No. 24-6814

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTONIO GARCIA,
Plaintiff-Appellant,

v.

COUNTY OF ALAMEDA,
Defendant-Appellee.

YESENIA SANCHEZ,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Civil Case No. 3:24-cv-03997 (Honorable Richard Seeborg)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND LOS ANGELES TIMES COMMUNICATIONS LLC IN SUPPORT OF APPELLANT

Grayson Clary
Counsel of Record for Amici Curiae
Mara Gassmann*
Renee M. Griffin*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
gclary@rcfp.org

**Of counsel*

CORPORATE DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Other Authorities:

Rules:

SOURCE OF AUTHORITY TO FILE

Consent to file this amici curiae brief has been given by Appellant Jose Antonio Garcia and Appellees County of Alameda and Yesenia Sanchez, and this brief is thus filed pursuant to Federal Rule of Appellate Procedure 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

The Reporters Committee for Freedom of the Press declares that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is an unincorporated nonprofit association. It was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

In this and other federal courts, the Reporters Committee frequently serves as amicus curiae in cases involving the ability of the press to obtain the news. *See, e.g.*, Br. of Amici Curiae Reporters Committee for Freedom of the Press & 60 News Media Orgs., *Index Newspapers LLC v. U.S. Marshals Serv.*, No. 20-35739 (9th Cir. filed Nov. 23, 2020).

The Reporters Committee is joined on this brief by Los Angeles Times Communications LLC (together, "amici"), whose journalists rely on the constitutional protections for newsgathering discussed herein. Los Angeles Times Communications LLC is one of the largest daily newspapers in the United States. Its popular news and information website, www.latimes.com, attracts audiences throughout California and across the nation.

SUMMARY OF THE ARGUMENT

Firsthand observation is fundamental to the work of journalism; for many stories, there is no substitute for the reporter herself seeing events unfold and describing what took place. *See People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023) ("First-hand accounts, buttressed by video evidence, enhance accuracy and credibility in reporting and increase transparency and reader trust, allowing the press to tell more complete and powerful stories." (cleaned up)); *see also, e.g.*, *Standards & Values*, Reuters (last accessed Dec. 4, 2024), https://perma.cc/V3U8-VMXU ("A Reuters journalist or camera is generally the best source on a witnessed event.").

That newsgathering has long received constitutional protection, *see Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012), and the government may not circumvent the First Amendment by chopping up the journalistic process into parts—be it note-taking, recording, observing, or the like—and labelling the pieces "conduct," *see Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). Otherwise, without protection for those acts that make gathering and publishing the news possible, journalists could not stand in the shoes of the public and ensure it has the information it needs to be informed. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his

government, he relies necessarily upon the press to bring to him in convenient form the facts.").

Here, Appellee County of Alameda enacted a criminal sanction aimed at *observers* of a crime that will necessarily sweep in the press. *See* Alameda County Code §§ 10.40.020–030 ("the Ordinance") (prohibiting presence within 200 feet of a "Sideshow, Street Race, or Reckless Driving Exhibition" on public streets and highways "*for the purpose of viewing, observing, watching, or witnessing* the Sideshow Event as it progresses" (emphasis added)). The Ordinance as written would encompass newsgathering and criminalize the act of reporting in public, an essential part of the press's job. Sideshows take place on public streets, may provoke a police response, and are matters of intense public interest—as evidenced by the readership of Appellant's prior work on this subject. Appellant's Br. 4–7. Yet the District Court held that the observation of public sideshows is "conduct" that deserves no First Amendment protection at all. Op. at 8, ER-0010. This troubling conclusion contravenes decades of case law and if affirmed, would undermine public service reporting on an array of subjects. The recognition by courts that government action limiting newsgathering, especially in public, must be subject to constitutional scrutiny has enabled reporting on important stories around the country, from coverage of protests to accounts of migrants crossing the border.

For all the reasons set forth in Appellant's brief, the Ordinance is a content-based law that cannot survive this Court's strict scrutiny. Indeed, under any level of First Amendment scrutiny, the Ordinance is unconstitutional. Even content-neutral laws restricting newsgathering must, at a minimum, be "narrowly tailored to serve a significant government interest," *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017), and must leave open "alternative observation opportunities" to document the event at issue, *id.* at 1212. This law, however, sweeps in reporters and any number of other individual standing in a traditional public forum, no matter how legitimate their purpose for observing and documenting a sideshow, and bars them all from coming within 200 feet. The Ordinance is far from narrowly tailored to its public safety goal, and for reporters seeking to cover one of these events, standing out of sight over 200 feet away is simply not an adequate alternative.

Amici ask the Court to reverse the Order of the District Court and enjoin the enforcement of the Ordinance on the grounds that it forecloses observation by the press, which is entitled to First Amendment protection, and cannot survive constitutional scrutiny.

ARGUMENT

I. The First Amendment's protection for newsgathering encompasses "viewing, observing, watching, or witnessing" events in public fora.

Two distinct, bedrock principles of First Amendment law make clear that the Ordinance triggers constitutional scrutiny: first, that newsgathering—and its constituent acts, such as firsthand observation of matters in the public interest—is entitled to First Amendment protection; and second, that restrictions on access to a traditional public forum necessarily implicate the freedoms of speech and the press. These two principles help ensure the press is able to inform the public on matters of legitimate interest and public concern, including in the context of crime.

A. The Ordinance restricts expressive activity.

"[N]ewsgathering is an activity protected by the First Amendment." *Leigh*, 677 F.3d at 897 (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978)); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). Nowhere in its opinion did the District Court mention this settled rule. Doing so would have made clear that the answer to the question "whether the spectating conduct that drew the legal remedy has a significant expressive element," Op. at 5, ER-0007, is yes. Because newsgathering is expressive activity, so, too, is "[v]iewing, observing, watching, or witnessing" the event that is the subject of the news—or else the press would have very little to report. ACC § 10.40.020(7)

(defining "Spectator"). By prohibiting first-hand observation,[1] the Ordinance restricts newsgathering and expression.

Given its connection to newsgathering, documenting a matter of public interest is "an inherently expressive activity" protected by the First Amendment. *Wasden*, 878 F.3d at 1203; *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). The District Court tried to distinguish that rule by reasoning that the Ordinance "does not involve an anti-recording component." Op. at 8, ER-0010. But observation is "a necessary prerequisite to recording," *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020), such that the Ordinance's ban on observing within 200 feet of a sideshow is also a ban on recording within 200 feet, *see Brown v. Kemp*, 86 F.4th 745, 779 (7th Cir. 2023) (holding that "visual or physical proximity" and "approaching" a subject of news were "essential to carry out plaintiffs' protected monitoring and recording," and so were protected). To allow the government to get around the First Amendment right to record by criminalizing "mere" observation would render this Court's precedents on the issue meaningless.

But more to the point, observation itself is entitled to at least as much constitutional protection as recording, because it too is a necessary element of

[1] Neither Appellees nor the District Court below put forth any interpretation of the Ordinance that would exempt journalists reporting on a sideshow from criminal liability.

newsgathering. Journalists were reporting on matters of public interest long before cameras and video, doing their jobs by going to the scene, interviewing witnesses, and describing what they saw. In this sense, observation is a "constituent act[]" of journalism itself. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."). To prohibit viewing a public event firsthand prevents reporters from doing their most fundamental work and strikes at the heart of the First Amendment. *See People for the Ethical Treatment of Animals*, 60 F.4th at 829. A picture might be worth a thousand words, but the First Amendment provides just as much protection to journalists who left their camera at home.

The Ordinance's predictable consequences underline the constitutional harm. Criminal activities like sideshows will often be followed by a police response, and the "inevitable effect," *United States v. O'Brien*, 391 U.S. 367, 384 (1968), of barring journalists and the public from witnessing the event is that will be unable to effectively report on the law enforcement action in response. But coverage of police action is quintessential First Amendment activity. *See Jordan v. Jenkins*, 73 F.4th 1162, 1169 (10th Cir. 2023) ("[T]he First Amendment . . . protects the right to remain in the area [of law enforcement action] to be able to criticize the observable police conduct."); *Sharpe v. Winterville Police Dep't*, 59

F.4th 674, 681 (4th Cir. 2023) ("[L]ivestreaming a police traffic stop is speech protected by the First Amendment."); *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 & n.4 (9th Cir. 2020) (finding plaintiffs were "engaged in a constitutionally protected activity" when recording police); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (similar); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (similar); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (similar). The Ordinance's ban on observing a sideshow, which as written will in practice inhibit coverage of any police response, necessarily stymies the vital work, most often carried out by the press, *see Cox*, 420 U.S. at 491, of documenting the acts of law enforcement.

Even absent a police response, though, newsgathering does not lose First Amendment protection simply because the news to be covered involves other parties' criminal activity. Journalists must be able to cover civic unrest, and in doing so, they will sometimes witness law-breaking. Yet they "cannot be punished for the violent acts of others" at a protest or other event in a public space. *Index Newspapers LLC*, 977 F.3d at 834; *see also Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996) ("First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence."). The U.S. Department of Justice has also recognized this principle in its recent report and recommendations advising police at protests to "protect[] journalists' and the

public's First Amendment rights," including "the right to record anything—including police activity—occurring in public spaces." Police Executive Research Forum, *Police-Media Interactions during Mass Demonstrations: Practical, Actionable Recommendations*, at 21 (2024), https://portal.cops.usdoj.gov/resource center/content.ashx/cops-r1167-pub.pdf. In other words, even in spaces where crimes are underway or likely to be committed, the First Amendment limits the government's ability to restrict expression, including newsgathering and observation. The Ordinance violates that settled rule and triggers First Amendment scrutiny.

B. First Amendment scrutiny is also required because the Ordinance restricts access to a traditional public forum.

Even were the Ordinance not an impediment to protected newsgathering, it undeniably limits access to a traditional public forum and thus must satisfy constitutional scrutiny on that basis. "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). This right is protected "spatial[ly]," and "a street or a park is a quintessential forum for the exercise of First Amendment rights." *Id.* Any restriction of access to those traditional public fora is thus "subject to First Amendment scrutiny," *McCullen v. Coakley*, 573 U.S. 464, 476 (2014), even where it "says nothing about speech on its face," *id.* And that right to

"speak and listen" in public fora is intertwined with the right of the press to access those same spaces and report on what occurs therein, "given journalists' role as 'surrogates for the public.'" *Index Newspapers LLC*, 977 F.3d at 830 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980)); *see also Cox Broad. Corp.*, 420 U.S. at 492. After all, "a protest [or other event] not open to the press and general public is not a public demonstration." *Index Newspapers LLC*, 977 F.3d at 830.

Here, sideshows and observation thereof take place, by definition, in the traditional public fora of public streets and sidewalks. *See* ACC § 10.40.030(1) ("It is unlawful for any person to knowingly be a Spectator at a Side Show Event conducted on a *public street or highway*." (emphasis added)); *McCullen*, 573 U.S. at 476 (describing "public ways" and "sidewalks" as traditional public fora (cleaned up)). The Ordinance functionally bars members of the press and the public from substantial sections of these fora. Supreme Court precedent thus requires that the Ordinance be subject to First Amendment scrutiny, *see McCullen*, 573 U.S. at 476, even independent of the Ordinance's direct regulation of protected newsgathering.

II. With no alternative channel left for reporting, the Ordinance is not adequately tailored to a government interest under any standard.

As an alternative to its holding that the Ordinance does not implicate the First Amendment at all, the District Court determined that the Ordinance is a

content-neutral regulation that survives intermediate First Amendment scrutiny. Not so. For the reasons set forth above, and discussed in Appellant's brief, the Ordinance is a content-based restriction on expressive activity, and it fails strict scrutiny. Appellant's Br. at 35–47. The government's stated interests cannot support the suppression of disfavored speech here, or the ordinance's over-inclusive application to all spectators. *Id.* But *even if* the Ordinance were content-neutral and subject to a lower level of scrutiny, it would still run afoul of the First Amendment because it fails to leave open adequate alternative channels for observing and documenting public sideshows. *See Reed*, 863 F.3d at 1211–12.

A. A statute that explicitly sweeps in law-abiding reporters is not narrowly tailored to a government interest in public safety.

Even "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). But while public safety is a legitimate government interest, the Ordinance reaches too far by punishing the observation of sideshows—including by members of the press—even when an individual's presence bears no relationship to the interests that motivated the law. After all, the Ordinance applies to all observers without any regard for whether those individuals are participating in the sideshows, promoting the sideshows, decrying the sideshows, or (like Appellant) impartially reporting them. In effect, the Ordinance directly prohibits expression as a roundabout way to deter non-

expressive criminal conduct. This is not permissible: "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The appropriate remedy for lawbreaking is "to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Collins*, 110 F.3d at 1373.

Appellees cannot justify their targeting of expressive conduct. They have not suggested that journalists attending a sideshow are themselves causing a threat to public safety, and none of the reasons listed in the "Purpose" section of the Ordinance describe a danger created by an otherwise law-abiding reporter or observer. *See* ACC § 10.40.010 (discussing sideshows' damage to infrastructure; strain on police resources; encouragement of other criminal conduct such as reckless driving, drug use, and firearm discharge; pollution and disruptive noise; and risk of vehicles injuring spectators). The District Court nevertheless found the Ordinance's scope fits its goals because "the spectator who does nothing more than show up and cheer" is still "a causal contributor to the dangers that the County seeks to prevent" because their support encourages lawbreaking. Op. at 11; ER-0013. But setting aside whether that theory comports with the First Amendment on its own terms, "show[ing] up and cheer[ing]" is not what the Ordinance prohibits; it criminalizes showing up within 200 feet of a sideshow *in order to*

observe it, cheering or not.[2] The obvious way to prevent sideshows from endangering the public is to ban sideshows, but by imposing a blanket ban on any kind of observation, sweeping in reporters and other peaceable witnesses, the Ordinance "restricts significantly more speech than is necessary." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011).

Courts regularly repudiate efforts by the government to cast aside First Amendment protections for newsgathering and indiscriminately expel reporters from places (especially public places) where news is happening. *See supra* Section I.A-B. Whether or not the County intended it, the Ordinance does exactly that. It lumps together all observers within 200 feet of a sideshow and punishes them, regardless of whether they take part in the misbehavior or are simply documenting it as a matter of legitimate public concern. This is not narrow tailoring or anything close to it. "[T]he proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who

[2] Singling out a particular viewpoint may create other First Amendment problems, but Appellees cannot circumvent the First Amendment by criminalizing observation itself. *See Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015); *see also People for the Ethical Treatment of Animals*, 60 F.4th at 828 (explaining that "legislatures do not write themselves out of the First Amendment analysis"—and make their statutes constitutional—"simply by extending a statute's reach" to cover a broad category of expression while intending to target a viewpoint within the category).

actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Collins*, 110 F.3d at 1372 (internal citations omitted).

For just that reason, this Court has held—and the Department of Justice agrees—that police dispersal orders are not narrowly tailored where they fail to preserve access to a public protest for non-obstructive journalists, even if removal of members of the public from a specified area might be permissible. *Index Newspapers LLC*, 977 F.3d at 833–34 (finding police dispersal orders not narrowly tailored because government failed "to show that the dispersal of press was essential"); Police Executive Research Forum, *Police-Media Interactions*, at 7 ("There may be situations . . . where the police may reasonably limit public access. In these circumstances, to ensure that these limitations are narrowly tailored, the police may need to exempt reporters from these restrictions."). The Ordinance's tailoring is even more defective: It not only fails without justification to *preserve* opportunities for the press to document sideshows, it directly targets reporters and others for the non-obstructive act of observing.

In their brief below, Appellees claimed that "the integral nature of the audience" at a sideshow justifies the Ordinance's extreme prohibition, Defs.' Opp'n to Mot. for Prelim. Inj. at 12, n.5, ER-0079, asserting for example that "a driver is more likely to 'ghost ride the whip' for an audience watching his stunts,"

id. at 24, ER-0091. But to penalize observers for the malintent of another effectively exhumes the "thoroughly discredited doctrine" of "guilt by association." *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959); *see Healy v. James*, 408 U.S. 169, 186 (1972) ("[G]uilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." (cleaned up)); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982) ("[L]iability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."). Moreover, Appellee's proffered distinction for sideshows lacks any limiting principle. An audience is integral to any number of acts: For example, a protest is designed to draw attention from a specific audience, and violence by protesters may bring even more attention—but the government still may not ban reporting on protests wholesale.[3] Just as the reliance on an audience does not permit bans on coverage

[3] Terrorist attacks are an archetypal example of a crime that relies on an audience—instilling terror in observers is the primary goal. *See* Z.S. Mitnick, *Post-9/11 Media Coverage of Terrorism*, CUNY Academic Works (2017), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1013&context=jj_etds ("[A] terrorist attack that goes unnoticed by the media is often an abject failure . . . . [T]he intent is usually to convey a message to a larger group."). One can imagine the government citing the terrorist's underlying motivation to justify censoring news coverage of terrorism—the acts and perpetrators. But that would violate the First Amendment and would prevent some of the most important news

of protests, it cannot justify this one on observing sideshows. The Ordinance's attempt to impute the misconduct of sideshow participants to reporters and other independent observers reflects a failure of narrow tailoring and violates the First Amendment.

B. Interviewing attendees or standing 201 feet away from a sideshow are not reasonable alternative channels for communication.

Even if the Ordinance were otherwise narrowly tailored, the Supreme Court has made clear that the government cannot restrict protected speech in a traditional public forum without "leav[ing] open ample alternative channels for communication of the information" at issue. *Ward*, 491 U.S. at 791. Where the right to gather the news is at stake, this Court has made clear that that principle requires "alternative observation opportunities" to document the event in question. *Reed*, 863 F.3d at 1212. But the only "alternative" opportunity for observation of a sideshow left open by the Ordinance is standing more than 200 feet away. This

---

coverage of the modern era. *See, e.g.*, *From Ground Zero to New York's exodus: Eyewitness News coverage from September 11, 2001*, ABC7, Sept. 11, 2024, https://abc7ny.com/eyewitness-news-september-11th-anniversary-coverage-day-air-coverage/217686/ (collecting local reporting from attacks and aftermath); *see also* Hannah Hartig & Carol Dougherty, *Two Decades Later, The Enduring Legacy of 9/11*, Pew Research Center (Sept. 11, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/ ("The 9/11 attacks inflicted a devastating emotional toll on Americans, but as horrible as the events of that day were, a 63% majority of Americans said they couldn't stop watching news coverage of the attacks.").

200-foot buffer zone effectively bans observation of a sideshow full stop, underscoring the Ordinance's failure to accommodate the right to document it.

The Ordinance's 200-foot line—which would move as the sideshow itself moves—appears to be entirely arbitrary, with Appellees not having explained the necessity of 200 feet. Courts have rejected similar "floating buffer zones" prohibiting speech activities at distances as small as fifteen feet, *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377–80 (1997); thirty feet, *Berger v. City of Seattle*, 569 F.3d 1029, 1056 (9th Cir. 2009); eight feet, *Ariz. Broads. Ass'n v. Brnovich*, 626 F. Supp. 3d 1102, 1106 (D. Ariz. 2022); and twenty-five feet, *Reps. Comm. For Freedom of the Press v. Rokita*, No. 1:23-cv-1805, 2024 WL 4333137, at *8 (S.D. Ind. Sept. 27, 2024). In *Rokita*, the court relied on declarations from reporters demonstrating that they often needed to get within 25 feet to properly see or record the police officers they were covering. 2024 WL 4333137, at *3. Likewise, here, Appellant stated that recording sideshows "within 200 feet of the intersections where they occur" is important "to convey adequately detailed visual and auditory context that can enhance readers' comprehension." Garcia Decl. ¶ 19, ER-0157. Two hundred feet is so far away as to "completely . . . prevent[] the public and the press from being able to meaningfully observe" sideshows and any police action that follows. *See Martinez v. City of Fresno*, No. 1:22-cv-00307, 2022 WL 1645549, at *11 (E.D. Cal. May 24, 2022); *see also*

Reed, 863 F.3d at 1212 (finding government failed to show that "there was any alternative observation point open to [plaintiff] from which he was able to view" a newsworthy event, after police forced plaintiff to leave the public road where he had been watching).

The District Court suggested that the 200-foot boundary was reasonable because Appellant may still "venture inside a 200-foot radius of a sideshow to interview residents, passersby, spectators, or even drivers," and may "obtain videos and photos from beyond the 200-foot radius." Op. at 12, ER-0014. But these possibilities only highlight the poor tailoring of the Ordinance, because it is both overinclusive and underinclusive. The purported risk to Appellant's safety and the public's is the same—or higher—if he "ventures inside a 200-foot radius" to interview bystanders with his back turned to the sideshow as it would be if he were there to observe the event. Similarly, the Ordinance allows promoters with high-quality cameras to film the sideshow from 201 feet away and distribute videos encouraging further lawbreaking, but a reporter filming with her iPhone 50 feet away to help the public understand the sideshow's risks to public safety would be subject to criminal liability. This lack of fit between the government's stated interest and the reach of the Ordinance is the hallmark of an unconstitutional law.

Nor will the law accomplish the government's ultimate goal. Preventing the press and public from seeing a crime is neither a constitutional method for

stamping out crime nor an effective one. To the contrary, because firsthand journalistic coverage is essential to the public's understanding of sideshows, the havoc they may wreak, and the police response they may provoke, it has the power to educate—and possibly prompt the very societal and legal reform Appellees claim to desire. But under the First Amendment, whether the government approves of the public's reaction to truthful information on matters of public concern or not, it cannot prohibit the press from gathering it in the first place. Whether reviewed under strict or intermediate scrutiny, the Ordinance is invalid.

III. The public relies on journalists' ability to observe and access newsworthy events without interference by the government.

The protections for newsgathering described herein exist in no small part because the resulting journalism is important. Crime reporting is a prototypical example. Reporters and photojournalists have received Pulitzer Prizes for their on-the-ground coverage of protests, immigration, and drug epidemics—all subjects that can involve witnessing illegal acts live and in person. *See, e.g.*, *The 2021 Pulitzer Prize Winner in Breaking News Reporting: Staff of the Star Tribune, Minneapolis, Minn.*, The Pulitzer Prizes (last accessed Dec. 11, 2024), https://www.pulitzer.org/winners/staff-star-tribune-minneapolis-minn; *The 2018 Pulitzer Prize Winner in Local Reporting: Staff of The Cincinnati Enquirer*, The Pulitzer Prizes (last accessed Dec. 3, 2024), https://www.pulitzer.org/winners/staff-cincinnati-enquirer; *The 2024 Pulitzer prize Winner in Feature photography:*

Photography Staff of Associated Press, The Pulitzer Prizes (last accessed Dec. 10, 2024), https://www.pulitzer.org/winners/photography-staff-associated-press-1.

Were the government to broadly prohibit, for example, the mere observation of unlawful border crossings in the name of national security, Pulitzer Prize-winning photographs could be the basis for a criminal prosecution.[4] Likewise, were the police to disperse everyone from a protest as soon as violence or unlawful conduct by any participant occurred, the press would be unable to report on demonstrations of the highest public importance. In part for that reason, this Court affirmed an injunction prohibiting federal marshals from dispersing journalists during the protests that followed George Floyd's death in 2020. *Index Newspapers LLC*, 977 F.3d at 833–34. This type of coverage contributes to public safety and accountability.[5]

---

[4] Reporters feared such prosecution under a statute that prohibited "encourag[ing] or induc[ing]" illegal immigration, 8 U.S.C. § 1324, which was challenged in *United States v. Hansen*, 599 U.S. 762 (2023). A majority of the Supreme Court found that the statute did not reach journalists, *see id.* at 781, but in dissent, Justice Jackson noted that U.S. Customs and Border Protection (CBP) created "a 'watchlist' of potential speakers that CBP had compiled in connection with its monitoring of a large group of migrants—a list that included journalists simply reporting factual information about the group's progress. . . . There can be no doubt that this kind of Government surveillance—targeted at journalists reporting on an important topic of public concern, no less—tends to chill speech." *Id.* at 810–11 (Jackson, J., dissenting).

[5] Newsgathering has been afforded constitutional protection in other contexts as well, to ensure journalists can bring news to the public, even (or especially) if

It bears emphasis that without protection for the underlying act of observation, journalists could be prevented from first-hand eyewitness reporting that has historically been vital to informing the public and catalyzing public policy change. *See, e.g.*, *The Journalist as Eyewitness*, Poynter Institute, Dec. 27, 2004, https://www.poynter.org/archive/2004/the-journalist-as-eyewitness/ (describing impact of Edward R. Murrow's first-person reporting as one of the first witnesses following the liberation of a concentration camp at Buchenwald). Upton Sinclair could not write *The Jungle* without seeing inside meatpacking facilities; Nellie Bly could not write *Ten Days in a Mad-House* without infiltrating an insane asylum. And while the expression at issue in this case occurs in a public forum, courts have held that the First Amendment prevents the state from restricting newsgathering (in the form of filming or copying documents) even on *nonpublic* premises for a

---

the news concerns criminal activity. For example, the press's role in informing the public about criminal and civil wrongdoing is a central justification for the reporters' privilege. *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("[S]ociety's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." (internal quotation marks omitted)); 28 C.F.R. § 50.10(a)(1) (U.S. Department of Justice policy "intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering."). And it is well settled that a reporter's receipt and use of information that was unlawfully obtained by a third party does not expose the reporter to criminal liability, because "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

particular purpose, if the law would "halt all meaningful undercover investigations." *People for the Ethical Treatment of Animals*, 60 F.4th at 823, 831 ("[A]n employer could freely choose to deny entry to journalists who seek to secretly record its inner workings, [but] it does not follow that a State can . . . punish those journalists" without implicating the First Amendment). This authority demonstrates that newsgathering is expressive and essential, even when it happens in nonpublic spaces and covers the conduct of nonpublic actors.[6]

None of that is to say that journalists receive a special right of access or freedom from criminal liability beyond what any other member of the public receives, near a sideshow or elsewhere. But by criminalizing observation as such, the Ordinance directly targets not just access but *speech*—the expression of journalists and bystanders alike, who have a right to witness and discuss matters of public interest without interference by law enforcement. If observation were deemed "non-expressive conduct," state actors could prevent journalists or anyone else from even seeing a particular incident, "allow[ing] the government to simply proceed upstream and dam the source of speech—*i.e.*, it would allow the government to bypass the Constitution." *Jordan*, 73 F.4th at 1169-70 (cleaned up). The Court should reject this transparent end-run around the First Amendment.

---

[6] Here of course, the Court is not called to consider newsgathering in nonpublic spaces because these sideshows take place on public streets. *See supra* Section I.B.

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urges this Court to reverse the decision below and enjoin Appellees from enforcing the Ordinance.

Dated: December 27, 2024

Respectfully submitted,

/s/ *Grayson Clary*
Grayson Clary
Counsel of Record for Amici Curiae
Mara Gassmann*
Renee M. Griffin*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

**Of counsel*

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2024, I caused the foregoing Brief of Amici Curiae the Reporters Committee for Freedom of the Press and Los Angeles Times Communications LLC to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notices of such filing to all counsel of record.

/s/*Grayson Clary*
Grayson Clary
Counsel of Record for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): No. 24-6814

I am the attorney for *amicus curiae* the Reporters Committee for Freedom of the Press.

This brief contains 5,385 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: */s/Grayson Clary* **Date:** December 27, 2024