IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURA LEIGH, Petitioner / Plaintiff, vs. KEN SALAZAR, in his official capacity as Secretary of the U.S. DEPARTMENT OF THE INTERIOR; BOB ABBEY, in his official capacity as Director of the BUREAU OF LAND MANAGE-MENT; RON WENKER in his official capacity as Nevada State Director of the BUREAU OF LAND MANAGEMENT, Respondents / Defendants	No. ________________ (District of Nevada No. 3:10-cv-597)

PETITION FOR PERMISSION TO APPEAL
UNDER 28 U.S.C. § 1292(a)(1)

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CORPORATE DISCLOSURE STATEMENT

Petitioner LAURA LEIGH is a journalist and photojournalist. Her legal efforts are supported in part by Grass Roots Horse, a 501(c) (3) nonprofit corporation whose principal place of business is in Connecticut. Grass Roots Horse has no subsidiary, parent or affiliate entity.

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PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(a)(1)

Pursuant to 28 U.S.C. § 1292(a)(1), and Rules 5 and 27(b) of the Federal Rules of Appellate Procedure, Laura Leigh respectfully petitions this Court for permission to immediately appeal from the district court's inaction or refusal to rule or decide Petitioner's Amended Motion for Preliminary Injunction sought some four months past (filed October 1, 2010 as Docket No. 16). (See District Court Civil Docket for case 3:10-cv-597 at **Exhibit "1"**) ("Docket").

An immediate interlocutory appeal should be allowed for these reasons:

1. The District court's inaction or refusal to rule is in effect, a denial of the Petitioner's requested preliminary injunctive relief. Jurisdiction to the court is granted under 28 U.S.C. § 1292(a)(1), allowing appeals from among other actions of district courts in, "[r]efusing or dissolving injunctions." See, *Mt. Graham Red Squirrel v. Madigan*, 954 F. 2d 1441 (9th Cir. 1992).

2. Denial of the requested relief is an abuse of discretion where the record demonstrates continuing serious, irreparable consequences. The Petitioner suffers ongoing irreparable harm from repetitive prior restraints to her freedom of speech, her freedom of expression and her ability as a journalist to report newsworthy matters of significant public interest on what transpires on public lands and at government sponsored "facilities." See Declaration at **Exhibit "2"**.

3. The denial of Petitioner's relief and continuing irreparable harm can

only be effectively challenged by an immediate appeal.

The Petitioner is not aware of a specific rule determining *when* a Petition for Permission to Appeal under 28 U.S.C. § 1292(a)(1) must be brought where the basis for requested appellate review stems from the District court's inaction or refusal to rule. Admittedly, there is no order on paper. There is merely the grim effect from the passage of time without a formal ruling.

INTRODUCTION

Transparency in government is stifled when the Respondents repress free speech and expression of those who observe and report to the public, government actions involving matters of public interest.

Petitioner is a wild horse journalist, photojournalist, and correspondent and credentialed media for Horseback Magazine. She travels to Bureau of Land Management ("BLM") wild horse roundups to observe and report to the public what she sees and captures on film or what she is otherwise able to physically view. She also travels to "facilities" used by the Respondents to warehouse captured wild horses, to likewise film and pass on to the public what she observes.

The public reads Ms. Leigh's material. The public looks at her videos. Ms. Leigh's published material is disseminated on the Internet, is used by news media, and is occasionally found in hard copy publications. The public formulates thought, impressions and opinions through the eyes of Ms. Leigh's work and

camera unless the Respondents restrict or block her from viewing the Respondents' work.

<u>Restricted access to view wild horse roundups</u>

> If somethin' happens we're gonna correct it quickly; just like we talked about. If it's a broken leg, gonna put it down. We're gonna slide it on the trailer; same thing; we're gonna go to town with it. ***We're not gonna give them that one shot they want.***
>
> (BLM contractor, talking in the open range at Twin Peaks Roundup Recorded by Clare Major, New York Times, Aug. 27, 2010).

When Ms. Leigh's photos, videos and reports began circulating among the public of what she was able to capture with her camera at wild horse roundups, her access thereafter became virtually non-existent. Disliking her published subject and seeking to avoid further "negative press" the Respondents cut-off Ms. Leigh's further close-up access to observe crucial moments of wild horse captures. The Petitioner has since, no longer been able to observe at these crucial times.

The Respondents also singled-out Ms. Leigh in punishment for her having publicly disseminated the videos and photos of the Respondents activities. Her exclusion over other public and other press members is accomplished when the Respondents allow other press members or even young children to come close-in to "horse traps" during the actual capturing process. Petitioner is simultaneously kept away for purported "safety" concerns.

The Respondents are keenly aware, if Laura Leigh is able to photograph the

interaction of the Respondents with their capturing, transporting or shipping of wild horses, their poor choices in causing horse deaths or injuries would likely be caught on her camera. This "bad press" is the very subject the Respondents seek to avoid. Rather than correcting their conduct, the Respondents instead, exclude the journalist, the Petitioner, from capturing on camera, those crucial moments.

The Respondents clearly discriminate against the Petitioner because the Respondents are repelled by the content of her published reports. Her photos merely demonstrate the truth of the Respondents' management of wild horses. Precluding the Petitioner's observation and reporting is an example of content-based censorship at its worst.

When the Respondents accomplish the removal of the Petitioner and her camera, they cause her to have no story. The public sees only how the Petitioner is kept afar from the process.

In each instance where the Petitioner's speech, her expression and her ability to publicly report the government's conduct is repressed, she is irreparably harmed. She can never regain those moments when stripped of her freedoms.

Restricted access to view wild horse warehousing

Ms. Leigh and the public had previously been allowed access to some of the "facilities" where the Respondents ship and store or warehouse captured wild horses. Her access evaporated there as well after her photos and videos circulated.

Ms. Leigh has since been entirely foreclosed from gaining access to these same wild horse warehouses in which she was previously given access. Once again she is precluded from reporting what would have been her observations.

Whether public or privately owned, these wild horse warehouses are operated, managed and/or maintained with U.S. government funds and are controlled at the instance of Respondents. They house a federal public resource – wild horses taken from public lands – supposedly protected by an entire Act of Congress, The Wild Free-Roaming Horses and Burro Act of 1971, P.L. 92-195, 16 U.S.C. § 1331 et. seq.

The reason wild horse holding facilities are closed to the press and public is, as one BLM official writes, because of, "[the] damage that is being done to BLM's image as a result of the [public] tours."

(Email from BLM's Bolstad of May 25, 2010)
(Filed as an Exhibit to Docket No. 39)

4. ***Focus***

This matter speaks to the removal of *people*, and *press members* from viewing government in action, not the removal of horses.

The *wrongness* of the Respondents' conduct is emphasized by the words of an iconic jurist who conveyed the following:

> The Press was protected so that it could bare the secrets of the government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the

> responsibilities of a free press is the duty to prevent any part of the government from deceiving the people. . . .
>
> Justice Hugo Black, in his concurring opinion with whom Justice William O. Douglas joined in the "Pentagon Papers" case, *New York Times v. U.S.*, 403 U.S. 713, 717, 91 S. Ct. 2140 (1971).[1]

FACTUAL BACKGROUND

1. ***Earlier Companion Case (not part of this requested appeal)***

An earlier companion case touched, with limited success, on the First Amendment issue raised herein. *Leigh v. Salazar*, 2010 WL 2834889 (D. Nev. Jul. 16, 2010) (published slip opinion, not cited as precedence) ("*Leigh I"*). In *Leigh I*, the district court recognized at least fleetingly, the Petitioner's First Amendment rights to view wild horse roundups on public lands and likewise recognized the public's interest on the subject. The court:

> Leigh argues that a blanket closure of 27,000 acres of public land on which the Tuscarora gather is going to take place is a prior restraint on her First Amendment rights because she will be unable to observe and report on the health of the horses and the BLM's Management of the gather. The court agrees and finds that she has made a sufficient showing of probable success on the merits to warrant granting the motion.
>
> * * *
>
> The court is cognizant of the public interest in this matter and of the right of the public and press to have

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[1] Perhaps the most well known "national security" prior restraint ruling is the *New York Times* (or "Pentagon Papers") case.

Recognizing the immediacy to act against government imposed restrictions on speech and the press, the entire federal judiciary kept the Pentagon Papers case only *fifteen days* before the historic order issued from the Supreme Court.

> reasonable access to the gather under the First Amendment. *Id.*

Even so, the district court gave deference to the Respondents' activities occurring thereafter (in *Leigh I*) which emboldened the resolve of the Respondents to keep Ms. Leigh afar from the roundups. The Petitioner was foreclosed entirely from viewing the first of the three roundups addressed in *Leigh I*. Her access was so restrictive at the other two roundups there, that she was denied any meaningful observation so as to, "report on the health of the horses and the BLM's Management of the gather." *Id.*

When new instances of repressive conduct were brought to the district court's attention in *Leigh I*, the Respondents were voluntarily ceasing their roundup activity. Resultantly the district court merely conveyed the matter was at that point,

> [n]ow moot. It is elementary that a temporary restraining order is a prospective remedy intended to preserve the status quo and, the prospective activity challenged by Leigh has ended and there is no prospective action or harm for the court to restrain.[2]

2. ***Procedural – Instant Matter***

The procedural history in the instant matter is protracted for one seeking

[2] *Leigh v. Salazar*, 2010 WL 3199945 (Aug. 12, 2010) (published slip opinion)(not cited as precedence).

immediate injunctive relief. (See Docket, Exhibit 1).

The case commenced September 22, 2010 upon the filing of the "Complaint for Declaratory and Injunctive Relief" ("Complaint"). The identical court as in *Leigh I* ultimately received the assignment.

The Respondents' roundup at the Silver King Herd Management Area ("Silver King") would commence at any moment. Relying on matters recalled in *Leigh I*, the district court immediately denied the Petitioner's first TRO motion for erroneous factual reasons and because the offending conduct had yet to occur.

The Petitioner's Amended TRO and Amended Motion for Preliminary Injunction pointed out the district court's errors.

Well after the Silver King roundup ceased, on November 16, 2010 the district court chose for the first time to hold its Fed.R.Civ.P. Rule 65 evidentiary hearing.[3] As of this filing, the district court *still* has yet to decide the matter.

Even without a ruling, much like how the court ruled in *Leigh I*, the district court showed its predisposition once again, to find this matter mooted.

> I view the injunctive relief as moot because there's nothing left for the Court to enjoin.[4]
>
> [m]y view is that insofar as injunctive relief is

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[3] The official Transcript of Proceedings was transcribed at Petitioner's expense. See Docket No. 37.

[4] Hearing Transcript, p. 5, lines 20-22. (Docket No. 37)

> concerned, it's moot, for the reason that I don't see anything to enjoin at this stage because the gathers have been completed.[5]

The wild horses captured from Silver King continue to remain warehoused somewhere within the Respondent's secretive warehouse system. These facilities continue to remain "off limits" to journalists and the public.

3. ***Background giving rise to controversy***

One of America's most shameful atrocities is how the Respondents are systematically removing America's wild horse from the landscape. The Respondents' process is brutal. Horses are oftentimes maimed or killed during BLM roundups. The Petitioner photographed some of these instances. The publishing of these images led to her denial of further close-up viewing of wild horses during the moments of their capture and thereafter. Her preclusion interferes with her right, "to observe and report on the health of the horses and the BLM's Management . . . ." *Id.*

In holding facilities, the condition of many horses were found by the Petitioner to be dreadful. Her published photos demonstrated this. Once her photos circulated the Petitioner was thereafter barred from further entry.

When a journalist like the Petitioner observes and records images of the Respondents' methodology of capturing and storing wild horses, and then

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[5] Hearing Transcript, p. 141, lines 5-8. (Docket No 37)

publishes these images, the images create embarrassing moments for the Respondents who must attempt if they can, to explain how their conduct amounts to reasonable management. Of course, there is no valid explanation for theses atrocities since the Respondents are charged with managing wild horses *humanely* under The Wild Free-Roaming Horses and Burro Act of 1971, P.L. 92-195, 16 U.S.C. § 1331 et. seq. ("Wild Horse Act"). Rather than changing their conduct to avoid harsh images, the Respondents' chosen "damage control" is to remove the journalist, in this instance, Ms. Leigh.

It is the truth found in Petitioner's photos and videos that precipitates the removal of journalists like the Petitioner. Remove the journalist and her camera and there is no story and no photos. This is content based censorship at its worst.

QUESTIONS PRESENTED

The questions before the Court on appeal would be as follows:

Question 1

Is the district court's inaction or refusal to act on Petitioner's request for Preliminary Injunction an effective denial of the requested relief?

Question 2

Shall prior restraints be permitted against members of the press or public by denying their access to observe government activity which in practice, effectively bars the publication of materials with respect

to their coverage of newsworthy, public interest matters?

Question 3 When Petitioner is denied meaningful observation time after time, from one BLM roundup to the next, and the preclusion causes prior restraints on speech, expression and the press, where BLM roundups take less time to complete than it takes the district court to rule on requested relief,

Does a district court abuse its discretion when erroneously applying "mootness" to forego review of requested injunctive relief where offending conduct, causing irreparable harm, repeats but ceases before the court's review?

Question 4 Has Ms Leigh met her burden such that a preliminary injunction should issue?

RELIEF SOUGHT

The Petitioner seeks reversal of the district court's effective denial of her Amended Motion for Preliminary Injunction and a remand with instructions to enter promptly, the Petitioner's requested relief.

The Petitioner asks for constitutional instruction relative to the Respondents' repressive conduct toward the Petitioner so she is no longer required to repeat litigation in piecemeal fashion with each BLM roundup and with her preclusion from viewing Silver King horses wherever situated.

REASONS WHY APPEAL SHOULD BE PERMITTED

1. *The inaction of the District Court amounts to a denial of Petitioner's requested preliminary injunctive relief.*

28 U.S.C. § 1292(a)(1) allows this court to review interlocutory orders "granting, continuing, modifying, refusing or dissolving . . . or refusing to dissolve or modify injunctions. . . ."

A district court may not avoid review of its determination that a preliminary injunction should not issue merely by refusing to make a formal ruling on the motion. The district court's refusal to act is the equivalent denial of requested preliminary injunctive relief and is appealable as such.[6]

2. *Fundamental notions of free speech, of expression and freedom of the press to report government activity are repeatedly restrained*

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., amend. I.

A "prior restraint" in this instance references the Respondents' "rules that operate to forbid expression before it takes place." *Smoller and Nimmer on*

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[6] See, *Mt. Graham Red Squirrel v. Madigan*, 954 F. 2d 1441 (9th Cir. 1992); *Rolo v. General Devel. Corp.*, 949 F. 2d 695, 703 (3rd Cir 1991); *McCoy v. Louisiana State Bd. of Educ.*, 332 F. 2d 915 (5th Cir. 1964); *U.S. v. Lynd*, 301 F. 2d 818 (5th Cir. 1962); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2962, at 614 (1973) ("when a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable"); see also *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161-62 (4th Cir.1977) ("the indefinite continuance amounted to the refusing of an injunction and is appealable"), *cert. denied,* 434 U.S. 1047, 98 S. Ct. 893, 54 L. Ed. 2d 798 (1978).

Freedom of Speech, Vol II, § 15.1 (2010).

In this circumstance "prior restraints" are accomplished when the Respondents impose arbitrary rules causing barriers or impediments to be placed in between the Petitioner's view and the Respondents' activity. These impediments could be physical such as mountains, hillsides, fencing, panels, structures, or vehicles; or, dimensional such as distance or time.

The Respondents recite "safety" as the excuse for keeping journalists far away. What rings clearly though, is the Respondents' desire to remove cameras and journalists from recording what takes place, to hide what occurs.

The consequence of the Respondents' efforts causes a chilling effect on speech and expression. The artificial impediments cause Petitioner to have no observation and story on the crucial interaction between the Respondents and the wild horses, from which to convey to others. Where the Respondents must manage wild horses "humanely," this crucial view is at the core of the controversy. This is what engenders public interest. Without independent observation, the public and Petitioner must accept, time after time, the Respondents' "spin" or version of what transpires in secret, away from public scrutiny.

> Secrecy in government is fundamentally anti-democratic . . . perpetuating bureaucratic errors.
>
> *New York Times,* 403 U.S. at 724, 91 S. Ct. at 2146
> (Concurring opinion by the Hon. William O. Douglas)

"Prior restraints" are *presumptively* unconstitutional.[7]

> [a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity. *Bantam Books, supra*, 372 U.S. at 70.

> [t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on the First Amendment rights.
> *Nebraska Press Ass'n v. Stuart*, 472 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d, 683 (1976)

The Respondents have been accorded deference for their actions in *Leigh I* and in this matter. The Respondents should not receive deference when determining the constitutionality of their own rules. If it is determined the Respondents' rules violate the Constitution, those rules must be invalidated.[8]

3. *The district court abused its discretion where the record aptly demonstrates Petitioner's immediate entitlement to relief*

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions, the purpose of which are to preserve the status quo pending resolution

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[7] *New York Times, supra* at 714; *Pittsburgh Press v. Pttsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 1577-78, 29 L. Ed. 2d 1 (1971); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347 (1968); *Freedman v. Maryland*, 380 U.S. 51 , 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed 2d 584 (1963); *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F. 2d 590, 595 (9th Cir. 1985). See also, *CBS Inc. et al. v. Davis*, 510 U.S. 1315, 114 S. Ct. 912, 127 L. Ed 2d 358 (1994).

[8] See, *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir.1979). See also, *Small v. Operative Plasters' and Cement Masons' International Ass'n Local 200 AFL*, 611 F. 3d 483 (9th Cir. 2010).

on the merits.[9] The Court reviews the district court's denial of a preliminary injunction under an abuse of discretion standard.[10] Discretionary abuse occurs when the district court bases its decision "on an erroneous legal standard or clearly erroneous finding of fact." *Id.*

Factual Error

The district court's *only* definitive ruling occurred September 27, 2010 when denying Petitioner's first TRO based on facts it obtained from *Leigh I*.[11] The *Leigh I* facts were neither germane nor asserted in the instant case, causing the court's erroneous ruling.

The court's flawed factual assumptions permeated the process. The Amended Preliminary Injunction motion pointed out these factual errors but to no avail.[12] The Petitioner's Amended Preliminary Injunction Motion:

> The court's Order states the TRO Motion (Doc 6) challenges the decision of the defendants, "to use helicopters to gather the horses while there are pregnant mares and young foals in the herds . . . ." [reference omitted].
>
> Not so. This TRO Motion does *not* seek injunctive relief because the Defendants' roundup and related methods are inhumane. They *are* inhumane although that subject is not the

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[9] *Chalk v. U.S. District Court*, 840 F. 2d 701, 705 (9th Cir. 1988).

[10] *Lands Council v. McNair*, 537 F. 3d 981, 986 (9th Cir. 2008)(en banc).

[11] The TRO is at Docket No. 6. The court's Order is at Docket No. 13.

[12] The Amended TRO and Amended Preliminary Injunction motions were filed October 1, 2010 as Docket Nos. 15 and 16 respectively.

> point of the TRO Motion. In fact, neither "pregnant mares" nor "young foals" are mentioned in the TRO Motion (Doc 6).
>
> Contrary to the court's impression, this is strictly a First Amendment case. This case challenges the preclusion of the Plaintiff and public [to]. . . access to roundups . . . "equal access" to roundups . . . access to observe facilities . . . .[13]

The court neither acknowledged its factual errors nor ruled definitively thereafter.

Error of Law

In the wake of clear First Amendment abuses which cause Petitioner continuing irreparable injury, the district court abused its discretion. In *Leigh I* the court recognized the importance of the Petitioner's access, to, "observe and report on the health of the horses and the BLM's Management of the gather."[14] The court in *Leigh I* found Ms. Leigh had made a sufficient showing of probable success on the merits to warrant injunctive relief.

The court's effective denial in this case is diametrically opposed to its statements made in *Leigh I,* concerning the importance of Ms. Leigh's work, the public interest in the subject, and the probable success of the merits of her case.

The court's denial in this case effectively grants the Respondents unfettered licence to remove the Petitioner and her camera from the landscape, to censor her reporting. Such conduct amounts to unconstitutional "prior restraints" and bears a heavy burden which the Respondents herein could not likely surmount. See

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[13] Amended Motion for Preliminary Injunction, pp 3-4 (Docket No. 16).

[14] *Leigh I*, *supra*, at pp 7-8 of this motion.

authorities, pp. 12-14 herein. In so doing, the district court has given deference to the Respondents not only as to their conduct, but to the Respondents' own opinions on what is or is not constitutional when the Respondents keep the public and journalists at bay. This too, is error. *Porter*, *supra.*

> "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary injunction.[15]

The court record is replete with specific instances of the Petitioner having been kept afar or completely blocked from view. The court at hearing refused to hear many of these instances because, although "mootness" was raised, the court nevertheless believed other instances of the Respondents' repetitive efforts, whether occurring prior or subsequent to the filing of the Preliminary Injunction Motion, were somehow irrelevant, even to "mootness." The Petitioner filed her "offer of proof" of the relevance of the offered (but excluded) testimony.[16]

A preliminary injunction is warranted when a moving party can demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities

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[15] *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976); see also *SOC, Inc. v. County of Clark*, 152 F. 3d 1136, 1148 (9th Cir.1998); *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959 (9th Cir. 2002).

[16] The "offer of proof" is contained in the Petitioner's Post Hearing brief, Docket No. 39.

tips in their favor, and (4) an injunction is in the public interest.[17]

This Court follows this traditional inquiry and also uses its "serious questions" test when applied to *Winter's* four part criteria.[18]

Irreparable Harm Irreparable harm to the Petitioner is clearly outlined herein. "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury . . . ." *Elrod*, *supra*.

Likelihood of Success The Petitioner's strongest argument is that she's repeatedly stripped of her constitutional freedoms by being kept away. Her preclusion not only affects the Petitioner adversely, the public loses where she is denied the opportunity to observe and report. This *is* the constitutional violation.

So long as the district court follows prevailing authority and allows the evidence, the Petitioner's likelihood of success remains probable. The authorities against this type censorship of the press and public are overwhelming. At the very least, "serious questions" going to the merits are raised. *Alliance, supra.*

Balance of Hardships The hardship to the Respondents is they must accommodate journalists and the press, allowing them to observe, unfettered, those critical moments when the Respondents interact with the wild horses. The

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[17] *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)

[18] *Alliance For The Wild Rockies v. Cottrell*, ___ F. 3d ___, 2011 WL 208360 (9th Cir. 2011)(en banc).

Respondents previously accommodated the press until Ms. Leigh published her material, after which, she was foreclosed from the process.

The Respondents selectively allow others including young children, to stand alongside the wild horse traps during “capture” moments. How would the journalist cause a safety issue compared with these young children? Also, how is it burdensome to allow the press and public into facilities to view the condition of the horses and how they are maintained by their stewards, the Respondents?

The hardship to Ms. Leigh is clear and overwhelming. Once removed she’s foreclosed from reporting the very activity she came to observe. She’s stripped of her constitutional freedoms in each instance where she and her camera are removed.

Ms. Leigh can never recoup those moments when she was denied freedoms which the drafters of the First Amendment promised her. One never knows what the future brings or where the next opportunity lies for journalists who are able to observe and report newsworthy matters. When denying access, the Respondents remove these opportunities to press members and journalists, many of whom still have that *gleam in their eye* for the next big story.

Public Interest This analysis requires consideration of whether there exists some critical public interest that would be injured by the grant of preliminary relief.” *Cal. Pharmacists Ass’n v. Maxwell-Jolly,* 596 F.3d 1098, 1114-15 (9th

Cir.2010) (internal quotations omitted).

The benefits of allowing public and press observation of how government functions is significant. The strongest benefit to allowing such access is to foster the public's protection against the government's censorship of information.

> [at its core, the prior restraint doctrine is linked to the core aversion to censorship that the First Amendment embodies. Prior restraints are simply repugnant to the basic values of an open society.[19]

In this specific instance, the handling of America's wild horses that are supposedly "protected" by an act of Congress, has significant newsworthy interest. One need only look through the internet to see its popularity, even in foreign countries where others are enamored with America's settling of the west. The subject matter is newsworthy and timely.

CONCLUSION

For these reasons, Petitioner requests the Court allow an immediate appeal.

Respectfully, this 13th day of February 2011.

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/S/

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[19] Smoller and Nimmer on Freedom of Speech, Vol II, § 15.10 (2010). See also, *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F. 2d 590, 595 (9th Cir. 1985).

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 32(a)(7)(c) the Motion herein is proportionately spaced, has a typeface of 14 points in Roman style type and contains 4,721 words exclusive of tables and certificates.

LAW OFFICE OF GORDON M. COWAN
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/S/
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Gordon M. Cowan, Esq.,
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STATEMENT OF RELATED CASES

Petitioner LAURA LEIGH is not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

The Petitioner believes in January 2011 this Court heard and submitted a somewhat similar matter involving the same Respondents, concerning the Twin Peaks wild horse roundup. See, Ninth Circuit Docket No. 10-16715. That case however, does not address constitutional, First Amendment concerns.

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Gordon M. Cowan, Esq.,
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PROOF OF SERVICE

I hereby certify, on the 14th day of February 2011, I served current counsel of record, Erik Peterson of the U.S. Department of Justice electronically with a copy of the foregoing including all attached exhibits, to the email address known to me to be the following email address for him: Erik.Petersen@usdoj.gov.

I also certify I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Ninth Circuit by using the appellate CM/ECF system on February 14, 2011. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some participants may not be registered CM/ECF users. I have mailed the foregoing with attachments by First Class mail, postage prepaid or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following:

Erik Peterson, Esq.
U.S. Dept. of Justice
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, D.C. 20044

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