

No. 25-923

In the Supreme Court of the United States

MIKE YODER, DRONE DEER RECOVERY LLC, AND
JEREMY FUNKE,

Petitioners,

v.

SCOTT BOWEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF THE MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

*On Petition for a Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit*

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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INTRODUCTION

The challenge by Petitioners Mike Yoder, Drone Deer Recovery, and Jeremy Funke serves as a proper vehicle to resolve a circuit split over whether First Amendment protection of speech creation is conditioned on the speech being political. The principal response of Respondent Michigan Department of Natural Resources (Government or MDNR) to the petition is not a defense of the Sixth Circuit's rule. It is an effort to obscure what the Sixth Circuit actually held.

The Government repeatedly asserts that Petitioners "won" the question presented below because the Sixth Circuit acknowledged that the creation and dissemination of information are speech. *See* Respondent's Brief in Opposition (BIO) at 2, 9, and 10. But that characterization depends on collapsing two fundamentally different First Amendment concepts into one: (1) recognizing that a law may incidentally burden speech, and (2) recognizing protected speech creation is entitled to heightened scrutiny. The Sixth Circuit did the former while refusing to do the latter, and that distinction is the entire case. It is also precisely the problem Judge Bush identified in urging this Court's review. App. 49a-56a, 58a.

Petitioners argued that by applying a statutory ban on the taking of animals with a drone (Drone Statute) to Mr. Yoder, MDNR criminalizes his use of drones to generate and transmit factual location information, directly burdening protected speech creation. The Fourth and Ninth Circuits recognize that restrictions on acquiring or creating factual information implicate the First Amendment regardless of whether the

resulting speech is political. But the Sixth Circuit refused to treat Petitioners' drone-enabled information gathering as protected speech creation because it did not produce "traditional political speech." App. 19a-20a. Having imposed that limitation, the court declined strict scrutiny and instead treated Michigan's law as a mere regulation of conduct that only incidentally burdens speech.

The Government's Response never confronts that holding directly. Instead, it points to the Sixth Circuit's abstract acknowledgment that information creation can implicate First Amendment interests while ignoring the doctrinal consequence that followed: the court withheld the speech-inputs doctrine itself because Petitioners' speech was non-political. *Ibid.*

That is not agreement with Petitioners' position. It is the precise split Petitioners identified. Indeed, the Government's own merits defense confirms the conflict. It repeatedly recasts Petitioners' activity as ordinary conduct merely containing speech elements rather than protected speech creation. BIO at 13-14, 17-19. But that is exactly the disagreement dividing the circuits. The Fourth and Ninth Circuits do not permit governments to evade heightened scrutiny simply by relabeling restrictions on information gathering as conduct regulations whenever the resulting speech lacks political content.

Lastly, the Government's vehicle argument is makeweight. The Sixth Circuit expressly held that Petitioners have standing and proceeded to resolve the merits of the First Amendment question presented here. The Government's contrary argument merely relitigates standing on the merits.

If that were enough to defeat review, virtually every pre-enforcement First Amendment challenge would become uncertworthy whenever a respondent disagreed with the lower court's jurisdictional analysis.

At bottom, the Petition concerns criminalization by Michigan of Petitioners' use of speech inputs to create and transmit factual information. The Sixth Circuit let this stand because of its outlier limitation on speech inputs to the creation of political speech. The Government sidesteps this by attempting to recast this case as a burden on conduct that merely burdens speech incidentally. The Sixth Circuit was unequivocal. It withheld speech-input protection here because Petitioners' drones did not "generate 'traditional political speech.'" App. 19a-20a. Other circuits have rejected that limitation. This Court should grant review and resolve the conflict.

I. The Sixth Circuit Withheld First Amendment Protection Because Petitioners' Speech Is Non-Political

The Sixth Circuit withheld speech-input protection from Petitioners' drone-enabled information gathering because it did not produce "traditional 'political speech.'" App. 19a-20a. No other circuit has imposed that limitation.

The Government therefore incorrectly asserts that the Sixth Circuit resolved Petitioners' question favorably. BIO at 10-11. The error in the Government's position is its failure to distinguish between incidental burdens on speech and direct burdens on speech creation. The speech-inputs doctrine recognizes that the First Amendment protects not only dissemination of speech, but also the

creation of speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“the creation and dissemination of information are speech within the meaning of the First Amendment.”). Restrictions directed at speech creation therefore receive heightened scrutiny. *See id.* at 557, 564-65.

The Government’s Response depends on conflating two distinct categories of regulation. Some laws regulate conduct and only incidentally burden speech. Those laws may receive intermediate scrutiny. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991). But laws directed at the creation of speech burden the First Amendment directly. *See Sorrell*, 564 U.S. at 570. The Drone Statute falls into the latter category because Michigan applies it to prohibit Petitioners from using drones to generate and transmit factual information. The Sixth Circuit nevertheless withheld speech-input protection because Petitioners’ drones did not create “traditional political speech.” App. 19a-20a.

Although the Sixth Circuit acknowledged that the Drone Statute implicates First Amendment protection, it misidentified where the constitutional burden strikes. App. 19a-22a. It determined that the burden on Petitioner’s free speech rights is merely incidental and thus receives intermediate scrutiny. App. 22a-25a. And after drawing a distinct limitation on speech inputs to political speech creation, the court failed to apply strict scrutiny to the Drone Statute. App. 19a-20a. But the Drone Statute directly burdens Petitioners’ speech creation. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010) (“Laws enacted to control or suppress speech may operate at different points in the speech process.”). The Drone Statute “operates at the front end of the

speech process by restricting the use of a common, indeed ubiquitous, instrument of communication.” *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012). Mr. Yoder’s right to transmit location information “would be insecure, or largely ineffective, if the antecedent act of making” that information was “wholly unprotected.” *Id.* at 595.

The Sixth Circuit “sidestep[s] the First Amendment,” *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 828 (4th Cir. 2023) (*PETA*), by plainly restricting the speech inputs doctrine to the creation of political speech. App. 19a-20a. In declining to apply strict scrutiny to the Drone Statute that *Lichtenstein v. Hargett*, 83 F.4th 575, 584 (6th Cir. 2023), applies to speech inputs, the Sixth Circuit held, “*Lichtenstein* is not as broad as Plaintiffs suggest. Rather, *Lichtenstein*’s discussion of ‘speech inputs’ refers to ‘inputs’ that create traditional ‘political speech.’” App. 20a. A plain reading of the Sixth Circuit’s treatment of *Lichtenstein* shows that the court set a clear limitation on the speech inputs doctrine to the creation of political speech. This directly conflicts with the Fourth and Ninth Circuits, which have not limited protection of speech inputs to political speech creation. *PETA*, 60 F.4th at 828-29; and *Garcia v. Cnty. of Alameda*, 150 F.4th 1224, 1230-31 (9th Cir. 2025).

Consequently, the Sixth Circuit’s application of intermediate scrutiny is improper. Its rejection of strict scrutiny contravenes its acknowledgment of “rigorous[] review,” or “exacting scrutiny” to speech inputs by this Court. *Lichtenstein*, 83 F.4th at 585-86. Despite the Government’s application of the Drone Statutes to Mr. Yoder to “regulate something that the

Plaintiffs use to speak and thereby target or burden that speech,” *id.* at 586, the Sixth Circuit refused to recognize the drones as speech inputs and declined strict scrutiny in contravention of the First Amendment.

Judge Bush recognized the problem:

[T]he central authority for *Lichtenstein* came from the Court’s striking down the commercial speech restriction in *Sorrell*. So the panel was mistaken to the extent that it sought to distinguish *Sorrell* based on the non-political nature of Drone Deer Recovery’s speech.

App. 53a.

Sorrell itself confirms the error. It was not a political-speech case. This Court’s review is needed.

II. No Other Circuit Limits Speech Inputs to Political Speech

Other circuits recognize that restrictions on acquiring or creating factual information can burden protected speech without conditioning that protection on whether the resulting speech is political. The Sixth Circuit alone imposed that limitation here. App. 19a-20a.

The Government cites the Fifth Circuit as offering common ground, BIO at 14, but the Fifth Circuit applied intermediate scrutiny for a different reason. In *Nat’l Press Photographers Ass’n v. McCraw*, the Fifth Circuit applied intermediate scrutiny not because the information gathered was non-political, but because the press “has no special privilege to invade the rights and liberties of others.” 90 F.4th 770, 793 (5th Cir. 2024). *McCraw* nowhere suggests

that speech-input protection depends on whether the resulting speech is political.

The Government likewise ignores the absence of political line-drawing in the Fourth and Ninth circuits, asserting again that the Sixth Circuit is in broad agreement with those circuits based on the application of First Amendment jurisprudence. BIO 14-16. As detailed in the Petition and outlined above, neither circuit limited protection of speech inputs to political speech creation in the same way that the Sixth Circuit does, which is the actual dispute presented to this Court. *PETA*, 60 F.4th at 828-29; and *Garcia*, 150 F.4th at 1230-31.

Meanwhile, the Government acknowledges that the Third and Fifth Circuits establish a First Amendment right to record, BIO at 16, further demonstrating the Sixth Circuit's unfounded error in limiting that right to the creation of political speech. And the Government once again misses the point by citing agreement between these circuits and the Sixth Circuit on First Amendment implications. None of these circuits propose limiting protections of speech inputs to the creation of political speech. *Fields v. City of Philadelphia*, 862 F.3d 353, 358-60 (3d Cir. 2017) (declining to address limits on the constitutional right to record); *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (agreeing with other circuits to establish the First Amendment right to record police).

The Tenth Circuit notably suggested that protecting speech creation does not depend on distinguishing the purpose of the speech. In *Western Watersheds Project v. Michael*, the Tenth Circuit considered a statute that punished individuals for crossing private land to access adjacent areas to

collect resource data, including writing notes on habitat conditions, photographing wildlife, or taking water samples. 869 F.3d 1189, 1191-92 (10th 2017). The Tenth Circuit held that the statute regulates speech creation, noting, “An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.” *Id.* at 1196. It made no distinction between the creation of speech pertaining to wildlife, which is nonpolitical, and the creation of speech pertaining to police, which is in the public interest. *Ibid.* The Tenth Circuit added that resource data collection is protected because it furthers public debate, but it never set this as a condition of First Amendment protection. *See ibid.* The Sixth Circuit decided differently, demarcating the creation of speech that concerns public matters for exclusive protection.

III. Petitioners Have Standing to Bring a Pre-Enforcement Challenge to the Drone Statute

The Sixth Circuit already resolved standing in Petitioners’ favor, and nothing about the standing question prevents this Court from reaching the merits. App. 8a-14a. And for good reason. This case presents the ordinary features of a pre-enforcement First Amendment challenge: Petitioners wish to engage in conduct arguably protected by the First Amendment; the State publicly interprets its statute to prohibit that conduct; the statute carries criminal penalties; and the State refuses to disavow enforcement. That is more than sufficient to permit review. *See Susan B. Anthony List v. Driehaus*, 573

U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Petitioners plainly allege a substantial threat by the Government to enforce the Drone Statute against them. MDNR has already advised potential drone operators via email that it is unlawful to use drones in any manner related to hunting, including locating a deer *after* it has been shot. App. 73a ¶¶ 32-33. And the Drone Statute has no exemptions that would make the threat of enforcement remote. App. 73a-74a ¶¶ 34-37. Contrary to the Government's view, Petitioners are not required to violate the Drone Statute and subject themselves to prosecution to establish standing. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The Sixth Circuit found standing, reached the merits, and announced the rule Petitioners challenge here. The Government identifies no genuine obstacle preventing this Court from resolving the split.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted,

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