

**No. 20-35739**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**INDEX NEWSPAPERS, et al.,**  
*Plaintiffs - Appellees,*

**v.**

**UNITED STATES MARSHALS SERVICE, et al.,**  
*Defendants - Appellants.*

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On appeal from the United States District Court for the District of  
Oregon,  
Case No. 3:20-cv-1035-SI, Hon. Michael H. Simon

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**AMICUS BRIEF**

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**STATEMENT OF COMPLIANCE WITH RULE 29(a)**

All parties have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than counsel for amici curiae contributed money to fund the preparation of this brief.

**IDENTITY AND INTEREST OF AMICI CURIAE**

Amici Curiae, Western States Center, Inc., The First Unitarian Church of Portland, Oregon, Sara Eddie, Oregon State Representative Karin A. Power and Oregon State Representative Janelle S. Bynum respectfully file this Brief in support of Appellees. Amici Curiae are plaintiffs in a related case – *Western States Center, Inc. v. United States Department of Homeland Security*, 3:20-cv-01175-JR, which is currently pending in United States District Court for the District of Oregon. Amici Curiae sought and obtained an injunction that enjoined the Federal Government’s unconstitutional law enforcement activity. Amici Curiae have an interest not only in ensuring that the Government remains restrained in its ability to engage in the plenary policing of Portland untethered to the federal situs of the Hatfield Courthouse, but also in the protection of the ability of Appellees – journalists and fellow legal observers – to report and share information about protests and the Government’s conduct.

## **I. Amici Curiae and their Interests.**

### **A. Western States Center, Inc.**

Western States Center, Inc. (“WSC”) is an Oregon public benefit corporation headquartered in Portland. Its mission is to strengthen the organizing capacity of often marginalized communities; to provide training, leadership development and organizational capacity to social movements and leaders; to promote peaceful protest and reconciliation; and to defend democracy and democratic engagement. During the protests in Portland throughout 2018 and 2019, WSC worked closely with the City of Portland to de-escalate conflict between protesters and Portland Police Bureau.

The Government’s violation of the First Amendment and overreach into the affairs of local law enforcement has injured WSC. Beginning on May 26, 2020, when George Floyd was killed in Minneapolis, WSC devoted significant resources to deescalating conflict between the Portland Police Bureau and protesters, and was making progress in this regard. Then the Federal Government arrived and began to undertake purported law enforcement actions on the streets of Portland. The Government harmed WSC by inserting itself into the policing of



Portland, which disrupted WSC's efforts and frustrated its mission. This required WSC to divert resources away from other programs in order to address the chaos the Government caused when it overstepped the constitutional bounds limiting its authority to engage in purported law enforcement activities.

### **B. First Unitarian Church of Portland, Oregon**

The First Unitarian Church of Portland, Oregon ("First Unitarian") is a domestic religious nonprofit corporation located in Portland. Founded in 1866, First Unitarian draws upon a long heritage of social activism. Activism and social justice are central tenets of the church – its stated mission is, among other things, "to act for social justice." First Unitarian has organized a Social Justice Council and a Police Accountability Team.

First Unitarian also has a protest witness group, the purpose of which is to equip congregants to observe and monitor protests and the police response to them. It is part of First Unitarian's social justice mission—a fundamental aspect of religious life and practice—to encourage protest against unjust laws and government actions. The congregation has been active in the George Floyd protests. Moreover,

First Unitarian's witnessing activities are themselves a form of expression and assembly.

The Government's violent policing of the streets of Portland has diminished congregant participation in the protests and harmed First Unitarian's social justice mission. First Unitarian has become hesitant to encourage its congregants to protest even though such protesting is peaceful, because defendants' unconstitutional targeting of peaceful protesters increases both the risk of bodily harm to congregants and the likelihood of the church's civil liability to congregants who are injured or traumatized in the course of abduction by federal law enforcement.

### **C. Sara Eddie**

Sara Eddie is an individual residing in Portland. She is a legal observer volunteer with the ACLU of Oregon. As a neutral legal observer, she attends and observes demonstrations and protests, and documents what she sees—including any police abuses or any violence or vandalism by protesters. Since approximately June 1, 2020, Ms. Eddie has acted as a legal observer at numerous protests in the aftermath of the killing of George Floyd. Ms. Eddie views objective, neutral legal observing as an important way to give back to the community and to protect civil rights.

The Government's overreaching police activities have caused Ms. Eddie to cease her service as a legal observer in downtown Portland because she is fearful that she will be harmed and unable to care for her two children and 96-year-old grandfather.

**D. Oregon State Representative Karin Power**

Representative Karin A. Power is the duly-elected representative of Oregon's 41<sup>st</sup> House District, which encompasses Milwaukie, Oak Grove and parts of Southeast Portland. She is the Vice-Chair of the House Judiciary Committee, which oversees, creates and modifies state civil and criminal laws; oversees the judicial system; and sets the certification and licensure requirements for criminal justice public safety professionals, including Portland police officers. As a legislator, she makes and enacts laws, including on issues of law enforcement. In her capacity as a citizen, she has a right to gather with political protesters, to participate in political protest, and to observe political protest, all of which the Government seeks to chill or prevent—and have chilled and prevented, in the case of Rep. Power—through their First Amendment-suppressive activities.

### **E. Oregon State Representative Janelle Bynum**

Representative Janelle S. Bynum is the duly-elected representative of Oregon's 51<sup>st</sup> House District, which encompasses East Portland, Damascus, Gresham, Boring, North Clackamas and Happy Valley. In her capacity as a citizen, Representative Bynum and her family have the right to be policed by federal authorities only to the extent authorized by valid federal law, federal regulation, or the Federal Constitution. She has the right as a citizen to gather with political protesters, to participate in political protest, and to observe political protest.

However, the pattern of aggressive federal policing at issue here – consisting of unexpected chases of peaceful protesters, attacks upon them by the discharge of less-lethal munitions and tear gas at by the federal police, has deterred her and her family from attending protests, particularly as the mother of four Black children, two of which are sons. She is chilled from attending Black Lives Matter or any other protests in downtown Portland – even though she had attended past Black Lives Matter protests.

## II. The Western States Center Injunction.

Amici Curiae brought suit in the District of Oregon against federal defendants conducting policing in downtown Portland during the racial justice protests of July 2020. Citing ample evidence of prophylactic federal policing far from the Hatfield Courthouse that was not hot pursuit of wrongdoers, nor meaningfully defensive, and often aimed at peaceful protesters rather than persons attacking federal officers, amici argued that the federal defendants were violating both the First Amendment by chilling and retaliating against speech, and also violating the Tenth Amendment by engaging in prophylactic federal policing that was unreasonably far from the Hatfield Courthouse. As part of their First Amendment allegations, the Amici Curiae likewise cited Tweets and statements by the Chief Executive, as well as Executive Order 13933 – which authorized the military-style federal policing of American cities this summer at issue in this case – as establishing a hostility to racial justice protests and protesters, painting them as anti-American displays of criminality and disorder that his Government would not permit.

On October 22, 2020, the district court received argument concerning the appropriate spatial limitations of the Government's power

to issue dispersal orders and otherwise engage in general policing. The Government's counsel essentially refused to acknowledge any limiting principle, while Amici Curiae argued that the federal defendants clearly lacked authority to disperse protests more than 100 yards (and thus more than one city block) from the Hatfield Courthouse, relying in substantial part on this Court's October 9, 2020 opinion in this case (including the dissent thereto, which argued for a limited authority to disperse crowds adjacent to the Hatfield Courthouse) on the Government's motion to stay the injunction. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020).

On November 2, 2020, the district court issued a preliminary injunction in the Amici Curiae's favor. (*Western States Center, Inc. et al. v. Department of Homeland Security, et al.*, Case 3:20-cv-01175-JR, ECF No. 50; Related Order of Chambers). Specifically, the district court found that while particular federal agents may lack a motive to engage in retaliatory conduct towards peaceful protesters, "they operate under the burden of statements from the President (and for Border Patrol agents, Acting Secretary Wolf) expressing precisely such a motivation." (*See id.*; Related Order of Chambers, at 2.)

The district court – itself notably operating from within the Hatfield Courthouse and not unmindful of issues pertaining to its safety and environs – enjoined the federal defendants from engaging in policing beyond the 100 yard, one city block radius from the Hatfield Courthouse. The court reasoned that it would provide protesters with a “zone of safety where they can peacefully protest without fear of retaliation.” (*See id*; Related Order of Chambers, at 3). The court limited the Government’s “crowd control activities” to that extended city block around the Hatfield Courthouse, within which the federal law enforcement could freely engage in crowd control activities, and beyond which it could not. Notably, Amici Curiae conceded and the district court’s injunction was at pains to preserve inviolate the other prerogatives of federal law enforcement, such as the hot pursuit of wrongdoers and engaging each activity specifically authorized in 40 U.S.C. § 1315, including the pursuit and arrest of those seen committing federal crimes.

## ARGUMENT

- I. **The Government’s Position Rests on the False Premise that Its Dispersal Orders Are Valid and Improperly Ignores that Its Policing Authority Is Limited to Federal Property and Its Curtilage**.

**A. The Government’s Authority Is Directly Tethered to Federal Property and Personnel.**

The Government argues that it may “prohibit[] the public from entering or remaining on its property” or “threatening” its property. AOB at 15 (citing *United States v. Christopher*, 700 F.2d 1253, 1259061 (9th Cir. 1983)). It likewise argues that federal officers who have issued dispersal orders on federal property may effectuate those orders off federal property when necessary, for example by establishing a secured perimeter. (Appellants’ Opening Brief (“AOB”) at 18 (citing *United States v. Evans*, 581 F.3d 333, 340 (6th Cir. 2009))). But these actions do not describe what the Government did here, nor does the Government justify how its actual dispersal orders – away from the Hatfield Courthouse – comply with this limited authority. The district court’s findings that the Government exceeded these limits in both this case and *Western States Center* were not clearly erroneous and do not present a basis to disturb the injunction on appeal.

The Government acknowledges – or at least pays lip service to – the fact that 40 U.S.C. § 1315(b)(2)(A) and (C) do not authorize roving sweeps away from the Hatfield Courthouse. (AOB at 17-18.) Rather, 40



U.S.C. § 1315(b)(2)(A) allows warrantless arrests for any federal crime committed in the presence of that federal agent, and 40 U.S.C. § 1315(b)(2)(C) allows warrantless arrests for any federal felony the federal agent reasonably believes a person has committed or is committing. The roving sweeps and dispersals at issue in this case – in which federal police roamed many blocks from the Hatfield Courthouse and engage or disperse protesters where they find them – are none of those things.

The Government consistently ignores the law controlling what the it may and may not do in federal law enforcement. For example, 40 U.S.C. § 1315(b)(2)(C) allows warrantless arrests for federal offenses committed in the presence of a federal officer. This allows for hot pursuit of someone seen committing federal crimes right outside the Hatfield Courthouse. Indeed, courts generally construe federal agents' jurisdiction to end outside the curtilage of federal property, so that unless they are in hot pursuit of a particular subject or reasonably investigating a crime, they cannot act outside their jurisdiction. *See, e.g., United States v. Jackson*, 139 F. App'x 83, 85–86 (10th Cir. 2005). And the Government's own witness has agreed with this limitation on federal authority – Officer Gabriel Russell testified that the Government generally would lack

authority to “enforce a dispersal order against an unlawful assembly on Southwest Fourth Street[.]” (*Western States Center, Inc. et al. v. Department of Homeland Security, et al.*, Case 3:20-cv-01175-JR, ECF No. 39 at 15.) He separately opined that, “federal authorities are, you know, required to operate within a reasonable distance of a federal facility.” (*Id.* at 76.)

The Government implicitly concedes these limits to federal authority by arguing that its conduct fit them. Indeed, the Government repeatedly acknowledges the bounds of its authority without meaningfully explaining how its conduct conformed with that authority in this case. *See* AOB 18-20. The Government vaguely discusses how police may deal with unruly crowds but does not tie this behavior to lawful dispersal orders on federal property or immediately around it. The Government does not nor cannot claim its officers were continuously engaging federal lawbreakers in a “hot pursuit” manner, or continuously seeking to apprehend individual wrongdoers they witnessed violating federal law, as 40 U.S.C. § 1315(b)(2)(C) contemplates. The Government offers no percipient testimony that it was. The Government was – and

this makes all the difference – engaging protesters and journalists away from the Hatfield Courthouse.

By policing away from the federal situs they purport to defend, the Government violates the First Amendment. It cannot squelch speech in service of securing an overbroad public space in supposed defense of security – here, the security of the Hatfield Courthouse.

**B. Federal Law Enforcement Should Be Limited to Federal Property and Its Curtilage, as It Was in Western States Center.**

The First Amendment converges with the limits on the Government’s power in Section 1315, helping to establish a proper limit to the extent of the federal policing authority in relation to the Hatfield Courthouse. Two Ninth Circuit cases are instructive: *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224 (9th Cir. 1990); *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1996). In *Peace Navy*, the Ninth Circuit rejected as over extensive a 75-yard safety and security zone around the San Francisco pier during fleet week, where Peace Navy, a group of antiwar demonstrators, typically demonstrated. *Id.* at 1227. The Ninth Circuit rejected the proposed zone of speech restriction because it “burden[ed]

substantially more speech than [was] necessary to further the government's legitimate interests." *Id.* at 1228.

So it should be in Portland today. There is no reason for the Government to send squads of armed DHS agents on patrols as far from the Hatfield Courthouse agents to confront protesters while standing at Main Street and 5<sup>th</sup> Ave.—two blocks from the Hatfield Courthouse – as evidence in *Western States Center* shows it did. Likewise, the agents Sam Hill testified in *Western States Center* conducted a sweep from Lownsdale Square, at 3<sup>rd</sup>, all the way to Broadway four blocks away, were not defending the Hatfield Courthouse. And the agents had no reason to be at Third and Taylor, confronting Amanda Dunham without probable cause that far from the Hatfield Courthouse. Nor should they have advanced as far as 10<sup>th</sup> Ave., while firing munitions, tackling protesters and making arrests on July 25. This is all the “proactive” policing promised by Acting Secretary of Homeland Security Chad Wolf, citation and it is all unauthorized by Section 1315 and likewise improper under the First Amendment. For as the Ninth Circuit held in *Peace Navy*, the government “is not free to foreclose expressive activity in public areas on mere speculation about danger.”

*Collins* is likewise instructive. There, the Ninth Circuit held that a citywide ban on demonstrations in the wake of the Rodney King verdict violated the First Amendment. 110 F.3d at 1372 (“The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence.”). That is functionally what the federal forces are doing in Portland – citing prior demonstrations, they sweep out broadly to suppress in an overbroad geographic zone. This, *Peace Navy* and *Collins* teach, they cannot do.

This Court should restrain the defendants generally to a defense perimeter no greater than 100 yards (one city block) from the Hatfield Courthouse, which encompasses a wider area than that disallowed in *Peace Navy*, encompasses the full block in front of the courthouse, and allows more than a fair distance to defend the Hatfield Courthouse. It is notable that an injunction consistent with this spatial analysis was issued by a district judge well familiar with the Courthouse and its environs in *Western States Center*.

## **II. The Government Has Flagrantly and Offensively Violated the First Amendment by Targeting Protesters and Journalists for Exercising their First Amendment Rights.**

### **A. The Core of the First Amendment – Stopping the Government From Squelching Dissent – Is at Issue in This and Other Portland Protest Cases.**

The First Amendment is a linchpin of American democracy, and this case goes to the heart of whether the Government will be permitted to encroach upon expressive liberties the Founders guaranteed all of us so that democracy may work.

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 601–02 (1998) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). “Above all else, the First Amendment means that government has no power to restrict expression because of its message or its ideas.” *Id.* (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). The “principle of viewpoint neutrality ... underlies the First Amendment.” *Id.* (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984)); *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citation omitted) (holding

that the First Amendment prohibits the government from restricting expression because of “its message, its ideas, its subject matter, or its content.”). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). Even where restriction or restrictive activity may be facially content neutral, they are considered content-based if they “cannot be ‘justified without reference to the content of the regulated speech,’ or were adopted by the government ‘because of disagreement with the message [the speech] conveys.’” *Reed*, 576 U.S. 164 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

When a federal court is “called upon to vindicate this ideal,” it first asks “whether the government has adopted a regulation of speech because of disagreement with the message it conveys” because the “government’s purpose is the controlling consideration.” *Finley*, 524 U.S. at 603 (citing *Rock Against Racism*, 491 U.S. at 791). To use the Supreme Court’s own phrasing in *Finley*, the “answer in this case is damning.”

**B. The Attacks on Journalists in This Case Are First Amendment Violations That Flow Inexorably From the First Amendment Violations Giving Rise to Operation Diligent Valor.**

The more than thirty-five unrefuted proofs of assaults on journalists by federal officers are shocking. Federal forces shot journalists obeying their instructions not to move. (Plaintiffs' Response Brief ("PRB") 15). In an ugly metaphor for attacking justice itself, federal forces shoved a journalist down the courthouse steps. (PRB 18). Federal officers shot a legal observer in the chest from four feet away. (PRB 18). Federal officers shot a journalist in the arm while she was recording them. (PRB 19). Federal officers shot a journalist in the head twice. (PRB 16).

These literal attacks on the free press flow inexorably from the equally shocking attacks on free expression that sent these federal officers to Portland in the first place. The President declared his intention to quash protest in Executive Order 13933 and related public statements. These statements collectively establish that the strong uses of force in Portland this year were meant to quash speech and to chill



dissent and protest, making that Executive Order presumptively unconstitutional.

This President's crackdown on political protest is a paradigmatic violation of *Finley* and *R.A.V.* and is thus presumptively unconstitutional. That crackdown flowed from the President's June 26 Executive Order that criticized state and local governments, directing the use of force wrapped in the frank judgment that while disorder or violence are bad, the failure to condemn and combat noxious protest is "worse," stating that "they apparently have lost the will or the desire to stand up to the radical fringe and defend the fundamental truth that America is good...." Exec. Order No. 13933, [85 FR 40081](#). This language makes the defendants a Constitutionally prohibited "truth" squad, deployed to enforce the President's "truth." It is openly hostile towards the protesters' messages and communicates that any speech questioning certain beliefs of the Administration will be quashed. *See Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004) ("The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is

disagreement with the underlying ideology or perspective that the speech expresses.”).

The Executive Order’s language exceeds the bounds of protected government advocacy because it is directly tied to government action used to “silence or muffle the expression of disfavored viewpoints.” *NRA v. Cuomo*, 350 F. Supp. 3d 94, 112 (N.D.N.Y. 2018) (citing *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017)). “[T]he First Amendment prohibits government officials from encouraging the suppression of speech in a manner which ‘can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request.’” *Zieper v. Metzinger*, 474 F.3d 60, 65–66 (2d Cir. 2007).

The threat to speech and First Amendment rights here is even clearer than that in *NRA v. Cuomo*, where Governor Cuomo’s press release encouraged insurance companies and financial institutions to “reevaluate” their relationship with the National Rifle Association. There, the court concluded that the NRA stated a free speech claim, because in the totality of the circumstances the press release and related guidance letters “constituted implicit threats of adverse action against

financial institutions and insurers that did not disassociate from the NRA.” 350 F. Supp. 3d at 112-18. The language here is stronger and worse. It directly calls out persons with conflicting viewpoints from the Administration’s, namely the “radical fringe” or the “left-wing extremists who have . . . explicitly identified themselves with ideologies — such as Marxism — that call for the destruction of the U.S. system of government.” Exec. Order 13933, [85 FR 40081](#).

The Order then not only suggests – ***but directs*** – that action be taken against these individuals. If government speech that “can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to [an] official's request” can give rise to a valid First Amendment claim, then the speech here certainly does. *Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003). The President’s announcement of official disfavor of the challenged speech necessarily invalidates all subsequent action taken in furtherance of its unconstitutional mandate because the government may not undertake action that “silence[s] or muffle[s] the expression of disfavored viewpoints.” *See Tam*, 137 S. Ct. at 1758.

The Order's content strongly suggests that actions taken in furtherance of this Order aim to suppress a certain ideology, and violate the First Amendment. The President's July 20 statement linking the protesters' ideology to his reaction makes this analysis inescapable. (Case 3:20-cv-01175-JR, ECF No. 17 at 18) ("These people are not protesters, these people are anarchists. These are people that hate our country and we're not going to let it go forward.").

The Government's only response to Appellees' claims of retaliation is that their "agencies forbid their officers from targeting *anyone* for exercising First Amendment rights." (AOB at 13 (emphasis in original)). This misses the point entirely. The deployment itself targets the exercise of First Amendment rights. Saying those executing this unconstitutional mandate do so pursuant to guidelines would alter nothing, were it so. The Government stresses that its officers must "undergo extensive training in permissible uses of force," and are prohibited from using crowd-control techniques to punish, harass, or abuse. (AOB at 25).

Unfortunately, the unrefuted proofs of assault after assault on journalists – even after the district court entered the injunction – show that regardless of policies, federal policing in Portland violated the First

Amendment just as starkly as the Executive Order and statements that gave rise to the deployment in Portland. The Government's protestations that there is no retaliation in the officers' conduct because there are policies that should prevent them unfortunately call to mind Chief Justice Roberts' rejection of wholly unpersuasive, pretextual explanations in the census case: "We are not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (quoting *U.S. v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.)). The retaliation is patent in this record and throughout Operation Diligent Valor. This Court should so hold.

**C. The Federal Defendants Owe Their Existence to the Acceptance of the Very Limitations on Their Power That Index Newspapers Properly Calls Upon This Court to Enforce.**

It is important to remember that we have a federal government because we have a Bill of Rights – including the First, Fourth, and Tenth Amendments – all of which are relevant to the Portland protests, and which are vital to circumscribing any President’s and any administration’s powers to quash dissent. The absence of a Bill of Rights enjoining federal intrusion onto individual liberties was “the single most important obstacle to the ratification of the Constitution.” John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights 1787-1792*, 33 Santa Clara L. Rev. 887, 897 (1993). Because the Constitution’s text “contains few provisions concerning individual liberties,” several states “were concerned about the absence of an enumeration of rights” and refused to ratify it without the caveat that it would be immediately amended to add a Bill of Rights. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 488 (Wolters Kluwer Law & Bus. 4th Ed. 2011); *see also* Kaminski, *supra*, at 906-07 (describing how Patrick Henry “urged the [Virginia] convention to adopt

the Constitution conditionally with amendments.”).

Accordingly, at the first Congress in 1789, James Madison drafted amendments to the Constitution. *See Chemerinsky, supra*, at 12, 488. Congress ratified twelve amendments and the states ratified ten. *Id.* at 488. “These amendments became known as the Bill of Rights.” *Id.* Since its ratification, the Bill of Rights has been applied to protect individual liberties from intrusion from the federal government. *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (“In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments.”); *Chemerinsky, supra*, at 5.

### **CONCLUSION**

This case is in part about restoring the proper function of the First Amendment in the American public square. The federal litigants in this Court in 2020 only exist because in the federal government’s birthing in 1791 the Founders lashed it down with these very cords. This Court

should affirm the district court's well-founded order enjoining the Government's improper targeting of journalists and chilling of protest in derogation of the First Amendment.

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Dated: November 23, 2020

SNELL & WILMER L.L.P.

By: /s/ Andrew M. Jacobs

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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