas look to sister states for a regulatory selection that will only improve its own drone laws' compatibility with the First Amendment.

In North Carolina, an explicit newsgathering exemption to state UAV regulations is already in effect.³⁰³ The example is shown in the statute's plain text.³⁰⁴ Accordingly, the state has received praise from multiple drone journalism scholars and has been positioned in direct contrast to Texas because of it.³⁰⁵ If an express exception to newsgathering is not an option, Texas could take a page from the UAV regulations of Arkansas, Louisiana, Mississippi, and Virginia.³⁰⁶ Remember, all four of these states specifically modified their existing privacy statutes to account for drones.³⁰⁷ But in doing so, they focused on limiting the drone usage for "lewd purpose."³⁰⁸ These antivoyeurism laws reconcile the traditional Fourth Amendment concept of a reasonable expectation of privacy with First Amendment protections via state statutes that do not lend themselves to broad, sweeping interpretations encompassing drone journalism.³⁰⁹

³⁰¹ Fischer, *supra* note 34, at 143.

³⁰² *Id.* at 140.

³⁰³ N.C. GEN. STAT. ANN. § 15A-300.1(b)(2) (West 2017) ("This subdivision shall not apply to newsgathering, newsworthy events, or events or places to which the general public is invited.").

³⁰⁴ *See id.*

³⁰⁵ *See* Calvert et al., *supra* note 82, at 550–51.

³⁰⁶ ARK. CODE ANN. § 5-16-101(b)(1) (West 2021); LA. STAT. ANN. § 14:283(1)(a) (2021); MISS. CODE ANN. § 97-29-61(1)(b) (West 2022); VA. CODE ANN. § 18.2-130.1 (West 2017).

³⁰⁷ *See supra* Section III.A.

³⁰⁸ *See* Fischer, *supra* note 34, at 124; ARK. CODE ANN. § 5-16-101(b)(1) (West 2021); LA. STAT. ANN. § 14:283(1)(a) (2021); MISS. CODE ANN. § 97-29-61(1)(b) (West 2022); VA. CODE ANN. § 18.2-130.1 (West 2017).

³⁰⁹ *See* Fischer, *supra* note 34, at 123–24; ARK. CODE ANN. § 5-16-101(b)(1) (West 2021); LA. STAT. ANN. § 14:283(1)(a) (2021); MISS. CODE ANN. § 97-29-61(1)(b) (West 2022); VA. CODE ANN. § 18.2-130.1 (West 2017).

Additionally, Kansas shows an effective way to properly criminalize unlawful drone usage.³¹⁰ In its statutory prohibition of drone stalking, Kansas requires a “course of conduct,” defined as “two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress.”³¹¹ Mostly importantly, UAVs used for legitimate newsworthiness are explicitly protected in this statute via Kansas’s exemption for “[c]onstitutionally protected activity.”³¹² This legislation has been well received since enactment, with drone journalism scholars showcasing it as a realistic countermeasure against the invasion of privacy in the ideal, comprehensive state UAV regulatory scheme.³¹³

Unsavory consequences loom if the successes of surrounding state UAV regulation are ignored. When it comes to accommodating drone journalism, governments put themselves in the best possible position by allowing “a newsgathering defense” or requiring “an element of non-newsworthiness in their drone ‘surveillance’ statutes.”³¹⁴ Otherwise, these state statutes run a real “risk of being struck down as unconstitutional.”³¹⁵

VI. CONCLUSION

The images that come to mind when people think of Texas were once described as “that of bigness, of strength, of goodness.”³¹⁶ But since the birth of the Texas Privacy Act, this state has stood as a beacon against the lawful use of UAVs by journal-

³¹⁰ See David M. Remillard, Comment, *Highway to the Danger Drone: Reconciling First Amendment Rights of Drone Owners and Privacy Rights of Individuals in Creating a Comprehensive Statutory Scheme in Rhode Island*, 22 ROGER WILLIAMS U. L. REV. 640, 663–64 (2017); KAN. STAT. ANN. § 60-31a02(d)(1) (West 2018).

³¹¹ KAN. STAT. ANN. § 60-31a02(d)(2) (West 2018).

³¹² *Id.*

³¹³ See Remillard, *supra* note 310, at 663–64.

³¹⁴ Fischer, *supra* note 34, at 144.

³¹⁵ *Id.*

³¹⁶ Texas Agriculture (@TexasDeptofAg), TWITTER (July 18, 2016, 8:56 AM), <https://twitter.com/texasdeptofag/status/755038420393570304?lang=AR> [<https://perma.cc/8DW3-34FB>]. This quote has been attributed to Ninfa Laurenzo, otherwise known as “Mama Ninfa,” one of the most influential women in Texas history. See *Ninfa Laurenzo*, WOMEN TEX. HIST., <https://www.womenintexashistory.org/biographies/ninfa-laurenzo/> [<https://perma.cc/D866-AEV9>]; Patricia Sharpe, *We Remember Ninfa Laurenzo*, TEX. MONTHLY (Aug. 2001), <https://www.texasmonthly.com/articles/we-remember-ninfa-laurenzo/> [<https://perma.cc/L47N-JCLK>].

ists.³¹⁷ While the protection of an ordinary citizen's privacy will always be a goal worth defending, that purpose is tainted when it must abridge other fundamental rights in order to do so. Now that *National Press Photographers Ass'n v. McCraw* has pulled back the curtain, the country is watching to see what will happen to Texas UAV regulations.³¹⁸ One way or another, Texas will end up an example for just how far the protections of freedom of the press truly extend.

³¹⁷ See TEX. GOV'T CODE ANN. §§ 423.001–.009 (West 2013).

³¹⁸ See *supra* Part IV.