

No. _____

IN THE
Supreme Court of the United States

*JOSEPHINE HAVLAK PHOTOGRAPHER, INC.,
ET AL.,
PETITIONERS,*

v.

*VILLAGE OF TWIN OAKS, MISSOURI, ET AL.,
RESPONDENTS.*

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a \$100 permit, to be obtained at least 48 hours in advance, is a constitutional time, place and manner restriction as applied to a professional photographer who wishes to shoot an individual subject within an 11-acre public park.

PARTIES TO THE PROCEEDINGS

Petitioners are Josephine Havlak Photographer, Inc., a Missouri corporation, and Josephine Havlak individually.

Respondents are the Village of Twin Oaks, Missouri and its Village Clerk, Kathy Runge, in her official capacity only.

CORPORATE DISCLOSURE STATEMENT

Petitioner Josephine Havlak Photographer, Inc. is a Missouri corporation wholly owned by petitioner Josephine Havlak. It does not have any parent companies, and no other entity or person has any ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINIONS BELOW	5
STATEMENT OF JURISDICTION	6
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	6
STATEMENT OF THE CASE.....	10
REASONS FOR GRANTING THE PETITION	15
CONCLUSION.....	25
APPENDIX A, EIGHTH CIRCUIT OPINION .	APP 1
APPENDIX B, DENIAL OF REHEARING	APP 26
APPENDIX C, DISTRICT COURT OPINION	APP 27
APPENDIX D, VILLAGE OF TWIN OAKS CODE §220.020	APP 56

TABLE OF AUTHORITIES

CASES

<i>American-Arab Anti-Discrimination Committee v. City of Dearborn</i> , 418 F.3d 600 (6th Cir. 2005) ..	20
<i>Berger v. City of Seattle</i> , 669 F.3d 1029 (9th Cir. 2009)	3, 21
<i>Board of Trustees of the State University of New York v. Fox</i> , 492 U.S. 469 (1989)	22
<i>Brown v. Entm’t Merchs. Ass’n</i> , 564 U.S. 786 (2011)	23
<i>Burk v. Augusta-Richmond County</i> , 365 F.3d 1247 (11th Cir. 2004)	20
<i>Cantwell v. State of Conn.</i> , 310 U.S. 296 (1940)	15
<i>Central Hudson Elec. Sys. v. Public Svc. Comm’n.</i> , 447 U.S. 557 (1980)	4, 22
<i>Clark v. Community for Creative Non-Violence</i> , 468 U.S. 288 (1984)	23
<i>Cox v. City of Charleston</i> , 416 F.3d 281 (4th Cir. 2005)	20
<i>Cox v. New Hampshire</i> , 312 U.S. 569 (1941)	3, 16
<i>Dana’s R.R. Supply v. Attorney General of Florida</i> , 807 F.3d 1235 (11th Cir. 2015)	24
<i>Doe v. Cooper</i> , 842 F.3d 833 (4th Cir. 2016)	19

<i>Douglas v. Brownell</i> , 88 F.3d 1511 (8th Cir. 1996) .	18
<i>Forsyth Cnty., Ga. v. Nationalist Movement</i> , 505 U.S. 123, 130 (1992)	1
<i>Frisby v. Schultz</i> , 487 U.S. 474 (1988).....	16
<i>Grossman v. City of Portland</i> , 33 F.3d 1200 (9th Cir. 1994).....	20
<i>Heffron v. Int’l Soc. for Krishna Consc.</i> , 452 U.S. 640 (1981)	17
<i>Hobbs v. County of Westchester</i> , 397 F.3d 133 (2d Cir. 2005)	2, 19
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952)	22
<i>Kaahumanu v. Hawaii</i> , 682 F.3d 789 (9th Cir. 2012)	3, 19
<i>Long Beach Area Peace Network v. City of Long Beach</i> , 522 F.3d 1010 (9th Cir. 2008)	21
<i>McCullen v. Coakley</i> , 134 S.Ct. 2518 (2014).....	4, 18
<i>Poulos v. New Hampshire</i> , 345 U.S. 395 (1953)	16
<i>Reed v. Town of Gilbert</i> , 135 S.Ct. 2218 (2015).....	24
<i>Riley v. Nat’l Fed’n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988)	2, 4
<i>Rosen v. Port of Portland</i> , 641 F.2d 1243 (9th Cir. 1981).....	20

<i>Santa Monica Food Not Bombs v. City of Santa Monica</i> , 450 F.3d 1022 (9th Cir. 2006)	19
<i>Schneider v. State of N.J.</i> , 308 U.S. 147 (1939).	15, 17
<i>Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.</i> , 502 U.S. 105 (1991)	23
<i>Thomas v. Chic. Park Dist.</i> , 534 U.S. 316 (2002)	2
<i>United States v. Edge Broadcasting Co.</i> , 509 U.S. 418 (1993)	23
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	22
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	23
<i>Vill. of Schaumburg v. Citizens for a Better Env't</i> , 444 U.S. 620 (1980)	15, 17
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	16
<i>Watchtower Bible v. Village of Stratton</i> , 536 U.S. 150 (2002)	15, 16, 17

STATUTES

28 U.S.C. § 1254(1) (2006)	6
28 U.S.C. § 1291	13
28 U.S.C. § 2201	13
42 U.S.C. § 1983	13

CONSTITUTIONAL PROVISION

United States Constitution, First Amendment
..... *passim*

RULES

U.S. Sup. Ct. R. 13..... 6

MISCELLANEOUS

Village of Twin Oaks, Missouri Ordinances, Title II,
 sec. 220.020 *passim*

PETITION FOR WRIT OF CERTIORARI

Josephine Havlak Photographer, Inc., and Josephine Havlak respectfully petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

INTRODUCTION

When the government regulates speakers in a traditional public form, group size matters. Permit and fee requirements in a public park constitute prior restraints on speech, and as such, there is a heavy presumption against their validity. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Josephine Havlak is a professional photographer who typically shoots individual portraits and wedding groups. The ordinance at issue here requires a permit for such photography, applied for 48 hours in advance for a fee of \$100¹. The Trustees of the Village of Twin Oaks, a St. Louis suburb, passed the ordinance after the Village created a park so uniquely scenic that many photographers wanted to use it for their shoots.

The ordinance applies equally to an individual paid photographer shooting a bird in a tree, a single subject, or a large wedding party. Petitioners believe that until this case there has never been a reported decision upholding a permit requirement in a traditional public forum for one or two people, except

¹ The fee is not set by the ordinance but rather promulgated by the Village and posted on its website.

Hobbs v. County of Westchester, 397 F.3d 133, 150 (2d Cir. 2005) involving the conduct of a registered sex offender in a public park using props and equipment in conduct directed at children.

Havlak's form of artistic expression dates back to John Singer Sargent and beyond. Her photos are thus visual art - even if the subject is paying her to take the picture - because her speech is no less protected because it is sold rather than given away. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). She desires to pick her shoot times and locations spontaneously, based on whim, lighting and weather.

The record reflects a recent national trend to ban or require advance permitting for any photography in public parks. This case, then, addresses not just restrictions in *this* park alone, but also the shrinking of once-ample alternative public parks around the Nation where photographers can engage in expressive speech.

This court has previously approved a permit requirement for a "large scale" event involving a group of fifty or more persons. *Thomas v. Chic. Park Dist.*, 534 U.S. 316, 322 (2002). "[T]he object of the permit system . . . is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event." This court also approved a permit requirement for four to five groups of 20 or more persons to parade through the streets.

Cox v. New Hampshire, 312 U.S. 569 (1941). The Ninth Circuit approved an instant permit system for beach weddings, but a wedding requires more than two people and in that case the wedding party had exclusive use of a portion of the beach and the court found no significant burden on the marrying couple. *Kaahumanu v. Hawaii*, 682 F.3d 789, 794 (9th Cir. 2012).

This case is stronger for petitioners than the permit scheme for street performers overturned in *Berger v. City of Seattle*, 669 F.3d 1029, 1037–38 (9th Cir. 2009), where the congestion was of much larger scale but the regulation was not narrowly tailored. Even the *Berger* dissent acknowledged that individuals and small groups of two cause congestion only in the trivial sense that they take up space, and there is a “presumption” against time, place and manner regulation of their expression. *Id.* at 1071 (Kozinski, J., dissenting).

The permit here is untethered to the location of the photography session, and does not grant exclusive use of a location. As such it fails to meaningfully regulate the “place” prong of a time, place and manner regulation for an 11-acre site.

The Eighth Circuit opinion ignores four material burdens mentioned in *Berger*, 669 F.3d at 1037–38, and which the Village’s regulatory scheme places on Havlak: (1) the procedural hurdle of filling out and submitting a written application to the Village Clerk by mail or in person (there is no instant, online option from a website or smartphone, *cf. Kaahumanu*, 682 F.3d at 794); (2) the temporal hurdle of waiting for the permit to be granted; (3) the

elimination of anonymous speech by Havlak should she or her clients wish to remain anonymous to the Village; and (4) the elimination of spontaneous speech.

The record shows that the Village trustees find their own tranquility to be disturbed by the presence of photographers. But this court has repeatedly held that shielding others from potentially unpleasant speech is not a legitimate government objective in a traditional public forum. *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014).

Even if the regulation here is treated solely as a regulation of commercial conduct, *see generally Central Hudson Elec. Sys. v. Public Svc. Comm'n.*, 447 U.S. 557, 566 (1980), the Village ordinance sweeps up far too much expressive speech in targeting that conduct.

Review is needed to alleviate the Hobson's choice the Village offers to those who, like Havlak, earn a living through artistic means: either go to another park to take a photograph, or wait at least two days and pay \$100 to engage in protected expression. *Riley*, 487 U.S. at 801.

OPINIONS BELOW

The Eighth Circuit Court of Appeals decision affirming the District Court, was issued on July 26, 2017. It is reported at 864 F.3d 905. It is attached as Appendix A.

The Eighth Circuit denial of rehearing was issued on August 29, 2017. It was not separately reported. It is attached as Appendix B.

The District Court Order granting a declaratory judgment in favor of respondents, and denying petitioners' motion for a permanent injunction, was issued on July 14, 2016. It is reported at 195 F. Supp.3d 1065 (E.D. Mo. 2016). It is attached as Appendix C.

STATEMENT OF JURISDICTION

The Eighth Circuit filed its decision on July 26, 2017. It entered its order denying petitioner's Motion for Rehearing on August 29, 2017. Under 28 U.S.C. § 1254(1) (2006) this court has jurisdiction to review the Eighth Circuit's decision on a writ of certiorari.

Pursuant to U.S. Sup. Ct. R. 13 this Petition is being filed on or before November 27, 2017, that is, within 90 days of August 29, 2017.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amend. I, states:

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

The Village of Twin Oaks Park Ordinance, attached in full in Appendix D, states in relevant part at Village Code §220.020:

P. Regulation of Solicitations and Commercial Activities. Solicitation of any business or service is prohibited. No person, firm, or corporation is permitted to offer or advertise merchandise or other goods for sale or hire. Excepting Village-sponsored events and activities, the 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 of its designated representative(s). Such permit shall be clearly displayed by the person(s) seeking to conduct commercial activities within the park. The permitting process will help to ensure that the Village is aware of the activity taking place within the park, that the proposed date/time/location does not conflict with scheduled activities/events/operations, and that no harm is done to the landscape of the park. In its review of the permit request, the Board of Trustees or its designated representative(s) should consider.

1. The risk of damage and injury as set forth in Sections 220.020(B)-(E);
2. The disruption of or conflict with the public's use and enjoyment of the park;
3. Whether the issuance of such permit may result in crowded or congested conditions due to the anticipated number of attendees for a planned event.
4. The nature of the requested activity, including whether such activity involves:
 - a. The sale of products or items, which is prohibited unless it is a First Amendment protected activity;

- b. The use of furniture, tents (as that term is defined in Section 220.040(D)) or large “prop” amenities, which is prohibited; or
 - c. The use of models or equipment.
- 5. The time and duration requested for such commercial purposes, including:
 - a. Whether the activity will exceed one (1) hour;
 - b. Whether the number of people involved exceeds two (10); or
 - c. Whether the time requested conflicts with a period of peak visitation to the park or other scheduled events, activities, or operations.

Any permit request involving less than ten (10) people, lasting for less than one (1) hour, and complying with the above, will be granted by the Village Clerk/Controller or a designee. All permit requests must be submitted at least forty-eight (48) hours before the proposed activities. Any permit request involving more than ten (10) people, lasting more than one (1) hour, or otherwise conflicting with any of the above factors must be submitted at least fourteen (14) days in advance of the proposed activities so that the Board of Trustees may review the request and the permitted authority may be limited to certain designated areas. Each permit issued by the Village shall only be effective on the date and time specified on the permit. Specific permit fees

shall be set by the Board of Trustees from time to time and shall be posted on the Village's website.

STATEMENT OF THE CASE

I. The Village's history of regulating professional photographers

Josephine Havlak is a professional photographer based in St. Louis, Missouri, focusing on portrait and wedding photography. She places her expressive work within the longstanding American artistic tradition best exemplified by the painter John Singer Sargent. Havlak maintains the copyright to her photographs, but licenses them to her clients through her wholly owned corporation Josephine Havlak Photographer, Inc. Havlak is among the most successful and respected photographers in the St. Louis market.

She routinely takes photographs of her subjects in local public parks. Her portrait shoots usually last for less than an hour and feature either an individual or only a handful of people. The timing of such shoots is often spontaneous based on the weather and lighting, as well as the artistic impulses that may move Havlak. Her larger wedding shoots, by contrast, are scheduled more in advance because they involve larger numbers.

The Village of Twin Oaks is a small community of approximately 400 residents in St. Louis County, Missouri, governed by a five-member Board of Trustees. The Village contracts with St. Louis County to provide police services. In 1994, the Village dedicated an 11-acre public park, which includes a walking trail, lake, waterfall, Monet-style bridge, gazebo, playground, and sporting amenities. In testament to its unique beauty, the park has had a

large number of visitors—including photographers seeking to use as a backdrop the gazebo, waterfall, bridge, and other garden structures within a 2-acre area referred to by one Village trustee as “the secret garden.”

The Board first enacted a park ordinance prohibiting all commercial activity. Then during the course of this litigation, the Village changed its ordinance from a flat ban on commercial activity to a permitting scheme. *See* park ordinance, Title II, sec. 220.020.P (Appendix D).

To be sure, the record reflects that congestion sometimes occurs in the park. Multiple families hold weekend picnics, and Girl Scout troops and school groups visit. So too, multiple photographers have sought to shoot within the park at the same time. Sometimes larger groups such as wedding parties have congregated for photos on the park bridge. Other problems have occurred, for example, with photo subjects using the park restroom facilities to change clothes. Some photographers have set up outdoor studios in the park for shooting multiple subjects in an assembly-line fashion.

It is undisputed that if Havlak is paid to take photographs of wildlife, or a portrait of an individual standing within the park, but lacks an advance permit, then she will violate the ordinance and be subject to penalties of up to \$1,000 in fines or 90 days in the County jail, which is pursuant to the Village Code’s general penalty provision.

The permit process requires the Board to consider the risk of damage to the park, any

disruptive effects on typical park use, the potential congestion caused by the activity, and the nature of the activity itself. The ordinance allows for automatic approval of events lasting less than one hour, having fewer than ten people, and with 48 hours' advance notice. The permit fee is \$100 according to the Village website. As far as the record discloses, the Village has approved all permit applications. The permit fee is tied to the cost of a police officer to manage the event. Nevertheless it does not on its face provide the permittee with exclusive use of certain park areas, nor does it prohibit the use of bathroom facilities, nor ban other potentially annoying or unauthorized behavior.

During a consent "stand down" period of non-enforcement during this litigation, Havlak visited the park to take the portrait of a high school senior. For one picture the high school senior climbed over the bridge railing to hang out over the water. The Village characterized this conduct as dangerous.

Havlak recognizes that regulating congestion is a legitimate government objective. She also asserts, however, that obstructing pathways, hogging bathrooms or changing clothes therein, or dangling from bridges are all harmful activities that can be independently regulated.

Since 2011, there has been a national regulatory movement to restrict photography in public parks, which she opposes and which she believes is "depriving mothers of their right not to have their child lost in the heap of history."

The ordinance does not describe what planning and/or security is provided to the photographer, or what areas are granted for exclusive use of the photographer who has the permit. The ordinance is also silent as to restrictions on many of the alleged actual harms: groups of persons competing for use of the same space within the park; obstructing parkways; changing in bathrooms; or dangling from the outside of the bridge.

One Village trustee testified: “My wife won’t let me go down [to the park] during the weekends any longer because I see so many of these activities going on and I’m not an enforcement officer.” Another Trustee complained that a photographer “set[] up a studio inside ... the only other picnic area in the park built for that use” and disturbed her family’s use of the park.

II. Procedural History

Petitioners filed suit in the Circuit Court of St. Louis County, 21st Judicial Circuit, State of Missouri, and respondents removed. The District Court had federal question jurisdiction under the Civil Rights Act of 1871 as amended, 42 U.S.C. § 1983, and the case proceeded pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Petitioners also sought a permanent injunction under 28 U.S.C. § 1291.

The Village counterclaimed for declaratory relief that its permitting Ordinance is lawful

The District Court² held an evidentiary hearing on the parties' claims. The District Court then issued an Order granting a declaratory judgment in favor of the Village and its Clerk, and denying petitioners' claims. That opinion is reported at 195 F.3d 1065 (E.D. Mo. 2016).

Petitioners appealed both rulings to the Eighth Circuit Court of Appeals, which affirmed 3-0 on July 26, 2017.³

Addressing Havlak's narrow tailoring arguments as to individuals and groups under ten persons, the panel held "[g]iven the high demand, the history of congestion, and the limited facilities of the park, the ordinance's lack of a permit exception for groups smaller than ten people does not create a constitutional infirmity."

Petitioners' request for rehearing in the Eighth Circuit was denied on August 29, 2017.

² The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

³ Smith, Chief Judge, Arnold and Shepherd, Circuit Judges.

REASONS FOR GRANTING THE PETITION

- I. Prior restraints on expressive speech by individuals and small groups in traditional public fora are almost always unconstitutional, in that any harmful activities can be independently regulated through less intrusive means
 - a. The Eighth Circuit opinion conflicts with the holdings of this court as to group size for advance permits

This court has consistently looked askance at advance registration requirements for speech by individuals and small groups, even in contexts such as the front door of the home where the speaker's rights are more curtailed than in a traditional public forum. *See Watchtower Bible v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (holding an ordinance regulating door-to-door solicitation facially unconstitutional because it covers too much speech); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638-39 (1980) (striking down a solicitation permit requirement); *Cantwell v. State of Conn.*, 310 U.S. 296, 301, 306-07 (1940) (striking down a license requirement as applied to Jehovah's Witnesses "going singly from house to house" for the purpose of religious solicitation); *Schneider v. State of N.J.*, 308 U.S. 147, 163-64 (1939) (striking down a permitting scheme covering all forms of solicitation). In the context of the front doorstep of the home, moreover, the public interests—curtailing crime and fraud, protecting residential privacy—are considerably more substantial than those asserted by

Village here: managing ordinary congestion and competing uses of the park.

The principles set forth by this court in *Watchtower Bible* apply with as much force in the context of visual artists in a public park as they do in the context of door-to-door canvassers on the stoop of a private home. Although this court has not addressed the validity of single-speaker permitting requirements for expressive artistic speech in a public forum, it stands to reason that such requirements would be at least as constitutionally suspect when applied to speech in a public park, where a speaker's First Amendment protections reach their zenith, as when applied to speech on a citizen's doorstep, where substantial privacy interests exist. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

To be sure, time, place, and manner restrictions need not be the least restrictive alternative available. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). That has been a bedrock of this court's time-place-and-manner jurisprudence since *Cox v. New Hampshire*, *supra*, when it upheld a permit requirement for four or five groups of 15-20 Jehovah's Witnesses to parade through the streets of a small New Hampshire city. Similarly, in *Poulos v. New Hampshire*, 345 U.S. 395 (1953), this court upheld a permitting requirement for religious services in a public park because it only wished to determine the day and time at which the practitioners wished to hold the service. The government's interest began and ended at coordinating multiple uses of limited public space by

large groups. *Cf. Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981) (limiting literature distribution to certain points within a fairground, but in a limited public forum).

But, where there are easily available alternative modes of regulation that both satisfy the government's substantial, legitimate concerns and affect considerably less speech than the mode chosen, then the governmental restriction sweeps in substantially more speech than is necessary to meet the government's concerns. Single-speaker permitting requirements are not a constitutionally valid means of advancing those interests because, typically, (1) they sweep too broadly, *see, e.g., Vill. of Schaumburg*, 444 U.S. at 636-37 (invalidating registration requirement because, among other things, it applied to groups engaged in legitimate activities as well as those who were not); *Watchtower Bible*, 536 U.S. at 165-66 (same), (2) they only marginally advance the government's asserted interests, *see, e.g., id.* 168-69 (noting that a permitting requirement is "unlikely . . . [to] preclude criminals from knocking on doors and engaging in conversations [with homeowners]," and that "[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit"), and (3) the government's interests can be achieved by less intrusive means, *see id.* at 168-69 (noting that a homeowner's privacy interests can be adequately protected by "No Solicitation" signs); *see also Vill. of Schaumburg*, 444 U.S. at 637, asserting that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly," (citing *Schneider*, 308 U.S. at 164).

Here, the ordinance fails because there are easily available alternative modes of regulation. The Village can independently ban the obstruction of pathways, the hogging of bathrooms or changing of clothes therein, or dangling from bridges. These harms are not properly mitigated by a permit requirement on commercial activity that sweeps up individual visual artists with their subjects engaging in expressive speech acts. To the extent the record may suggest that photographers are otherwise “disturbing” or “annoying” to other park users or the Village board, then that is an insufficient basis to uphold a time, place and manner regulation given this court’s holding in *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014) that traditional public fora are areas that have historically been open to the public for speech activities.

- b. There is a need to resolve inconsistencies between the Second, Fourth, Sixth, Eighth and Ninth Circuits as to reasonableness of advance permits for individual and small group speakers for *political* versus *expressive* speech**

The Eighth Circuit has rejected advance registration requirements in the contexts of political processions of fewer than ten persons. *Douglas v. Brownell*, 88 F.3d 1511, 1521 (8th Cir. 1996). The Eighth Circuit opinion here differentiated *Douglas* by distinguishing potential spontaneous speech by an unlimited number of different small groups from this ordinance’s specific application to commercial activity, stating that the permit here does not

prevent small-scale expressive activity unrelated to commercial enterprise.

That ignores that Havlak’s artistic speech is no less expressive and valuable because she is paid for it, and that the permitting scheme inhibits spontaneity—whether the weather is bad, or Havlak’s artistic decisions otherwise change. The need for spontaneity also distinguishes Havlak’s speech from the beach wedding case, *Kaahumanu*, 682 F.3d at 804, where commercial wedding service permits could be obtained online virtually instantaneously.⁴ (*Kaahumanu* is also distinguished because of the number of people involved in a wedding, the ten cents per square foot reservation of an exclusive area of the beach for the wedding, and the court’s finding of a lack of significant burden on the marrying couple.)

Almost all circuits which have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum. *See, e.g., Santa*

⁴ The Second Circuit has upheld a single-speaker permitting requirement in the context of a registered sex offender using props and equipment to perform for children in a county park, *Hobbs v. County of Westchester*, 397 F.3d 133, 150 (2d Cir. 2005). Since the regulation in *Hobbs* was based on the registered sex offender’s use of “props and/or equipment,” then the permit requirement was triggered by conduct, not speech. *Id.* at 151. Also, the court did not directly consider the constitutionality of the permitting requirement. By contrast, the Fourth Circuit has invalidated broad restrictions on movement of registered sex offenders near places where minors may gather, including public parks. *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016).

Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1039 (9th Cir. 2006) (“As the cautionary language in our earlier opinions indicates, the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks.”); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (holding that the possibility that the ordinance at issue could reach “the actions of single protestors” rendered it unconstitutional); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247-48 (9th Cir. 1981) (invalidating a one-day advance registration requirement because it applied to individuals and therefore “regulate[d] far more than mass conduct that necessarily interferes with the use of public facilities”); *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (striking down a permit requirement as “hopelessly overbroad” on the ground that the requirement could conceivably apply to groups as small as “two or more persons”); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (permit requirement invalidated for “any parade, meeting, exhibition, assembly or procession” on streets or sidewalks as applied to 16 anti-abortion protestors on street); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1249 (11th Cir. 2004) (permit requirement invalidated as required for public demonstration or protest in context of 16 female protestors outside the Masters golf tournament).

Rather, the circuits have emphatically emphasized that advance registration permits are

only appropriate for larger crowds. *See Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1033 (9th Cir. 2008) (“*Although it is a close question*, we hold that a group of seventy-five people using a public open space in Long Beach is large enough to warrant an advance notice and permitting requirement.” (emphasis added)). An otherwise valid, general permit requirement applicable to large groups could be applied to visual artists but only if the group is in fact large enough to reach the minimum crowd size covered by that valid requirement. That is because individual-to-individual and small group-to-small group interactions generally do not pose the sort of problems that time, place and manner rules are designed to deal with. *Berger*, 579 F.3d at 1072 (Kozinski, J., dissenting). The Village’s permitting requirement in this case implicates just such interactions.

Under the current rules, Havlak must obtain a permit whether she wishes to photograph one person for one minute, or fifty people for five hours. The record here does not indicate that the general problem of congestion and competing group uses cannot be managed the same or better by rules targeting actual types of conduct—rules that burden expression far less substantially. In addition, the Village’s permitting requirements have an impermissibly broad scope, do not meaningfully promote the City’s asserted interests, and address interests that could be achieved through means far less intrusive than an individual speaker registration requirement. These considerations indicate that the regulation is not sufficiently narrowly tailored to

meet the standard for a valid time, place, and manner regulation.

II. The act of creating speech is as protected as the product

Havlak acknowledges that neutral regulation of conduct is constitutional even if it does not exempt expressive activity. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding conviction for burning draft card as political protest).

But in a public park there is a difference in kind between creating a work of visual art, and shouting “hot dogs for sale.” The conduct regulated here is not the selling of photography services; it is the act of creating artwork itself. Commercial speech regulations ordinarily concern advertising or proposing business transactions. *See, e.g., Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989). By contrast this case involves photography, which like books and films is a form of expression whose liberty is safeguarded [to the maximum extent] by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952). Even under the more deferential standard of analysis for commercial speech, *see generally Central Hudson Elec. Sys. v. Public Svc. Comm’n.*, 447 U.S. 557, 566 (1980), the Village ordinance sweeps up too much expressive speech in targeting congestion-causing conduct or generally regulating commercial activity.

This court and the circuit courts have always regarded the process of creating a form of pure speech (such as writing or painting) and the product

of these processes (the essay or the artwork) as one and the same as equally protected by the First Amendment. There is no logical reason here to treat the act of photography as commercial but not also artistic conduct. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) (“Whether government regulation applies to *creating*, distributing, or consuming speech makes no difference.”) (emphasis added); *United States v. Stevens*, 559 U.S. 460, 464 (2010) (striking down a federal statute on free-speech grounds that “criminalize[d] the commercial *creation*, sale, or possession of certain [video] depictions of animal cruelty”) (emphasis added); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (invalidating “[t]he Son of Sam law” because it “establishe[d] a financial disincentive to *create* or publish [written] works”) (emphasis added).

Prior restraints and permit fees burden professional photographer’s speech more than incidentally, and the analysis for narrow tailoring is “very similar” when commercial speech is involved. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993) (“the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context”). In the context of speech acts such as photography it is thus likely unconstitutional that some individual and small group speakers need permits to speak while others do not—depending solely on whether the speech is to be sold.

Although a photographer uses “equipment” in the trivial sense that she carries a camera, perhaps supported with a strap around her neck or shoulder, any serious concerns about conduct involving obtrusive props or equipment can be independently regulated.

Applying *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), the Eleventh Circuit has recognized that restraints on speech sometimes appear in sheep's clothing as facially-neutral regulations of economic conduct. See *Dana's R.R. Supply v. Attorney General of Florida*, 807 F.3d 1235 (11th Cir. 2015) (invalidating restrictions on merchant “credit card surcharges” but allowing “cash discounts” as restriction on speech).

This ordinance treats any speech done for profit—writing a book or pamphlet, painting a watercolor, or taking a photograph—as commercial activity without narrow tailoring to the harms caused by the conduct involved.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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