No. 11-16088

United States Court of Appeals
for the
Ninth Circuit

LAURA LEIGH

Plaintiff-Appellant,

v.

KEN SALAZAR, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEVADA,
THE HONORABLE LARRY R. HICKS

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, IN SUPPORT OF APPELLANT'S APPEAL TO REVERSE THE DENIAL OF A PRELIMINARY INJUNCTION

Lucy A. Dalglish
Gregg P. Leslie
Derek D. Green
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

**Additional Counsel listed on inside cover*

Additional Counsel

Mickey H. Osterreicher
40 Wagon Wheel Drive
East Amherst, New York 14051
Tel: 716.983.7800
General Counsel for The National Press Photographers Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, *amici* state the following:

- The Reporters Committee for Freedom of the Press is an unincorporated association that has no parent and issues no stock.
- The National Press Photographers Association does not have a parent company and does not own any stock in a party or in the Reporters Committee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY OF *AMICI* AND INTEREST IN CASE

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

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 8,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism.

Amici, on behalf of the journalists that they represent, have an interest in upholding the public's right of access to public places for the purpose of newsgathering and informing the public on matters of public concern. This interest is particularly strong in cases in which restrictions on public access compromise the ability of the press to fulfill its constitutional obligation to hold the government accountable to the people through reporting on government actions. The district

court's order refusing injunctive relief is of concern to *amici* because the analysis underlying the court's order reflects a troubling interpretation of the right to challenge restrictions on access to public places for the purpose of newsgathering.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), *amici* are concurrently filing a motion for leave to file this brief with the Court. As noted in that motion, neither counsel for appellant nor appellees opposes the filing of this *amici* brief in principle, but the parties did not reach agreement on whether appellees should have additional time to respond to the briefing.

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

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

STANDARD OF REVIEW

This Court generally reviews the denial of a preliminary injunction for abuse of discretion, although "[w]hen the district court is alleged to have relied on an erroneous legal premise, [the Court] review[s] the underlying issues of law *de novo*." *Harris v. Board of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2003) (citations

omitted). "A district court abuses its discretion in denying a request for a preliminary injunction if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact." *Earth Island Institute v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010).

On review, this Court determines whether the district court "employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Plaintiffs may qualify for a preliminary injunction by showing:

> (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest.

Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) . This Court weighs these elements on a "sliding scale," in which "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.2d 1127, 1135 (9th Cir. 2011) (citation omitted).

SUMMARY OF ARGUMENT

Amici urge this Court to reverse the district court's order refusing plaintiff-appellant's ("plaintiff") request for a preliminary injunction[1] to preserve public access to a wild horse roundup known as the Silver King Gather. Procedurally, in determining that the requested relief was mooted by the completion of the gather, the district court did not acknowledge that disputes over the denial of access to places and events are the exact types of controversies for which the "capable of repetition, yet evading review" exception to the mootness doctrine should apply. The record here indicates that plaintiff's efforts to seek injunctive relief complied with all necessary requirements in order to maintain an injunctive action.

Substantively, the district court's alternative holding – that the merits did not entitle plaintiff to injunctive relief on her First Amendment claim – is premised on an incorrect, or at least incomplete, legal analysis. The district court concluded that plaintiff had "made no showing that she was denied access to the Silver King Gather, or that other members of the media were treated more favorable." ER at 6. This brief does not address the fact-intensive issue of whether plaintiff was subjected to unfavorable treatment at the Silver King Gather. But there can be no

[1] The district court's April 13, 2011 order denied, *inter alia*, plaintiff's initial motion for a preliminary injunction, an amended motion for a temporary restraining order, and an amended motion for a preliminary injunction. Excerpt of Record ("ER") at 2. *Amici* understand this appeal to center on the denial of the amended motion for a preliminary injunction. ER at 10.

dispute that the government imposed significant restrictions on plaintiff's – and the general public's – access to public land during the Silver King Gather. Indeed, the government acknowledges the existence of restrictions.

This Court's case law recognizes a First Amendment right to gather news, including a right to film matters of public interest. The constitutional analysis of such a First Amendment claim must therefore turn on whether the acknowledged governmental restrictions impermissibly infringed on the recognized right of plaintiff to gather and disseminate information about a newsworthy event. The district court erred in not conducting such an analysis.

Alternatively, this dispute could also be viewed as one involving the First Amendment right of access. Under this alternative view, the district court's denial of preliminary relief would still warrant reversal. The evidence that plaintiff and other members of the public were prevented from viewing significant portions of the horse gather raises serious doubts as to whether the restrictions were justified in light of the First Amendment right at issue.

Either way, the fact remains that the district court appears to have not subjected the government restrictions to a constitutional analysis. Regardless of the ultimate determination, this Court must overturn the district court's decision because it is premised on an incorrect legal analysis.

ARGUMENT

I. The District Court Erred in Ruling that Plaintiff/Appellant's Amended Request for Injunctive Relief was Moot.

The district court improperly concluded that plaintiff was not entitled to a preliminary injunction because the Silver King Gather occurred prior to the court's ruling. ER at 5 ("[B]ecause the gather has been completed, there is no conduct to enjoin."). Before reaching this conclusion, the district court should have considered whether the claims at issue fell within the "capable of repetition, yet evading review" exception to the mootness doctrine. The claims here meet all the requirements for that exception.

Typically, a "case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984). But there is a well-recognized exception where "the underlying dispute between the parties is 'capable of repetition, yet evading review.'" *Id.* at 1353 (internal citations omitted). This exception applies when "(1) the challenged action is too short in duration to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiff[] will again be subject to the same action." *American Civil Liberties Union v. Lomax*, 471 F.3d 1010, 1017 (9th Cir. 2006).

This exception commonly appears in disputes over government restrictions on access to newsgathering and publishing. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (review of trial court order excluding public access to trial witness' testimony); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976) (prior restraint on publishing information about crime). Relief is often warranted in such cases because of the difficulty of litigating such disputes in a short timeframe and because similar disputes are likely to recur in the future. *Globe Newspaper*, 457 U.S. at 603; *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 377-78 (1978).

The same reasoning is equally compelling in First Amendment challenges to regulations affecting public resources. In *Greenpeace Action v. Franklin*, this Court held that the "capable of repetition, yet evading review" exception to the mootness doctrine applied to a lawsuit challenging a fishing regulation that was in effect for under a year, noting that it was "difficult to obtain effective judicial review" on such a timeframe. 14 F.3d 1324, 1329-30 (9th Cir. 1992).

As the present case reflects, controversies involving BLM horse gathers present similar timing challenges.[2] The short timeframe between the announcement of a

[2] Of note, a recent opinion from the Eastern District of California relied on this exception in declining to dismiss as moot a claim for injunctive and declaratory relief related to a horse gather that occurred prior to the court's ruling. *In Defense of Animals v. United States*, No. 2:10-cv-01852-MCE-DAD, 2011 WL 1528176 at *10-12 (E.D. Cal. April 20, 2011).

horse gather and the completion of the gather is such that it makes litigating the issue in advance difficult. The record also reflects that similar issues between the same parties are likely to recur at future gathers. *Compare Nebraska Press*, 427 U.S. at 547 ("The dispute between the State and the petitioners who cover events throughout the State is thus 'capable of repetition.'") *with, e.g.*, ER at 79 (testimony from plaintiff that she "go[es] to gathers all the time all over the place") *and* ER at 283-84 (plaintiff's declaration regarding previous horse roundups); *see also* ER at 273-74 (discussing prior litigation between the same parties involving another horse gather).

In *American Horse Protection Ass'n, Inc. v. Watt*, this Court held that an appeal of a district court's order refusing to enjoin a horse gather was mooted by the completion of the gather. 679 F.2d 150, 151 (1982) (per curiam). But the reasoning in the *Watt* case is instructive: the district court's order expressly instructed the BLM to give the appellants advance notice of future BLM actions, so that the plaintiffs would have an opportunity to challenge the actions. For this reason, this Court was "unconvinced" that "repetition will evade review." The Court even noted that if the plaintiffs received "an adverse ruling," they would have a chance to seek a stay pending appeal. *Watt*, 679 F.2d at 151 ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review."). Here, it is this type of adverse ruling that plaintiff is

challenging. Plaintiff did everything possible to enable judicial review in this case. In such circumstances, it is error for a district court to dismiss the challenge on mootness grounds.

II. The District Court Erred in Applying the Incorrect Legal Standard to Deny Plaintiff/Appellant Injunctive Relief.

The district court's alternative ground for denying plaintiff's motion for a preliminary injunction with respect to accessing the Silver King Gather was that plaintiff had "failed to establish that she [was] likely to succeed on the merits of her complaint." ER at 6. The district court correctly recognized that determining the likelihood of success on the merits is of central importance to a preliminary injunction ruling. But the district court's decision failed to undertake the proper constitutional analysis of the merits.

This Court has recognized that "the First Amendment protects the media's right to gather news." *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (citation marks omitted). In denying plaintiff's request for injunctive relief, the district court failed to properly evaluate plaintiff's likelihood of success on this First Amendment claim.

A. The First Amendment protects the public's right to gather news.

The parameters of the press and public's recognized right to gather news are "less well developed" than other areas of First Amendment law.[3] Yet both this Court and the Supreme Court have acknowledged that the First Amendment affords protection to newsgathering activities.

Newsgathering is "not unambiguously enumerated in the very terms of the [First] Amendment," but it is among the freedoms that should be recognized as "nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper*, 457 U.S. at 604 (holding public exclusion from criminal trial unconstitutional under strict scrutiny analysis); *See also, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (First Amendment incorporates a "right to gather information"); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) ("The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment, and the order here clearly restrained the media in their attempts to gather news.") (citation omitted) (holding that trial court order restricting access to jurors after trial violated the First Amendment).

The recognition of a right to gather news is consistent with the understanding that the "First Amendment goes beyond protection of the press and the self-

[3] *See* C. Thomas Dienes, Lee Levine and Robert C. Lind, *Newsgathering and the Law* § 1.05 (3rd ed. 2005).

expression of individuals to prohibit 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 (1978). As the Fifth Circuit explained:

> The [F]irst [A]mendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say. Therefore, the Supreme Court recognized in *Branzburg v. Hayes*, 408 U.S. 665, 681(1972), that news-gathering is entitled to first amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated."

In re. Express News Corp., 695 F.2d 807, 808 (5th Cir. 1982) (holding post-verdict restriction on access to jurors violated First Amendment).

Of course, the right to gather news is not unlimited. Generally, the newsgathering right does not afford the press any greater rights than that of the general public. *See Branzburg*, 408 U.S. at 684. And it is true, for example, that the Supreme Court has rejected attempts to force additional media access to prisons that is not available to the public, *see, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

Nonetheless, precedent has firmly established that the right to gather news prohibits the government from unnecessarily restricting the witnessing and documenting of public events. In *Daily Herald Co.*, news organizations challenged a state restriction on exit polling as an "unconstitutional[] infringe[ment] on their

First Amendment rights to gather and broadcast news." 838 F.3d at 383. This Court agreed. The Court explained that the statute implicated First Amendment rights "on several levels," including the "right to gather news":

> The media plaintiffs' exit polling constitutes speech protected by the First Amendment, not only in that the information disseminated based on the polls is speech, but also in that the process of obtaining the information requires a discussion between pollster and voter. . . . *Moreover, the First Amendment protects the media's right to gather news*. Exit polling is thus speech that is protected, on several levels, by the First Amendment.

Id. at 384 (citations and footnote omitted) (emphasis added). Because the governmental restrictions impinged on the exercise of these First Amendment rights, this Court held that the restrictions were subject to constitutional scrutiny, which they could not survive. *Id.* at 384-87.

Similarly, this Court is one of the many that has recognized that the right to gather news encompasses a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). In *Fordyce*, for example, the plaintiff claimed that police officers violated his First Amendment "right to gather news" by interfering with his attempt to videotape a protest march. *Id*. at 438. This Court held that a triable issue of fact existed "regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest." *Id.* at 439.

This Court is not alone in recognizing this general right. The Eleventh Circuit, for example, has held that the First Amendment "protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment right to photograph or videotape police conduct, subject to reasonable time, place and manner restrictions). Other courts have reached similar conclusions.[4]

B. The district court erred in not subjecting the BLM restrictions to public forum analysis.

The standard framework for evaluating government restrictions on protected expression is to determine the type of forum in which the restriction occurs and then apply the corresponding level of scrutiny. *See, e.g., Preminger v. Principi*, 422 F.3d 815, 823 (9th Cir. 2005) ("In order to assess their [free expression] claim, we first must 'identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or

[4] *See, e.g., Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (police officer was not entitled to qualified immunity for violating plaintiff's clearly established First Amendment right to videotape public officials talking in lobby of municipal building); *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (noting prohibition on recording a public meeting "touched on expressive conduct protected by the Free Speech Clause"); *cf. Dorfman v. Meiszner*, 430 F.2d 558, 561 (7th Cir. 1970) (per curiam) (court rule limiting photography and broadcasting in courthouse and federal building was overbroad and "goes beyond the scope permitted by the first amendment.").

nonpublic.'") (citation omitted). The district court erred in not undertaking this analysis here.

1. The government's restrictions occurred on public land that qualifies as a public forum.

This Court's case law suggests that the public forum framework is the proper method for analyzing newsgathering claims. In *Daily Herald Co.*, this Court used this approach, first concluding that the exit polling restrictions occurred in a public forum and then assessed the restrictions for content neutrality and the reasonableness of time, place and manner restrictions. *See Daily Herald Co.*, 838 F.3d at 384-86.

In one respect, this framework presents a somewhat uneasy fit in many newsgathering cases.[5] In typical expression cases, the quintessential public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *accord Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (describing public streets as the "archetype of a traditional public forum") (citation omitted).

[5] *See, e.g., S.H.A.R.K v. Metro Parks Serving Summit County*, 499 F.3d 553, 559-60 (6th Cir. 2007) (declining to evaluate challenge to recording events at public park under public forum analysis); *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 181-83 (3rd Cir. 1999) (recognizing presumptive constitutional right of access to government meetings, but declining to adopt public forum analysis); *cf. Daily Herald Co.*, 838 F.3d at 389-90 (Reinhardt, J., concurring) (analyzing exit polling restriction as a right of access issue).

In challenges based on the "right to gather news," however, the First Amendment right at stake is less the ability to be heard at a particular forum as it is to observe and report about events that occur at that forum. In such instances, courts should consider whether the forum at issue is one that has traditionally been open to the exercise of those protected activities. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.") (quotation marks and citations omitted). As *Daily Herald Co.* reflects, this framework is compatible with newsgathering cases to the extent that courts acknowledge that the right to gather news is a type of expressive activity that informs whether the forum is "public."

Under this understanding of the public forum framework for newsgathering purposes, the BLM land at issue qualifies as a public forum. Federal environmental laws and regulations establish that public lands, including those under control of the BLM, are generally open to the public for a variety of uses. Congress has

repeatedly recognized the importance of allowing members of the public to access land – including BLM land – for a variety of uses.[6]

Federal regulations governing BLM land also create a presumption that the agency's lands are open to the public for a variety of uses. BLM officials have the power to close or restrict designated public lands to "protect persons, property, public lands and resources," but in order to do so officials must follow particular procedures outlined by BLM's federal regulations. 43 C.F.R. § 8364.1 (2010). The implication from the rule is therefore that public lands are presumptively open for use and enjoyment by the public. Indeed, the BLM website for the Ely, Nevada District Office includes the following invitation to the public:

> Whether you are here to hike, fish, hunt or simply to enjoy the scenery, wildlife or wide-open spaces, we urge you to explore the many wonders of our district. [7]

Nonetheless, the government asserted at the district court that the BLM land at issue was a non-public forum. *See* ER 210. That position, however, is difficult to square with this Court's oft-repeated assumption that another type of multi-purpose

---

[6] *See, e.g.*, National Trails System Act of 1968, 16 U.S.C. § 1241(a) (maintaining and expanding "public access to . . . outdoor areas and historic resources of the Nation") (emphasis added); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(8) (declaring that "public lands be managed in a manner that will [*inter alia*] . . . provide for outdoor recreation and human occupancy and use").

[7] U.S. Department of Interior, Bureau of Land Management website for the Ely District Office in Nevada. http://www.blm.gov/nv/st/en/fo/ely_field_office.html (last accessed May 26, 2011).

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

Discerning a difference for public forum purposes between the BLM land at issue and other "public grounds, like a national forest," *Griefen*, 200 F.3d at 1259, is not easy, particularly on this record. That fact should not be held against plaintiff, as the government bears the burden on the issue of whether "speech was restricted in a public forum." *NAACP v. City of Richmond*, 743 F.2d 1346, 1354 (9th Cir. 1984).

In short, BLM land at issue is a traditionally open public space in which news gathering can occur. Accordingly, it should be considered a public forum.

2. The government restrictions on newsgathering are subject to reasonable time, place and manner restrictions.

In a public forum, "permissible restrictions on expression . . . must be content-neutral, be narrowly tailored to serve an important government interest,

and leave open ample alternative channels for the communication of the message." *Kuba v. 1-A Agr. Ass'n.*, 387 F.3d 850, 856 (9th Cir.2004) (citation omitted).

The district court's order did not undertake this analysis. With respect to the issue of "Access to the Silver King Gather," the court's order suggests that the court's focus was solely on the issue of disparate treatment (or lack thereof) between plaintiff and other members of the public. *See* ER at 5-6. To be sure, the court found that "Leigh has not proven that she was denied access to gather activities or that other members of the media received special treatment." ER at 6. But the record leaves no doubt that the access of plaintiff, along with other members of the public, was restricted during the gather. The evidence was uncontested that the BLM limited the places the public could be during the gather. Indeed, the government's briefing acknowledged as much, rightfully focusing on whether the restrictions were justified. *See, e.g.*, ER at 209, 212-14.

The record here suggests that those restrictions were not justified. The evidence cited in Appellant's opening brief raises concerns about the need for restrictions that effectively blocked public viewing and documenting of substantial portions of a newsworthy government event. Safety concerns are undoubtedly "significant" interests. *See Kuba*, 387 F.3d at 858. But the mere invocation of those interests is not sufficient justification for a restriction that affects a First Amendment right; instead, "the government must also show that the proposed communicative activity

endangers those interests" that the restrictions are to protect. *Id*. (holding that proffered concerns over traffic safety and congestion did not support restriction on leafleting and demonstrating).

Moreover, the restrictions also appear to not leave "open ample alternative channels for the communication of the message" that plaintiff seeks to convey through her newsgathering. *See Kuba*, 387 F.3d at 856. This Court recognized a similar issue in *Daily Herald Co*., holding that even if a ban on exit polling was considered content-neutral, it was nonetheless still an unreasonable restriction because it left "no alternative channels of discussing or obtaining information uniquely derived from exit polling." *See Daily Herald Co.* 838 F.3d at 386.

The present case is analogous. The evidence suggests that plaintiff and other members of the public were prevented from viewing significant portions of the gather due to the placement of the viewing zones selected by the BLM. The proffered evidence also suggests that the restrictions curtailed public viewing more significantly than in some other past gathers, which casts further doubt on the need for the restrictions here. *See, e.g.*, ER at 43-51, 108-115, 187.

At a minimum, the district court should have analyzed the evidence in light of these constitutional requirements. But there is no indication that analysis took place here. As such, the district court's order constitutes reversible error.

C. Reversal of the district court's order is also warranted under an alternative right of access analysis.

As noted above, some Circuits have declined to analyze challenges to restrictions on news gathering on government land under the traditional public forum analysis, instead relying on a "right of access" analysis instead.[8] *Amici* advance the public forum framework above because that is the analysis this Court has previously used in the newsgathering context. *See Daily Herald Co.*, 838 F.3d at 384 n.3 (expressly noting that it was not deciding the case under an alternative "right of access" analysis). Nonetheless, even if viewed under a right of access framework, the district court's denial of injunctive relief should be reversed.

The Sixth Circuit addressed an attempt to access public lands to document government wildlife management activity as a right of access issue in *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007).[9] The Sixth

---

[8] *See supra* note 5; *see also Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 181, 183 (3rd Cir. 1999) (constitutional right of access to government meetings turns on history and logic analysis common in access to court proceedings cases; "[t]he critical question regarding a content-neutral restriction on the time, place, or manner of access to a government proceeding is whether the restriction meaningfully interferes with the public's ability to inform itself of the proceeding: that is, whether it limits the underlying right of access rather than regulating the manner in which that access occurs").

[9] The plaintiffs in *S.H.A.R.K.* challenged the government's removal of plaintiffs' surreptitiously-placed cameras in a park to document a deer culling operation. The court held that the government was justified in removing the cameras, which were affixed to trees, under existing regulations protecting the trees. 499 F.3d at 562. The court did not reach the merits on whether the government's erasure of the camera footage violated the plaintiffs' First Amendment rights.

Circuit's inquiry recognizes that while members of the press do not have a guarantee of special access to events, the government cannot arbitrarily shield newsworthy events from the public. *Id*. at 559-60.

The Sixth Circuit's inquiry in *S.H.A.R.K*. contained three parts. The court first asked what government rule prohibits the plaintiffs from accessing the information and whether the rule selectively restricts the audience. *Id*. at 560. Next, the court examined the government's stated interest in invoking the rule. *Id*. at 561. Finally, the court determined whether the government's interest is sufficiently related to the means of accomplishing the interest, using different levels of scrutiny depending on whether the government regulation selectively restricts the audience. *Id*. If the restriction does not selectively restrict the audience, then the restriction can be upheld so long as it is reasonably related to the government interest. *Id*. If the restriction selectively restricts the audience, then a stricter level of scrutiny applies. *Id*. [10]

The district court's order could not withstand this analysis. Whether the BLM's restrictions were audience selective is a disputed issue of fact, but it is uncontested that the restrictions limited the ability of plaintiff and the public to view and document the gather. *See* ER at 209, 213-14.

[10] This Court has indicated that the standard should be even higher. Although *Daily Herald Co.* was not decided as an access case, this Court did note that "even where the right to access is qualified, any restriction must be narrowly tailored to serve a compelling governmental interest." 838 F.3d at 384 n.3.

Accordingly, the court would need to scrutinize the government's rules and their stated purpose to determine if the reasons for the restrictions outweigh the plaintiff's First Amendment rights. The inquiry is essential to ensuring that First Amendment rights are not given short shrift, because as the *S.H.A.R.K.* opinion points out, without such scrutiny the mere creation of a rule restricting access could establish a near-absolute bar to accessing newsworthy events. *S.H.A.R.K.*, 499 F.3d at 560 ("if the first amendment is to retain a reasonable degree of vitality, the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access") (quotation omitted).

The record suggests that it is, at a minimum, debatable whether the benefits obtained through the BLM's actual restrictions on public access outweighed the benefits to the public that could have been obtained through less-restrictive limitations on access. Such inquiry would be a necessary part of any right of access analysis undertaken by a district court.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court reverse the district court's order denying a preliminary injunction to plaintiff.

Dated: June 2, 2011

Respectfully Submitted,

By: /s/ Lucy Dalglish

Lucy A. Dalglish
Gregg P. Leslie
Derek D. Green
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
Tel: (703) 807-2100
Counsel for The Reporters Committee for Freedom of the Press

CERTIFICATE OF COMPLIANCE

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

(1) the foregoing brief *amici curiae* complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,340 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

(2) the foregoing brief *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: June 2, 2011
Arlington, VA

/s/ Lucy A. Dalglish

Lucy A. Dalglish
Counsel for The Reporters Committee
for Freedom of the Press