No. 22-____

IN THE

Supreme Court of the United States

GORDON PRICE,

Petitioner,

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, AND SHAWN BENGE, IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR EXERCISING THE AUTHORITY OF DIRECTOR OF THE NATIONAL PARK SERVICE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. District Court for the District of Columbia enjoined enforcement of 54 U.S.C. § 100905, which directs the Secretary of the Interior to "require a permit and [] establish a reasonable fee for commercial filming activities" on designated federal lands. Noncommercial filming and commercial newsgathering are exempt, and the fee is a revenue-generating measure unrelated to administrative costs. The court held the law is a content-based prior restraint, that it fails strict scrutiny, and that it imposes a tax on speech. A divided panel of the D.C. Circuit reversed, holding that filming is "merely a noncommunicative step in the production of speech." Judge Tatel dissented, describing the majority's reasoning as "untethered from our court's precedent and that of our sister circuits." This raises the following questions:

1. Whether filmmaking is "communicative activity" protected by the First Amendment or merely "a noncommunicative step in the production of speech" subject to a diminished level of constitutional scrutiny?

2. Whether First Amendment protections in public forums can be diluted by disaggregating the constituent parts of expressive activities and applying diminished constitutional scrutiny to information gathering?

3. Whether requiring commercial filmmakers to obtain a permit and pay a fee to film on public lands without regard to their impact on public property violates the First Amendment?

PARTIES TO THE PROCEEDINGS

The Petitioner and appellee below, Gordon Price, is a part-time independent filmmaker who was cited for violating 54 U.S.C. § 100905 for failure to obtain a commercial filming permit for shooting portions of a feature film in areas open to the general public in or around four locations within the Yorktown Battlefield in the Colonial National Historical Park. After charges were dismissed, he brought an action challenging the law's constitutionality, giving rise to the proceedings below.

The Respondents and appellants below, are Merrick B. Garland, in his official capacity as Attorney General of the United States, Debra A. Haaland, in her official capacity as Secretary of the Interior, and Shawn Benge, in his official capacity as Deputy Director Exercising the Authority of Director of the National Park Service.

RELATED PROCEEDINGS

1. U.S. District Court for the District of Columbia

   Price v. Barr

   Docket No. 19-3672 (CKK)

   Date of Entry of Judgment: January 22, 2021

2. U.S. Court of Appeals for the District of Columbia Circuit

   Price v. Garland

   Docket No. 21-5073

   Date of Entry of Judgment: August 23, 2022

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STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 23, 2022. A timely petition for rehearing en banc was filed on September 15, 2022 and denied on October 21, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The challenged law, 54 U.S.C. § 100905(a)(1), appears in the Appendix pursuant to Rules 14.1(f) and 14.1(i)(v).

INTRODUCTION

Each year, tens of millions of people visit America's national parks and record their experiences by taking videos and still photographs. National Park Service, Visitation By State and by Park for Calendar Year: 2021 (https://www.nps.gov/aboutus/visitation-numbers.htm). The Park Service maintains that "[p]hotography is an important part of national park history," National Park Service, Picturing the Parks (https://www.nps.gov/subjects/photography/index.htm), and even encourages such activity by sponsoring an annual amateur photo contest with cash prizes up to $10,000. National Park Foundation, Share the Experience (https://www.sharetheexperience.org/). The U.S. Fish and Wildlife Service also sponsors photo contests, U.S. Fish and Wildlife Service Photo Contests (https://www.fws.gov/story/photo-contests), and describes wildlife photography as "a priority public use on national wildlife refuges." U.S. Fish and Wildlife Service Photography (https://www.fws.gov/photography).

While the government broadly encourages park visitors to take photographs or videos in all areas generally accessible to the public, federal law treats commercial filmmakers differently. It requires them to first obtain a permit and pay a fee before they may commence filmmaking. 54 U.S.C. § 100905(a)(1). The distinction is not based on any potentially different impact on park use or resources posed by commercial versus noncommercial filmmakers, as a lone individual recording video on his cell phone for posting on an ad-supported website must get a permit and pay a fee, while a non-commercial film crew with heavy equipment does not. The law is a revenue measure designed simply to provide "a fair return to the United States." *Id.* § 100905(a)(1).

Petitioner Gordon Price is an independent filmmaker who was criminally charged for failing to get a permit before filming, but who later successfully challenged Section 100905 as an unconstitutional prior restraint and tax on speech. 44a-45a. The District Court's major premise in upholding his claim—that "filmmaking is a form of expressive speech protected by the First Amendment"—is a vitally important principle that this Court has not yet had occasion to address. Eight circuit courts have upheld First Amendment protections for photography, filming, and/or audio recording, but the D.C. Circuit in this case disagreed. It reversed the District Court's decision based on its conclusion that filming is not "communicative activity" but is "merely a noncommunicative step in the production of speech."

The D.C. Circuit's decision disaggregating protected speech from the act of creating it is unsupported by any decision of this Court and directly

conflicts with holdings by a majority of the other circuits upholding First Amendment protections for photography as expressive activity. Unless it is reversed by this Court, the decision will confuse and disrupt settled principles of First Amendment law in various areas—including the public forum doctrine—and will, as Judge Tatel wrote in dissent, leave "important expressive activities unprotected in places where the First Amendment's guarantee of free speech should be at its apex." 42a. Review by this Court is imperative.

STATEMENT OF THE CASE

a. Background

Petitioner Gordon Price, a part-time independent filmmaker, was criminally charged in 2019 for failure to obtain a commercial filming permit before shooting portions of a feature film in areas open to the general public in or around four locations within the Yorktown Battlefield in the Colonial National Historical Park.

Mr. Price had filmed one scene on the Battlefield during the summer of 2017, a second in the summer of 2018, and a third during a separate one-hour visit to a location on Crawford Road known as Crybaby Bridge. No more than four people were present during the filming on the first two occasions, and Mr. Price used only a small camera and tripod, without any other equipment. Only Mr. Price and one associate were present during the third filming at Crybaby Bridge. Mr. Price neither sought nor received a permit from NPS prior to filming. 49a.

On October 17, 2018, the resulting film, *Crawford Road*, premiered to an audience of about 250 people

at a local restaurant in Newport News, Virginia. 49a. The premiere received some local press coverage and the filmmakers were interviewed on location at Crybaby Bridge by local CBS affiliate WTKR.

In December 2018. after learning of *Crawford Road* from news reports, two National Park Service ("NPS") officers came to Mr. Price's place of business and cited him under 36 C.F.R. § 5.5 for failure to obtain a commercial filming permit. The regulation under which he was charged was adopted pursuant to 54 U.S.C. § 100905(a)(1) ("Section 100905"), which provides that the Secretary of the Interior "shall require a permit and shall establish a reasonable fee for commercial filming activities or similar projects in a System unit." 54 U.S.C. § 100905(a)(1) ("Permit Regime").

Price filed a motion to dismiss the criminal charges on grounds that the Permit Regime violates the First Amendment, and, rather than defend the law, the government moved to dismiss the citation. The District Court granted the motion without ruling on the constitutionality of the statute, but suggested Mr. Price could assert his constitutional claims in a separate civil action. *United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Nov. 1, 2019), ECF No. 23 (Order), at 4.

b. Proceedings Below

In December 2019, Price filed a civil complaint in the U.S. District Court for the District of Columbia challenging the facial constitutionality of 54 U.S.C. § 100905 and its implementing regulations. 6a. Ruling on cross-motions for judgment on the pleadings, the District Court held the Permit Regime is facially unconstitutional and enjoined its

enforcement. 45a. The court applied the analytic framework for public forum questions set forth in *Boardley v. Department of Interior*, 615 F.3d 508, 514 (D.C. Cir. 2010), and held that (1) filming a movie constitutes expressive speech protected by the First Amendment, (2) the Permit Regime restricts speech in public forums, and (3) the Permit Regime fails to satisfy heightened constitutional scrutiny. 62a-66a. It also found the law is content-based, fails strict scrutiny, and imposes an unconstitutional tax on protected speech. 67a-72a, 86a-87a.

A divided panel of the D.C. Circuit reversed. 3a. Writing for the majority, Judge Ginsburg rejected the District Court's premise that "the speech-protective standards of a public forum apply to filmmaking just as they apply to other speech." 11a. He characterized filming as "merely a noncommunicative step in the production of speech," and concluded forum analysis was "misplaced," because "a filmmaker does not seek to communicate with others at the location in which he or she films," and therefore "does not use the location as a 'forum.'" 12a.

Judge Ginsburg cited no cases holding (or even suggesting) that different steps in the speech process could be segregated and analyzed under different levels of First Amendment scrutiny. Instead, he surveyed "the history of forum analysis" and cited selected phrases from cases indicating that the public forum exists to provide locations for "assembly and debate," then suggested that "filmmaking, like typing a manuscript, is not itself communicative activity; it is merely a step in the creation of speech that will be communicated at some other time, usually in some other location." 13a-16a. On that basis, he concluded

that "[t]here is no historical right of access to government property in order to create speech." 16a.

Judge Henderson issued a short concurrence to express "complete agreement with Judge Ginsburg's analysis," but added "[w]e need not—and do not—explain the full contours of what does and does not constitute 'communicative speech.'" 28a-29a (Henderson, J., concurring).

Judge Tatel dissented, describing the majority's reasoning as "untethered from our court's precedent and that of our sister circuits." 29a-30a (Tatel, J., dissenting). He wrote that the case is governed by the D.C. Circuit decision in *Boardley*, and that "[l]ike the expressive activities at issue in *Boardley*, the 'commercial filming activities' regulated by the Permit Regime constitute speech." 33a. Judge Tatel pointed to cases from other circuits holding "that forum analysis applies to all First Amendment expression, including filming," and he concluded that "[b]y stripping filming of the protections afforded to expression in public forums, the court puts us in direct conflict with other circuits and leaves important expressive activities unprotected in places where the First Amendment's guarantee of free speech should be at its apex." 39a-42a.

Petitioner timely filed a petition for rehearing en banc, which was denied on October 21, 2022. 89a-90a. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THAT FILMMAKING IS "COMMUNICATIVE ACTIVITY" THAT IS FULLY PROTECTED BY THE FIRST AMENDMENT

The D.C. Circuit's holding based on the conclusion that filmmaking is not "communicative activity" but is "merely a noncommunicative step in the production of speech" is not supported by any of this Court's First Amendment decisions and conflicts directly with numerous decisions of other circuits.

a. This Court has long recognized that speech regulations cannot be justified by disaggregating the different elements necessary to produce protected expression. This is because "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). As Justice Scalia cautioned, "[c]ontrol any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part), *rev'd in part*, *Citizens United*, 558 U.S. 365-66. Accordingly, the Court has invalidated numerous measures that restrict speech at different stages, including "requiring a permit at the outset," burdening speech "by impounding proceeds on receipts or royalties," imposing "a cost after the speech occurs," and "subjecting the speaker to criminal penalties." *Citizens United*, 558 U.S. at 336-47 (citations omitted). *See Minneapolis Star & Trib.*

Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating tax on newsprint and ink).

The same principle limits the government's ability to restrict information gathering as part of the speech process because "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (laws that establish a "disincentive to create or publish works" are subject to First Amendment scrutiny) ; *cf. Bartnicki v. Vopper*, 532 U.S. 514, 526-27 (2001) (rejecting argument that publication is non-expressive "conduct," explaining "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.") (citation omitted).

b. The linchpin of the decision below was the assumption that different elements of the speech process can be separated for purposes of setting the level of First Amendment scrutiny. The majority characterized filming as "merely a non-communicative step in the production of speech," that it said is "like typing a manuscript, [which] is not itself communicative activity." 16a. The D.C. Circuit cited no decisions of this Court to support its assumption that First Amendment scrutiny can be avoided by targeting one stage of the speech process.

Numerous circuits have rejected the D.C. Circuit's novel approach of determining the level of First Amendment scrutiny only after bifurcating segments of the speech process. As the Ninth Circuit observed in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010), "neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." In *Anderson*, the court struck down a local ordinance banning tattoo parlors, holding that the First Amendment does not permit "disconnect[ing] the end product from the act of creation." *Id.* at 1061-62.

There is widespread agreement among the circuit courts that the process of creating expression "is inextricably intertwined with the purely expressive product … and is itself entitled to full First Amendment protection." *Id.* at 1062. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018). *See also Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021) ("[W]e recognized a significant volume of precedent from the Supreme Court and other circuit courts protecting the creation of information in order to protect its dissemination."), *cert. denied*, 142 S. Ct. 2647 (2022); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) ("it is firmly established that the First Amendment protects 'a range of conduct' surrounding the gathering and dissemination of information"); *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("[W]e have not attempted to disconnect the end product from the act of creation.") (citation omitted); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir.

2017) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment.") (quoting *Sorrell*, 564 U.S. at 570). "Speech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019).

The consequences of the D.C. Circuit's contrary approach are staggering. For "[i]f 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." *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022) (quoting *Michael*, 869 F.3d at 1196). To claim that the act of creating speech can be separated from its expression "is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not." *Wasden*, 878 F.3d at 1203. And if each step of the speech process could be disaggregated and regulated under separate standards, "then wide swaths of protected speech would be subject to regulation by the government." *Telescope Media Grp.*, 936 F.3d at 752.

c. Under this principle, filmmaking cannot be accorded less constitutional protection because "[i]t defies common sense to disaggregate the creation of the video from the video or audio recording itself." *Wasden*, 878 F.3d at 1203-04. Numerous courts have recognized "there is no fixed First Amendment line between the act of creating speech and the speech itself," *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012), and that "taking photographs and recording videos are … an important stage of the speech process." *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021).

Apart from the D.C. Circuit, every circuit court to address this issue has held that the First Amendment protects the right to make audio and/or video recordings as part of the "speech process." *Irizarry*, 38 F.4th at 1289 ("videorecording is 'unambiguously' speech-creation, not mere conduct") (quoting *Kelly*, 9 F.4th at 1228); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020) ("the First Amendment limits the government regulation of information collection") , *cert. denied*, 142 S. Ct. 560 (2021); *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material.") (citing *Brown*, 564 U.S. at 790); *Turner*, 848 F.3d at 689 ("[T]he First Amendment protects the act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself.'"); *Alvarez*, 679 F.3d at 595 ("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."); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("[V]ideotaping of public officials is an exercise of First Amendment liberties."); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (First Amendment protects "a right to record matters of public interest"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest").

Dissenting from the decision below, Judge Tatel observed that "my colleagues—for the very first time—disaggregate speech creation and dissemination, thus degrading First Amendment

protection for filming, photography, and other activities essential to free expression in today's world." 43a (Tatel, J., dissenting). He agreed with the consensus of the other circuits that "the longstanding right to 'expression by means of [audiovisual recording]' would have little meaning if 'the act of creating that material" were unprotected.'" *Id.* at 33a (citations omitted).

d. Review by this Court is warranted under both Rule 10(a), which provides that certiorari is appropriate if a "court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," and under Rule 10(c), which provides for review where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(a), (c).

The panel decision conflicts with rulings of the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have upheld First Amendment protections for photography and filmmaking. *See supra* 12. At least six circuits have expressly addressed—and rejected—the D.C. Circuit's specific premise that filming can be considered "noncommunicative conduct" and regulated under a reduced level of First Amendment scrutiny. *E.g.*, *Wasden*, 878 F.3d at 1203 ("recording is itself an inherently expressive activity"). *See also Irizarry*, 38 F.4th at 1289; *Telescope Media Grp.*, 936 F.3d at 752; *Ness*, 11 F.4th at 923; *Turner*, 848 F.3d at 688-89; *Fields*, 862 F.3d at 358; *Alvarez*, 679 F.3d at 596.

Review by this Court is necessary to resolve this disagreement. *See, e.g.*, *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846 (1973) (granting certiorari to resolve "an apparent conflict in approach" between the Ninth and D.C. Circuits on an important First Amendment question); *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993).

Review is warranted under Rule 10(c) because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Although this Court has long held that different stages of the speech process cannot be disaggregated, it has not yet had the occasion to apply that principle to photography or filmmaking as a form of information gathering. While the circuits (until now) have uniformly recognized this particular First Amendment application, this is a relatively recent phenomenon.

The Ninth Circuit was the first to apply such protections in 1995. *Fordyce*, 55 F.3d at 442, and by 2000, only two circuits had decided the issue. *Smith*, 212 F.3d at 1333. However, after smart phones with built-in cameras became ubiquitous, the question arose more frequently. By the time the First Circuit considered the question in *Glik* in 2011, the court observed that the "terseness" of prior discussions of the applicable principles "implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area." 655 F.3d at 85. Changes in photographic technology generated more controversies, and this past summer, the Tenth Circuit surveyed the more recent cases. It found that after *Glik*, the trend toward consensus became a stampede between 2014 and 2019, when the Third and Fifth Circuits joined four previous circuits to

place the constitutional question "beyond debate." *Irizarry*, 38 F.4th at 1289, 1294-96.

But the principles at issue in this case only seemed "self-evident" and "beyond debate" until the decision below. Because this Court has not yet weighed in on this important and increasingly prevalent question of First Amendment law, the majority below was free to disaggregate stages of the speech process in order to deny Petitioner's First Amendment claim. As Judge Tatel wrote in dissent, that decision is unsupported by any case law and "untethered" to the decisions of all other circuits that have addressed the issue. 29a (Tatel, J., dissenting).

II. THIS COURT SHOULD CLARIFY THAT FIRST AMENDMENT PROTECTIONS IN PUBLIC FORUMS CANNOT BE DILUTED BY DISAGGREGATING INFORMATION GATHERING FROM OTHER EXPRESSIVE ACTS

The D.C. Circuit's decision is deeply at odds with basic First Amendment principles and with the decisions of other circuits for another reason: It denies protection to expressive activities specifically in public fora—those areas that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

a. The District Court correctly held that "Section 100905 and its implementing regulations restrict speech in [traditional] public forums" as well as in "*designated* public forums administered by the National Park Service." 66a (emphasis added). The

government's admission that Section 100905 licenses and taxes speech in public forums alone provided ample reason to affirm the District Court's holding by applying the forum analysis set forth in *Boardley*, 615 F.3d 508.

The District Court's application of the public forum doctrine under circuit precedent and decisions of this Court was sufficient to decide the case. However, it did not address all of Section 100905's constitutional problems, given that still photographers generally are welcomed in national parks without a permit wherever "members of the public are generally allowed" unless they are engaged in commercial filming. 54 U.S.C. § 100905(c). The law provides for such access without regard to whether some areas of national parks have been specifically designated as public forums.

On appeal, the D.C. Circuit resolved the case solely on public forum grounds, and held that the "the speech-protective rules of a public forum" do not apply to Section 100905's permit and fee requirements because "a filmmaker does not seek to communicate with others at the location in which he or she films." 12a. This truncated theory of the public forum, that "[t]here is no historical right of access to government property in order to create speech," 16a, is unsupported by this Court's decisions and in conflict with those of other circuits.

b. The D.C. Circuit's narrow interpretation of the public forum doctrine was not based on any decisions of this Court that expressed such a view regarding speech creation as "noncommunicative." Instead, it emerged from what the majority described as "the historical underpinnings of forum analysis, the

evolution of this analytical framework, and the cases in which the Supreme Court has applied it." 12a. The majority observed that past cases "are concerned with assembly, the exchange of ideas to and among citizens, the discussion of public issues, the dissemination of information and opinion, and debate —all of which are communicative activities," and concluded that "forum analysis applies only to communicative activities, not to activities that, even if generally protected by the First Amendment, are not communicative." 16a.

In reaching this conclusion, the majority simply assumed that gathering information and filmmaking are not "communicative." It made no reference to any of this Court's decisions regarding the indivisibility of elements of the "speech process." Its analytic approach, of merely describing past forum cases as dealing with such issues as parading, leafletting, or the use of a school's internal mail system, did nothing to explicate the contours of the public forum doctrine. "[S]uch descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter" to permit the government to bifurcate what is generally recognized as protected speech. *United States v. Stevens*, 559 U.S. 460, 471 (2010).

In short, the majority engaged in circular reasoning and simply assumed its own conclusion that filming is not "communicative." No decisions of this Court endorse this crabbed view of the public forum doctrine, and the D.C. Circuit cited none. 42a (Tatel, J., dissenting) ("the court cites not a single case that applies a 'reasonableness' standard of scrutiny to a government restriction on filming in public places").

Judge Tatel observed that the majority's approach "reimagine[s] the public forum doctrine to protect the stumping politician but not the silent photographer, to shield the shouting protestor but not the note-taking reporter." *Id.* at 40a. He concluded such distinctions "find no basis in First Amendment jurisprudence," noting that "[b]y stripping filming of the protections afforded to expression in public forums, the court puts us in direct conflict with other circuits and leaves important expressive activities unprotected in places where the First Amendment's guarantee of free speech should be at its apex." 42a.

c. The majority's assumption that forum analysis applies only to the "speaker" at the moment he stands on a soap box is at odds with decisions of other circuits. As the Seventh Circuit explained,

> forum analysis is not merely about who has the right to speak on government property. It also addresses who has the right of access to government property to engage in various expressive pursuits—whether that expressive pursuit is leafletting teachers, soliciting charitable donations, wearing political buttons at a polling place, or gathering information for news dissemination.

John K. MacIver Inst. for Pub. Policy, Inc. v. Evers, 994 F.3d 602, 611-12 (7th Cir. 2021) (string cite omitted), *cert. denied*, 142 S. Ct. 711 (2021).

Consistent with this view, circuits that have affirmed a First Amendment right to record held that the government is the *most* constrained when it seeks to restrict photography in traditional forums. The First, Fifth, Eighth, Ninth, and Tenth Circuits have

applied forum analysis to protect filming just as they would to any other form of speech. *See Ness*, 11 F.4th at 923 (applying "the level of scrutiny applicable" to "traditional public fora" because the filming activities occurred in a "public park"); *Glik*, 655 F.3d at 84 (explaining that the government's right to restrict filming was "sharply circumscribed" because the filming occurred in "the oldest city park in the United States and the apotheosis of a public forum") (citation omitted); *Turner*, 848 F.3d at 690 (explaining that filming from a public sidewalk is "'subject to reasonable time, place, and manner restrictions'" that must be "narrowly tailored to serve a significant governmental interest"); *Irizarry*, 38 F.4th at 1292 n.10 (in the traditional public forum, the government's ability "to limit the exercise of First Amendment activity [is] 'sharply circumscribed'") (citation omitted); *Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044-46 (9th Cir. 2018) (same).

Other circuits have explained that information gathering in the public forum must be protected as an essential step in the process for speech to be effective. As the Fifth Circuit observed in upholding a right to record, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Turner*, 848 F.3d at 688 (citation omitted). *See Alvarez*, 679 F.3d at 596 ("Restricting the use of an audio or audiovisual recording device suppresses speech as effectively as restricting the dissemination of the resulting recording."); *Fields*, 862 F.3d at 359; *Glik*, 655 F.3d at 82-83. *See also Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) ("[T]he public became aware of the

circumstances surrounding George Floyd's death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd's neck until he died.").

d. If not corrected, the D.C. Circuit's constricted view of the public forum doctrine will lead to absurd results. Under the majority's reasoning, it would raise no First Amendment issue to prevent a documentary crew from filming a demonstration on the National Mall because it is not "speaking" there and the recording is "merely a step in the creation of speech that will be communicated at some other time." 16a. And, because the majority classifies expressive activities "like typing a manuscript" to be "noncommunicative," a protestor could be prohibited from composing his speech on a picnic table even if he has a First Amendment right to deliver it at the same location. Or, as Judge Tatel noted in dissent, the majority's view is that the public forum doctrine does not protect "the note-taking reporter." 40a. He added that "[e]ven a park visitor who takes a five-minute video on her phone, planning to post it on YouTube and generate advertising revenue, must obtain a permit and pay a fee." *Id.* at 36a. Worse still, that same person could be criminally charged for failing to get a permit even if she decided to post the video in the hope of possibly monetizing it only *after* her park visit.

Even more confusingly, the D.C. Circuit suggested that forum analysis "may well apply to live streaming" but not recording for later dissemination, 19a n.*, which means the level of constitutional protection may depend on the filmmaker's camera settings alone.

Public forum doctrine is already sufficiently complex without further muddying its application by such factors as what part of the "speech process" is involved, how the speaker's recording equipment is configured, or whether he or she hopes to profit from the speech. The D.C. Circuit's opinion injects each of these complicating factors into public forum analysis without providing any offsetting clarity. This Court's review is needed to fix it. *Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009) (noting this Court "has not addressed the validity of single-speaker permitting requirements for speech in a public forum").

III. THE D.C. CIRCUIT DECISION UPHOLDING THE PERMIT AND FEE REQUIREMENTS OF SECTION 100905 IS WRONG

The District Court correctly held that Section 100905 is facially unconstitutional. The court applied public forum decisions of this Court and the D.C. Circuit and held the law and Permit Regime imposes a prior restraint on protected speech. 45a. And it found that the required fee constitutes an unconstitutional tax on speech because it "mandates payment not only for the incidental costs of filming and permit administration, but for the act of filming itself." 73a.

The D.C. Circuit majority reversed these holdings after applying a "reasonableness" test to the Permit Regime. Its application of diminished scrutiny flowed from its assumption that filmmaking is "noncommunicative first amendment activity" and that "the highly-protective rules of a traditional public forum are inapplicable." 19a. The court held

that the fee "is reasonable extraction of a rent by the owner of a property," and that this Court's holdings prohibiting taxes on speech, including *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), do not apply. 22a.

For the reasons set forth above, this Court should accept review to correct the D.C. Circuit's erroneous premise that it can disaggregate different stages of the speech process in order to apply a lesser degree of First Amendment scrutiny. Doing so would necessarily undermine the court's rationale for upholding the constitutionality of Section 100905.

a. First, application of correct First Amendment principles would undo the D.C. Circuit's improper assumption that it is permissible to treat publicly-accessible areas of national parks as "non-forums" for purposes of photography. As Judge Tatel explained in his dissent, once the permit requirement is understood as a regulation of speech, it violates this Court's public forum cases, as well as D.C. Circuit precedent applying those cases. 31a-39a. It is also unconstitutional based on the reasoning other circuits have employed to find the First Amendment protects photography at its zenith in the public forum. *See supra* 12.

Second, the First Amendment protects the right to photograph and film generally in publicly accessible areas even if they are not deemed public forums. In *Rollins*, the First Circuit surveyed cases finding a right to record in "public spaces" and noted that such places include traditional public fora, sites of traffic stops, and other "inescapably" public spaces, as well as publicly accessible private property. 982 F.3d at 827. It found that without regard to forum analysis, "the intermediate level of scrutiny … roughly tracks

the scrutiny applied to restrictions on newsgathering in other locales to which the public generally has access to collect information." *Id.* at 835-36. In short, the D.C. Circuit's use of a "reasonableness" test was in error whether or not public forum analysis applies.

b. The same is true of the D.C. Circuit's approval of the fee requirement. The First Amendment bars the government from raising revenue by taxing the exercise of constitutional rights, or charging fees in excess of costs of administering a legitimate regulation that governs speech. *Murdock*, 319 U.S. at 113-14. Here, it is undisputed the permit fee is separate from any fees to cover costs of administering the permitting process. *See* 54 U.S.C. § 100905(b); 43 C.F.R. § 5.8(b); 36 C.F.R. § 5.5(c).

The D.C. Circuit described the fee as a "reasonable extraction of a rent by the owner of a property" when operating in a proprietary capacity, comparable to collecting "rent from a vendor that sells newspapers in a government-controlled airport or subway station." 22a (citing *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298 (11th Cir. 2003)). But as Judge Tatel explained, the cases on which the majority relies pertain only to nonpublic forums where businesses reserved fixed locations from which they sold, exhibited or distributed materials. 38a. None are applicable to the situation here, where the public is generally invited to take photographs in national parks (except for commercial filmmakers), and the filmmakers are not selling anything at locations in the parks.

Judge Tatel thus concluded that the *Murdock* line of cases was controlling here, because Section 100905 singles out speech. It applies only to "commercial

filming activities or similar projects" and not to commercial activity in general. 37a. He noted "even were we to accept the government's characterization of the Permit Regime as simply a means to generate revenue from filmmakers, it would still amount to an unconstitutional 'tax' on 'activities guaranteed by the First Amendment.'" 37a (quoting *Murdock*, 319 U.S. at 113).

All of the D.C. Circuit's errors hinge on its threshold assumption that filmmaking is not "communicative activity" and that the speech-protective rules of the First Amendment do not apply. Review by this Court to correct that flawed premise would dispose of all the issues in this case.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

Whether filmmaking is "communicative activity" that is fully protected by the First Amendment, as opposed to a mere "noncommunicative step in the production of speech," was squarely decided in the court of appeals below. The First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all have held to the contrary—that the act of filming or photographing a subject is inherently "expressive" and cannot be disaggregated from the speech process. No further percolation among the circuits is needed to help this Court resolve the issue.

This Court's resolution of this important question will be fully dispositive of all of the questions presented. It would affirm, as this Court has long held as a general matter, that the First Amendment protects all elements of "the speech process." It would

make clear that the speech-protective rules applicable to the public forum cannot be subdivided to exclude information gathering. And it would confirm that Section 100905's permit and fee requirements violate the First Amendment, since the D.C. Circuit's decision was based on an erroneous understanding of First Amendment law.

This case comes to the Court on review of cross-motions for judgment on the pleadings. In this context, it presents the pure legal issue of whether the permit and fee requirement for commercial filmmaking violates the First Amendment. This appeal does not present, as might a motion for summary judgment or a decision after trial, disputes of fact, disagreements about evidence sufficiency, or any other fact-bound issues.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,

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