

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

NO. 16-17199

---

LEESA JACOBSON; PETER RAGAN,

Plaintiffs – Appellants,

vs.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants – Appellees

---

On Appeal from the United States District Court  
for the Central District of California

---

***AMICUS CURIAE* BRIEF OF NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION AND THE CENTER FOR INVESTIGATIVE REPORTING,  
INC., SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL**

---

Rochelle L. Wilcox (CA Bar No. 197790) rochellewilcox@dwt.com

Taylor S. Ball (CA Bar No. 228824) taylorball@dwt.com

John Parsi (AK Bar No. 1205022) johnparisi@dwt.com

DAVIS WRIGHT TREMAINE LLP

865 S. Figueroa St., Suite 2400

Los Angeles, California 90017-2566

(213) 633-6800

(213) 633-6899 fax

*Attorneys for Amici Curiae*

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND  
THE CENTER FOR INVESTIGATIVE REPORTING, INC.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, undersigned counsel for *Amici Curiae* provide the following statement of corporate disclosure:

**The National Press Photographers Association** does not have a parent company and issues no stock.

**The Center For Investigative Reporting, Inc.** does not have a parent company and issues no stock.

DAVIS WRIGHT TREMAINE LLP

By /s/ Rochelle L. Wilcox  
Rochelle L. Wilcox

Attorneys for *Amici Curiae*  
NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION and THE CENTER FOR  
INVESTIGATIVE REPORTING, INC.

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTEREST OF THE <i>AMICI CURIAE</i> .....	1
II. STATEMENT OF THE CASE .....	3
III. ARGUMENT .....	4
A. The District Court Plainly Erred in Its Public Forum Analysis. ....	4
1. The First Amendment Limits the Government Defendants’ Ability to Control Expressive Conduct in a Public Forum.....	4
2. As a Public Thoroughfare, Arivaca Road Is a Public Forum, and the District Court Erred in Holding Otherwise. ....	6
3. Arivaca Road Also Satisfies This Court’s Three-Factor Test for Determining Whether Property Is a Public Forum. ....	9
B. The District Court’s Analysis Ignored the Important First Amendment Interest in Overseeing the Government.....	14
1. The First Amendment Protects the Right to Gather Information to Disseminate to the Public.....	15
2. The Border Patrol Checkpoint on Arivaca Road Meets the Two-Part Test for the Right of Access.....	19
3. The Public Has a Strong Interest in Monitoring the Arivaca Road Checkpoint. ....	24
IV. CONCLUSION .....	29

**TABLE OF AUTHORITIES**

**Page**

**Cases**

*ACLU of Nev. v. City of Las Vegas*,  
333 F.3d 1092 (9th Cir. 2003) .....*passim*

*Board of Airport Comm’rs v. Jews for Jesus*,  
482 U.S. 569 (1987).....5

*Branzburg v. Hayes*,  
408 U.S. 665 (1972).....17

*California First Amendment Coalition v. Woodford*,  
299 F.3d 868 (9th Cir. 2002) .....17

*Capital Cities Media, Inc. v. Chester*,  
797 F.2d 1164 (3d Cir. 1986) .....20

*Cincinnati Enquirer v. Cincinnati Bd. of Educ.*,  
249 F. Supp. 2d 911 (S.D. Ohio 2003) .....20

*Citizens United v. Fed. Election Comm’n*,  
558 U.S. 310 (2010).....6

*Cornelius v. NAACP Legal Def. & Educ. Fund*,  
473 U.S. 788 (1985).....4, 5, 7, 24

*Courthouse News Srv. v. Planet*,  
750 F.3d 776 (9th Cir. 2014) .....17, 18

*Cox Broad. Corp. v. Cohn*,  
420 U.S. 469 (1975).....15

*Fordyce v. City of Seattle*,  
55 F.3d 436 (9th Cir. 1995) .....11

*Frisby v. Schultz*,  
487 U.S. 474 (1988).....6, 7, 8

*Garrison v. Louisiana*,  
379 U.S. 64 (1964).....5

*Gericke v. Begin*,  
753 F.3d 1 (1st Cir. 2014).....18

*Ginsberg v. DeHart*,  
1:10-cv-00452-JAW, 2011 WL 1100989 (D.N.H. Mar. 22, 2011).....20

*Glik v. Cunniffe*,  
655 F.3d 78 (1st Cir. 2011).....18

*Hague v. CIO*,  
307 U.S. 496 (1939).....7

*Hale v. Dept. of Energy*,  
806 F.2d 910 (1986).....8, 9

*In re Guantanamo Bay Detainee Litig.*,  
630 F. Supp. 2d 1 (D.D.C. 2009).....19, 22

*Int’l Soc’y for Krishna Consciousness v. Lee*,  
505 U.S. 672 (1992) (Kennedy, J., concurring) .....4

*Johnson Newspaper Corp. v. Melino*,  
77 N.Y.2d 1 (1990).....20

*Leigh v. Salazar*,  
677 F.3d 892 (9th Cir. 2012) .....*passim*

*Mayhew v. Wilder*,  
46 S.W.3d 760 (Tenn. Ct. App. 2001).....20

*Nat’l Ass’n for Advancement of Colored People v. Button*,  
371 U.S. 415 (1963).....13, 24

*New York Times Co. v. United States*,  
403 U.S. 713 (1971) (Stewart, J., concurring).....19

*Newspapers, Inc. v. Roberts*,  
576 Pa. 231 (2003).....20

<i>Perry Educ. Ass’n v. Perry Local Educators’ Ass’n</i> , 460 U.S. 37 (1983).....	4, 6
<i>Press–Enterprise Co. v. Superior Court (Press–Enterprise II)</i> , 478 U.S. 1 (1986).....	19, 20, 21, 23
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	15
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	18
<i>Shoen v. Shoen</i> , 5 F.3d 1289 (9th Cir. 1993) .....	14
<i>Smith v. City of Cumming</i> , 212 F.3d 1332 (11th Cir. 2000) .....	11
<i>Turner v. Driver</i> , 848 F.3d 678 (5th Cir. 2017) .....	19
<i>U.S. v. Grace</i> , 461 U.S. 171 (1983).....	6
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976).....	12
<i>United States v. Miami Univ.</i> , 294 F.3d 797 (6th Cir. 2002) .....	20
<i>United States v. Sherman</i> , 581 F.2d 1358 (9th Cir. 1978) .....	17
<i>Venetian Casino Resort, L.L.V. v. Local Joint Executive Bd.</i> , 257 F.3d 937 (9 <sup>th</sup> Cir. 2001) .....	9, 11
<i>Whiteland Woods, L.P. v. Township of W. Whiteland</i> , 193 F.3d 177 (3d Cir. 1999) .....	20
<b>Regulations</b>	
Executive Order 13767, Border Security and Immigration Enforcement Improvements, (January 25, 2017) .....	19, 22

**Constitutional Provisions**

United States Constitution, amend. I .....*passim*

**Other Authorities**

9 Writings of James Madison 103 (G. Hunt ed. 1910).....15

Andrew Siff, Jonathan Dienst and Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Case*, NBC UNIVERSAL NEW YORK, Dec. 3, 2014, available at <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Statens-Island-chokehold-death-NYPD-284595921.html> (last visited Apr. 10, 2017).....27

*Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Remarks as Prepared for Delivery)*, April 11, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed> (last visited Apr. 11, 2017) .....23

Cale Ahearn, *Reading Police Officer Facing Charges After Trying to Stop Woman from Recording Traffic Stop with Cell Phone*, FOX 43, May 18, 2016, available at <http://fox43.com/2016/05/18/reading-police-officer-facing-charges-after-trying-to-stop-woman-from-recording-stop-with-cell-phone/> (last visited Apr. 10, 2017).....26

Chris Matyszczyk, *Woman Jailed After Recording Police Sues*, C|NET, Feb. 20, 2014, available at <https://www.cnet.com/news/woman-jailed-after-recording-traffic-stop-on-phone-sues/> (last visited Apr. 10, 2017).....26

Dan Gillmor, *Ferguson’s Citizen Journalists Revealed the Value of an Undeniable Video*, THE GUARDIAN, Aug. 16, 2014, available at <http://bit.ly/2mfCtvL>.....6

Daniel Victor and Matt Stevens, *United Passenger Dragged from Overbooked Flight*, NEW YORK TIMES, Apr. 10, 2017, available at [https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html?\\_r=0](https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html?_r=0) (last visited Apr. 10, 2017) .....27

David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, PETAPIXEL (reprinted from DETROIT FREE PRESS), Jul. 16, 2013, available at <http://bit.ly/2hySmdC> (last visited Apr. 10, 2017) .....25

David Felix Sutcliffe, *Why the Systematic Targeting of Citizen Journalists by Police Must Stop*, TALKHOUSE, Aug. 10, 2016, available at <http://www.talkhouse.com/talks/why-the-systematic-targeting-of-citizen-journalists-by-police-must-stop/> (last visited Apr. 10, 2017).....28

Deborah Bloom and Jareen Imam, *New York Man Dies after Chokehold by Police*, CNN, Dec. 8, 2014, available at <http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/> (last visited Apr. 10, 2017) .....27

Eric Zorn, *Chicago Police ‘Statement’ Another Weird Twist to United Fiasco*, CHICAGO TRIBUNE, Apr. 11, 2017, available at <http://www.chicagotribune.com/news/opinion/zorn/> (last visited Apr. 17, 2017).....28

Jamiles Lartey, *Film-Makers Demand Inquiry into ‘Targeting’ of People Who Record Police*, THE GUARDIAN, Aug. 11, 2016, available at <https://www.theguardian.com/film/2016/aug/10/filmmakers-citizen-journalists-justice-department-investigation> (last visited Apr. 10, 2017).....28

*Journalist Faces Charges After Arrest While Covering Dakota Access Pipeline Protest*, LOS ANGELES TIMES, Feb. 5, 2017, available at <http://www.latimes.com/nation/la-na-standing-rock-journalist-arrest-20170205-story.html> (last visited Apr. 10, 2017) .....25

Mark Berman, *Mistrial Declared in Case of South Carolina Officer Who Shot Walter Scott After Traffic Stop*, THE WASHINGTON POST, Dec. 5, 2016, available at [https://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm\\_term=.5d9ffa97e713](https://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm_term=.5d9ffa97e713) (last visited Apr. 10, 2017) .....27



Mark Joseph Stern, *“Just Following Orders”; Horror Stories About the Lawlessness of Customs and Border Protection Agents in the Aftermath of Trump’s Immigration Ban*, SLATE, Feb. 7, 2017, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/02/how\\_badly\\_did\\_cbp\\_treat\\_visa\\_holders\\_read\\_these\\_horror\\_stories.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/how_badly_did_cbp_treat_visa_holders_read_these_horror_stories.html) (last visited Apr. 11, 2017) .....23

Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, LOS ANGELES TIMES, March 9, 2016, available at <http://lat.ms/1QFntAG> (last visited Apr. 10, 2017) .....25

Matt Sledge, *Rochester Woman Arrested After Videotaping Police from Her Own Front Yard*, HUFFINGTON POST, June 22, 2011, available at [http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester\\_n\\_882122.html](http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester_n_882122.html) (last visited Apr. 10, 2017) .....26

Noah Bierman, *Wall Won’t Span the Entire U.S.-Mexico Border, Homeland Security Secretary Concedes*, LOS ANGELES TIMES, April 5, 2017, available at <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-1491426578-htmlstory.html> (last visited Apr. 10, 2017) .....22

*Rodney King Biography*, BIOGRAPHY, available at <http://www.biography.com/people/rodney-king-9542141> (last visited Apr. 10, 2017) .....27

Sara Rafsky, *At Occupy Protests, U.S. Journalists Arrested, Assaulted*, COMMITTEE TO PROTECT JOURNALISTS, Nov. 11, 2011, available at <http://bit.ly/2i2Mblp> (last visited Apr. 10, 2017) .....26

Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 381-86 (2011) .....17

Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, Aug. 2, 2011, available at <http://bit.ly/2i2zBmi> (last visited Apr. 10, 2017) .....25

Tal Coban, *Trump Admin Pledges Tougher Prosecutions of Undocumented Immigrants*, CNN, Apr. 11, 2017, available at <http://www.cnn.com/2017/04/11/politics/trump-immigration-sessions-prosecutions/> (last visited Apr. 11, 2017) .....23

Tim Perry, *CBS News Journalist Relives His Arrest at a Chicago Trump Event*, CBS NEWS, Nov. 14, 2016, <http://cbsn.ws/2i0ihvJ> (last visited Apr. 10, 2017) .....25

*Times Photographer Is Arrested on Assignment*, NEW YORK TIMES, Aug. 5, 2012, available at <http://nyti.ms/2hk8W4U> (last visited Apr. 10, 2017) .....25

Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992) ..... 16

Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBC UNIVERSAL WASHINGTON, June 23, 2011, available at <http://bit.ly/2h9JeLD> (last visited Apr. 10, 2017).....25

WOLA, *Fact Sheet on the U.S.-Mexico Border*, Jan. 25, 2017, available at <https://www.wola.org/2017/01/fact-sheet-u-s-mexico-border/> (last visited Apr. 11, 2017).....22

## **I. INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism creation, editing and distribution. NPPA’s approximately 6,000 members include television and still photographers, editors, students and business representatives serving the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

The Center for Investigative Reporting, Inc. (“CIR”) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, CIR is upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage its audience, across the aisle, coast to coast and worldwide.

---

<sup>1</sup> Statement pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-3: All parties to this appeal have consented to the filing of this amicus brief. Further, no counsel for any party authored this brief in whole or in part, and no person made a monetary contribution intended to fund preparation or submission of this brief.

This case is of paramount importance to Amici because it presents the Court with the opportunity to recognize and vindicate the First Amendment rights of journalists, photographers and members of the public to access and record matters of public concern – including police activity in public places – even when the government is determined to restrict access to those public places. The Government Defendants responded to the Plaintiffs’ attempts to monitor government activities by trying to change the very nature of a public street in Arizona. Although the public street at issue, Arivaca Road, is a thoroughfare, freely accessible to anyone traveling between two Arizona towns, the Government Defendants have used an expansive “enforcement zone” to thwart any attempts by Plaintiffs or other citizen activists to monitor the conduct of Government officials at the checkpoint erected on that road. Amici and their members rely on the long-recognized guarantees of public access in exercising their constitutional right to record Government officials performing their public duties. If the Government Defendants’ overreach is allowed to stand, Amici and their members will be harmed as their constitutional rights are chipped away by an increasingly aggressive and secretive federal government. Amici therefore submit this *Amicus Curiae* Brief to urge this Court to protect the clearly-enunciated rights of the press and public to record law enforcement personnel when they interact with the public in public spaces such as Arivaca Road.

## II. STATEMENT OF THE CASE

Arivaca Road is a two-lane road connecting the rural Arizona towns of Arivaca and Amado. A decade ago, the Border Patrol set up a checkpoint on Arivaca Road. Beginning in 2014, local residents, including the Plaintiffs in this case, began a campaign to monitor and protest reported abuses at the checkpoint. Plaintiffs sought to monitor and protest conduct from the public right-of-way located alongside Arivaca Road just outside the primary and secondary inspection areas of the checkpoint. Border Patrol agents (collectively the “Government Defendants”) took numerous actions to deter Plaintiffs’ activity on Arivaca Road; including erecting barricades, preventing approach to the checkpoint, and threatening arrest.

On November 20, 2014, Plaintiffs filed the instant lawsuit seeking declaratory and injunctive relief for violation of Plaintiffs’ First Amendment rights. On September 30, 2016, the District Court for the District of Arizona granted summary judgment in favor of the Government Defendants, relying primarily on an incorrect analysis of the public forum doctrine. Plaintiffs appealed the District Court’s order and *Amici Curiae* NPPA and CIR (“Amici”) submit this brief in support of appeal and reversal of the district court’s order.

### III. ARGUMENT

#### A. The District Court Plainly Erred in Its Public Forum Analysis.

Amici and their members have a profound interest in protecting access to traditional public forums such as streets, sidewalks and parks. This access is critical to monitoring government conduct, and depends on a strong, independent judiciary to prevent overreach by government agents who would prefer to avoid oversight by the press and public. As demonstrated in Plaintiffs' Opening Brief and below, the district court plainly erred in performing that oversight; reversal is justified on this basis alone.

##### 1. The First Amendment Limits the Government Defendants' Ability to Control Expressive Conduct in a Public Forum.

“The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech.” *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 695, (1992) (Kennedy, J., concurring). The Supreme Court evaluates First Amendment claims relating to speech on government property using an analytical framework known as “forum analysis.” *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)); see also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis balances the constitutionally protected speech interests of a citizen (or group of citizens) with the interests of the government in

controlling access to its property. *See Cornelius*, 473 U.S. at 800 (“the Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes”); *see also Board of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (rejecting resolution that “purports to create a virtual ‘First Amendment Free Zone’ at LAX”).

Under forum analysis the government’s power to restrict First Amendment activity on public property depends on the type of forum. *See ACLU of Nev.*, 333 F.3d at 1098 (“[t]hus, the scope of permissible governmental interference with expressive activity varies depending upon the nature of the location in which speech is to take place”); *Cornelius*, 473 U.S. at 800 (“[a]ccordingly, the extent to which the Government can control access depends on the nature of the relevant forum”). There are three forum types: “traditional public forum, a designated public forum, or a nonpublic forum.” *ACLU of Nev.*, 333 F.3d at 1097-98. The level of scrutiny depends on the forum type. *Id.*

Forum analysis provides clarity in exercising First Amendment rights on public property. Clarity is vital, under circumstances such as this case, because such exercise constitutes “the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see* Section III.B, *infra*. “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the

people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (citation omitted). Indeed, the recent rise of citizen journalism has proved invaluable in establishing accountability and inspiring democratic social movements.<sup>2</sup>

**2. As a Public Thoroughfare, Arivaca Road Is a Public Forum, and the District Court Erred in Holding Otherwise.**

A public forum is property where free exercise of the right to speech, public debate and assembly is established by long-standing use, historical association, or a government act. *Perry Educ. Ass’n*, 460 U.S. at 45 (1983). “In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.” *Id.* “The quintessential traditional public forums are sidewalks, streets, and parks.” *ACLU of Nev.*, 333 F.3d at 1092 (citing *U.S. v. Grace*, 461 U.S. 171, 177 (1983)) (sidewalks adjacent to Supreme Court are public forums); *see also Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (referring to public streets as “the archetype of public forum”). As the Supreme Court has held:

---

<sup>2</sup> See Dan Gillmor, *Ferguson’s Citizen Journalists Revealed the Value of an Undeniable Video*, THE GUARDIAN, Aug. 16, 2014, available at <http://bit.ly/2mfCtvL>.



Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but *it must not, in the guise of regulation, be abridged or denied.*

*Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (emphasis added). Sidewalks, streets, and parks are *per se* public forums. *Frisby*, 487 U.S. at 481.

“Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum *only* when the exclusion is *necessary* to serve a *compelling* state interest and the exclusion is *narrowly drawn to achieve that interest.*” *Cornelius*, 473 U.S. at 800 (emphasis added). Plaintiffs seek to stand, speak and monitor government conduct along Arivaca Road, a designated public right-of-way. The public spaces along Arivaca Road (excluding the narrowly defined primary and secondary inspection areas of the checkpoint) are *per se* traditional public forums, and government exclusion requires demonstrating that restriction is necessary to serve a compelling state interest. The district court’s analysis should have ended here, and it erred in holding otherwise. As the Supreme Court has made clear, “[*no*] *particularized inquiry into the precise nature of a specific street is necessary*; all public streets are held in the public trust

and are properly considered traditional public fora.” *Frisby*, 487 U.S. at 481 (emphasis added).

Instead, the district court relied on *Hale v. Dept. of Energy*, 806 F.2d 910, 915 (1986) to hold that Arivaca Road is a nonpublic forum because the government “withdrew” it from public use. In *Hale*, this Court held that a three-mile stretch of road between a cattle guard and the main guard gate leading to the Nevada Nuclear Weapons Testing Site (“NTS”) was not a public forum because it was not open to unrestricted public use. *Id.* at 916. The government “withdrew” the stretch of road from public use for the purpose of conducting nuclear testing. *Id.* The road at issue was the main road to NTS, led **only** to NTS and ended at the main guard gate, and individuals without any business were asked to leave. *Id.* at 911-12. The Court explained that “Mercury Road between Highway 95 and the main gate is not an open thoroughfare despite the fact that visitors are generally allowed to approach the main guard gate without being stopped. To say otherwise is to confuse what is no more than a long driveway with the highway with which it connects.” *Id.* at 916.

Arivaca Road is nothing like the “long driveway” in *Hale*. The installation of the primary and secondary checkpoints by the Government Defendants does not change the road’s intended use; Arivaca residents regularly drive through the checkpoint to go to school or work, and to perform routine errands. ER251.

Therefore, Arivaca Road remains a public forum intended for general public use.

*Venetian Casino Resort, L.L.V. v. Local Joint Executive Bd.*, 257 F.3d 937, 943 (9<sup>th</sup> Cir. 2001), (private sidewalk was a public forum where it remained “a thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use”); *ACLU of Nev.*, 333 F.3d at 1103 (“Although there is no doubt that the decorative pavement, barriers to cars, and canopy indicate to the public that the Fremont Street Experience is not simply another street, its openness to the public and smooth integration into downtown *preserve its public forum status.*”) (emphasis added). The district court plainly erred in relying on *Hale* to hold that Arivaca is a non-public forum. On this basis alone, the district court’s decision must be reversed.

### **3. Arivaca Road Also Satisfies This Court’s Three-Factor Test for Determining Whether Property Is a Public Forum.**

Even if further inquiry were necessary – although it is not because Arivaca Road is a public road – consideration of this Court’s three-factor test adopted to evaluate public forums supports reversal of the district court’s decision. For property other than sidewalks, streets, and parks, this Court has emphasized three factors in determining a public forum:

- 1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area;
- 2) the area’s physical characteristics and the existence of the clear boundaries delimiting the area; and
- 3) traditional or historic use of both the property in question and other similar properties.

*ACLU of Nev.*, 333 F.3d at 1100-01.

**First**, the use and purpose of Arivaca Road support a conclusion that it is a traditional public forum. Courts consider the uses and purpose of a property because “by informing us of the compatibility of expressive activity with other uses of the property, they enable us to evaluate the societal costs of allowing versus restricting speech.” *ACLU of Nev.*, 333 F.3d at 1101. “[W]hen a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are inherently compatible with such activity.” *Id.* As discussed above, residents continue to use Arivaca Road as a public thoroughfare despite the presence of the checkpoint. They regularly drive on Arivaca Road, through the checkpoint, to perform the basic tasks of everyday life, including going to school and work, and undertaking routine errands. ER251. Plaintiffs’ use of Arivaca Road for expressive activity, therefore, is “inherently compatible” with the property’s use and purpose.

**Second**, the physical characteristics of Arivaca Road support a conclusion that it is a traditional public forum. Nothing about Arivaca Road significantly differs from any other public street. Arivaca Road is a paved two-lane county road with minimal traffic. ER250-51. The roadside where Plaintiffs seek to demonstrate and monitor checkpoint activity is unpaved and designated as a public right-of-way. ER250. Arivaca Road’s physical characteristics, therefore, are

suitable for conducting expressive activity. *ACLU of Nev.*, 333 F.3d at 1102 (“Similarity to other traditional public forums not only indicates suitability for the conduct of expressive activity, but additionally, areas that are centrally located and integrated into the surrounding locale provide no alteration of expectations that would justify non-public forum status.”).

**Finally**, Arivaca Road as a public thoroughfare is part of the class of property historically and traditionally treated as a public forum. *Id.* at 1103 (citing *Venetian Casino Resort*, 257 F.3d at 934-44). The existence of the checkpoint – in operation for only a decade – does not change the historical use of Arivaca Road as a public forum, because its sole use is for transit between two parts of Arizona.

The district court did not fully consider these factors when evaluating whether Arivaca Road is a public forum. Instead, the court held that the **present** use of the checkpoint for “law enforcement operation” warrants treating the road near the primary and secondary inspection areas as a nonpublic forum. ER026. The court’s superficial analysis failed to consider the compatibility of the use of Arivaca Road as a checkpoint with Plaintiffs’ expressive activity. As discussed in Section III.B below, this Court long has recognized that citizens enjoy a First Amendment right to photograph law enforcement officers performing their official duties in public places. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing “First Amendment right to film matters of public interest”); *see also*

*Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property,” including the right “to photograph or videotape police conduct”). Therefore, the mere fact that property is being used for “law enforcement operation” does not make the property incompatible with Plaintiffs’ First Amendment expressive conduct.

The district court cited no authority in support of its departure from this Court’s three-factor test. Instead, it relied on *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976), to hold that traffic checkpoints are a “necessary” part of border patrol operations and are more effective when they are located on highways. ER026. But this is a *non sequitur*. *Martinez-Fuerte* addressed the scope of law enforcement powers in conducting a checkpoint, not whether the public has a First Amendment right to observe what occurs at that checkpoint. The necessity and location of a border patrol checkpoint has no bearing on the road’s public forum status under a forum analysis approach to the First Amendment.

The alleged “necessity” of the checkpoint is more properly analyzed in the context of appropriateness of government restrictions given the nature of the forum. Yet, the district court’s analysis collapsed the forum analysis and allowed the government’s *alleged* need to restrict First Amendment conduct to dictate the characterization of the forum. This is nothing more than the tail wagging the dog.

Traditional public forums cannot be changed to nonpublic forums based solely on the government's desired use of the property. As this Court explained in *ACLU of Nev.*, 333 F.3d at 1104, "the intent of a government to create a nonpublic forum has *no direct bearing* upon traditional public forum status." (Emphasis added.)

In holding that a public road – the “quintessential” public forum – is a nonpublic forum merely because the government erected a checkpoint, the district court created tremendous uncertainty surrounding the exercise of First Amendment rights on public property. Perhaps more so than any other constitutional right, “First Amendment freedoms need breathing space to survive.” *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). Amici necessarily rely on the clear lines drawn by the traditional public forum analysis in pursuing their constitutional right to gather news and record government conduct on busy city streets and remote county roads. Clarity as to the scope of a free speech right protects journalists and citizens in the exercise of those rights without fear of unredressable reprisal, and restrains government officials who might otherwise attempt to limit constitutionally-protected activity they deem a nuisance. Without a ruling by this Court overturning the district court’s error, important speech and newsgathering on matters of public concern will be chilled even if the conduct occurs in locations long held to be public forums for free expression. This Court should reverse the district court’s decision and make clear that the

government is not entitled to withdraw roads and other public forums from public use on such a thin reed.

**B. The District Court’s Analysis Ignored the Important First Amendment Interest in Overseeing the Government.**

Plaintiffs are not merely activists; they also gather information for dissemination to the public, in much the same way as a member of the press. As their Complaint alleges:

PHP’s petition drive followed the launch, in September 2013, of PHP’s “Abuse Documentation Clinic,” through which PHP invited local residents to document their experiences with Border Patrol in the community. PHP subsequently published a selection of residents’ accounts to its website (<http://phparivaca.org/>). Several of those accounts described abuses by Border Patrol agents at the checkpoint, including prolonged interrogation and detention, invasive searches, false canine alerts, racial profiling, verbal harassment, and physical assault.

ER252. This Court long ago recognized that the First Amendment protects not just the institutional press, but everyone who “had ‘the intent to use material – sought, gathered or received – to disseminate information to the public’” so long as that “‘intent existed at the inception of the newsgathering process.’” *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (citation omitted).

The district court ignored Plaintiffs’ interests in gathering information for dissemination to the public. In doing so, it adopted a standard that could severely impact the rights of Amici and similar press entities to conduct the government oversight that the drafters of the First Amendment intended. As discussed below,



this Court should reverse the district court's decision and make clear that the government may not arbitrarily deny members of the press and public access necessary to monitor government activities.

**1. The First Amendment Protects the Right to Gather Information to Disseminate to the Public.**

The First Amendment broadly protects not only speech, but also the newsgathering that often precedes speech. Freedom to gather information about the government helps to maintain an open government, which has been recognized as essential to 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.'" *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910)). "By reporting about the government, the media are 'surrogates for the public.'" *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment)). These newsgathering protections extend the reach of the public into areas that are impractical for individuals. "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *Id.* (quoting *Cox Broad. Corp. v. Cohn*, 420

U.S. 469, 490-91 (1975)). A checkpoint in lightly traveled rural Arizona squarely fits this analysis.

The guarantees of public and press access are particularly important where the government is suspected of wrongdoing. As this Court explained in *Leigh*, “[w]hen wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.” 677 F.3d at 900. Thus, “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.” *Id.* (quoting Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 949 (1992)). The Court recognized the critical role of the courts in such circumstances, emphasizing that “[i]f a government agency restricts public access, the media’s only recourse is the court system. The 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.***” *Id.* (emphasis added).

The right to access, although not directly enumerated in the First Amendment, is well-recognized. “Although the First Amendment does not enumerate special rights for observing government activities, ‘[t]he Supreme Court

has recognized that newsgathering is an activity protected by the First Amendment.” *Leigh*, 677 F.3d at 897-98 (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)). The right to access is essential to providing a meaningful freedom of the press. “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Thus, “the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.” *Leigh*, 677 F.3d at 897-98.<sup>3</sup>

The First Amendment right of access as an assurance of freedom of the press is essential in enabling free expression on important issues. “By guaranteeing that the individual citizen can effectively participate in and contribute to our republican system of self-government, the First Amendment right of access ensures that th[e] constitutionally protected discussion of governmental affairs is an informed one.” *Courthouse News Srvc. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) (quoting *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 874 (9th Cir. 2002)) (internal quotes omitted). Press access permits the public to make informed decisions about government. “By enabling the free discussion of governmental

---

<sup>3</sup> See also Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 381-86 (2011) (“The modern process of image capture is an essential element in producing and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication.”).

affairs, the right of access strengthens the core ‘marketplace’ of political ideas that the Founders sought to protect.” *Id.* (citing *Roth v. United States*, 354 U.S. 476, 483-84 (1957)).

The recording of police activity in public places falls within the First Amendment’s protective aegis because it is a necessary prerequisite to documenting and reporting official conduct, as well as misconduct. As the First Circuit has explained:

Moreover, as the [Supreme] Court has noted, ***freedom of expression has particular significance with respect to government because it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.*** Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

*Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (citations, quotation marks omitted; emphasis added). The right extends beyond the press to individuals. *Id.* at 84 (“[t]he First Amendment right to gather news is, as the [Supreme] Court has often noted, not one that inures solely to the benefit of the news media”); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (“the Constitution protects the right of ***individuals*** to videotape police officers performing their duties in public” (emphasis added)). “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and

make informed decisions about police policy.” *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017).

The right to access is particularly important “in the areas of national defense and international relations” because “the only effective restraint upon executive policy and power ... may lie in an enlightened citizenry.” *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 11 (D.D.C. 2009) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)). The Border Patrol checkpoint on Arivaca Road involves the exercise of both national defense and international relations. *See, e.g.*, Executive Order 13767, Border Security and Immigration Enforcement Improvements (Jan. 25, 2017). The involvement of both areas of executive power requires particular consideration of press access as an important bulwark against abuse of government power.

## **2. The Border Patrol Checkpoint on Arivaca Road Meets the Two-Part Test for the Right of Access.**

The Supreme Court’s decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”), established the right of access to criminal trials; subsequent cases have extended that right to a number of government activities. This Court’s decision in *Leigh* discussed the many cases that extended that right beyond access to criminal court proceedings, including “a list of California almond growers eligible to vote in an agricultural marketing order referendum” and “executions from the moment the condemned enters the

execution chamber through, to and including, the time the condemned is declared dead.” 677 F.3d at 899 (citations omitted).<sup>4</sup> Applying these cases, the Court held that the *Press-Enterprise II* test also applied to a horse roundup by the Bureau of Land Management. *Id.* As the Court explained, “*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.* at 900.

Here too, Plaintiffs seek access to the checkpoint, in part, to observe and report to the public about government conduct. Thus, the two-part test adopted by the Supreme Court in *Press-Enterprise II* squarely applies. *Leigh*, 677 F.3d at 897-98. “First, the court must determine whether a right of access attaches to the government proceeding or activity.” *Id.* The assessment requires two considerations: (1) “whether the place and process have historically been open to the press and general public” and (2) “whether public access plays a significant

---

<sup>4</sup> See also *United States v. Miami Univ.*, 294 F.3d 797, 821 (6th Cir. 2002) (university’s student disciplinary records); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (planning commission meetings); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (state environmental agency records); *Ginsberg v. DeHart*, 1:10-cv-00452-JAW, 2011 WL 1100989, at \*13 (D.N.H. Mar. 22, 2011) (attorney disciplinary proceeding records); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F. Supp. 2d 911, 915 (S.D. Ohio 2003) (resumes of candidates for school superintendent); *Newspapers, Inc. v. Roberts*, 576 Pa. 231 (2003) (legislator’s telephone records); *Mayhew v. Wilder*, 46 S.W.3d 760, 776-77 (Tenn. Ct. App. 2001) (meetings of state legislature); *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1 (1990) (dentist’s professional disciplinary hearing).

positive role in the functioning of the particular process in question.” *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8-9). “Second, if the court determines that a qualified right applies, 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.’” *Id.* (citing *Press-Enterprise II*, 478 U.S. at 9). Applying the two-part test to the Border Patrol checkpoint on Arivaca Road illustrates that the public and press – including Plaintiffs – have a qualified right of access to areas outside of the primary and secondary screening areas.

**First**, access to the Border Patrol checkpoint on Arivaca Road meets the first test for qualified access. As established in Section III.A.2 above, Arivaca Road is a public forum “historically [ ] open to the press and general public.” *Leigh*, 677 F.3d at 897-98. It is undisputed that Arivaca Road remains a thoroughfare, accessible by any member of the public. ER249-250. Moreover, while the Government *may* be justified in protecting a small area around the actual checkpoint, it did not come close to meeting its heavy burden to establish that *as a matter of law* it was entitled to erect such an expansive “enforcement zone” in response to Plaintiffs’ activities here. ER067. The district court plainly erred in paying no heed to the public’s right to monitor the activities at the checkpoint,

completely thwarted by creating a 150-foot barrier between the checkpoint and the public. *Id.*

In addition, observation of the Border Patrol checkpoint on Arivaca Road “plays a significant positive role in the functioning of the particular process in question.” As discussed above, the right to access is particularly important “in the areas of national defense and international relations” because “the only effective restraint upon executive policy and power ... may lie in an enlightened citizenry.”

*In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d at 11 (citation omitted).

The Border Patrol checkpoint on Arivaca Road involves the exercise of both national defense and international relations. *See* Executive Order 13767, Border Security and Immigration Enforcement Improvements (Jan. 25, 2017).

The Government’s exercise of that power here significantly impacts rights of those detained and the public in understanding the conduct of Border Patrol agents. The court in *In re Guantanamo Bay Detainee Litig.* specifically noted unwavering interest in Guantanamo Bay coupled with the public’s incomplete understanding of the proceedings. Here too, it is undeniable that activities at the United States border are an area of unwavering public interest and incomplete understanding.<sup>5</sup>

---

<sup>5</sup> *See, e.g.*, Noah Bierman, *Wall Won’t Span the Entire U.S.-Mexico Border, Homeland Security Secretary Concedes*, LOS ANGELES TIMES, April 5, 2017, available at <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-1491426578-htmlstory.html> (last visited Apr. 10, 2017); WOLA, *Fact Sheet on the U.S.-Mexico Border*, Jan. 25, 2017, available at <https://www.wola.org/2017/01/fact-sheet-u-s-mexico-border/> (last visited Apr.



This is particularly true as the federal government announces a policy shift to focus resources on undocumented immigrants<sup>6</sup> and members of the press and public decry behavior by Customs and Border Protection that they contend reflects profound abuses of power.<sup>7</sup> Thus, press access to the Border Patrol checkpoint on Arivaca Road meets both requirements of the first test.

*Second*, having met the first part of the test, the burden shifts to the government, to demonstrate “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 897-98 (citing *Press-Enterprise II*, 478 U.S. at 8-9). The Government Defendants did not meet this heavy burden, particularly at this

---

11, 2017).

<sup>6</sup> *E.g.*, Tal Coban, *Trump Admin Pledges Tougher Prosecutions of Undocumented Immigrants*, CNN, Apr. 11, 2017, available at <http://www.cnn.com/2017/04/11/politics/trump-immigration-sessions-prosecutions/> (last visited Apr. 11, 2017). *See also* Attorney General Jeff Sessions *Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement (Remarks as Prepared for Delivery)*, April 11, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed> (last visited Apr. 11, 2017) (declaring government’s commitment to “secure this border and bring the full weight of both the immigration courts and federal criminal enforcement to combat this attack on our national security and sovereignty”; referring to certain persons who cross border illegally as “this filth”).

<sup>7</sup> *E.g.*, Mark Joseph Stern, “*Just Following Orders*”; *Horror Stories About the Lawlessness of Customs and Border Protection Agents in the Aftermath of Trump’s Immigration Ban*, SLATE, Feb. 7, 2017, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/02/how\\_badly\\_did\\_cbp\\_treat\\_visa\\_holders\\_read\\_these\\_horror\\_stories.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/how_badly_did_cbp_treat_visa_holders_read_these_horror_stories.html) (last visited Apr. 11, 2017).

early stage of the proceeding. Even if the Government has an interest in providing some barrier between the public and the checkpoint, its 150-foot barrier is grossly excessive. Plaintiffs should have had the opportunity to obtain discovery regarding the Government's decision to erect its oversized "enforcement zone" and whether it considered other alternatives that would serve the Government's interests while also protecting the public's right to monitor the activities of Border Patrol Agents at the checkpoint.

**3. The Public Has a Strong Interest in Monitoring the Arivaca Road Checkpoint.**

While the Border Patrol checkpoint on Arivaca Road is a public thoroughfare, it is not heavily traveled. As a result, access to that checkpoint to report on the activities of the Border Patrol is essential to affording a check on the government. As discussed above, the Supreme Court long has recognized that "First Amendment freedoms need breathing space to survive." *NAACP*, 371 U.S. at 433. Without clarity as to the existence and scope of a First Amendment right, citizens may avoid exercising that right for fear of unredressable reprisal, while government officials may feel free to retaliate against expressive actions they deem a nuisance.

These concerns are hardly hypothetical. Professional journalists and citizens are not infrequently arrested in the course of documenting newsworthy events on charges that are often dismissed without further action. For example, in 2011, a

credentialed Long Island news videographer was arrested and charged with obstructing governmental administration for videotaping police activity from a public street, in the midst of other bystanders.<sup>8</sup> In August 2012, a photographer on assignment for The New York Times was assaulted, arrested, and charged with obstructing government administration and resisting arrest for photographing the arrest of a teenage girl in the Bronx.<sup>9</sup> In February 2017, a reporter covering the Dakota pipeline protests for Indian Country Today and the Center for Investigative Reporting was arrested and charged with criminal trespass and “engaging in a riot.”<sup>10</sup> Indeed, the numerous instances of mistreatment of members of the news media by police during various Occupy Wall Street protests starkly illustrate the

---

<sup>8</sup> Steve Myers, *News Photographer Arrested on Long Island for Videotaping Police*, POYNTER, Aug. 2, 2011, available at <http://bit.ly/2i2zBmi> (last visited Apr. 10, 2017) (noting that charge was later dropped).

<sup>9</sup> *Times Photographer Is Arrested on Assignment*, NEW YORK TIMES, Aug. 5, 2012, available at <http://nyti.ms/2hk8W4U> (last visited Apr. 10, 2017).

<sup>10</sup> *Journalist Faces Charges After Arrest While Covering Dakota Access Pipeline Protest*, LOS ANGELES TIMES, Feb. 5, 2017, available at <http://www.latimes.com/nation/la-na-standing-rock-journalist-arrest-20170205-story.html> (last visited Apr. 10, 2017). *See also, e.g.*, Tom Sherwood, *Journalists Handcuffed, Removed from Taxi Commission Meeting*, NBC UNIVERSAL WASHINGTON, June 23, 2011, available at <http://bit.ly/2h9JeLD> (last visited Apr. 10, 2017); David Becker, *Detroit Newspaper Photographer Arrested While Covering Police Action*, PETAPIXEL (reprinted from DETROIT FREE PRESS), Jul. 16, 2013, available at <http://bit.ly/2hySmdC> (last visited Apr. 10, 2017); Matt Hamilton, *L.A. Times Photographer Arrested After Covering Nancy Reagan Funeral Motorcade*, LOS ANGELES TIMES, March 9, 2016, available at <http://lat.ms/1QFntAG> (last visited Apr. 10, 2017); Tim Perry, *CBS News Journalist Relives His Arrest at a Chicago Trump Event*, CBS NEWS, Nov. 14, 2016, <http://cbsn.ws/2i0ihvJ> (last visited Apr. 10, 2017).

problem. Many outlets have reported that news reporters and photojournalists were arrested along with protesters, merely for attempting to cover the events.<sup>11</sup>

These problems are not limited to the media. Citizens also have been arrested for exercising their right to record the police. For example, a Florida police officer arrested a driver who recorded a routine traffic stop.<sup>12</sup> New York police arrested a woman who stood in her own front yard and recorded police searching a car in her neighborhood.<sup>13</sup> And in Pennsylvania, a police officer was charged with official oppression and other crimes after his false arrest of a driver and passenger who recorded the police stop.<sup>14</sup>

Moreover, the value of citizen recordings in police oversight cannot be overstated. Years ago, the beating of Rodney King by Los Angeles police officers paralyzed the nation precisely because a bystander videotaped the police abuse,

---

<sup>11</sup> See, e.g., Sara Rafsky, *At Occupy Protests, U.S. Journalists Arrested, Assaulted*, COMMITTEE TO PROTECT JOURNALISTS, Nov. 11, 2011, available at <http://bit.ly/2i2Mblp> (last visited Apr. 10, 2017).

<sup>12</sup> Chris Matyszczyk, *Woman Jailed After Recording Police Sues*, CNET, Feb. 20, 2014, available at <https://www.cnet.com/news/woman-jailed-after-recording-traffic-stop-on-phone-sues/> (last visited Apr. 10, 2017).

<sup>13</sup> Matt Sledge, *Rochester Woman Arrested After Videotaping Police from Her Own Front Yard*, HUFFINGTON POST, June 22, 2011, available at [http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester\\_n\\_882122.html](http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester_n_882122.html) (last visited Apr. 10, 2017).

<sup>14</sup> Cale Ahearn, *Reading Police Officer Facing Charges After Trying to Stop Woman from Recording Traffic Stop with Cell Phone*, FOX 43, May 18, 2016, available at <http://fox43.com/2016/05/18/reading-police-officer-facing-charges-after-trying-to-stop-woman-from-recording-stop-with-cell-phone/> (last visited Apr. 10, 2017).

allowing the public to see what the officers had done.<sup>15</sup> In recent years, citizen recordings exposed police abuse that might not have come to light without the videos, leading to protestors repeating the cry “I can’t breathe” and a New York grand jury investigation of an illegal chokehold,<sup>16</sup> and criminal charges and a mistrial in a South Carolina case in which an officer shot a fleeing man in the back.<sup>17</sup> As this Amicus Brief is being written, United Airlines is facing widespread criticism for having a passenger forcefully removed from an overbooked flight (as recorded by numerous passengers), and the Chicago Police Department is being condemned for a misleading statement that the passenger’s injuries resulted from a “fall” rather than the use of force by police.<sup>18</sup> Indeed, the importance of citizen

---

<sup>15</sup> *Rodney King Biography*, BIOGRAPHY, available at <http://www.biography.com/people/rodney-king-9542141> (last visited Apr. 10, 2017).

<sup>16</sup> Deborah Bloom and Jareen Imam, *New York Man Dies after Chokehold by Police*, CNN, Dec. 8, 2014, available at <http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/> (last visited Apr. 10, 2017); Andrew Siff, Jonathan Dienst and Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Case*, NBC UNIVERSAL NEW YORK, Dec. 3, 2014, available at <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html> (last visited Apr. 10, 2017).

<sup>17</sup> Mark Berman, *Mistrial Declared in Case of South Carolina Officer Who Shot Walter Scott After Traffic Stop*, THE WASHINGTON POST, Dec. 5, 2016, available at [https://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm\\_term=.5d9ffa97e713](https://www.washingtonpost.com/news/post-nation/wp/2016/12/05/mistrial-declared-in-case-of-south-carolina-officer-who-shot-walter-scott-after-traffic-stop/?utm_term=.5d9ffa97e713) (last visited Apr. 10, 2017).

<sup>18</sup> *E.g.*, Daniel Victor and Matt Stevens, *United Passenger Dragged from Overbooked Flight*, NEW YORK TIMES, Apr. 10, 2017, available at <https://www.nytimes.com/2017/04/10/business/united-flight-passenger->

journalism led a respected group of more than 40 documentarians, including eight Oscar winners, to write to the Justice Department demanding an investigation into the alleged harassment of citizens who recorded police abuse.<sup>19</sup> Each of these events contributed to national discussions of tremendous public importance, reinforcing the value of protecting the right of the public and press to oversee law enforcement personnel whenever they interact with the public.

The district court did not pay sufficient heed to these important rights. Its decision harms Plaintiffs, who have committed extensive time and resources to monitoring the Border Patrol checkpoint on Arivaca Road, only to be thwarted by a government resolved to hide its activities from public view. Beyond that, the court's reasoning threatens to harm Amici and their members, in their constitutionally-recognized role of serving as the public's eyes and ears. This Court should conduct the thorough, searching review that the First Amendment

---

dragged.html?\_r=0 (last visited Apr. 10, 2017); Eric Zorn, *Chicago Police 'Statement' Another Weird Twist to United Fiasco*, CHICAGO TRIBUNE, Apr. 11, 2017, available at <http://www.chicagotribune.com/news/opinion/zorn/> (last visited Apr. 17, 2017).

<sup>19</sup> Jamiles Lartey, *Film-Makers Demand Inquiry into 'Targeting' of People Who Record Police*, THE GUARDIAN, Aug. 11, 2016, available at <https://www.theguardian.com/film/2016/aug/10/filmmakers-citizen-journalists-justice-department-investigation> (last visited Apr. 10, 2017); see David Felix Sutcliffe, *Why the Systematic Targeting of Citizen Journalists by Police Must Stop*, TALKHOUSE, Aug. 10, 2016, available at <http://www.talkhouse.com/talks/why-the-systematic-targeting-of-citizen-journalists-by-police-must-stop/> (last visited Apr. 10, 2017) (discussing alleged examples of police targeting of citizen journalists).

demands and, following that review, reverse the lower court's Opinion and remand this matter for discovery and trial on Plaintiffs' claims.

#### IV. CONCLUSION

Amici urge the Court to make clear that the public and press have a clearly-established First Amendment right to access and record police activity in traditionally-public places such as Arivaca Road. Amici ask the Court to reverse the district court's order rejecting Plaintiffs' claims and to direct that court to deny the Government Defendants' motion for summary judgment so that Plaintiffs may pursue their claims for violation of their First Amendment rights.

RESPECTFULLY SUBMITTED this 17th day of April, 2017.

DAVIS WRIGHT TREMAINE LLP  
Rochelle L. Wilcox  
Taylor S. Ball  
John Parsi

Attorneys for *Amici Curiae*  
NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION and THE CENTER FOR  
INVESTIGATIVE REPORTING, INC.

NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION  
Mickey H. Osterreicher  
Attorneys for *Amicus Curiae*  
NATIONAL PRESS PHOTOGRAPHERS  
ASSOCIATION

By /s/ Rochelle L. Wilcox  
Rochelle L. Wilcox

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-17199**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1. The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 and FRAP 29(a)(5). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1)  separately represented parties; (2)  a party or parties filing a single brief in response to multiple briefs; or (3)  a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated . The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2(a) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2(c)(2) or (3) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rochelle L. Wilcox

Rochelle L. Wilcox