20-35739

In the
United States Court of Appeals
For the Ninth Circuit

INDEX NEWSPAPERS LLC, DBA PORTLAND MERCURY, DOUG BROWN, BRIAN CONLEY, SAM GEHRKE, MATHIEU LEWIS-ROLLAND, KAT MAHONEY, SERGIO OLMOS, JOHN RUDOFF, ALEX MILAN TRACY, TUCK WOODSTOCK, JUSTIN YAU and Those Similarly Situated,

Plaintiffs-Appellees,

– v. –

UNITED STATES MARSHALS SERVICE and U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants,

– and –

CITY OF PORTLAND, a Municipal Corporation and JOHN DOES 1-60, Individually and Supervisory Officers of Portland Police Bureau and Other Agencies Working in Concert,

Defendants.

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

BRIEF FOR *AMICI CURIAE* THIRTEEN SCHOLARS AND PRACTITIONERS OF FIRST AMENDMENT LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify 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 this brief, and no person—other than *amici* or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICI CURIAE AND CONSENT TO FILE

Amici Curiae are 13 scholars and practitioners of First Amendment law. *Amici* have an interest in preserving robust protections for the First Amendment right to gather and report the news without undue government interference. *Amici* have a range of views on the proper interpretation of the First Amendment, but all agree that the Press Clause independently supports the preliminary injunction entered by the district court. Each *amicus* is identified in the Appendix. This brief is filed with all-party consent.

PRELIMINARY STATEMENT

This appeal presents important questions concerning the proper exercise of judicial authority to protect the First Amendment rights that all individuals enjoy. The journalists who brought this case allege that agents from the Department of Homeland Security (DHS) and the U.S. Marshals Service (USMS) targeted them with tear gas, pepper spray, and other less-lethal munitions in order to prevent them from observing and reporting on the government's response to protests. That targeting made it impossible for them to gather the news and, by extension, prevented the public from receiving relevant information about its government's actions. By preventing journalists from observing their activities, DHS and USMS impermissibly infringed the First Amendment-protected right to gather the news.

The Press Clause of the First Amendment safeguards freedom "of the press" because the gathering and reporting of "news" (or information related to matters of public concern[1]) is indispensable to democracy. After declaring independence from an illiberal regime, the Framing generation understood that the new nation's constitutional system would require checks on government power. Chief among these was a free press acting as an independent watchdog on behalf of the public. Reflecting their conviction that a free press would preserve liberty, the Framers guaranteed an individual right to gather and publish the news through the Press Clause. Since the adoption of the First Amendment, the Supreme Court and this Circuit have repeatedly vindicated this constitutional right and recognized the importance of journalists' oversight role in our democracy.

The Press Clause protects the journalists' activity in this case. While the district court correctly held that Appellants unlawfully burdened the general First Amendment right of public access, the Press Clause provides independent support for the injunctive relief entered by the court. The journalists here were engaged in the very kind of oversight activity that the Framing generation intended the Press Clause to protect: reporting on the government's response to citizens' exercise of

[1] See *Snyder v. Phelps*, 462 U.S. 443, 453 (2011) (describing matters of public interest as "'a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public'" (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004))).

their rights to assemble, speak, and petition. If the government can bar journalists from observing its treatment of protestors, the public will lose its eyes and ears on the ground and the government will face no external check—even when the need for an independent watchdog is at its zenith. The district court injunction should be affirmed as a proper enforcement of the rights protected by the Press Clause.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES FREEDOM "OF THE PRESS" BECAUSE NEWSGATHERING IS ESSENTIAL TO A FUNCTIONING DEMOCRACY

Since the Founding, members of the press have performed a vital oversight role in the American constitutional system. Leaders of the Framing generation, keenly aware that the press's ability to gather and report the news is a crucial safeguard of liberty, included the Press Clause in the Bill of Rights to guard against the tyranny that caused them to break from the British Crown. Over the ensuing centuries, courts—including the Supreme Court and the Ninth Circuit—have consistently acknowledged that journalists play an essential role in our constitutional system by functioning as the public's "eyes and ears." *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978). Press freedom animated Founding-era debates, was explicitly enshrined in the First Amendment, and has been embraced by the courts because newsgathering is an indispensable public function.

A. The Framing Generation Understood That the Free Press Plays a Critical Oversight Role

The Framing generation recognized that freedom of the press would be vital to the newly formed constitutional system. While the Constitution established a system of internal checks and balances, the consensus at the time was that a free press provided a critical external check on government.[2] In the words of Justice William Cushing to John Adams in 1789, criticism of government conduct by a free press "tends to the Security of Freedom" and may "prevent the necessity of a revolution."[3] Fearing that those in power would attempt to muzzle members of the press as they pursued their watchdog role,[4] the Framers provided an affirmative constitutional safeguard: the First Amendment's guarantee of press freedom.

The Framing generation's decision to provide independent protection for press freedom, as distinct from the protection for speech freedom, reflected the understanding that the free press serves both an expressive function and a structural oversight function. As the political historian Robert W. T. Martin has noted, the Framing generation both "lionized the press as the prime defender of public liberty in its role as a bulwark against governmental tyranny" and "stressed

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[2] Sonja R. West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49, 68 (2014).

[3] Wendell Bird, *Press and Speech Under Assault* 155 (2016) (quoting Letter from William Cushing to John Adams (Feb. 18, 1789)).

[4] David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 491 (1983).

the individual right of every man to air his sentiments for all to consider."[5] Pennsylvania's original constitution, which both protected press freedom as an expressive right intertwined with the freedom of speech and separately recognized the press's structural role as a government watchdog, illustrates these dual purposes.[6]

While the expressive right is today largely protected by the Speech Clause, the Founding generation understood the Press Clause to secure the structural oversight function. In fact, "[t]he textual antecedents of the [F]irst [A]mendment reflect a greater concern with press than with speech."[7] According to the historian Leonard Levy, the freedom of speech emerged "as an offshoot of freedom of the press" and the "freedom of religion."[8] Perhaps reflecting this hierarchy during the Founding era, only one original state—Pennsylvania—explicitly mentioned the freedom of speech in its declaration of rights.[9] Meanwhile, the question of how to

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[5] Robert W. T. Martin, *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800*, at 3–4 (2001).

[6] West, *supra* note 2, at 66–67.

[7] Anderson, *supra* note 4, at 508.

[8] Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 5 (1960).

[9] *See* Anderson, *supra* note 4, at 465; Stephen M. Feldman, *Free Expression and Democracy in America: A History* 52 (2008).

protect press freedom animated debates over the Bill of Rights. Patrick Henry and Thomas Jefferson joined Madison in advocating for a distinctive press provision.[10]

The debates over the proposed Bill of Rights further demonstrate that the Framers saw the Press Clause as granting an independent right to gather and publish the news, separate from the broader right to speak provided by the Speech Clause. James Madison, who considered a free press to be among the "choicest privileges of the people," advocated for a separate constitutional provision guaranteeing the freedom of the press.[11] He believed that press freedom stood apart from speech freedom and warranted an independent safeguard.[12] Notably, one of his proposed amendments made no reference to speech rights but would have prohibited states from infringing "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[13] Another proposal read: "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[14] Madison's draft proposal of a right "to speak, to

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[10] West, *supra* note 2, at 64.

[11] James Madison, Amendments to the Constitution, June 8, 1789, *in* 5 *The Writings of James Madison* 377, 380 (Gaillard Hunt ed., 1904).

[12] *Id*.

[13] 1 Joseph Gales, *The Debates and Proceedings in the Congress of the United States 1789-1791*, at 452 (1834) [hereinafter *Congress Debates*].

[14] *Id.* at 451.

write, or to publish" could have been read to encompass press freedom. Yet by identifying "freedom of the press" as a distinct right, Madison underscored the importance of safeguarding the press function in our constitutional system. The final text of the First Amendment differed from those drafts, but Madison's support for a specific guarantee of press freedom prevailed. The historical record shows that the Framers intended "to protect press freedom uniquely as press freedom."[15]

The Framing generation's emphasis on the importance of press freedom had deep roots in the revolutionary period. Early Americans celebrated the distinctive role of the press in preserving freedom. Massachusetts colonial leaders, for example, lauded the "Liberty of the Press" as "a great Bulwark of the Liberty of the People."[16] In 1776, many of the newly independent states embraced similar language in their declarations of rights.[17] Virginia proclaimed "[t]hat the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained

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[15] West, *supra* note 2, at 65.

[16] Leonard W. Levy, *Emergence of a Free Press* 66 (1985) (quoting Letter from Massachusetts House of Representatives to Gov. Francis Bernard (Mar. 3, 1768), *in* Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 275 (1865)).

[17] *See generally* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971).

but by despotick Governments."[18] Maryland likewise declared "[t]hat the liberty of the press ought to be inviolably preserved."[19] Pennsylvania provided *two* guarantees for press freedom: first, that "the freedom of the press ought not to be restrained," and second, that "[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[20] In total, nine of the thirteen original colonies included specific protections for a free press in their founding documents.[21] Only the freedom of religion and the right to a jury trial were more commonly recognized rights.[22] Certain that without a free press their experiment in self-government was doomed to failure, early Americans safeguarded, through the Press Clause, an independent right to gather and report the news.

B. Courts Have Long Recognized That Oversight by Journalists Is Fundamental to Our Constitutional System

The Supreme Court and the Ninth Circuit have repeatedly emphasized the constitutional significance of the press's structural oversight function that the

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[18] Virginia Declaration of Rights, 1776, reprinted in Schwartz, *supra* note 17, at 234–35.

[19] Maryland Declaration of Rights, 1776, reprinted in Schwartz, *supra* note 17, at 284.

[20] Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 14–15 (2002).

[21] Bird, *supra* note 3, at 27.

[22] *Id*.

Framing generation sought to protect. Both courts have recognized that journalistic scrutiny means little without protections for both gathering and reporting the news.

The landmark libel decision in *New York Times Co. v. Sullivan*, for example, rests upon a recognition that the press plays a constitutionally protected oversight role. In that case, Justice Brennan adopted the views of the First Amendment's drafter, James Madison, who believed that the press's "right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government." 376 U.S. 254, 275 (1964). Because this right to critique the government represents "the central meaning of the First Amendment," the Court held that proof of actual malice is required for damages in libel actions brought by public officials against their critics. *Id.* at 273, 283-84. Any lower standard would risk placing the "censorial power" "in the Government over the people," rather than where it belongs, "in the people over the Government." *Id.* at 282-83. Because "systematic scrutiny of [public] officials seems necessary in light of the tyrannical possibilities . . . of modern government," those who report on the government must receive independent protection under the First Amendment.[23]

[23] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521, 575 (1977); *see also id.* (analyzing the Supreme Court's First Amendment jurisprudence and advancing a descriptive theory centered around the "checking function" of public scrutiny).

First Amendment protections for the press extend into the national security context. In *New York Times Co. v. United States*, the Court rejected the federal government's request to enjoin *The New York Times* and *The Washington Post* from publishing the contents of a classified study about U.S. policy in the Vietnam War. 403 U.S. 713 (1971) (per curiam). Justice Black, in his concurrence, underscored that the First Amendment safeguards the right of the press to "bare the secrets of government and inform the people"—a right that would not yield to "a broad, vague" invocation of "security" concerns. *Id.* at 718-19 (Black, J., concurring). As Justice Black explained, "the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *Id.* at 717 (Black, J., concurring).

The Supreme Court has repeatedly acknowledged that the ability to gather information is essential to the press's oversight role. At its core, "the press serves as the information-gathering agent of the public." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978). As the public's "eyes and ears," journalists "can be a powerful and constructive force, contributing to remedial action in the conduct of public business." *Houchins*, 438 U.S. at 8.

The Court first recognized a First Amendment "right of access" to certain government proceedings and information in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which found a constitutional right of access to

observe criminal trials. Chief Justice Burger noted that because reporters act "as surrogates of the public," they are "often" prioritized as trial observers so that their reporting may "'contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . .'" *Id.* at 573 (plurality opinion) (quoting *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 587 (Brennan, J., concurring in the judgment)). In a concurring opinion, Justice Brennan emphasized that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Id*. at 587 (Brennan, J., concurring) (collecting cases). Unduly restricting access to government information would undermine the structural role of the free press.

Sensitive to the myriad ways in which government may encroach on press freedom, the Supreme Court has prohibited end runs around the First Amendment that could jeopardize the independence of journalists. For example, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court held unconstitutional a Minnesota state tax on paper and ink used by news publications. 460 U.S. 575 (1983). The Court warned that the targeted tax threatened to "operate . . . as a censor to check critical comment by the press, thus undercutting the basic

assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585.

The Ninth Circuit has similarly emphasized the important role of newsgatherers as government watchdogs, describing the free press as "the guardian of the public interest." *Leigh v. Salazar*, 677 F.3d 892, 897, 900 (9th Cir. 2012). In a case involving the reporter's privilege, this Court acted to safeguard "society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). Journalists, the Court explained, "have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance." *Id.* at 1293. Through *Leigh* and *Shoen*, this Court, like the Supreme Court, has affirmed the original understanding of the press as performing an indispensable role in democratic governance.

II. THE PRESS CLAUSE SAFEGUARDS THE FREEDOM TO GATHER AND PUBLISH THE NEWS

Because journalists act as watchdogs for the public and perform an important checking function in our constitutional system, both the Supreme Court and this Circuit have recognized that the First Amendment protects the act of newsgathering. Although the Supreme Court has yet to articulate the precise scope of the right, it has acknowledged "an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978)

(quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972)). Supreme Court precedent makes clear that the Press Clause safeguards an individual right to gather and report the news.

A. The Press Clause Protects the Act of Newsgathering

Courts have long recognized that the First Amendment not only protects the individual's right to speak, write, and publish, but also ensures the free flow of information to the public. Access to information, the Supreme Court has written, is a "fundamental right[]" that is "implicit" in the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). The First Amendment thus "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1977); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (recognizing the public's right to receive information from a willing speaker).

Restrictions on a person's ability to obtain information are constitutionally suspect because "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Gathering information is a prerequisite to speaking and to publishing the news. *See Richmond Newspapers*, 448 U.S. at 576–77 (plurality opinion) ("The explicit, guaranteed rights to speak and to publish concerning what

takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily."). Accordingly, the Supreme Court has held that states cannot circumvent the First Amendment by restricting access to information as a means of limiting subsequent, disfavored speech. *Sorrell v. IMS Health Inc*., 564 U.S. 552 (2011); *see also Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (holding that the First Amendment restricts a state's ability to "effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result").

Constitutional protections for access to information apply with even greater force when the government infringes on the act of newsgathering, because the press "play[s] an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). In *Richmond Newspapers,* the Supreme Court concluded that the constitutional right of access derives in part from the Press Clause: "It is not crucial whether we describe this right . . . as a 'right of access' or a 'right to gather information,'" Chief Justice Burger explained, "for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" 448 U.S. at 576–77 (plurality opinion) (quoting *Branzburg*, 408 U.S. at 681) (additional citations omitted).

This Court has similarly recognized a "right of the press to gather news and information." *Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 981 (9th Cir.

1998). This includes the right to record "matters of public interest," especially the conduct of law enforcement. *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (triable issue of fact existed whether plaintiff's right to record police officers was infringed); *see also Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) (recognizing right of public and journalists, as "the public's surrogate," to view executions). In short, the Press Clause specifically protects the act of gathering and disseminating the news.

B. The Press Clause Protects Individuals Engaged in Newsgathering

The Press Clause protects "all who exercise its freedoms." *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring). The protections of press freedom are held by individuals engaged in the act of newsgathering, rather than by an "institutional press." *Id.* at 799 (Burger, C.J., concurring) (internal quotations omitted); *see also Citizens United*, 558 U.S. at 352 (rejecting the proposition that the Speech Clause gives "the institutional press" privileges beyond those of other speakers). The role of the Press Clause, as Justice Stevens explained, is to protect those who *function* as members of the press. *See Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part) (noting that reporters "might be able to claim special" protections under the Press Clause).[24]

[24] Justice Scalia suggested in *Citizens United* that the Press Clause was merely a written-word variant of the Speech Clause, *see* 558 U.S. at 390 (Scalia, J.,

Modern technology has given individuals a new ability to disseminate information to a wide audience. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (noting the "wide array of protected First Amendment activity" now taking place over the Internet). Yet there remains a distinction between the general public and the "press"—those who are actively fulfilling the constitutionally protected function of gathering and disseminating the news.[25] As the Supreme Court has recognized, the press function is unique. It "carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984).

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concurring) (interpreting the Speech and Press Clauses together to mean "everyone's right to speak or publish"), but such a reading belies the Founders' understanding of the Press Clause and contradicts standard tools of textual interpretation. *See* Part I.A, *supra* (discussing early Americans' and the Framers' understanding of the Press Clause's structural function). Unless the Press Clause—which the majority in *Citizens United* did not discuss—provides some protection to journalists, it would, as Justice Stewart noted, be left with no role at all, reduced to a "constitutional accident." *Houchins v. KQED, Inc.* 438 U.S. 1, 17 (1978) (Stewart, J., concurring); *see also* West, *supra* note 2, at 65 (arguing that the Framers must have meant for the Press Clause to do more than extend the protections of the Speech Clause to "the written, as well as the spoken, word").

[25] *See* Sonja R. West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729, 746-749 (2014) (observing the Court's repeated use of the term "press" to refer to a subset of speakers that is different from the general public and is interchangeable with the news media).

Recognizing the distinct constitutional role that journalists fill conforms with the structural function of the free press. Members of the press serve as "surrogates for the public." *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion). As the public's "watchful eyes," journalists further its "vital" interest in monitoring government activities that the citizenry as a whole cannot observe. *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). The Supreme Court, furthermore, has noted the practical reality that most citizens have "limited time and resources with which to observe at first hand the operations of [their] government," and therefore "rel[y] necessarily upon the press to bring to [them] in convenient form the facts of those operations." *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 490–91 (1975); *see also id*. at 492 (noting that "[w]ithout the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally."); *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("[W]ithout an informed and free press there cannot be an enlightened people."). When, as in this case, countervailing government interests mean that not everyone can practically be permitted to observe the government's actions, the Court has found that protecting the newsgathering rights of journalists is both appropriate and important. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion) (noting that reporters

are often provided with privileges, such as "special seating and priority of entry" not afforded to the general public, to enable them to report on official activity).

Accordingly, Supreme Court precedent and the law of this Circuit make clear that those who are engaged in the act of gathering and disseminating the news enjoy distinct constitutional protection.

C. Appellants Are Wrong in Arguing That the Supreme Court Has Foreclosed First Amendment Protection for Newsgathering

Appellants mischaracterize *Branzburg* as rejecting any constitutional protection for newsgathering. There, the Court held only that reporters cannot evade the "normal duty" of responding to grand jury subpoenas by claiming that compliance would unduly burden newsgathering. *Branzburg*, 408 U.S. at 685. Declining to shield reporters from the reach of a law that "may" have had an "incidental burden[]" on the press, the Court relied on precedent that upheld the application of generally applicable laws to news organizations. *See id.* at 682-83 (collecting cases). None of these generally applicable laws foreclosed the ability of reporters to gather the news, and in applying these precedents the Court simply found that grand jury subpoenas do not *impermissibly* burden newsgathering—not that such a burden could never exist. *See id.* at 681-82.

Writing for the Court, Justice White explicitly recognized that press freedom was at stake, but he balanced the public interest in maintaining the free flow of information against the constitutional guarantee of due process, which could be

jeopardized by excusing reporters from grand jury appearances. *Id.* at 686-88. The Court found no clear evidence that "a testimonial privilege would have much effect on the newsgathering capabilities of journalists."[26] Far from denying the existence of a constitutional right to gather and report the news, the Court explicitly recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. The Court simply balanced that right against another significant constitutional right, which it determined was sufficiently weighty to override a "consequential, but uncertain, burden on news gathering."[27] *Id.* at 690.

Justice Powell, who cast the deciding vote, stressed that the holding was "limited" and that reporters who received grand jury subpoenas were not "without constitutional rights with respect to the gathering of news." *Id*. at 709 (Powell, J., concurring). Accordingly, almost every federal circuit to consider the question has held that *Branzburg* established a qualified reporter's privilege in certain contexts. *See Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) (collecting cases). And the Supreme Court has since explained that "generally applicable statutes" that "bear[] absolutely no connection to any expressive activity"—such as a general

[26] Blasi, *supra* note 23, at 592.

[27] Justice Powell would have applied a balancing test on a case-by-case basis. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

requirement to comply with a grand jury summons—are very different from laws that *directly* burden First Amendment activities. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 664 (1991) (application of promissory estoppel to member of the press had only an "incidental[] and constitutionally insignificant" burden on newsgathering).

Appellants cite a host of First Amendment right-of-access cases for the proposition that courts have somehow *foreclosed* the possibility of recognizing unique access rights under the Press Clause for reporters who are engaged in the act of newsgathering. These cases establish no such thing.[28] Each of the cases cited either fails to address the question of a special press right of access—because the public right of access was sufficient to resolve the case[29]—or rejected a right of

[28] *See supra*, Part II.A at 14 (noting that the Supreme Court derived the First Amendment right of access to criminal trials in part from the Press Clause in *Richmond Newspapers*).

[29] *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13, (1986) ("*Press-Enterprise II*") (concluding that the public has a qualified right of access to preliminary proceedings before criminal trials, obviating the need to decide whether the Press Clause provided any greater protection); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 610 (1982) (finding that the ordinary public right of access sufficed to hold unconstitutional the Massachusetts law in question, which barred public access to trials involving minor victims of certain sexual offenses); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion) (holding that the public's right to attend criminal trials was sufficient to decide the case); *Gannett Co. v. DePasquale*, 443 U.S. 368, 392–93 (1979) (explicitly reserving the question of whether the public or the press had a right of access to a pretrial hearing).

access in the narrow context of newsgathering "inside prison walls." *Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 982 (9th Cir. 1998).

On both occasions when this Court has considered the right of access for the press and the public outside the prison context, it has not reached the question of special press access. *See Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017) (recognizing a public right of access to view buffalo-herding operations from a public street); *Leigh*, 677 F.3d at 901 (district court failed to properly apply the *Press-Enterprise II* test for public access). And access to penal institutions, which are closed to the public "by definition," presents unique difficulties. *See Richmond Newspapers*, 448 U.S. at 576 n.11 (plurality opinion). Moreover, in *Houchins*, where a plurality of the Supreme Court declined to grant the press a "constitutional right of access to prisons or their inmates" beyond that "afforded the general public," the Court noted that the press and the public had other ways to gather facts about prison conditions. 438 U.S. at 11. *Houchins* and *Saxbe* stand only for the proposition that the First Amendment does not grant members of the press special rights of access to corrections facilities when reporters can obtain information through other means.[30]

[30] Appellants' reliance on this Court's decision in *California First Amendment Coal. v. Calderon* is similarly unavailing. In *Calderon*, this Court recognized that the First Amendment protects the "right of the press to gather news" but declined to grant reporters access to certain phases of lethal executions. 150 F.3d 976, 981–

Appellants can find no support in the doctrine for their view that the Press Clause is a constitutional accident. This is because the Framing generation understood that members of the press required—and received through the Press Clause—independent constitutional protection.

III. THE PRESS CLAUSE PROVIDES AN INDEPENDENT GROUND TO AFFIRM THE PRELIMINARY INJUNCTION

The facts of this case—involving journalists reporting on the government's response to public protests—illustrate exactly why the Framing generation understood that constitutional protection for the press was essential to democracy. During this year's protests, journalists have acted as the public's eyes and ears—precisely the surrogate role protected by the Press Clause. The preliminary injunction falls well within the scope of that protection, and the injunction's test for identifying those gathering the news is both practical and consistent with Supreme Court and Ninth Circuit precedent.

A. The Protection of Newsgathering Is Particularly Important in the Circumstances Addressed by the Preliminary Injunction

Throughout the protests following the police killing of George Floyd, members of the press have played an indispensable role in informing the public

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82 (9th Cir. 1998) (internal quotation marks omitted). This Court went out of its way to emphasize that its holding was "limited to the facts of this case." *Id*. at 982.

about the actions of its government[31] and in countering the spread of false information online.[32] This information has allowed citizens to exercise their fundamental constitutional rights to assemble and petition the government—rights that would mean little without relevant information. Just as the Supreme Court concluded in *Richmond Newspapers* that the right to speak about a trial "would lose much meaning" if the government were arbitrarily to bar access to the courtroom, so, here, the protestors' rights to assemble, speak, and petition would be nullified if the government could blind journalists' watchful eyes. 448 U.S. 555, 576–77 (1980) (plurality opinion). Reporting that illuminates the government's response to protests falls squarely within the role that the founding generation identified for the press as "one of the great bulwarks of liberty"[33] against "despotick" government power.[34]

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[31] *See, e.g.*, Katie Bo Williams, *Helicopters Over DC Protesters Broke Regulations While Commander was Driving Home, DC Guard Concludes*, Defense One (Oct. 30, 2020), https://perma.cc/EB4D-B4Y3; Dalton Bennett et al., *The Crackdown Before Trump's Photo Op*, Wash. Post (Jun. 8, 2020), https://perma.cc/72HQ-3MFL.

[32] *See, e.g.*, Davey Alba, *Misinformation About George Floyd Protests Surges on Social Media*, N.Y. Times (June 1, 2020), https://perma.cc/TC2T-BSY5; Jack Goodman and Flora Carmichael, *George Floyd: Fake White House image and protest videos debunked*, BBC (June 5, 2020), https://perma.cc/7UDR-9YGP.

[33] Congress Debates, *supra* note 13, at 451; *see* Section I.A, *supra*.

[34] Virginia Declaration of Rights, 1776, reprinted in Schwartz, *supra* note 17, at 234-35.

As the Supreme Court has noted, in situations where access for the general public may not be feasible—as in this case—it is proper for courts to protect the press's ability to serve as the public's eyes and ears. In *Richmond Newspapers*, for example, the Court observed that journalists are often provided "special seating and priority of entry" in courtrooms to allow them to "report what people in attendance have seen and heard." 448 U.S. at 573 (plurality opinion). Writing separately, Justice Brennan likewise observed that journalists are "the likely, and fitting, chief beneficiary of a right of access" because they act as "the 'agent' of interested citizens and funnel[] information about trials to" the public. *Id.* at 586 n.2 (Brennan, J., concurring in the judgment).

Allowing the government to block journalists from observing and reporting on its response to a public protest would violate their First Amendment right to "seek[] out the news." *Branzburg v. Hayes*, 408 U.S. 665, 681(1972). Because it is impossible for all citizens to see what their government is doing at all times, journalists must be allowed to remain "the watchful eyes" of the public. *See Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012). The district court's injunction recognized this and properly enforces the rights guaranteed by the Press Clause.

B. The District Court's Functionalist Test for Identifying Individuals Engaged in Newsgathering Demonstrates That the Press Clause Is Readily Administrable Here

To identify those who are gathering and reporting the news, courts look to what they do, not who they are or what organization employs them. In *Shoen v. Shoen*, this Court held that "the critical question" in deciding if an individual qualified for the reporter's privilege was whether she was "gathering news for dissemination to the public." 5 F.3d 1289, 1293 (9th Cir. 1993). Press membership, *Shoen* held, should turn on the act in question—reporting—not the medium used to disseminate the resulting information or the institution employing the reporter. *Id*. In this case, the district court observed that same principle by providing factors that serve as effective proxies for identifying those who are engaged in newsgathering. Those factors include whether someone is carrying professional equipment or standing off to the side of the protest. *Index Newspapers LLC v. City of Portland*, No. 3:20-CV-1035-SI, 2020 WL 4883017, at *59 (D. Or. Aug. 20, 2020) (order granting preliminary injunction) ("Order"). This approach for identifying journalists, which can be implemented by police officers on the ground, is both practical and consistent with this court's precedent.

Looking to real-world indicators of function while avoiding formulaic definitions matches the approach courts have taken to identify those protected by other constitutional rights. For example, to determine who qualifies as a "minister"

for purposes of the Free Exercise Clause—a question no less knotty than determining who is a journalist—the Supreme Court has identified several practical factors and declined to adopt "a rigid formula." *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 190 (2012).[35] In *Hosanna-Tabor*, the Court looked to a teacher's job title, her degree of ministerial training, her self-presentation as a minister, and the religious nature of her job duties in deciding whether she qualified for a ministerial exception. *Id*. at 191–92. Just this year, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court reprised that approach, considering job duties, training, and description by their employer when deciding whether two schoolteachers at religious schools fit the designation. 140 S.Ct. 2049, 2066–67 (2020).

In this case, the district court correctly applied an analogous, functionalist test to identify those gathering and reporting the news. Just as the Court in *Hosanna-Tabor* relied on the church's description of the teacher "as a minister," 565 U.S. at 191, the district court noted that possession of "a professional or authorized press badge or other official press credentials"—which may be issued by a journalist's employer, a professional organization, or a government agency—

[35] *See also* Sonja R. West, *Press Exceptionalism*, 127 Harv. L. Rev. 2434, 2443-45 (2014) (discussing *Hosanna-Tabor* as "a helpful model demonstrating how to identify a group of distinct constitutional rightsholders").

can serve as an indicator that someone is functioning as a journalist. Order at *59. Another indicator is self-identification. In *Hosanna-Tabor*, the Court found it significant that the teacher had "held herself out as a minister." 565 U.S. at 191. In the same fashion, the district court here listed the possession of "professional gear," including "professional photographic equipment," and "distinctive clothing" that "identifies the wearer as a member of the press" as further indicia. Order at *59. As in *Hosanna-Tabor*, moreover, where the Court adopted a case-by-case, holistic approach in which no single factor was determinative, 565 U.S. at 190,[36] the district court stated that these indicia were "not exclusive" and no person must "exhibit every indicium to be considered a Journalist," Order at *59.

By adopting an analogous approach to *Hosanna-Tabor*, the district court appropriately balanced the practical difficulties of identifying journalists in real time with the need to protect those who do "precisely that which the Founders hoped and trusted they would do"—hold the government to account. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

[36] *See also Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2067 (2020) (rejecting the argument that the *Hosanna-Tabor* factors are "checklist items to be assessed and weighed against each other in every case").

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed as a necessary and proper act to safeguard the right to gather and report the news that is independently protected by the Press Clause.

Dated: November 23, 2020

Respectfully submitted,

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This brief complies with the type-volume limitation of Rule 29 of the Federal Rules of Appellate Procedure because it is 6,490 words, excluding the parts of the brief exempted by Rule 32(f).

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Dated: November 23, 2020

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 November 23, 2020.

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