No. 25-30128

United States Court of Appeals
for the
Fifth Circuit

DEEP SOUTH TODAY, doing business as VERITE NEWS; GANNET COMPANY, INCORPORATED; GRAY LOCAL MEDIA, INCORPORATED; NEXSTAR MEDIA, INCORPORATED; SCRIPPS MEDIA, INCORPORATED; TEGNA, INCORPORATED,

Plaintiffs-Appellees/ Cross-Appellants,

v.

LIZ MURRILL, in her Official Capacity as Attorney General of Louisiana; ROBERT P. HODGES, in his Official Capacity as Superintendent of the Louisiana State Police; HILLAR C. MOORE, in his Official Capacity as District Attorney of East Baton Rouge Parish,

Defendant-Appellants/ Cross-Appellees.

On Appeal from the United States District Court
for the Middle District of Louisiana, No. 3:24-cv-0623
Honorable John W. deGravelles Presiding

BRIEF OF *AMICI CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,

[Caption Continued on Inside Cover]

FREEDOM OF THE PRESS FOUNDATION, SOCIETY OF ENVIRONMENTAL JOURNALISTS, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS WITHOUT BORDERS, THE GUILD FREELANCERS, SOCIETY OF PROFESSIONAL JOURNALISTS, THE INTERCEPT MEDIA, AND AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Case No. 25-30128, *Deep South Today, et al. v. Murrill*.

The undersigned counsel of record certifies that, in addition to the persons and entities in the parties' Certificates of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rules 28.2.1 and 29.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Foundation for Individual Rights and Expression	*Amicus curiae*
National Press Photographers Association	*Amicus curiae*
Freedom of the Press Foundation	*Amicus curiae*
Society of Environmental Journalists	*Amicus curiae*
The Radio Television News Directors Association, d/b/a Radio Television Digital News Association	*Amicus curiae*
Reporters Without Borders, Inc.	*Amicus curiae*
Society of Professional Journalists	*Amicus curiae*

The Guild Freelancers	*Amicus curiae*
The Intercept Media, Inc.	*Amicus curiae*
American Society of Media Photographers	*Amicus curiae*
Ronald G. London	Counsel of Record for *amici curiae*

/s/ Ronald G. London
Ronald G. London
Counsel of record for *amici curiae*

July 3, 2025

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1(a), counsel for *amici* certifies that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amici*.

/s/ Ronald G. London
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Attorney of record for *amici curiae*

July 3, 2025

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression (FIRE)** is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the most essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, *Villarreal v. City of Laredo, Texas*, 94 F.4th 374 (5th Cir. 2024), *cert. granted, judgment vacated sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368. FIRE has a strong interest in this case because the First Amendment squarely protects Americans' right to film and gather news in public spaces. *See* Br. *Amici Curiae* First Amendment Lawyers Ass'n*, et al.*, *Grant v. Trial Court*, 137 F.4th 1 (1st Cir. 2025); Compl., *Rienzie v. Haaland*, No. 24-cv-00266 (D. Wyo., filed Dec. 18, 2024).

[1] Under Rule 29(a)(4)(E), counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part. Further, no person, other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

National Press Photographers Association (NPPA), founded in 1946, is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages photojournalists to reflect the highest standards of quality in their professional performance, in their business practices, and in their personal code of ethics. NPPA vigorously promotes freedom of the press in all its forms, especially as it relates to the right to take pictures in public. Its members include still and television photographers, editors, students, and representatives of businesses that serve the photojournalism industry.

Freedom of the Press Foundation (FPF) is a nonprofit organization dedicated to defending and protecting public interest journalism. In addition to advocating for journalists' rights and freedoms, FPF documents press freedom violations around the country, develops software tools that help journalists communicate with sources confidentially, and provides digital security training to newsrooms.

Society of Environmental Journalists is the only North American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization.

The **Radio Television News Directors Association, d/b/a Radio Television Digital News Association (RTDNA)** is a 501(c)(6) non-profit association incorporated in Delaware, with headquarters in Washington, DC. RTDNA is the world's largest professional organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA's mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country, honors outstanding work in the profession through the Edward R. Murrow Awards and provides members with training to encourage ethical standards, newsroom leadership, and industry innovation.

Reporters Without Borders, Inc. ("RSF USA") is the US affiliate of the independent international non-profit organization Reporters Sans Frontiers ("RSF") that defends the right of every human being to have access to free and reliable information. RSF acts for the freedom, pluralism, and independence of journalism and defends those who embody these ideals. RSF advocates for press freedom throughout

the world by monitoring and communicating on abuses committed against journalists and on all forms of censorship, including by publishing the annual World Press Freedom Index, which measures the state of press freedom in 180 countries. RSF regularly acts before national and international judicial or quasi-judicial bodies (including UN human rights organs) and regularly files amicus briefs in support of media freedom.

The **Guild Freelancers** is a unit of the Pacific Media Workers Guild (The NewsGuild-Communications Workers of America Local 39521, AFL-CIO), representing freelance journalists and other communications professionals. While our primary service area is Northern California, Northern Nevada and Hawaii, our unit has members throughout the country, and even those based within said service area might have occasion to travel to Louisiana in the course of their work.

Society of Professional Journalists (SPJ) is the nation's most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free

flow of information vital to a well-informed citizenry through the daily work of its roughly 6,000 members; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.

The Intercept Media, Inc. is a nonprofit news organization that publishes The Intercept, an award-winning, nationally recognized news organization with a reputation for in-depth investigations that focus on politics, national security, crime and justice, surveillance, corruption, the environment, science, technology, and the media. One of its projects is the Press Freedom Defense Fund that provides support, training and financial assistance to news organizations, individual journalists, and documentarians when confronted with security and legal threats.

The **American Society of Media Photographers ("ASMP")** is a 501(c)(6) not-for-profit trade association, established in 1944 to protect and promote the interests of professional photographers who earn their living by making photographs intended for publication, licensing fees, and other compensation derived from the bundle of rights arising under the Copyright Act. With more than 7,000 Members nationwide working

in every genre of photography, ASMP is a leading trade organization representing professional photographers' interests.

SUMMARY OF ARGUMENT

There is no reconciling Louisiana's Act 259[2] with the First and Fourteenth Amendments. The law allows police officers to unilaterally create 25-foot "no press" buffers around themselves at a moment's notice. These buffer zones make criminals of anyone—journalists included—who fails to immediately stop or retreat upon a police officer's direct order. Below, *amici* highlight two key reasons why the district court was right to enjoin Act 259.

First, Act 259 is void for vagueness. Americans have a clearly established First Amendment right to observe and record the police. Under the Fourteenth Amendment, governments can deprive Americans of that right only with due process, which requires definite standards, meaningful notice, and an opportunity to be heard. This is not confusing First Amendment and Fourteenth Amendment doctrines, as the State suggests. Rather, it is the usual way that due process interacts with other constitutional protections. And Act 259 fails that due process analysis: As *amici*'s real-world examples demonstrate, the 25-foot no-man's land will encumber the right to film or observe police—a right held by all

[2] H.B. 173, Act 259, La. R.S. § 14:109.

Louisianans, including journalists. Moreover, the Act provides no standards, notice, or opportunities as to when an officer may issue a retreat order, granting law enforcement unfettered discretion to order citizens and the press away from public spaces. Giving officers unbounded authority to restrict that right invites arbitrary, capricious, and discriminatory enforcement in violation of the Fourteenth Amendment's Due Process Clause.

Second, Act 259 also violates the First Amendment. Numerous courts, including the Fifth Circuit, have recognized that gathering information about public officials in public places is core protected expression. Yet Act 259 imposes roving buffer zones, arising at a moment's notice, that move with officers like invisible force fields and will chill people attempting to observe police activity. The threat of criminal penalty for merely standing too close, without any consistent rule or marker, will inevitably deter reporters and citizens from engaging in protected speech and press activities. Whether viewed as a de facto content-based prior restraint on newsgathering, or as a runaway time, place, and manner restriction, Act 259 is unconstitutional. By granting officers unbridled discretion to order journalists away, it is not at all

tailored to any legitimate government interest and therefore fails both strict and intermediate scrutiny.

Act 259 gives police carte blanche to push the press back and silence observers. But the First and Fourteenth Amendments do not permit police officers to unilaterally close off access to public spaces where Louisianians may otherwise lawfully be. The district court was therefore right to enjoin this vague, overreaching law, and this Court should affirm.

ARGUMENT

I. Act 259 Is Unconstitutionally Vague Because It Gives Officers Unfettered Discretion to Restrict First Amendment Rights.

Act 259 violates due process because it gives officers complete discretion to burden particular First Amendment rights, while at the same time giving bystanders and journalists no clear standards they can follow to ensure compliance. Because Louisianans will be required to comply based on the whim of individual officers—as opposed to clear, articulable standards—the law fails to give fair notice of what is required to comply. That is inconsistent with the "fundamental principle in our legal system … that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television*

Stations, Inc., 567 U.S. 239, 253 (2012). This principle "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* A vague statute is not precise and does not restrict the state's potentially arbitrary enforcement.

Statutory vagueness is especially concerning when laws implicate the First Amendment. That's in part because the mere possibility that vague laws will be arbitrarily applied is enough to chill speakers. "[W]here a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Hence, the Supreme Court applies "stricter standards of permissible statutory vagueness … to a statute having a potentially inhibiting effect on speech …." *Smith v. People of the State of California*, 361 U.S. 147, 151 (1959).

The district court was right to enjoin the law under the vagueness doctrine. First, the court correctly asked whether a constitutional right was burdened by Act 259. This was not, as the State maintains, confusing

due process and First Amendment standards. Rather, the First Amendment provides the substantive right burdened without sufficient process, *i.e.*, without lawful prosecution under a precise, definite, non-vague law. Next, the district court was undoubtedly correct that Act 259 burdens the First Amendment rights of journalists like Plaintiffs. Eight Circuit Courts of Appeals have explicitly recognized the right to record police engaged in official activity, including this Court. *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017).[3] Yet under Act 259's spur-of-the-moment, floating no-go zones, many journalists and press photographers

[3] *See also Glik v. Cunniffe*, 655 F.3d 78, 80, 84 (1st Cir. 2011) (a bystander with a cell phone has a right to videorecord officers making an arrest from roughly ten feet away); *Fields v. City of Philadelphia*, 862 F.3d 353, 356, 360 (3d Cir. 2017) (two individuals videorecording police without interfering with arrests were protected by the First Amendment); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (arrest for videotaping protest and individual protesters was unjustified); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (preventing the videorecording of an arrest violated First Amendment rights); *Irizarry v. Yehia*, 38 F.4th 1282, 1288 (10th Cir. 2022) (journalist had a right to record a traffic stop); *Sharpe v. Winterville Police Dept.*, 59 F.4th 674, 679 (4th Cir. 2023) (town policy banning vehicle occupants from recording their own traffic stops violated First Amendment rights).

would be unable to adequately document police activity. Finally, Act 259 provides no clear standards that might restrain the arbitrary will of police officers or, conversely, assure onlookers their actions are lawful. Thus, the district court did not err in preliminarily enjoining Act 259's enforcement.

A. The freedoms of speech and press are liberty interests the State cannot burden without due process.

Plaintiffs' vagueness claim is not "mudd[ied]" by their First Amendment claims, as the State argues. Defendants-Appellants (State) Br. 43. Rather, each claim simply relies on overlapping constitutional provisions. In the vagueness claim, the First Amendment provides the liberty interest burdened by Act 259's vagueness that violates the Due Process Clause. The State's argument that "Plaintiffs' vagueness claim is an "empty repackage" of their" First Amendment claim therefore fundamentally misunderstands the vagueness doctrine and its interaction with other constitutional rights. State Br. 37.

As the State itself recognizes, vagueness is a kind of due process claim. State Br. 37. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause …." *United States v. Williams*, 553 U.S. 285, 304 (2008). And when a law infringes upon First

Amendment rights, it must take special pains to avoid vague terminology and the potential for arbitrary application. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254–55 (2012).

Vague laws are unconstitutional because they do not provide adequate process (such as fair notice) before depriving someone of a property or liberty interest. *See Williams*, 553 U.S. at 304. As with all due process claims, "a plaintiff must allege that he was deprived of a constitutionally protected property or liberty interest" without sufficient process. *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996, 1013 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 348 (2023), *reh'g denied*, 144 S. Ct. 629 (2024).

Due process plaintiffs will therefore rely on constitutional rights to establish their liberty interest, often pairing due process claims with other constitutional claims. If someone has a constitutional right, the government cannot take it away using a vague law or policy. That right—say, the right to free speech—might have been substantively violated in its own right. But the government also cannot take away or burden that right through a law that violates due process. In the case of unconstitutionally vague laws, they violate the Due Process Clause when

their lack of clear and precise standards chills the exercise of rights protected elsewhere in the Constitution: "Many times void-for-vagueness challenges are successfully made when laws have the capacity to chill constitutionally protected conduct, especially conduct protected by the First Amendment." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (quotation marks omitted).

The Supreme Court has recognized that rights protected by the First Amendment are liberty interests that the government cannot restrict without due process. *Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (prisoners' First Amendment interests in use of mails "is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment … protected from arbitrary governmental invasion"), *abrogated on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *see also Spence v. Nelson*, 533 F. App'x 368, 371 (5th Cir. 2013) (same).

But First Amendment rights are not like any other liberty interest. They are also fundamental rights, and they thus deserve "rigorous adherence" to due process and to the requirement that laws be comprehensible and precise, not vague. *Fox Television Stations*, 567 U.S. at 253–54. First Amendment rights to free speech and a free press are

especially vulnerable to chilling effects. That is why the government might violate the First Amendment even without directly prohibiting certain speech. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). "[R]egulations that touch upon sensitive areas of basic First Amendment freedoms" should therefore be crystal clear as to what is and is not prohibited. *Fox Television Stations*, 567 U.S. at 254–55 (quotation marks omitted) (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech.")).

Here, the district court's examination of Plaintiffs' due process claim did not "muddy" vagueness and First Amendment doctrines; it recognized and followed the usual way the Due Process Clause interacts with other constitutional rights. As will be shown, the district court correctly held Act 259 burdens Plaintiffs' First Amendment right to record and gather news about the police. ROA 52–53. The question that vagueness analysis therefore asks is whether Act 259, when burdening Plaintiffs' First Amendment interests, provides sufficient process to Plaintiffs. If the law is vague, it does not, and it is unconstitutional.

B. Act 259 burdens journalists' clearly established right to record police.

Act 259 must satisfy "rigorous" due process review because it deprives journalists of their First Amendment rights to record police activity and gather news. *See Fox Television Stations*, 567 U.S. at 253–54. In *Turner*, this Court held "a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." 848 F.3d at 688. That right to record, it reasoned, safeguards not only "[n]ews-gathering" but also the "First Amendment right to 'receive information and ideas.'" *Id.* (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976)). Seven other circuits concur.[4]

Videorecording is "unambiguously" speech-creation, not mere conduct. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021). "If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017)

[4] *See supra*, n.3.

(quotation marks omitted). *But see Price v. Garland*, 45 F.4th 1059, 1075 (D.C. Cir. 2022) (holding that "although filmmaking is protected by the First Amendment," government may regulate the "commercial" aspects of commercial filmmaking). The right to "film police under the First Amendment" is therefore "clearly established." *Bailey v. Ramos*, 125 F.4th 667, 685 (5th Cir. 2025).

Act 259 restricts this clearly established First Amendment right. In the first place, it is confusing and ultimately unworkable on the ground. Act 259 applies not just to anyone who approaches an officer; its invocation also may force individuals to move away from an officer or scene. ROA 20.

If a crowd is moving, a photojournalist must move alongside them in order to document them. In a moving crowd with a police presence, a photographer who is ten feet away from an officer and is ordered to stop "approaching," would have to freeze or retreat, then wait until the officer moved before continuing on. Continuing to move would be "approaching," even if the distance from the officer never changes. If there are numerous journalists or bystanders, the buffer zone becomes a sort of musical-chairs, with bystanders being ordered back as they come within a zone—

a zone that moves with the police officer's movement. The presence of multiple officers could create more than one buffer zone, each "pinball" zone moving with those officers. This constant shuffling creates a significant burden on journalists' right to record law enforcement officers and to engage in speech in a quintessential public forum, preventing any assurance they are complying with the law.

The zone's distance also poses problems. At a distance of 25 feet, cameras cannot "obtain a clear line of sight to newsworthy events, especially at crowded public events like Mardi Gras, significant festivals, and major sports games." ROA 21. Cameras will not be able to record visual details such as officers' badge numbers, subtle gestures, or physical interactions.[5] And audio, including any relevant police commands, is often beyond range from 25 feet, especially amid ambient noise. ROA 21–22. "Without audio, video may give the public a misleading or incomplete understanding of an event. When an officer is

[5] Richard A. Webster, *New Louisiana Law Serves as a Warning to Bystanders Who Film Police: Stay Away or Face Arrest*, ProPublica (July 21, 2024), https://perma.cc/E9MG-9XGP ("Cherri Foytlin, who was working for a small newspaper and a community media project, said she was within 4 feet when she photographed officers violently dragging a Black man off private property and arresting him.").

making an arrest, for instance, Plaintiffs' reporters would not be able to hear at 25 feet whether an officer identified themselves as law enforcement or provided *Miranda* warnings." *Id.*

Moreover, journalistic practice routinely demands getting close to unfolding events. "The first hurdle to overcome is gaining access to the scene of the event."[6] Journalists are "first responders," who "must be close enough to record the events."[7] The Poynter Institute for Media Studies says journalists' "goal should be to get close enough to observe the scene without endangering yourself or others, or interfering with security or rescue operations."[8] Act 259's buffer zone severely undermines the press's ability to record police conduct and diminishes the clarity and informational value of any recordings.

Real-world incidents demonstrate that rigid, 25-foot buffer zones would hinder newsgathering. The footage of George Floyd's tragic death at the hands of Minneapolis police—awarded a special citation by the

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[6] Lucy A. Dalglish, *First Amendment Handbook*, 7th ed., Reporters Committee for Freedom of the Press, https://perma.cc/F94V-VCAM.

[7] Committee to Protect Journalists, *Civil Matters and Disturbances*, Journalist Safety and Emergencies, https://perma.cc/CPG7-7TSJ.

[8] Al Tompkins, *Covering Unrest: A Guide for Journalists*, Poynter, https://perma.cc/9GBW-YLUV.

Pulitzer Prize Board[9]—was recorded by a 17-year-old bystander from just several feet away.[10] In Louisiana, photographers captured similar images—of police putting men in chokeholds or other violent arrests—from similar distances, sometimes within four feet.[11] Had there been a 25-foot rule blocking newsgathering during these incidents, evidence that ignited nationwide movements would never have existed.

It's not just professional journalists who are burdened, as *amicus* FIRE's work with student journalists demonstrates. Just last year, for instance, police arrested two student journalists while they livestreamed a pro-Palestine protest at Dartmouth. The journalists were covering the protest up close, standing among protestors as arrests proceeded. Even though they were wearing press identification and had received prior permission to cover the protest, police arrested them anyway, and charged them with criminal trespass. Only later, long after the restriction of the journalists' First Amendment rights, did their school

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[9] Angela Fu, *Pulitzers award Darnella Frazier a special citation for recording the murder of George Floyd*, Poynter (June 11, 2021), https://perma.cc/N3W7-C2VC.

[10] Webster, *New Louisiana Law*, *supra* n.5.

[11] *Id.*

decide not to pursue charges,[12] once again demonstrating that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

To be clear, due process applies whether or not First Amendment interests are at stake; other liberty interests can suffice. Laws that do not infringe on explicit constitutional protections are nonetheless subject to facial challenge as unduly vague. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008). For example, all Americans, including journalists, retain a basic right to freedom of movement. *See City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (rejecting First Amendment interest but recognizing "freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause").

But where, as here, a law burdens First Amendment rights, it must withstand an especially strict vagueness analysis. *See Fox Television Stations*, 567 U.S. at 253–54. And Act 259 comes nowhere close to providing adequate notice to journalists or cabining police discretion.

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[12] FIRE, *Dartmouth College: Student Journalists Arrested Covering Campus Protest*, https://perma.cc/9JLJ-2KQR.

C. Act 259 provides no clear standards to restrain officers or protect Louisianans.

Vague laws violate due process because they both "fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56. Act 259 is vague on both accounts: It does not provide fair notice of when an individual may violate an officer's order, and it does not restrain an officer's enforcement.

The Supreme Court has recognized that moving buffer zones do not provide adequate notice to bystanders. In *Schenck v. Pro-Choice Network of Western New York*, the Supreme Court struck down a fifteen-foot buffer zone around individuals entering or leaving an abortion clinic as unconstitutionally vague. 519 U.S. 357, 378–79 (1997). It held that the buffer zone—because it moved or "floated" with certain individuals—made it difficult for people to "to know how to remain in compliance …." *Id.* at 378. The moving buffer zones would create hazards, as officers and other people move about attempting to observe them rather than a fixed zone. *See id.* These hazards are worse when there are multiple officers and crowds of people (such as at a large public event), including

protestors and journalists, creating a pinball effect of violations. "[T]hey are then faced with the problem of watching out for other individuals entering or leaving the clinic who are heading the opposite way from the individual they have targeted." *Id.* at 378.

Act 259 authorizes the same type of unconstitutional buffer zone, because the 25-foot bubble moves as an officer moves. As noted above, a journalist recording police or engaged in other expressive activity must continuously move as the officer moves to avoid violating a stay-back or dispersal order. This standard is of course difficult, if not impossible, to comply with in many situations. Multiple officers giving stay-back orders would just increase that confusion, creating intersecting and moveable buffer zones that journalists would need to impossibly navigate like a game of *Frogger*.

Act 259's restrictions are vaguer still because they restrict mere *presence*. In *Kolender v. Lawson*, the Supreme Court held a statute that criminalized loitering was unconstitutionally vague because it restricted simply wandering in public. 461 U.S. 352, 358, 361 (1983). Under the rigorous vagueness standards applicable to restrictions on First Amendment rights, Act 259 is similarly vague because its restriction on

movement fails to provide fair notice of when the right to move freely in a public forum is restricted.

Act 259 is also vague for the separate reason that it gives complete enforcement discretion—with no judicial check—to police officers, as the 25-foot buffer zone is required only if an individual officer requests it. Act 259, § 109 (A) (prohibiting presence within 25-foot zone "after the peace officer has ordered the person to stop approaching or to retreat"). In other words, the 25-foot buffer is the law when a police officer on the scene says so, and not the law if the officer opts not to say so. The officer makes the law, on the spot, in his or her sole discretion. The buffer zone is thus not just a moving target that follows individual police officers around. It also applies only at the whim of those officers. Act 259 does not, therefore, provide fair notice to journalists as to when they may be subjected to an order to stay back or retreat from the scene.

During legislative consideration of Act 259, opponents pointed out it might allow a group of officers to daisy-chain retreat orders, such that they could push someone 50 or even 100 feet away from key, newsworthy events. The only reply from the Act's sponsor was that obeying police officers is the best way to keep them from using violence: "[A]sk yourself

in all the conflicts you've seen … with police officers, if … any one of those individuals complied with the simple demands of an officer to back up, show your hands, would that have escalated into deadly force? It's very simple: Comply with police and we'll have a peaceful ending."[13] In other words, officer discretion is a feature, not a bug, and we'd best grant them that discretion if we want "a peaceful ending."

This is no answer at all. The Constitution does not permit giving officers such imperious control over either newsgathering or Americans' right "to receive information and ideas." *Turner*, 848 F.3d at 688 (quotation marks omitted); *see also Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 789 (5th Cir. 2024) (*Turner* "reasoned that the Supreme Court has held that newsgathering and the right to receive information are entitled to First Amendment protection"), *cert. denied sub nom. Nat'l Press Photographers Ass'n v. Higgins*, 145 S. Ct. 140 (2024). Laws affecting constitutional rights must incorporate "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

[13] S. Comm. on Judiciary C, 2024 Reg. Sess. (La. May 7, 2024), https://senate.louisiana.gov/s_video/VideoArchivePlayer?v=senate/2024/05/050724JUDC, at 48:22–48:51.

discriminatory enforcement." *Kolender*, 461 U.S. at 357. Yet the only standards Act 259 provides is the arbitrary order of an officer and the invisible, moving, 25-foot perimeter it creates.

Act 259 notably gives police the power to issue these orders at *any* time they are "engaged in the execution of [their] official duties." So, whether they are calmly walking their usual patrol route, writing a parking ticket, engaged in protest crowd-control, or making an active arrest on the sidewalk, the sole trigger for a 25-foot buffer zone is the will of an individual officer. This unbridled discretion necessarily allows officers to issue orders and threats of arrest on an ad hoc and subjective basis, with no legal standard or process to check officers' orders and the accompanying restriction of First Amendment rights. Act 259 is therefore unconstitutionally vague.

II. Act 259 is Content-Based and Unconstitutionally Restricts First Amendment Rights in a Traditional Public Forum.

Act 259 not only violates Louisianians' right to due process; it also violates the First Amendment under any level of scrutiny. As the district correctly held, even under intermediate scrutiny Act 259 is not sufficiently tailored to the state's asserted interests to satisfy. ROA 345–

46. The district court erred, however, in so quickly dismissing Plaintiffs' arguments for stricter scrutiny.

First and foremost, Act 259 deserves the strictest scrutiny because it is a content-based prior restraint, if not explicitly then by implication. The district court rejected Plaintiffs' argument that Act 259 is "a content-based restriction on newsgathering" that warranted strict scrutiny. ROA 27, 38, 49–50. But laws like Act 259 specifically intend to restrict reporting on police activity, and therefore deserve strict scrutiny.

"Because strict scrutiny applies either when a law is content based on its face *or when the purpose and justification for the law are content based*, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015) (emphasis added); *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) ("If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based."). Here, Act 259 does not prohibit newsgathering or photographing city council meetings, or rock concerts, or even Blue Santa programs. On its face, and in practice, the law will

only result in an arrest when that a bystander is engaged in newsgathering related to police activity. As Plaintiffs point out, other laws already cover the behaviors the state fears: interfering with or violently attacking police officers during their duties. Pls.-Appellees' Br. 60–61. The only purpose not served by current laws, it seems, is the ability of a police officer to unilaterally prevent onlookers from observing the scene of law-enforcement activity. But observing police during their duties is precisely what the First Amendment protects. A law, like Act 259, drafted to defeat that protection is, therefore, content-based. *Project Veritas v. Schmidt*, 125 F.4th 929, 950 (9th Cir. 2025) ("Regulations of speech that are facially neutral may nevertheless be content based *in their justification* ….") (citing *Reed*, 576 U.S. at 164).

Act 259 also allows content-based application because it gives officers unbridled discretion to limit First Amendment activity. "[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Officials will likely not restrict newsgathering of which they approve, but may restrict

newsgathering of which they disapprove, and that will chill newsgathering. But even were they to use their discretion nobly, the law remains unconstitutional: "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). In other words, by giving single police officers discretion to restrict First Amendment activity, Act 259 can impose a content-based chill on protected speech, whether or not the officers in fact use their discretion to restrict speech—the discretion itself is the problem.

Even if giving unbridled discretion to government officials does not necessarily make a law content-based, it *does* necessarily mean the law isn't tailored to the government's interests. *City of Houston v. Hill*, 482 U.S. 451, 465 (1987) ("[W]e have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."). Simply put, a statute that "condition[s] the free exercise of First Amendment rights on the

'unbridled discretion' of government officials" is never narrowly tailored, even under intermediate scrutiny. *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) (quoting *City of Lakewood*, 486 U.S. at 755). To be a valid "time, place, and manner" regulation, a law "must not delegate overly broad discretion to a government official." *Seattle Affiliate of Oct. 22nd Coal. v. City of Seattle*, 550 F.3d 788, 798 (9th Cir. 2008).

In any case, even were this Court to consider Act 259 a "time, place, and manner" restriction, the Act is doomed for the reasons the district court explained. Under intermediate scrutiny, a law must be "justified without reference to the content of the regulated speech, … narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citing *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)). But Act 259 is too broad and allows law enforcement too much discretion to silence protected speech.

As the Supreme Court held in *Schenck*, buffer zones that move with people through a traditional public forum are not appropriately tailored, "because they burden more speech than is necessary to serve the relevant

governmental interests." 519 U.S. at 377. Such a "broad prohibition" unconstitutionally prevents even peaceful conversation, leafletting, and other "classic forms of speech." *Id.* Act 259 likewise prohibits First Amendment activity without any tailoring to specific interests not already furthered by other statutes. It therefore cannot be sustained under *Schenck*, and the district court was right to preliminarily enjoin it and to deny the motion to dismiss.

CONCLUSION

The Constitution does not permit law enforcement to arbitrarily restrict journalists and observers from public spaces. For that reason, and those above, this Court should affirm the district court's injunction.

Dated: July 3, 2025

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The undersigned certifies that on July 3, 2025, an electronic copy of the *Brief of Amici Curiae Foundation for Individual Rights and Expression,* et al.*, in Support of Plaintiffs-Appellees* was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

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