No. 22-665

In the Supreme Court of the United States

GORDON M. PRICE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MICHAEL S. RAAB
JOSHUA M. SALZMAN
JOSEPH F. BUSA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's facial challenge under the First Amendment to the Act of Congress and implementing National Park Service regulations that require commercial film crews to obtain advance permission and to pay a reasonable fee before using National Park Service lands for private commercial gain.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 22-665

GORDON M. PRICE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 45 F.4th 1059. The opinion of the district court (Pet. App. 44a-88a) is reported at 514 F. Supp. 3d 171.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2022. A petition for rehearing en banc was denied on October 21, 2022 (Pet. App. 89a-90a). The petition for a writ of certiorari was filed on January 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Park Service (NPS) administers some of the country's most beautiful, most fragile, and most visited lands. It does so under a risk-averse mandate from Congress to "conserve the scenery, natural

and historic objects, and wild life" in national parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. 100101(a). Like other federal agencies, NPS also operates under a congressional directive that it be "self-sustaining to the extent possible." 31 U.S.C. 9701. To achieve that goal, NPS and other federal agencies are authorized to "charge for a service or thing of value provided by the agency" based on the "value of the service or thing to the recipient." *Ibid.*

Consistent with those congressional mandates, any person seeking to use NPS lands for private commercial gain generally must obtain permission and pay a reasonable fee. Many such requirements are imposed under the general authority of the Secretary of the Interior (Secretary) to "prescribe such regulations as the Secretary considers necessary or proper for the use and management" of NPS lands. 54 U.S.C. 100751(a); see, *e.g.*, 36 C.F.R. 5.3 ("Engaging in * * * any business in park areas" without a permit "is prohibited."); NPS, *Management Policies 2006* § 8.6 (2006), https://perma.cc/D5S4-XBL8 (requiring permits and fees for special park uses, such as cattle grazing, agriculture, cell towers, and rights-of-way). Other requirements are imposed by specific statutes. *E.g.*, 54 U.S.C. 101913(3)-(5) (concession contracts); 54 U.S.C. 101925 (commercial use authorizations). But permission and fees are generally required for all commercial uses of park lands.

The same is true of commercial filming. From the early days of moviemaking through 1946, the Secretary required permits and fees for commercial filming on NPS lands. *E.g.*, 10 Fed. Reg. 2522, 2522 (Mar. 6, 1945). In 1946, the Secretary revised those regulations to continue to require permits, but to no longer require fees for com-

mercial filming on NPS lands. *E.g.*, 11 Fed. Reg. 11,706, 11,706-11,707 (Oct. 9, 1946).

In 2000, Congress enacted the statute that petitioner challenges here, 54 U.S.C. 100905, to reverse that regulatory carve-out and restore a uniform permitting and fee system for commercial filming akin to the system otherwise still in place for other commercial uses of NPS lands. Under that statute, the "Secretary shall require a permit and shall establish a reasonable fee for commercial filming activities." 54 U.S.C. 100905(a)(1). The fee must "provide a fair return to the United States" based on the "number of days" of filming, the "size of the film crew," the "amount and type of equipment" used, and "other factors" that "the Secretary considers necessary." 54 U.S.C. 100905(a)(1) and (a)(2). "[I]n addition to" this fee for the use of the land, sometimes referred to as a location fee, the Secretary shall also recover "any costs incurred as a result of filming activities." 54 U.S.C. 100905(b). The cost-recovery and location fees are "available for expenditure" by NPS for park purposes "without further appropriation." 54 U.S.C. 100905(e). The statute provides that the Secretary shall not permit any filming or related activity if the Secretary determines that the activity would create "a likelihood of resource damage," "unreasonable disruption of the public's use and enjoyment of the site," or "health or safety risks to the public." 54 U.S.C. 100905(d).

Regulations implementing 54 U.S.C. 100905 are codified at 43 C.F.R. Part 5 and 36 C.F.R. 5.5. When those regulations were promulgated, the Secretary explained that the statutory permitting and fee requirements would apply even to smaller film crews because NPS protects "some of the nation's most treasured and valuable natural and cultural resources." 78 Fed. Reg. 52,087, 52,090 (Aug.

22, 2013). "While it could be assumed" that smaller crews "have less potential for causing resource damage," the Secretary explained that it is still "important for land managers to know the specific time and location" of proposed commercial filming to "mitigate the possibility of resource damage or impact to visitors" in areas that "may have limited space, fragile resources, or experience high visitation during a specific time period." *Ibid.*[1]

b. Petitioner is a commercial filmmaker. In 2017 and 2018, petitioner filmed three scenes of "an independent feature film" at four locations in the Yorktown Battlefield, which is part of the Colonial National Historical Park in Yorktown, Virginia. C.A. App. 19 (Complaint). Petitioner's filming involved a camera, a tripod, a microphone, and up to four people, plus "a couple of observers," per session. *Ibid.* Petitioner did not obtain a permit or pay a fee prior to filming. *Id.* at 13, 19.

In December 2018, two NPS officers served petitioner with a written notice of a misdemeanor violation of the commercial-filming rules. C.A. App. 20; see 18 U.S.C. 1865(a); 36 C.F.R. 1.3(a), 5.5(a). "The government's general practice in such cases has been to rec-

---

[1] Petitioner incorrectly asserts that there is no permit requirement for *non*commercial filming operations. Pet. 3. Under separate legal authority, NPS policy directs parks to require a permit for noncommercial filming that "could result in damage to park resources" or disrupt "normal visitor use." NPS, *RM-53 Reference Manual Special Park Uses*, Appx. A13-2 (Apr. 2000), https://perma.cc/4EUW-UTFG. "[W]hether commercial or noncommercial," filming activities must not "cause unacceptable impacts." *Management Policies 2006* § 8.6.6.1 (2006). NPS waives the permit requirement only for personal, noncommercial filming that is incidental to an otherwise typical park visit, *id.* § 8.6.6.2, because such filming is unlikely to raise additional risks beyond the risks inherent in the visit itself.

ommend a fine upon conviction with no jail time or court supervision." D. Ct. Doc. 19, at 3 (Aug. 27, 2019). Petitioner challenged the commercial-filming statute and regulations on First Amendment grounds, and the government voluntarily dismissed the case. *Ibid.*; C.A. App. 21 (Complaint).

2. a. Petitioner subsequently brought this action against the Attorney General, the Secretary, and the person exercising the authority of the Director of NPS, in their official capacities. C.A. App. 13-14 (Complaint). Petitioner contended that the statute and regulations governing commercial filming on NPS lands were facially overbroad under the First Amendment. Petitioner sought a nationwide injunction against enforcement of the statute and regulations against any commercial filmmaker on any NPS lands under any circumstances. *Id.* at 10-13, 34.

b. The district court denied the government's motion for judgment on the pleadings, granted petitioner's motion for judgment on the pleadings, held the statute and regulations to be facially overbroad, and permanently enjoined their enforcement on a nationwide basis. Pet. App. 44a-88a.

The district court first determined that the commercial-filming permitting and fee requirements were subject to the "heightened level of First Amendment scrutiny" applicable to restrictions on speech occurring in public fora. Pet. App. 66a. Petitioner had conceded that his own unpermitted filming did not occur in any public forum, and he did not allege that any of his future filming would occur in a public forum. D. Ct. Doc. 25, at 17 n.15 (July 9, 2020). The district court nonetheless focused on hypothetical commercial filming in public fora

because petitioner brought a facial challenge to the statute and regulations. Pet. App. 61a.

The district court next determined that the statute and regulations are content-based and that strict scrutiny applied. The court reasoned that although permit and fee requirements for commercial activity in national parks, in general, would be content-neutral, the commercial-filming statute and regulations at issue here "do not apply generically to all commercial activity in national parks" but rather apply to "filming" in particular. Pet. App. 70a. The court further reasoned that "application of" the statute and regulations depends on whether filming activities are "commercial," which, according to the court, "necessarily turns on an assessment of * * * the content of a film." *Ibid.*

The district court then ruled that the statute and regulations fail strict scrutiny. Pet. App. 72a-80a. The court concluded that the government's interest in obtaining a fair return for the commercial use of federal lands was not compelling and that the government could instead raise revenue with a general tax that does not "single[] out" speech. *Id.* at 73a (citation omitted). The court assumed that the government did have a compelling interest in protecting national parks from harm. *Id.* at 74a. But the court determined that the statute and regulations are not narrowly tailored to serve that interest because they do not cover non-commercial filming and because they cover small-scale commercial filming that, in the court's view, had "no clear connection to the government's land conservation goals." *Id.* at 77a.

Finally, the district court concluded that the statute and regulations were facially overbroad and invalid in their entirety because their potential application in a public forum restricted "a substantial amount of speech

that is constitutionally protected." Pet. App. 61a (citation omitted). Based on that conclusion, the court declared that the statute and regulations "are unconstitutional under the First Amendment" in all of their applications, and it permanently enjoined their enforcement by NPS against anyone on any NPS lands. *Id.* at 87a.

3. The court of appeals reversed. Pet. App. 1a-43a.

The court took issue with many aspects of the district court's reasoning, including the district court's conclusion that the statute was facially overbroad. The court of appeals noted that "despite the vast areas of NPS land that are not public forums, [the district court's] opinion contains no comparing of valid and invalid applications whatever, 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." Pet. App. 8a (citations and internal quotation marks omitted).

The court of appeals ultimately did not decide "whether the district court's over-breadth analysis, which pa[id] little attention to proportionality, [was] consistent with [the court's] precedent and that of the Supreme Court," or "the propriety of the district court's issuing a nationwide injunction." Pet. App. 26a n.* Instead, the court concluded that, although commercial filming on NPS lands "warrants solicitude under the First Amendment, that solicitude does not come from the speech-protective rules of a public forum." *Id.* at 12a. The court reached that conclusion after reviewing "the historical underpinnings of forum analysis, the evolution of this analytical framework, and the cases in which the Supreme Court has applied it." *Ibid.* The court explained that "a filmmaker does not seek to communicate with others at the location in which he or she

films" and "does not use the location as a 'forum.'" *Ibid.* The court thus concluded that "it would be a category error to apply the speech-protective rules of a public forum to regulation" of commercial filming, where that filming does not use government property as a forum. *Ibid.*

Having determined that forum analysis was inappropriate, the court of appeals proceeded to apply the same reasonableness standard "that applies to restrictions on first amendment activity" on government property outside the context of special public-forum rules. Pet. App. 20a. The court ruled that the statute and regulations at issue here are reasonable and viewpoint-neutral and thus can be applied to commercial filming on all NPS lands. *Id.* at 19a-28a. As to the fee requirement, the court "ha[d] no difficulty" in rejecting petitioner's contentions, reasoning that the requirement does not "single[] out speech" but "merely puts a commercial filmmaker on the same footing as any other person who uses park land for a commercial purpose." *Id.* at 22a-23a. The court further explained that the permit requirement serves the "undoubtedly significant governmental interests" in "[p]rotecting and properly managing park lands," even as applied to smaller filming crews. *Id.* at 23a-24a.

b. Judge Henderson concurred, noting that she was "in complete agreement with Judge Ginsburg's analysis" in the majority opinion and "join[ed] it fully." Pet. App. 28a. Judge Henderson wrote separately to "emphasize the limited reach of the court's holding." *Ibid.* She observed that the court of appeals would "still apply heightened scrutiny to a wide variety of speech" in public fora, where speakers use government property as a forum. *Id.* at 29a. But, Judge Henderson emphasized,

this case "presents a paradigmatic example" of a situation in which a person engages in expressive activity on government property but does not use that property as a forum of any kind. *Ibid.*

c. Judge Tatel dissented. Pet. App. 29a-43a. He would have applied public-forum rules to any First Amendment activity taking place on government property set aside as a public forum, regardless of whether that activity uses the government property as a forum or not. *Id.* at 39a-43a. And he further concluded that the permit and fee requirements do not withstand heightened scrutiny. *Id.* at 35a-39a.

d. The court of appeals denied rehearing en banc, Pet. App. 89a-90a, with no judge "request[ing] * * * a vote" on the petition, *id.* at 90a.

ARGUMENT

Petitioner contends (Pet. 8-25) that the Act of Congress and implementing National Park Service regulations adopting permit and fee requirements for commercial filming on national park lands violate the First Amendment on their face. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Although petitioner contends (Pet. 8) that review is warranted to "clarify" the scope of First Amendment protection for filmmaking activities, this case would be a poor vehicle for addressing those issues. The narrow issue in this case concerns the constitutionality of a specific statute and regulations governing commercial filming on NPS lands. This case does not implicate any issues about the First Amendment status of filmmaking writ large. And in any event, petitioner's facial overbreadth challenge would fail even if a heightened standard of review were applied to the application

of the statute and regulations to commercial filming on the small amount of national park lands that may qualify as public fora. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the statute and regulations governing commercial filming on NPS lands are consistent with the First Amendment.

a. A private speaker's right to access government property for expressive activity generally depends on whether the government has created a forum for expression, and if so, what type of forum. "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'" *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A designated public forum is property that is not traditionally regarded as a public forum, but that the government "has opened for expressive activity by part or all of the public." *Ibid.* Finally, a nonpublic forum is government property that "is not by tradition or designation a forum for public communication," for example, museums or government offices. *Perry*, 460 U.S. at 46.

Restrictions on expression in traditional public fora or designated public fora are subject to strict scrutiny if the restrictions are content-based, and intermediate scrutiny if the restrictions are content-neutral. See *Perry*, 460 U.S. at 45. As the court of appeals recognized, however, "not every activity the First Amendment protects as speech benefits from the strict, speech-protective rules of a public forum." Pet. App. 12a. This Court's early cases giving rise to the public-

forum doctrine were "concerned with assembly, the exchange of ideas to and among citizens, the discussion of public issues, the dissemination of information and opinion, and debate," and those cases "bas[ed] the justification for heightened protection of [such] communicative activities in traditional public forums on their having 'immemorially been held in trust' for that activity." *Id.* at 15a (quoting *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). Because "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens," forum doctrine applies more-searching scrutiny to restrictions on speakers who seek to "use the streets and parks for communication of views on national questions." *Hague*, 307 U.S. at 515-516; see *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147, 163 (1939) (concluding that public streets are the "natural and proper places for the dissemination of information and opinion," and a town could thus not prohibit distributing literature on them); *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) (describing "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"); *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943) (protecting the use of public streets for "the communication of ideas by handbills and literature as well as by the spoken word").

This Court formalized the public forum doctrine in *Perry*, *supra*. As in its earlier cases, this Court in *Perry* again described public fora as property that is set aside for a specific purpose: "for public communication," "assembly and debate." 460 U.S. at 45-46. A school's internal mail system was thus a forum of some kind

(though not a public one) because it was an "instrumentality * * * used for the communication of ideas." *Id.* at 49 & n.9. At the same time, the Court emphasized the continued applicability, outside the special context of public-forum rules, of the general First Amendment rule that the government may preserve its own property "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable" and viewpoint-neutral. *Id.* at 46.

Since *Perry*, "every single * * * case" from this Court has consistently applied forum analysis only where a speaker seeks to use government property as a platform for communicating with others. Pet. App. 16a.[2] And, as the court of appeals noted, this Court in *Arkansas Educational Television Commission* v. *Forbes*, *supra*, expressly "warn[ed] 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." Pet. App. 12a-13a (quoting *Forbes*, 523 U.S. at 672-673). The Court cautioned that

---

[2] See, *e.g.*, *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (explaining that fora are "used as a vehicle for communication" and that certain "[l]ampposts can of course be used as signposts," and thus could be fora, though they were not public ones); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800, 803 (1985) (describing a forum as an "instrumentality used for communication" or "a place or means of communication," and holding that a charity drive can be a forum for soliciting donations, though not a public one); *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 464, 479 (2009) (noting that "a park is a traditional public forum for speeches and other transitory expressive acts" and "a soapbox for * * * orators," but concluding that installation of donated monuments on a park, though expressive, constituted government speech not subject to forum analysis); see also *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1588 (2022).

some restrictions on First Amendment activities on government property "do[] not lend [themselves] to scrutiny under the forum doctrine." *Forbes*, 523 U.S. at 675.

Heeding this Court's warning, the court of appeals correctly concluded that, "although filmmaking is protected by the First Amendment, the specific speech-protective rules of a public forum" do not apply to commercial filming on NPS lands because such filming does not use NPS lands as a "forum" of any kind. Pet. App. 28a. Unlike protesters, proselytizers, performers, and other speakers, "a filmmaker does not seek to communicate with others at the location in which he or she films," and "does not use the location as a 'forum.'" *Id.* at 12a. Instead, commercial filmmakers use shooting locations as visual inputs that, along with many other raw materials, can be used to make a final film that is then exhibited at another time and place. It would thus be a "category error to apply the speech-protective rules of a public forum" to commercial filming activities. *Ibid.*

Based on its analysis of this Court's public forum precedents, the court of appeals concluded that filmmaking on NPS lands "is subject to the same degree of regulation in a traditional public forum as it would be in a nonpublic forum." Pet. App. 19a. Applying that reasonableness standard, the court correctly upheld the commercial-filming provisions, which are concededly viewpoint neutral and further two important governmental interests—raising revenue to maintain federal lands, and ensuring that filming does not harm federal lands or impair the visitor experience. *Id.* at 19a-28a.

b. Petitioner argues (Pet. 15) that the court of appeals erred in analyzing the constitutionality of the commercial-filmmaking requirements under a reasona-

bleness standard, rather than the more demanding standards applicable to public fora. But petitioner identifies no inconsistency between the court of appeals' analysis and this Court's public-forum cases. Indeed, petitioner does not seriously engage with the court of appeals' reasoning or this Court's case law establishing that the point of a public forum is to serve as a platform for communicating with others. See Pet. 16-17. Petitioner instead asserts that the court of appeals derived its conclusions about the scope of public-forum doctrine from "mere[] descri[ptions]" of the factual circumstances in which the Court's cases arose. Pet. 17. To the contrary, as explained above, the court of appeals' conclusions were well grounded in the actual holdings and analyses of this Court's precedents, which have explained the purpose and scope of public forum analysis and cautioned against extending forum rules beyond their established and proper scope.

Rather than dispute the court of appeals' analysis of the origins and purposes of public forum doctrine, petitioner primarily contends that review is necessary to "clarify that filmmaking is 'communicative activity' that is fully protected by the First Amendment." Pet. 8 (emphasis omitted; capitalization altered). In making this argument, petitioner relies (Pet. 8-12) on the general proposition 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), and the more-specific proposition that "the First Amendment protects the right to make audio and/or video recordings," Pet. 12 (collecting cases). Those undisputed propositions are not implicated by the court of appeals' disposition of this case. The relevant question here is not whether commercial filmmak-

ing is protected by the First Amendment—undoubtedly it is—but *how* the First Amendment applies to commercial filmmaking activities when they occur *on government property*. And the key point, which petitioner does not address, is that none of the commercial filmmaking activities covered by 54 U.S.C. 100905 and implementing NPS regulations concern the use of government property as a forum to communicate with others. The special rules that provide a particularly heightened level of protection for First Amendment activity within public fora accordingly do not apply here.

2. The court of appeals' rejection of petitioner's constitutional challenges to NPS's commercial-filming requirements does not conflict with a decision of any other court of appeals. Indeed, petitioner does not identify any other court of appeals that has considered the constitutionality of 54 U.S.C. 100905 or the implementing regulations petitioner challenges. Petitioner instead contends that the decision below is contrary to decisions from other circuits that "have upheld First Amendment protections for photography and filmmaking." Pet. 13. That contention is incorrect. As the court of appeals explained, see Pet. App. 16a-19a, the decisions on which petitioner relies primarily concern the constitutionality of laws restricting the recording of public officials (often police) performing public duties in public places.[3] Those

---

[3] See *Irizarry* v. *Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022) ("[T]here is a First Amendment right to film the police performing their duties in public."); *Fields* v. *City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017) ("[T]his case is * * * about how our public servants operate in public."); *Turner* v. *Lieutenant Driver*, 848 F.3d 678, 690 n.50 (5th Cir. 2017) (identifying a "right to film police activity carried out in public") (quoting *Gericke* v. *Begin*, 753 F.3d 1, 8 (1st Cir. 2014))); *Smith* v. *City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.)

cases proceed from the premise that there is " 'particular significance' of First Amendment newsgathering rights 'with respect to government.' " *Project Veritas Action Fund* v. *Rollins*, 982 F.3d 813, 831 (1st Cir. 2020), cert. denied, 142 S. Ct. 560 (2021) (quoting *Glik* v. *Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)); see also *American Civil Liberties Union* v. *Alvarez*, 679 F.3d 583, 597 (7th Cir.) ("First Amendment interests are quite strong" where people record "public officials performing their official duties in public."), cert. denied, 568 U.S. 1027 (2012). Petitioner's facial challenge to the Act of Congress and implementing regulations governing the use of national park lands for commercial filming does not "implicate[] [the] unique first amendment interests" at issue in those cases, Pet. App. 17a, because petitioner's challenge does not involve public officials performing public duties in public places.

Moreover, many of petitioner's cited cases focus on public "space[s]" generally and "make no effort to determine whether the location of the recording is a public forum" as such. Pet. App. 18a (citation omitted). The decisions relied on by petitioner reason that privacy interests are diminished when officials perform public duties in public places, while the public interest in monitoring that activity is heightened. See, *e.g.*, *Rollins*, 982 F.3d at 835-836, 838-839; *Alvarez*, 679 F.3d at 586, 597, 605-606. Petitioner identifies no comparable basis for subjecting restrictions on commercial-filming activities on national park lands to any level of scrutiny above the First Amendment test of viewpoint-neutrality and reasonableness.

(discussing right "to gather information about what public officials do on public property"), cert. denied, 531 U.S. 978 (2000).

For similar reasons, petitioner misplaces his reliance on *Ness* v. *City of Bloomington*, 11 F.4th 914 (8th Cir. 2021) and *John K. MacIver Institute for Public Policy, Inc.* v. *Evers*, 994 F.3d 602 (7th Cir.), cert. denied, 142 S. Ct. 711 (2021). *Ness* held 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 "matters of public controversy"—specifically, alleged violations of a permit issued to a youth center by the city. 11 F.4th at 923. As the court of appeals explained, *Ness* "does not suggest a general right to record on public property," Pet. App. 18a, and thus does not contradict the analysis in this case.

Evers is even further afield. That case "does not even deal with filming," but with unique interests relating to "gathering information for *news* dissemination." Pet. App. 18a n.* (quoting *Evers*, 994 F.3d at 612). *Evers* rejected a claimed right to participate in "limited-access press conferences," 994 F.3d at 607, at which the governor "answers questions from members of the press," *id.* at 606. The *Evers* court upheld the limited-access restrictions as viewpoint-neutral and reasonable —just as the court of appeals here held that the commercial-filming permit and fee requirements applicable to national park lands withstand such scrutiny.

Even if genuine tension existed between the decision below and other cases according First Amendment protection to other filmmaking activities, any such tension would not warrant further review in this case. The parties' dispute is limited to the narrow question of whether Congress can permissibly require commercial filmmakers to comply with permitting and fee requirements on NPS lands. This case does not present any

questions about the scope of First Amendment protection for commercial filmmaking more generally. Indeed, both judges of the court of appeals who joined the majority opinion disclaimed that overbroad interpretation of the decision. Pet. App. 9a (majority opinion) (recognizing that "[f]ilmmaking undoubtedly is protected by the First Amendment"); *id.* at 28a-29a (Henderson, J. concurring) (emphasizing the "limited reach" of the court's decision, and noting that the court "need not—and do[es] not—explain the full contours of what does and does not constitute 'communicative speech'"). This case accordingly provides no opportunity for the Court to delineate the contours of First Amendment protection for commercial filmmaking activities occurring outside the limited confines of the particular permit and fee-payment requirements challenged by petitioner.

3. In any event, this case would be a poor candidate for the Court's review because, as the government explained in briefing before the court of appeals, the district court's facial overbreadth ruling could not stand even under the rules applicable to public speech in a public forum. See Gov't C.A. Br. 18-64; Gov't C.A. Reply Br. 11-33.

Section 100905 and NPS's implementing regulations do not regulate commercial filming based on its status as protected speech or the content of any film. As with all other commercial operations on NPS land, commercial filming is regulated based on its commercial nature and the potential for harming national parks or interfering with national park users. Gov't C.A. Br. 19-40; Gov't C.A. Reply Br. 11-17. Strict scrutiny thus does not apply. And the permit and fee requirements would withstand heightened scrutiny: They are adequately

tailored to achieve the government's substantial interests in safeguarding natural resources, preserving visitors' use and enjoyment of the national parks, and raising money for national park maintenance from those who use federal lands for private gain. Gov't C.A. Br. 40-59; Gov't C.A. Reply Br. 19-28. Accordingly, even assuming public-forum rules governed, the statute and regulations could still be applied, consistent with the First Amendment, on all NPS lands, including to any hypothetical commercial filming that may take place on those tracts of NPS lands that would qualify as public fora.[4]

Moreover, petitioner's facial overbreadth challenge would fail even if the Court were to conclude that public forum rules govern and that applying the permit and fee requirements to commercial filming in public fora located on national park lands would violate the First Amendment. Petitioner asserts (Pet. 16) that the applicability of the statute and regulations "in public fo-

---

[4] Petitioner incorrectly assumes that charging a revenue-raising fee for commercial filming would not survive heightened scrutiny because it would "tax" "activities guaranteed by the First Amendment." Pet. 23-24 (quoting *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113 (1943). As petitioner does not dispute, all commercial uses of NPS lands are generally subject to similar fees. See pp. 2-3, *supra*. And "taxing businesses generally" does not violate the First Amendment, even when some of the taxed activity has an expressive component. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983); see *Leathers* v. *Medlock*, 499 U.S. 439, 453 (1991). Petitioner also does not dispute that commercial filming operations routinely pay location fees for the privilege of shooting on private, municipal, tribal, and state land. *E.g.*, 145 Cong. Rec. 6141 (1999) (statement of Rep. Romero-Barcelo). The absence of similar fees on NPS land would draw commercial filmmakers who would otherwise film in other locations, resulting in additional adverse impacts on the national parks.

rums alone provide[s] ample reason" for his facial overbreadth claim to prevail on the merits. Pet. 16. That assertion ignores the cardinal rule that, to prevail on a facial overbreadth claim, the person bringing that claim must show that the "statute's overbreadth [is] *substantial* * * * relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 553 U.S. 285, 292 (2008). As the court of appeals correctly observed, "despite the vast areas of NPS land that are not public forums, [the district court's] opinion contains no comparing of valid and invalid applications whatever, to demonstrate that the overbreadth [the district court identified] is substantial." Pet. App. 8a (citation and internal quotation marks omitted).

Petitioner has never disputed that "over 80 percent of *all* NPS lands" are "managed as wilderness." NPS, *Parks with Wilderness*, https://perma.cc/5QPB-3DF2. And the vast majority of the remaining land is plainly administered by NPS for purposes other than providing a platform for speakers. The designated zone for demonstrations in the Yorktown Battlefield, for example, is restricted to the small area between the visitor's center and the bus parking lot. See NPS, *Colonial National Historical Park: Superintendent's Compendium* 20, 28, https://perma.cc/EL4R-PTV9. The applications of the statute outside any public forum, which are plainly permissible, "dwarf[]" any hypothetical application in a public forum. *United States* v. *Stevens*, 559 U.S. 460, 482 (2010). Petitioner's overbreadth claim thus would fail as a matter of law even if the special rules governing public fora were applied to commercial filming in the very small areas of NPS lands that other people use as public fora, and even if the statute were assumed to be unconstitutional in that application. This Court's review of the ques-

tion presented therefore would not alter the outcome of petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MICHAEL S. RAAB
JOSHUA M. SALZMAN
JOSEPH F. BUSA
Attorneys

MARCH 2023