No. 13-16473

In the

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAURA LEIGH
Plaintiff - Appellant

vs.

SALLY JEWELL,
in her official capacity as Secretary of the
U.S. DEPARTMENT OF THE INTERIOR,
NEIL KORNZE,
in his official capacity as Principal Deputy Director of the
BUREAU OF LAND MANAGEMENT,
AMY LUEDERS,
in her official capacity as Nevada State Director of the
BUREAU OF LAND MANAGEMENT,
Defendants - Appellees

On Appeal from the U.S. District Court
for the District of Nevada

BRIEF OF APPELLANT, LAURA LEIGH

Gordon M. Cowan
Law Office of Gordon M. Cowan
P.O. Box 17952, Reno, NV 89511 USA
10775 Double R Blvd., Reno, NV 89521 USA
Phone 775.786.6111

Counsel for Plaintiff-Appellant LAURA LEIGH

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant LAURA LEIGH is a journalist and photojournalist. Her legal efforts are supported by WILD HORSE EDUCATION, a Nevada nonprofit corporation whose principal place of business is in Carson City, Nevada. WILD HORSE EDUCATION has no subsidiary, parent or affiliate entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Codes

Acts and Public Laws

Treatises

Suggested Reading

JURISDICTIONAL STATEMENT

Ms. Laura Leigh, the plaintiff-appellant, appeals from the denial of her motion for preliminary injunction.

Original jurisdiction in the district court is based on a federal question. 28 U.S.C. § 1331. The principal claim arises under the First Amendment to the United States Constitution. U.S. Const., amend I. Original jurisdiction also occurs where the Defendants-Appellees are federal agencies. 28 U.S.C. § 1346.

Appellate review is by right where an interlocutory order of the district court refuses a preliminary injunction. 28 U.S.C. § 1292(a)(1).

On July 19, 2013 the district court's written order denied Ms. Leigh's Motion for Preliminary Injunction. ER 1. ("ER" references pages of the "Excerpts of Record"). The order denying relief follows this court's remand decision and order. ER 257, 258-276. See, *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012).

Ms. Leigh filed her Notice of Appeal July 19, 2013. ER 22. This is the same date the order denying relief was entered. ER 1.

ISSUES PRESENTED

Question 1 Are the agency's viewing restrictions unconstitutional?

Question 2 Does the district court commit reversible error or abuse its discretion when ignoring substantial evidence that the agency's "access" restrictions violate or harm another's First Amendment rights?

Question 3 Are the "public safety" and "administrative convenience" interests identified by the district court essential in this instance to preserve *higher values* to those of First Amendment concerns, and which must override the First Amendment rights of the public and press and Ms. Leigh to observe government activity and to gather and report the news?

Question 4 Does the district court commit reversible error or abuse its discretion when failing to particularly analyze or explain how administrative convenience and public safety issues identified by the district court, are *higher values* to that of the fundamental First Amendment notions involved?

Question 5 Did the agency in this instance "narrowly tailor" enforcement of its overriding concerns when restricting Ms. Leigh's (and others) access to observe government activity and to gather news? Were they arbitrarily enforced? Were they discriminatory to Ms. Leigh?

Question 6 Did the district court commit reversible error or abuse its discretion when denying Ms. Leigh preliminary injunctive relief?

STATEMENT OF THE CASE

Constitutional Provision Involved

"Congress shall make no law ... abridging the freedom of speech, or of the press...." U.S. Const., amend 1.

Nature of Case, Remand from Ninth Circuit and Course of Litigation

This case presents as an appeal from the district court's July 19, 2012 order denying Ms. Leigh's motion for preliminary injunction, following remand. ER 1.

Ms. Leigh is a photojournalist and credentialed press with Horseback Magazine. She possess a deep and abiding interest in ensuring that both her's and the public's right of access to observe government activity and to report its newsworthy aspects, a right guaranteed by the First Amendment, are not further compromised as they have been thus far, in this case.

This matter challenges an agency's repeatedly burdensome and unnecessary restrictions which prevent Ms. Leigh from reasonable access to the government activity she seeks to observe, which prevents her from gathering news. Ms. Leigh contends her viewing restrictions violated her First Amendment right to observe government activity.

Ms. Leigh published her photos and videos which show the methods employed by the BLM when they round up and warehouse wild horses removed from public lands. Her photos and videos sparked public debate and concern. One of Ms. Leigh's videos had been viewed by nearly three million viewers to date, on the website, "You Tube," found when "googling," *Is it Bad Enough for You Wild Horses*.

Ms. Leigh's photos resultantly became unpopular with the agency. The

government then crafted restrictive protocols, continually changing, which effectively foreclose Ms. Leigh's meaningful public observation of these activities.

To be clear, Ms. Leigh seeks reasonable access to (1) have unobstructed views of the capturing of wild horses, (2) assess the health condition of horses so captured, (3) view the corralling, loading, shipment, transportation and the "holding facilities" where the horses are "warehoused," after their capture.[1]

This case involves roundups at the location known as "Silver King," in a remote region in northern Nevada. Initial roundups sparked the filing of this lawsuit. Roundups are expected to continue later this year or early next year in the same location, Silver King, and Ms. Leigh will be there.

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[1] It appears necessary to settle the dispute over what the district court coins as "unlimited access" versus what the plaintiff truly seeks. No document filed by the plaintiff and no document the district court could unearth, uses the term "unrestricted access" or "unlimited access" with implication that the plaintiff could, somehow, come and go anywhere or wherever she pleases during the government roundup activities or elsewhere following the shipment of captured wild horses, even though such access had been allowed historically, before Ms. Leigh began publishing her photos.

Rather, the plaintiff has sought all along, reasonable access to *all facets* of the agency's handling of wild horses, from the time the horses are corralled and rounded up, through the time they remain "stored" in government sponsored warehouses the agency labels as "holding facilities." See, e.g., Complaint, ER 551-579; Amended Motion for Preliminary Injunction, ER 479-504.

Ms. Leigh even found it necessary to file a "Notice - Point of Clarification" (ER 25-28) to make clear her requested relief. Even so, the district court continued to characterize her requested relief as seeking "unrestricted access," a term "sold" to the court when the agency portrayed the requested relief as being unreasonable.

In recent hearing (February 19-20, 2013) Mr. Ben Noyes, BLM's Wild Horse and Burro Specialist for Silver King roundups, confirmed the BLM would return to Silver King sometime in 2013 or early 2014 to round up horses because the horse population is currently over "AML" (acronym for ""appropriate management level," a phrase coined by the BLM). See Mr. Noyes' testimony on rounding up horses this year at ER 201-212.

The district court denied Ms. Leigh's first motion for preliminary injunction. ER 280. On appeal, the Ninth Circuit found the First Amendment right of access at the core of its decision to remand the case for further analysis. ER 258. This court stated the following:

> [T]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Thus, courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.
>
> * * *
>
> We hold that the *Press–Enterprise II* test applies to Leigh's claim that the BLM's viewing restrictions violate her First Amendment rights.[2]
>
> ER 258, *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012).

When concluding "[t]he district court failed to conduct the proper First Amendment analysis," *Id.*, this court remanded with the following instruction:

> Accordingly, we reverse the denial of the preliminary

[2] *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735 (1986) *(Press Enterprise II)*.

> injunction. We remand this case for the district court to conduct the analysis that *Press–Enterprise II* requires. First, the district court must determine whether the public has a right of access to horse gathers by considering whether horse gathers have historically been open to the general public and whether public access plays a positive role in the functioning of gathers. Second, if the district court determines that a right of access exists in this case, it must determine whether the BLM has overcome that right by demonstrating an overriding interest that the viewing restrictions are essential to preserve higher values and are narrowly tailored to serve those interests.
>
> ER 258, *Leigh v. Salazar*, 677 F.3d at 901.

On remand the district court received two-days of testimony where substantial evidence was offered on these topics.

The hearing transcript is remarkable with witness accounts that included members of the public, interested wild horse advocates, one who traveled as far as from Illinois to attend the hearing. Also testifying was a best-selling children's book author and also Ms. Leigh who, in the past three years attended more BLM roundups than has *any* BLM employee. ER 139-141.

Each witness outlined their traditional access before restrictions were imposed. Some gave known (undisputed) historical accounts of the public's access to roundups prior to their involvement. ER 33-198, 217-253. One witness, when a child, had the pleasure of meeting Wild Horse Annie (ER 35). Ms. Farley helped Annie with her letter writing campaign (ER 35) which ultimately caused Congress to pass unanimously, the Wild Free Roaming Horses and Burros Act of 1971.

P.L.92-195. See, 16 U.S.C. §§ 1331 *et seq.*

This testimony confirms there were no access restrictions until recent times. Before restrictions, government officials were friendly and helpful. The public was welcome to come right up to the pens to view captured horses. ER 36-39. The public was allowed up-close to the wild horse traps (where horses are actually captured), to see the wild horses up-close, even while being rounded up during helicopter roundup operations. *Id.*, ER 147-162. No one was hurt. No one became concerned. The public remained safe. All was good absent restrictions. No one kicked viewers out even when holding differing thoughts of the government's process. Ms. Farley, who did not agree with the roundup process, even dedicated her first published children's book, a world-wide best-seller, to the BLM employees whom she found helpful during these early roundups. ER 36-39.

This was but the surface of the evidence offered to the district court on remand. ER 29-200, 213-254.

The district court next identified multiple benefits the public's involvement plays when involved with wild horse roundups. Among them, the district court acknowledged that "news gathering for the benefit of the public" is important. ER 15. And, "plaintiff Leigh testified, public access allows individuals to report on the government's activities as well as the health and condition of the gathered horses." ER16. The court confirmed that even BLM employees admitted the

public has a right of access to gather activities and that public access plays a significant role in the function of the roundups. ER 16.

The District Court's Findings At Issue

After finding that the public maintains a right of access because it was proven as a historical and a beneficial process, incredibly, the district court concluded that (1) the efficiency of the wild horse roundups and (2) the safety of the public and those involved, are more important and override the important First Amendment right of access to gather news. ER 1-22. The district court also concluded that the agency "narrowly tailored" its access restrictions, even though substantial evidence permeated the record demonstrating that the limited "access" was unreasonable, was arbitrarily granted or denied, and most often, was non-existent.

Also, the district court failed to consider whether Ms. Leigh was singled-out, or whether her access was reduced or denied in a discriminatory manner when compared with the access that others enjoyed, after Ms. Leigh's published photos were to blame for the agency having incurred a public sentiment "black eye." Ms. Leigh's "discriminatory access" is raised in the first preliminary injunction motion (CR 12, ER 521, 529 *et seq*.), it is raised in the amended preliminary injunction motion (CR 16, ER 479, 492 *et seq*.) and raised again in hearings. See, transcript, ER 163 *et seq*. The issue is foregone by the district court.

The district court fatally misconstrues or avoids the great weight of evidence

which contradicts its conclusion (discussed below). The district court also misconstrues or misapplies the gravamen of the near strict scrutiny analysis required in this instance, mandating that, "the government may overcome that right *only* by demonstrating "an overriding interest based on findings that closure is *essential to preserve higher values* and is *narrowly tailored to serve that interest.*" *Leigh*, 677 F.3d at 898 (quoting *Press Enterprise*, 106 S.Ct. 2735, with internal citation omitted)(emphasis added).

Although required to do so under the constitutional analysis, the district court never explains or analyzes in detail, how the agency's administrative convenience and safety concerns, raised in this instance, are somehow "essential to preserve *higher values*" to that of the fundamental First Amendment notions meant to foster transparency in government.

The district court also fails to examine and distinguish for constitutional concerns, the disparity and inequity in the much less restricted access the public and Ms. Leigh enjoyed in earlier roundups and at holding facilities (access which the agency never disputes), versus the prohibitive restrictions Ms. Leigh and others must now endure at roundups and at holding facilities. This is never explained.

STATEMENT OF FACTS

Ms. Leigh is a wild horse journalist, photojournalist and credentialed media for Horseback Magazine. ER 139. She travels to Bureau of Land Management ("BLM") wild horse roundups to observe and report to the public what she sees and captures on film or what she is otherwise able to physically view. She also travels to "facilities" used by the government to warehouse captured wild horses, to likewise film and pass on to the public what she observes. See generally ER 108-150, 186-199.

The public reads Ms. Leigh's material. The public looks at her videos. Ms. Leigh's published material is disseminated on the Internet, is used by news media, and is occasionally found in hard copy publications. The public formulates thought, impressions and opinions through the eyes of Ms. Leigh's work and camera unless the government restricts or blocks her from viewing the Appellees' work. *Id.*

Restricted access to view wild horse roundups

> If somethin' happens we're gonna correct it quickly; just like we talked about. If it's a broken leg, gonna put it down. We're gonna slide it on the trailer; same thing; we're gonna go to town with it. ***We're not gonna give them that one shot they want.***
>
> (BLM contractor, talking in the open range at Twin Peaks Roundup Recorded by Clare Major, New York Times, Aug. 27, 2010) (Emphasis added). ER 496.

When Ms. Leigh's photos, videos and reports began circulating among the

public of what she was able to capture with her camera at wild horse roundups, her access thereafter became virtually non-existent. In apparent dislike of Ms. Leigh's published subject, Ms. Leigh's further close-up access to observe crucial moments of wild horse captures, ceased. Ms. Leigh has since, no longer been able to observe at these crucial times, the focus here being Silver King.

Restricted access to view wild horse warehousing

Ms. Leigh and the public had previously been allowed access to some of the "facilities" where the BLM ships and stores or warehouses captured wild horses. Her access evaporated there as well after her photos and videos circulated. Ms. Leigh has since been entirely foreclosed from gaining access to these same wild horse warehouses ("Indian Lakes") except during rare, sanitized tours lasting about an hour or more, in which she and others were previously given considerably more access than with sanitized tours. Once again Ms. Leigh is precluded from reporting what would have been her observations at these facilities. Even her remedy of buying cameras to give to the BLM to observe unobtrusively in that fashion, were rejected by the BLM.

It is not disputed, whether public or privately owned, that these wild horse warehouses are operated, managed and/or maintained with U.S. government funds. These facilities are controlled at the instance of the BLM. These facilities house a federal public resource – wild horses taken from public lands – supposedly

protected by an entire Act of Congress, The Wild Free-Roaming Horses and Burros Act of 1971, P.L. 92-195, 16 U.S.C. § 1331 et. seq. ("Wild Horse Act").

The true reason wild horse holding facilities are closed to the press and public is, as one BLM official (not a private individual) writes, because of, "[the] *damage that is being done to BLM's image as a result of the [public] tours*."
(Email from BLM's Bolstad of May 25, 2010).
ER 326-327. Emphasis added.

SUMMARY OF ARGUMENT

The District Court Committed Reversible Error

The district court:

1. Ignored the great weight of the evidence, permeating the record, demonstrating that the BLM's "access" given Ms. Leigh and the public was unreasonable, was arbitrarily granted or denied, and was, most often, non-existent. The district court avoids the great weight of the presented evidence which contradicts its conclusions;
2. failed to consider whether Ms. Leigh was singled-out, or whether her access was reduced or denied in a discriminatory manner when compared with the access that others enjoyed even though these matters were raised in the motions and during evidentiary hearing;
3. misconstrues or misapplies the gravamen of the near strict scrutiny analysis required in this instance, mandating that, "the government

may overcome that right *only* by demonstrating "an overriding interest based on findings that closure is *essential to preserve higher values* and is *narrowly tailored to serve that interest.*" *Leigh v. Salazar*, 677 F.3d at 898 (quoting *Press Enterprise*, 106 S.Ct. 2735, with internal citation omitted)(emphasis added);

4. never explains or analyzes in detail, how the agency's administrative convenience and safety concerns, raised in this instance, are somehow "essential to preserve *higher values*" to that of the fundamental First Amendment notions meant to foster transparency in government. *Id.*;

5. fails to examine and distinguish for constitutional concerns, the disparity and inequity between the much less restricted access the public and Ms. Leigh enjoyed in earlier roundups and also at holding facilities (which the BLM never disputes), versus the prohibitive restrictions Ms. Leigh and others must now endure at roundups and at holding facilities that keep Ms. Leigh and others from observing and reporting what truly occurs;

6. failed to conclude, in the wake of overwhelming evidence, that the BLM's restrictions were unconstitutional.

The BLM's Restrictions are Unconstitutional

1. The BLM's restrictions are not overriding concerns that are somehow

"essential to preserve *higher values*" to that of the fundamental First Amendment notions involved;

2. The BLM's restrictions are not "narrowly tailored" but instead, were arbitrarily granted or denied, and most often, access was non-existent.

3. The BLM's access restrictions effectively prevent the observation of government activity and quell news gathering. By denying public and press access to observe government activity, the government in practice, effectively censors the publication of materials with respect to coverage of newsworthy, public interest matters, contrary to First Amendment notions of a free press and free speech.

Preliminary Injunctive Relief is Appropriate

1. Ms. Leigh's evidence satisfies all requirements for the issuance of a preliminary injunction.

ARGUMENT

Background to Controversy

One of America's most shameful atrocities is how the BLM systematically removes America's wild horse from the landscape. The BLM's process is brutal. Horses are oftentimes maimed or killed or mishandled during BLM roundups. Ms. Leigh's camera captured these moments before subsequent restrictions to her access changed, and which foreclosed Ms. Leigh from catching those moments

with her camera, now except in rare instances, where photos are taken afar.

In holding facilities, the condition of many horses were found by Ms. Leigh to be dreadful. Her published photos demonstrated this. Once her photos circulated, restrictions were imposed, precluding meaningful observation of America's wild horses, in this case, Silver King horses, who remain public resources wherever situated in the BLM removal system.

When a journalist like Ms. Leigh observes and records images of the BLM's methodology of capturing and storing wild hoses, and then publishes these images, the images create embarrassing moments for the BLM which must attempt if they can, to explain how their conduct amounts to reasonable management. Of course, there is no valid explanation for these atrocities since the BLM is charged with managing wild horses *humanely* under the Wild Horse Act. See, 16 U.S.C. §§1333(b)(2)(iv)(A), (B), (C), 1338a. Rather than change the conduct to avoid harsh images, the BLM's chosen "damage control" is to remove the journalist, in this instance, Ms. Leigh.

It is the truth found in the reporting of observation and in photos and videos that precipitates the removal of journalists like Ms. Leigh. Remove the journalist and her camera, there is no story and no photos.

The Remand

On remand the district court was instructed to apply the standard of the well-

established qualified right of access balancing test set forth in *Press–Enterprise Co. v. Superior Court* ("*Press–Enterprise II* "), 478 U.S. 1, 8–9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). See, *Leigh v. Salazar*, 677 F.3d 892, 894 (9th Cir. 2012).

The District Court Committed Reversible Error

When making factual determinations, the district court ignored the great weight of the evidence, permeating the record, demonstrating that the BLM's "access" given Ms. Leigh and the public was unreasonable, was arbitrarily granted or denied, and was, most often, non-existent. The district court avoids the great weight of the presented evidence which contradicts its conclusions. See, ER 29-107, 108-150, 186-199, 200-255, 328-436, 439, 462-465, 466-470, 473-478, 505-508, 511-520, 542-550. The district court's factual determinations are reviewed for clear error. *Klein v. City of San Clemente,* 584 F.3d 1196, 1200 (9th Cir.2009).

The district court also failed to consider whether Ms. Leigh was singled-out, or whether her access was reduced or denied in a discriminatory manner when compared with the access that others enjoyed. Ms. Leigh's "discriminatory access" is raised in the first preliminary injunction motion (CR 12, ER 521, 529 *et seq*.), it is raised in the amended preliminary injunction motion (CR 16, ER 479, 492 *et seq.*) and raised again in hearings. See, transcript, ER 163 *et seq*. The district court does not address this issue. This is error or an abuse of discretion.

The district court misconstrues or misapplies the gravamen of the near strict

scrutiny analysis required in this instance, mandating that, "the government may overcome that right *only* by demonstrating "an overriding interest based on findings that closure is *essential to preserve higher values* and is *narrowly tailored to serve that interest.*" *Leigh v. Salazar*, 677 F.3d at 898 (quoting *Press Enterprise*, 106 S.Ct. 2735, with internal citation omitted)(emphasis added). This is error.

The district court does not provide analysis on how the BLM's "administrative convenience," described by the district court as efficiently running horse roundups, is somehow a "higher value" to that of one's constitutional First Amendment freedoms. Contrarily, an agency's "administrative convenience" most always takes a "second seat" to all important constitutional notions, as aptly demonstrated in the following statement from the *Frontiero* case:

> "Our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'
>
> * * *
>
> there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.
>
> *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S. Ct. 1764, 1772, 36 L. Ed. 2d 583 (1973)

The district court's "public safety" analysis falters for the same reason, but even more so, where evidence clearly demonstrates the disparity and inequity between the much less restricted access the public and Ms. Leigh enjoyed in

earlier roundups and also at holding facilities (which "access" the BLM never disputes), versus the prohibitive restrictions Ms. Leigh and others must now endure at roundups and at holding facilities, that keep Ms. Leigh and others from observing and reporting what truly occurs afar or behind closed doors. ER

Here, the court fatally misapplies or ignores important facts offered at hearing. The court also fails to explain the disparity in access from what was allowed previously, to what is restrained today. This is error.

Also, the district court never provides a detailed explanation or analysis on how the BLM's administrative convenience and safety concerns are "essential to preserve *higher values*" to that of the fundamental First Amendment notions meant to foster transparency in government. As the remanding court emphasized, "[T]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Leigh v. Salazar*, 677 F.3d at 900 (quoting *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 510, 104 S. Ct. 819, 824, 78 L. Ed. 2d 629 (1984)(*Press-Enterprise I*)). Failing to do so , in this instance, is error.

Regarding wild horse holding facilities to which Ms. Leigh is denied reasonable access: The district court followed an oblique course when citing "bomb threats" having occurred elsewhere, even afar from the State of Nevada, to justify the restrictions imposed at the wild horse holding facilities in Nevada. No

one contends that Ms. Leigh or any other witness who supported the motion at hearing, are, somehow, "security risks." No evidence supports that a bomb was threatened at the very facilities to which Ms. Leigh seeks access. Incredibly, no evidence demonstrates that the closure or restrictions at the facilities Ms. Leigh seeks to gain access, was based on bomb threats having occurred there or elsewhere. To the contrary, Ms. Dean Bolstad (a BLM management official) sent email confirming the facility closure was because of, "[the] *damage that is being done to BLM's image as a result of the [public] tours*."

(Email from BLM's Bolstad of May 25, 2010). ER 326-327. Emphasis added.

The district court follows a strained interpretation that fails to support the "narrowly tailored" concept it must find before preferring a "safety" concern to that of one's constitutional freedoms. This, too, is error.

Standard of Review

A district court's legal conclusions are reviewed *de novo*, and its application of the preliminary injunction factors are reviewed for abuse of discretion. *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1119 (9th Cir.2009). The district court's factual determinations are reviewed for clear error. *Klein, supra.*

Also, a district court's determinations on mixed questions of law and fact that implicate constitutional rights, are reviewed *de novo*. See *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009); *Cogswell v. City of Seattle*, 347 F.3d 809,

813 (9th Cir.2003). Where key "issues aris[e] under the First Amendment," the court conducts an independent review of the facts. See *Rosenbaum v. City & County of S.F,* 484 F.3d 1142, 1152 (9th Cir.2007).

Fundamental First Amendment Notions of Access and Reporting Government Activity Are Repeatedly Restrained

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., amend. I.

The artificial impediments and restrictions imposed by the BLM constantly challenge Ms. Leigh. To a photojournalist, to have no observation means there is no story. In this instance, the true story involves the crucial interaction between the BLM and the wild horses. Where the BLM must manage wild horses "humanely," this crucial view is at the core of the controversy. This is what engenders public interest. Without independent observation, the public and Ms. Leigh must accept, time after time, the BLM's "spin" or version of what transpires in secret, away from public scrutiny.

> Secrecy in government is fundamentally anti-democratic . . . perpetuating bureaucratic errors.
>
> *New York Times v. U.S.,* 403 U.S. 713, 724, 91 S. Ct. 2140, 2136, 29 L. Ed. 2d 822 (1971) (Concurring opinion by the Hon. William O. Douglas)

If it is determined the BLM's restrictions or rules violate the Constitution, those

rules must be invalidated.[3]

The *wrongness* of the Appellees' conduct is emphasized by the words of an iconic jurist who conveyed the following, important message:

> The Press was protected so that it could bare the secrets of the government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people. . . .
>
> Justice Hugo Black, in his concurring opinion with whom Justice William O. Douglas joined in the "Pentagon Papers" case, *New York Times v. U.S.*, 403 U.S. at 717.

This court, when last reviewing this very case before remand, emphasized the following concept:

> Open government has been a hallmark of our democracy since our nation's founding. As James Madison wrote in 1822, "a popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings Of James Madison 103 (G. Hunt ed. 1910).
>
> *Leigh v. Salazar*, 677 F.3d at 897.

The evidence suggests that the BLM's excuses for restricting Ms. Leigh's access, based on "safety" or for the "efficiency of roundups," are but excuses to keep good journalists afar from the activity. For reasons stated, the restrictions imposed remain unconstitutional.

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[3] See, *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir.1979). See also, *Small v. Operative Plasters' and Cement Masons' International Ass'n Local 200 AFL*, 611 F. 3d 483 (9th Cir. 2010).

Preliminary Injunctive Relief: the District Court Abused its Discretion Where the Record Aptly Demonstrates Ms. Leigh's Immediate Entitlement to Injunctive Relief

***Standard of Review**:*

A district court's legal conclusions are reviewed *de novo*, and its application of the preliminary injunction factors are reviewed for abuse of discretion. *Stormans, supra*. The district court's factual determinations are reviewed for clear error. *Klein, supra.*

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions, the purpose of which are to preserve the *status quo* pending resolution on the merits.[4] In the usual course the court reviews the district court's denial of a preliminary injunction under an abuse of discretion standard.[5] Discretionary abuse occurs when the district court bases its decision "on an erroneous legal standard or clearly erroneous finding of fact." *Id.*

Winter Factors

A court may grant a preliminary injunction only if the plaintiff establishes four elements: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm absent a preliminary injunction; (3) the balance of equities tips in the plaintiff's favor; and (4) injunctive relief is in the public interest. *Winter v.*

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[4] *Chalk v. U.S. District Court*, 840 F. 2d 701, 705 (9th Cir. 1988).

[5] *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008)(en banc), *overruled, other grounds*, *American Trucking v. Los Angeles*, 559 F.3d 1046 (9th Cir. 2009).

NRDC, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). This court follows this traditional inquiry and also uses its "serious questions" test when applied to *Winter's* four part criteria.[6]

This court already disagreed with the district court's conclusion that Ms. Leigh would not likely succeed on the merits, and it disagreed that Ms. Leigh did not establish a valid First Amendment claim. See *Leigh v. Salazar*, 677 F.3d at 896. Perhaps this is why the district court did not conduct a *Winters* analysis this last round, following remand.

Likelihood of Success on the Merits

Ms. Leigh's strongest argument is that she is repeatedly stripped of her constitutional freedoms by being kept afar, whether from roundups or from holding pens or from holding facilities. Her preclusion not only affects Ms. Leigh adversely, but also the public loses out where Ms. Leigh is denied the opportunity to observe and report. This *is* the very constitutional violation at stake.

When previously visiting this case, this court was reminded of the profound efforts of key struggles by individuals who helped provide transparency in government. "Indeed, this transparency has made possible the vital work of Ida Tarbell, Rachel Carson, I.F. Stone, and the countless other investigative journalists who have strengthened our government by exposing its flaws." *Leigh*, at 897.

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[6] *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011)(en banc).

So long as the district court is able to follow and apply prevailing authority to appropriate facts, Ms. Leigh's "likelihood of success" remains probable. The authorities against this type preclusion from open government are overwhelming and if included herein, would spill-over well beyond the page count allowed this brief.

At the very least, "serious questions" going to the merits are raised. See, *Alliance For The Wild Rockies, supra.* (Serious questions going to the merits and hardship balance that tips sharply toward plaintiff can support issuance of preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest).

Irreparable Harm

Irreparable harm to Ms. Leigh is clearly outlined in the record. See ER cites herein, pp. 7, 16.

> "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary injunction.[7]

Balance of Hardships

The hardship to the BLM is they must accommodate Ms. Leigh as they had before they began imposing unnecessary and unreasonable restrictions. Where is

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[7] *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); see also *SOC, Inc. v. County of Clark*, 152 F. 3d 1136, 1148 (9th Cir.1998); *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959 (9th Cir. 2002).

the harm? How is this harmful to the BLM where Ms. Leigh's access to roundups was successfully engaged previously? The BLM previously accommodated the press and the public until Ms. Leigh published her material, after which, Ms. Leigh found herself foreclosed from the process. What changed besides hurt feelings?

The BLM selectively allows others including young children, to stand alongside the wild horse traps during "capture" moments, even after their restrictions on Ms. Leigh began. How would the journalist cause a safety issue compared with these young children? Also, how is it burdensome to allow the press and public into facilities to view the condition of the horses to independently determine for themselves (rather than taking someone's word for it), how those wild horses are maintained by their steward, the BLM?

The hardship to Ms. Leigh is clear and overwhelming. Once removed she's foreclosed from reporting the very activity she came to observe. She's stripped of her constitutional freedoms in each instance where she and her camera are removed. Her story should be about the horses, not about how the BLM foreclosed her access.

Ms. Leigh can never recoup those moments when she was denied freedoms which the drafters of the First Amendment promised her. One never knows what the future brings or where the next opportunity lies for journalists who are able to

observe and report newsworthy matters. When denying access, the BLM removes these opportunities to press members and to aspiring journalists and photojournalists, many of whom still have that *gleam in their eye* for the next big story. The BLM's restrictions and "games," dulls the luster of promising news gatherers.

Public Interest

This analysis requires consideration of whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Cal. Pharmacists Ass'n v. Maxwell-Jolly,* 596 F.3d 1098, 1114-15 (9th Cir.2010) (internal quotations omitted).

The benefits of allowing public and press observation of how government functions is significant. The strongest benefit to allowing such access is to foster the public's protection against the government's censorship of information, as has been previously outlined. Although this is not truly a "prior restraint" case, the following quote is relevant to the discussion:

> [a]t its core, the prior restraint doctrine is linked to the core aversion to censorship that the First Amendment embodies. Prior restraints are simply repugnant to the basic values of an open society.[8]

In this specific instance, the handling of America's wild horses that are

[8] Smoller and Nimmer on Freedom of Speech, Vol II, § 15.10 (2010). See also, *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F. 2d 590, 595 (9th Cir. 1985).

supposedly "protected" by an act of Congress, has significant newsworthy interest. One need only look through the internet to see its popularity, even in foreign countries where others are enamored with America's settling of the West. The subject matter is newsworthy and timely.

An "On Point" Example of Why Access Is Important

Ms. Farley, the children's book best selling author, attributes her success in having sold 2.5 million copies worldwide (published in 27 different languages) of the book that is received in evidence in this case, *Phantom Stallion*, to her having been given the opportunity to watch early roundups, up-close and personal, when restrictions were honest and fair, allowing her reasonable viewing. Her book is about these very BLM roundups, in Nevada. ER 44-48. She would not have been blessed with that opportunity with today's restrictions. *Phantom Stallion* is perhaps, more widely read than any of the authorities cited herein, except, of course, the First Amendment.

CONCLUSION

Ms. Leigh seeks reversal of the district court's denial of her Amended Motion for Preliminary Injunction.

Ms. Leigh respectfully asks the court, based on her having endured two appeals, to rule in her favor and grant the requested injunctive relief, before the

BLM would claim that all is "moot" at the year's end when their Environmental Assessment expires.

Respectfully, September 6, 2013

LAW OFFICE OF GORDON M. COWAN
Reno, Nevada

s/ Gordon Cowan

Gordon M. Cowan, Esq.,
for Plaintiff-Appellant LAURA LEIGH

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 32(a)(7)(c) the Motion herein is proportionately spaced, has a typeface of 14 points in Roman style type and contains less than 6,900 words exclusive of tables and certificates.

LAW OFFICE OF GORDON M. COWAN
Reno, Nevada

s/ Gordon Cowan

Gordon M. Cowan, Esq.,
for Plaintiff-Appellant LAURA LEIGH

STATEMENT OF RELATED CASES

This case is on remand following this court's decision in *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012).

Ms. Leigh is not aware of any related case pending before this court.

LAW OFFICE OF GORDON M. COWAN
Reno, Nevada

s/ Gordon Cowan

Gordon M. Cowan, Esq.,
for Plaintiff-Appellant LAURA LEIGH

PROOF OF SERVICE

I certify I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Ninth Circuit by using the appellate CM/ECF system on September 6, 2013. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

LAW OFFICE OF GORDON M. COWAN
Reno, Nevada

s/ Gordon Cowan

Gordon M. Cowan, Esq.,
for Plaintiff-Appellant LAURA LEIGH