

No. 13-16473

**United States Court of Appeals
for the Ninth Circuit**

LAURA LEIGH,
Plaintiff-Appellant,

v.

SALLY JEWELL, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEVADA

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, THE NATIONAL PRESS
PHOTOGRAPHERS ASSOCIATION AND 13 OTHER NEWS
MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-
APPELLANT URGING REVERSAL

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- Battle Born Media LLC is a privately owned company with no affiliates or subsidiaries that are publicly owned.
- First Amendment Coalition is a nonprofit organization with no parent company. It issues no stock and does not own any of amici's stock.
- The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

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- Stephens Media LLC is a privately owned company with no affiliates or subsidiaries that are publicly owned.
- Student Press Law Center is a 501(c)(3) not-for-profit corporation that has no parent and issues no stock.
- Society of Professional Journalists is a non-stock corporation with no parent company.

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IDENTITY OF AMICI AND INTEREST IN THE CASE

Amici, on behalf of the journalists that they represent, have an interest in upholding the public's right of access to public places for the purpose of newsgathering and informing the public on matters of public concern. This interest is particularly strong in cases in which restrictions on public access compromise the ability of the press to fulfill its constitutional obligation to hold the government accountable to the people through reporting on governmental actions. The district court's order refusing injunctive relief is of concern to *amici* because it gives excessive weight to the Government's justifications for limiting access to the horse gathers, and insufficient weight to the right of access to such activities.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The National Press Photographers Association ("NPPA") is a 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's almost 7,000

members include video and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

With some 500 members, American Society of News Editors (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary

and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Battle Born Media LLC publishes weekly newspapers in rural Nevada, including the *Ely Times*, *Eureka Sentinel*, *Lincoln County Record* and the *Mineral County Independent*.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The Nevada Press Association is the formal trade organization for the newspaper industry in Nevada. It is a voluntary non-profit organization that represents 7 daily and 35 weekly newspapers in Nevada and the Lake Tahoe region of Northern California, as well as two online news services.

The *Reno Gazette-Journal*, published by Reno Newspapers, Inc., is a daily newspaper serving northern Nevada. The newspaper also operates a website serving its readers at www.rgj.com.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Stephens Media LLC is a nationwide newspaper publisher with operations from North Carolina to Hawaii. Its largest newspaper is the *Las Vegas Review-Journal*.

Student Press Law Center (“SPLC”) is a nonprofit, nonpartisan organization which, since 1974, has been the nation’s only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

SOURCE OF AUTHORITY TO FILE (PARTIES' CONSENT)

Pursuant to the Federal Rules of Appellate Procedure, Rule 29(a), all parties have consented to the filing of this brief.

FED. R. APP. P. 29(c)(5) STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, Rule 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than *amici*, their members or counsel – contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The public has a right to *see* what happens during wild horse roundups on Bureau of Land Management (BLM) lands. Because of their remote location, the only effective way for the public to monitor BLM's activities is through visual recordings by media representatives such as plaintiff-appellant Laura Leigh. Although the court below correctly recognized that there is a public and press right of access to such activities, it gave excessive weight to the Government's justifications for limiting access to the horse gathers. In particular, it afforded too much discretion to the Government to decide whether observing the gathers was safe, without recognizing that journalists routinely – and critically – face far more dangerous situations on a regular basis without official interference or protection. In its holding, the court below denied meaningful public and press access to the horse roundups, while sustaining unconstitutional restrictions on such access. The lower court's decision should be reversed.

ARGUMENT

I. THE PRESS AND PUBLIC HAVE A RIGHT OF MEANINGFUL ACCESS TO HORSE GATHERS ON BLM LANDS.

A. The District Court Correctly Held That The Press And Public Have A Right Of Access To Horse Roundups On BLM Lands.

In its prior decision in this action, this Court reaffirmed the well-established rule that “newsgathering is an activity protected by the First Amendment.” *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012) (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)); *see also id.* at 898 (“the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities”); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (“the First Amendment protects the media’s right to gather news”); *accord Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“without some protection for seeking out the news, freedom of the press could be eviscerated”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (the First Amendment “prohibit[s] government from limiting the stock of information from which members of the public may draw”).¹

¹ In addition to the right to gather and disseminate information, the First Amendment also protects the public’s right to *receive* information. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S.

This Court reversed the district court’s initial denial of injunctive relief and remanded with instructions to apply the Supreme Court’s right of access analysis under *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”), 478 U.S. 1, 8-9 (1986),² holding that “the *Press-Enterprise II* test applies to Leigh’s claim that the BLM’s viewing restrictions violate her First Amendment rights.” *Leigh*, 677 F.3d at 900. Application of this test is critical here because “*Press-Enterprise II* balances the vital public interest in preserving the media’s ability to monitor government activities against the government’s need to impose restrictions if necessary for safety or other legitimate reasons.” *Id.*

On remand, the district court conducted a *Press-Enterprise II* analysis and properly concluded that there is a First Amendment right of access to horse gathers. The court found that “historically, subject to a variety of restrictions, the press and general public have had access and a right to be

748, 756–57 (1976) (“the protection afforded is to the communication, to its source and to its recipients both”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“[i]t is now well established that the Constitution protects the right to receive information and ideas”); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“[t]his freedom embraces the right to distribute literature ... and necessarily protects the right to receive it”).

² The *Press-Enterprise II* right of access test requires considering: (1) “whether the place and process have historically been open to the press and general public;” and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.” 478 U.S. at 8-9.

present at wild horse gathers on public land,” and “that public access to gather activities plays an important role in the function of the gather, namely protecting the interests of the overpopulated horses and news gathering for the benefit of the public.” *Leigh v. Salazar*, No. 3:10-CV-0597 (D. Nev. July 19, 2013), ECF No. 80 (hereinafter “7/19/13 Order”) at 15:2-16:11.

B. The Right Of Access To Horse Gathers Must Be Meaningful.

A right of access in this case means nothing if access to the action is such that it limits the ability to visually depict the horse roundups. Meaningful access to the horse gathers mandates *seeing* what is happening, *recording* it for dissemination and the unfettered ability to actually disseminate it. Restrictions that prevent journalists such as Leigh from seeing the action and recording it without the use of extraordinary equipment renders the right of access meaningless.

Two analogies effectively illustrate what is at stake. First, recordings of police activity get substantial protection despite government protests that such recordings may obstruct law enforcement or compromise safety. Second, the importance of access to courtrooms exemplifies why the press must see and hear the action firsthand in order to accurately capture and convey proceedings.

1. The Right Of Access Is Analogous To Recording Police Activity In Public Places.

In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), the United States Court of Appeals for the First Circuit, after reviewing a long line of cases, reiterated “the fundamental and virtually self-evident nature of the First Amendment’s protections” of the “right to film government officials or matters of public interest in a public space.” *Id.* at 85. As in the instant case, “a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” *Id.* The Court noted that “[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Id.* at 82 (quoting *Mills v. Alabama*, 384 U.S 214, 218 (1966)). The opinion in *Glik* also pointed out, in a matter analogous to the instant case, that “the same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.” *Id.* at 84. The court concluded that, “such peaceful recording of an arrest in a public

space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Id.*

Courts are not the only branch of government expressing skepticism over the motives for government officers to limit recordings in public places. In two separate cases involving the right to photograph and record the police, the United States Department of Justice (DOJ) entered Statements of Interest supporting those rights. In *Sharp v. Baltimore Police Department*, the government stated:

The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.

Statement of Interest of the United States, *Sharp v. Baltimore City Police Dept.*, No. 1:11-cv-02888 (D. Md. Jan. 10, 2012), ECF No. 24.

The same can and should be said of BLM officials while they are conducting wild horse roundups. In a subsequent case, the DOJ went further by stating:

[T]he United States is concerned that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights. The United States believes that courts

should view such charges skeptically to ensure that individuals' First Amendment rights are protected.

Statement of Interest of the United States, *Garcia v. Montgomery County, Maryland*, No. 8:12-cv-03592 (D. Md. Mar. 4, 2013), ECF No. 15.

It is in that same vein that *amici* urge this court to be highly skeptical of assertions by the BLM that restrictions placed on media access were done for administrative convenience and/or to satisfy safety concerns.

2. The Right To Meaningful Access To BLM Activities During Horse Roundups Is Analogous To The Right Of Access To Courtroom Proceedings.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). While the press does not enjoy “absolute access” to criminal proceedings, “the circumstances under which the press and public can be barred from a criminal trial are limited.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

As in the instant case, the superseding rule from *Globe Newspaper* is that the First Amendment right of access may only be overcome by a narrowly tailored, compelling governmental interest. *Id.* at 607. Instead of acquiring information about trials by firsthand observation or by word of

mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public which “contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system” *Richmond Newspapers*, 448 U.S. at 572-73.

Imagine, though, if the access granted to trials meant that the reporters had to stand outside the courtroom with their ears pressed up against the door straining, hoping to catch a word of the proceedings here or there. That would not be meaningful access, and neither are BLM restrictions that prevent Leigh and others from seeing and recording the action firsthand.

3. The Visual Medium Plays An Important Role In Press Coverage Of Horse Roundups On BLM Lands.

The public interests that favor visual coverage far outweigh the perceived but unsubstantiated concerns by BLM that the presence of journalists and others with cameras would have a negative impact on the efficiency of the wild horse roundups or endanger the safety of the public and those involved.

In 1981, a federal district court took notice of the importance of television news coverage:

[i]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one's impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.

Cable News Network v. American Broadcasting Cos., 518 F. Supp. 1238, 1245 (N.D. Ga. 1981). Based on this statement, the court held that the total exclusion of television cameras from White House events was a clear violation of the First Amendment. *Id.* The court rejected the contention that the inclusion of the print media compensated for the exclusion of the electronic media, holding:

... the unique continuous visual element of television news coverage will be denied to the public and the press. Such film imagery which is so vital to television reporting cannot meaningfully be replaced by still photographs provided by the non-television participants in pool coverage. By totally excluding television participants, a complete visual record . . . is lost forever.

Id. at 1246.

Audio-visual coverage allows viewers to see for themselves what is actually taking place. No writing, no matter how descriptive or eloquent, can do that. There is significant truth to the cliché “a picture is worth a thousand words.” At mere mention of an historic event, certain

photographic images instantly come to mind: the America's poor struggling through the Great Depression (Appendix A-1); the mushroom clouds leaving thousands dead in their wake in Hiroshima (App. A-2); soldiers raising the flag at Iwo Jima (App. A-3); liberated Jewish children cheering at Dachau (App. A-4); a naked Vietnamese girl running through the streets following a napalm attack (App. A-5); the jetliner on September 11 as it was about to explode into one of the World Trade Center towers (App. A-6); families grieving over the bodies of the 2004 tsunami victims (App. A-7). The public absorbs these images, ingraining them with the events they represent, so as to preserve their record of history. "To remember is, more and more, not to recall a story but to be able to call up a picture." Susan Sontag, *Regarding the Pain of Others* 89 (2003). Photographic images are instantly uniquely able to tell the truth simply and without embellishment.

When famed Civil War photographer Matthew Brady received permission from President Lincoln to photograph the Civil War, he set in motion what would be a reliance by the public on visual images to depict important historical events. Photographs completely changed how Americans view war — they remove the physical barrier of distance and enable the viewer to be an eyewitness to history. "Photography has marched arm-in-arm with war since its invention," providing the public with a reality

it would not otherwise know. Michael Browning, *War photos that changed history*, Palm Beach Post, May 12, 2004 at 1D.

Along with his team of photographers, Brady made it possible for American citizens to view images of the Civil War. It marked the first time most people would see images of the suffering of war, setting the precedent for military coverage to come. A century later, Associated Press photographer Eddie Adams brought the Vietnam War to the United States with his photograph of the South Vietnamese National Police Chief executing a Viet Cong officer on a Saigon street with a single pistol shot to the head (App. A-8). Then in the 1990s, the Gulf War came to life with freelance photographer Peter Turnley's unforgettable image of the Iraqi soldier incinerated at the wheel of his vehicle (App. A-9). Few will forget the photographs that marked the beginning of the present war on terror: smoke filling the sky as the World Trade Center towers burned on September 11 (App. A-10). And, the images of the war that followed: the Saddam Hussein statue toppling in Baghdad (App. A-11); Associated Press photographer Khalid Mohammed's photo of the bodies of the four burned contractors hanging from an Iraqi bridge (App. A-12); and the American flag-draped caskets returning from the battlefield (App. A-13). These images remain a part of the historical record. They have been used to paint a

picture for Americans hundreds of miles from the lands in which they were taken to allow for meaningful evaluation and review, and to allow the public to see what is being done in its name.

Visual images are more searing than words. Images tell an entire story instantly — it would take a writer pages to describe what a single picture can convey. Photojournalism depicts what was occurring at a given place at a given time, permitting the public to view the facts of an event with their own eyes instead of requiring them to rely on a conduit to accurately convey the details of an event. Accurate information is one of the best tools to evaluate any situation. When provided with truthful information about government, citizens can best evaluate the choices their leaders have made and can best hold them accountable.

The government may not always agree, but in a democracy the road to change begins with information. “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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Leigh*, 677 F.3d at 897 (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910) (emphasis added)).

It has been said that character means “doing the right thing even when no one is looking.”³ Implicit in this statement is that most people will “do the right thing” when someone *is* looking. Inherently, and far greater than words, visual images carry with them the qualitative difference of “looking” and “being seen.” Most people will not commit an illegal or anti-social act if they know that those acts are being photographed or recorded. Soldiers and policemen have put their hands over the camera lens to prevent the “truth of the matter” from being seen. One only has to look at recent world events in the Mideast to see how visual images have contributed to political change. Visual journalists and citizens have risked and in some cases lost their lives in order to observe and document newsworthy events throughout history. If they are willing to assume such risks in a warzone it should certainly be considered that such safety concerns by the government are nothing but mere pretext when it comes to horse gathers.

When witnessing large, remote operations like wild horse roundups is not an option for most people, the media act as public surrogates, conveying those images to a vast public audience and enabling the public to satisfy its civic duty in monitoring the government. The benefits of allowing such coverage are numerous and significant: it will bring transparency to the

³ Representative J.C. Watts (R-OK), Nominating speech at the Republican National Convention (Aug. 13, 1996).

government actions and provide increased accountability on the part of the government actors. Such coverage will allow the public to ensure that the roundups are conducted humanely, and, by extension, that government systems are working correctly. We expect that the watchful eye of the public will demand increased accountability from everyone involved. Such oversight may imbue in all an increased responsibility to act in an appropriate manner, thereby diminishing the risk of animal abuse. The most transparent way for the public to know these things is to see them and the best way to accomplish that when they cannot be there to observe for themselves is through visual images shot by visual journalists who are permitted meaningful access.

Although the Government argues that audio-visual coverage must be restricted in order to preserve the agency's administrative convenience as well as to satisfy safety concerns, it has failed to show how those arguments override Leigh's First Amendment rights, or how they are so narrowly tailored to serve those interests. It appears their expressed concerns, far from being essential to preserve higher values, are speculative at best and at worst are overly broad and ambiguous, often arbitrarily and capriciously chilling visual journalists' ability to cover matters of public concern.

II. GENERALIZED SAFETY CONCERNS ARE INSUFFICIENT GROUNDS TO DENY MEANINGFUL ACCESS TO OBSERVE AND REPORT ON HORSE GATHERS.

This Court should be skeptical of any government justifications for limiting the media's right of access. Indeed, this Court cautioned in its earlier decision in this matter that "a court cannot rubber-stamp an access restriction because the government says it is necessary." *Leigh*, 677 F.3d at 900. "When wrongdoing is underway," this Court warned, "officials have a great incentive to blindfold the watchful eyes of the Fourth Estate." *Id.* (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 *Stanford L. Rev.* 927, 949 (1992) (hereinafter "Dyk") ("when the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence"))).

Consistent with these warnings, it is well-established that restrictions on First Amendment rights cannot be so vague as to grant unbridled discretion to the government authority seeking to abridge those rights. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such

discretion has the potential for becoming a means of supporting a particular point of view.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (quoting *Heffron v. Int’l Society for Krishna Consc., Inc.*, 452 U.S. 640, 649 (1981)). To guard against such a risk, restrictions on First Amendment activities may be imposed only where there are “narrow, objective, and definite standards to guide” the appropriate authority. *Forsyth*, 505 U.S. at 130. Without such a scheme, “the danger of censorship and of abridgement of our precious First Amendment freedoms is too great.” *Id.*

Here, the district court deferred considerably to the Government’s asserted justifications for limiting access to BLM lands during horse roundups. In particular, the court below should not have accepted the talismanic invocation of “safety” as a rationale for limiting meaningful access. Reporters face much more challenging and dangerous situations on a regular basis, and consistently maintain a robust right of access.

A. The Government Argued That Purported Safety Concerns Warranted Limiting Access To The Horse Roundups.

One of the Government’s chief justifications for restricting access was the purported safety of the viewing public, including members of the media such as Leigh. 7/19/13 Order at 16:21-25, 17:25-26; 18:2-19:10. For example, the Government claimed that the presence of helicopters in the

horse gather justified the limitations it placed on “non-essential personnel – i.e., the viewing public[.]” *Id.* at 18:8-9. Those limitations included relegating Leigh and others to an observation post that “did not provide a view of the actual holding corral, or trap” during the portion of the gather in which the horses were being driven. *Id.* at 14:13-23. Besides helicopters, the Government also cited supposed safety concerns related to semi-trailers, truck trailers and potential defects in the corral and holding pens, as well as the possibility that the horses might veer “towards the public.” *Id.* at 17:19, 18:11-16.

Leigh and other members of the media were allowed to access a second observation point closer to the horses only after the helicopters were gone and the horses were already in the corral. *Id.* at 14:23-25. Even then, Leigh was denied meaningful access because the Government used “snow fencing” that created a “visual barrier” between Leigh and the horses. *Id.* at 18:20-19:1. Once again, the Government justified this restriction based on claimed safety considerations. *See id.*

The restrictions the Government placed on Leigh and others were significant. The District Court found that “because of these restrictions Leigh was not able to take the pictures she wanted, and was not provided an

unobstructed view of the horses close enough to identify them by their markings.” *Id.* at 19:5-7.

B. Generalized Concerns For Press Safety Are Not Legitimate Grounds For Denying Meaningful Access.

1. The Press Routinely Reports From Arenas More Dangerous Than Horse Gatherings.

The government’s professed concern for Leigh’s safety disregards the fact that journalists regularly report from venues far more dangerous than horse gatherings. War correspondents have been reporting from battlefields since at least the American Civil War. *See* Kevin A. Smith, *Notice the Media at the Tip of the Spear*, 102 Mich. L. Rev. 1329, 1329 (2004).

Despite the threat of gunfire and bombardment, the press has covered many armed conflicts in the ensuing 150-plus years. For example, famous World War II war correspondent Ernie Pyle died at the hands of a Japanese sniper while covering the war in the Pacific. Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F.L. Rev. 957, 996-97 n. 306 (1994) (hereinafter “Steger”). And, dozens of reporters were killed while covering the Vietnam War. *Id.*

These and other press casualties demonstrate that “[j]ournalists have historically covered wars at their own risk,” and that purported justifications

to exclude the media from certain venues based on “the personal safety of reporters, is also not a compelling justification for restricting access.” *Id.*; *see also* Dyk, *supra*, at 955 (“Concerns about journalists’ safety would also fail to justify denying access. While government concerns for public safety often compel public access restrictions, journalists assume the risk of bodily harm, and therefore need not be excluded from situations in which police, fire, military, or other government officials may remain.”)

This still holds true today. Journalists continue to travel to some of the most dangerous places to report firsthand on the world’s bloodiest events. *See, e.g., Boley v. Atl. Monthly Grp.*, 2013 WL 3185154, * 1 (D.D.C. June 25, 2013) (discussing *Atlantic Magazine* correspondent Jeffrey Goldberg’s reporting from Liberian civil war); Ned Parker and Reed Johnson, *Libya blast kills photojournalists Tim Hetherington and Chris Hondros*, *L.A. Times*, April 21, 2011 (reporting on the death of war correspondent and Academy-Award nominated documentarian Tim Hetherington in Libyan civil war); *see also Nation Magazine v. U.S. Dep’t of Def.*, 762 F. Supp. 1558, 1563 (S.D.N.Y. 1991) (noting that after enduring significant negative media coverage during the Vietnam War, the United States government subsequently took steps to restrict press access during the

Grenada and Panama invasions and the first Gulf War, leading to criticism and claims that such restrictions violated the First Amendment).

Journalists routinely embed with American troops pursuant to government ground rules that direct commanders to “ensure the media are provided with every opportunity to observe *actual combat operations*.”

Elana J. Zeide, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. Rev. 1309, 1315 (2005) (hereinafter “Zeide”) (emphasis added).⁴ Former Chairman of the Joint Chiefs of Staff Colin Powell said that correspondent safety was not a valid reason for the military to exclude the media from combat operations. Steger, *supra*, at 997. Indeed, embedded reporters are often required to sign liability waivers in light of the great dangers they voluntarily face. Zeide, *supra*, at 1315. They sometimes even wear the same biological and chemical protective gear that soldiers put on before heading to battle. *See id.*

Besides wars, journalists routinely cover other events that place their lives in danger. They cover infernos like the massive Rim Fire still burning near Yosemite National Park.⁵ They report on tornadoes, sometimes with

⁴ Quoting Memorandum from the Sec’y of Def., Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations P 2.A (Feb. 2003), available at <http://www.dod.mil/news/Feb2003/d20030228pag.pdf>.

⁵ *See, e.g.*, <https://www.youtube.com/watch?v=4sd7yyHKl84>.

fatal results.⁶ They investigate and publish stories on drug gangs and terrorists who retaliate by killing reporters.⁷ And, almost twelve years ago to the day when everyone was running from the collapse of the World Trade Center towers, first responders and news photographers were running toward the scene, each to fulfill their own unique and important function in our society. Some of those journalists narrowly escaped being killed while documenting history.⁸

In sum, reporters routinely – and voluntarily – cover events far more dangerous than the horse gather at issue in this case. Thus, the Government’s paternalistic claim that restrictions on Leigh and others can be justified by concerns for their safety should be rejected as invalid justifications for impinging on journalists’ and the public’s First Amendment rights to report on – and receive information about – governmental activities.

⁶ See <http://www.hollywoodreporter.com/news/discoverys-storm-chasers-stars-killed-561626> (discussing the June 2013 death of National Geographic Society member Tim Samsaras and his companions during the course of their following and recording Oklahoma tornado).

⁷ See, e.g., *Murder of Honduran Reporter Blamed on Drug Gangs*, REUTERS, May 16, 2012 (<http://www.reuters.com/article/2012/05/16/us-honduras-journalist-idUSBRE84F1F120120516>); Daren Fonda, *On the Trail of Daniel Pearl*, TIME MAGAZINE, Sept. 27, 2003 (discussing the murder of *Wall Street Journal* reporter Daniel Pearl in Pakistan).

⁸ See <http://www.biography.com/tv/i-survived/videos/911-special-david-2094193999>.

2. Many Jurisdictions Recognize The Special Role The Press Plays In Reporting From Dangerous Situations.

Consistent with the reality that journalists frequently risk life and limb to gather and disseminate the news, several state legislatures recognize that, even in the most harrowing of situations, there is a special place for the press. For example, under California law, “a duly authorized representative of any news service, newspaper, or radio or television station or network” may lawfully enter an area closed off to the general public by peace officers because of any “menace to the public health or safety [that] is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster.” Cal. Pen. C. § 409.5(a), (d). Similarly, in Ohio, a law prohibiting the hampering of the “lawful operations” of peace officers “at the scene of a fire, accident, disaster, riot, or emergency of any kind,” may not be invoked to “limit access or deny information to any news media representative in the lawful exercise of the news media representative’s duties.” Ohio Rev. C. § 2917.13(A)(1), (B) (West 2013). And, in Virginia, barricades may be erected to secure locations where “fires, accidents, wrecks, explosions, crimes, riots or other emergency situations where life, limb or property may be endangered,” but “personnel from information services such as press, radio and television, when gathering news,” may “proceed at their own risk,” and are exempt from the barricade rules except

to the extent they obstruct the peace officers in the performance of their duties at such scene. Va. C. Ann. § 15.2-1714 (West 2013).

In a case involving press access to the site of an airplane crash closed to the public, the California Court of Appeal recognized the “Legislature’s considered judgment that members of the news media must be afforded special access to disaster sites in order that they may properly perform their function of informing the public.” *Leiserson v. City of San Diego*, 184 Cal. App. 3d 41, 51 (1986) (citing *Branzburg*, 408 U.S. at 706). The Court made clear that any restrictions on access to a disaster site must be strictly circumscribed:

Accordingly, press representatives must be given unrestricted access to disaster sites unless police personnel at the scene reasonably determine that such unrestricted access *will interfere* with emergency operations. If such a determination is made, the restrictions on media access may be imposed for only so long and only to such extent as is necessary to prevent actual interference. This means that members of the press must be accommodated with whatever limited access to the site may be afforded without interference. ... We assume that the police and press will find it to their mutual advantage to cooperate in such circumstances, consistent with the legislative goal that the maximum possible press access be provided.

Leiserson, 184 Cal. App. 3d at 51 (emphasis in original; citation omitted)

(holding that a restriction on access was legitimate because California’s

lieutenant governor, who had recently received threats on his life, died in air crash, and the crash was also a crime scene).⁹

In the face of asserted concerns for the safety of prison personnel, this Court affirmed a permanent injunction prohibiting the government “from preventing uninterrupted viewing of executions from the moment the condemned enters the execution chamber through, to and including, the time the condemned is declared dead.” *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 882-83, 886 (9th Cir. 2002). With a healthy dose of skepticism, this Court held that the government’s asserted safety concerns were “exaggerated” and did not warrant the prison’s proposed limitations on public and press access. *Id.* at 885-86.

In the context of media access to the battlefield – presumably one of the most dangerous situations imaginable – a federal district court

⁹ See also *Connell v. Town of Hudson*, 733 F.Supp. 465, 469-70 (D.N.H. 1990) (news photographer had the right to photograph fatal car crash from inside and outside a police perimeter where he did not interfere with police and emergency activities); *Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 638 (D. Minn. 1972) (in the context of a television cameraman filming a burglary scene, holding that newsgatherers “have a constitutional right not to be interfered with” by police so long as they “do not unreasonably obstruct or interfere with ... official investigations of physical evidence or gain access to any place from which the general public is prohibited for essential safety purposes”) (internal quotation marks omitted); *accord Housing Works, Inc. v. Safir*, 101 F.Supp.2d 163, 170-71 (S.D.N.Y. 2000) (rejecting the argument that safety concerns required that press conferences involve 25 or fewer people).

acknowledged that “there is an almost absolute right of access to open places, including such fora as streets and parks,” and then further held that “there is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation.” *Nation Magazine*, 762 F.Supp. at 1572 (citing *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)).¹⁰ “As such,” the court ruled, “the government could not wholly exclude the press from a land area where a war is occurring that involves this country.” *Id.*

If there is a right to access an “overt combat operation” overseas, and – as several states recognize – a right of access in serious disaster situations then, *a fortiori*, there must be a right of access to BLM lands during horse roundups. BLM land is more akin to an open park than a battlefield, and a horse gather is less dangerous than open combat or fires, floods, explosions and other calamities where safety concerns are at stake.¹¹ Many jurisdictions

¹⁰ *But cf. Flynt v. Rumsfeld*, 355 F.3d 697, 703-05 (2d Cir. 2004) (declining to hold that there is a First Amendment right for reporters to “embed” with combat troops).

¹¹ *Cf. United States v. Griefen*, 200 F.3d 1256, 1259-60 (9th Cir. 2000) (restrictions on expressive conduct that occurs “on public grounds, like a national forest,” is subject to public forum analysis) (quoting *United States v. Johnson*, 159 F.3d 892, 895 (4th Cir. 1998)); *United States v. Adams*, 388 F.3d 708, 710-11 (9th Cir. 2004) (treating Forest Service land as a public forum for First Amendment challenge to permitting restriction).

recognize, as this Court should, that the mere invocation of “safety” should not lead to a denial of meaningful media access.

III. CONCLUSION

The court below rubber stamped the Government’s asserted rationales for eliminating meaningful access to BLM lands during horse gathers. The decision below is constitutionally infirm and should be reversed.

Respectfully submitted:

September 13, 2013

/s/ Jean-Paul Jassy
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The Reporters Committee for
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Press Photographers Association and
13 Other News Media Organizations

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that:

- (1) the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,678 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
- (2) the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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