

No. 16-55719

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RAY ASKINS and CHRISTIAN RAMIREZ,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.

Defendant-Appellee.

United States District Court, Southern District of California
Honorable Thomas J. Whelan
D.C. 3:12-cv-02600-W-BLM

**BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND 7 MEDIA ORGANIZATIONS IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 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 the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENTS

The parties to this *amicus* brief are The Reporters Committee for Freedom of the Press, Digital First Media, LLC, Gannett Co., Inc., Los Angeles Times Communications LLC, The McClatchy Company, National Press Photographers Association, San Diego Union-Tribune LLC, and The Thomas Jefferson Center for Protection of Free Expression.

Pursuant to Fed. R. App. P. 26.1, *amici* disclose as follows:

The Reporters Committee for Freedom of the Press certifies that it is an unincorporated nonprofit association with no parent corporation and no stock.

Digital First Media, LLC is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company holds 10% or more of its stock.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are subsidiaries of tronc, Inc., which is publicly held. Merrick Media, LLC, Nant Capital, LLC, Oaktree Capital Management, L.P., and HG Vora Capital Management, LLC each own 10 percent or more of tronc, Inc.'s stock.

The McClatchy Company is publicly traded on the New York Stock Exchange under the ticker symbol MNI. Contrarius Investment Management Limited owns 10% or more of the common stock of The McClatchy Company.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit organization with no parent corporation and no stock.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. P. 29(a), all parties to this appeal have given consent for *amici* to file this brief. *See also* Ninth Circuit Advisory Committee Note to Rule 29-3.

STATEMENT OF INTEREST OF *AMICI CURIAE*

As representatives and members of the news media, *amici* have a strong interest in ensuring that their First Amendment rights are fully protected when courts consider government restrictions on the right to photograph government activity. In particular, policies that restrict the news media’s ability to photograph or record activity at the United States border impinge upon the press’s constitutionally protected rights to gather news and report on matters of public concern, including immigration, drug trafficking, and other border issues.

The Reporters Committee for Freedom of the Press is joined in this brief by Digital First Media, LLC, Gannett Co., Inc., Los Angeles Times Communications LLC, The McClatchy Company, National Press Photographers Association, San Diego Union-Tribune LLC, and The Thomas Jefferson Center for Protection of Free Expression. Descriptions of all parties to this brief are given more fully in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici file in support of Plaintiffs-Appellants Ray Askins and Christian Ramirez (collectively, “Plaintiffs”) and urge this Court to reverse the district court’s order granting Defendants-Appellees’ motion to dismiss.

Plaintiffs assert that policies of Customs and Border Protection (“CBP”) that prohibit photography while on the property of a United States port of entry without

the agency's advance permission, *see* CBP Directive No. 5410-001B (Mar. 18, 2009), *available at* <http://foiarr.cbp.gov/streamingWord.asp?i=1245>; CBP, Ground Rules for News Media Representatives When Visiting Southern California Ports of Entry, *available at* http://nemo.cbp.gov/opa/2013/media_ground_rules.pdf (the "CBP Media Restrictions"), infringe upon their First Amendment rights. In 2013, the District Court dismissed Plaintiffs' complaint, with leave to amend, and in 2016 dismissed an amended complaint, on the ground that the CBP Media Restrictions survived strict scrutiny as the least restrictive means by which to serve the compelling interest of protecting United States territorial sovereignty. *See* Order Granting Defendants' Motion to Dismiss [Doc. 65], *Askins et al. v. DHS et al.*, 3:12-cv-02600-W-BLM ("*Askins*") at 6:13-7:2 (Mar. 23, 2016), ECF No. 73 ("Mar. 2016 Order").

As representatives and members of the news media, *amici* write to emphasize the importance of this case to the press's ability to report on issues that take place at the United States' border. *Amici* have a strong interest in ensuring that their First Amendment rights are not curtailed in a manner that impinges on the news media's ability to report on matters of significant public concern. The CBP Media Restrictions severely hinder the ability of the press to gather the news and inform the public—particularly in cases of breaking news where permission

cannot be sought in advance—and essentially grant CBP veto power over the First Amendment right to photograph and record government activity.

The news media has long had a constitutionally recognized role in informing and educating the public, and audio-visual recording is an essential part of modern journalism. Because the United States border is frequently the site of important news stories, including those related to immigration, drug trafficking, the environment, and more, the ability of the public and reporters to document events at the border, including from ports of entry, is vital to the news media's ability to fully and accurately report on these matters.

In addition, the CBP Media Restrictions infringe upon the public and press's well-established First Amendment right to photograph and record official conduct generally. Courts have recognized several significant public policy rationales behind the First Amendment right to record police activity, including the ability to hold public officials accountable for misconduct and the promotion of trust in the community that comes with such transparency. These rationales are equally applicable to the recording of CBP officials in the performance of their official duties.

Finally, Defendants' interests in the CBP Media Restrictions are neither compelling nor narrowly tailored. Although border security may be a compelling governmental interest when properly invoked, Courts must cast a skeptical eye at

blanket invocations of national security interests in cases where these interests are not served by the challenged government conduct.

ARGUMENT

I. Photography and visual recording are essential elements of the news media's reporting on numerous matters of significant public concern, including those that arise at or around the border.

Reporting on the United States' borders shines a light on the way those borders are regulated and policed. Activities at the border touch on numerous issues of legitimate and pressing public concern that arise frequently in the national political debate, including regulation of immigration, policing of drug and human trafficking, and control of environmental damage. *See, e.g.*, Miriam Valverde, *Compare the Candidates: Clinton v. Trump on Immigration*, PolitiFact (July 15, 2016), <https://perma.cc/9K6N-GEKA>; Geneva Sands and Jack Date, *How Smugglers Attempt to Get Drugs and Other Contraband Over the Border*, ABC News (Sept. 21, 2016), <https://perma.cc/4GBG-WTDV>; Jerry Markon and Joshua Partlow, *Unaccompanied Children Crossing Southern Border in Greater Numbers Again, Raising Fears of New Migrant Crisis*, Wash. Post (Dec. 16, 2015), <https://perma.cc/3VJ9-AG4U>.

Because journalism can be a deeply visual medium, restrictions on the ability of reporters and members of the public to photograph and film at the border impede the news media's ability to fully and accurately report these important

stories. Many of the most compelling and effective news stories use photography or video. For example, in 2008, multimedia production company MediaStorm published *Intended Consequences*, a documentary about the use of mass rape as a weapon of war during the 1994 Rwandan genocide. Jonathan Torgovnik, *Intended Consequences*, MediaStorm (Oct. 23, 2008), <https://goo.gl/HPV8TY>. The film later won an Alfred I. DuPont-Columbia University Award. Jessica Stuart, *Intended Consequences Named as First Web Winner of Alfred I. DuPont-Columbia University Awards*, MediaStorm (Jan. 14, 2010), <https://perma.cc/BU4E-AYMG>. In 2010, Associated Press reporter Rich Matthews created a video story about the Deepwater Horizon oil spill, filming his scuba dive into the oily Gulf of Mexico to document oil plumes and declining sea life beneath the water's surface. Rich Matthews, *AP Exclusive: Scuba Diving in the Gulf Oil Spill*, Associated Press (June 9, 2010), <https://goo.gl/a0ubCK>. More recently, *The New York Times* published a video story about the aftermath of an airstrike in east Aleppo, Syria, showing how rescuers responded in the minutes and hours after the attack. Yara Bishara & Megan Specia, *The Anatomy of an Airstrike*, N.Y. Times (Sept. 28, 2016), <http://nyti.ms/2da8Jwf>. *The New York Times* also published a video about ambulance workers in Liberia as part of its Pulitzer Prize winning coverage of the 2014 Ebola outbreak. Ben C. Soloman, *Ambulance Work in Liberia is a Busy and Lonely Business*, N.Y. Times (Oct. 16, 2014), <http://nyti.ms/1qA5Oeh>.

Photographic images are also often an essential element of a story. *See, e.g.*, Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, Wash. Post (Feb. 18, 2007), <https://perma.cc/MKG4-YA9D> (documenting deplorable living conditions at Walter Reed Army Medical Center and featuring photographs by the late Michel du Cille of soldiers recovering from combat wounds); IWMF 2016 Courage in Photojournalism Award, <https://perma.cc/B6EA-RRWV> (recognizing Adriane Ohanesian for her photography in Sudan depicting “the reality of life within a war zone”). From iconic images such as “The Terror of War,” depicting children fleeing from a napalm bombing in Vietnam, to more recent images such as those of a drowned Syrian boy, photography has captured innumerable newsworthy events in a way that words cannot. *See, e.g.*, *Photographer Nick Ut: The Napalm Girl*, Associated Press Images, <https://perma.cc/5C9Y-QQ8B>; Helena Smith, *Shocking Images of Drowned Syrian Boy Show Tragic Plight of Refugees*, Guardian (Sept. 2, 2015), <http://perma.cc/6ZTZ-ANSV>.

Visual journalism is equally important at the border. Several recent examples demonstrate the importance of photography and film to reporting border-related stories and to the corresponding public awareness and civic debate. In April 2012, PBS aired a special about the death of Anastasio Hernandez-Rojas, a Mexican national, who died following an altercation with federal agents, including

CBP officers, at the San Ysidro Port of Entry near San Diego. *See* Brian Epstein, *Crossing the Line at the Border*, PBS (Apr. 20, 2012), <https://goo.gl/6Z8yye> at 21:42. Initially, the only information about the May 31, 2010, incident came from statements by local police and CBP that indicated Hernandez-Rojas had been handcuffed for a period of time and “became combative” after officers removed his handcuffs, at which point a CBP officer used a Taser to subdue him. *See* Randal C. Archibold, *San Diego Police Investigate the Death of a Mexican Man Resisting Deportation*, N.Y. Times (June 1, 2010), <http://nyti.ms/1MZZOvQ>. Hernandez-Rojas died after being stunned with the Taser.

The altercation, however, was visible from public areas at the port of entry, and several travelers filmed what transpired on their phones. *See* Epstein, *supra* at 21:42. Nearly a year later, one of the bystanders, Ashley Young, provided footage she had shot to a documentarian and activist. *Id.* at 16:50. Young told filmmakers that, on the night of Hernandez-Rojas’ death, she simply “kept walking” after CBP officers “stopped a couple that had been there about the same length of time that [she] was there, and the couple had recorded what happened on their cell phones, and the officers took their cell phones away and said, ‘What did you record? We’re going to delete it.’” *Id.* at 21:42. As a result, nearly two years after Hernandez-Rojas’ death, Young’s footage survived and was publicly aired for the first time in the PBS special. *Id.* Immediately following the airing of the PBS

report, 16 members of Congress demanded a review of CBP's use-of-force policies. Bob Ortega, *CBP Releases Scathing Use-of-Force Report, New Policies*, Arizona Republic (May 30, 2014), <https://perma.cc/C5M4-S7S8>. That review led to reforms that required, among other things, training in less-lethal weapons as well as a limit on the number of times Tasers can be used on a person and a restriction against their use on persons not actively resisting. *Id.*

In addition, the 2015 Oscar-nominated film *CARTEL LAND* relied in part on footage shot at the border. *CARTEL LAND* (Matthew Heineman 2015). The film documents illegal drug trafficking in the United States and Mexico by following activist groups in both countries “to create the parallel portrait of vigilantism on both sides of the border,” as the filmmaker told an interviewer. Antonia Blyth, *Matthew Heineman On ‘Cartel Land:’ “I Didn’t Know We Were Going To Get Shot At”*, Deadline (Feb. 14, 2016), <https://perma.cc/4HJE-BNZR?type=image>. As part of the film, director Matt Heineman followed Tim Foley, the leader of a paramilitary group, and shot footage as the group patrolled the United States–Mexico border in Arizona’s Altar Valley. Ted Johnson, *‘Cartel Land’ Blurs Lines Between Good vs. Evil in Mexican Drug Wars*, Variety (June 30, 2015), <https://perma.cc/AM8F-PQD8?type=image>; Kenneth Turan, *‘Cartel Land’ Goes Deep Inside Vigilantes’ Fight on Both Sides of Mexico–U.S. Drug War*, L.A. Times (July 9, 2015), <https://perma.cc/AWC6-YNP5>.

Journalists may also rely on photography and recordings to tell important stories that occur at the border that are unrelated to immigration or drug trafficking. For example, local and national news outlets and academic researchers have frequently reported on environmental issues at the border. *See* Alejandro Davila Fragoso, *The Overlooked Crisis on the U.S.-Mexico Border*, Think Progress (Sept. 1, 2016), <https://perma.cc/E9WZ-WVDQ> (discussing air pollution and idling cars at the border); Melissa Gaskill, *The Environmental Impact of the U.S.-Mexico Border Wall*, Newsweek (Feb. 26, 2016), <https://perma.cc/RJ8X-TFQA>. Pictures and footage are essential to reporting such stories, as journalists rely heavily on visuals to quickly convey to an audience what occurred and the magnitude of an incident.

Rules like the CBP Media Restrictions that chill the public and press's ability to photograph or film at the border limit the news media's ability to report on matters of crucial importance. For example, had CBP officers been more diligent in enforcing the agency's policies after the Hernandez-Rojas incident, Young's footage would have been deleted before she left the port of entry, and the public never would have seen footage that contradicted the official version of events. Without such footage, CBP would have controlled the only information concerning Hernandez-Rojas's death, leaving the news media unable to accurately report this significant story to the public. *See, e.g.,* Elliot Spagat, *U.S. Border*

Inspector Kills Knife-Wielding Mexican Man, Associated Press (Oct. 22, 2015), <https://perma.cc/D9A3-AKQB> (reporting on the October 2015 death of a man at the Calexico Port of Entry and noting that CBP declined to publicly release the only known footage of the incident, a recording taken by a surveillance camera).

Moreover, the need for advanced permission to photograph at ports of entry required by the CBP Media Restrictions hinders reporters' ability to cover breaking news. The narrow window of opportunity to report on most breaking news stories will likely be closed by the time CBP approves or denies a photography request. For all of these reasons, the CBP Media Restrictions prevent the news media from fully and accurately informing the public of significant matters of public concern that occur at the nation's borders.

II. Strong public policy rationales underlie a First Amendment right to photograph public officials such as police officers and CBP officials.

This Court, other federal appellate courts, and the U.S. Department of Justice ("DOJ") have repeatedly recognized a First Amendment right to videotape and photograph public officials, including police officers, in public places. These decisions rely, in part, on the recognition that the right to photograph and record law enforcement officers in the performance of their official duties is essential to government transparency and accountability. These same justifications just as clearly apply to recording the activities of CBP officials, who have many of the same law enforcement powers and responsibilities that police officers do.

A. The First Amendment right to photograph public officials in public places is well-established.

The Ninth Circuit has recognized a First Amendment right to photograph public officials, including police officers, in public places. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439, 442 (9th Cir. 1995) (finding a “First Amendment right to film matters of public interest,” including the activities of police officers assigned to work a protest demonstration on a public street); *Adkins v. Limtiaco*, 537 Fed. Appx. 721, 722 (9th Cir. 2013) (holding that plaintiff had a First Amendment right to photograph the scene of an accident during a police investigation). Similarly, other circuit courts that have directly considered this issue also have found a First Amendment right to photograph or record police officers in the performance of their official duties. *See Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (finding police violated plaintiff’s First Amendment right by arresting him for filming an arrest on a public street); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012) (blocking enforcement of Illinois eavesdropping statute that would have prevented recording police in public); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment right protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).¹

¹ Two other federal appellate courts considering the issue in the context of

The DOJ also recognizes a First Amendment right to film and photograph police officers when the officers are performing their duties in public places. *See* Statement of Interest of the United States, *Garcia v. Montgomery County*, 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), ECF No. 15 (“Garcia SOI”); Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep’t, et al.*, 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012), ECF No. 24 (“Sharp SOI”). In addition, the DOJ warns against subtler actions that chill speech such as threats, intimidation, or other discouragement by officers or intentionally blocking or obstructing cameras or recording devices. Letter from Jonathan M. Smith, Chief, Special Litigation Section, DOJ, to Mark H. Grimes, Baltimore Police Department & Mary E. Borja, Wiley Rein LLP at 5 (May 14, 2012), <https://perma.cc/P9NL-A9YX> (“Smith Letter”). Specifically, the DOJ recognizes that police may all too easily use discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights and urges courts to view such charges skeptically to ensure that individuals’ First Amendment rights are protected.

complaints filed under 42 U.S.C. § 1983 avoided the question of whether there is a First Amendment right to photograph police officers and instead held that any such right was not “clearly established” law at the time of the alleged violations by police officers, allowing the officers to be protected by a qualified immunity. *See True Blue Auctions v. Foster*, 528 Fed. Appx. 190, 193 (3d Cir. 2013); *Szymecki v. Houck*, 353 Fed. Appx. 852, 853 (4th Cir. 2009) (unpublished, per curiam opinion).

Garcia SOI at 2, 8–10. The DOJ also took a strong position in *Sharp* that “[u]nder the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed.” Smith Letter at 5.

B. The policy reasons favoring the First Amendment right to photograph law enforcement officers are equally applicable to CBP officers.

Significant public policy reasons undergird this Court’s determination that the First Amendment protects the right of the public and the press to record law enforcement officers in the performance of their official duties. The First Amendment includes the freedom to listen and receive ideas along with the freedom to speak. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). The U.S. Supreme Court has recognized that the press has a “special and constitutionally recognized role” in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 781 (1978). When journalists cover events, they are “functioning as surrogates for the public.” *Richmond Newspapers*, 448 U.S. at 572–73. Press coverage is necessary to undertake the fact-checking and dissemination of messages on a scale beyond the capacity of private individuals.

Nowhere is the new media’s special role in informing the public more important than when reporting on actions of government officials. As the U.S. Supreme Court has noted, “[M]any governmental processes operate best under

public scrutiny.” *Press–Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (“*Press–Enterprise II*”). Because government has suppressive power, it must be subject to public scrutiny. *First Nat’l Bank*, 435 U.S. at 777 n.11. This is especially true of law enforcement officials. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035–36 (1991) (observing that “[t]he public has an interest in [the] responsible exercise” of the discretion granted prosecutors and highlighting the press’s role as a safeguard against potential miscarriages of justice by police and prosecutors).

The First Amendment right to photograph and record police officers is essential to the news media’s ability to monitor law enforcement and expose officers’ actions to public scrutiny. Recording information is a predicate to expressing it to others. “Gathering 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 government affairs.’” *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Therefore, to allow police to prevent documentation of their public activities is to foreclose speech by limiting the information that members of the public and the news media can record and report, contrary to the First Amendment. *See First Nat’l Bank*, 435 U.S. at 783 (“The First Amendment goes beyond protection of the

press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”).

Moreover, the press must often rely on private citizens who witness and record information to share it with news organizations, which then publish it more broadly. *See Glik*, 655 F.3d at 84 (noting that “[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper”). For example, the infamous 1991 assault of Rodney King was exposed by a private citizen with a video recorder who filmed the beating and provided the footage to the news media, which broadcast it on national television. *See Erik Ortiz, George Holliday, Who Taped Rodney King Beating, Urges Others to Share Videos*, NBC News (June 9, 2015), <https://perma.cc/QF5T-THR7>. More recently, individuals with cellphones have recorded many controversial uses of lethal force by police and posted them to social media, or turned them over directly to journalists, leading or contributing to national coverage of these events. *See Russell Contreras and Deepti Hajela, Citizen Recordings of Police Interaction Growing Amid Push*, Associated Press (July 9, 2016), <https://perma.cc/5QT2-94SS>; David Uberti, *How Smartphone Video*

Changes Coverage of Police Abuse, Columbia Journalism Review (April 9, 2015), <https://perma.cc/R4N3-M85H>.

In addition to facilitating public accountability of law enforcement, the transparency created by the public and the press's ability to photograph and film police builds community trust of police officers that is crucial for the justice system to function. *See Richmond Newspapers*, 448 U.S. at 571–72 (“To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ and the appearance of justice can best be provided by allowing people to observe it.”) (internal citation omitted) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *see also* Sharp SOI at 1 (recognizing that the right to record police officers in the performance of their official duties is not only required by the Constitution but is also “instill[s] public confidence in the police officers who serve us daily”). A trusting public will more willingly communicate with police, provide them with information, and embrace the justice system. *See Richmond Newspapers*, 448 U.S. at 572 (“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.”). In recognition of the benefits of transparency, some police departments have begun phasing in body cameras and providing for the release of the footage they record to the public. *See, e.g.*, Reporters Committee

for Freedom of the Press, *Access to Police Body-Worn Camera Video*,

<http://www.rcfp.org/bodycams>.

Just as the First Amendment right to photograph and film police officers is essential to the news media's ability to inform the public about police conduct, so too is the First Amendment right to photograph and film CBP officers necessary to ensure the public is informed of CBP actions and thus able to monitor such conduct and hold public officials accountable. Like police officers, CBP officials wield law enforcement authority and discretionary power, both of which require public scrutiny. CBP employs more than 60,000 people, including 44,000 armed enforcement officers. Brian Bennett, *Report Finds Little Progress at Curbing Border Patrol Abuses*, L.A. Times (Mar. 14, 2016), <https://perma.cc/E3RC-LDJ5>. These officers have the power to stop private citizens, search their vehicles and other property, deny them entrance to the country, arrest them, and even use deadly force upon them. Each of these actions is subject to abuse and error about which the public has a right to know. *See, e.g.*, Fernanda Santos, *Border Patrol Accused of Profiling and Abuse*, N. Y. Times (Oct. 14, 2015), <http://nyti.ms/1VS00BI> (reporting that drivers crossing the border have repeatedly accused border checkpoint agents of "improper gunplay, racial profiling, excessive roughness, and verbal abuse").

Internal CBP reviews suggest the media spotlight is, in some cases, necessary to spur officials to address problems at the agency. A recent report by the CBP Integrity Advisory Panel states that CBP “has not been noted for its transparency” surrounding use of force incidents and had not developed an effective system for receiving and responding to public complaints. Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel*, Mar. 15, 2016, at 1, <https://perma.cc/S546-X5AT>. In addition, the report notes that CBP’s Office of Internal Affairs is “woefully understaffed” and may require a decade to reach staffing sufficient to prevent corruption and abuse. *Id.* at 11. As a result, the CBP disciplinary process is too long to be an effective deterrent to misconduct, with the average case involving allegations of corruption at present taking more than 1.5 years to resolve. *Id.* at 1, 21. Similarly, documents from the Department of Homeland Security obtained by the ACLU show that of 142 complaints received by CBP from January 2011 to August 2014, only one resulted in disciplinary action. In that instance, an agent received a one-day suspension for unjustifiably stopping a vehicle driven by the son of a retired Border Patrol agent. Santos, *supra*. ““People make complaints, but their complaints go nowhere,”” explained U.S. Rep. Raul M. Grijalva of Arizona. *Id.* At the same time, “arrests of border agents and customs officers exceed, on a per capita basis, arrests at other law enforcement agencies.” Bennett, *supra*.

Thus, the public scrutiny of CBP actions that the news media provides is essential to supplement CBP's often ineffective internal controls. And, just as photography and recordings greatly enhance the news media's ability to expose police misconduct, journalists must be able to visually document CBP officers' actions, or to obtain such images or footage from members of the public, to fulfill their constitutionally recognized role in informing and educating the public about matters of great public concern.

III. National security concerns do not provide a compelling interest that justifies the CBP Media Restrictions.

Plaintiffs have alleged, and the lower court found, that the CBP Media Restrictions impose restraints on speech in a public forum. *See* First Amended Complaint at ¶¶ 12, 122, 125; Order Granting in Part and Denying in Part Defendants' Motion to Dismiss [Doc 22] With Leave to Amend, *Askins* at 8:19–22, 9:5–6 (Sept. 30, 2013), ECF No. 42. Restrictions on speech in a public forum must be “justified without reference to the . . . content of the regulated speech . . . narrowly tailored to serve a significant governmental interest, . . . and leave open ample alternative channels for communication of the information.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

As Plaintiffs argue, the CBP Media Restrictions are not content neutral because they require CBP to determine whether granting a photography request would “compromise[e] the [Department of Homeland Security [(“DHS”)]/CBP

mission,”” which necessarily requires CBP to evaluate the potential content of the requested photography to determine its compatibility with the work of DHS and CBP. *See* Appellant’s Br. at 29 (quoting *CBP Directive No. 5410-001B, Office of Public Affairs; Roles, Functions, Responsibilities* ¶ 3.1). Nor do they leave open ample alternative channels for communication, *see* Appellant’s Br. at 40, especially because the CBP Media Restrictions grant CBP officials the unbridled discretion to deny *all* requests to photograph on ports of entry as contrary to the DHS/CBP mission. Even more troubling, the CBP Media Restrictions could allow CBP to cultivate friendly media coverage by granting only certain reporters’ requests to photograph from ports of entry in the guise of furthering the DHS/CBP mission, while denying other reporters’ requests if they are critical of CBP policies or practices.

Moreover, the CBP Media Restrictions are not narrowly tailored to serve a significant government interest. Defendants have argued that the CBP Media Restrictions are necessary to the security of the United States border. *See* Declaration of Billy Whitford in Opposition to Plaintiffs’ Motion for Preliminary Injunction, *Askins* at 4-5 (Feb. 22, 2013) (stating that “[u]nauthorized photography would make it easier for cartel members and smugglers to visually document CBP’s sensitive border search techniques in order to attempt circumventing them going forward” and that “[u]nauthorized photography . . . could aid in the planning

of [terrorist attacks]”). Similarly, the lower court found that the CBP Media Restrictions “serve the compelling interest of protecting United States territorial sovereignty” by shielding “CBP operations that would lose efficacy if made known to those who would smuggle aliens or contraband across the border.” Mar. 2016 Order at 3:14–18. These arguments do not withstand scrutiny.

Courts must be skeptical of claims that the security of the nation will suffer as a result of the exercise of First Amendment rights, as such arguments are often sweeping and lacking in specificity. *See New York Times v. United States*, 403 U.S. 713, 719 (1971) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”) (Black, J., concurring). As the U.S. Supreme Court has stated, “[C]oncerns of national security and foreign relations do not warrant abdication of the judicial role.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). Ninth Circuit precedent, in particular, demands skepticism of government rationales when agencies assert an interest shielding their activities from public observation. As this Court has held, “[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. . . . When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). Because “the independent judiciary is the guardian of the free press,” this Court

has noted, “courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.” *Id.*²

Moreover, the argument that border security is undermined by photography incorrectly assumes that journalism and security are mutually exclusive.

Defendants argue that unauthorized photography on ports of entry jeopardizes border security by exposing CBP security practices to public view, allowing those who seek to thwart such measures to study them and determine how to overcome them. But far more expedient ways exist for such individuals to learn about CBP security measures than relying on photographs and videos taken from ports of entry. As the locksmith A.C. Hobbs put it back in 1853, “Rogues are very keen in their profession, and know already much more than we can teach them.” Randall Stross, *Theater of the Absurd at the TSA*, N.Y. Times (Dec. 17, 2016),

<http://nyti.ms/2csYrKc>. Those who cross the border are already free to see the latest CBP procedures first-hand. And such observations can be made multiple

² Although in *Leigh* the court was considering a photojournalist’s First Amendment challenge to viewing restrictions by the Department of the Interior and Bureau of Land Management (“BLM”) at a BLM horse roundup under the test set forth in *Press-Enterprise II*, the Court’s reasoning is equally applicable to an analysis of restrictions on First Amendment activity in a public forum. Just as restrictions on speech in a public forum must “narrowly tailored to serve a significant governmental interest,” *Clark*, 468 U.S. at 293, the right of access to government activities articulated in *Press-Enterprise II* can be overcome only if the government demonstrates “that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise II*, 478 U.S. at 9.

times or over a longer period of time simply by crossing the border repeatedly or observing it from the United States or a neighboring country. Thus, to the extent that CBP believes it is necessary to protect some procedures from public view, it would be better served by taking steps such as conducting such activities indoors or shielding certain outdoor activities with screens, partitions, or curtains than it is by the CBP Media Restrictions. Barring unauthorized photography of ports of entry, a necessity for members of the news media seeking to report on the border, does little to actually protect CBP procedures.

Conversely, public awareness of security flaws can be the first step towards fixing them. For example, patterns in choices of who to inspect or when inspections are carried out that could be exploited by wrongdoers may be revealed through public scrutiny of security procedures. Public observation may also reveal a lack of appropriate oversight and discipline of CBP officials, which may not be visible through internal controls that depend upon adequate supervision.

Such public scrutiny, including reporting by the news media, has revealed significant flaws in border security protocols in the past. For example, a recent story in *The Atlantic* discussed the risk of radioactive material being shipped through an American port for use in a dirty bomb. Steven Brill, *Is America Any Safer?*, Atlantic (Sept. 2016), <https://perma.cc/Z36F-SV9H>. The article reported that, despite a CBP official's testimony before a House of Representatives

subcommittee that “all 11 million containers arriving at U.S. seaports are ‘analyzed’ and ‘screened’” and a 2007 mandate by Congress requiring the scanning of every container, currently only about three percent of containers are X-rayed. *Id.* Similarly, *The Atlantic* has also reported on DHS activity with regard to private airplanes, including an incident in 2012 when CBP diverted a pair of agents and wasted several hours searching a private plane because its flight “started in California and flew from west to east,” a profile the agents deemed “suspicious.” James Fallows, *Annals of the Security State: More Airplane Stories*, *Atlantic* (May 21, 2013), <https://perma.cc/LB7B-VMCC>. In addition, the news media has reported extensively on security expert Bruce Schneier’s decades-long, largely fruitless effort to get the Transportation Security Administration (“TSA”) to fix a variety of loopholes in airport security screening, some of which are vulnerable to anybody who can print a document on a printer. *See, e.g.*, Jeffrey Goldberg, *The Things He Carried*, *Atlantic* (Nov. 2008), <https://perma.cc/VU4F-BNKX> (describing Schneier and the author’s successful use of fake boarding passes created using a laptop and laser printer to pass through a TSA security checkpoint); Charles C. Mann, *Smoke Screening*, *Vanity Fair* (Dec. 20, 2011), <https://perma.cc/2352-GNGZ>; James Ball, *Airport Security Checks are Vulnerable to Fake Boarding Passes, Experts Warn*, *Wash. Post* (Nov. 3, 2012), <https://perma.cc/EP5K-FCBQ>.

Absent the ability by members of the public and the news media to observe and report on CBP activities, including through photography and recording, such vulnerabilities would continue unchecked. Thus, by shielding ineffective procedures and activities from view, efforts to obscure CBP security practices by banning unauthorized photography at ports of entry may in fact weaken border security, rather than enhance it. The CBP Media Restrictions are therefore neither necessary nor narrowly tailored to providing border security.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the district court's ruling.

Respectfully submitted,

s/ Bruce D. Brown

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Caitlin Vogus

The Reporters Committee for Freedom of the Press

Dated: October 3, 2016

APPENDIX A: STATEMENTS OF INTEREST

Digital First Media publishes the San Jose Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post and the Detroit News among other significant community papers throughout the United States.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

Los Angeles Times Communications LLC and The San Diego Union-Tribune, LLC are two of the largest daily newspapers in the United States. Their popular news and information websites, www.latimes.com and www.sandiegouniontribune.com, attract audiences throughout California and across the nation.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television 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.

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 assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Located in Charlottesville, Virginia, the Thomas Jefferson Center is a nonprofit, nonpartisan institution whose sole mission is the protection of the First Amendment rights of free speech and free press. Since its founding in 1990, the Center has pursued its mission in a variety of ways, including the filing of amicus curiae briefs in federal and state courts across the country.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 16-55719

I certify that this brief complies with the length limits set forth at Ninth Circuit Rule 32-1. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 5,759 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit and delivered by operation of the CM/ECF system to the counsel of record.

s/ Bruce D. Brown

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