

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209-2211
(703) 807-2100
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org
(703) 807-2101

STEERING COMMITTEE

SCOTT APPLEWHITE
The Associated Press

WOLF BLITZER
CNN

DAVID BOARDMAN
Seattle Times

CHIP BOK
Creators Syndicate

ERIKA BOLSTAD
McClatchy Newspapers

MICHAEL DUFFY
Time

RICHARD S. DUNHAM
Houston Chronicle

ASHLEA EBELING
Forbes Magazine

FRED GRAHAM
InSession

JOHN C. HENRY
Freelance

NAT HENTOFF
United Media Newspaper Syndicate

DAHLIA LITHWICK
Slate

JANE MAYER
The New Yorker

JOHN MCKINNON
The Wall Street Journal

TONY MAURO
National Law Journal

DOYLE MCMANUS
Los Angeles Times

ANDREA MITCHELL
NBC News

MAGGIE MULVIHILL
New England Center for Investigative Reporting

BILL NICHOLS
Politico

SANDRA PEDDIE
Newsday

JIM RUBIN
Bloomberg News

BOB SCHIEFFER
CBS News

ERIC SCHMITT
The New York Times

ALICIA SHEPARD
Freelance

MARGARET LOW SMITH
NPR

PAUL STEIGER
Pro Publica

PIERRE THOMAS
ABC News

SAUNDRA TORRY
USA Today

JUDY WOODRUFF
PBS/The NewsHour

*Affiliations appear only
for purposes of identification.*

April 1, 2013

The Honorable Patti Jo McKay
Presiding Judge
Los Angeles Superior Court
Appellate Division
111 North Hill Street
Room 111A
Los Angeles, CA 90012

Re: *People of the State of California v. Superior Court of California, County of Los Angeles (Raef)*; Case No. BS140861

Dear Judge McKay:

The Reporters Committee for Freedom of the Press (“Reporters Committee”) and National Press Photographers Association (“NPPA”) together with the additional *amici* below, respectfully request that the Court consider the following letter brief in its deliberation of the above-captioned case, specifically as to the charges against Paul Raef, the Real Party in Interest.¹ We write to ask the Appellate Division of the Superior Court of California to uphold the November 12, 2012 order by Judge Thomas Rubinson finding California Vehicle Code Section 40008 overbroad because it penalizes newsgathering activities, and accordingly deny the People’s petition for writ of mandate.

Interest of the Amici

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

The National Press Photographers Association is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA’s approximately 7,000 members, (734 residing in California) include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

¹ No party or counsel for any party, other than counsel for amici, has authored this letter in whole or in part or funded the preparation of this letter.

The Association of Alternative Newsmedia (“AAN”) is a diverse group of 125 alternative news organizations covering every major metropolitan area and other less-populated regions of North America. AAN member publications reach more than 50 million active, educated and influential adults in print, on the web and on mobile devices.

The Associated Press Media Editors (“APME”) is an association of editors at newspapers, broadcast outlets and journalism educators and student leaders in the United States and Canada. APME works closely with The Associated Press to foster journalism excellence and to support a national network for the training and development of editors who will run multimedia newsrooms in the 21st Century. APME is a nonprofit, tax-exempt association under Section 501(c)(6) of the Internal Revenue Code. APME is on the front line in setting ethical and journalistic standards for newspapers and in the battle for freedom of information and the First Amendment.

The California Broadcasters Association (“CBA”) is the trade organization representing the interests of the over 1000 radio and television stations in our state. The CBA advocates on state and federal legislative issues, provides seminars for member education and offers scholarship opportunities to students in the communication majors. Many of our stations have extensive news operations and CA Vehicle Code Section 40008 puts them at legal risk each day for doing their jobs. This code section jeopardizes not only news reporters at our stations, but anyone who carries a camera, tape recorder, or other kinds of electronic equipment as a requirement of their employment.

The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of nearly 850 daily, weekly and student newspapers. For over 130 years, CNPA has worked to protect and enhance the freedom of speech guaranteed to all citizens and to the press by the First Amendment of the United States Constitution and Article 1, Section 2 of the California Constitution. CNPA strongly opposed AB 2479 (Bass), the legislation that established the enhancements at issue in this matter.

The E.W. Scripps Company owns 19 network affiliated television stations and Spanish language stations across the country, including ABC and Azteca affiliates in San Diego and Bakersfield. Scripps also owns daily newspapers in 14 markets, including Ventura and Redding. The company also operates web operations to support all of its newspapers and television stations.

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

DISCUSSION

We do not suggest here that the act of driving recklessly down California roadways itself should be considered a constitutionally protected newsgathering activity. Indeed, Mr. Raef himself did not contest the charges he received based on the state's reckless driving laws. Rather, *amici* urge the court to recognize Section 40008 for what it is: a duplicative law which establishes heightened penalties to photographers with the intent of capturing images for commercial gain for the exact same conduct proscribed by other portions of the state's vehicle code.

The Petitioner's contention that Section 40008 does not implicate the First Amendment because it regulates the act of reckless driving but not the actual snapping of the image or the content of the resulting photograph is, at best, disingenuous and runs contrary to established First Amendment jurisprudence. Newsgathering activities do not commence, as Petitioners would have this court to believe, at the moment a photographer snaps a shutter. Rather, oftentimes the process of gathering news includes the actions journalists take to physically bring themselves in proximity to where events of public interest occur. Vehicles such as television news trucks are crucial tools of the trade for visual journalists. The law as it is written threatens to sweep into its grasp and subject to enhanced penalties not only the much-maligned paparazzi photographers in pursuit of lucrative celebrity images, but members of the mainstream press traveling on assignment to the places where news happens and the visual-journalist en route to capture images of relevance to the community.

Newsgathering is protected by the First Amendment

Petitioners make the point several times in their briefings with this court that California Vehicle Code Section 40008 does not infringe on speech activities, and therefore does not implicate First Amendment interests. Rather, Petitioners claim the law simply proscribes the conduct of reckless driving by photographers who have the intent to capture images. Petitioners further make the claim that because the statute "does not regulate spoken words or patently expressive conduct, it does not fall within the ambit of the First Amendment." (Petitioner's Reply brief, p. 2).

The U.S. Supreme Court, however, makes clear that the First Amendment's guarantee of press freedom is meaningless if journalists do not possess an attendant right to gather the news. In *Branzburg v. Hayes*, the Court recognized that the First Amendment's protection of a free press carries with it protection for essential newsgathering:

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

408 U.S. 665, 681 (1972). Justice Stewart similarly wrote in dissent that "[n]ews must not be

unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.” *Id.* at 728 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting).

In *Texas v. Johnson*, the Court made clear that the interests protected by the First Amendment were not limited to the written word: “The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the first and Fourteenth Amendments.’” 491 U.S. 397, 404 (1989). Moreover, newsgathering is essential to preserving a free press and the free flow of information, as “freedom of the press can be no broader than the freedom of reporters to investigate and report the news.” *See* Department of Justice Policy with Regard to the Issuance of Subpoenas to Members of the News Media, 28 C.F.R. § 50.10 (1998).

Section 40008 cannot be exempt from First Amendment protection, as Petitioners claim. No statute exists outside the parameters of the Constitution. *See Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) (holding that no state is “free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.”). Further, the U.S. Supreme Court made clear the responsibility courts have in scrutinizing statutory provisions to ensure speech-related conduct – such as the ability of journalists to gather the news – is not unconstitutionally burdened:

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Comm. Inc. v. Virginia, 435 U.S. 829, 844 (1978). Moreover, because an otherwise valid law can conflict with the First Amendment, the court must consider whether it is overbroad as applied in a given situation. As the Court has stated:

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

NAACP v. Button, 371 U.S. 415, 432-33 (1963). Application of Section 40008 to a journalist engaged in the constitutionally protected act of newsgathering demands careful balancing of

competing interests because constitutional freedoms “are delicate and vulnerable, as well as supremely precious in our society.” *See Branzburg*, 408 U.S. at 738 (quoting *NAACP*, 371 U.S. at 433). “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity” and must take care not to apply statutory provisions in a manner that violates constitutional rights. *Button*, 371 U.S. at 433 (citations omitted). As such, courts considering punishments for exercise of the right to gather news should weigh the public interest in obtaining information against competing interests.

The Petitioners offer a strained argument in support of their claims that no speech interests are implicated through violation of Section 40008. In doing so, Petitioners attempt to cast the newsgathering activities of photographers as a “peripheral effect on First Amendment activity” while analogizing their actions to California cases involving the activities of drug dealers and prostitutes in pursuit of their illicit trades. (Petitioner’s Reply brief, p. 3-4). Section 40008 differs from the state’s other reckless driving laws in one significant respect – the statute singles out those engaged in an expressive activity, namely, the capturing of visual images or sound recordings, while the statutes in the cases cited by Petitioners single out criminal actions such as prostitution and drug-dealing.

Photojournalists are often subject to intrusions on constitutionally protected newsgathering activities through criminal statutes

Amici are concerned that should Section 40008 stand unchallenged, it could serve as a tool by this state’s law enforcement community to limit the actions of the mainstream press and visual journalists attempting to report on matters of public concern, not just paparazzi. Photographers are never charged with the crime of “photography,” but it is that activity that brings them to the attention of police officers who use a range of catch-all charges to prosecute. Indeed, cases throughout the country demonstrate how journalists often find themselves in the crosshairs of overzealous law enforcement:

- In 2011, the American Civil Liberties Union of Southern California filed a lawsuit against the Los Angeles Sheriff’s Department challenging the detention and harassment of photographers who were taking pictures in public places, stating, “to single them out for such treatment while they’re pursuing a constitutionally protected activity is doubly wrong.” The lawsuit was filed on behalf of three photographers, and the ACLU press release touting the suit noted “[p]hotographers in Los Angeles and nationwide are increasingly subject to harassment by police officers. . . . Safety and security concerns should not be used as a pretext to chill free speech and expression or to impede the ability to gather news.” *See Challenging Sheriff’s Dept.’s Detention of Photographers*, ACLU OF SOUTHERN CALIFORNIA, October 27, 2011, <http://www.aclu-sc.org/challenges-sheriffs-depts-detention-of-photographers>.
- Freelance photojournalist Mannie Garcia was arrested by Montgomery County police while filming police activity on a public street in Wheaton, Maryland. Officers

- charged him with disorderly conduct. Mr. Garcia was acquitted after a bench trial. Unfortunately, because of those pending charges he was denied the renewal of his White House Press credential and his ability to cover stories there. Mr. Garcia commenced a civil rights lawsuit against the county and the officers, and most recently, the United States Department of Justice filed a Statement of Interest on his behalf noting among other things “that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights.” See Donald R. Winslow, *Justice Department Statement Supports Mannie Garcia's Federal Civil Rights Lawsuit*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, March 4, 2013, <https://www.nppa.org/node/42647>.
- Freelance journalist Phil Datz was arrested by Suffolk County police in Long Island, New York, while attempting to record a police investigation. Mr. Datz was standing on a public street when a sergeant approached him while repeatedly yelling at him to “go away, go away now.” When Datz asked where he should go, he was told that he needed to leave the area or face arrest. When he attempted to videotape police from more than a block away, Datz was arrested. The charge was later dropped after letters objecting to the arrest were sent to the police department and the story was publicized. Datz then filed a lawsuit claiming his civil rights had been violated. See Clara Hogan, *Photojournalist arrested after filming police on public street*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Aug. 2, 2011, <http://www.rcfp.org/browse-media-law-resources/news/photojournalist-arrested-after-filming-police-public-street>; see also Steve Myers, *Photojournalist sues cop, Suffolk County, N.Y., over right to videotape police*, POYNTER, <http://www.poynter.org/latest-news/mediawire/169671/photojournalist-sues-cop-suffolk-county-n-y-over-right-to-film-police>.
 - Jim Epstein and Peter Tucker, both online journalists, were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission. Both were charged with disorderly conduct and “unlawful entry/remaining” by U.S. Park Police after refusing to stop photographing and recording the meeting which was held at Park Police headquarters in order to better accommodate the large number of taxicab drivers who were there to voice their opposition to a change in licensing rules. The attorney general dismissed the charges almost immediately after the actions were widely criticized in the press. See Mark Segraves, *Journalists won't face charges*, WJLA-TV, June 24, 2011, <http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html>.
 - Milwaukee Journal Sentinel photojournalist Kristyna Wentz-Graff was arrested while taking pictures of an Occupy Wall Street protest. The officers making the arrest claimed they were unaware Ms. Wentz-Graff was a journalist even though video of the incident showed that she was prominently displaying her press credential. See Karen Herzog, *JS photographer arrested while covering Occupy Milwaukee protest*,

MILWAUKEE JOURNAL SENTINEL, Nov. 2, 2011,
<http://www.jsonline.com/news/milwaukee/js-photographer-arrested-while-covering-occupy-milwaukee-protest-133090133.html>.

- A student photojournalist covering an “Occupy” demonstration in Rochester, New York, was arrested for trespassing and violation of a municipal code that prohibits being in the public park after hours after the journalist refused to leave the park, which, according to police, was closed at the time. The judge ultimately dismissed the charges. *The People of the State of New York v. Acuff et al.*, No. CR011-343597 (Rochester City Ct. Monroe County Jan. 12, 2012).
- Emily Good was arrested by police in Rochester, New York for videotaping a traffic stop from the front lawn of her home. She was charged with obstructing governmental administration, but the charge was dropped by prosecutors within days after her story received national attention. See Jesse Solomon, *Charge dismissed against woman who videotaped police encounter*, CNN, June 27, 2011, http://www.cnn.com/2011/CRIME/06/27/new.york.police.video/index.html?_s=PM:CRIME.

Unfortunately, some infringements on newsgathering activity are only resolved after protracted litigation. In at least two federal appellate circuits, courts affirmed the constitutional protections afforded to newsgathering. In *Glik v. Cuniffe*, the U.S. Court of Appeals for the First Circuit affirmed the rights of citizens to record police officers carrying out their duties in public spaces. 655 F.3d 78 (1st Cir. 2011). In 2007, Simon Glik was arrested under the Massachusetts wiretapping law for openly recording with his cell phone what he believed to be an unlawful arrest on the Boston Common. In affirming Glik’s First Amendment rights to record police in public, the Court noted in its analysis the “self-evident” First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press and extends beyond the prohibition against governmental abridgment of freedom of speech to “encompasses a range of conduct related to the gathering and dissemination of information.” *Id.* at 82-83. “There is an undoubted right to gather news from any source by means within the law.” *Id.* (internal citations and quotations omitted).

Similarly in *ACLU v. Alvarez*, the Seventh Circuit barred enforcement of the Illinois Eavesdropping Act against the American Civil Liberties Union of Illinois. 679 F.3d 583 (7th Cir. 2012). In doing so, that court also recognized the importance of constitutionally protecting newsgathering activity:

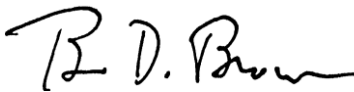
In short, the eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and

dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.

Id. at 600.

For the foregoing reasons, we respectfully urge the Court to allow the trial court decision to stand and to deny the People's petition for writ of mandate.

Very truly yours,



Bruce D. Brown
Gregg P. Leslie
Jack S. Komperda
*For The Reporters Committee
for Freedom of the Press*



Mickey H. Osterreicher
*For the National Press Photographers
Association*



Jean-Paul Jassy (Cal. Bar No. 205513)
Bostwick & Jassy LLP
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
Tel: (310) 979-6059
Counsel for Amici Curiae

PROOF OF SERVICE

IN THE APPELLATE DIVISION OF THE LOS ANGELES
SUPERIOR COURT

PEOPLE V. SUPERIOR COURT (RAEF)
App. Div. Case No. BS140861

At the time of service, I was over 18 years of age and not a party to the above-referenced action. I am employed in the County of Los Angeles, State of California. My business address is 12400 Wilshire Boulevard, Suite 400, Los Angeles, California 90025.

On April 1, 2013, I served true copies of the following document(s) described as AMICI LETTER BRIEF IN SUPPORT OF PAUL RAEF on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices at 12400 Wilshire Boulevard, Suite 400, Los Angeles, California 90025. I am readily familiar with Bostwick & Jassy LLP practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 2013, at Los Angeles, California.



Marianne Poff

SERVICE LIST

The People v. Superior Court (Raef)

Case No. BS140861

Carmen A. Trutanich, City Attorney
Debbie Lew, Assistant City Attorney
Katharine H. MacKenzie,
Deputy City Attorney
CRIMINAL APPELLATE DIVISION
500 City Hall East
200 North Main Street
Los Angeles, California 90012
Tel: (213) 473-6900
Fax: (213) 978-8779

Attorneys for Petitioner,
**PEOPLE OF THE STATE OF
CALIFORNIA**

Barry R. Levy (BAR No. 53977)
Jeremy B. Rosen (BAR No. 192473)
Mark A. Kressel (BAR No. 254933)
HORVITZ & LEVY LLP
15760 VENTURA BOULEVARD, 18TH FLOOR
Encino, California 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
blevy@horvitzlevy.com
jrosen@horvitzlevy.com
mkressel@horvitzlevy.com

Attorneys for Real Party In Interest,
PAUL RAEF

David S. Kestenbaum (BAR NO. 85228)
Dmitry Gorin (BAR NO. 178353)
Brad Kaiserman (BAR NO. 266220)
KESTENBAUM, EISNER &
GORIN, LLP
14401 Sylvan Street, Suite 112
VAN Nuys, California 91401
(818) 781-1570 • FAX: (818) 781-5033
brad@keglawyers.com

Attorneys for Real Party In Interest,
PAUL RAEF

Honorable Thomas Rubinson
Judge of the Superior Court
Van Nuys Courthouse, Dept. 113
14400 Erwin Street Mall
Van Nuys, California 91401