No. 22-665

In the Supreme Court of the United States

Gordon Price,

Petitioner,

v.

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

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ANTHONY BARILLA IN SUPPORT OF PETITIONER

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Questions Presented

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

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

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

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

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Identity and Interest of *Amici Curiae*[1]

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation seeks to ensure that all speakers enjoy the full protection of the First Amendment to the United States Constitution. To that end, PLF has participated in cases before this Court on matters affecting the public interest, including content-based and commercial speech issues arising under the First Amendment. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Wine & Spirits Retailers, Inc. v. R.I. & Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

Anthony Barilla is an accordionist who will sometimes busk (perform in public for tips) on the streets of Houston. In addition to playing accordion in a three-piece cover band, he also writes, composes, and produces music for theater, short films, dance, and radio. Mr. Barilla busks as a means of refining his

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[1] Pursuant to Rule 37.6, counsel for *Amici Curiae* certifies that no counsel for any party authored this brief in whole or in part, and no person or entity aside from *Amici* and their counsel funded its preparation or submission. Counsel of record for the parties received timely notice of the intent of *Amici* to file this brief.

skills while getting paid to perform. But a city regulation prohibited playing music "with the view of taking up a collection," except for in the Theater District, where performers were allowed to busk only after completing an onerous permit process. Houston, Tex., Code of Ordinances, art. I, § 28-6. Yet the city broadly allowed public speech and expression, including publicly protesting, panhandling, and even playing music; the ordinance just blocked musicians from asking their audiences for tips. Mr. Barilla successfully sued to invalidate the ordinance because it violated his First Amendment rights. *See* Order on Summ. J., *Barilla v. City of Houston, Texas*, No. 4:20-cv-00145 (S.D. Tex. Dec. 20, 2022), ECF No. 62. Mr. Barilla believes that speech protection should not be diminished solely because the speaker hopes to profit from his expression.

PLF and Mr. Barilla filed a brief in support of Petitioner as *amici curiae* before the D.C. Circuit.

Introduction and Summary of Argument

The Secretary of the Interior defines "commercial filming" in a national park based on the filmmaker's subjective intent. Specifically, filming is "commercial" if it is done "for a market audience with *the intent* of generating income." 43 C.F.R. § 5.12 (emphasis added). Yet regardless of their intent, news-gathering filmmakers are exempt from the fee requirement applicable to commercial filming. *Id.* § 5.4. And because the Park Service will not issue a permit for any filming that presents a danger of damaging park land, creates any health or safety risk, or disrupts public enjoyment, *id.* § 5.5; 54 U.S.C. § 100905(d), the only persons subject to the fee requirement are

those—like Petitioner Gordon Price—who present none of these adverse conditions.

The district court concluded that this permit and fee regime violated Mr. Price's First Amendment rights. Yet a divided D.C. Circuit panel reversed, with the majority concluding that recording a video for later dissemination is "merely a noncommunicative step in the production of speech" that is not covered by the same First Amendment protections that apply to "communicative activity." Pet. 12a.

This Court should grant certiorari to review that novel conclusion and to ensure that essential steps in the creation and preparation of speech or expression—regardless of whether accompanied by a profit motive—are protected from government interference. There are at least three aspects of this case that merit this Court's review: (1) the regulation's definition of "commercial filming" based on the filmmaker's "intent" to "generat[e] income"; (2) the majority's conclusion that recording a video is a "noncommunicative step" that is subject to lesser First Amendment protection; and (3) the exclusion of "news-gathering activities" from the fee requirement when other similarly situated filmmakers must pay.

This is a particularly good vehicle to address these questions. The extent of First Amendment protection afforded to the recording of video is an important growing issue on which the decision below created a circuit split. Additionally, the interchangeability of newsgathering and the work of an independent documentary filmmaker like Mr. Price highlights the difficulty in defining whether speech is "commercial." Although this Court held in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New*

York that the Constitution accords lesser protection to commercial speech, it narrowly focused on "expression related *solely* to the economic interests of the speaker and its audience." 447 U.S. 557, 561 (1980) (emphasis added).[2] The statute and regulations in this case go much further, burdening speech based on whether the speaker subjectively intends to generate income. Any objective method for discerning such an intent (short of an admission by the filmmaker) necessarily requires analysis of the content of the communication itself: is it likely to appeal to a market audience to such an extent that it will generate income for the filmmaker? And of course, laws that target speech based on its communicative content are presumptively unconstitutional and subject to strict scrutiny, "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015) (cleaned up); *see also Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346–50, 2356 (2020) (relying on *Reed* to apply strict scrutiny to content-based restrictions on robocalls).

No one disputes that the federal government may regulate filming in national parks based on content-neutral factors such as the size of the film crew, the

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[2] *Central Hudson* is therefore of limited utility when a speaker combines elements of both commercial and noncommercial speech. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 676–77 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795–96 (1988) (determining that mixed speech is not treated as commercial speech); Deborah J. La Fetra, *Kick It up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1217 (2004).

duration of the filming, or the type of equipment used. But when a regulation turns on a speaker's state of mind, it should be subject to strict scrutiny, even if the First Amendment activity it regulates occurs prior to the final step of sharing speech or expression with an audience.

Reasons to Grant the Petition

I. The Court Should Decide Whether First Amendment Protection Can Be Diminished Because the Speaker Intends to Profit from His Expression

The law at issue regulates videographers' First Amendment activity in national parks if, and only if, the filmmaker *intends* that enough members of the public to comprise a "market audience" will pay to view his work and thus "generat[e] income." 43 C.F.R. § 5.12. Whether income is actually generated is beside the point; what matters for purposes of the fee requirement is the speaker's *intent*. Thus, the regulation singles out filmmaking when the filmmaker intends to generate income and exempts filmmaking that is not intended to be sold. The Court should grant certiorari to review whether such a distinction is permissible under the First Amendment.

There is good reason to think that the distinction is constitutionally problematic, for at least three reasons. ***First***, it is unclear whether "generating income" requires anticipating a net profit, or whether the regulation also applies if the filmmaker intends only to cover his costs, or even if he knows the film will be a net loss but hopes to offset some costs of production. But either way, the regulation turns on a speaker's subjective intention, which regulators

apparently discern by reviewing the content of the expression to assess its marketability.[3] As such, the regulation is content based and should be subject to the high bar of strict scrutiny. *See, e.g.*, *Christ v. Town of Ocean City, Maryland*, 312 F. Supp. 3d 465, 471 (D. Md. 2018) (an ordinance that "more narrowly restricts speech with a commercial motive than speech with a noncommercial motive" is not content neutral) (citation omitted); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (concluding that an ordinance relying on "the difference in content between ordinary newspapers and commercial speech" was not content neutral and could not withstand scrutiny).

Second, the regulation appears to conflict with the principle that speech protection cannot be reduced because of the speaker's motive. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988). A contrary rule would lead to "bizarre result[s]," such as a situation where "identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (citing Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001) ("[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection.")).[4] Thus, restrictions on

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[3] For the criminal charges brought against Mr. Price, NPS officers apparently made a retroactive intent determination based on his decision to screen the documentary to an audience. Pet. 5a.

[4] Courts may, however, consider subjective motivation to *expand* First Amendment protections. For example, a First Amendment

otherwise fully protected speech are not subject to diminished scrutiny solely because the speaker has a subjective profit motive. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118–23 (1991) (determining that autobiographies published for profit were protected speech); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away."); *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 801 ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 384–85 (1973) (an advertisement is not unprotected speech just because a newspaper was paid for running it).

And even though current doctrine allows greater regulation of commercial speech, a profit motive cannot alone suffice to categorize speech as "commercial." Otherwise, all elements of a speaker's operations could be more heavily regulated if they were geared toward increased sales, which "clearly would be incompatible with the First Amendment." *Pittsburgh Press Co.*, 413 U.S. at 385; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 952 (11th Cir. 2017) (published articles that do not offer

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retaliation claim can consider whether an adverse action was based on a "forbidden motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). Similarly, *Hustler Magazine*'s holding that the First Amendment prohibits damages based on jurors' subjective assessment of whether a parody is "outrageous" works to expand constitutional protection. 485 U.S. at 53.

anything for sale "are not commercial speech simply because extraneous advertisements and links for membership may generate revenue"); *see also Cent. Hudson*, 447 U.S. at 579–80 (Stevens, J., concurring in the judgment) ("[E]ven Shakespeare may have been motivated by the prospect of pecuniary reward.").

In *Amici*'s experience, government regulations that fail to respect this principle often result in arbitrary restrictions. For example, under the anti-busking ordinance that *Amicus* Mr. Barilla successfully challenged, one musician would be prohibited from playing music with his instrument case open inviting tips, while people could lay tips on the ground in front of another musician (even if playing the same music on the same instrument) with a closed case, because the open instrument case is perceived as profit-seeking, while the other is not. *See, e.g.*, Anthony Barilla, *Busking the Streets of Houston*, Houston Press (Sept. 17, 2018).[5]

Third, as a practical matter, relying on a filmmaker's subjective intent at the moment of filming makes little sense, as there is no guarantee that he will succeed in generating income. At that point in the production, the filmmaker might not even have a well-defined plan for the final film, let alone a final product that can be examined for marketability, meaning that (as happened with Mr. Price) government enforcers will generally make their intent determinations well after the fact based on the finished product. And even if a filmmaker hopes to generate income, generally the odds are against it. Especially in the filmmaking industry, intentions do not translate into actual income, much less profit over

[5] https://tinyurl.com/42unzsv8.

expenses. *See, e.g.*, Schuyler Moore, *Most Films Lose Money!*, Forbes (Jan. 3, 2019).[6] At best, the statute and regulations at issue target activity that officials speculate *may* be income-generating, and constitutional protection should not depend on such speculation. *Edenfeld v. Fane*, 507 U.S. 761, 770 (1993) (the burden of upholding a speech restriction "is not satisfied by mere speculation or conjecture").

II. The Court Should Decide Whether Filming Receives Less First Amendment Protection Because It Is a "Noncommunicative Step"

It is well established that First Amendment protections extend not only to the written or spoken word, but to the use of pictures, films, or video in its various forms. No less than penning a pamphlet or giving a speech, creating a movie is an inherently expressive endeavor protected by the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection . . . ."); *Metzger v. Pearcy*, 393 F.2d 202, 203 (7th Cir. 1968) ("[M]otion pictures, like books, are protected by

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[6] https://tinyurl.com/p6szm6wh; *see also* Arthur De Vany, *Hollywood Economics: How Extreme Uncertainty Shapes the Film Industry* 257 (2004) ("[M]ovie revenues can go off in strange directions for small reasons that totally escape analysis . . . . Explanations will be attempted after the fact—it was the trailer, it was the advertising, it was a bad movie, etc. They can all be given an air of plausibility because when you have chaos anything is a possible explanation. But, nobody knows."), *available at* https://tinyurl.com/fy93crp9.

the constitutional guaranties of freedom of speech and press.").

This case asks to what degree that protection extends beyond showing a film to an audience to also include the antecedent pieces of filmmaking, including perhaps the most important part of the process: capturing video footage. As is well-documented in the Petition, many courts have concluded that the act of recording videos is fully protected by the First Amendment. *See* Pet. 10–12 (citing cases); *see also Sharpe v. Winterville Police Dep't*, __ F. 4th __, 2023 WL 1787881 (4th Cir. Feb. 7, 2023) ("Creating and disseminating information is protected speech under the First Amendment. . . . [O]ther courts have routinely recognized these principles extend the First Amendment to cover [video] recording. . . . We agree.").

Yet under the panel majority's decision, recording video footage for later use receives less protection than showing a film to an audience simply because the "filmmaker does not seek to communicate with others at the location in which he or she films." Pet. 12a. Recording a video can be more heavily regulated, the majority concluded, because it is not "communicative activity" subject to forum analysis, but is instead an activity that, although "generally protected by the First Amendment" to some degree, is "not communicative." Pet. 16a. Thus, the majority held 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." Pet. 20a.

This Court has never countenanced the novel approach of carving up the speech creation process

into its constituent parts, then applying different First Amendment standards to different parts of the process. Indeed, doing so would seem contrary to the principle that First Amendment protections apply against "[l]aws enacted to control or suppress speech" that "operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336–37 (2010).

Moreover, categorizing the act of recording a video as a lesser-protected "noncommunicative step"—a phrase that appears nowhere in this Court's precedents (or any other reported federal court decision)—not only creates a conflict among the circuits, *see* Pet. 10–12, but creates practical line-drawing problems. It means that the timing of a video's distribution to an audience becomes the preeminent factor in the level of protection afforded to First Amendment activity. Perhaps most glaringly, although the majority would apparently fully protect the act of streaming video for contemporaneous viewing as "communicative activity," Pet. 19a n.*, recording that same video for later distribution would not receive the same protection. Thus, the majority's standard would offer more protection to someone transmitting video in real time via FaceTime, Zoom, or a live-streaming service than to someone recording videos for Marco Polo or YouTube, even though such videos may be viewed within a few minutes of their creation. Under this confusing standard, recording a video to later post on Instagram would receive less protection than streaming the exact same scene on

Instagram Live. This Court should grant review to decide whether that is the correct constitutional line.[7]

Taken to its logical conclusion, the majority's analysis means that the government generally has a greater ability to restrict speech during the creation process, before it is transmitted to an audience. That sets a dangerous precedent. For example, an author's "noncommunicative step" of writing a rough draft may be restricted in ways that would not pass muster if applied to a final pamphlet. A performer could be subject to regulation in obtaining an instrument or identifying a venue that could not lawfully be imposed on the performance itself. And officials would have greater leeway to restrict the recording of the public activities of law enforcement officers than to restrict a public protest of those activities. *But see* Pet. 17a ("Filming a public official performing public duties on public property implicates unique first amendment interests."). Whether such a view is consistent with the First Amendment merits this Court's review.

The majority opinion also pays little regard to the vital First Amendment rights of citizens to *receive* speech or expression. *See, e.g.*, *Citizens United*, 558 U.S. at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality) (the right to receive information "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed

[7] As discussed in Part II, *infra*, these line-drawing problems are exacerbated by the regulation's distinction between filming that is "inten[ded]" to generate income and filming that is not.

by the Constitution" and a "necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"). That right can only be fully protected if all parts of the creation process—not just dissemination of the final product—are protected. And although the speech at issue here may not relate directly to "enlightened self-government," it is nonetheless of substantial value to prospective audiences. Filming documentaries in national parks can provide an educational and aesthetic experience that would otherwise elude those who are not able to easily visit the parks due to factors like distance and travel cost. The Court should grant certiorari to determine whether the decision below properly protects the First Amendment rights of both filmmakers and their audiences.

III. The Court Should Decide Whether the Government Can Legitimately Distinguish Between Commercial Newsgathering and Other Commercial Filming

If CNN or Fox News sends a videographer to Yellowstone to gather footage for a story about waste management in national parks, those for-profit commercial networks (which publicly tout—and generate ad revenue based on—their share of the market audience) pay no fees. 43 C.F.R. § 5.4. But if an independent documentarian records identical footage for a short movie about the same topic, intending to sell tickets rather than funding the movie through grants or sale to a television news network, the documentarian must pay. The Court should grant certiorari to review whether that disparity is permissible under the First Amendment.

The interchangeability of newsgathering and independent documentary filmmaking highlights a frequent problem with speech regulation that restricts profit-earning speech but not identical noncommercial speech: it fails to solve the stated problem that inspired the regulation. There is "a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015). Thus, exempting certain types of speech may undermine the validity of an entire regulation. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 685 (9th Cir. 2010).

For that reason, the Court has been wary of restrictions that distinguish between commercial and noncommercial speech when both types of speech similarly affect the state's interest. In *City of Cincinnati v. Discovery Network*, the Court struck down as unconstitutional an anti-littering ordinance prohibiting commercial newsstands but not noncommercial newsstands. 507 U.S. at 430. There was no reasonable fit between the ordinance's prohibition and the goal of alleviating litter because most of the newsstands in the city were noncommercial, and they generated the most litter. *Id.* at 417–18. Rather than achieving a legitimate purpose, the regulation merely targeted speech that the city valued less. *Id.* at 428. Similarly, in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 179 (1999), a federal regulation prohibited privately-owned casinos from advertising on the radio because the signals could be received in states where gambling was illegal. However, tribal-

owned casinos were exempted from this prohibition. Given that exemption, the Court held that the regulation, which restricted advertising based on whether the advertisement was profit-driven, *id.* at 194, was unconstitutional because it "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Id.* at 195.

In both cases, the desired effect—reduction of either litter or gambling—could have been addressed through either a narrow regulation applicable to all speech, regardless of commercial content, or a regulation directly targeting the problem itself. *See Discovery Network*, 507 U.S. at 429–30; *Greater New Orleans*, 527 U.S. at 192–93 ("[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."); *see also W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1096 (9th Cir. 2001), *aff'd sub nom. Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (declaring a statute unconstitutional under *Greater New Orleans* when it prohibited the advertising of compounded drugs but allowed doctors to advertise their compounding services).

When a speech restriction contains exemptions such that whether similarly situated speakers are allowed to speak—at least without paying a fee—depends on the government's determination of the value of the speech, this is a content-based restriction, subject to strict scrutiny, that violates the First Amendment. Here, the exemption of "news-gathering activities" from the fee requirement, including when those activities are conducted by for-profit commercial

enterprises, raises those same concerns and merits this Court's review.

Conclusion

The Petition should be granted.

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Respectfully submitted,

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