IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 16-55719

RAY ASKINS and CHRISTIAN RAMIREZ,
Plaintiffs/Appellants

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,
Defendants/Appellees.

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE

On Appeal from the United States District Court
For the Southern District of California

No. 3:12-cv-02600 W-BLM
The Honorable Thomas J. Whelan,
Judge, U.S. District Court

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Dated: October 3, 2016

s/Ilya Shapiro
Ilya Shapiro

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because it concerns the right to depict government actions through video and photographic recording of public places. Only by accurately showing government actions can those actions be effectively criticized and, as needed, remedied.

No person other than *amicus* or *amicus*'s counsel authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

SUMMARY OF ARGUMENT

The cellphone video camera has been the greatest technological advance in protecting our constitutional rights from abusive government officials in the last century. Following the cellphone video recording of the police shootings of Alton Sterling and Philando Castile, President Obama noted that "This is an American issue that we should all care about." Statement by the President (July 7, 2016),

https://www.whitehouse.gov/the-press-office/2016/07/07/statement-president. Each of these videos was viewed by millions of people, leading to popular outrage that even the president could not ignore.

Being able to record and disseminate the potentially wrongful behavior of government officers in the performance of their official duties is critical for a free society and protected by the First Amendment. *See Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011) ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these [First Amendment] principles.'"). As Benjamin Franklin said at the Constitutional Convention, "In free governments, the rulers are the servants and the people their superiors and sovereigns." 2 *The Records of the Federal Convention of 1787* at 120 (Max Farrand ed., 1911) (Madison's Notes, July 26, 1787). By recording the actions of government officers a person can prove to others what occurred. That is how citizens can criticize government operations that officials wish to hide. Such criticism—and resulting petitioning for redress of grievances—lies at the core of First Amendment protection.

Streets, parks and other public forums "have immemorially been held in trust for the use of the public." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). The right to speak and otherwise engage in constitutionally protected activities in such forums "must not, in the guise of

regulation, be abridged or denied." *Id.* Thus the appellee here, the U.S. Department of Homeland Security ("DHS"), has rightly acknowledged that "the public has a right to photograph the exterior of federal facilities from publically accessible spaces such as streets, sidewalks, parks and plazas." U.S. DHS Federal Protective Service Threat Management Division, *Photographing the Exterior of Federal Facilities*, FPS Information Bulletin, Report Number HQ-IB-012-2010 (Aug. 2, 2010), *available at* https://goo.gl/vZRhvy.

Yet this right to engage in First Amendment-protected activity in public places has been violated in this case by DHS itself. While appellee tells its law enforcement officers that they "should not seize the camera or its contents and must be cautious not to give such 'orders' to a photographer to erase the contents of a camera, as this constitutes a seizure or detention," *id.*, here the officers did exactly what DHS told them they could not do without violating First Amendment rights. ER 76-77, 82 ¶¶ 57, 59, 64, 94-95.

Courts enforce the distinction between mere regulation and denying the First Amendment right altogether by requiring the government to "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative NonViolence*, 468 U.S. 288, 293 (1984). As the court below recognized: "Restrictions on speech in a public forum must . . . 'leave open ample alternative channels for communication of the information.'" ER 120 (quoting

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), in turn quoting *Clark*, 468 U.S. at 293). But the lower court never explained how the restriction here does not violate this constitutional rule. Blanket bans on protected First Amendment conduct by definition shut down all such communication, not merely regulate it.

Moreover, there is no potential danger to public safety in recording government officials' public actions. An individual who makes a video recording gains no additional information that he did not have from simply observing the action. And recording certainly doesn't rise to the level of any "direct, immediate, and irreparable damage to our nation," which the Supreme Court requires before speech can be suppressed before publication. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Stewart, J., concurring, joined by White, J.). For privacy, safety, or security reasons the government can exclude people from a non-public forum, but once allowed to witness the actions of government officials there is no harm in recording that account and thus no justification for banning such record.

ARGUMENT

I. Recording Government Officials in the Public Performance of Their Duties Is Protected by the First Amendment

From the beginning of the debate over the scope of the First Amendment, discussions of government operations have been seen as lying at the core of the political speech protected by the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) ("Whatever differences may exist about interpretations of the

First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, *the manner in which government is operated* or should be operated, and all such matters relating to political processes.") (emphasis added). While past reporters would have used pencils to chronicle government actions, today we have technology that more accurately handles the task. But new technology doesn't change the constitutional analysis. *Cf. Joseph Burstyn, Inc. v. Wilson* 343 U.S. 495, 502 (1952) ("[M]otion pictures [are] included within the free speech and free press guaranty of the First and Fourteenth Amendments.").

The First Amendment is based on the idea of a free republic described by James Madison as one in which "the censorial power is in the people over the government, not the government over the people." *See* 4 *Annals of Cong.* 934 (Joseph Gales, ed. 1790). Benjamin Franklin also commented on this idea at the Constitutional Convention: "In free governments, the rulers are the servants and the people their superiors and sovereigns." 2 *The Records of the Federal Convention of 1787* at 120 (Max Farrand ed., 1911) (Madison's Notes, Jul. 26, 1787). But a free people cannot debate the nature of government if we cannot accurately describe the manner of which government currently operates. For instance, whether a search is a violation of a person's rights can turn on various

details that can later be hard to prove. The ability to record the conduct of public officers leads directly to the ability to criticize that conduct.

This Court has itself recognized a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F. 3d 436, 439 (9th Cir. 1995); *accord Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011) ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering 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.'"). While courts make determinations in specific legal cases, it is ultimately up to the public itself to judge the performance of the government agents to whom it has delegated authority. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (holding that "the citizenry is the final judge of the proper conduct of public business").

Moreover, the government cannot prohibit the means by which a protected expression that the government doesn't like is created. *Minneapolis Star & Tribune Co v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582–83 (1983) (holding that a tax on paper and ink burdens the freedom of the press); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) ("[L]imiting the creation of art curtails expression as effectively as a regulation limiting its display. The government need

not ban a protected activity such as the exhibition of art if it can simply proceed upstream and dam the source."); *ACLU v. Alvarez*, 679 F.3d 583, 595-56 (7th Cir. 2012) ("[B]anning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes."). As the Supreme Court recognized in *Citizens United v. FEC*, "[l]aws enacted to control or suppress speech may operate at different points in the speech process." 130 S. Ct. 876, 896 (2010). For this reason the right to record police officers falls within the First Amendment "speech and press rights as a corollary of the right to disseminate the resulting recording." *Id.* at 595.

A. Blanket prohibitions on First-Amendment-protected activity in a public forum do not leave open alternate communication channels.

As the court below acknowledged, "[r]estrictions on speech in a public forum must . . . 'leave open ample alternative channels of communication.'" ER 120 (citation omitted). The Supreme Court has explained the reason for this rule. Streets, parks, and other public forums "have immemorially been held in trust for the use of the public." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Such a right "must not, in the guise of regulation, be abridged or denied." *Id.* The court below recognized that the places where the appellants seek to exercise their

First Amendment rights are traditional public forums, but did not explain how the ban here—leaving no alternate communication channel—can possibly pass muster.

The government likewise offers no justification; while it may certainly regulate expression in public forums, the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Acceptable regulations in this context are designed to make sure that one person's activities—such as a large loud protest—do not interfere with others' use and enjoyment of the property. Yet the government's actions here do not to protect others' use of the public forum. Indeed, the appellants' actions do not and cannot interfere with anyone else—and yet the government would deny the right to engage in that First-Amendment-protected conduct altogether. The government's legal position is untenable. *See, e.g.*, *Food Employees v. Logan Valley Plaza, Inc*., 391 US 308 (1968) ("The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.").

B. Prior restraint of protected activity for national security reasons requires at least showing a "direct, immediate, and irreparable damage to our nation."

When balancing the interests of national security against the right to publish information, the Supreme Court has required the government to carry a "heavy burden," *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citation omitted). Even when highly classified details become publicly known, the general public may generally publish without prior restraint. Some on the Court even rejected the idea that *any* leaked secrets can be suppressed before publication:

> [W]e are asked to hold that, despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of 'national security.' . . . No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time. The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

Id. at 717 (Black, J., joined by Douglas, J., concurring).

Others on the Court were not willing to go as far as Justices Black and Douglas, but insisted on a very high standard demonstrating that the information would "surely result in direct, immediate, and irreparable damage to our Nation." *Id.* at 730. The lower court here never even came close to making such a claim. Indeed, such a claim about information already broadly known to many members

of the public would make no sense. And while that standard was based on stopping the publication of classified information—allowing at least the potential of post-publication prosecution—"in the entire history of the United States the government has never prosecuted the press for publishing classified information relating to the national security." Geoffrey R. Stone, *Secrecy and Self-Government*, 56 N.Y. L. Sch. L. Rev. 81, 91 (2011).

In this case there was pre-publication prior restraint of First-Amendment-protected activity. Government officers arrested the plaintiffs for engaging in that activity, seized its products (the recordings), and then destroyed them. ER 76-77, 82 ¶¶ 57, 59, 64, 94-95. While usually the government waits for a hard-to-get court order before physically engaging in prior restraint, the failure to do so here makes it *a fortiori* egregious. *See* Rodney A. Smolla and Melville B. Nimmer, *Smolla and Nimmer on Freedom of Speech* at § 15:1 (1996) (noting that it is a prior restraint if the government "binds and gags a speaker, or physically seizes a printing press or radio transmitter, or impounds copies of newspapers in newsstands."). Had government officials instead of seeking a court order in *N.Y. Times* instead seized and destroyed the Pentagon Papers, it would not have helped their case.

Of course, the First Amendment right to discuss government actions does not include the right to know all the details of what government does. For instance, the government quite properly restricts information regarding espionage operations

or troop movements. But the information in this case is routinely exposed to the public every day. Every time a person crosses the border or witnesses someone doing so from a publicly accessible place, she acquires the very information that the government here seeks to suppress.

Indeed, photography of government operations from public forums occurs quite regularly without interference with government operations. DHS has even set specific guidelines for its agents to follow in dealing with such photographers. U.S. DHS Federal Protective Service Threat Management Division, *Photographing the Exterior of Federal Facilities*, FPS Information Bulletin, Report Number HQ-IB-012-2010 (Aug. 2, 2010), *available at* https://goo.gl/vZRhvy. In the general case of most government buildings the general public is not allowed to enter without special permission, but federal regulation

> does *not* prohibit photography by individuals of the *exterior* of federally owned or leased facilities from publicly accessible spaces such as streets, sidewalks, parks, plazas. Rather, this regulation only prescribes photography of the *interior* of federally buildings, i.e., 'space occupied by a tenant agency' or 'building entrances, lobbies, foyers, corridors, or auditoriums.' Therefore, absent reasonable suspicion or probable cause, *law enforcement and security personnel and must allow individuals to photograph the exterior of federally owned or leased facilities from publicly accessible spaces*.

Id. (emphasis added). The report goes on to express sensible guidance for law enforcement personnel who encounter someone recording a government building:

- Observe the individual's actions until such time that you believe a Field Interview (FI) is warranted. *Remember that the public has a*

right to photograph the exterior of federal facilities from publically accessible spaces such as streets, sidewalks, parks and plazas.

- Approach the individual taking the photographs.
- Identify yourself.
- Conduct a FI to determine the purpose for taking photographs of the facility and endeavor to ascertain the identity of the individual. Note that such encounters are voluntary contacts, not detentions. A photographer may not be detained unless, and until the officer develops reasonable suspicion (for a brief Terry Stop) or probable cause (for an arrest).
- If the field interview does not yield reasonable believe of criminal behavior or terrorist reconnaissance activity, the photography should be permitted to procced unimpeded. . . .
- Because the initial interview is voluntary, *officers should not seize the camera or its contents, and must be cautious not to give such "orders" to a photographer to erase the contents of the camera, as this constitutes a seizure or detention.*

Id. (emphasis added). If only the officers here had followed official DHS guidance, we would not be here.

II. The Lower Court Ruling on the Issue of Narrow Tailoring (Which Was Not Raised By the Government) Violates the Due Process of Law

The appellees' give no reason why their policy is narrowly tailored in their memorandum in support of their motion to dismiss. ER 153-73. In fact, the government rejected the idea that any narrow tailoring is necessary and instead insisted that its actions "need not constitute the least restrictive alternative available." ER 168. Even though no argument was offered on this issue, the court below *sua sponte* decided that the policy was indeed narrowly tailored. ER 124-25.

Yet due process requires "notice and a meaningful opportunity to be heard before a claim is decided." *Lachance v. Erickson*, 522 U.S. 262, 266 (1998). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992).

Such a notice and an opportunity to be heard were not provided by the district court to the appellants here. By deciding the narrow-tailoring issue without any briefing, the lower court thus deprived the appellants of being able to rebut its own *sua sponte* legal argument. And when the appellants tried to rebut this holding after amending their complaint, the court invoked the law-of-the-case doctrine to refuse to reconsider the issue. ER 11. The result was that at no time in the lower-court proceedings were the appellants given an opportunity to respond to the legal argument that ultimately led to their case being dismissed below.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Supreme Court reversed a court of appeals that proceeded to the merits of a case which had been dismissed at the district court for lack of standing. The Court noted that

> [w]e have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Id. at 120.

Like in *Singleton*, the plaintiffs here were not given the opportunity before the district court to at least proffer evidence and present the legal argument against narrow tailoring because no such argument was made by defendants in their motion to dismiss. Such a ruling must at least be vacated and remanded to the district court to hear arguments *de novo*.

CONCLUSION

The government's restriction here does not "leave open ample alternative channels for communication of the information" and fails even to address the high bar of "direct, immediate, and irreparable damage to our nation." Accordingly, the prior restraint of First-Amendment-protected activity has no constitutional justification. This Court should reverse the court below.

Respectfully submitted,

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Dated: October 3, 2016

STATEMENT OF RELATED CASES

Amici are unaware of any related cases presently before this Court.

Dated: October 3, 2016

s/Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,334 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: October 3, 2016

s/Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: October 3, 2016

s/Ilya Shapiro
Ilya Shapiro