No. 22-665

IN THE

Supreme Court of the United States

GORDON PRICE,

Petitioner,

v.

MERRICK B. GARLAND, ET AL.,

Respondents.

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

PETITIONER'S REPLY

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I. THE OPPOSITION EVADES THE QUESTIONS PRESENTED

a. One need look no further than the first page of Respondent's Opposition to understand the government is trying to avoid the fundamental First Amendment issues presented. It reframes the case as raising a single question—whether Section 100905 is constitutional—eliding the first two questions raised in the Petition: whether filmmaking is "noncommunicative activity" subject to diminished First Amendment protection, and whether the public forum doctrine can be diluted by disaggregating the constituent parts of the speech process.

True enough, if this Court were to accept the case, it hopefully would decide Section 100905's constitutionality. But to resolve that issue, it is necessary to confront the D.C. Circuit's revision of First Amendment jurisprudence in these areas. Indeed, it is *only* possible to reach the government's preferred conclusion about the law's validity after accepting the D.C. Circuit's anomalous propositions that filmmaking is "noncommunicative activity," that any profit motive undermines First Amendment protections, and that the public forum doctrine only applies to contemporaneous vocalizations. Thus, the government evades the issue when it claims the case "does not implicate any issues about the First Amendment status of filmmaking writ large," "does not present any questions about the scope of First Amendment protections for commercial filmmaking more generally," and that the decision below "does not conflict with a decision of any other court of appeals." Opp. 9, 15, 17-18.

The Opposition's theme that there is "nothing to see here" is just misdirection. As Judge Tatel explained, "my colleagues—for the very first time—disaggregate speech creation and dissemination, thus degrading First Amendment protection for filming, photography, and other activities essential to free expression in today's world." 43a (Tatel, J., dissenting). He added the majority's approach "reimagine[s] the public forum doctrine" based on distinctions that "find no basis in First Amendment jurisprudence," noting "[b]y stripping filming of the protections afforded to expression in public forums, the court puts us in direct conflict with other circuits and leaves important expressive activities unprotected in places where the First Amendment's guarantee of free speech should be at its apex." 39-42a.

It is difficult to imagine a more direct conflict on a vital question of First Amendment law than the D.C. Circuit's load-bearing conclusion that filmmaking is "merely a noncommunicative step in the production of speech." 12a. *See* Brief of *Amicus Curiae* Foundation for Individual Rights and Expression in Support of Petitioner at 8 ("[T]he unanimity of other circuits speaks volumes and underscores the need for this Court to grant review.").

b. The government's claim that no such conflict exists because another court has not issued a contrary ruling about the constitutionality of Section 100905, Opp. 15, views the case through the wrong end of the telescope. When this Court accepts cases for review based on circuit conflicts in First Amendment matters, it has never required that the diverging opinions arise from rulings on same statutory scheme. If it did, it is difficult to imagine how any case

involving the public forum doctrine or other basic questions of First Amendment law would ever have been taken up. Rather, the conflicts arise from different approaches to constitutional interpretation.

Thus, in its most recent case applying the public forum doctrine, this Court reviewed a policy governing access to a city-owned flag pole based on conflicting decisions involving the distribution of literature in public schools, display of a menorah on public property, and meeting space for a Christian club in public schools. Petition for Writ of Certiorari, *Shurtleff v. City of Boston*, No. 20-1800, at 44-45 (identifying conflicting decisions of the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits) (https://www.supremecourt.gov/DocketPDF /20/20-1800/182191/20210621143022313_Cert%20 Petition%20-%20FINAL.pdf). Likewise, when the Court examined the constitutionality of a fee to conduct a rally in a public forum, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992), it resolved conflicting decisions involving fees for the distribution of literature in an airport terminal, *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), access to an abandoned rail bed, *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050 (2d Cir. 1983), and a gay rights parade. *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991).

Pointedly, no case—including public forum cases on which the Opposition relies—supports the government's conception of circuit splits as only involving disputes over a particular statute. *See Perry Educ. Ass'n v. Perry Educator's Ass'n*, 460 U.S. 37, 43 & n.6 (1983) (accepting review of forum question involving use of school's internal mail system based on conflicting circuit rulings involving

"similar access policies" and because the "constitutional issues presented are important").

c. This case merits review not just because of the circuit split created by the ruling below, but because it raises important issues that should be settled by this Court. Pet. 13-15. One would think the government should *support* review under Rule 10(c) because it tacitly admits this Court has never addressed whether "noncommunicative conduct" in a public forum is protected. The Opposition relies instead on what the D.C. Circuit dubbed "the historical underpinnings of forum analysis." 12a. As *amicus* Pacific Legal Foundation observed, the term "noncommunicative step" on which the D.C. Circuit relied "appears nowhere in this Court's precedents (or any other reported federal court decision)." *See* Brief *Amicus Curiae* of Pacific Legal Foundation and Anthony Barilla in Support of Petitioner at 11 ("Pac. Legal Found. Br.").

Curiously, the government's effort to play down the constitutional issues presented here stands in stark contrast with its position in other cases that raise the same underlying issues. It filed an *amicus* brief in *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022), in which it urged the Tenth Circuit to address "an important issue that this Court has not yet addressed: whether the First Amendment provides a qualified right to record law-enforcement officers performing their duties in public," noting that "[a]ll six circuit courts to confront that issue have concluded that such a right exists." Brief for the United States as *Amicus Curiae* in Support of Neither Party, *Irizarry v. Yehia*, No. 21-1247 (10th Cir., filed Nov. 24, 2021) ("*DOJ Amicus*") at 6.

The government now discounts the import of these cases as relevant only to a right to "record the police," or to engage in "newsgathering," Opp. 15-16, but it made clear in *Irizarry* that the First Amendment principles at issue transcend those particular applications: "These cases fit squarely within the broader constellation of decisions recognizing that documenting matters of public concern constitutes core First Amendment activity." *DOJ Amicus* 12.

The government cited *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) for the principle that "[a]n individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter," adding "these cases further illustrate that the First Amendment protects the public's right to record those matters, *even when they do not involve government activity*." *DOJ Amicus* 13-14 (emphasis added). And it stressed that the First Amendment's protections extend both to the "ability to create and disseminate speech." *Id.* at 14.

Unlike here, the government in *Irizarry* urged the court to address the vital First Amendment questions, to decline defendants' "invitation to take the easy way out," and to "adhere to the same approach as its sister circuits." *Id.* at 17.

The Tenth Circuit was persuaded. It extended the unbroken line of circuit court decisions upholding the right to record, noting "[i]f the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech." *Irizarry*, 38 F.4th at 1289 (quoting

Michael, 869 F.3d at 1196). Contrary to the D.C. Circuit here, it held that "videorecording is 'unambiguously' speech-creation, not mere conduct." *Id.*

II. SECTION 100905 IS UNCONSTITUTIONAL UNDER ANY LEVEL OF FIRST AMENDMENT SCRUTINY

a. The Opposition skips over the threshold questions of First Amendment doctrine and posits that "commercial filming is regulated based on its commercial nature and the potential for harming national parks or interfering with national park users." Opp. 18. However, it fails to explain how requiring a permit and fee for low-impact "commercial" filmmakers like the Petitioner serves any asserted governmental purpose.

A lone person with a camera, tripod, and one or two assistants imposes no impact on public lands nor does he affect other visitors simply because that person hopes to profit from the images he captures, yet he must get a permit, while the same person without a pecuniary motive does not. The government disingenuously compares such a person to those who, pursuant to other statutes not at issue here, use public lands for cattle grazing, growing crops, erecting cell towers, or operating hot dog concessions. Opp. 2. But the people subject to Section 100905 do not "reserve 'fixed locations' on government property nor use such locations 'to sell, exhibit or distribute materials.'" 38a (Tatel, J., dissenting).

This is why the government's "rent extraction" theory fails, as the commercial filmmaker in this scenario is not using public property to "operate a business." Pet. 23-24; *see* 36a-38a (Tatel, J.,

dissenting) ("proprietary capacity" cases do not apply; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), is controlling authority because Section 100905 singles out speech for special taxation).

This Court has long held that the government cannot justify regulating speech merely by attaching the label "commercial." In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), it struck down a ban on distributing commercial publications (but not newspapers) using freestanding newsboxes. The Court found the commercial/ noncommercial distinction "bears no relationship *whatsoever* to the particular interests that the city has asserted" of protecting safety and aesthetics. *Id.* at 424. That was because "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." *Id.* at 425.

The same is true of speech motivated by a desire to make a profit, as distinguished from "commercial speech" (*i.e.*, advertising). In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 573 (2011), the Court held the government's interest in protecting physician confidentiality was not served by preventing profit-motivated speakers from accessing data when the same information was widely available for "noncommercial" uses. It also found that special restrictions on profit-motivated speech are inherently content-based and subject to heightened scrutiny. *Id.* at 566-67 ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."). *Cf. Discovery Network*, 507 U.S. at 429 ("[B]y any commonsense understanding of the term, the ban in this case is 'content based'").

Here, the Opposition tries to frame the question as "*how* the First Amendment applies to commercial filmmaking activities when they occur *on government property*," Opp. 15, but never explains how Section 100905 can be reconciled with the basic principles set forth in cases like *Discovery Network* and *IMS Health*. The fact is, it cannot, and the government's novel attempt to create constitutional distinctions focused on speakers' financial motivations is an important reason why this Court should grant review. *See* Pac. Legal Found. Br. 5-9.

b. The D.C. Circuit's reasoning 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," 20a, depends on its prior conclusions that filming is "noncommunicative activity" and that the speech process can be disaggregated in public forum analysis—the first two constitutional questions raised in this Petition (that the government now tries to ignore). *See* 42a (Tatel, J., dissenting) ("[T]he court cites not a single case that applies a 'reasonableness' standard of scrutiny to a government restriction on filming in public places."). Accordingly, the Opposition's assumption that Section 100905 is constitutional begs the question.

Even if "reasonableness" were the correct standard, Section 100905 would fail. This Court applied a reasonableness test to invalidate a Minnesota law that prohibited any person from wearing a political badge, political button, or other political insignia in polling places on election day in *Minnesota Voters All. v. Mansky,* 138 S. Ct. 1876 (2018). It found polling places are nonpublic forums, the law was content-neutral, and the state's objectives

of avoiding campaigning or voter intimidation inside polls were permissible. Nevertheless, it held the law did not reasonably distinguish between speech constituting "advocacy" that could be restricted and other expression that did not affect the state's interests. *Id.* at 1890-91.

The same problem plagues Section 100905. Just as the distinction between commercial and noncommercial newsracks in *Discovery Network* bore "no relationship *whatsoever*" to the city's interest in promoting safety and aesthetics, 507 U.S. at 424, Section 100905's purported interest in park management is not reasonably served by the law's distinctions between commercial filmmakers, noncommercial filmmakers, and still photographers. *See* 78a (explaining how commercial/noncommercial distinction in Section 100905 is unrelated to government's asserted interests).

While the District Court fully explained how Section 100905 is disconnected from its purported purposes, the disparities created by the law are even crazier:

- Section 100905 requires Mr. Price to get a permit and pay a fee even as a solo filmmaker in national parks, but not the news crew with heavier equipment that documents his activities at the same time and place. 43 C.F.R. § 5.4.
- A tourist who captures stunning images of Old Faithful is not required to get a permit or pay a fee, but could be prosecuted under Section 100905 if he later decided to monetize the video by posting it online. 42a-43a (Tatel, J., dissenting).

- A commercial still photographer may take photographs in any area "generally accessible to the public" without getting a permit or paying a fee, Section 100905(c)(1), but would be in violation of the law if he changed the settings on his camera from "photo" to "video." *See* Brief of *Amici Curiae* National Press Photographers Ass'n and 13 Other Organizations in Support of Petitioner at 14 ("NPPA Br.").
- According to the majority below, a commercial filmmaker likely *would* be engaging in "communicative activity," if his camera were set to livestream video, but would be engaged in "noncommunicative conduct" if the camera were set just to record, 19a n.*, demonstrating yet another way a speaker's constitutional status would depend on camera settings alone.[1]

These distinctions that govern who receives First Amendment protection are not just unreasonable, they are irrational. Pac. Legal Found. Br. 11-12. And the few examples cited above only scratch the surface of the ways in which Section 100905's distinctions make no sense. *See* NPPA Br. 9-19.

c. The D.C. Circuit majority implicitly recognized that Section 100905 cannot survive First Amendment review under the public forum doctrine. Instead, it dodged the question by concluding "the speech-protective rules of a public forum" do not apply to "a

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[1] After this Petition was filed, the Fourth Circuit held that livestreaming video is protected by the First Amendment for the same reasons as the act of recording video. *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023).

noncommunicative step in the production of speech." 12a. Of course, the District Court found what happens when public forum analysis is properly applied—Section 100905 is a content-based regime of prior restraint and an unconstitutional tax on speech. 67a-81a. Relying on *Discovery Network* and other relevant authorities, the court concluded that the law could not survive heightened scrutiny. 69a-74a. The government has made no serious argument that the law could satisfy First Amendment review under the public forum doctrine.

d. The D.C. Circuit decision, and the government's defense of it, are flawed for another reason. They assume incorrectly that commercial filmmaking on public lands receives First Amendment protection *only* if the public forum doctrine applies. Public forum analysis provides one means of understanding the issues in this case, but is not required. As Petitioner observed in his merits brief below, "forum analysis is *sufficient* to decide this case [but] it is not *necessary* to decide it." Appellee Br. 21.

Decisions finding a First Amendment right to record do not depend on forum analysis, although they recognize the government is on particularly shaky ground when it seeks to restrict photography in traditional forums. *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). The First Circuit surveyed cases finding a right to record in "public spaces," noting that such places include traditional public fora, sites of traffic stops, and other "inescapably" public spaces, as well as publicly accessible private property. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 827 (1st Cir. 2020).

Cases upholding the First Amendment right to film or record in "public places" are premised on the principle that if a person has a right to be in a public setting, he or she has a right to observe and record the scene. *See Fields v. City of Phila.*, 862 F.3d 353, 359 (3d Cir. 2017) (recording "what there is the right for the eye to see or the ear to hear" falls "squarely within the First Amendment right of access to information"). These cases do not purport "to predicate the level of scrutiny that applied to the challenged recording restrictions on forum analysis." *Rollins*, 982 F.3d at 835. Intermediate scrutiny governs content neutral restrictions on public photography, and various courts have applied this level of scrutiny (whether or not in a public forum). *Id.* at 835-37 (citing *Glik*, 655 F.3d at 84, and *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014)).

The Opposition's assertion that these cases only relate to a right to record "police activity" or to engage in "newsgathering," Opp. 15-16, is incorrect. *E.g.*, *Michael*, 869 F.3d at 1196. And such a claim sits most uncomfortably next to the government's arguments in *Irizarry* that the First Amendment protects the right to record "even when [the subjects] do not involve government activity." *DOJ Amicus* 14.

CONCLUSION

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

Respectfully submitted,

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