REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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By email

August 12, 2022

Municipal Court of the County of Medford
City Hall
411 W 8th Street
Medford, OR 97501

Re: *State of Oregon v. April Rosemary Fonseca*;
Complaint No. 178044, Case No. 20F16737, 20F16736

On behalf of the undersigned coalition of fifty-two state and local news media, national news organizations with properties in Oregon, wire services, and other organizations dedicated to defending the newsgathering rights of journalists (together, "amici"), the Reporters Committee for Freedom of the Press respectfully requests leave to submit this letter brief in support of defendant April Rosemary Fonseca's motion to dismiss Count Two of the criminal complaint in the above-captioned matter. Ms. Fonseca consents to the filing of this letter. The City opposes the filing "substantively but also as a practical matter" due to scheduling concerns.

As an unincorporated nonprofit association of reporters and editors that works to safeguard the First Amendment and newsgathering rights of the press, the Reporters Committee often participates as amicus curiae, including in Oregon courts, in matters implicating journalists' right to gather the news. *See* Br. of the Reporters Committee et al., *Index Newspapers v. City of Portland*, No. 3:20-cv-1035 (D. Or. Aug. 5, 2020). The Reporters Committee and proposed amici have a keen interest in the resolution of this case. Ms. Fonseca's prosecution for routine newsgathering—documenting the clearing of an encampment in Hawthorne Park—threatens to have a chilling effect on all Oregon journalists who cover housing policy, the management of public land, and issues affecting individuals who live outdoors on public property. *See RCFP Urges Dismissal of Prosecution of Oregon Journalist*, Reporters Comm. for Freedom of the Press (Oct. 11, 2021), https://perma.cc/C4QS-YSDU.

This letter brief will aid the Court's consideration of Ms. Fonseca's motion by detailing the state and federal constitutional standards protecting her right to document government activities, including the park closure and sweep at issue here. That the First Amendment guarantees that right is firmly established: The Constitution protects "the activity of observing a government operation" in contexts as varied as buffalo herding and policing at protests, *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017)—the clearing of encampments on public land is no exception, *see Martinez v. City of Fresno*, No. 1:22-cv-00307, 2022 WL 1645549, at *11 (E.D. Cal. May 24, 2022).

On the contrary, the First Amendment's safeguards apply with special force in public fora like the park at issue in this case. *See Index Newspapers v.*

U.S. Marshals Serv., 977 F.3d 817, 830 (9th Cir. 2020). When the government blocks access to such a forum, the closure must be "narrowly tailored" to an "overriding interest" and must, in particular, leave open adequate opportunities for the press to document government operations there. *Id.* at 829 (internal quotation omitted). So too under Article I, section 8, of the Oregon Constitution, which requires that restrictions on expressive activity—including closures of public fora where such activity traditionally occurs—"advance a legitimate state interest without restricting substantially more speech than necessary," while providing "ample alternative opportunities" to engage in expression. *State v. Babson*, 326 P.3d 559, 575 (Or. 2014).

The City's order closing Hawthorne Park—the predicate for the allegation that Ms. Fonseca committed trespass—does not comply with those stringent tests. In effect, the City imposed a flat ban on documenting the clearing operation. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1995) (holding that government action "that foreclose[s] an entire medium of expression" will virtually always violate the First Amendment). And because a journalist plainly "cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution," Count Two of the complaint must be dismissed. *Wright v. Georgia*, 373 U.S. 284, 291–92 (1962); *accord State v White*, 211 Or. App. 210, 215 (2007) ("[A]n essential element of criminal trespass in the second degree is that the underlying order to leave the premises must be lawful, and the lawfulness . . . may be circumscribed by constitutional provisions.")

I. The First Amendment protects the right of the press and public to document government operations, including encampment sweeps.

When Ms. Fonseca recorded members of the Medford Police Department interacting with individuals living in Hawthorne Park, she was performing the core function the Constitution assigns the press. "[T]he First Amendment protects the media's right to gather news," *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988), a right that encompasses "the right to photograph and record matters of public interest," including officials "engaged in the exercise of their official duties in public spaces." *Askins v. U.S. Dep't of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018). As numerous courts have explained, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the 'free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). And that openness "not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally." *Id.* at 82–83.

Those principles have obvious application here. In Oregon, the management of public land on which unhoused individuals live is a subject of legitimate public interest and recurring controversy. *See, e.g.*, Brenna Visser, *Bend Camp Cleanup Draws Criticism*, The Bulletin (Mar. 11, 2021), https://perma.cc/MD4X-7RDD. The City's eviction of such persons implicates sensitive questions of public policy, as well as the constitutional rights of individuals living outdoors. *See, e.g.*, *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended and superseded on denial of reh'g en banc*, 920 F.3d

584, 617 (9th Cir. 2019) (holding that the Eighth Amendment prohibits punishing "conduct that is an unavoidable consequence of being homeless"). As a result, members of the press and public routinely seek to document the clearing of encampments to ensure that agency policies are "carried out 'fairly to all concerned.'" *Index Newspapers*, 977 F.3d at 831 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)).

The City's insistence that the constitutional limitations imposed by the First Amendment and Article I, section 8 are irrelevant to this case because Ms. Fonseca failed to comply with an officer's order to leave the park, *see* Plaintiff's Amended Motions in Limine at 3–4, is question-begging. Ms. Fonseca does not argue that she has a constitutional right to trespass, or that journalists uniquely enjoy a right to defy police orders that is not available to the public generally. Rather, she is invoking the basic and universally applicable principle that "[a] police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it." *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999). Recent federal cases, including one arising out of Portland, Oregon, have evaluated similar governmental claims in the context of dispersal orders given by law enforcement during protests. There is now no question that such an order's legality turns on the burdens it imposes on *each* First Amendment activity affected; the government cannot justify arresting peaceful reporters documenting police crowd control activities by invoking its entirely separate interest in detaining disruptive protestors. *See Index Newspapers*, 977 F.3d at 831 (order enjoining federal marshals from dispersing clearly identified journalists "did not grant a special exemption to the press" where the district court had "found that dispersing the press was not essential to the government's interests"); *accord Goyette v. City of Minneapolis*, 338 F.R.D. 109, 116 (D. Minn. 2021).

Even the City's cited authorities confirm as much, explaining that while "[t]he Constitution does not serve to place the media or their representatives above the law," the tailoring of law enforcement orders must nevertheless "tak[e] into account the special role performed by the press." *State v. Lashinsky*, 404 A. 2d 1121, 1128 (N.J. 1979). As a result, "[r]estrictions which fail to give proper weight to the importance of the news and those who gather it" are invalid. *Id.* So too here. The City cannot impose criminal sanctions against Ms. Fonseca where the underlying City order purporting to close Hawthorne Park was itself an invalid restriction of her constitutional rights. As discussed below, the closure order was patently deficient.

II. The Hawthorne Park order that Ms. Fonseca allegedly violated violates the First Amendment because it was not narrowly tailored.

Even where the government restricts only the time, place, or manner by which the press may document its public operations, the burden on the right to gather the news must be "narrowly tailored to a significant government interest" and must "leave[] open ample alternative channels for communication of the information." *Reed*, 963 F.3d at 1211. Where a restriction defeats the possibility of documenting a particular government undertaking in its entirety, the government bears the stricter burden of meeting the standard for wholesale closure of a public forum, demonstrating "an overriding interest

based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Index Newspapers*, 977 F.3d at 829 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986)); *cf. Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n.17 (1982) (distinguishing the strict scrutiny applied to closures from the standard for "limitations on the right of access that resemble 'time, place, and manner restrictions'"). Viewed with either lens, the City's closure order, which Ms. Fonseca is alleged to have violated, violated the First Amendment.

The recent decision of the U.S. District Court for the Eastern District of California in *Martinez v. City of Fresno*, No. 1:22-cv-00307, 2022 WL 1645549 (E.D. Cal. May 24, 2022), is instructive. There, advocates for individuals facing housing insecurity challenged a municipal ordinance that assigned city employees standardless discretion to bar the press and public from property on which the City of Fresno was "engage[d] in abatements or 'sweeps' of encampments where unhoused individuals live." *Id.* at *1. But the city took that drastic step with "no explanation as to how having the press on the location of abatement activities it carries out would interfere with . . . health and safety goals," *id.* at 12—silence that raised the inference that the city's goal was "simply to avoid public scrutiny," *id.* at 9; *see also Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("When wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate."). Even under the more lenient standard governing time, place, and manner restrictions, then, the court found that the ordinance was not narrowly tailored to a substantial government interest (or for that matter a legitimate one).

So too here. The City's closure order consisted of a single sentence stating that "the City Manager has ordered the closure of Hawthorne Park for at least 48 hours to allow for the sanitation, cleaning, and inspection of City property," with no effort made to explain why the presence of the press would impede the park's sanitation, cleaning, or inspection. Memorandum in Support of Defendant's Motion to Dismiss Count 2, Ex. 4, at 1. And the City's communications make express that the City hoped to avoid public scrutiny of the operation, which it expected would draw related First Amendment activity. *See id.*, Ex. 1, at 1. But "public officials have no general privilege to avoid publicity and embarrassment by preventing public scrutiny of their actions," *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (internal quotation omitted), and in the absence of any "genuine safety or operational reason" to prevent the press from performing its usual constitutional function, *Reed*, 863 F.3d at 1212, such scrutiny must be permitted. The City's closure order made no effort to tailor its burdens to any other interest that restricting access to the park might notionally serve, and Ms. Fonseca cannot be punished for failure to comply with it.

III. The Hawthorne Park order that Ms. Fonseca allegedly violated violates the First Amendment because it failed to leave open adequate alternative channels for press to document the encampment sweep.

The order's invalidity is compounded by its failure to leave open any "reasonable alternative" means of documenting the City's operations, let alone "ample" alternative means. *Reed*, 863 F.3d at 1212 (internal quotation omitted). And while the Medford

Police officers responsible for Ms. Fonseca's arrest attempted to justify their conduct by reference to her refusal to report from a "media staging area" located "outside Hawthorne Park, along a busy road," Memorandum in Support of Defendant's Motion to Dismiss Count 2, at 7, the current record makes clear that any such staging area did not provide a constitutionally adequate opportunity to document the clearing of Hawthorne Park.[1]

The right to report on government operations encompasses access to both sights and sounds. *See, e.g., First Amend. Coalition v. Ryan*, 938 F.3d 1069, 1075 (9th Cir. 2019) ("[T]he First Amendment right of access to governmental proceedings encompasses a right to hear the sounds of executions in their entirety."); *cf. Galvin v. Hay*, 374 F.3d 739, 749 (9th Cir. 2004) (buffer zone did not leave open adequate alternative channels for protest where "[f]rom 75 yards away the audience could neither see the protestors' banners *nor hear their singing*" (emphasis added). Here, though, the 'staging area' to which Medford officers attempted to confine Ms. Fonseca was unquestionably too far from the park to record audio of interactions between City officials and individuals living there. In other words, the City left open no means of radio reporting. The Constitution condemns that result. *See Martinez*, No. 1:22-cv-00307, 2022 WL 1645549, at *11 (buffer "that completely severs the public from the unhoused community . . . preventing the public and the press from being able to meaningfully observe defendant's actions during a sweep" flunks an adequate alternatives analysis). In imposing what amounted to a flat ban on newsgathering within the park, the City violated the First Amendment, and its unlawful order cannot provide the basis for criminal trespass liability.

IV. The Hawthorne Park order is likewise inconsistent with Article I, section 8 of the Oregon Constitution's protections for expressive activity.

Oregon law requires the same result. Article I, section 8 of the Oregon Constitution prohibits the government from restricting "the right to speak, write, or print freely on any subject whatever." When a city promulgates a restriction implicating Article I, section 8—in this case, the Hawthorne Park closure order—courts must weigh whether its application to defendant "was directed at the content or the expressive nature of [her] activities, advanced legitimate state interests, and provided ample alternative opportunities to communicate the intended message." *Babson*, 326 P.3d at 575.

It is beyond dispute that on September 22, 2020 Ms. Fonseca was engaged in expressive activity protected by Article I, section 8. She repeatedly told City officials she was present at the park as a member of the press exercising her right to speak, write, or print freely about the camp clearing. *See* Memorandum in Support of Defendant's Motion to Dismiss Count 2, at 5, 7 (noting that Ms. Fonseca told officers she was "reporting on this" and "doing her job by being in the park to report on this.")

[1] It is far from clear that Ms. Fonseca was given a chance to comply with the order to proceed to any asserted 'staging area' before she was arrested—an independent ground for invalidating it. *See United States v. Huizar*, 762 F. App'x 391, 393 (9th Cir. 2019).

For the reasons explained in Section II and III *supra*, neither the order itself nor Medford officers' enforcement of it adequately protected Ms. Fonseca's constitutional rights. The City Manager's order closing Hawthorne Park did not provide *any* alternative opportunity for Ms. Fonseca (or anyone else for that matter) to document the clearing. And even if the City's enforcement of the order as applied to Ms. Fonseca arguably included an option to go to a "media staging area"—which it appears the officers' decision to arrest Ms. Fonseca effectively prevented her from doing—that location did not provide ample opportunity for Ms. Fonseca to engage in protected newsgathering and reporting activity.

For the foregoing reasons, the Reporters Committee and all of the undersigned proposed amici respectfully urge the Court to dismiss Count Two of the complaint against Ms. Fonseca.

Should the Court have any questions regarding this letter or wish to hear directly from proposed amici at a hearing, please do not hesitate to contact Ellen Osoinach (eosoinach@rcfp.org) or Grayson Clary (gclary@rcfp.org).

Sincerely,

The Reporters Committee
for Freedom of the Press

ACLU of Oregon
Advance Publications, Inc.
The Associated Press
The Atlantic Monthly Group LLC
Bloomberg L.P.
BuzzFeed, Inc.
The Center for Investigative Reporting (d/b/a Reveal)
Clackamas Review/Oregon City News
Committee to Protect Journalists
Eugene Weekly
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