APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 31, 2022 Decided August 23, 2022

No. 21-5073

GORDON M. PRICE,
APPELLEE

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,
APPELLANTS

Appeal from the United States District Court
For the District of Columbia
(No. 1:19-cv-03672)

Joseph F. Busa, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Brian M Boynton*, Acting Assistant Attorney General, *Michael S. Raab* and *Joshua M. Salzman*, Attorneys.

Robert Corn-Revere argued the cause for appellee. With him on the brief was *Patrick J. Curran Jr.*

Glenn E. Roper was on the brief for *amici curiae* Pacific Legal Foundation and Anthony Barilla in support of appellee.

Mickey H. Osterreicher and *Alicia Wagner Calzada* were on the brief for *amici curiae* National Press Photographers Association, et al. in support of appellee.

Before: HENDERSON and TATEL*, *Circuit Judges,* and GINSBURG, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* GINSBURG.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Dissenting opinion filed by *Circuit Judge* TATEL.

GINSBURG, *Senior Circuit Judge:* Gordon Price is an independent filmmaker. He filmed parts of a feature film on land administered by the National Park Service (NPS) without having obtained the requisite permit and having paid the requisite fee. The Government charged him with a misdemeanor but later dismissed the charge. Price then sued for declaratory and injunctive relief, arguing the permit-and-fee requirements are facially unconstitutional

* Judge Tatel assumed senior status after this case was argued and before the date of this opinion.

under the First Amendment to the Constitution of the United States. The district court agreed with Price, holding the permit-and-fee requirements do not satisfy the heightened scrutiny applicable to restrictions on speech in a public forum.

We hold that regulation of filmmaking on government-controlled property is subject only to a "reasonableness" standard, even when the filmmaking is conducted in a public forum. Because the permit-and-fee requirements are reasonable, we reverse the order of the district court.

I. Background

A. Statutory and Regulatory Framework

By statute, the Secretary of the Interior must "require a permit and . . . establish a reasonable fee for commercial filming activities" on land administered by the NPS. 54 U.S.C. § 100905(a)(1). In keeping with this mandate, the implementing regulations state that "[a]ll commercial filming requires a permit," and that the NPS "will require a reasonable location fee. . . assess[ed] . . . in accordance with a fee schedule . . . publish[ed] in the Federal Register." 43 C.F.R. §§ 5.2(a), 5.8(a)(1),(3). The regulations go on to define "commercial filming" as "the film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income." *Id.* § 5.12. Although some news gathering activities fit within this definition, the regulations generally exempt news gathering from these requirements. *Id.* § 5.4.

The regulations also specify that a permit will be denied if, among other reasons, it is likely an activity would: "(a) Cause resource damage; (b) [u]nreasonably disrupt or conflict with the public's use and enjoyment of the site; (c) [p]ose health or safety risks to the public; [or] (d) [r]esult in unacceptable impacts or impairment to National Park Service resources or values." 43 C.F.R. § 5.5.

The location fee, which must be calculated to "provide a fair return to the United States," is to be based upon "the number of days of the filming activity," "the size of the crew," "the amount and type of equipment present," and any "other factors . . . the Secretary considers necessary." 54 U.S.C. § 100905(a)(1)-(2). In addition to the location fee, the Secretary must recover "any costs incurred as a result of filming activities." *Id.* 100905(b). A person convicted of engaging in commercial filming without obtaining a permit or paying a fee faces a fine and up to six months in prison. *See* 18 U.S.C. § 1865; 36 C.F.R. § 1.3, 5.5(a).

These regulations are consistent with others that apply to various types of commercial activity conducted on land administered by the NPS. For instance, it is generally prohibited to "engag[e] in or solicit[] any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States." 36 C.F.R. § 5.3. Similarly, a concessionaire must contract with the Government and pay a "franchise fee." 54 U.S.C. § 101913. Finally, a person who wishes to provide services to visitors on NPS land must obtain authorization and pay "a reasonable fee

for issuance of a commercial use authorization." 54 U.S.C. § 101925(a)(2)(A).

All these regulations are consistent with and implement the Congress's declaration "that it is the policy of the United States that the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9). They are also consistent with the Congress's delegation of authority to "[t]he head of each agency" to "prescribe regulations establishing the charge for a service or thing of value provided by the agency," 31 U.S.C. § 9701(b), because "[i]t is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible," *id.* § 9701(a).

B. Facts

The following facts are taken from the district court's memorandum opinion. Plaintiff-Appellee Gordon Price is a part-time independent filmmaker. In 2018 he released *Crawford Road, a* film about a stretch of road in York County, Virginia that was the location of unsolved murders and long rumored to be haunted. Price filmed scenes on the Yorktown Battlefield in the Colonial National Historical Park, land administered by the NPS, without first obtaining a permit from the NPS and paying the fee. For those scenes, Price used a camera, a tripod, and a microphone. A crew of no more than four people were present.

Crawford Road premiered in October 2018 to an audience of around 250 people in Newport News, Virginia. A couple of months later, NPS officers

issued Price a "violation notice" for failing to obtain a commercial filming permit.

In the wake of the criminal charge, Price canceled further screenings of *Crawford Road* and removed from it all footage shot on NPS land. Discussions about a distribution deal for the film came to an abrupt halt. Price had also been doing preliminary work on another film that would involve filming on land administered by the NPS, but he refrained from shooting this footage out of fear of prosecution.

Appearing before the United States District Court for the Eastern District of Virginia, Price moved to dismiss the charge, on the ground that § 100905 and its implementing regulations are facially unconstitutional. Instead of litigating this question, the Government dismissed the charge. Deprived of jurisdiction to consider the merits of Price's constitutional challenge, which were raised only as a defense to a criminal prosecution, the district judge dismissed the case. The Government did not, however, renounce its belief in the constitutionality of the statute and the regulations, nor did it forswear prosecution of Price for any future violation of the permit-and fee-requirements.

In December 2019 Price pressed his constitutional argument in a civil complaint filed in the United States District Court for the District of Columbia. Price sued several individuals in their official capacities: the Attorney General of the United States of America, the Secretary of the Department of the Interior, and the Deputy Director Exercising the

Authority of Director of the NPS. Alleging that § 100905 and the regulations implementing it are facially unconstitutional, Price sought declaratory and injunctive relief.

The parties cross-moved for judgment on the pleadings. The district court denied the defendants' motion and granted Price's.

In the memorandum opinion accompanying her order, the district judge treated the permit-and fee-requirements as content-based regulations of speech and determined that they do not withstand heightened (intermediate or strict) scrutiny. *Price v. Barr*, 514 F. Supp. 3d 171, 187-93 (D.D.C. 2021). She therefore concluded the requirements unconstitutionally restrict speech on land administered by the NPS that "courts have already identified as traditional public forums" (e.g., the National Mall and sidewalks outside the Vietnam Veterans Memorial) or that the NPS has designated as forums for certain first amendment activities, namely, demonstrations and the distribution of message-bearing items, *see* 36 C.F.R. §§ 2.51¬2.52. 514 F. Supp. 3d at 187. Although Price did not film on park land that is a public forum and therefore had no basis to challenge the permit-and-fee regime as applied to him, the district judge concluded that the regime was unconstitutional on its face because it "burdens substantially more speech than is necessary to achieve the government's substantial interests." *Id.* at 193 (cleaned up).

In dispensing "the strong medicine of overbreadth invalidation," *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (cleaned up), the district judge relied

primarily upon our decision in *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508 (2010), which she deemed sufficiently analogous to "provide[] considerable support for Mr. Price's argument." 514 F. Supp. 3d at 190. The district judge did not, however, specifically wrestle with the "proportionality aspect of [the] overbreadth doctrine," *Hicks*, 539 U.S. at 122 n.3; that is, despite the vast areas of NPS land that are not public forums, her "opinion contains no `comparing' of valid and invalid applications whatever," *id.*, to demonstrate that the overbreadth is "substantial not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications," *id.* at 120 (cleaned up).

Having concluded that the permit-and-fee requirements are facially unconstitutional, the district judge granted Price's request for declaratory relief and issued a nationwide injunction barring enforcement of the permit-and-fee requirements.

II. Analysis

"[W]e review de novo the district court's ruling on the motion for judgment on the pleadings." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9 (D.C. Cir. 2009). The Government does not dispute that Price has standing to pursue his claims. That, of course, does not relieve us of our obligation to determine whether we have jurisdiction. To that end, we agree with the district judge that Price "has presented a sufficiently credible statement of his intention to conduct commercial filming within a national park," thereby implicating a constitutional interest, 514 F. Supp. 3d at 182 (cleaned up), and "has also established that his

proposed filmmaking creates a credible threat of prosecution," *id.* at 183 (cleaned up); *see Woodhull Freedom Found. v. United States*, 948 F.3d 363, 370 (D.C. Cir. 2020). That the NPS has issued interim guidance complying with the district court's decision certainly does not make the case moot because, as the NPS has stated, it "intends to update regulations addressing filming activities that are consistent with the outcome of [this litigation]." NPS, *Filming and Still Photography Permits*, https://www.nps.goviaboutusinews/commercial-film-and-photo-permits.htm (Aug. 26, 2021). *See W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022). ("Voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (cleaned up)).

A. The Applicability of Forum Analysis

Filmmaking undoubtedly is protected by the First Amendment. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."). This uncontroverted fact, however, merely launches our inquiry, for "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property." *Cornelius v. NAACP Legal Def & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). Because "the Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated, the Court has adopted a forum analysis" to determine the

legality of restrictions upon speech on Government property. *Id.* at 800 (cleaned up).

For the purposes of this analysis, Government property is generally divided into three categories: traditional public forums, designated public forums, and nonpublic forums.

A traditional public forum is property that has "time out of mind" been used to assemble and to communicate with others. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Examples include public streets and city parks. *Id.* Government regulation of speech on this type of property is subject to the same heightened scrutiny as applies to regulation of speech on property not controlled by the Government: strict scrutiny if the regulation is content-based, intermediate scrutiny if it is content-neutral. *See id.*

A designated public forum is "government property that has not traditionally been regarded as a public forum," but the Government has "intentionally opened up for that purpose." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Examples include meeting facilities maintained by state universities and municipal theaters. *Perry*, 460 U.S. at 45. So long as the government chooses to "retain the open character" of the property, "it is bound by the same standards as apply in a traditional public forum." *Id.* at 46.

A nonpublic forum is government property that "is not by tradition or designation a forum for public communication," *id.*; examples are museums and

offices. There, the Government has far more leeway to regulate speech: a restriction of speech in a nonpublic forum is "examined only for reasonableness," *United States v. Kokinda*, 497 U.S. 720, 726 (1990). This means the restriction is constitutional if it is reasonable given "the purpose of the forum and all the surrounding circumstances," *Cornelius*, 473 U.S. at 809, and is viewpoint neutral, *id.* at 806.

A hybrid case is the limited public forum, in which the Government has "create[d] a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 470. Those limitations, like restrictions in a nonpublic forum, need only be reasonable and viewpoint neutral. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106 (2001).

The district court's conclusion that the permit-and-fee requirements for filming on NPS property are unconstitutional is based upon its assumption that the speech-protective standards of a public forum apply to filmmaking just as they apply to other speech. This assumption flows from a simple, initially attractive syllogism:

- **Major premise:** All the details of forum analysis, including the speech-protective rules of a public forum, apply to any speech the First Amendment protects.

- **Minor premise:** The First Amendment protects filmmaking.

- **Conclusion:** All the details of forum analysis, including the speech-protective rules of a public forum, apply to filmmaking.

This syllogism also undergirds Price's argument in defense of the district court's decision.

The United States argues that the syllogism proceeds from a flawed major premise because not every activity the First Amendment protects as speech benefits from the strict, speech-protective rules of a public forum. Because a filmmaker does not seek to communicate with others at the location in which he or she films, the filmmaker does not use the location as a "forum." Therefore, the United States argues, the district court's forum analysis was misplaced. Price counters that the district judge had it right: There is no basis to distinguish between filmmaking and other activities protected by the First Amendment.

We think the Government is correct. Based upon the historical underpinnings of forum analysis, the evolution of this analytical framework, and the cases in which the Supreme Court has applied it, we are convinced that it would be a category error to apply the speech-protective rules of a public forum to regulation of an activity that involves merely a non-communicative step in the production of speech. Although that activity warrants solicitude under the First Amendment, that solicitude does not come from the speech-protective rules of a public forum. In reaching this conclusion we are buoyed by the Supreme Court's warning against extending the public forum doctrine "in a mechanical way" to contexts that meaningfully differ from those in which the doctrine

has traditionally been applied. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998).

We begin by examining the history of forum analysis and how the Supreme Court has described and justified it. Modern forum analysis came to fruition in the 1983 case of *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, but its seed had been planted decades earlier. Although the earlier cases do not present a fully developed forum doctrine, they are widely cited for their descriptions of the types of government-controlled property that are subject to special rules under the First Amendment. In *Hague v. CIO*, for instance, the Court had stated:

> Wherever the title of streets and parks may rest, they 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*. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

307 U.S. 496, 515 (1939) (emphasis added). Similarly, in *Schneider v. State of New Jersey, Town of Irvington*, the Court had said that "the streets are natural and proper places *for the dissemination of information and opinion*." 308 U.S. 147, 163 (1939) (emphasis added). Soon thereafter, in *Cox v. State of New Hampshire*, the Court summarized the relevant case law as follows:

> As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge *the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.*

312 U.S. 569, 574 (1941) (emphasis added).

In the 1970s, the Court began using the term "public forum" to denote government-controlled property on which the Government would have to tread far more lightly in regulating speech. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (describing municipal theaters as "public forums designed for and dedicated to expressive activities"); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (declaring that "the business of a military installation" is "to train soldiers, not to provide a public forum").

Perry was the culmination of this doctrinal evolution. There, the Court delineated the contours of forum analysis as we know it. It quoted the above passage from *Hague* and relied upon other proto-forum-analysis cases to announce that "[i]n places which by long tradition or by government fiat have been *devoted to assembly and debate*, the rights of the state to limit expressive activity are sharply circumscribed." 460 U.S. at 45 (emphasis added).

Two related commonalities run through the cases from *Hague to Perry*: the types of activities associated with public forums and the proffered justification for affording special protection to those activities in a public forum. As for the types of activities, the 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. It should come as no surprise, therefore, that the Court in *Perry* described the rule for a traditional public forum as follows: "In these quintessential public forums, the government may not prohibit all *communicative* activity." *Id.* (emphasis added).

The emphasis on communicative activities makes perfect sense considering the second commonality in the foundational cases: basing the justification for heightened protection of communicative activities in traditional public forums on their having "immemorially been held in trust" for that activity, and on participation in that activity being a privilege the public has enjoyed "time out of mind." *Hague*, 307 U.S. at 515. As explained by the most eloquent Professor Harry Kalven, Jr., this longstanding use of public forums provides the public with an "easement" on this type of property. *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 13 (1965). It follows, as the Supreme Court has demonstrated, that to determine whether the highly speech-protective rules of a public forum apply to a given property, the question for a court is whether there is "a traditional right of access . . . comparable to that recognized for public streets and

parks." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).

Unsurprisingly, every single Supreme Court case from *Perry* onward in which the application of forum analysis was at issue involved communicative activity. *See, e.g., Perry*, 460 U.S. at 37 (interschool mail system); *Taxpayers for Vincent*, 466 U.S. at 789 (lampposts used to hang signs); *Cornelius*, 473 U.S. at 801) (access to government-created charity drive conducted in federal workplaces during working hours); *Forbes*, 523 U.S. at 666 (1998) (debate among political candidates broadcast on public television stations). This buttresses our conclusion that forum analysis applies only to communicative activities, not to activities that, even if generally protected by the First Amendment, are not communicative.

Though protected as speech under the First Amendment, filmmaking, like typing a manuscript, is not itself a 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. Creation of speech is not the type of activity for which streets and parks have been used "time out of mind," and therefore it cannot be said that they have "im-memorially been held in trust" for such activity. There is no historical right of access to government property in order to create speech.

Price argues our distinction between communicative activity and filmmaking contradicts the consensus of the courts of appeals: "Every circuit court to address the issue," he says, "has held that the

First Amendment protects the right to make audio and/or video recordings in public places."

The cases Price cites do not establish a general right to create recordings in public places. Save for one, those cases deal with the filming of a public official (usually a police officer) performing public duties on public property. *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 832 (1st Cir. 2020); *Fields v. City of Phila.*, 862 F.3d 353, 355-56 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 687-88 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1, 7-8 (1st Cir. 2014); *Alvarez*, 679 F.3d at 595-97; *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Filming a public official performing public duties on public property implicates unique first amendment interests. "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). It should come as no surprise, therefore, that these cases do not speak of a sweeping right to record in public, but of a narrower right "to gather information about what public officials do on public property." *Smith*, 212 F.3d at 1333.

We understand these cases as standing for the proposition that it is unreasonable to issue a blanket prohibition against the recording of a public official performing public duties on public property, so long as the recording does not interfere with the performance

of the official's duties. "Such peaceful recording of [the performance of a public duty] in a public space . . . is not reasonably subject to limitation." *Glik*, 655 F.3d at 84. This helps explain why these cases make no effort to determine whether the location of the recording is a public forum: Because prohibiting the recording of a public official performing a public duty on public property is unreasonable, the specific nature of the public property is irrelevant.

Of the cases cited by Price, the only one that reaches beyond the recording of a public official on public property is *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021). The court in that case concluded that a city ordinance banning the video recording of a child without the consent of the child's guardian was unconstitutional as applied to a person who wished to record alleged violations of a permit issued to a youth center by the city. *Id.* at 918. As the court noted, however, the plaintiff's video recordings were "of matters of public controversy" for dissemination to the public, which the court likened to "news gathering." *Id.* at 923. Even that case, therefore, does not suggest a general right to record on public property.*

Although the *Ness* court proceeded to apply traditional forum analysis in concluding that the ordinance was unconstitutional, *id.*, its analysis does

* The same goes for *John K MacIver Institute for Public Policy, Inc. v. Evers*, 994 F.3d 602 (7th Cir. 2021), invoked by our dissenting colleague as support for his contrary position. That case, which does not even deal with filming, holds merely that forum analysis applies to "gathering information for *news* dissemination." *Id.* at 612 (emphasis added).

not resolve the key question here. After noting that "video recording is speech," the court merely assumed forum analysis should apply; it did not grapple with the differences between communicative activity and video recordings. *Id.* As we have explained, extending traditional forum analysis in this manner ignores the analytical underpinnings of forum analysis.*

B. Reasonableness

Price asserts that the regulation of filmmaking is subject to heightened scrutiny when the filming takes place on NPS land considered a traditional public forum or on land designated by the NPS as a free speech area. But the key takeaway from the preceding analysis is that, with respect to noncommunicative first amendment activity such as filmmaking, the highly-protective rules of a traditional public forum are inapplicable. As a result, filmmaking is subject to the same degree of regulation in a traditional public forum as it would be in a nonpublic forum. The same surely applies to filmmaking in the designated free speech areas the district judge identified as other NPS land in which heightened scrutiny ought to apply. 514 F. Supp. 3d at 187. Those areas are limited public forums, which the Government has opened specifically for "demonstrations" and the sale or distribution of message-bearing items, *see* 36 C.F.R. § 2.52-2.53, but

* Our conclusion about the applicability of forum analysis to filmmaking is based upon the difference between communicative activity and steps in the creation of speech. Forum analysis may well apply to live streaming, which is communicative activity, albeit to people who are not necessarily located in the forum in which the streaming is conducted.

not for noncommunicative first amendment activity such as filmmaking. For that type of activity, these areas are effectively nonpublic forums.

The upshot is that filmmaking on all NPS land is subject to the same "reasonableness" standard that applies to restrictions on first amendment activity in a nonpublic forum: The "restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum," *Good News Club*, 533 U.S. at 106-07 (cleaned up).

It follows that *Boardley* (upon which the district judge and Price rely) has nothing to do with this case. That case dealt with the distribution of written materials, 615 F.3d at 512, a communicative activity to which the heightened speech-protective rules of a public forum undoubtedly apply. Here, by contrast, we must assess the permit-and-fee requirements under the aforementioned "reasonableness" standard.

As several of our sister circuits have recognized, "reasonableness" requires something more than the toothless "rational basis" test used to review the typical exercise of a state's police power. *See NAACP v. City of Phila.*, 834 F.3d 435, 443-44 (3d Cir. 2016); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 966-67 (9th Cir. 2002); *Multimedia Pub. Co. of S.C. v. Greenville–Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993). At the same time, "[r]easonableness is a relatively low bar," *NAACP*, 834 F.3d at 443, so regulations subject to this standard are subject "must survive only a much more limited review" than are regulations subject to heightened

(intermediate or strict) scrutiny, *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Moreover, a reasonable regulation "need not be the most reasonable or the only reasonable limitation," *Cornelius*, 473 U.S. at 808. Indeed, "there is no requirement . . . 'that the restriction be narrowly tailored' to advance the government's interests." *Hodge v. Talkin*, 799 F.3d 1145, 1164-65 (D.C. Cir. 2015) (quoting *Cornelius*, 473 U.S. at 809). Crucially, the "reasonableness" of any restriction "must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 806, 809. And, finally, "reasonableness" may be established by evidence in the record or even by a commonsense inference. *See NAACP*, 834 F.3d at 443-44 (summarizing relevant Supreme Court precedent).

No party argues (nor could they) that the permit-and-fee requirements discriminate based upon viewpoint. Therefore, we need assess only whether those requirements are reasonable.

The Government argues the permit-and-fee regime furthers two significant interests: (a) raising revenue to maintain and improve the parks; and (b) ensuring that filming does not harm federal lands or otherwise interfere with park visitors' enjoyment of them. Price counters the revenue-raising justification, saying the district judge correctly concluded it runs afoul of the well-settled rule that the Government may not "impose a charge for the enjoyment of a right granted by the federal constitution," *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

Price further argues the permit requirement is unconstitutional because, insofar as it is justified as protecting park land, the distinction in the regulation between commercial and noncommercial filmmaking bears no relationship to that purported interest.

1. The fee requirement

We have no difficulty rejecting Price's contention that the location fee violates the *Murdock* rule. The fee is not an impermissible charge for engaging in constitutionally protected activity; it is reasonable extraction of a rent by the owner of a property. As the Eleventh Circuit has noted, "reasonableness, for purposes of forum analysis, includes a commercial component." *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1309 (11th Cir. 2003). With respect to a nonpublic forum, "reasonable regulations may include profit-conscious fees for access for expressive conduct, in a manner similar to fees that would be charged if the forum was owned by a private party (i.e., a fee for an auditorium for a dance recital, or a fee for displaying advertisements in a newspaper)." *Id.* That is why a government agency may extract rent from a vendor that sells newspapers in a government-controlled airport or subway station. *See id.*; *Jacobson v. City of Rapid City*, 128 F.3d 660, 664 n.2 (8th Cir. 1997); *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 775 (2d Cir. 1984) ("If Gannett were to place its news-racks on privately owned business property it undoubtedly would have to pay rent to the owner of the property. The fact that the business property in question is

owned by the MTA should confer no special benefit on Gannett.").

Charging for commercial use of park land is no different. The Government has not singled out speech to charge a fee; as detailed above, it charges a fee for all types of commercial activity on land controlled by the NPS, which is consistent with the Congress's declaration "that it is the policy of the United States that the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9). The fee requirement merely puts a commercial filmmaker on the same footing as any other person who uses park land for a commercial purpose, such as a concessionaire. Just as the Government may charge the concessionaire a rental fee, so too may it charge the commercial filmmaker a usage fee.

We do not suggest that any fee would be constitutionally permissible or that any as-applied challenge to the fee charged by the NPS would fail. We simply reject the district judge's categorical conclusion that "any attempt to justify § 100905's permitting regime on the basis of a governmental need to raise revenue is a dead end," 514 F. Supp. 3d at 190, and conclude that on the present record, there is no basis to say the fee requirement is unreasonable. Which brings us to the permit requirement.

2. The permit requirement

Protecting and properly managing park lands are undoubtedly significant governmental interests, *see Boardley*, 615 F.3d at 519. With regard to whether a small film crew with a small amount of equipment

implicates those interests, we find illuminating the words of the NPS when it first adopted the regulation:

> While it could be assumed that crews of three people or fewer have less potential for causing resource damage or interfering with the public's use or enjoyment of the site, the agencies governed by this regulation manage and protect some of the nation's most treasured and valuable natural and cultural resources. In many circumstances it is important for land managers to know the specific time and location of certain activities so permit terms and conditions may be used to mitigate the possibility of resource damage or impact to visitors. For example, park units may have limited space, fragile resources, or [may] experience high visitation during a specific time period. Refuges may need to protect nesting areas of threatened or endangered species during certain times of the year.

Commercial Filming and Similar Projects and Still Photography Activities, 78 Fed. Reg. 52,087, 52,090 (Aug. 22, 2013).

Price gives us no basis for second guessing the factual underpinnings of this rationale for requiring filmmakers to get a permit. What remains is his question about under-inclusiveness, for which he points to the disparate treatment of a small commercial production, for which a permit is required, and a larger non-commercial production, which is exempt from the permit requirement. Although Price

raised the question to argue the permit requirement fails heightened scrutiny, his point is relevant, as far as it goes, even under the much less demanding standard of "reasonableness."

An argument that a restriction on speech is underinclusive faces an uphill battle, even when the restriction is subject to heightened scrutiny. Indeed, "it is surprising at first glance that a regulation of speech should ever be found impermissibly *underinclusiv*e," *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 956 (D.C. Cir. 1995) (cleaned up), for, as the Supreme Court reminds us, "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992). Thus, "an underinclusive . . . regulation that is otherwise valid must be found to be constitutional so long as it does not favor one side of an issue and its rationale is not undermined by its exemptions." *ISKCON*, 61 F.3d 957.

There can be no serious argument that the permit requirement favors one side of any issue. Nor does the distinction between commercial and non-commercial filming undermine the NPS's rationale for requiring a permit. As the Government points out, it stands to reason that "an expansive operation that generated no income would be rare compared to the common occurrence of large-scale commercial filming." It follows that a commercial film production is likely to involve more activities that are disruptive to park operations and are more likely to cause damage to park resources than does a non-commercial film production.

Therefore, the distinction between commercial and non-commercial filming seems reasonably related to the Government's interests. While it may be that "these purposes would be more effectively and not so clumsily achieved" by drawing different distinctions, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297 (1984), that possibility does not make the line NPS has drawn unreasonable. Even if the question were a closer one, we would not have "the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 299.

As with the fee requirement, we have no occasion to foreclose the possibility of a successful as-applied challenge to the permit requirement. We hold only that, on the record before us, we cannot conclude the permit requirement is facially unreasonable.*

3. A brief rejoinder regarding the "news-gathering" exception

Price argues that the special treatment the NPS regulations afford to "news-gathering activities" amounts to an impermissible content-based distinction. He further argues that the distinction in the regulations between "news-gathering activities"

* Because we dispose of the case on this ground, we have no occasion to comment on (1) the propriety of the district court's issuing a nationwide injunction or (2) whether the district court's over-breadth analysis, which pays little attention to proportionality, is consistent with our precedent and that of the Supreme Court, *see Hicks*, 539 U.S. at 122; *United States v. Williams*, 553 U.S. 285, 292-93 (2008); *Ass'n of Priv. Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 456-57 (D.C. Cir. 2012).

(exempt from the permit-and-fee requirements) and filming a "documentary" (subject to the permit-and-fee requirements, 43 C.F.R. §§ 5.4, 5.12), is untenable and arbitrary.

Even if these arguments raised a real problem with a part of the regulations, they would not be grounds for facially invalidating the entire permit-and-fee regulation, much less the statute. In any event, the arguments are without merit. The favorable treatment of news-gathering is but an example of the unremarkable practice of the Congress "sometimes grant[ing] the press special privileges and immunities." *Associated Press v. F.C.C.*, 452 F.2d 1290, 1298 (D.C. Cir. 1971); *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 579 (1977) (holding a state may privilege the press by exempting it from a right-of-publicity tort). Indeed, the exemption and the definition of "news-gathering activities" in the regulations are modeled on the Freedom of Information Act, which provides for a lower fee to be charged "a representative of the news media, 5 U.S.C. § 552(a)(4)(A)(i). Considering the centrality of the unimpeded functioning of the news media to the health of the Republic, an exception for "news-gathering" is certainly reasonable.

The distinction between news-gathering and filming a documentary is just as benign as the exemption for news-gathering. To the extent that a documentary is not "news," i.e., does not contain "information that is about current events or that would be of current interest to the public, gathered by news-media entities for dissemination to the public," 43 C.F.R. § 5.12, the distinction between filming a

documentary and news-gathering is no different than the distinction between filming a drama and news-gathering. And to the extent the documentary is "news," it surely is included in the exception for "news-gathering."

III. Conclusion

To summarize, although filmmaking is protected by the First Amendment, the specific speech-protective rules of a public forum apply only to communicative activity. Consequently, regulations governing filmmaking on government-controlled property need only be "reasonable," which the permit-and-fee requirements for commercial filmmaking on NPS land surely are. We therefore reverse the grant of Price's motion for judgment on the pleadings and the denial of the defendants' motion for judgment on the pleadings; vacate the declaratory judgment and the permanent injunction entered by the district court; and remand the case to that court with instructions to deny Price's motion for judgment on the pleadings and to grant the defendants' motion for judgment on the pleadings.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring: Although I am in complete agreement with Judge Ginsburg's analysis and join it fully, I write separately only to emphasize the limited reach of the court's holding. We conclude that the regulation of most non-communicative speech on government property is subject to "reasonableness" review. Maj. Op. at 2, 16-17. We need not—and do not—explain the full contours of what does and does not constitute

"communicative speech." Under Supreme Court precedent, "communicative" speech is that which "inten[ds] to convey a particularized message" in a manner that allows others to understand it. *Cf. Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative"). After today, we will still apply heightened scrutiny to a wide variety of speech. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 569 (1995) (finding "protected expression" as varied as the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll"). Price's filmmaking presents a paradigmatic example of non-communicative speech, which is itself an oxymoronic term. As Judge Ginsburg explains, it "is merely a *step* in the creation of speech." Maj. Op. at 15 (emphasis added). Indeed, Price will still need to edit and show his film before "communicating" what he "inten[ds] to convey." *Spence*, 418 U.S. at 410-11.

TATEL, *Circuit Judge*, dissenting: Federal law prohibits anyone from engaging in "commercial filming activities" in the national parks without first obtaining a permit and paying a fee. 54 U.S.C. § 100905(a)(1). Even though our court recently struck down similar restrictions on speech in national parks as "overbroad" and "antithetical to . . . core First Amendment principle[s]," *Boardley v. United States Department of Interior*, 615 F.3d 508, 511 (D.C. Cir. 2010), the court today upholds these restrictions on grounds untethered from our court's precedent and that of our

sister circuits. Because the permit and fee requirements penalize far more speech than necessary to advance the government's asserted interests, they run afoul of the First Amendment.

I.

Under 54 U.S.C. § 100905, any person who wishes to conduct "commercial filming activities" in any national park must obtain a permit and pay a fee. Designed solely to "provide a fair return to the United States," the fee is "in addition" to the government's recovery of all "costs incurred as a result of filming activities." *Id.* § 100905(a)–(b). Although the statute contains no definition of "commercial filming," the National Park Service's (NPS) implementing regulations define the term as any "recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income." 43 C.F.R. § 5.12. Commercial filming includes "feature film, videography, television broadcast, [and] documentary," *id.*, but the term excludes "[n]ews-gathering activities." *Id.* § 5.4.

Appellee Gordon Price, without first obtaining a permit or paying a fee, used a single camera and microphone to film in Virginia's Colonial National Historical Park, intending to document rumored "hauntings and . . . unsolved murders" in the area. Compl. ¶¶ 37-39. Using his footage, Price produced *Crawford Road*, an independent film that premiered for an audience of 250 people and later acquired additional views on social media platforms. *Id.* ¶¶ 40-42. Several months later, "two NPS officers came to Price's [workplace] and issued him a [criminal

citation]" for filming without a permit. *Id.* ¶ 43. After the district court dismissed the charge (at the NPS's request), Price brought a facial challenge to the constitutionality of section 100905 and its implementing regulations (collectively, "Permit Regime"). *Price v. Barr*, 514 F. Supp. 3d 171, 179–80 (D.D.C. 2021). Acting on cross-motions for judgment on the pleadings, the district court ruled that the Permit Regime violates the First Amendment. *Id.* at 181.

II.

To evaluate a facial challenge like Price's, we must first determine whether the regulated activity is "speech" protected by the First Amendment. *Boardley*, 615 F.3d at 514 (internal quotation marks omitted). If so, we "identify the nature of the forum, because the extent to which the [g]overnment may limit access depends on whether the forum is public or non-public." *Id.* (internal quotation marks omitted). Finally, we "assess whether the government's justifications for restricting speech in the relevant forum satisfy the requisite standard." *Id.* (internal quotation marks omitted). As relevant here, restrictions on speech in traditional public forums like the National Mall and designated public forums like "`free speech areas'" within the national parks must, at minimum, be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternatives for communication." *Id.* at 515-16 (describing the standard of scrutiny applicable to "[c]ontent-neutral restrictions on the time, place, or manner of speech in a public forum").

In this case, how we proceed at each step of our analysis is controlled by *Boardley v. United States Department of Interior*, in which our court held facially unconstitutional NPS regulations making it "unlawful to engage in expressive activities within any . . . national parks unless a park official first issue[d] a permit." *Id.* at 511. At the outset, we observed that requiring a permit for "public expressions of views" unquestionably regulated "'speech' within the meaning of the First Amendment." *Id.* at 512, 514. We then explained that the NPS regulations applied in "all . . . locations within the national parks," including the "'free speech areas' . . . and other public forums within [the] . . . parks." *Id.* at 515, 525. "[W]ithout deciding the forum status of every part of every national park," *id.* at 521, we analyzed the NPS regulations as restrictions on speech in public forums, asking whether the permit requirement was narrowly tailored to achieve the government's substantial interests in protecting national park resources and facilities from damage, minimizing interference with park activities, and preserving peace and tranquility within the parks. *Id.* at 519-24. We concluded that the regulations were not narrowly tailored because they required permits for large groups, small groups, and individuals even though requiring permits for "individuals and small groups promote[d] the government's [interests] only marginally." *Id.* at 522; *see id.* at 524 ("Because the means chosen are . . . substantially broader than necessary to achieve the government's interest[s], the NPS regulations are overbroad and not narrowly tailored." (internal quotation marks and citation omitted)).

Like the expressive activities at issue in *Boardley*, the "commercial filming activities" regulated by the Permit Regime constitute speech. Although the government argued in the district court that filming receives no First Amendment protection, it wisely dropped that argument on appeal because "[t]he act of *making* an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). Indeed, the longstanding right to "expression by means of [audiovisual recording]," *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), would have little meaning if "the act of creating that material" were unprotected. *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017); *see Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (To claim that "the act of creating an audiovisual recording is not speech protected by the First Amendment . . . is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not.").

Moreover, like the permit requirement in *Boardley*, the Permit Regime at issue here targets speech in public forums. As the government concedes, the Permit Regime applies to all NPS lands, including both "areas that [undoubtedly] meet the definition of traditional public forums" as well as "'free speech areas'" that constitute "'designated public forums.'" *Boardley*, 615 F.3d at 515; *see* Appellant's Br. 41 (Permit Regime "appl[ies] on *all* NPS lands, including . . . areas that constitute public forums."); *see also* 54 U.S.C. § 100501 (Permit Regime applies to "any area of land and water administered by the Secretary [of the

Interior], acting through the Director [of the NPS], for park, monument, historic, parkway, recreational, or other purposes."). Because "[t]hese areas are subject to the same permit [and fee] requirement[s] as all other locations within the national parks," they "must be analyzed as restrictions on speech in public forums, and we need not . . . decide whether the same analysis would apply to the diverse range of other areas within the national parks." *Boardley*, 615 F.3d at 515-16.

The government argues that because many national parks include nonpublic forums, we must employ the lower standard of scrutiny applicable to content-neutral restrictions on speech outside public forums. In *Boardley*, however, we rejected this precise argument. We recognized that "many national parks include areas—even large areas, such as a vast wilderness preserve—which never have been dedicated to free expression and public assembly, would be clearly incompatible with such use, and would therefore be classified as nonpublic forums." *Id.* at 515. We also observed that, as in this case, the record lacked evidentiary submissions to "determine the forum status of the hundreds of national parks governed by the NPS regulations." *Id.* Nevertheless, because the national parks' public forums "[were] subject to the same permit requirement as all other locations within the . . . parks," we analyzed the NPS regulations as restrictions on speech in public forums "without deciding the forum status of all 391 national parks." *Id.*

The government makes much of the fact that Price's "own filming activity . . . occur[red] outside of any public forum." Appellant's Br. 59. But the location

of Price's filming activity is irrelevant because, as the Supreme Court has made clear, "in the area of freedom of expression[,] an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

At *Boardley*'s third step, we assess whether the NPS's justifications for restricting speech in public forums satisfy the requisite standard of scrutiny. *Boardley*, 615 F.3d at 514. The government contends that the Permit Regime is content-neutral and, as such, need only be "'narrowly tailored to serve a significant governmental interest' and 'leave open ample alternatives for communication.'" Appellant's Br. 42 (quoting *Boardley*, 615 F.3d at 516). But even if the Permit Regime is content-neutral, it still fails to withstand scrutiny under *Boardley*'s precise reasoning.

Like the NPS regulations in that case, the Permit Regime burdens substantially more speech than necessary to achieve the government's significant interests in protecting NPS resources and preventing interference with park visitors. *See Boardley*, 615 F.3d at 519 (finding significant governmental interests in protecting the national parks' natural and cultural resources, protecting visitors, and avoiding interference with park activities). Because "commercial filming" includes any videography intended to "generat[e] income," 43 C.F.R. § 5.12, the Permit Regime applies to an extraordinarily broad group of people, ranging from large-scale filming operations, to small documentary film crews, to

individuals who take short videos on their phones and later monetize this content on social media platforms. Even 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. Although large commercial filming projects may well "involve equipment operators, filming subjects, and sustained operations" that burden park resources and disturb visitors, Appellant's Br. 52, the government provides no reason to think that individuals and small groups "interfere meaningfully with [these] interests," *Boardley*, 615 F.3d at 521 (internal quotation marks omitted); *see id.* at 522 ("[T]he government has failed to show that *most* individuals and small groups . . . pose such problems."). "No doubt *some* individuals and small groups will cause these problems, but many will not; and the government has not explained why those [with the intent to generate income] are more likely to be problematic" than visitors who capture videos for personal use. *Id.* at 522. Thus, like the regulations in *Boardley* that "applie[d] not only to large groups, but also to small groups and even lone individuals," the Permit Regime "target[s] much more [speech] than necessary" to advance the government's asserted interests in protecting NPS resources and park visitors. *Id.* at 520, 523.

The government argues that the Permit Regime, in addition to protecting NPS resources and park visitors from interference by filmmakers, advances a second significant governmental interest: "raising money." Appellant's Br. 42. But this interest is a nonstarter because the government may not "impose a charge for the enjoyment of a right granted

by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Although the government may impose licensing fees to "defray the expenses of policing" activities guaranteed by the First Amendment, any such fees may not exceed the amount needed to cover administrative costs. *Id.* at 113-14; *see Cox v. State of New Hampshire*, 312 U.S. 569, 577 (1941) (permitting "the charge of a fee limited to" covering administrative costs). As the statute itself and the implementing regulations make clear, the Permit Regime's fee is "in addition" to "any costs incurred as a result of filming activities or similar projects, including administrative and personnel costs." 54 U.S.C. § 100905(b); *see* 43 C.F.R. § 5.8 ("[T]he location fee is in addition to any cost recovery."). Thus, 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." *Murdock*, 319 U.S. at 113.

The government insists that the Permit Regime's fee does not impose a tax on constitutionally protected speech because it is part of a broader suite of NPS permit and fee requirements that "tax[] businesses generally." Appellant's Br. 45 (internal quotation marks omitted); *see* Majority Op. at 20 (noting that the government "charges a fee for all types of commercial activity on land controlled by the NPS"). But the challenged Permit Regime applies only to "commercial filming activities or similar projects." 54 U.S.C. § 100905(a)(1). It is thus irrelevant that other statutes and regulations not implicated in this lawsuit

apply to "commercial activity, in general." Appellant's Br. 45.

Next, the government argues that it may tax commercial filming in its "proprietary capacity," citing the Eleventh Circuit's statement in *Atlanta Journal and Constitution v. Atlanta Department of Aviation* that "'when the [government] acts as a proprietor, reasonable regulations may include profit-conscious fees for access for expressive conduct.'" Appellant's Br. 48 (first quote); *id.* at 47 (second quote) (quoting *Atlanta Journal*, 322 F.3d 1298, 1309 (11th Cir. 2003)); *see* Majority Op. at 20-21. But as the Eleventh Circuit made clear, that rule applies only to fees charged for "distribution space in a *non-public* forum." *Atlanta Journal*, 322 F.3d at 1312 (emphasis added). The Permit Regime levies fees in *public* forums. And unlike the rental fees at issue in the government's cited cases, the Permit Regime's fee applies to individuals who neither reserve "fixed locations" on government property nor use such locations "to sell, exhibit or distribute materials." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 643 (1981) (internal quotation marks omitted); *see Jacobsen v. City of Rapid City*, 128 F.3d 660, 664 n.2 (8th Cir. 1997) (explaining that the government may charge "rent . . . as landlord" when a "newspaper leases public property for commercial use"). Accordingly, the government's desire to tax commercial filming does not qualify as a "significant governmental interest." *Boardley*, 615 F.3d at 516.

Because the Permit Regime's restrictions on speech in public forums are not narrowly tailored to

serve a significant governmental interest, they cannot withstand constitutional scrutiny.

III.

My colleagues opt to forego any application of heightened scrutiny to the government's speech restrictions and instead uphold the Permit Regime under a "'reasonableness' standard." Majority Op. at 17-18. Specifically, they hold that filming is not the "type of activity" to which forum analysis applies and, thus, filming in public forums "is subject to the same 'reasonableness' standard that applies to restrictions on [F]irst [A]mendment activity in . . . nonpublic forum[s]." Majority Op. at 18 ("For [filming], these areas are effectively nonpublic forums.").

The application of forum analysis to expressive pursuits, however, is not reserved for particular types of First Amendment expression. Far from parsing different treatment for different types of expression, the Supreme Court focuses on "the character of the *property* at issue," applying public forum doctrine to "*property* which . . . by tradition or designation [is] a forum for public communication" or "expressive activity." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983) (emphasis added). Put another way, public forums are defined by "the objective characteristics of the property" or the designation of "propert[y] for expressive use." *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666, 677-78 (1998); *see Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (analyzing the "'character of the property at issue'"). If the property at issue qualifies

as a public forum, it remains so regardless of which particular type of First Amendment expression occurs within the forum. *See John K. Maclver Institute for Public Policy, Inc. v. Evers*, 994 F.3d 602, 611 (7th Cir. 2021) (explaining that forum analysis encompasses "various expressive pursuits").

True, as my colleagues observe, "earlier [Supreme Court] cases" describe public forums as "natural and proper places" for "assembly," "discussion of public questions," and "dissemination of information." Majority Op. at 11-13 (internal quotation marks omitted). But this very same case law emphasizes the broad scope of protection afforded to speech in public forums, shielding against the abridgment of "the exercise of [one's] liberty of expression in [such] places," not merely the abridgement of certain types of expression. *Schneider v. New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939); *see also Perry*, 460 U.S. at 45 ("[T]he rights of the state to limit *expressive activity* [in traditional public forums] are sharply circumscribed." (emphasis added)). Professor Harry Kalven Jr.'s conception of public forums as First Amendment "easement[s]" reinforces this point. *See* Majority Op. at 14. The venerable right protected by this "easement" is not merely the right to communicate in public forums. It is the right "to *use* the streets and parks *for communication*," which a filmmaker does, regardless of where he later displays the film. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-16 (1939) (emphasis added). My colleagues reimagine the public forum to protect the stumping politician but not the silent photographer, to shield the shouting protester but not the note-taking reporter.

These distinctions find no basis in First Amendment jurisprudence. It makes no more sense to exclude certain types of speech from public forums than it does to police which squirrels may enter a conservation easement.

More recently, several of our sister circuits have reiterated that forum analysis applies to all First Amendment expression, including filming. For example, the Seventh Circuit explained that forum analysis "addresses who has the right of access to government property" to engage in "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." *Evers*, 994 F.3d at 611-12 (emphasis added). The First, Fifth, and Eighth Circuits, moreover, have applied forum analysis to filming just as they would to any other form of speech. *See Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (applying "the level of scrutiny applicable" to "traditional public fora" because the filming activities occurred in a "public park"); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (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"); *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (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'").

Although some of these cases arose in the context of recording public officials, Majority Op. at 15, the principles they state are much broader, describing "the First Amendment's protection of the broader right to film" in public places. *Turner*, 848 F.3d at 689; *see id.* at 690 ("Like all speech, filming the police 'may be subject to reasonable time, place, and manner restrictions.'"); *Wasden*, 878 F.3d at 1203-04 (citing cases involving the filming of police officers as examples of the "'First Amendment right to film matters of public interest"); *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) ("An individual who photographs animals . . . is creating speech in the same manner as an individual who records a police encounter."). Yet the court cites not a single case that applies a "reasonableness" standard of scrutiny to a government restriction on filming in public places. By 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.

IV.

Under today's sweeping holding, regulation of filming on government property is no longer subject to heightened scrutiny, even when the filming occurs in traditional public forums where "the rights of the [government] to limit expressive activity are sharply circumscribed" or designated public forums that the government "has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45; *see* Majority Op. at 2. Before standing outside

Yosemite National Park's visitor center using a cell phone to record commentary on our national parks that will air on an advertisement-supported YouTube channel, an individual must obtain a permit and pay a fee. Before filming a protest on the National Mall, tourists must obtain a permit and pay a fee if they have any inkling that they might later make money from this footage on social media. And when the filming is spontaneous, these individuals will be criminally liable and face up to six months in prison even though they could not possibly have obtained a permit ahead of time. *See* 18 U.S.C. § 1865; 36 C.F.R. §§ 1.3, 5.5(a). By stripping public forum protection from filming, 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. *See Wasden*, 878 F.3d at 1203 (disaggregating video creation from dissemination "defies common sense"); *Fields*, 862 F.3d at 358 (similar); *Alvarez*, 679 F.3d at 595-96 (similar). I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GORDON M. PRICE, Plaintiff, v. WILLIAM P. BARR, U.S. Attorney General, et al., Defendant.	Civil Action No. 19-3672 (CKK)

MEMORANDUM OPINION
(January 22, 2021)

Plaintiff Gordon M. Price is an independent filmmaker from Yorktown, Virginia. In this action, Mr. Price asserts a facial constitutional challenge to the permitting requirements imposed on commercial filming by 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5. Mr. Price brings this action against the Attorney General of the United States of America, the Secretary of the Department of the Interior, and the Director of the National Park Service ("NPS") (collectively, "Defendants"). Defendants have now moved for a judgment on the pleadings, seeking the complete dismissal of Mr. Price's case. *See* Defs.' Mot. at 1. In turn, Mr. Price has filed a cross-motion for a judgment on the pleadings in his favor. *See* Pl.'s Mot. at 1.

Upon consideration of the briefing, the relevant authorities, and the record as a whole,[1] the Court concludes that Mr. Price has established his claim on the merits that the restrictions on commercial filming set forth in 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5, violate the First Amendment. Accordingly, the Court **DENIES** Defendants' motion for a judgment on the pleadings and **GRANTS** Mr. Price's cross-motion for a judgment on the pleadings. As set forth below, the Court will enter a declaratory judgment and permanent injunction in Mr. Price's favor.

I. BACKGROUND

A Section 100905

Mr. Price raises a facial constitutional challenge to 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5. *See* Compl. ¶ 1. Section 100905 provides that the

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[1] The Court's consideration has focused on the following briefing and material submitted by the parties:

- Compl., ECF No. 1;
- Am. Answer, ECF No. 13;
- Defs.' Mem. in Supp. of Def.'s Mot. for J. on the Pleadings ("Defs.' Mot."), ECF No. 18;
- Pl.'s Cons. Mem. of P. & A. in Supp. of Cross-Mot. for J. on the Pleadings and in Opp'n to Defs.' Mot. ("Pl.'s Mot."), ECF No. 25-1;
- Defs.' Reply in Supp. of Defs.' Mot. & Opp'n to Pl.'s Mot. ("Def.'s Opp'n"), ECF No. 31; and
- Pl.'s Reply to Defs.' Opp'n ("Pl.'s Reply"), ECF No. 33.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

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). The statute's paid permit requirement, however, does not apply to non-commercial filming. *See id.* Separately and in addition to the permit fee required for commercial filming by § 100905(a)(1), the Secretary of the Interior "shall [also] collect any costs incurred as a result of filming activities or similar projects, including administrative and personnel costs." *Id.* § 100905(b). Additionally, § 100905(c) imposes a distinct permit requirement for "still photography," applicable in limited circumstances. *Id.* § 100905(c)(1)–(2). Section 100905's permitting regime for "commercial filming" and "still photography" applies to "any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." *Id.* § 100501 (defining a "system unit"); see also *id.* § 100102(1)–(6). Section 100905 itself does not define the terms "commercial filming" or "still photography." *See id.* § 100905; Compl. ¶ 24.

The permitting regime required by § 100905 promotes two principal goals: land preservation and rent extraction. As to the former, Congress endeavored to reduce "the impairment of the values and resources which are to be protected on federal lands." H.R. Rep. 106-75, at 3 (1999). Accordingly, § 100905 prohibits the issuance of a permit for "any filming" or "still photography" that threatens "a likelihood of resource damage." 54 U.S.C. § 100905(d)(1). Section 100905, however, also

furthers the purpose of rent extraction. On its face, § 100905 states that the permit fees imposed on "commercial filming" "shall provide a fair return to the United States," measured in relation to the "number of days of the filming activity," the "size of the film crew present," the "amount and type of equipment used," *id.* § 100905(a)(1)(A)–(C), or any other factor the Secretary of the Interior deems "necessary," *id.* § 100905(a)(2). All such fees collected under § 100905 "shall be available for expenditure by the Secretary [of the Interior], without further appropriation and shall remain available until expended." *Id.* § 100905(e)(1). Notably, the statute's legislative history emphasizes the fact that "high-grossing films" are produced in national parks and indicates that § 100905's purpose "is to authorize the Secretary of the Interior . . . to assess fees for commercial filming activities on Federal lands." S. Rep. 106-67, at 2–3 (1999). Relatedly, Congress has declared "that it is the policy of the United States that the United States receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9).

To implement the permitting regime required by § 100905, the Department of the Interior ("DOI") promulgated the regulations found at 43 C.F.R. Part 5. The regulations thereunder "cover[] commercial filming and still photography activities on lands and waters administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service." 43 C.F.R. § 5.1. In accordance with § 100905, the DOI implementing regulations require a permit for "[a]ll commercial filming." *Id.*

§ 5.2(a). The DOI regulations define "commercial filming" as:

> [T]he film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income. Examples include, but are not limited to, feature film, videography, television broadcast, or documentary, or other similar projects. Commercial filming activities may include the advertisement of a product or service, or the use of actors, models, sets, or props.

Id. § 5.12. The DOI regulations, however, specifically exempt "news-gathering" activities from the permitting regime. *Id.* § 5.4(a). For the purposes of 43 C.F.R. Part 5, "news" is defined as "information that is about current events or that would be of current interest to the public, gathered by news-media entities for dissemination to the public." *Id.* § 5.12. The DOI regulations also set forth a separate set of less restrictive permitting criteria for "still photography." *Id.* § 5.2(b).

Finally, the DOI regulations enumerate seven permissible bases for the denial of a commercial filming or still photography permit. *See id.* § 5.5(a)–(g). Specific to the national parks themselves, a permit may be denied where the commercial filming or still photography would "[r]esult in unacceptable impacts or impairment to National Park Service resources or values." *Id.* § 5.5(d). Failure to comply with any provision of 43 C.F.R Part 5, including the

obligation to procure a permit for commercial filming or still photography, is a violation of 36 C.F.R. § 5.5. Thereunder, a permit violation carries the potential for fines and up to six months in prison. *See* 18 U.S.C. § 1865; 36 C.F.R. § 1.3.

B. Mr. Price's Commercial Filming

Mr. Gordon Price is a part-time independent filmmaker who lives and works in Yorktown, Virginia. *See United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. July 31, 2019), ECF No. 10-1 (Price Decl.), ¶ 1. In February 2017, Mr. Price and a colleague began filming an independent feature entitled *Crawford Road* about "a stretch of road in York County, Virginia, that has long been the subject of rumors of hauntings and was the location of unsolved murders." *Id.* ¶ 2. Mr. Price filmed some *Crawford Road* scenes "in areas open to the general public at about four locations within the Yorktown Battlefield in the Colonial National Historical Park," which is property administered by NPS. *Id.* ¶ 8. Mr. Price shot multiple scenes on the Yorktown Battlefield, as well as a location known as "Crybaby Bridge" along Crawford Road. *Id.* ¶ 9. No more than four people were present during this filming, and Mr. Price used only a camera tripod and a microphone, without any "heavy equipment," for his recordings in the park. *Id.* Mr. Price, however, "neither sought nor received a permit from [NPS] before filming on the Battlefield." *Id.* ¶ 10.

Crawford Road premiered at a restaurant in Newport News, Virginia on October 17, 2018 before a crowd of approximately 250 people. *Id.* ¶¶ 3–4. The

film garnered some attention in the local press and on social media sites. *See id.* ¶¶ 5–6. In December 2018, however, two NPS officers located Mr. Price at work and "issued him a violation notice for failure to obtain a commercial filming permit under 36 C.F.R. § 5.5(a)." *Id.* ¶ 11; *see also United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Mar. 26, 2019), ECF No. 1 (Not. of Violation), at 1. Mr. Price subsequently appeared before the United States District Court for the Eastern District of Virginia, and, after retaining counsel, challenged his 36 C.F.R. § 5.5 violation on grounds that § 100905 was "facially invalid as a content-based prior restraint of freedom of speech." *United States v. Price,* No. 4:19-po-180-DEM (E.D. Va. July 31, 2019), ECF No. 9 (Mot. to Dismiss), at 1. In response, the government elected to dismiss the charge against Mr. Price rather than litigating the constitutional question raised, explaining that "the interests of justice [were not] served by pursuing this prosecution." *United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Aug. 27, 2019), ECF No. 19 (Gov't Mot. to Dismiss), ¶ 6.

Nonetheless, the government maintained that § 100905's permitting regime was constitutional, that all commercial filming within NPS's jurisdiction still required a permit, and that "failure to comply with any provision of 43 CFR part 5 is a violation." *Id.* ¶¶ 2–5. As such, "the government did not suggest in any way that it would refrain from issuing further violation notices to Mr. Price if he films on federal land in the future." Compl. ¶ 53; Am. Answer ¶ 53. Ultimately, the district court dismissed the criminal case against Mr. Price and found that the government's voluntary dismissal deprived the court

of jurisdiction to consider the merits of Mr. Price's First Amendment challenge to § 100905 and its implementing regulations. *See United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Nov. 1, 2019), ECF No. 23 (Order), at 4. The district court, however, advised Mr. Price that he could still "assert his constitutional claims in a civil action." *Id.*

Following the dismissal of the charge against Mr. Price, the specter of future violations under § 100905 had at least two effects on Mr. Price's conduct. First, Mr. Price altered his plans for his original *Crawford Road* film. After receiving the 36 C.F.R. § 5.5 violation notice, Mr. Price "canceled upcoming screenings of *Crawford Road* and reedited [the film] to delete footage that had been taken on property covered by the charge." Compl. ¶ 46; Am. Answer ¶ 46. He also suspended ongoing negotiations regarding the distribution of the film and presently remains unable to obtain distribution for *Crawford Road*. *See* Compl. ¶ 47; Am. Answer ¶ 47. Second, Mr. Price altered the plans for his new film entitled Ten Doors, United States v. Price, No. 4:19-po-180-DEM (E.D. Va. Aug. 29, 2019), ECF No. 20-1 (Price Decl.), ¶ 3, which was to "include a recreation of the Saltville Massacre that occurred on October 3, 1864, in Saltville, Virginia." *Id.* In preparation for this second film, Mr. Price had scouted filming locations "that included the Yorktown Battlefield and the Manassas National Battlefield," both federal parks under NPS jurisdiction. *See id.* ¶ 4. Mr. Price, however, has not proceeded with any filming at these sites out of concern for a subsequent citation and penalty under § 100905 and its implementing regulations. *See id.*

On December 9, 2019, Mr. Price filed a civil complaint with this Court challenging the facial constitutionality of 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5. *See* Compl. ¶ 1. In his complaint, Mr. Price asks this Court for "[a] declaratory judgment stating that the requirements in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 that those engaged in 'commercial filming' must obtain permits and pay fees are unconstitutional." Compl. at Prayer for Relief, ¶ A. Relatedly, Mr. Price seeks "[a] permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liabili ty thereunder." Compl. at Prayer for Relief, ¶ B. To support his request for relief, Mr. Price alleges, in Counts I through VI of his complaint, six reasons why 54 U.S.C. § 100905 and its implementing regulations violate the First Amendment. *See* Compl. ¶¶ 56–107. In Count VI of his complaint, Mr. Price also alleges that 54 U.S.C. § 100905 and its implementing regulations violate the equal protection component of the Fifth Amendment. *See* Compl. ¶¶ 103–07.

In response to Mr. Price's complaint, Defendants filed their answer on February 11, 2020, see Answer, ECF No. 9, and, shortly thereafter, filed an amended answer to Mr. Price's complaint on April 2, 2020, see Am. Answer, ECF No. 13. Defendants then moved under Federal Rule of Civil Procedure 12(c) for a judgment on the pleadings against Mr. Price. *See* Defs.' Mot. at 1. In turn, Mr. Price opposed Defendants' Rule 12(c) motion and filed his own cross-

motion under Rule 12(c) for a judgment on the pleadings against Defendants. *See* Pl.'s Mot. at 1. In his cross-motion, Mr. Price specifically moves the Court to "declare that the requirements in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 that those engaged in 'commercial filming' must obtain permits and pay fees are unconstitutional" and also to "permanently enjoin their enforcement and any prosecution or imposition of criminal liability thereunder." Pl.'s Mot. at 45. The parties have now completed their briefing on the pending cross-motions, and those motions are ripe for this Court's review.

II. LEGAL STANDARD

The parties have each moved for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Rule 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "[A] Rule 12(c) motion asks the court to render a judgment on the merits by looking at the substance of the pleadings and any judicially noted facts." *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) (quotation omitted). "Thus, a Rule 12(c) motion requires the court to consider and decide the merits of the case, on the assumption that the pleadings demonstrate that there are no meaningful disputes as to the facts such that the complaint's claims are ripe to be resolved at this very early stage in the litigation." *Id.* (citing 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1369 (3d ed. 2004)).

To prevail on a Rule 12(c) motion, the "moving party [must] demonstrate[ ] that no material fact is in dispute and that it is entitled to judgment as a matter of law." *Schuler v. PricewaterhouseCoopers*, LLP, 514 F.3d 1365, 1370 (D.C. Cir. 2008) (quoting *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992)). "[T]he Rule 12(c) burden is substantial: if the Rule 12(c) movant cannot show both that there is no material dispute of fact (as reflected in the parties' pleadings) and that the law is such that the movant is entitled to judgment as a matter of law, then the motion for judgment on the pleadings must be denied." *Murphy*, 326 F.R.D. at 49 (emphasis in original).

III. DISCUSSION

For the reasons set forth herein, the Court concludes that Mr. Price has established Article III standing to pursue his claim. Mr. Price has also established that 54 U.S.C. § 100905 and its implementing regulations impose a content-based restriction on expressive speech in public forums that runs afoul of the First Amendment. Accordingly, the Court **DENIES** Defendants' motion for a judgment on the pleadings, and the Court **GRANTS** Mr. Price's cross-motion for a judgment on the pleadings. The Court shall enter a declaratory judgment and permanent injunction in Mr. Price's favor.

A. Article III Standing

"The Constitution grants Article III courts the power to decide 'Cases' or 'Controversies.'" *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (quoting U.S. CONST. Art. III, § 2). "The doctrine of standing

implements this requirement" by demanding "that a case embody a genuine, live dispute between adverse parties." Casey, 141 S. Ct. at 498. "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). In this case, Defendants argue that Mr. Price lacks Article III standing to challenge the constitutionality of § 100905 and its implementing regulations because he "has failed to establish a sufficient injury in fact." *See* Defs.' Mot. at 10. The Court disagrees.

Mr. Price raises a classic First Amendment pre-enforcement challenge to § 100905 and its implementing regulations. "Pre-enforcement review is permitted where the threatened enforcement of a law is 'sufficiently imminent.'" *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 370 (D.C. Cir. 2020) (quoting SBA, 573 U.S. at 159). In this context, "a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Woodhull*, 948 F.3d at 370 (quotations omitted). The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") "has interpreted the Supreme Court's pre-enforcement standing doctrine broadly in the First Amendment sphere," *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 15 (D.D.C. 2018), and

"[a]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law," *Woodhull*, 948 F.3d at 370 (quotation omitted).

Mr. Price meets the pre-enforcement standard for injury-in-fact in this case. First, Mr. Price has sufficiently "allege[d] an intention to engage" in his proposed filmmaking activity. *Id.* As set forth above, Mr. Price is an independent filmmaker. *See* Compl. ¶ 36. Mr. Price is "presently working" on a new commercial film entitled *Ten Doors*, about an historical massacre in Saltville, Virginia in 1864. *See United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Aug. 29, 2019), ECF No. 20-1 (Price Decl.), ¶¶ 3–4. For this film, Mr. Price has actively scouted filming locations within two separate national park sites: Yorktown Battlefield and the Manassas National Battlefield. *See id.* ¶ 4. Moreover, these filming sites are geographically proximate to Mr. Price, himself a resident of Yorktown, Virginia, see *id.* ¶ 2, and Mr. Price has, in fact, already carried out similar commercial filming at Yorktown Battlefield for his previous production of *Crawford Road*, *see* Compl. ¶ 38; Am. Answer ¶ 38. For these reasons, Mr. Price has presented a sufficiently "credible statement" of his intention to conduct commercial filming within a national park. *ANSWER Coal. v. District of Columbia*, 589 F.3d 433, 435 (D.C. Cir. 2009); *see also Woodhull*, 948 F.3d at 370.

Next, the Court must consider whether Mr. Price's proposed course of conduct implicates a "constitutional interest." *Woodhull*, 948 F.3d at 370. It does. Filming scenes within selected locations, as Mr. Price plans to do here at Yorktown Battlefield and

the Manassas National Battlefield, is a constituent part of creating a movie. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process."). Accordingly, Mr. Price's filmmaking at these parks constitutes a form of expressive speech protected by the First Amendment. *See* disc. infra at § III.B.1; *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) ("It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity."). Mr. Price argues this point forcefully in his opening brief, see Pl.'s Mot. at 9–12, and Defendants appear to concede the argument in their opposition brief by not responding. Regardless, the Court is convinced that Mr. Price's filmmaking constitutes a form of expressive speech protected by the First Amendment. *See* disc. *infra* at § III.B.1.

Finally, Mr. Price has also established that his proposed filmmaking creates "a credible threat of prosecution." *Woodhull*, 948 F.3d at 370. Where a plaintiff "challenge[s] [a] law[] burdening expressive rights" and offers a "credible statement . . . of intent to commit violative acts," he may rely upon the "conventional background expectation that the government will enforce the law." *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 739 (D.C. Cir. 2016) (quotation omitted). This is particularly true in the First Amendment context, where the willingness of the courts "to permit pre-enforcement review is at its peak." *Id.* at 740. Consequently, Mr. Price could very well satisfy the "threat of prosecution" standard absent any showing

of prior prosecutions under § 100905 and its implementing regulations. *See Sandvig*, 315 F. Supp. 3d at 19. But, of course, in this case Mr. Price does not rely on the hypothetical. NPS officials have *already* charged Mr. Price under 36 C.F.R. § 5.5 for filming without a permit at "Yorktown Battlefield in the Colonial National Historical Park." Compl. ¶ 38; *see also United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Mar. 26, 2019), ECF No. 1 (Not. of Violation), at 1. And even while the government dismissed that charge against Mr. Price, it continued to defend the constitutionality of § 100905 and its enforcement against commercial filmmakers. *See United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Aug. 27, 2019), ECF No. 19 (Gov't Mot. to Dismiss), ¶¶ 2–5. Now, Mr. Price plans to shoot another commercial film at Yorktown Battlefield—the very same site where he received his initial violation. *See* Compl. ¶ 54. On this record, Mr. Price has convincingly demonstrated a credible threat of prosecution under § 100905 and its implementing regulations.

In sum, Mr. Price has adequately demonstrated injury-in-fact in this pre-enforcement action to challenge the restrictions on commercial filming imposed by § 100905 and its implementing regulations. *Woodhull*, 948 F.3d at 370. Defendants, moreover, do not challenge the remaining two elements of Article III standing: traceability and redressability. *See SBA*, 573 U.S. at 158. And for good reason. The restriction on Mr. Price's ability to film at Yorktown Battlefield and the Manassas National Battlefield is clearly traceable to § 100905 and its implementing regulations. Furthermore, any

unconstitutional infringement this regime might effectuate would be redressable through an injunction against its enforcement, the very relief Mr. Price now seeks. For these reasons, Mr. Price has satisfied each element of Article III standing in this action. *See SBA*, 573 U.S. at 157–58.

There is, however, an important limitation to Mr. Price's Article III standing. As noted above, § 100905 imposes two distinct permitting requirements: one for commercial filming and one for photography. *See* 54 U.S.C. § 100905(a), (c). The regulations in 43 C.F.R. Part 5 similarly distinguish between permits for commercial filming on the one hand, *see* 43 C.F.R. § 5.2(a), and for photography on the other, *see id.* at § 5.2(b). While Mr. Price has established a constitutional injury under the commercial filming regulations, the Article III "case" and "controversy" requirement still separately constrains this Court's authority to review the distinct provisions in § 100905 and 43 C.F.R. Part 5 pertaining to photography. *See Williams v. Lew*, 819 F.3d 466, 476 (D.C. Cir. 2016). This is problematic because the record in this case relates exclusively to Mr. Price's commercial filming efforts and says nothing of his photography ambitions. *See* Compl. ¶ 54; *United States v. Price,* No. 4:19-po-180-DEM (E.D. Va. Aug. 29, 2019), ECF No. 20-1 (Price Decl.), ¶¶ 3–4. In this way, Mr. Price has not established any "intention" to carry out photography in a manner that would credibly threaten prosecution under the photography permitting requirements of § 100905 and its implementing regulations. *Woodhull*, 948 F.3d at 370. Such a "controversy" is purely hypothetical at this time.

Therefore, the Court "declines to scrutinize the constitutionality of those provisions of [§ 100905 and its implementing regulations] that are not before it in this case." *Am. Soc. of Ass'n Executives v. United States*, 23 F. Supp. 2d 64, 71 (D.D.C. 1998), *aff'd sub nom. Am. Soc. of Ass'n Executives v. United States*, 195 F.3d 47 (D.C. Cir. 1999). Where a plaintiff's constitutional injury derives from a specific statutory or regulatory provision, a court should constrain its review to the alleged defect therein. *See id.*; *Tanner Advert. Grp., L.L.C. v. Fayette Cty.*, 451 F.3d 777, 795 (11th Cir. 2006) (Birch, J., concurring) ("[S]tanding to make a facial challenge to a particular provision under the overbreadth doctrine does not give the plaintiff standing to challenge other sections, or the entire statutory scheme, if the plaintiff was not injured thereunder."). To opine on the constitutionality of statutory provisions unrelated to the actual "case" or "controversy" before the Court would contravene the ethos of the Article III standing doctrine. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Mr. Price implicitly acknowledges this limitation, as he requests injunctive relief specific to the "commercial filming" provisions of 54 U.S.C. § 100905 and 43 C.F.R. Part 5. *See* Pl.'s Mot. at 45; Compl., at Prayer for Relief, ¶¶ A–B. The Court thinks this wise. As such, the Court concludes that Mr. Price has established Article III standing only to challenge the permit requirements for "commercial filming" in § 100905 and its implementing regulations. The Court will limit its constitutional review accordingly.

B. First Amendment Analysis

"The First Amendment prohibits laws 'abridging the freedom of speech.'" *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (quoting U.S. CONST. amend. I). In his motion, Mr. Price argues that 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5, violate this First Amendment right. *See* Pl.'s Mot. at 6–7, 45. Accordingly, Mr. Price asserts a facial challenge to 54 U.S.C. § 100905 and its implementing regulations. *See* Pl.'s Mot. at 16; Compl. ¶ 2. Such a facial challenge is appropriate where a plaintiff, like Mr. Price here, maintains that a law is overbroad and impermissibly restricts "'a substantial amount of speech that is constitutionally protected.'" *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 513 (D.C. Cir. 2010) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)); see also disc. *infra* at § III.B.3 (discussing overly broad scope of § 100905 and its implementing regulations).

"Claims under the Free Speech Clause of the First Amendment are analyzed in three steps." *Boardley*, 615 F.3d at 514. First, the Court must determine "whether the activity at issue is speech protected by the First Amendment." *Id.* (quotation omitted). Second, the Court must "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* And third, the Court must "assess whether the government's justifications for restricting speech in the relevant forum satisfy the requisite standard." *Id.* The Court will apply this framework to Mr. Price's facial First

Amendment challenge to § 100905 and its implementing regulations, addressing each prong of the analysis in turn.

1. Filming A Movie Constitutes Expressive Speech Protected By The First Amendment

As discussed above, filming a movie is expressive speech protected by the First Amendment. Two foundational First Amendment principles compel this conclusion. First, "the Supreme Court has long recognized that the First Amendment protects film" itself. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.")); *see also Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) ("Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press."). Second, the Supreme Court has found that "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) (emphasis added); *see also Citizens United*, 558 U.S. at 336 ("Laws enacted to control or suppress speech may operate at different points in the speech process."). Taken together, these First Amendment principles indicate that the creation of a film must also fall within the ambit of the First Amendment's protection of freedom of expression.

To find otherwise, would artificially disconnect an integral piece of the expressive process of

filmmaking. Indeed, "[i]t defies common sense to disaggregate the creation of the video from the video or audio recording itself." *Animal Legal Def. Fund*, 878 F.3d at 1203. Applying this reasoning, multiple circuit courts have granted First Amendment protection to filmmaking. *See*, *e.g.*, *id.* at 1204 ("Because the recording process is itself expressive and is inextricably intertwined with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity.") (quotation omitted); *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 . . . to have meaning [it] must protect the act of creating that material."). This Court is persuaded by such reasoning, which comports with the Supreme Court's First Amendment jurisprudence protecting not only the final form of expression, but also its medium and the iterative steps used in the creative process. *See*, *e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) ("[R]egulation of a medium inevitably affects communication itself."). Finally, as a practical matter, Defendants do not respond in their opposition brief to Mr. Price's argument that filming a movie is a form of speech, apparently conceding the point. *See* Pl.'s Mot. at 9–12; see generally Defs.' Opp'n, ECF No. 31. For these reasons, the Court concludes that filming a movie is a form of speech protected by the First Amendment.

2. Section 100905 And Its Implementing Regulations Restrict Speech In Public Forums

Because § 100905 and its implementing regulations affect speech protected by the First Amendment, the Court must next "identify the nature of the forum" within which they restrict such speech. *Boardley*, 615 F.3d at 514. The Supreme Court has recognized "three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." *Minnesota Voters All.*, 138 S. Ct. at 1885. "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Id.* "The same standards apply in designated public forums." *Id.* "In a nonpublic forum, on the other hand—a space that 'is not by tradition or designation a forum for public communication'—the government has much more flexibility to craft rules limiting speech." *Id.* (*quoting Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

"The dispositive question" in characterizing a particular forum is "what purpose [the forum] serves, either by tradition or specific designation." *Boardley*, 615 F.3d at 515. Relevant here, a "park" becomes a traditional public forum where "it has 'immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (*quoting Perry Educ. Ass'n*, 460 U.S. at 45). Moreover, the

government may "create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (quotation omitted).

Section 100905 and its implementing regulations restrict speech in public forums. On its face, the permitting regime applies to "any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. § 100501. The scope of § 100905's permitting regime, therefore, necessarily covers multiple locations that courts have already identified as traditional public forums. For example, the National Park Service administers the National Mall, a forum "where men and women from across the country will gather in the tens of thousands to voice their protests or support causes of every kind" and where "the constitutional rights of speech and peaceful assembly find their fullest expression." *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 952 (D.C. Cir. 1995). By way of further example, § 100905 applies to sidewalks outside the Vietnam Veterans Memorial, which the D.C. Circuit has also identified as a traditional public forum. *See Henderson v. Lujan*, 964 F.2d 1179, 1183 (D.C. Cir. 1992); 36 C.F.R. § 7.96(g)(ix)–(x). Unsurprisingly, the D.C. Circuit has also concluded more broadly that "many national parks undoubtedly include areas that meet the definition of traditional public forums." *Boardley*, 615 F.3d at 515.

Beyond this traditional public forum analysis, § 100905 and its implementing regulations also apply to designated public forums administered by the National Park Service. *See Pleasant Grove City*, 555 U.S. at 469. For example, the national parks contain designated "free speech areas" where visitors can specifically engage in First Amendment protected activities, such as speechmaking or picketing. *See* 36 C.F.R. § 2.51; *Boardley*, 615 F.3d at 515 ("The government concedes the 'free speech areas' made available within national parks . . . are 'designated public forums.'"). In fact, Defendants acknowledge that Colonial National Historical Park itself, the national park where Mr. Price filmed *Crawford Road*, "has designated an area close to the Yorktown Battlefield visitor center . . . for demonstrations, making that portion of the park a designated public forum." Defs.' Mot. at 16. Accordingly, § 100905 and its implementing regulations apply not only to traditional public forums like the National Mall, but also to designated public forums, like free speech areas within the national parks.

3. Section 100905 And Its Implementing Regulations Do Not Satisfy Heightened Constitutional Scrutiny

As set forth above, § 100905 and its implementing regulations restrict expressive speech (*i.e.*, filming a movie) carried out in traditional public forums and designated public forums. The Court, therefore, must apply a heightened level of First Amendment scrutiny to this permitting regime. *See Minnesota Voters All.*, 138 S. Ct. at 1885. For the reasons provided herein, § 100905 and its

implementing regulations do not satisfy this heightened level of constitutional review and, therefore, run afoul of the First Amendment.

a) Section 100905 And Its Implementing Regulations Impose a Content-Based Restriction on Speech

The applicable form of heightened scrutiny that § 100905 and its implementing regulations receive depends on whether they impose a "content-based" or "content-neutral" restriction on speech. *See Minnesota Voters All.*, 138 S. Ct. at 1885. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell*, 564 U.S. at 566). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. Both, however, "are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64. The parties dispute whether § 100905's specific application to "commercial filming" qualifies as a content-based restriction.

To support the argument that § 100905 and its implementing regulations are content-neutral, Defendants rely principally on the Eighth Circuit's

decision in *Josephine Havlak Photographer, Inc. v. Village of Twin Oaks*, 864 F.3d 905 (8th Cir. 2017), which of course is not binding authority in this case. *See* Defs.' Mot. at 25. In *Havlak*, the Eighth Circuit considered a First Amendment challenge to a municipal ordinance stating that: "[T]he maintaining of a concession or the use of any park facility, building, trail, road, bridge, bench, table or other park property for commercial purposes is prohibited unless a permit is issued by the Board of Trustees or its designated representative(s)." *Id.* at 910 n.2. The plaintiff in *Havlak* asserted that the ordinance created a content-based distinction between commercial and non-commercial photography in the park. *See id.* at 914. The Eighth Circuit, however, disagreed. Instead, the Eighth Circuit reasoned that the ordinance was content-neutral because it "does not reference any specific commercial enterprise or any specific message. It applies equally, for example, to commercial photographers and to hot dog vendors." *Id.* Defendants now argue, here, that the restriction on "commercial filming" in § 100905 is analogous to the content-neutral ordinance in *Havlak*, which required a permit for all commercial activity on municipal park grounds. *See* Defs.' Mot. at 25.

Conversely, Mr. Price relies on the Supreme Court's holding in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), to argue that § 100905 and its implementing regulations are, in fact, content-based restrictions on speech. In *Sorrell*, the Supreme Court considered a First Amendment challenge to a Vermont law, "Act 80," that regulated the disclosure of "prescriber-identifying information." *Id.* at 558. Prescriber-identifying information is the data

collected by pharmacies regarding the prescriptions sent to them by various physicians, which, in turn, is valuable to pharmaceutical manufacturers who can use that data to more precisely tailor their own physician-facing marketing practices for new prescription drugs. *See id.* Act 80, however, circumscribed the use of such data by providing that certain entities, such as pharmacies, "'shall not . . . permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug.'" *Id.* at 559 (quoting Vt. Stat. Ann. tit. 18, § 4631(d)). Act 80 similarly stated that "[p]harmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug." *Sorrell*, 564 U.S. at 559. Reviewing this statutory language, the Supreme Court reasoned that Act 80 created a content-based restriction by prohibiting "any disclosure when recipient speakers will use the information for marketing." *Id.* at 564. The Court also found that Act 80's "second sentence prohibits pharmaceutical manufacturers from using the information for marketing" and, therefore, "disfavors marketing, that is, speech with a particular content." *Id.* Mr. Price argues that § 100905's restriction on "commercial filming" is comparable to Act 80's content-based restriction on pharmaceutical marketing, struck down in *Sorrell*. *See* Pl.'s Mot. at 25.

Mr. Price has the better argument. Section 100905 and its implementing regulations impose a content-based restriction on "commercial filming," a form of speech. Unlike the municipal ordinance in *Havlak*, § 100905 and its implementing regulations

do not apply generically to all commercial activity in national parks. To the contrary, the permitting regime applies to filming, a form of expressive speech, *see* disc. *supra* at § III.B.1, and specifically to a type of filming, "commercial filming." 54 U.S.C. § 100905(a). Section 100905's implementing regulations make this content-based distinction even more apparent, defining "commercial filming" as the "recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income." 43 C.F.R. § 5.12. The application of § 100905's permitting regime, therefore, necessarily turns on an assessment of whether the content of a film was meant to appeal to a market audience and generate income. *See id.*

Consider, for example, the enforcement of § 100905 against Mr. Price and his film *Crawford Road*. *See* Compl. ¶¶ 43–44. To determine whether *Crawford Road* ran afoul of § 100905's permitting regime, NPS officials needed to review the film and determine ex post whether the content Mr. Price included therein was geared towards a "market audience" or evinced some "intent of generating income." 43 C.F.R. § 5.12. If, however, Mr. Price's film was "non-commercial" or happened to feature only news worthy "information . . . about current events or . . . of current interest to the public," *id.*, the permitting requirement would not apply, see *id.* at § 5.4(a). In this way, § 100905's permitting requirement is comparable to the content-based regime created by Vermont's Act 80, which disfavored the disclosure of prescriber-identifying information specifically for "marketing," but not for other purposes. *Sorrell*, 564 U.S. at 564.

The Supreme Court's analysis in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), further reinforces this conclusion. In *Discovery Network*, the Supreme Court addressed a First Amendment challenge to a municipal ordinance that prohibited the distribution of "commercial" handbills on public property, but permitted the distribution of "non-commercial" materials, like newspapers. *Id.* at 413. The Court found the ordinance to be content-based:

> [T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. Regardless of the mens rea of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."

Id. at 429 (quotations omitted). In much the same way, § 100905 and its implementing regulations impose a content-based restriction on commercial filming. *See*

Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2347 (2020) ("In *Sorrell*, this Court held that a law singling out pharmaceutical marketing for unfavorable treatment was content-based."); *Reed*, 576 U.S. at 169 ("For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.").

b) Section 100905 And Its Implementing Regulations Do Not Satisfy Heightened Constitutional Scrutiny

As the foregoing analysis demonstrates, § 100905 and its implementing regulations impose a content-based restriction on expressive speech in traditional public forums. The Court, therefore, must evaluate the permitting regime they create for commercial filming under strict scrutiny. *See Minnesota Voters All.*, 138 S. Ct. at 1885; *AAPC*, 140 S. Ct. at 2347. To survive strict scrutiny, "the Government [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (quotation omitted). Defendants do not even attempt to argue that § 100905 and its implementing regulations meet this standard. *See* Defs.' Mot. at 21–33 (addressing only intermediate scrutiny); Defs.' Opp'n at 15–21 (same). They do not meet this standard.

As an initial matter, Defendants contend that § 100905 furthers the government's interest in collecting compensation from commercial filmmakers

and thereby raising funds for the National Park Service. *See* Defs.' Mot. at 27–28. But, as noted, Defendants make no argument that this governmental interest in revenue collection could satisfy strict scrutiny. Nor would such an argument succeed. Section 100905 requires the imposition of a "fair market" permit fee for commercial filming, assessed in addition to payment for "any costs incurred as a result of filming activities or similar projects, including administrative and personnel costs." 54 U.S.C. § 100905(a), (b). Put differently, § 100905 mandates payment not only for the incidental costs of filming and permit administration, but for the act of filming itself. In accordance therewith, the DOI's implementing regulations require a stand-alone "location fee" for commercial filming, assessed in addition to a payment to cover any administrative costs incurred. *See* 43 C.F.R. § 5.8(a), (b). This regime is difficult to square with the longstanding rule that the government may not "impose a charge for the enjoyment of a right granted by the federal constitution," including the First Amendment right to free expression. *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 113 (1943). Moreover, the Supreme Court has specifically rejected the government's attempt to justify content-based restrictions on speech by pointing to a need to raise revenue. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Instead, "the State could raise the revenue by taxing [persons] generally, avoiding the censorial threat implicit in a tax that singles out" a particular speaker or form of speech. *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 586 (1983). As such, any attempt to justify § 100905's permitting regime

on the basis of a governmental need to raise revenue is a dead end.

Defendants, however, also offer another governmental interest that merits attention: protecting national park land from resource depletion and damage. *See* Defs.' Mot. at 28; see also Commercial Filming & Similar Projects & Still Photography Activities, 78 Fed. Reg. 52,087-02, 52,090 (noting that national parks have "limited space, fragile resources, or experience high visitation" and emphasizing the "need to protect nesting areas of threatened or endangered species during certain times of the year"). Protecting national park land and the resources it contains is a substantial governmental interest. *See Boardley*, 615 F.3d at 519 (collecting cases). Mr. Price does not challenge the validity of this interest, but instead questions the tailoring of § 100905 and its implementing regulations to this governmental goal. Specifically, Mr. Price argues that "there is no direct connection under [§ 100905] between the burden on commercial filming and its effect on property managed by DOI" and, further, that § 100905 "uniquely burdens commercial filming not only when there is no greater impact on federal lands than noncommercial filming . . . but also in instances when it has less of a burden." Pl.'s Mot. at 26 (emphasis in original).

The D.C. Circuit's decision in *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508 (D.C. Cir. 2010), provides considerable support for Mr. Price's argument. In *Boardley*, the D.C. Circuit evaluated a First Amendment challenge to two NPS regulations that prohibited "'[p]ublic assemblies, meetings,

gatherings, demonstrations, parades and other public expressions of views' and '[t]he sale or distribution of . . . printed matter' within park areas, unless 'a permit [authorizing the activity] ha[d] been issued.'" *Id.*; *see also* 36 C.F.R. §§ 2.51, 2.52. The D.C. Circuit found that even under intermediate scrutiny, these regulations violated the First Amendment. *See Boardley*, 615 F.3d at 525.

First, the D.C. Circuit in *Boardley* concluded that the NPS regulations "'burden[ed] substantially more speech than [wa]s necessary' to achieve the government's substantial interests" in protecting national park lands and resources from damage. *Id.* at 519 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989)). A "crucial problem" with the NPS regulations was their over-inclusivity, as the permitting requirements "applied to groups of all sizes." *Boardley*, 615 F.3d at 521. On this point, the D.C. Circuit reasoned: "The government asserts interests in preventing overcrowding, protecting park facilities, protecting visitors, and avoiding interference with park activities. But why are individuals and members of small groups who speak their minds more likely to cause overcrowding, damage park property, harm visitors, or interfere with park programs than people who prefer to keep quiet?" *Id.* at 522. The D.C. Circuit further emphasized that "[t]he fit between means and ends, [was] far more precise when the NPS regulations [we]re applied to large groups." *Id.* In short, the NPS permitting requirements for all demonstrations and distribution of printed material imposed "too high a cost, namely, by significantly restricting a substantial

quantity of speech that does not impede the NPS's permissible goals." *Id.* at 523 (quotation omitted).

Next, the D.C. Circuit in *Boardley* also considered the rule that "a time, place, or manner regulation must 'leave open ample alternatives for communication.'" *Id.* at 524 (quoting Forsyth County, 505 U.S. at 130). Here, the D.C. Circuit explained that the possible "alternatives" must be available to potential speakers "within the forum in question." *Boardley*, 615 F.3d at 524 (quotation omitted). The NPS regulations at issue in *Boardley* flatly failed this test. Under those regulations, anyone who wanted to distribute leaflets or host an assembly in a national park needed to first obtain a permit. *See id.* Indeed, the regulations "completely excluded" any person planning to engage in such expression within a national park without a permit, leaving no options for these speakers other than acquiescence to the permitting regime or withholding their speech altogether. *Id.* at 525 (quoting *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990)). It was no cure that such individuals could engage in speech on other properties near to the national parks, as this was not a viable "intra-forum alternative." *Boardley*, 615 F.3d at 525.

In this case, § 100905 and its implementing regulations suffer from flaws remarkably similar to those which rendered the NPS regulations unconstitutional in *Boardley*. First, § 100905 and its implementing regulations are overinclusive. On their face, § 100905 and its implementing regulations flatly require a paid permit for all "commercial filming." 54 U.S.C. § 100905(a); 43 C.F.R. §§ 5.1, 5.8. This regime,

therefore, requires "individuals and small groups to obtain permits before engaging in expressive activities," just the same as it does for large groups with heavy and potentially disruptive filming equipment. *Boardley*, 615 F.3d at 525; see also Commercial Filming & Similar Projects & Still Photography Activities, 78 Fed. Reg. 52,087-02, 52,090 ("There is no basis for an exclusion based on crew size or amount of equipment under this statute."). Defendants offer no explanation for how the broad sweep of this permitting regime is sufficiently tailored to the government's goal of protecting federal land. *See* Defs.' Mot. at 29–30; Defs.' Opp'n at 17– 18. Mr. Price, for example, filmed *Crawford Road* with no more than a camera tripod, a microphone, and a crew of no more than four people. *See* Compl. ¶¶ 38–39. Restricting Mr. Price's filming activity has no clear connection to the government's land conservation goals, yet Mr. Price was still threatened with a criminal sanction under § 100905 and its implementing regulations for filming without a permit. *See id.* ¶ 43.

As the *amici* in this case persuasively argue, the overinclusive sweep of § 100905's permitting regime is particularly problematic given the ease of filming in the modern technological age. *See* Br. of Amici Curiae, ECF No. 29, at 5–12. Section 100905's legislative history reveals a Congressional focus, over twenty years ago, on "major motion pictures" filmed in national parks, such as "Star Wars" and "Dances with Wolves." S. Rep. 106-67, at 3 (1999). Yet, Congress did not limit the reach of § 100905 to these "major" productions alone, but instead drew the line only at "commercial" filming. 54 U.S.C. § 100905(a).

Now, over two decades after the passage of § 100905, any individual may easily enter a national park and shoot a high-quality video at will using nothing more than a smart phone. *See* Br. of Amici Curiae, ECF No. 29, at 7. And with the expansion of mass-media outlets like YouTube, such filmmakers may expediently disseminate and monetize those videos on the internet. Yet, so long as these modern filmmakers attempt to commercially market their videos, § 100905 and its implementing regulations require a permit, without any regard for the effect that their filming might have on the preservation of national park land. *See* 43 C.F.R. § 5.12.

Relatedly, § 100905's permitting regime also *excludes* non-commercial filming without any consideration for the damage that activity might also cause to national parks. *See* Pl.'s Mot. at 41. For example, a "non-commercial" filming production carried out by a non-profit organization or a news crew would escape the reach of § 100905's permitting regime, *even if* those groups used heavy filming equipment that damaged federal land. *See* 54 U.S.C. § 100905(a). Or consider the case of Mr. Price and his forthcoming film *Ten Roads*. If Mr. Price shoots *Ten Roads* at Yorktown Battlefield by himself, with no more than a hand-held camera, he would still need a permit, so long as the film was "commercial." *See* 43 C.F.R. § 5.2(a). But what if instead Mr. Price produced *Ten Roads* as a private, non-commercial film, using heavy filming equipment and a crew of thirty workers? In such a case, Mr. Price's non-commercial film would pose a far greater threat to federal land, but could nonetheless proceed without a permit under § 100905. These under- and over-

inclusivity problems demonstrate the obvious tailoring defects of § 100905's restriction on commercial filming. *See, e.g., Gilleo*, 512 U.S. at 51 (addressing the First Amendment problem of underinclusive regulations); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (addressing the First Amendment problem of overinclusive regulations).

Indeed, the D.C. Circuit struck down a similar NPS permitting regime in *Boardley* for this very reason. *See Boardley*, 615 F.3d at 521–25. It is also notable that in response to the *Boardley* decision, the NPS regulations at issue were revised to include a "small group permit exception" for expressive activities "involving 25 persons or fewer." 36 C.F.R. § 2.51(b)(1); *id.* § 2.52(b)(1). This small group exception responded directly to the D.C. Circuit's holding that "[r]equiring individuals and small groups to obtain permits before engaging in expressive activities within designated 'free speech areas' (and other public forums within national parks) violates the First Amendment." *Boardley*, 615 F.3d at 525. As Mr. Price has demonstrated here, however, § 100905 and its implementing regulations contain no such exception for individual commercial filmmakers or small groups of commercial filmmakers.

It also bears mentioning that § 100905 and its implementing regulations do not leave open any adequate alternatives for commercial filmmakers who would like to film on national park grounds without a permit. *See* Pl.'s Mot. at 32–33. As explained above, the permitting regime applies to "any area of land and water administered by the

Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. § 100501 (defining a "system unit"); see also *id.* § 100102(1)–(6). Consequently, commercial filmmakers who would like to shoot on national park grounds must either obtain a permit or cancel their filming plans altogether. Mr. Price's decision to halt production of his forthcoming film on the Saltville Massacre, absent a permit, is a paradigmatic example of this scenario. *See* Compl. ¶ 54. Tellingly, Defendants argue that "*with a permit*, [filmmakers] would have multiple alternative channels to film [their] movie[s], most obviously applying for a permit . . ." Defs.' Mot. at 33 (emphasis added). Defendants also later suggest that filmmakers could simply "choose not to generate income from the film." Defs.' Opp'n at 20. But these are not "alternatives." They are simply ways of complying with § 100905's permitting regime. At bottom, § 100905 and its implementing regulations leave commercial filmmakers with no "intra-forum" alternative, but rather a binary proposition: either obtain a permit or forgo commercial filming in a national park. *Boardley*, 615 F.3d at 524 (quoting Turner, 893 F.2d at 1393). This lack of alternative channels is impermissible under First Amendment scrutiny, as the D.C. Circuit also made clear in *Boardley*. *See id.*

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As the foregoing analysis shows, § 100905 and its implementing regulation impose a content-based restriction on speech that does not pass constitutional

muster. Just as the NPS regulations struck down in *Boardley*, § 100905's permitting regime for commercial filming "'burden[s] substantially more speech than is necessary' to achieve the government's substantial interests" in protecting national park lands and resources from damage. *Boardley*, 615 F.3d at 519 (quoting *Ward*, 491 U.S. at 798–99). Section 100905 and its implementing regulations also fail to leave open any alternative channels for commercial filmmakers who would like to film in national parks without a permit. *Boardley*, 615 F.3d at 524 (quoting *Turner*, 893 F.2d at 1393). Accordingly, Mr. Price has established that the permit requirement for commercial filming imposed by 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 violates the First Amendment.[2] The Court may, therefore, enter a "judgment on the merits" in Mr. Price's favor on his First Amendment claim. *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 49 (D.D.C. 2018) (quotation omitted); see also Compl. ¶¶ 71–80.

C. Equitable Relief

The last remaining issue for the Court to consider is the equitable relief requested by Mr. Price. Mr. Price seeks two forms of equitable relief: (1) a declaratory judgment stating that the requirements in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 that those engaged in "commercial filming" must

[2] Neither party proposes severing any portion of the commercial filming restrictions set forth in 54 U.S.C. § 100905, 43 C.F.R. Part 5, or 36 C.F.R. § 5.5. The Court finds no basis for doing so here. *Boardley*, 615 F.3d at 525 ("Neither party has argued that we should sever the regulations in order to leave part of them intact, and we perceive no basis for doing so.").

obtain permits and pay fees are unconstitutional, and (2) a permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liability thereunder. *See* Compl. at Prayer for Relief, ¶¶ A, B; Pl.'s Mot. at 45. Both forms of equitable relief are appropriate here.

First, the Court will enter a declaratory judgment stating that 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 impose an unconstitutional permitting requirement on "commercial filming." "In a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). "To invoke the Declaratory Judgment Act, a plaintiff must demonstrate that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *United Gov't Sec. Officers of Am., Local 52 v. Chertoff*, 587 F. Supp. 2d 209, 222 (D.D.C. 2008) (quotation omitted).

Mr. Price meets this standard. As set forth above, Mr. Price has presented an actual Article III "case" over which this Court has jurisdiction. *See* disc. *supra* at § III.A. Moreover, the Court has also concluded that the permitting regime for "commercial filming" mandated by 54 U.S.C. § 100905 and its implementing regulations is an unconstitutional restriction on speech protected by the First Amendment. *See* disc. *supra* at § III.B. Declaratory relief is appropriate in such a case, where the plaintiff

demonstrates on the merits, as Mr. Price has done here, that a law violates the First Amendment. *See e.g., Boggs v. Bowron*, 842 F. Supp. 542, 547 (D.D.C. 1993), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995))("[C]ivil actions for declaratory relief against criminal prosecution have become a common method of challenging the constitutionality of federal statutes," particularly "where First Amendment rights are at stake."); *Nat'l Ass'n of Manufacturers v. United States Sec. & Exch. Comm'n*, No. 1:13-CV-00635-KBJ, 2017 WL 3503370, at *1 (D.D.C. Apr. 3, 2017) (issuing a declaratory judgment against a statute and regulations in violation of the First Amendment).

The Court will also grant Mr. Price's motion for a permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liability thereunder. *See* Pl.'s Mot. at 45. "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court." *Id.*; *see also*

Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998).

Mr. Price has satisfied this threshold. First, the Court has already concluded that Mr. Price has successfully shown on the merits that 54 U.S.C. § 100905 and its implementing regulations violate the First Amendment. *See* disc. *supra* at § III.B. A permanent injunction, however, "does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). And while "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the D.C. Circuit has charted a more discerning course when considering injunctive relief for First Amendment injuries. To establish "irreparable injury" in the context of free speech claims, the movant must also "demonstrate a likelihood that they will engage in the constitutionally protected expressive conduct." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006). But Mr. Price still clears this bar. As discussed above, the record in this case demonstrates Mr. Price's tangible plan to shoot a commercial film about the Saltville Massacre at two different national park locations. *See United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Aug. 29, 2019), ECF No. 20-1 (Price Decl.), ¶¶ 2–4. These locations are proximate to Mr. Price's residence, and he had just recently produced a similar film on one of these sites in the past. *See* Compl. ¶¶ 38–39. Mr. Price, however, stopped his commercial filming plans because of the unconstitutional permitting restrictions imposed by § 100905. *See United States*

v. Price, No. 4:19-po-180-DEM (E.D. Va. Aug. 29, 2019), ECF No. 20-1 (Price Decl.), ¶ 4. Mr. Price has, therefore, established an irreparable injury caused by § 100905 and its implementing regulations. *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1181 (D.C. Cir. 1992) (affirming injunction of NPS regulation in violation of the First Amendment); *Guffey v. Duff*, 459 F. Supp. 3d 227, 255 (D.D.C. 2020); Am. Civil *Liberties Union v. Mineta*, 319 F. Supp. 2d 69, 87 (D.D.C. 2004). It is also clear that a legal remedy, *i.e.*, a monetary award, would do nothing to permit Mr. Price the ability to conduct his filming absent § 100905's permitting restrictions. *See eBay Inc.,* 547 U.S. at 391; *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016). Defendants do not contest this point.

Finally, Mr. Price has shown that the "balance of the hardships" between the parties, as well as the public interest, weigh in favor of a permanent injunction. *eBay Inc.*, 547 U.S. at 391. Here, the hardship imposed upon Mr. Price by § 100905's unconstitutional permitting regime is consonant with the strong public interest in "always . . . prevent[ing] the enforcement of unlawful speech restrictions." *Guffey*, 459 F. Supp. 3d at 255 (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992) ("[A] policy that is unconstitutional would inherently conflict with the public interest.")). And given the broad scope of § 100905, the statute imposes a chilling effect on the expressive activities of a wide swath of national park visitors. *See* disc. *supra* at § III.B.3.b. Consequently, there is a significant equitable interest in avoiding the unconstitutional application and enforcement of § 100905 and its implementing

regulations. *See Pursuing Am.'s Greatness*, 831 F.3d at 511.

Moreover, the governmental and public interests in favor of § 100905 and its implementing regulations are insufficient to counterbalance such a chilling effect. While the government and the public do have an interest in preserving federal lands, such an interest does not justify a widely overinclusive law that infringes upon free expression. *See Boardley*, 615 F.3d at 525; disc. *supra* at § III.B.3.b. And, as Mr. Price notes, "filming and photography . . . had long proceeded on federal lands before [the] enactment" of § 100905. Pl.'s Mot. at 44; *see also* S. Rep. 106-67, at 3 (1999) (noting prior motion pictures filmed on national park lands). Moreover, the National Park Service has also shown itself capable of enacting regulations that preserve park resources without overly burdening expressive activity, and may continue to do so in ways that do not run afoul of the First Amendment. *See*, *e.g.*, 43 C.F.R. §§ 3.3, 3.11; 36 C.F.R. §§ 2.51, 2.52. This leaves, then, only the government's interest in raising revenue for federal land conservation. *See* 43 C.F.R. § 5.12 (allocating commercial filming fees "for the use of Federal lands or facilities"). The government certainly has an interest in collecting money for such a public use. But, as discussed, Congress may not tax the exercise of a fundamental right, *see Murdock*, 319 U.S. at 113, and, here, Congress could instead levy taxes without targeting any particular form of speech, *see Minneapolis Star*, 460 U.S. at 586. Consequently, the government's interest in raising revenue does not tip the balance of the equities against an injunction of § 100905 and its implementing regulations. To the

contrary, the balance of the equities favors such an injunction.

For these reasons, the Court will issue a permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liability thereunder. The Court issues this injunction in an exercise of is discretionary authority and after a complete and independent review of the record and a balancing of the equities. *See Winter*, 555 U.S. at 32. The Court also notes that beyond the merits of Mr. Price's First Amendment claim, Defendants have presented no argument specifically against the propriety of injunctive relief. Defendants' reticence on this issue further reinforces the Court's independent conclusion that a permanent injunction is appropriate.

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, the Court **DENIES** Defendants' Motion for Judgment on the Pleadings. *See* ECF No. 18. In turn, the Court **GRANTS** Mr. Price's Cross-Motion for Judgment on the Pleadings. *See* ECF No. 25. Accordingly, the Court will issue a declaratory judgment stating that the requirements in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 that those engaged in "commercial filming" must obtain permits and pay fees are unconstitutional under the First Amendment. The Court will also enter a permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C.

§ 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liability thereunder. In issuing this injunction, the Court observes that a more targeted permitting regime for commercial filming, which is more closely connected to the threat posed by large groups and heavy filming equipment, may pass constitutional muster in the future.[3]

An appropriate Order accompanies this Memorandum Opinion.

Dated: January 22, 2021

/s/_____
COLLEEN KOLLAR-KOTELLY
United States District Judge

[3] For example, Defendants suggest that an "alternative" available to commercial filmmakers wishing to operate without a permit is "filming with a smaller crew and equipment with a lighter footprint." Defs.' Opp'n at 20. The logic behind this proposal is sound and meaningfully connected to the goal of land conservation. Unfortunately, § 100905 and its implementing regulations, in their current form, contain no such exemption for filmmakers with "lighter footprints." As explained above, even the most non-intrusive filmmaker must obtain a permit, so long as his or her film is "commercial." 54 U.S.C. § 100905(a); 43 C.F.R §§ 5.1, 5.8.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5073 **September Term, 2022**

1:19-cv-03672-CKK

Filed On: October 21, 2022

Gordon M. Price,

Appellee

v.

Merrick B. Garland, in his official capacity as Attorney General of the United States of America, et al.,

Appellants

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, and Pan*, Circuit Judges; and Ginsburg and Tatel, Senior Circuit Judges

O R D E R

Upon consideration of appellee's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

*Circuit Judge Pan did not participate in this matter.

APPENDIX D

TITLE 54-NATIONAL PARK SERVICE AND RELATED PROGRAMS

§ 100905. Commercial filming

(a) Commercial filming fee.

(1) In general. – The Secretary shall require a permit and shall establish a reasonable fee for commercial filming activities or similar projects in a System unit. The fee shall provide a fair return to the United States and shall be based on the following criteria:

(A) The number of days the filming activity or similar project takes place in the System unit.

(B) The size of the film crew present in the System unit.

(C) The amount and type of equipment present in the System unit.

(2) Other factors. – The Secretary may include other factors in determining an appropriate fee as the Secretary considers necessary.

(b) Recovery of costs. – The Secretary shall collect any costs incurred as a result of filming activities or similar projects, including administrative and personnel costs. All costs recovered shall be in addition to the fee assessed in subsection (a).

(c) Still photography. –

(1) **In general.** – Except as provided in paragraph (2), the Secretary shall not require a permit or assess a fee for still photography in a System unit if the photography takes place where members of the public are generally allowed. The Secretary may require a permit, assess a fee, or both, if the photography takes place at other locations where members of the public are generally not allowed, or where additional administrative costs are likely.

(2) **Exception.** – The Secretary shall require and shall establish a reasonable fee for still photography that uses models or props that are not a part of the site's natural or cultural resources or administrative facilities.

(d) **Protection of resources.** – The Secretary shall not permit any filming, still photography or other related activity if the Secretary determines that—

(1) there is a likelihood of resource damage;

(2) there would be an unreasonable disruption of the public's use and enjoyment of the site; or

(3) the activity poses health or safety risks to the public.

(e) **Use of proceeds.** –

(1) **Fees.** – All fees collected under this section shall be available for expenditure by the Secretary, without further appropriation, at the site where the costs are collected and shall remain available until expended.

(2) **Costs.** – All costs recovered under this section shall be available for expenditure by the Secretary, without further appropriation, at the site where the costs are collected and shall remain available until expended.

(f) **Processing of permit applications.** – The Secretary shall establish a process to ensure that the Secretary responds in a timely manner to permit applicants for commercial filming, still photography, or other activity.