No. 21-5073

ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Appellants,

-v-

GORDON M. PRICE,

Appellee.

Appeal from the District Court of the District of Columbia,
1:19-cv-03672-CKK, Colleen Kollar-Kotelly, District Judge, Presiding

AMICUS CURIAE BRIEF OF THE *NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AND 11 OTHER MEDIA AND PHOTOGRAPHY ORGANIZATIONS*, IN SUPPORT OF APPELLEE AND AFFIRMANCE

MICKEY H. OSTERREICHER
GENERAL COUNSEL
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
70 NIAGARA STREET
BUFFALO, NY 14202
(716) 983-7800
LAWYER@NPPA.ORG

ALICIA WAGNER CALZADA
DEPUTY GENERAL COUNSEL,
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
ALICIA WAGNER CALZADA, PLLC
12023 RADIUM, SUITE B1
SAN ANTONIO, TX 78216
(210) 825-1449
ALICIA@CALZADALEGAL.COM

OCTOBER 13, 2021 *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amici curiae National Press Photographers Association, et al., pursuant to D.C. Circuit Rule 28(a)(1), by and through undersigned counsel, hereby certify as follows:

A. Parties and Amici

The Appellants (defendants below) are Merrick Garland, in his official capacity as Attorney General of the United States (substituted for William P. Barr), Debra Haaland, in her official capacity as Secretary of the Interior (substituted for David Bernhardt), and Shawn Benge, in his official capacity as National Park Service Deputy Director of Operations (substituted for David Vela). The Appellee (plaintiff below) is Gordon M. Price. Amici in this brief includes the National Press Photographers Association, First Look Media Works, Inc., American Society of Media Photographers, Inc., American Photographic Artists, Digital Media Licensing Association, Getty Images (US), North American Nature Photography Association, Radio Television Digital News Association, Society of Professional Journalists, White House News Photographers Association, Inc., American Society of Collective Rights Licensing and National Writers Union. Additionally, Amici received notice of an additional amicus brief to be filed by Pacific Legal Foundation and Anthony Barilla.

B. Ruling Under Review

The ruling under review is the district court's order of January 22, 2021, granting Plaintiff-Appellee's Motion for Judgment on the Pleadings. A memorandum opinion accompanying the order was issued on January 22, 2021 and is available at 514 F. Supp. 3d 171 (D.D.C. 2021).

Respectfully submitted,

/s/ Mickey H. Osterreicher
General Counsel
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
70 Niagara Street
Buffalo, NY 14202
(716) 983-7800
lawyer@nppa.org

Alicia Wagner Calzada
Deputy General Counsel
National Press Photographers Association
ALICIA WAGNER CALZADA, PLLC
12023 Radium, Suite B1
San Antonio, TX 78216
210-825-1449
alicia@calzadalegal.com

Counsel for Amici Curiae

Dated: October 13, 2021

CORPORATE DISCLOSURE STATEMENTS

In accordance with FRAP 26.1, amici state as follows:

National Press Photographers Association has no parent company nor issues stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly held corporation holds an interest of 10% or more in First Look Media Works, Inc.

American Society of Media Photographers, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock.

American Photographic Artists has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The North American Nature Photography Association is a non-profit 501(c)6 that has no parents or subsidiaries and issues no stock.

Digital Media Licensing Association is a NY non-profit 501(c)(6) that has no parents or subsidiaries and issues no stock

The White House News Photographers Association, Inc., is a 501(c)(6) non-profit organization that has no parents, affiliates, or subsidiaries and issues no stock.

National Writers Union has no parent company and issues no stock.

Getty Images (US), Inc., a New York corporation that is not publicly traded, is a wholly owned subsidiary of Getty Images, Inc. Getty Images, Inc., a Delaware corporation that is not publicly traded. No publicly traded company owns 10% or more of Getty Images (US), Inc.'s stock.

American Society for Collective Rights Licensing is a 501(c)(6) not for profit corporation and has no parents or subsidiaries and issues no stock.

STATEMENT REGARDING CONSENT TO FILE AND NECESSITY OF SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), and FRAP 29(a)(2), undersigned counsel for amici curiae represents that counsel for all parties have been sent notice of the filing of this brief and have consented to the filing. Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for amici curiae certify that a separate brief is necessary as further outlined in the National Press Photographers Association's Notice of Intent to File Amicus Brief, filed on October 4, 2021.

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

A. Parties and Amici.....i

B. Ruling Under Review ii

CORPORATE DISCLOSURE STATEMENTS iii

STATEMENT REGARDING CONSENT TO FILE AND NECESSITY OF SEPARATE BRIEFING.....v

TABLE OF AUTHORITIES viii

INTEREST OF AMICI CURIAE.....1

ARGUMENT 6

I. PUBLICLY ACCESSIBLE AREAS OF FEDERAL LANDS ARE PUBLIC FORUMS AS RELATED TO PHOTOGRAPHY. 8

A. To Determine That Federal Lands Are Public Forums with Respect to Visual Communication, This Court Should Consider That Even the Most Casual Communication Is Speech Protected by the First Amendment. 10

B. The National Parks Have a History Steeped in Visual Tradition.....11

C. Even If This Court Finds That the Land in Question Does Not Rise to the Character of a Quintessential/Traditional Public Forum, It Can Find That These Lands Are Public Forums with Respect to Photography and Videography. 14

II. THE GOVERNMENT'S ATTEMPT TO REFRAME FILMING AS AKIN TO VENDING MUST FAIL. 16

A. The Government's Requirement That Mr. Price Pay a Tax and Obtain Its Permission Because He Decided to Show His Film Publicly Demonstrates the Insidious Nature of the Permit Scheme That in Essence and Practice Is a Prior Restraint on Speech Outside of the Park.....17

B. The Government's Reliance on Cases That Involve in-Park Business Transactions Is Misplaced Because Price Never Conducted Business in the Park. 18

C. The Government's Only Legitimate Purpose Here—Minimizing Resource Damage and Impact to Visitors—Has No Relation to Whether a Work Is for Personal Use, or is News, Documentary, or a Fictional Film. 19

III. AS TECHNOLOGY AND THE MEDIA HAVE EVOLVED, THE INCONSISTENCIES OF COMMERCIAL VS. NON-COMMERCIAL AND STILL PHOTOGRAPHY VS. VIDEO DISTINCTIONS HAVE ONLY MAGNIFIED AS CAMERA USERS EASILY TRANSITION BETWEEN FORMATS AND INTENTIONS. 22

A. The Distinction Congress Created Between Video and Still Photography Is from a Bygone Era and the Merging of the Two Technologies Has Led to Arbitrary and Content-Based Enforcement.....22

B. Distinctions Between Commercial and Non-Commercial Photography and for-Profit and Non-Profit Productions Lead to an Impermissible Content-Based Analysis by the Government. 24

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Page

CASES

ACLU of Ill. v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 2

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987).....20

Boardley v. U.S. Dep't of Interior,
615 F.3d 508 (D.C. Cir. 2010)..... passim

Branzburg v. Hayes,
408 U.S. 665 (1972).....14

Burk v. Augusta-Richmond County,
365 F.3d 1247 (11th Cir. 2004) 21

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985).....25

Fields v. City of Phila.,
862 F.3d 353 (3d Cir. 2017) 1

First Nat'l Bank of Bos. v. Bellotti,
435 U.S. 765 (1978) 14

Glik v. Cunniffe,
655 F.3d 78 (1st Cir. 2012).....14

Henderson v. Lujan,
964 F.2d 1179 (D.C. Cir. 1992)..... 8, 17

Houchins v. KQED, Inc.,
438 U.S. 1 (1978).....14

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952).....25

Josephine Havlak Photographer, Inc.
v. Village of Twin Oaks,
864 F.3d 905 (8th Cir. 2017) 18, 19

Leigh v. Salazar,
677 F.3d 892 (9th Cir. 2012) 1, 13

Mahoney v. Babbitt,
105 F.3d 1452 (D.C. Cir. 1997)..... 8, 17

TABLE OF AUTHORITIES, Cont.

Page

Mayo v. Jarvis,
177 F. Supp. 3d 91 (D.D.C. 2016).....13

Mayo v. Reynolds,
875 F.3d 11 (D.C. Cir. 2017).....13

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,
460 U.S. 575 (1983).....20

Murdock v. Com. of Pennsylvania,
319 U.S. 105 (1943)..... 18, 19

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976).....18

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983)..... 11, 12

Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975).....14

Shuttlesworth v. City of Birmingham, Ala.,
394 U.S. 147 (1969).....19

Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.,
502 U.S. 105 (1991).....20

Turner v. Driver,
848 F.3d 678 (5th Cir. 2017) 2

United States v. Grace,
461 U.S. 171 (1983)..... 10, 15

United States v. Marcavage,
609 F.3d 264 (3d Cir. 2010) 8, 17

United States v. Stevens,
559 U.S. 460 (2010).....11

W. Watersheds Project v. Michael,
353 F. Supp. 3d 1176 (D. Wyo. 2018).....8

W. Watersheds Project v. Michael,
869 F.3d 1189 (10th Cir. 2017) 1

TABLE OF AUTHORITIES, Cont.

Page

CONSTITUTIONAL PROVISIONS

U.S. Const, amend. I ..... passim

STATUTES

16 U.S.C. § 4601-6d.....22

54 U.S.C. § 100905 ..... passim

JUDICIAL RULES

Fed. R. App. P. 29(a)(4)(E).....1

REGULATIONS

36 C.F.R. § 5.5 7

43 C.F.R. § 5 ..... 7, 26

43 C.F.R. § 5.1 7

43 C.F.R. § 5.12 ..... 19, 20, 24

43 C.F.R. § 5.8 20

CONGRESSIONAL DOCUMENTS

S. REP. 106-67, S. Rep. No. 67, 106th Cong., 1st Sess. 1999 22

OTHER AUTHORITIES

Alan Duke,
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.....27

Aperture Editors,
A History of Photography in America's National Parks, APERTURE
https://aperture.org/editorial/a-history-of-photography-in-americas-national-
parks/ 11

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 25

TABLE OF AUTHORITIES, Cont.

Page

Cory Hatch,
1st Amendment, YouTube Meet on Public Lands, JACKSON HOLE NEWS & GUIDE, June 2, 2010, https://www.jhnewsandguide.com/news/environmental/st-amendment-youtube-meet-on-public-lands/article_6eee4b1d-7428-530a-b1ad-5669f041642a.html 21, 24

Jackie Mansky,
How Photography Shaped America's National Parks, SMITHSONIAN MAGAZINE (June 22, 2016) https://www.smithsonianmag.com/travel/how-photography-shaped-americas-national-parks-180959262/ 12

Jason Cipriani,
Android Users Can Snap Photos While Recording Video Again, CNET, April 19, 2016. https://www.lifewire.com/taking-digital-photos-with-your-camcorder-487921 and https://www.cnet.com/tech/mobile/new-google-camera-update-brings-back-ability-to-snap-photos-while-recording-video/ 23

National Park Foundation,
Share the Experience Photo Contest, 2020 Winners, https://www.nationalparks.org/our-work/campaigns-initiatives/share-experience-photo-contest/2020-winners 9

National Park Foundation,
Share the Experience, Official Federal Recreation Lands Photo Contest, https://www.sharetheexperience.org/home.....12

National Park Service,
About Photography, https://www.nps.gov/subjects/photography/about.htm.....12

National Park Service,
Melting Glaciers, https://www.nps.gov/glac/learn/nature/melting-glaciers.htm (last visited July 6, 2020) 27

National Park Service,
Picturing the Parks, NATIONAL PARK SERVICE, https://www.nps.gov/subjects/photography/index.htm 12

National Park Service,
Be an Artist-in-Residence, https://www.nps.gov/subjects/arts/air.htm (last visited October 7, 2021) 12

National Parks Foundation, *When Nature is the Muse: Photography in National Parks*, https://www.nationalparks.org/connect/blog/when-nature-muse-photography-national-parks 12

TABLE OF AUTHORITIES, Cont.

Page

Phil Archer,
A Silent but Most Effective Voice: Ansel Adams and Advocacy,
National Parks Conservation Association (Oct. 14, 2016).....12

Rocio Lower,
The Photographic Legacy of Ansel Adams, NATIONAL PARK FOUNDATION BLOG, February 20, 2020, https://www.nationalparks.org/connect/blog/photographic-legacy-ansel-adams 11

Shutterstock,
https://support.submit.shutterstock.com/s/article/What-is-the-difference-between-Commercial-and-Editorial-content?language=en_US.....24

INTEREST OF AMICI CURIAE[1]

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. Specific to this brief it should be noted that in 2007 NPPA filed comments and testified at legislative hearings regarding the Department of the Interior's proposed "New Fees For Filming And Photography On Public Lands" and was one of the plaintiffs in *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017) and filed or participated in amicus briefs in *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012), *Fields v. City of Phila.*, 862 F.3d 353 (3d Cir. 2017), *Turner*

[1] Pursuant to FRAP 29(a)(4)(E), amici state that no party's counsel has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than amici curiae, and their members, have contributed money that was intended to fund preparing or submitting the brief.

v. Driver, 848 F.3d 678 (5th Cir. 2017) and *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

First Look Media Works, Inc. ("FLMW") is a 501(c)(3) non-profit media company devoted to supporting independent voices across all platforms. FLMW has three divisions. It publishes The Intercept, an award-winning online news organization dedicated to holding the powerful accountable through fearless, adversarial journalism. Field of Vision is the documentary unit that commissions and creates original non-fiction films. The Press Freedom Defense Fund provides essential legal support to journalists, news organizations and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest. FLMW has an interest in ensuring that its journalism can continue unimpeded by the threat of legal liability under an unconstitutional licensing scheme.

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.

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.

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.

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.

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. DMLA actively advocates on behalf of its members and their creators to ensure a fair licensing economy.

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.

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.

Getty Images (US), Inc. ("Getty Images") is a leading source for visual content around the world, no other organization has the exact combination of creative

imagery, vectors and video footage, along with a comprehensive editorial offering. Through both Getty Images and iStock, we have provided a platform for content creators to lawfully license and monetize their creative work and support these endeavors by advocating for the rights of creative photographers and journalists.

American Society for Collective Rights Licensing ("ASCRL") is a 501(c)(6) not-for-profit corporation founded in the United States to collect and distribute collective rights revenue for photography and illustration to United States authors and rights holders and to foreign national authors and rights holders whose works are published in the United States. ASCRL, represents over 16,000 illustrators and photographers, and is the leading collective rights organization in the United States for this constituency of rights owners. ASCRL is a zealous defender of the primary rights of illustrators and photographers, and ASCRL actively engages in policy and legislative initiatives that advance their interests.

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

ARGUMENT

Filming and photography are expressive forms of speech protected by the First Amendment. The act of filming is part of a continuum of gathering and disseminating information that is as protected as is the publication of the work itself. The public regularly engages in free expression—including photography and videography—on federal lands. Congress does not have the power to change the character of the areas of the National Park System, that are held for public use, via a permitting scheme. At the district court level, Appellants argued that filming is merely "facilitative" to speech, akin to mail delivery. On appeal they have traded that losing argument for one seeking to treat filming as if it were an expressionless activity like selling hot dogs. But like most people capturing images with a camera, the filmmaker here did not set-up a business or interact with customers on federal land, and did not even share his expressive speech with audiences in the park itself. The government's attempt to regulate, discriminate against, and tax his speech violates the First Amendment. Such attempts to limit that expression are subject to strict scrutiny, a standard that the government has not even tried to argue it meets.

Having lost the argument (under both strict and intermediate scrutiny) that 54 U.S.C. § 100905 is overbroad and an unconstitutional attempt to restrict speech in public forums, the Government now attempts to narrow the ruling, by asserting that

the granted injunctive relief only applies to the National Park Service ("NPS") statute[2] and that the right to photograph and record can be limited to "free speech areas" in some federally controlled land.[3] If this Court were to agree, it would create a disparate patchwork of regulations for park rangers to administer and would create confusion for park-goers wishing to photograph or record during their stay. It would also run counter to the grand tradition of photography in all areas of national parks and other federal lands. This chilling proposition is made even more onerous when combined with the government's position that even in locations which it grudgingly concedes as public forums, it can limit expressive activity and seek content-based enforcement of its regulations long after the expressive activity occurred.[4] This Court should reject those arguments.

---

2 *See* App. Br. 8 ("Only the NPS Statute is at issue here"). In fact, the court below actually issued a declaratory judgment overturning requirements in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 "that those engaged in 'commercial filming' must obtain permits and pay fees are unconstitutional under the First Amendment" and enjoining the enforcement of fee requirements for commercial filming under those statues and regulations. JA 70-71. 43 C.F.R. Part 5, "covers commercial filming and still photography activities on lands and waters administered by the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife Service." 43 C.F.R. § 5.1 (emphasis added).

3 *See* App. Br. 59-64.

4 App. Br. 10.

I. PUBLICLY ACCESSIBLE AREAS OF FEDERAL LANDS ARE PUBLIC FORUMS AS RELATED TO PHOTOGRAPHY.

Because the challenged statute is a content-based restriction on protected First Amendment speech, a public forum analysis is not required.[5] However, should there be such an analysis, this Court—alongside other Circuits–has previously found that that the traditional public forum status of national parks goes beyond simply designated free speech areas that the government has created. "[M]any national parks undoubtedly include areas that meet the definition of traditional public forums." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010). *See also*, *Mahoney v. Babbitt*, 105 F.3d 1452, 1458 (D.C. Cir. 1997) (sidewalk along Pennsylvania Avenue, though part of the National Parks System, is a quintessential public forum); *Henderson v. Lujan*, 964 F.2d 1179, 1181 (D.C. Cir. 1992) (area inside the national park Vietnam War Memorial is a public forum); *United States v. Marcavage*, 609 F.3d 264, 278 (3d Cir. 2010) (sidewalk in front of the Liberty Bell, in Independence National Historical Park is a public forum even though it's not a designated "free speech area"). The *Boardley* Court declined to address the question

5 "Courts have repeatedly found forum analysis unnecessary in the case of content-based restraints on speech." *See*, *e.g. W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1190 (D. Wyo. 2018) (forum analysis was not necessary to hold that a law restricting photography and other types of data collection was unconstitutional). Amici find no need to duplicate Appellees analysis explaining why the statute is a content-based restriction.

of whether all 391 national parks in the system were public forums because there was nothing in the record about the history and tradition of distributing pamphlets—the expressive activity at issue in that case—for such a wide swath of national parks. *Boardley* at 515. This Court is not so constrained and with respect to the right to photograph or film in National Parks, it can rely on an array of references to that tradition. It can also take note that millions of Americans traverse the publicly accessible areas of national parks while engaging in photography, using cameras from the smallest ones in their pocket and on their cell phones to the most sophisticated professional cameras. Indeed, such activity is encouraged and supported by the NPS and other agencies as part of their "Share the Experience Photo Contest" with over 13,000 entries in 2020 (*see* https://www.nationalparks.org/our-work/campaigns-initiatives/share-experience-photo-contest/2020-winners).

The district court in the instant case repeatedly recognized the long tradition of filming and photography in national parks, finding that "any individual may easily enter a national park and shoot a high-quality video at will, using nothing more than a smart phone"[6]; and "filming and photography . . . had long proceeded on federal lands before the enactment of § 100905."[7] As a result, the district court held that

---

6 JA 63.

7 JA 69 (emphasis added).

"the statute imposes a chilling effect on the expressive activities of a wide swath of national park visitors."[8]

Congress may not "destroy the 'public forum' status of streets and parks which have historically been public forums." *United States v. Grace*, 461 U.S. 171, 180 (1983). "Nor may the government transform the character of [a public forum] by including it within the statutory definition of what might be considered a non-public forum parcel of property." *Id*. "What makes a park a traditional public forum is not its grass and trees, but the fact that it has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Boardley*, at 515. Accordingly, the government's assertions that filming is only protected in narrow free speech zones are not only misplaced but stand in stark contradiction to such well-settled public forum jurisprudence.

A. To Determine That Federal Lands Are Public Forums with Respect to Visual Communication, This Court Should Consider That Even the Most Casual Communication Is Speech Protected by the First Amendment.

The tradition of "communicating thoughts" referenced in the public forum analysis in *Boardley* is not limited to distributing pamphlets, and clearly applies to expressive activity by photographers and videographers—both professional and

8 *Id.*

amateur—on federal lands. *Boardley*, at 523; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Members of the public have long engaged in photography and filming in the National Parks for a broad range of communicative purposes. The communicative purpose does not need to be sophisticated or high level to be protected.

While not a public forum case, the U.S. Supreme Court noted over a decade ago 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." *United States v. Stevens,* 559 U.S. 460, 479 (2010). The age-old tradition of communicating thoughts and discussing public questions through visual mediums has resulted in a public forum status for photography on federal lands.

B. The National Parks Have a History Steeped in Visual Tradition.

Given the role that visual art has played in National Parks System, including its role in the very the inception and creation of the system[9], there should be no doubt

---

9 *See:* Aperture Editors, *A History of Photography in America's National Parks* https://aperture.org/editorial/a-history-of-photography-in-americas-national-parks/ and Rocio Lower, *The Photographic Legacy of Ansel Adams*, APERTURE, February 20, 2020, https://www.nationalparks.org/connect/blog/photographic-legacy-ansel-adams ("Renowned photographer Ansel Adams is undeniably among the great names associated with our national parks and conservation in America. His work with the National Park Service and the Sierra Club greatly influenced his artistry (and vice versa!" (emphasis added)).

that at least with respect to photography, the entirety of the publicly accessible portions of that land are a traditional/quintessential public fora which have "immemorially been held in trust for the use of the public," for "communicating thoughts between citizens, and discussing public questions." *Perry*, at 45 (emphasis added). "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."[10] The NPS and its partners tout "Photography is an important part of national park history . . . .Today, professional and amateur photographers alike travel from around the world to capture scenic and historic vistas."[11] The connection between photography and the

---

10 National Park Service, *Be an Artist-in-Residence*, nps.gov/subjects/arts/air.htm (last visited October 7, 2021).

11 National Park Service, *Picturing the Parks*, https://www.nps.gov/subjects/photography/index.htm; *See also*, *When Nature is the Muse: Photography in National Parks*, National Parks Foundation, https://www.nationalparks.org/connect/blog/when-nature-muse-photography-national-parks; *Share the Experience, Official Federal Recreation Lands Photo Contest*, https://www.sharetheexperience.org/home; National Park Service, *About Photography*, https://www.nps.gov/subjects/photography/about.htm ("Compelling photography has contributed to the creation of the National Park Service and the preservation of America's most special places since artists first began capturing images of Yosemite and Yellowstone in the early nineteenth century."); Phil Archer, *A Silent but Most Effective Voice: Ansel Adams and Advocacy*, National Parks Conservation Association (Oct. 14, 2016), https://www.npca.org/articles/1307-a-silent-but-most-effective-voice-ansel-adams-and-advocacy; Jackie Mansky, *How Photography Shaped America's National Parks*, SMITHSONIAN MAGAZINE (June 22, 2016) https://www.smithsonianmag.com/travel/how-photography-shaped-americas-national-parks-180959262/.

aesthetic impact of the National Parks System is so great that the District of Columbia District Court expressly recognized the "concrete and particularized interests" of photographers in the parks as indisputable and sufficient to convey standing to challenge hunting regulations. *Mayo v. Jarvis*, 177 F. Supp. 3d 91, 129 (D.D.C. 2016).[12] 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 NPS and a core part of its overall value to the American people.

Federal lands are also presumptively and traditionally open to photography so that citizens can observe and gather information on government activity. *See Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). In *Leigh*, the Ninth Circuit held that a photographer had a right to access and photograph a horse round-up on federal lands controlled by the Bureau of Land Management. In its holding the Court applied prior access principles and considered 1) "whether the place and process have historically been open to the press and general public" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* As was found in *Leigh*, 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.*

---

[12] Amended by 203 F. Supp. 3d 31 (D.D.C. 2016) *vacated sub nom. on other grounds by Mayo v. Reynolds*, 875 F.3d 11 (D.C. Cir. 2017) *and aff'd sub nom. Mayo v. Reynolds*, 875 F.3d 11 (D.C. Cir. 2017).

These critical First Amendment protections extend well beyond the press. *See Glik v. Cunniffe*, 655 F.3d 78, 83-84 (1st Cir. 2012) ("[T]he public's right of access to information is coextensive with that of the press."), *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (First Amendment reach "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"); *Houchins v. KQED, Inc*., 438 U.S. 1, 11 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972). Particularly in the era of social media, citizens regularly "report" and share information about their national park experiences for audiences of varying sizes.

C. Even If This Court Finds That the Land in Question Does Not Rise to the Character of a Quintessential/Traditional Public Forum, It Can Find That These Lands Are Public Forums with Respect to Photography and Videography.

Once the National Parks system opened the parks up for the public to come and engage in expressive activity—specifically photography—they created a public forum for that purpose. *See Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that a public auditorium was a public forum dedicated to a specific expressive activity—namely theatrical performances). Even if some expressive activities are not appropriate in every publicly accessible portion of the National Parks System, photography is an expressive activity that the general public has been

invited and encouraged to engage in throughout the corners of the system. *Id*. *See also*, section I, B., *supra*.

The creation by the government of a "free speech" area in a national park does not change the fact that they have opened the entire park—and indeed the entire publicly accessible NPS system—for photographic activity making it a public forum for this kind of expressive activity.[13] *See United States v. Grace*, 461 U.S. 171, 180. 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 protected First Amendment activities. JA 20-21. The government opened the park up for those "approved" individuals to engage in expressive activity without restriction but charged Mr. Price with a crime for doing the same. Because the public generally is allowed to engage in expressive photographic activity in that location, that area is a public forum.

---

[13] *Amici* note that some free speech areas in some national parks are merely sections in a parking lot—which are hardly sufficient to meaningfully communicate about national parks. *See*, *e.g.*, John Broward, Superintendent, *Pu'uhonua o Hônaunau NHP Designated First Amendment Areas map*, National Park Service Superintendent's Compendium, August 18, 2021, https://www.nps.gov/puho/learn/management/compendium.htm

II. THE GOVERNMENT'S ATTEMPT TO REFRAME FILMING AS AKIN TO VENDING MUST FAIL.

The government claims that the NPS permitting scheme—promulgated solely for the purpose of imposing a tax on expressive activity—is no different than charging a hot dog vendor for setting up a business in a national park. App. Br. 6-7. That argument fails because, Mr. Price never operated his business or engaged with his clients in the Colonial National Historical Park. He engaged with his clients in a restaurant where he showed his film, many miles away, and months after he left the park. JA 19-20. His only activity in the park was related to the creation of protected speech. Additionally, the original NPS permit requirement for filming and photography was meant to recover administrative costs and regulate how commercial activities impacted the use and enjoyment of the park by others in the same way that operating a business might.[14] Being permitted to engage in First Amendment activity is not a "service" provided by the federal government for which it can charge[15].

---

[14] App. Br. 6-7. As Appellants pointed out in their brief, the "long applied" permit fees were to "recover the cost of administering permits" but NPS "could not charge revenue-raising location fees for commercial filming" that are at issue in this case. *Id*.

[15] App. Br. 4.

A. The Government's Requirement That Mr. Price Pay a Tax and Obtain Its Permission Because He Decided to Show His Film Publicly Demonstrates the Insidious Nature of the Permit Scheme That in Essence and Practice Is a Prior Restraint on Speech Outside of the Park.

Mr. Price would never have come under the ambit of the NPS permitting scheme if he had taken the film he created in the park and kept it hidden.[16] Instead, he showed it to an audience. And based on the government's own position and actions, it is only because Mr. Price communicated his expressive work—at a location far from the public forum in question, that he was fined. App. Br. 10-11. That is the absurdity of a park permit rule that penalizes speech based on it being communicated outside of the park. In this manner, Section 100905 is far more insidious than the permit requirements in *Boardley* or other speech cases involving National Parks. In all of those cases, the permit requirements related to expressive activities in the parks themselves. *See Boardley*, 615 F.3d at 512 (expressive activity took place within Mount Rushmore National Memorial); *Mahoney*, 105 F.3d at 1453 (expressive activity along Pennsylvania Avenue); *Henderson*, 964 F.2d at 1181 (Vietnam War Memorial); *Marcavage*, 609 F.3d 264, 278 (Independence National Historical Park). In Mr. Price's case, the government went beyond just limiting his expressive activity inside the park and fined him based on speech communicated outside the park. The requirement that he obtain permission from the government and pay a fee before

[16] Indeed, he took steps to avoid further fines by editing his film. JA 42.

showing his film to the public is a prior restraint, which bears "a 'heavy presumption' against its constitutional validity. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976).

B. The Government's Reliance on Cases That Involve in-Park Business Transactions Is Misplaced Because Price Never Conducted Business in the Park.

The government's reliance upon *Josephine Havlak Photographer, Inc. v. Village of Twin Oaks,* 864 F.3d 905 (8th Cir. 2017) (imposing a total ban on in-park commercial activity) is misplaced. The ordinance at issue in that case applied to all commercial activity equally and did not single out expressive activity because Photographers brought their clients to the park and essentially were operating their business at that location. The city in that case had created a special exemption from the general ban on commercial activity for photographers in the form of a content-neutral permitting process that regulated only the time, place, or manner of park usage. The associated fee was not a tax and was limited to recovering the cost of managing the permit scheme and hiring security during the photo shoot.

Contrary to Section 100905, it was not the purpose of the ordinance in *Havlak* to bring "a fair return" to the city. Further, the Eight Circuit in no way endorsed the notion that the government can impose a content-based tax or compel 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution." *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 114 (1943). Unlike

the *Havlak* permit ordinance, Section 100905 "subject[s] the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, and is unconstitutional." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51(1969).

The NPS regulations are arbitrary content-based restrictions that serve no articulable or permissible government interest, restrict far more speech than necessary and fail to leave open alternative avenues for communication. The government's reliance on Section 100905 for getting a "fair return" for the value of allowing a "special use" should not be arbitrarily used to burden those who make their expressive speech available "for a market audience with the intent of generating income." 43 C.F.R. § 5.12. And as the district court and other courts have made clear, raising revenue is not a legitimate government purpose. *Murdock*, at 113-14.

C. The Government's Only Legitimate Purpose Here—Minimizing Resource Damage and Impact to Visitors—Has No Relation to Whether a Work Is for Personal Use, or is News, Documentary, or a Fictional Film.

The stated governmental purpose of obtaining a rent-like return for use of the property by imposing a fee that shall provide a fair return to the United States in exchange for exercising a First Amendment right, is not a legitimate governmental purpose, let alone a compelling one. *See* App. Br. 23; 43 C.F.R. § 5.12. And the government's arguments fall flat where the fee is not charged to everyone who enters

the parks—only some of those exercising a First Amendment right involving specific content. Raising revenue alone, simply is not an interest that overcomes First Amendment rights. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 593 (1983). *See also*, *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.,* 502 U.S. 105, 120 (1991). The government runs afoul of the First Amendment because the "fair return" clause operates on top of a clause that already recovers costs related to administrative expenses. *See* 43 C.F.R. § 5.8 ("the location fee is in addition to any cost recovery amount assessed").

To charge a fee for expressive work simply because it reaches "a market audience" is an inappropriate tax on First Amendment speech. *Arkansas Writers' Project, Inc.* 481 U.S. 221, 231. And while the government points to its exception for newsgathering, amici are concerned that as the lines between non-commercial or "newsgathering" and commercial activities become more blurred, it may not be long before a "commercial filming" designation could be applied to newsgathering as well. *See*, *e.g.*, 43 C.F.R. § 5.12 (limiting exempted media entities to "entities [that] qualify as disseminators of 'news'"). And there are plenty of examples where federal authorities have arbitrarily decided that newsgathering does not sufficiently meet

their "breaking news" standard to warrant an exemption from commercial filming permit requirements.[17]

As NPPA and other amici testified and commented over the years, the government may use permits as a content-neutral time, place, and manner regulation under certain conditions such as when there is a clear impact to the park or excessive disturbance of visitors. Protection of governmental resources or traffic management are recognized interests, although case law suggests that there needs to be a certain threshold regarding the number of people involved before a permit may be required. *See, e.g., Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255, n.13 (11th Cir. 2004) (listing appellate courts, including this one, that have rejected permit requirements for groups of 10, 6-8, and 2 people). When such an activity involves costs, government may charge an amount that is calibrated to reflect administrative costs. But it is impermissible to simply condition the exercise of First Amendment rights on the payment of a tax or fee.

---

17 *See*, *e.g.*, Cory Hatch, *1st Amendment, YouTube Meet on Public Lands*, JACKSON HOLE NEWS & GUIDE, June 2, 2010. https://www.jhnewsandguide.com/news/environmental/st-amendment-youtube-meet-on-public-lands/article_6eee4b1d-7428-530a-b1ad-5669f041642a.html;

III. AS TECHNOLOGY AND THE MEDIA HAVE EVOLVED, THE INCONSISTENCIES OF COMMERCIAL VS. NON-COMMERCIAL AND STILL PHOTOGRAPHY VS. VIDEO DISTINCTIONS HAVE ONLY MAGNIFIED AS CAMERA USERS EASILY TRANSITION BETWEEN FORMATS AND INTENTIONS.

A. The Distinction Congress Created Between Video and Still Photography Is from a Bygone Era and the Merging of the Two Technologies Has Led to Arbitrary and Content-Based Enforcement.

Twenty years ago, Congress considered "Commercial Filming" as entailing big, bulky, highly specialized equipment that would typically be used in large scale productions where there would almost certainly be more impact on the park land and greater administrative costs to manage the project.[18] Advances in technology have obliterated those assumptions. It was highly inconceivable in 1999 that almost every modern-day visitor to a national park would be able to shoot and broadcast or publish high resolution digital video—or still images—using a hand-held device, and by a tap of their finger would be able to toggle between formats, outlets, and forms of expression. This is also true for professional digital single lens reflex (DSLR) cameras that can capture high-definition, motion-picture quality video footage and

---

[18] In the legislative history for 16 U.S.C. § 4601-6d, the committee report for the Senate Committee on Energy and Natural Resources referred to *Star Wars, the Last of the Mohicans,* and *Dances with Wolves*, as examples of major motion pictures that were filmed in national parks. S. REP. 106-67, S. Rep. No. 67, 106th Cong., 1st Sess. 1999.

still images almost simultaneously.[19] 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 (JA 30))—now arbitrarily places those same expensive permitting requirements on low impact/low or no budget film makers with only a distant possibility of future sales or licensing. This has resulted in wild disparities. For example, a photographer who shoots a digital still photograph, with the goal of 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, they are required to obtain a permit. Often photographers focused on shooting still images will make an instantaneous decision to shoot video, and videographers will shoot still images. Thus, the basis for such a disproportionate distinction in the permitting scheme has become a nullity. Further, a government official seeking to determine at any given moment whether a person using one of these multi-format cameras is capturing still photography or "committing" commercial filming that requires a permit, will need to make an impermissible content-based inspection and distinction.

---

19 See, Jason Cipriani, *Android Users Can Snap Photos While Recording Video Again*, CNET, April 19, 2016. https://www.lifewire.com/taking-digital-photos-with-your-camcorder-487921 and https://www.cnet.com/tech/mobile/new-google-camera-update-brings-back-ability-to-snap-photos-while-recording-video/

This would be subject to strict scrutiny (which the government would be unable to survive).

B. Distinctions Between Commercial and Non-Commercial Photography and for-Profit and Non-Profit Productions Lead to an Impermissible Content-Based Analysis by the Government.

Documentary filmmaking is typically categorized in the journalism industry as being "editorial" and non-commercial in nature[20] but the regulations at issue in this case define documentary filmmaking as "commercial."[21] Once again the only way for the government to make a determination between "commercial" and "non-commercial" for permitting purposes would require agents to review the work to determine the proper category.[22] The disparate treatment of commercial and non-commercial works in § 100905 discriminates against each of them because of confusion created over what is "commercial."[23] Commercial status does not

---

[20] As the name suggests, commercial content can be used to commercialize, monetize, sell, promote, and advertise a product, business or service. *See*: Shutterstock, https://support.submit.shutterstock.com/s/article/What-is-the-difference-between-Commercial-and-Editorial-content?language=en_US

[21] *See*, *e.g.*, 43 C.F.R. 5.12 (listing "documentary" as included in the definition of "commercial filming"); *see also*, Hatch, *1st Amendment, YouTube Meet on Public Lands.*

[22] 43 C.F.R. 5.12.

[23] As commentors advised the Forest Service in a 2014 rulemaking on the commercial filming permit regime, forest and park managers have historically enforced those requirements inconsistently, requiring some noncommercial broad-casters to obtain a permit and pay a fee because they paid their professional staff.

change the fact that expressive works are protected First Amendment activities. Documentaries are core First Amendment speech and whether a work is for profit has no bearing on its status as falling within the "aegis" of the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). *See also, e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) ("Time and again we have made clear that speech loses none of its constitutional protection even though it is carried in a form that is sold for profit.") (internal quotation marks and citations omitted).

In comments before the U.S. Forest Service regarding proposed filming requirements in wilderness areas, public broadcasters noted many instances where agency officials based permitting decisions on distinctions between whether a public-broadcasting project met their subjective interpretation of "commercial,"

This erroneously conflates "commercialism" with "professionalism," even though the programs were broadcast on not-for-profit public TV stations. *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

rather than on its environmental impact.[24] Commenters gave several examples of U.S. Forest Service and NPS decisions regarding "special use" permits all-too-often involving review of programming content,[25] or where permits were either denied or fees imposed based on an arbitrary determination of "commercial filming" because employees were paid, or in another case because the company in question offered DVDs of past shows for sale on its website, even though it was clearly a non-profit.[26] In another incident an NPS "permit officer" told a journalist "she needed to get a permit or film elsewhere," stating "unless OPB 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."[27]

The subjective and vague nature of many of these distinctions only amplifies the potential for abuse. This threat is exacerbated by other constitutional infirmities such as the statute's definition of commercial filming applying when there is "the intent of generating income." 43 C.F.R. § 5 (emphasis added). This requires officials to search the subjective mind of photographers and filmmakers who may have mixed intentions. A photographer may make an image with the sole intention of posting on

---

24 *See* "Public Television Comments" at 9.

25 *Id*. at 20, 23-24.

26 *Id.* at 20.

27 *Id.*

their Instagram feed, a promotional use that does not generate income. Or they may be taking pictures in furtherance of a hobby or interest, but later decide to make the image available for sale. Even a photographer's family vacation photos can later be integrated into a book or personal project, licensed as stock photo, or used to illustrate an advertisement. Rather than leaving the "commercial vs. non-commercial" distinction open to arbitrary abuse and interpretation, this Court should hold that all expressive activity is protected unless it is having an impact on the land or on the use and enjoyment of the park by other visitors.

Photographers—both amateur and professional—repeatedly find themselves in unexpected situations where they witness something extraordinary that later is commercially viable. The permit scheme requires someone in that situation to stop their activity, obtain a permit, and once acquired continue their filming—the moment likely being lost.[28] One only need look at the iconic wilderness images created by Ansel Adams, that are now worth millions, to realize the immense value of a "decisive moment."[29] Images filmed in national parks may be considered of public interest. A video in a commercial project showing nature's breathtaking

---

[28] Mr. Price was told that he couldn't buy a permit after the fact. JA 21.

[29] *See* Alan Duke, *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

beauty, might also be demonstrative of the effects of global warming.[30] 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 picked up by national news outlets and later documentary programing. The film permit requirement puts the photographer at risk of criminal penalties even though she did not intend to be engaging in "commercial speech". It is entirely unclear how a photographer, who does not yet know how their work will eventually be used, is supposed to safely navigate the permitting rules.

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 at all. And the idea that a photographer could capture extraordinary footage, and either be foreclosed from publishing it 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.

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

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Mickey H. Osterreicher
General Counsel
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
70 Niagara Street
Buffalo, NY 14202
(716) 983-7800
lawyer@nppa.org

Alicia Wagner Calzada
Deputy General Counsel
National Press Photographers Association
ALICIA WAGNER CALZADA, PLLC
12023 Radium, Suite B1
San Antonio, TX 78216
210-825-1449
alicia@calzadalegal.com

Counsel for Amici Curiae

Dated: October 13, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). I further certify that the attached amici brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Respectfully submitted,

/s/ Mickey H. Osterreicher
General Counsel
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
70 Niagara Street
Buffalo, NY 14202
(716) 983-7800
lawyer@nppa.org

Alicia Wagner Calzada
Deputy General Counsel
National Press Photographers Association
ALICIA WAGNER CALZADA, PLLC
12023 Radium, Suite B1
San Antonio, TX 78216
210-825-1449
alicia@calzadalegal.com

Counsel for Amici Curiae

Dated: October 13, 2021

CERTIFICATE OF SERVICE

I certify that on October 13, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/S/ MICKEY H. OSTERREICHER
GENERAL COUNSEL
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
70 NIAGARA STREET
BUFFALO, NY 14202
(716) 983-7800
LAWYER@NPPA.ORG

ALICIA WAGNER CALZADA
DEPUTY GENERAL COUNSEL
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
ALICIA WAGNER CALZADA, PLLC
12023 RADIUM, SUITE B1
SAN ANTONIO, TX 78216
210-825-1449
ALICIA@CALZADALEGAL.COM

Counsel for Amici Curiae

Dated: October 13, 2021