No. 22-665

IN THE
Supreme Court of the United States

GORDON PRICE,
Petitioner,
v.
MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, AND SHAWN BENGE, IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR EXERCISING THE AUTHORITY OF DIRECTOR OF THE NAT'L PARK SERVICE,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 13 OTHER ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI[1]

Amici are news organizations and associations that defend First Amendment interests, and who will be directly affected by the limitations on speech imposed by this case if the D.C. Circuit opinion remains standing. They represent photographers, videographers and other speakers who recognize that a significant part of their work involves pre-production or pre-speech activities which, if found to be a noncommunicative part of their work and thus not protected by the First Amendment, will materially affect how they exercise their rights and protect their interests.

Individual *amici* are more fully described in Appendix A.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment provides a presumptive right to film in public places. The visual journalists, photographers, and filmmakers that provide our country with a vast array of critical news, art, and knowledge rely heavily upon this right. *Amici* urge this Court to grant certiorari so as to protect this profoundly important component of speech and find that the commercial filmmaking statute, 54 U.S.C. § 100905, cannot be so broadly applied.

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[1] No counsel for a party authored the brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and, no person other than the amicus curiae, its members, or its counsel, made such a monetary contribution. Counsel for respondents received timely notice of the intent to file this brief as required by Rule 37.2.

Currently, eight other circuits have addressed this issue, and upheld the rule that the act of filmmaking is protected speech. As the First Circuit explained, the question of whether filming itself is protected speech is "fundamental and virtually self-evident." *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). As technology put video cameras in the hands of the majority of Americans over the past two decades, and more citizens have exercised the right to record in public spaces, district and circuit courts have had more occasion to examine the question. Courts have resoundingly held that the right to record is an inseparable part of the speech process.

When the D.C. Circuit held that filmmaking is "merely a noncommunicative step in the production of speech," *Price v. Garland*, 45 F.4th 1059, 1068 (D.C. Cir. 2022), it ventured—without precedent—into a dangerous area that has long been proscribed by this Court: restrictions upon the creation of speech. The D.C. Circuit's holding violates this Court's longstanding First Amendment protection of speech at each step of the process of creation and publication. It further contravenes every other circuit court that has addressed the question of whether filming is protected speech. As the Ninth Circuit explained, "[i]t defies common sense to disaggregate the creation of the video from the video or audio recording itself." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). In determining that the act of filming is not protected speech, the D.C. Circuit gave the government the right to restrict filming in public parks and public forums, *even when the restriction is content-based, or speaker-based*.

The creation of visual works such as photographs, paintings and films has always been an

integral part of the American experience in national parks. In the mid-to-late 1800's, photographers and other artists published visual records of Yosemite and Yellowstone. They "captured the grandeur and beauty of the West," which led to "a groundswell of support to preserve the natural wonders that culminated in the establishment the National Park Service in 1916."[2] The American people's appreciation of the beauty and wonder of these lands would have been stunted without the creation of images depicting them. Yet today, an amateur videographer who is unobtrusively creating a video of his visit to a national park can film freely; whereas, an equally unobtrusive professional filmmaker using the exact same equipment, deemed by the park to be "commercial," risks up to six months in prison. 18 U.S.C. § 1865.

ARGUMENT

I. It is self-evident that filming is included in this Courts' prior holdings protecting speech at every stage of its creation and distribution.

This Court first had the occasion to hold that "motion pictures are within the ambit of protection" of the First Amendment seventy years ago in *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501 (1952). In the decades since, a line of jurisprudence evolved to generally apply First Amendment scrutiny to laws that target "creating, distributing, or consuming speech."

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[2] *Landscape Art and the Founding of the National Park Service*, NATIONAL PARK SERVICE, https://www.nps.gov/museum/exhibits/landscape_art/art_founding_nps.html; *see also*, *About Photography*, NATIONAL PARKS SERVICE, https://www.nps.gov/subjects/photography/about.htm.

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 n.1 (2011). But this Court has never been expressly asked to link those two principles and affirm that the creation of a motion picture is protected speech, subject only to reasonable time, place, and manner restrictions.

The lack of a direct ruling on the question likely stems from the "fundamental and virtually self-evident nature" of the principle. *Glik v. Cunniffe*, 655 F.3d at 85. Indeed, without questioning whether the *act* of filming is itself speech, this Court has struck down a law that banned the creation of films depicting animal cruelty[3] and a law that banned creating photographs of money.[4]

Yet even while conceding that filmmaking is protected by the First Amendment, the D.C. Circuit improperly divorced the act of filming from the definition of speech. This flies in the face of the principle that the creation of information is "speech within the meaning of the First Amendment", *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

The other circuits have broadly applied the protection of the speech creation to acts of filming and photography in various public spaces, regardless of whether the intended audience receives the message at the time the filming takes place. The other circuits have also unanimously upheld the protected nature of filming and photography. *See W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017) (overturning a law that banned photography and other data collection, and holding that "[i]f the creation of speech did not warrant protection under the First

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[3] *United States v. Stevens*, 559 U.S. 460, 482 (2010).
[4] *Regan v. Time, Inc.*, 468 U.S. 641, 643-44, (1984).

Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech"); *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012) (holding that a photographer had a right of access—for the purpose of creating photographs—to a horse round-up on federal lands controlled by the Bureau of Land Management).

In acknowledging complete agreement among the circuits regarding the First Amendment right to film public activities of police officers, the Fifth Circuit held that "the First Amendment protects the act of making film." *Turner v. Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017). *See also*, *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (finding "First Amendment right to record police activity in public")*; ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (the "act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."); *Glik v. Cunniffe*, 655 F.3d 78, 82-83 ("the First Amendment protects the filming of government officials in public spaces")*; Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (there is a First Amendment right to record matters of public interest); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (same). The highest criminal court in Texas has also rejected the suggestion that taking a picture was merely pushing a button and not communicative. *Ex parte Thompson*, 442 S.W.3d 325, 331, 337 (Tex. Crim. App. 2014) (holding that "a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves).

In *Fields*, the Third Circuit rejected a problematic district court holding about the nature of content-creation. The District Court for the Eastern District of Pennsylvania had "decline[d] to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions." *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 542 (E.D. Pa. 2016). Specifically, the district court found that "photographing police is not, as a matter of law, expressive activity." *Id.* at 538. In reversing, the Third Circuit explained that for the First Amendment's protection of "actual photos, videos, and records" to have any meaning, the First Amendment "must also protect the act of creating that material." *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d. Cir. 2017). "There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Id.* (citations omitted). To say that the protection of expressive speech does not extend to the acts which create such speech is as absurd as finding that a right to scuba dive does not cover the use of an oxygen tank.

Central to the Third Circuit's reasoning in *Fields* was the logical notion that "[t]o record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately." *Id.* at 359. Thus, where and what one has the right to see or hear, one has the right to record, because recording is simply seeing and hearing more accurately. Without fully fleshing out the outer bounds of this right, the Third Circuit noted that the right to record may be subject to reasonable time,

place, and manner restrictions. *Id.* at 360 (citation omitted).

Accordingly, "[t]here is no fixed First Amendment line between the act of creating speech and the speech itself." *Turner v. Lieutenant Driver*, 848 F.3d at 689. Whether a restriction "applies to creating, distributing, or consuming speech makes no difference"; all such restrictions burden speech and are suspect. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. at 793 n.1; *see also Alvarez*, 679 F.3d at 595 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording").

The circuits have also declined to "disconnect the end product from the act of creation," *see, e.g., Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010), when forms of speech other than filming and photography are involved, concluding that it makes no difference whether the audience is nearby when the speech is created. For example, the Ninth Circuit upheld the First Amendment right to protest in a national park even though "it ha[d] become clear that they were not trying to communicate with an onsite audience." *Galvin v. Hay*, 374 F.3d 739, 749 (9th Cir. 2004). In doing so, the Ninth Circuit affirmed the importance of "individual choice of both communicative aspects, message and manner of presentation," and this Court's mandate that courts "presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 750.

Even the U.S. government agrees that the act of recording is expressive. In the 2021 appeal of *Irizarry v Yehia* to the Tenth Circuit, the U.S. Department of Justice filed an amicus brief explaining its

position that "[t]he First Amendment generally protects recordings as expressive works and, separately, protects the ability to record matters of public interest." *See* Brief for the United States as Amicus Curiae in Support of Neither Party, *Irizarry v. Yehia*, No. 21-1247, *available at* 2021 WL 5577946 (10th Cir. 2021). While the government's main concern was how restrictions in this area affect the credibility of the criminal justice system, recordings of all matters of public concern could be at risk if the D.C. Circuit decision is allowed to stand. The Department asserted that protecting the right to record also "extends protections to gathering information about the government's public activities, particularly in the policing context," because "[p]rotecting the free flow of information about the criminal justice system ultimately 'guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Id.* at 7 (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559-560 (1976) (citation omitted)). While, in *Irizarry,* the Department asked the Tenth Circuit to "hold that the First Amendment protects the right to record police officers performing their duties in public," s*ee Irizarry* amicus, *supra*, at 8, the D.C. Circuit's opinion in the instant case threatens to undermine the status that "every Court of Appeals to consider this issue has held that the First Amendment protects the right to record public police activity."

The array of cases above indicates that these issues of the bounds of expressive speech are recurring, resolution of them is important, and the instant petition is the perfect vehicle for this Court to address the questions. The implications of this case will be profound. If the D.C. Circuit's opinion that the *act* of

filming or photographing can be disaggregated from expression prevails over the clearly established protections provided by eight other circuit courts, such opinion may be used to roll back or undermine the growing body of law protecting expressive rights.

II. The disparate treatment of similar activities, particularly between commercial and non-commercial filming, is not a reasonable restriction.

Under § 100905, a tourist with a large camera and a tripod can set up anywhere the public is allowed, and create pictures and video all day long. 54 U.S.C.S. § 100905. But a videographer standing next to that tourist, who later profits from video created and produced on their cell phone, must obtain a permit weeks in advance, secure an insurance policy, 43 C.F.R. 5.7, and if more than a couple of people are involved, pay a fee. 43 C.F.R. 5.8.[5] In favoring one over the other, Congress made a value judgment on what can and cannot be filmed without prior permission – a "startling and dangerous" proposition. *Stevens*, 559 U.S. at 470.

As this Court has explained, the protection of discourse on public matters firmly extends to entertainment, in part because "it is difficult to distinguish politics from entertainment, and dangerous to try." *Brown v. Entm't Merchants Ass'n*, 564 U.S. at 790 ("Everyone is familiar with instances of propaganda through fiction. What is one man's amusement,

[5] The amount of the fees is set out on the NPS website. https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm.

teaches another's doctrine."). Likewise, the for-profit status of a communication has no bearing on its protections under the First Amendment. Documentaries are core First Amendment speech – and making a profit has no bearing on existence within the "aegis" of the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

The distinctions between commercial and non-commercial, and filming and still photography, are illogical for permitting purposes and do not serve a government interest other than taxing the exercise of a First Amendment right. Even the definitions in the regulations are devoid of any logical difference between commercial filming and newsgathering. The regulations define "commercial filming" as filming "for a market audience with the intent of generating income," including "feature film, videography, television broadcast, or documentary, or other similar projects." 43. C.F.R. § 5.12. Newsgathering is exempt from the permit requirement and is circuitously defined as "gather[ing] information of potential interest to a segment of the public, us[ing] editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience." *Id*.

Within the media industry, documentary filmmaking is most often categorized as non-commercial in nature.[6] But the regulations claim that documentary filmmaking is commercial, even though it meets the definition of "newsgathering." 43. C.F.R. § 5.12. The indistinct definitions here indicate that the

[6] In copyright law, documentaries are also treated as "editorial" under the first factor of the "fair use" test, whether such use is of a commercial nature. *Brown v. Netflix, Inc.*, 855 F. App'x 61, 63 (2d Cir. 2021) (listing decisions that found documentaries to favor the first fair use factor).

government will have to review the film to decide whether filming in question meets the standard of speech that the government favors. And because the definitions are so confusing, the determination is subjective—something park and forest managers have historically been inconsistent and even flat wrong on.[7] The cost of falling on the wrong side of this subjective determination is up to six months in prison. *See* 18 U.S.C. § 1865; 36 C.F.R. §§ 1.3, 5.5(a).

The subjective and vague nature of many of these distinctions also requires officials to search the subjective mind of photographers and filmmakers who may have mixed intentions. A photographer may make a video with the sole intention of posting on their personal Instagram feed, a promotional use that does not generate income, but which is an overall piece of a marketing strategy. Is that commercial or not? Or they may be filming wildlife in furtherance of a hobby or interest, but later decide to expand that hobby into a more formal or professional project. Even a photographer's family vacation photos can later be integrated into a book or personal project, licensed as stock photography, or used to illustrate an advertisement.

Photographers—both amateur and professional—repeatedly find themselves in unexpected situations where they witness something extraordinary

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[7] *See*, Association of Public Television Stations, et al*, Joint Comments of Public Broadcasters before the U.S. Forest Service*, Comments Re: PROPOSED DIRECTIVE FOR COMMERCIAL FILMING IN WILDERNESS; SPECIAL USES ADMINISTRATION, FR DOC. 2014-21093, December 3, 2014 ("Public Television Comments"), https://s3.amazonaws.com/s3.documentcloud.org/documents/1374934/comments-of-public-broadcasters-commercial.pdf.

that later is commercially exploitable. The permit scheme requires someone in that situation to stop their activity, obtain a permit (and insurance), and once acquired, continue their filming—the moment likely being lost. One only need look at the iconic wilderness images created by Ansel Adams, that are now worth millions, to realize the immense value of the "decisive moment."[8] Images filmed in national parks may be considered of public interest in a variety of ways. A video in a commercial project showing nature's breathtaking panoramas might also be illustrative of the effects of global warming.[9] A wildlife photographer may spend days documenting bumble bees coming to wildflowers. But if a federally endangered rusty patched bumble bee lands on a flower and is the first sighting of that bee in decades, it may result in an expressive work that gets shared by both national news outlets and in documentary films. It is entirely unclear how a photographer, who does not yet know how their work will eventually be used, is supposed to navigate the current rule and avoid criminal penalties.

The vagueness of the permitting scheme combined with the absurdity of a subjective intent test puts photographers and filmmakers in an impossible position as they try to decide whether they need a permit before they film, afterwards, or if at all. And the idea that a photographer could capture extraordinary footage and either be foreclosed from publishing it

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[8] *See Experts: Ansel Adams photos found at garage sale worth $200 million,* CNN (July 27, 2010), http://www.cnn.com/2010/-SHOWBIZ/07/27/ansel.adams.discovery/index.html.

[9] *See*, *e.g., Melting Glaciers,* U.S. National Park Service, https://www.nps.gov/glac/learn/nature/melting-glaciers.htm (last visited July 6, 2020).

commercially or be required to get permission from the government to do so, chills the clearly established First Amendment rights of not only Mr. Price but those like him to wish to photograph and record on federal land.

A. The distinctions Congress created between video and still photography are from a bygone era and the merging of the two technologies has led to arbitrary and content-based enforcement.

Twenty years ago, Congress may have considered[10] "commercial filming" as entailing big, bulky equipment and large-scale productions that would have a noticeable impact on a national park and significant administrative burdens. Advances in technology have obliterated those assumptions. Congress could not predict that modern-day visitors would shoot, produce and broadcast high resolution digital video all using a device in their pocket, and by a tap of their finger would be able to switch between still and video formats. They also could not have predicted the way social media has democratized commercial filming.[11] But that is the reality today, where professional digital single lens reflex (DSLR) cameras can even capture motion-picture quality video footage and

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[10] In 2000, Congress required the Secretary of the Interior and the Secretary of Agriculture "to establish a fee system for commercial filming activities on Federal land, and for other purposes." Pub L. 106-206, May 26, 2000.

[11] *See, e.g.*, "RV 'vloggers' fined, threatened with arrest for taking video in National Park," https://www.rvtravel.com/rvers-who-shot-video-taken-in-national-park-fined-arrest-threatened/

still images simultaneously.[12] As a result, a law that was originally written to raise fees by obtaining a "fair return" from a relatively narrow group of park users—high impact/high budget commercial film productions)—54 U.S.C. § 100905(a)(1), now arbitrarily places those same expensive permitting requirements on low impact/low budget film makers who are often simply shooting for their own expressive purposes with only a distant possibility of profit.

This produces wild dichotomies. A photographer who shoots a digital still photograph, with the goal of selling or licensing that single image later, does not need a permit. But if that same photographer then flips a switch or pushes a button on the same device and records a 30-second video clip that they hope to use commercially, they are required to obtain a permit, or be subject to arrest. Often photographers focused on shooting still images will make an on-the-spot decision to shoot video, and videographers will shoot still images to supplement their moving images, or for entirely different purposes. Any basis for such a disproportionate distinction in the permit requirement has become a nullity. And in order to determine whether a person using one of these multi-format cameras is capturing still photography, or "committing" the crime of commercial filming without a permit, the government will necessarily engage in a review of the content and likely make a judgment based on that content. These differences are fundamentally content and speaker-based; the permit and fee is not required of an amateur filmmaker, but it is required for a "commercial" filmmaker standing next to the

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[12]https://support.usa.canon.com/kb/index?page=content&id=ART140776.

amateur in the same location, with the same equipment. It applies to a documentarian filming a wildfire, but not a visual journalist covering news about the same wildfire. To those who must comply, the permit scheme applies regardless of whether their presence is even noticeable by park officials or visitors.

The result of this system is that well-financed, big-budget filmmakers, and those who are creating epic projects, will have no problem covering the costs associated with the permit. But low-budget independent filmmakers, documentarians, and even nature photographers who tell equally important stories of wildlife, flora, and the parks themselves, are left wondering if the story they want to share with the world will also get them arrested, imprisoned, or fined. Without the right to engage in this "step in the communicative process," their voices will be silenced and their stories untold.

B. Amici's concerns are not speculative, and have been evident throughout the history of enforcement of §100905 and prior rules.

The concerns of amici about prior restraint and disparate enforcement of §100905 are not speculative. Even as the implementing regulations were being considered, public broadcasters explained to the U.S. Forest Service how agency officials based film permitting decisions on whether a public-broadcasting project met their subjective interpretation of "commercial," rather than on its environmental impact.[13] Commenters gave several examples of U.S. Forest Service and

[13] *See* "Public Television Comments" at 9.

NPS decisions regarding "special use" permits all-too-often involving review of programming content,[14] or where permits were either denied or fees imposed based on an arbitrary determination of "commercial filming" because employees were paid.[15] In another incident an NPS "permit officer" told a journalist "she needed to get a permit or film elsewhere," stating that unless the station "was covering a 'breaking news event'–such as the death of a climber–it would be required to obtain a special use permit and pay the fee."[16]

Today, with the increasingly blurred lines between commercial and non-commercial filming, and still photography and videography, operators of national parks have proven unable to decode the contours of § 100905. Per § 100905, the National Park Service is not allowed to require a permit for still photography unless it "takes place at other locations where members of the public are generally not allowed, or where additional administrative costs are likely," 54 U.S.C. § 100905(c)(1); or if the photography "uses models or props that are not a part of the site's natural or cultural resources or administrative facilities." 54 U.S.C. § 100905(c)(1); 43 C.F.R. § 5.2. The statute's implementing regulations further clarify that "portrait subjects such as wedding parties and high school graduates are not considered models." 43 C.F.R. § 5.12. Yet superintendents and park permit officials have independently enacted local permit rules that include prior restraints and content-based restrictions on what and who can be photographed. This has included bans on professional photography

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[14] *Id*. at 20, 23-24.
[15] *Id*. at 20.
[16] *Id.*

(but not amateur photography) at certain times of the year, and in certain locations. Despite the plain language of §100905 and 43 C.F.R. part 5, Yellowstone National Park's rules state that—regardless of the amount of equipment or level of impact— "[c]ompensated photographers hired to photograph weddings or other ceremonies/events, or portraits (weddings, family, senior, pets, engagement, etc.) in the park are required to obtain a Commercial Use Authorization permit." *See Portrait Services CUA- Yellowstone National Park*, https://www.nps.gov/yell/getinvolved/single-session-portrait-services-cua.htm (last visited January 27, 2023). Yellowstone limits the location and time of year when photos can be taken, and requires portrait photographers to obtain insurance and report their revenue to the superintendent. *Id.* An even more onerous planned permit scheme in Grand Teton National Park would have banned professional photographers entirely from certain weddings, and imposed fees and prohibitions on where photographers with nothing more than a handheld camera could take pictures. The park relented after NPPA and other *amici* outlined the First Amendment and statutory violations. *See* Arnold, Billy, *Grand Teton park walks back permits for wedding photographers*, JACKSON HOLE NEWS & GUIDE, March 30, 2022, https://www.-jhnewsandguide.com/news/environmental/grand-teton-park-walks-back-permits-for-wedding-photographers/article_39c9f60f-52b8-5b35-a5ca-e46a2ee6c8e8.html.

These various permit schemes act as financial barriers targeted at filmmakers and photographers based solely on the content of the expressive work, or the identity of the speaker. Such content-based burdens on speakers is presumptively unconstitutional.

Sorrell v. IMS Health Inc. 564 U.S. at 565–66; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). It is widely understood that a "statute is inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Further, when filming is low-impact or no-impact, a requirement to obtain a permit prior to engaging in expressive First Amendment conduct bears "a heavy presumption against its constitutional validity." *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (content-based permit denial for theater was unconstitutional); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (a permit requirement to engage in expressive conduct "is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.").

Accordingly, it might be feasible for the NPS to require permits when photographers and filmmakers require access to areas that the public are generally not allowed, when additional administrative costs are likely, or when it might cause an unreasonable disruption to the public use and enjoyment of the site. *See, e.g.,* 16 U.S.C. § 460l-6d (c)-(d). But it can only do so if the permitting requirements: 1) are not overbroad; 2) are not based on the content of the message; 3) are narrowly tailored to serve a *significant* governmental interest, and 4) leave open ample alternatives for communication. *Forsyth County*, 505 U.S. at 130. The current permitting scheme fails this test.

The kind of speaker-based and content-based discrimination that Gordon Price was subjected to is

clearly proscribed by the First Amendment, and its disparate enforcement, based on the identity of the speaker, has become "simply a means to control content," *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 170 (2015); *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (regulations that discriminate based on the content of the message are not tolerated under the First Amendment). The government has not overcome the presumptive unconstitutionality of the NPS permitting scheme.

III. National Parks are public spaces where the First Amendment protects filming and photography, and regulations restricting expressive activities and creating a government tax scheme are not reasonable.

The majority below erred when suggesting that only topics that are "matters of public controversy" are worthy of protection of the right to record on public property. *Price*, 45 F.4th at 1071. This Court has already rejected that idea, holding that *"[m]ost* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U.S. at 479. Filming in national parks is a means of gathering information about the way the government runs the parks, and therefore, about our government itself. That the filming often captures beauty, instead of dramatic scenes such as police activity has no effect on its status as protected by the First Amendment.

The national parks have a history steeped in visual tradition. Hardly a person visits a national

park without taking home a visual record. Indeed, photography led to the establishment of some of the grandest national parks.[17] As roads and other infrastructure made parks and forest land more accessible to visitors, a new tradition- the vacation "slide show" evolved, where Americans shared their visual records with members of their community.[18] As a visual record of national parks has tied Americans to these places, these lands "have immemorially been held in trust for the use of the public" through and by filming and photography as a means by which our nation "communicat[es] thoughts between citizens, and discuss[es] public questions" especially as it relates to the parks themselves. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

"Artists have created art in national parks since the late 19th century," the NPS brags as it promotes over 50 Artists-in-Residence Programs "for visual artists, writers, musicians, and other creative media."[19] Throughout its communications, the National Park Service and its partners celebrate the intimate relationship between visual arts and park lands. "Photography is an important part of national park history … Today, professional and amateur photo-

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[17] Mansky, Jackie, *How Photography Shaped America's National Parks*, SMITHSONIAN MAGAZINE, June 22, 2016, https://www.-smithsonianmag.com/travel/how-photography-shaped-americas-national-parks-180959262/ ("Places like Yosemite, Yellowstone, the Grand Canyon really were established through photography and art.").

[18] Poole, Gary Andrew, *A Couple of Beers and 140 Views of Yellowstone*, THE NEW YORK TIMES, Nov. 21, 2008, https://www.nytimes.com/2008/11/21/travel/escapes/21Rituals.html.

[19] *Be an Artist-in-Residence*, NATIONAL PARKS SERVICE, https://www.nps.gov/subjects/arts/air.htm (last visited October 7, 2021).

graphers alike travel from around the world to capture scenic and historic vistas."[20] The connection to photography and the aesthetic impact of the National Parks System is so great that the District of Columbia District Court has expressly recognized the "concrete and particularized interests" of photographers in the parks as sufficient to convey standing to challenge hunting regulations. *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 129 (D.D.C. 2016).[21] Whether in reference to the historic origins or the current use and enjoyment of the park, photography and filming are and have been integral to the National Park Service and a core part of its overall value to the American people.

Federal lands generally are also presumptively and traditionally open to photography so that citizens can observe and gather information on government activity. *See Leigh*, 677 F.3d at 898. A "qualified right of access for the press and public to observe government activities" exists on federal lands, whether in the Bureau of Land Management, the National Park System or the National Forest Service. *Id*. These critical First Amendment protections extend well beyond the press "to prohibit government from limiting the stock of information from which members of the public may draw". *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978). Particularly in the era of social media, citizens regularly "report" and share information about their national parks for audiences of varying sizes. Journalists also gather and report on national parks. Indeed, as the Complaint alleges,

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[20] *Picturing the Parks*, NATIONAL PARK SERVICE, https://www.nps.gov/subjects/photography/index.htm.

[21] *amended on other grounds*, 203 F. Supp. 3d 31 (D.D.C. 2016); amended decision *aff'd sub nom*. *Mayo v. Reynolds*, 875 F.3d 11 (D.C. Cir. 2017).

members of the media and the general public have created videos from the exact location where Mr. Price filmed his project, and the NPS represented to him that those individuals were engaged in First Amendment activities. *See* Complaint, *Price v. Barr*, No. 19-3672, ECF No. 1 (Dec. 9, 2019) at para. 41-44. The government recognized the First Amendment nature of filming and opened the park up for those "approved" individuals to engage in expressive activity without restriction. But they charged Mr. Price with a crime for doing the same. The government cannot pick and choose who can take advantage of a public place, and who can create speech, in this manner. This kind of discrimination on who can collect information, based on the speaker and the content, cannot stand. *See Sorrell*, 564 U.S. at 570.

The D.C. Circuit's determination that a government tax on the creation of a film based on the content of that film is also not a reasonable restriction on expression. There are two parts to the National Park Service film permit scheme. The first is a cost-recovery fee related to the "costs incurred" as a result of the project, including administrative costs. U.S.C. § 100905(b). The second is a "fair return" fee — akin to a location fee that private landowners charge for photo shoots on private property. The "fair return" fee is Congress's attempt to get a cut of the presumed profit from a commercial filmmaking enterprise. 54 U.S.C. § 100905(a)(1). It is the "fair return" fee that the district court held was an unconstitutional tax on the exercise of a First Amendment right. *Amici* agree.

As Judge Tatel noted below in dissent, not only does the holding below improperly limit First Amendment protection to protect "the stumping politician but not the silent photographer, to shield the shouting

protester but not the note-taking reporter", but it also endorses a government tax on the silent photographer and the note-taking reporter. *Price v. Garland*, 45 F.4th at 1081 (Tatel, J., dissenting).

CONCLUSION

This Court should grant review of the D.C. Circuit decision, because this case is inconsistent with the long history of protecting speech by protecting the activities necessary to the creation of that form of expression.

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APPENDIX TABLE OF CONTENTS

APPENDIX A

List of Amici

National Press Photographers Association ("NPPA") is a 501(c)(6) not-for-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

American Photographic Artists ("APA") is a leading not-for-profit organization run by, and for, professional photographers since 1981. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide.

American Society for Collective Rights Licensing ("ASCRL") is a 501(c)(6) not-for-profit corporation founded in the United States to administer collective rights revenue for photographers and illustrators. ASCRL is the leading collective rights organization in the United States for this constituency, representing over 16,000 members. ASCRL actively engages in market preservation policy and legislative initiatives, including those for collective administration, where collective administration serves to supplement the primary rights marketplace of its constituents.

American Society of Media Photographers, Inc. ("ASMP") 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, sell, and license their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-five-year-plus history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.

Digital Media Licensing Association ("DMLA") represents the interests of digital licensing entities that offer, for license, millions of images, illustrations, film clips, and other content on behalf of thousands of individuals to editorial and commercial users.

First Amendment Lawyers Association ("FALA") is an Illinois nonprofit corporation with some 180 members throughout the United States, Canada, and Europe. Its membership consists of attorneys whose practice emphasizes the defense of First Amendment rights and related civil liberties. For more than half a century, FALA members have litigated cases concerning a wide spectrum of such rights, including free expression, free association, and related privacy issues.

Getty Images (US), Inc. ("Getty Images") is a leading source for visual content around the world, including a comprehensive editorial offering. Through our brands Getty Images, iStock and Unsplash, we provide a platform that enables customers to lawfully license editorial and creative work from content creators who are able to monetize their work.

The National Writers Union ("NWU") The National Writers Union ("NWU") is a 501(c)(5) non-profit, independent national labor union that advocates for freelance and contract writers and media workers. The NWU and our Digital Media Division (Freelance Solidarity Project) works to advance the economic conditions of writers and media workers in all genres, media, and formats.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper's circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

The North American Nature Photography Association ("NANPA") is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography (both stills and video) as an artistic medium for the documentation, celebration, and protection of the natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

Radio Television Digital News Association ("RTDNA") is the world's largest professional

organization devoted exclusively to broadcast and digital journalism. Founded as a grassroots organization in 1946, RTDNA's mission is to promote and protect responsible journalism. RTDNA defends the First Amendment rights of electronic journalists throughout the country, honors outstanding work in the profession through the Edward R. Murrow Awards and provides members with training to encourage ethical standards, newsroom leadership and industry innovation.

The Society of Environmental Journalists is the only North American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The White House News Photographers Association, Inc. ("WHNPA"), is a 501(c)(6) non-profit organization dedicated to the public's right to freedom in searching for the truth and the right to be accurately and completely informed about the world in which we live. WHNPA believes that there is a direct linkage between the survival of a democratic society and an accurate and free press.