ORAL ARGUMENT NOT SCHEDULED

No. 21-5073

United States Court of Appeals
for the District of Columbia Circuit

GORDON PRICE,

Appellee,

v.

MERRICK GARLAND, *ET AL.*,

Appellants.

On Appeal from the United States District Court
for the District of Columbia
Gordon Price v. William Barr, et al.
Civil Action No. 10-3672 (CKK)

BRIEF OF APPELLEE

Robert Corn-Revere
Patrick J. Curran Jr.
Patricia J. Peña
Davis Wright Tremaine LLP
1301 K Street NW, Suite 500 East
Washington, D.C. 20005-3317
(202) 973-4200
bobcornrevere@dwt.com
patcurran@dwt.com
patriciapena@dwt.com

Counsel for Appellee

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiff-Appellee Gordon M. Price, pursuant to D.C. Circuit Rule 28(a)(1), by and through undersigned counsel, hereby certifies 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 before the district court include 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., and National Writers Union.

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).

C. Related Cases

This case has not previously been before this or any other court. Counsel for Appellee are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes

Regulations

Constitutional Provisions

Other Authorities

INTRODUCTION

The District Court correctly declared 54 U.S.C. § 100905 ("Section 100905") unconstitutional because it targets purely communicative activity – the act of commercial filming in national parks – and subjects it to an overly broad prior restraint and a fee burdening the exercise of constitutional rights. JA 65-66. The Government does not try to defend Section 100905 on its own merits, but as part of "a broad suite of similar requirements governing all commercial activity on NPS land." Brief for Appellants ("App. Br.") 2. It claims that expressive activities are not "singled out," because the law applies generally to "commercial uses" of federal lands, like cattle grazing or operating a hot dog stand in a national park. But filmmaking and gathering information are not a "use" of federal land like setting up a concession stand or conducting mining operations, and are fully protected by the First Amendment.

Controlling Supreme Court and D.C. Circuit authority make clear that Section 100905 and its implementing rules (the "Permit Regime") violate the First Amendment as an overly broad restriction on speech that imposes a prior restraint and an unconstitutional tax on expressive activities. The Government concedes the law regulates speech even in areas set aside by tradition or designation for expressive activities, and makes no effort to defend the law under strict scrutiny, the standard the District Court correctly applied. Moreover, this Court's decision in *Boardley v.*

Department of Interior, 615 F.3d 508 (D.C. Cir. 2010) holds that overbroad permit schemes like Section 100905 are unconstitutional even under more relaxed First Amendment scrutiny.

BACKGROUND

A. Prosecution of Gordon Price for Commercial Filming

Gordon Price is a part-time independent filmmaker based in Yorktown, Virginia. Between February 2017 and August 2018, Price and a colleague filmed an independent feature film titled *Crawford Road*, based on rumored hauntings and unsolved murders on a stretch of road in York County, Virginia. Part of the film was shot in areas open to the general public in or around four locations within the Yorktown Battlefield in the Colonial National Historical Park, which falls under the jurisdiction of the National Park Service ("NPS"). Mr. Price neither sought nor received a permit from NPS prior to filming on the Battlefield. JA 19.

Mr. Price filmed one scene on the Battlefield during the summer of 2017, a second in the summer of 2018, and a third during a separate one-hour visit to a location on Crawford Road known as Crybaby Bridge. No more than four people were present during the filming on the first two occasions, and Mr. Price used only a small camera and tripod, without any other equipment. Only Mr. Price and one associate were present during the third filming at Crybaby Bridge. JA 19. *Crawford Road* premiered to an audience of about 250 people at a local restaurant in Newport

News, Virginia on October 17, 2018. JA 20. The premiere received some local press coverage and the filmmakers were interviewed on location at Crybaby Bridge by local CBS affiliate WTKR. JA 20.

After learning of Crawford Road from the news coverage, two NPS officers came to Mr. Price's place of business in December 2018 and cited him under 36 C.F.R. § 5.5 for failure to obtain a commercial filming permit. Mr. Price asked the officers why he was being treated differently than others who have taken video at the same location, including the news interview filmed on Crybaby Bridge, and was told that his film was commercial, and that the other activities did not require a permit because they were covered by the First Amendment. JA 20-21. After receiving the citation, Mr. Price canceled upcoming screenings of *Crawford Road* and reedited the film to exclude shots taken on federal property. At that time, Mr. Price was in discussions for distribution of the film, but talks were suspended because of the pending charge, and Mr. Price ultimately was unable to secure a distribution agreement. JA 21.

The citation required Mr. Price to appear in U.S. District Court for the Eastern District of Virginia. Price appeared without counsel in June 2019 with the intention of entering a "no contest" plea, but was informed he must plead either guilty or not guilty. Mr. Price reluctantly resolved to plead guilty in order to put the matter behind

him, but the court declined to accept his plea and advised him to obtain counsel. JA 21.

After securing representation, Mr. Price filed a motion to dismiss the criminal charges on grounds that the governing statute, 54 U.S.C. § 100905**,** and the Department of the Interior's implementing rules violated the First Amendment. The Government responded by moving to dismiss the citation, stating that it "does not wish to pursue . . . an evidentiary hearing in this criminal case," and that it did not "believe that the interests of justice are served by pursuing this prosecution." JA 21-22. The District Court dismissed the citation without ruling on the constitutionality of the statute, but suggested Mr. Price could assert his constitutional claims in a civil action. *United States v. Price*, No. 4:19-po-180-DEM (E.D. Va. Nov. 1, 2019), ECF No. 23 (Order), at 4. This case ensued.

B. 54 U.S.C. § 100905

Section 100905 provides that the Secretary of the Interior "shall require a permit and shall establish a reasonable fee for commercial filming activities or similar projects in a System unit." 54 U.S.C. § 100905(a)(1). Section 100905's permitting regime for "commercial filming" applies to "any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." *Id.* § 100501 (defining a "system unit"). Separately, and in addition to

the permit fee required for commercial filming, the statute provides that the "Secretary shall [also] collect any costs incurred as a result of filming activities or similar projects, including administrative and personnel costs." 54 U.S.C. § 100905(b). The statute's paid permit requirement and cost recovery mechanism do not apply to non-commercial filming. *See id.* Regulations implementing Section 100905 are codified at 36 C.F.R. §§ 5.1-5.12.

The permitting regime required by Section 100905 promotes two principal goals: land preservation and rent extraction. As to resource management, Congress sought to reduce "the impairment of the values and resources which are to be protected on federal lands where these activities occur." H.R. Rep. No. 106-75, at 3 (1999). *See* 54 U.S.C. § 100905(d)(1) (prohibiting the issuance of a permit for "any filming" or "still photography" that threatens "a likelihood of resource damage"). However, it was understood "that minor or temporary inconveniences for park visitors caused by [commercial filming activities] shall not be considered a 'significant disruption'" of federal lands. H.R. Rep. No. 106-75, at 3.

On the revenue side, Section 100905 states that the permit fees imposed on "commercial filming" "shall provide a fair return to the United States," measured in relation to the "number of days of the filming activity," the "size of the film crew present," the "amount and type of equipment present," *id.* § 100905(a)(1)(A)–(C), or any other factor the Secretary of the Interior deems "necessary," *id.* §

100905(a)(2).[1] All fees collected under § 100905 "shall be available for expenditure by the Secretary [of the Interior], without further appropriation and shall remain available until expended." *Id.* § 100905(e)(1).

Section 100905 does not define "commercial filming activities," and vests the Secretary with broad discretion to define the term. "Commercial filming" is defined in the implementing regulations as "[t]he film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income." 43 C.F.R. § 5.12. The rule lists examples that include, but are not limited to, "feature film, videography, television broadcast, or documentary, or other similar projects." *Id.* Commercial filming activities also may include "the advertisement of a product or service, or the use of actors, models, sets, or props." *Id.*

The rules exempt certain news organizations from the permit and fee requirements, 43 C.F.R. § 5.4, defining "news" as "information that is about current events or that would be of current interest to the public, gathered by news-media entities for dissemination to the public." *Id.* § 5.12. Exempted entities "include, but are not limited to, television or radio stations broadcasting to the general public and

[1] The statute's legislative history emphasizes the fact that "high-grossing films" are produced in national parks but acknowledges that "[t]he vast majority of films made on these lands are commercials or other short-duration projects, such as still photography; only a handful made each year are full-length feature films." S. Rep. No. 106-67, at 2-3, 7 (1999).

publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public." *Id*. *See Commercial Filming and Similar Projects and Still Photography Activities*, 78 Fed. Reg. 52087, 52091 (Aug. 22, 2013) ("We agree that news gathering should not be treated in the same manner as other commercial filming activities . . . .") ("*Commercial Filming Rulemaking*"). However, news documentaries are excluded from the exemption. *Id*. at 52090.

C. District Court Challenge

Mr. Price filed a civil complaint challenging the facial constitutionality of 54 U.S.C. § 100905 and its implementing regulations, 43 C.F.R. Part 5 and 36 C.F.R. § 5.5 in December 2019. JA 10. The complaint alleged the Permit Regime violated the First Amendment and the equal protection component of the Fifth Amendment, and sought declaratory and injunctive relief. JA 10-35. The District Court ruled on cross-motions for judgment on the pleadings, and held the restrictions on commercial filming set forth in Section 100905 and its implementing regulations violate the First Amendment and entered a declaratory judgment and permanent injunction in Price's favor. The District Court did not rule on the Fifth Amendment claim. JA 43, 70-71.

SUMMARY OF THE ARGUMENT

The Government's defense of the Permit Regime is predicated almost entirely

on two false premises. First, it characterizes NPS's management of the National Park System as a proprietary endeavor, as opposed to regulatory, where the government is free to set conditions and charge fees for its use—including for constitutionally protected activities—"just like any other landowner." App. Br. 49. Second, it tries to avoid First Amendment scrutiny by claiming Section 100905 does not "single out an expressive activity for regulation" because it is "part of a broader system of permit and land-use fee requirements" that apply generally to commercial activity on NPS land. *Id*. 19. Once these two pillars are toppled, the rest of the Government's argument collapses of its own weight.

The Government undermines its own claim that the Interior Department and NPS operate as proprietors of the national parks, and not regulators, by citing statutory authority to "prescribe such *regulations* as the Secretary considers necessary or proper" to manage NPS lands. 54 U.S.C. § 100751(a). *See* App. Br. 5. Although the federal government has proprietary jurisdiction over federal lands by virtue of the Property Clause, *Kleppe v. New Mexico*, 426 U.S. 529 (1976), that is not the same thing as saying the federal government operates like a private business, immune from constitutional constraints. *See infra* 46-50. Otherwise, the First Amendment would be a dead letter in 28 percent of the country – the 640 million acres of land owned and managed by the federal government. Congressional Research Service, *Federal Land Ownership: Overview and Data* (updated Feb. 21,

2020), at 1. Instead, NPS recognizes it "is governed by the NPS Organic Act as well as by First Amendment jurisprudence." *General Regulation; National Park System, Demonstrations, Sale or Distribution of Printed Matter*, 78 Fed. Reg. 37713, 37714 (June 24, 2013).

NPS has a dual mission: to preserve unique resources and to provide for their enjoyment by the public. *Federal Land Ownership: Overview and Data*, at 6. Within this mission, a key part of NPS's governmental role is to maintain the broadest possible access for expressive activities. As the NPS puts it: "Equally important, the National Park System has traditionally offered visitors the opportunity to engage in demonstration activity and the sale or distribution of printed matter in designated park areas." 78 Fed. Reg. at 37714. Presumption favors opening park lands for expressive purposes. *Boardley*, 615 F.3d at 512. Accordingly, under NPS rules, park superintendents may decline to make parkland available for purposes of expression only if it would damage resources or otherwise be incompatible with park use. *See* 36 C.F.R. §§ 2.51(e), 2.52(e). In implementing its statutory role, NPS strives "to protect the natural and cultural resources of the parks and to protect visitors and property within the parks," but also "to impose on those activities that involve First Amendment considerations only those narrow restrictions that are necessary to protect park resources and to ensure the management of park areas for public enjoyment." *General Regulations for Areas Administered by the National*

Park Service, 48 Fed. Reg. 30252, 30252, 30272 (June 30, 1983).

This case has nothing to do with occupying federal land to use government-owned resources, timber or mining operations, or renting a concession stand in a park, as the Government tries to frame the issue. App. Br. 21, 26. Apart from Section 100905 and its predecessors, the Government cannot cite a single example of a "use fee" on expressive activities among the welter of regulations it cites. App. Br. 5-6, 21-23.

The second false premise is the Government's attempt to characterize Section 100905 as "just one piece of an integrated, general regime for regulating commercial uses of NPS land." App. Br. 22-27. The repeated references to various other non-speech-related use fees cannot camouflage the fact that Section 100905 specifically targets speech (and only speech) by imposing a prior restraint and a tax on First Amendment activity. Section 100905 stands alone, and the District Court was correct to void it and its implementing rules in toto. But it would be equally unconstitutional if Section 100905 had been adopted as one provision in more comprehensive legislation. In that case, the Court's task would be to sever the unconstitutional provision. Either way, the law cannot survive First Amendment review.

The Permit Regime is unconstitutional under the analytic framework this Court articulated in *Boardley*, 615 F.3d at 514. Commercial filmmaking is protected

by the First Amendment; Section 100905 restricts speech in traditional public forums, designated public forums, and all national parkland where the public may freely go; and the law cannot survive First Amendment review under any level of scrutiny. The Permit Regime imposes an overly broad prior restraint on speech because it requires prior governmental approval to engage in expressive activities. Its discrimination between speakers with a "commercial motive" is not tailored to the asserted interest in preserving park resources and renders the regime content-based. The excessive discretion vested in the Interior Department has only exacerbated the problem by creating an exemption for some types of news coverage but not others (even where all are "commercial"). The Government concedes the Permit Regime cannot satisfy strict scrutiny, and this Court's analysis in *Boardley* shows why it also cannot satisfy intermediate scrutiny.

Section 100905's fee requirement is an unconstitutional tax on speech under the well-settled principle that the government cannot charge citizens for the exercise of fundamental rights. Although the Government tries to characterize it as a "user fee," the Permit Regime does not relate to circumstances where state-owned property is leased to a vendor of goods. And those few instances cited by Appellants where the government is operating as a business owner, as when it owns and manages an airport or commuter railway, are irrelevant. Section 100905 is a law that implements a purely governmental function, and, as such, it must obey First Amendment

commands. Because it cannot do so, the law must be invalidated on its face.

ARGUMENT

I. SECTION 100905 AND THE PERMIT REGIME ARE AN OVERBROAD ABRIDGEMENT OF EXPRESSIVE ACTIVITIES

A. Facial Challenge to 54 U.S.C. § 100905 is Appropriate

Section 100905 creates a permit system focused exclusively on expressive activity – commercial filming – and, as such, must be narrowly tailored to avoid restricting speech. "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Government regulations may be designed to serve legitimate ends, but "when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. . . . The overbreadth in achieving one goal is not cured by the underbreadth in achieving the other." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011).

Applying these principles, numerous cases have held overbroad laws that regulate speech are subject to facial review and invalidation. *E.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736-38 (2017); *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

The ability to facially challenge a law and have it declared unconstitutional has special relevance for permit regimes that regulate speech, because "[t]he core abuse against which [the First Amendment] was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the 'evils' of the printing press in 16th- and 17[th] century-England." *Boardley*, 615 F.3d at 516 (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002)).

Relying on *United States v. Salerno*, 481 U.S. 739 (1987), the Government argues that facial challenges can succeed only when plaintiffs can show "no set of circumstances exists under which the Act would be valid." Brief for Appellants ("App. Br.") 61. Although it grudgingly concedes that the test is "somewhat different in the First Amendment context," *id.*, this is quite an understatement. *Salerno* was not a speech case, and as the Supreme Court held in *Stevens*, *Salerno*'s test does not apply to First Amendment overbreadth challenges. *Stevens*, 559 U.S. at 472-73. Under the correct standard, a law is facially invalid if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)); *see also Free Speech Coal.*, 535 U.S. at 244 (statute "is unconstitutional on its face if it prohibits a substantial amount of protected expression").

The Government cannot seem to decide whether Mr. Price's challenge to Section 100905 is facial or as-applied. Ignoring the background that led to this challenge, the Government asserts Mr. Price could obtain complete relief from an as-applied challenge, while noting Mr. Price did not film in areas of public lands designated as public forums. App. Br. 2, 16-18, 41, 60. But this is irrelevant. "A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face." *New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982). Thus, Mr. Price did not need to film in just those areas designated as public forums to have a valid First Amendment claim. *See infra* 21-24. And the Government *admits* that the permit and fee requirement would have applied *even if he did*.

The District Court correctly applied this established law to find "a facial challenge is appropriate where a plaintiff, like Mr. Price here, maintains that a law is overbroad and impermissibly restricts 'a substantial amount of speech that is constitutionally protected.'" JA 50 (quoting *Boardley*, 615 F.3d at 513) (quoting *Forsyth Cty.*, 505 U.S. at 130). Its holding should be affirmed.

B. Section 100905 is a Facially Overbroad Prior Restraint

Because it requires every person who wishes to engage in commercial filing to obtain a permit and pay a fee before filming on federal land administered by the NPS, 54 U.S.C. § 100905; 43 C.F.R. §§ 5.2, 5.7, 5.8, the Permit Regime operates as

a classic prior restraint. *Boardley*, 615 F.3d at 516. *See Thomas*, 534 U.S. at 320; *Forsyth Cty.*, 505 U.S. at 131; *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Kunz v. New York*, 340 U.S. 290, 294 (1951); *Saia v. New York*, 334 U.S. 558, 559-60 (1948); *Hague*, 307 U.S. at 515-16; *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Any prior restraint faces a "heavy presumption against its constitutional validity" where it is content-based, *e.g.*, *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (citation omitted), or vests excessive discretion in the government licensor. *E.g.*, *Forsyth Cty.*, 505 U.S. at 133. Even content-neutral permitting schemes for speech are presumed invalid, but the presumption is more easily rebutted in that circumstance. *Boardley*, 615 F.3d at 516.

This Court's decision in *Boardley* provides the proper analytic framework for this case, and the District Court correctly found it "provides considerable support for Mr. Price's argument." JA 60. That case involved a First Amendment challenge to two NPS regulations that prohibited "'[p]ublic assemblies, meetings, gatherings, demonstrations, parades and other public expressions of views' and '[t]he sale or distribution of . . . printed matter' within park areas, unless 'a permit [authorizing the activity] ha[d] been issued.'" *Boardley*, 615 F.3d at 512; *see also* 36 C.F.R. §§ 2.51, 2.52. This Court found that these regulations violated the First Amendment even under intermediate scrutiny, *Boardley*, 615 F.3d at 525, after following these three steps: (1) determine whether the activity is protected by the First Amendment;

(2) analyze the nature of the forum; and (3) assess whether the Government's stated justifications satisfy the requisite First Amendment standard. *Id.* at 514. In this case, the district court applied *Boardley*'s analytical framework and found the Permit Regime is unconstitutional.

1. Section 100905 Regulates and Restricts Expressive Activities

Section 100905, on its face and through its implementing rules, directly targets speech by imposing a permit and fee requirement on commercial filmmaking. Although the Government attempts to hide the ball by claiming Section 100905 is "part of a broad suite of similar requirements governing all commercial activity on NPS land," App. Br. 2, those other laws and regulations are not implicated in this case, as the Government backhandedly admits. *Id.* at 8 ("Only the NPS statute is at issue here."). Appellee agrees that only the constitutionality of Section 100905 and its implementing rules is before this Court, and that law is about nothing but speech.

(a) Regulation of Filmmaking is Regulation of Speech

The Supreme Court has recognized that "[1]aws enacted to control or suppress speech may operate at different points in the speech process," *Citizens United v. FEC*, 558 U.S. 310, 336 (2010), and the First Amendment in fact encompasses a wide range of conduct related to gathering information, including photography. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2012); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 7-8 (1978) (the First Amendment generally protects news gathering

activities). "[T]he *creation* and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (emphasis added); *see also W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017) ("collection of resource data [about public lands] constitutes [] protected . . . speech"); *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012) (finding a qualified right of access "to observe government activities"). "[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary." 677 F.3d at 900.

The District Court correctly held that "filming a movie is a form of speech protected by the First Amendment." JA 52. While the Government had initially argued before the District Court that filmmaking in and of itself is not an expressive activity, it dropped that argument after its opening brief. JA 47. This was a wise choice, for it is well established that the First Amendment protects the process of filmmaking. *E.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018); *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678, 688-89 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

However, on appeal, the Government attempts to revive its abandoned argument that filmmaking is not "speech" in a slightly different form by asserting that "[c]ommercial filmers do not seek to communicate with others within the

locations in which they shoot." App. Br. 1-2, 16, 41. This argument assumes that only film *exhibition* is protected by the First Amendment, noting that the regulated locations merely "provide visual input for a camera; the film is exhibited elsewhere." *Id.* at 41. The Government does not cite any authority for this proposition, nor could it, because it is incorrect as a matter of law.

The Government's argument ignores the basic tenet that "there is no fixed First Amendment line between the act of creating speech and the speech itself." *Alvarez*, 679 F.3d at 596; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2012). In discussing the explicitly expressive nature of filmmaking, the Ninth Circuit observed that "[i]t defies common sense to disaggregate the creation of the video from the video . . . itself." *Wasden*, 878 F.3d at 1203. As the court explained:

> The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score. . . . Because the recording process is itself expressive and is "inextricably intertwined" with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity.

Id. at 1203-04. The Seventh Circuit agreed, stating unequivocally that "*making* an . . . audiovisual recording is necessarily included within the First Amendment[.]" *Alvarez*, 679 F.3d at 595.

The Eighth Circuit recently expanded upon this analysis in striking down on its face an ordinance regulating photography in public parks. The court explained that, "[i]f the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the 'speech process' and thus qualifies itself as speech protected by the First Amendment." *Ness v. City of Bloomington*, --- F.4th ---, 2021 WL 3918886, at *5 (8th Cir. Sept. 2, 2021) (citing *Citizens United*, 558 U.S. at 336-37). The court concluded that "[t]he acts of taking photographs and recording videos are entitled to First Amendment Protection because they are an important stage of the speech process that ends with the dissemination of information about a public controversy." *Id.*

Under this settled law, Section 100905 is a regulation of *speech*, and Mr. Price's filming of *Crawford Road* at Yorktown National Battlefield is protected under the First Amendment as an expressive activity.

(b) The Commercial Nature of Filming Does Not Diminish the Level of First Amendment Protection

The fact that Section 100905 applies to "commercial filming" does not alter the First Amendment analysis. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[T]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being . . . safeguarded by the First Amendment."); *see also Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (First Amendment protection is not lost "because the written materials sought to be

distributed are sold rather than given away or because contributions or gifts are solicited"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 953 (D.C. Cir. 1995) ("[E]xpressive materials do not lose their First Amendment protection merely because they are offered for sale.") (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)).

Simply labelling a certain subset of filming as "commercial" does not trigger application of the commercial speech doctrine or justify a lower level of scrutiny. As Mr. Price demonstrated before the District Court, that doctrine is inapplicable here. The Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and its progeny have only applied the doctrine to speech that does no more than propose a commercial transaction. *E.g.*, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993); *see also IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) (commercial speech doctrine does not apply merely when the speaker has an economic motivation). This conclusion is also implicit in *Boardley*, where this Court held that the First Amendment protects both the "sale or distribution of printed matter." 615 F.3d at 516.

2. Section 100905 Restricts Speech in Both Traditional and Designated Public Forums

The District Court correctly held that "Section 100905 and its implementing regulations restrict speech in [traditional] public forums" as well as in "*designated* public forums administered by the National Park Service." JA 53-54. In its brief, the Government *admits* this premise by acknowledging that "the statute and regulations can apply on *all* NPS lands, *including the few areas that constitute public forums*." App. Br. 41 (second emphasis added). This admission alone is sufficient to doom the Government's appeal, just as in *Boardley*, 615 F.3d at 515-16 ("[W]e need not (indeed, cannot) decide whether this same analysis would apply to the diverse range of other areas within the national parks.").

But it really is beside the point. No one would seriously argue that newsgatherers could ply their trade only in park areas "designated" by the Government or that noncommercial photographers could take videos only where park rangers say it is okay. While the Government may designate certain areas for purposes of public assembly (within constitutional limits), it has no authority to prohibit or license citizens' ability to gather information in areas where members of the public otherwise are free to go. *See Michael*, 869 F.3d at 1196; *Salazar*, 677 F.3d at 898-900. Thus, while forum analysis is *sufficient* to decide this case – particularly given the Government's stark admission that it restricts speech in both traditional and designated fora – it is not *necessary* to decide it.

Nevertheless, the Government argues that forum analysis is inappropriate, and that the Permit Regime may be constitutionally applied "in the millions of acres of NPS lands that lie outside of any public forum." App. Br. 41. This position is implicitly contradicted by the general presumption that National Park areas are freely open for purposes of communication unless park superintendents designate otherwise. *See, e.g.*, 36 C.F.R. §§ 2.51(e), 2.52(e); *Boardley*, 615 F.3d at 512 ("'Locations may be designated as not available only if' expressive activities would injury or damage park resources."). For other areas, where public access is more limited, the Government's interest is fully covered by other laws and regulations. *E.g.*, 43 C.F.R. §§ 3.1-3.17 (Preservation of American Antiquities), 7.1-7.37 (Protection of Archaeological Resources), 10.1-10.17 (Native American Graves Protection and Repatriation Regulations), 19.1-19.8 (Wilderness Preservation), 23.1-23.13 (Surface Exploration, Mining and Reclamation of Lands). Section 100905 and the Permit Regime have no work to do there.

Therefore, the Court must ask: (1) What unique interest does Section 100905 serve that is not already covered by other laws and regulations governing federal land, and (2) has the Government met its burden of demonstrating the law is necessary and actually serves its asserted interest? These questions must be answered even where the Government contends, as it does here, that the law at issue

is "part of a broad suite of similar requirements" governing park management in general. App. Br. 2.

This Court rejected a similar gambit in *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992), where it struck down a regulation governing excessive noise that applied in public forums. The Government had defended it as part of "a group of regulations promulgated to 'provide guidance and controls for public use and recreation activities (*e.g.*, camping, fishing, hunting, winter activities, boating) in areas administered by the National Park Service.'" *Id*. at 89-90 (quoting 48 Fed. Reg. 30252 (1983)). But the Court held NPS could not insulate the rule from constitutional review by shuffling it into a deck of other general regulations, and it stressed "[w]here constitutionally protected activity is implicated, we cannot simply defer to the Park Service's unexplained judgment." *Id*. at 90.

Likewise, in *Boardley*, this Court rejected the Government's premise that most publicly-controlled lands are not public fora, finding it irrelevant that "many national parks include areas—even large areas, such as a vast wilderness preserve—which never have been dedicated to free expression and public assembly, would be clearly incompatible with such use, and would therefore be classified as nonpublic forums." 615 F.3d at 515. It concluded that it could resolve the overbreadth claim without having to decide "the forum status of all 391 national parks" because the challenged regulations plainly applied to "speech in public forums." *Id.*

The unconstitutional regulations from *Boardley* are analogous to the Permit Regime challenged here. For the purposes of this case, the key fact is that Section 100905 restricts protected speech in *all* national parks where the public is free to go and engage in communicative activity, including *every* area considered to be a traditional public forum. *See* JA 53 ("The scope of § 100905's permitting regime . . . necessarily covers multiple locations that courts have already identified as traditional public forums."). As with *Boardley*, it is enough to find that Section 100905 "target[s] protected 'speech,' and that these restrictions apply in public forums." 615 F.3d at 516. Having met these conditions, the court in *Boardley* applied the requisite First Amendment test and found the regulations to be overbroad. *Id.* at 525. This Court should do the same here.

3. Section 100905 Fails Any Level of First Amendment Scrutiny

(a) Strict Scrutiny Applies Because Section 100905 is Content-Based

Section 100905 is a content-based restriction because it only targets "commercial filming." The District Court correctly held that under *IMS Health*, a distinction based on the commercial nature of the speaker's intent is content-based. JA 56-57. In *IMS Health*, the Supreme Court found that a law was content-based because it restricted who could gather information for speech purposes based on the commercial motivation of the speaker, 564 U.S. at 564-79, just as the Permit Regime does here. *See also Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335,

2347 (2020) ("*AAPC*") (applying *IMS Health* and finding that law "aimed at particular speakers" was content-based). In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Supreme Court held that "[s]trict scrutiny applies *either* when a law is content based on its face *or* when [its] purpose and justification . . . are content based." *Id.* at 166 (emphasis added).

The Government insists that content is "irrelevant" to the Permit Regime, and that Section 100905 and the implementing rules are content-neutral "because they draw no distinctions based on the message a film conveys." App. Br. 27. To support this statement, Appellants cite the first part of a sentence in *Reed*, 576 U.S. at 163, that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter," but ignore the rest of that sentence, which states "others are more subtle, defining regulated speech by its function or purpose." *Id.* *See* App. Br. 27. The Supreme Court explained that laws can be content-based even without any censorial motive, where they empower officials to use content as a factor in regulating speech. *Reed*, 576 U.S. at 167. In any event, the Government cannot say that content is *irrelevant* to the Permit Regime where its own guidelines say that "a superintendent may review a story board or other material offered by the

applicant to aid in the decision process" for whether to "permit and/or deny filming projects."[2]

Of course, if the NPS and DOI applied the Permit Regime based on the subject matter or viewpoint of a given film project, that would be an *additional* way the law would be content based. *Id.* at 169. But the Permit Regime on its face distinguishes between speakers based on their commercial intent without any explanation for how this distinction serves an interest in preserving parklands. In *Discovery Network*, 507 U.S. at 429, the Supreme Court found that a law that restricted newsbox placement based on whether a given newsbox dispensed newspapers as opposed to commercial matter was "by any commonsense understanding of the term . . . 'content based.'" Like the speaker-based discrimination struck down in *Discovery Network*, the Permit Regime's differential treatment of like-sized film crews based on their presumed motivations does nothing to advance the asserted governmental interest.[3]

---

[2] Director's Order No. 53 (2010) (http://go.usa.gov/xFvB5), Appendix 13, at A13-1. The Guidelines add that the NPA "encourages filming when it is for the specific use of the park or when it assists NPS in fulfilling its mission," *id.*, and "the NPS may see significant benefits from the production of 'human interest' or 'travelogue' segments filmed in parks." *Id.* at A13-3. In such cases, "the superintendent may reduce or waive fees for projects that provide benefit to the NPS." *Id.*

[3] The Government's citation to *Nicopure Labs v. FDA*, 944 F.3d 267 (D.C. Cir. 2019) is irrelevant to this analysis. App. Br. 35. In *Nicopure*, this Court held only that the FDA could look at a product's claims to determine what regulatory

The Government's argument that the Permit Regime's regulation of "commercial activity" is not content based mistakes the act of selling a product with the act of speaking. *See Josephine Havlack Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905 (8th Cir. 2017) (any commercial activity in a public park); *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012) (license for any commercial activity on public beaches); *Friends of the Vietnam Veterans Mem'l v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997) (T-shirt sales on the National Mall); *One World One Family Now v. City & Cty. of Honolulu*, 76 F.3d 1009 (9th Cir. 1996) (T-shirt sales on sidewalks); *O'Connor v. City & Cty. of Denver*, 894 F.2d 1210 (10th Cir. 1990) (entertainment license for adult businesses).[4] None of the cases relied on by the Government relate

---

track to place it in for FDA approval, and that the manufacturer's claims could be examined under the commercial speech doctrine to evaluate whether they were misleading. *Id.* at 284-90. The Government's comparison of a filmmaker's intent to make money with a tobacco company's intent in marketing electronic cigarettes is inapposite to say the least. In any event, the Supreme Court rejected this "cursory look" theory of content-neutrality in *Reed*, 576 U.S. at 162.

[4] Even where a commercial transaction is involved, this Court has held that the First Amendment limits the government's ability to restrict transactions where the regulations directly target expressive materials. *ISKCON of Potomac*, 61 F.3d at 954-55 ("expressive materials do not lose their First Amendment protection merely because they are offered for sale"). Where the government can regulate transactions, it cannot differentiate between different speakers or different forms of speech. *E.g., S.O.C., Inc. v. Cty. of Clark*, 152 F.3d 1136, 1146-47 (9th Cir. 1998) (granting preliminary injunction against enforcement of ordinance that forbade commercial handbillers but allowed non-commercial handbillers to operate on the Las Vegas strip).

to *the act of engaging in speech*, which is precisely the subject of Section 100905. In sharp contrast to the types of cases the Government cites, Mr. Price was not occupying federal land to engage in commercial transactions, such as selling Blu-Rays of *Crawford Road* from a kiosk or operating a drive-in theater at Yorktown National Battlefield.

(b) Strict Scrutiny Also Applies Because Section 100905 Vests Excessive Discretion in Licensing Authorities

In addition to Section 100905's content-based restriction on "commercial filmmaking," the regulation's generalized mandate vests excessive discretion in the DOI and NPS as licensing authorities. The mandate effectively empowers the DOI to arbitrarily discriminate between speakers. In *Boardley*, this Court explained that "[e]ven a content-neutral licensing scheme may raise significant censorship concerns if it vests government officials with unrestricted freedom to decide who qualifies for a permit and who does not." 615 F.3d at 517. *See also Forsyth Cty.*, 505 U.S. at 133 (First Amendment prohibits vesting official with authority to allow permit without any objective factors and without providing any explanation or review mechanism); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988) (plurality) (danger of content or viewpoint discrimination is at its zenith when a government official has unbridled discretion to grant a permit).

"A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion

has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cty.*, 505 U.S. at 130 (quoting *Heffron*, 452 U.S. at 649). To curtail discrimination between different speakers and subjects, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). *See also Staub v. City of Baxley*, 355 U.S. 313 (1958) (ordinance prohibiting solicitation of members for organization without permit and leaving to discretion of city officials whether to grant permit without definitive guidelines held unconstitutional); *Niemotko*, 340 U.S. at 271 (licensing scheme for use of public spaces is an unconstitutional prior restraint "in the absence of narrowly drawn, reasonable and definite standards for the officials to follow").

The Government acknowledges that Section 100905 exempts certain speakers from permitting and fee requirements, such as members of the institutional press who are pursing breaking news, even though they are engaging in "commercial filmmaking."[5] The Government attempts to discount this inconsistency by noting that it is found "only in the regulations [and] not the commercial-filming statute,"

[5] The rule exempts media entities that "include, but are not limited to, television or radio stations broadcasting to the general public and publishers of periodicals … *who make their products available for purchase by or subscription* by or free distribution to the general public." 43 C.F.R. § 5.12 (emphasis added).

App. Br. 36, but this proves our point: Section 100905 does not define "commercial filming activities," and under the uncabined discretion allowed by the law, DOI has adopted and enforced content-based distinctions even between different categories of commercial media. The fact that these anomalies are written into the regulations and not the statute does not help the Government. In evaluating a facial challenge to a licensing regime, courts "must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth Cty.*, 505 U.S. at 131.

The Government's ability under Section 100905 to require permits and to extract fees for some speakers while giving a free pass to more favored entities is the type of excessive discretion that the Court has found unconstitutional. *Id.* at 132. The newsgathering exemption is plainly content based. The regulations define "news" as having to include "information . . . about current events or . . . of current interest to the public." 43 C.F.R. § 5.12. As the Supreme Court has explained, any "determination concerning . . . newsworthiness . . . cannot help but be based on . . . content." *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). *See also AAPC*, 140 S. Ct. at 2346 (a law is content-based if it "singles out specific subject matter for differential treatment" even if it imposes no limits on different viewpoints) (applying *Reed*, 576 U.S. at 169).

While the Government claims that it charges all "commercial" actors equally for access to NPS lands, it treats newsgatherers differently than other for-profit media companies even though it acknowledges that they are undoubtedly commercial. *Commercial Filming Rulemaking*, 78 Fed. Reg. at 52091 ("We agree that news gathering should not be treated in the same manner *as other commercial filming activities* . . . .") (emphasis added). Even within this classification, the DOI's choices are arbitrary. For example, while newsgathering is exempted, documentary filmmaking is not. 43 C.F.R. § 5.12 (defining documentaries as "commercial filming").[6]

In adopting this rule, DOI responded to comments that "[d]ocumentaries are a form of news," by observing that "[d]ocumentaries convey information to the viewing public with content that is unique to that production." It added without further explanation that "we believe documentaries are commercial in nature and generate income for those involved in the production, and as such are subject to permit requirements, location fees, and cost recovery charges." *Commercial Filming Rulemaking*, 78 Fed. Reg. at 52090. It reached this conclusion despite also noting "[w]e agree that 'news' is more than just breaking news." *Id.* at 52091. In

[6] To be clear, Mr. Price is not suggesting that commercial news organizations should be subject to a permit and fee requirement. Such a requirement would be unconstitutional for the reasons the District Court articulated. But the discriminatory newsgathering exemption adds to Section 100905's constitutional defects.

short, according to DOI, documentaries are commercial while other for-profit news programs are not because "we said so."

The distinction between state sanctioned newsgathering and "commercial" filming that requires a permit is likewise arbitrary and unrelated to the Government's asserted interest. An independent filmmaker with a handheld camera (or one with only a camera tripod and microphone, like Mr. Price, JA 19) is required to come hat in hand to NPS and request a permit while network news operations with large crews and satellite trucks may come and go at will.[7] News crews also are exempt from administrative charges. 43 C.F.R. § 5.4(c). Where, as here, the distinction between newsgathering and other commercial speakers bears no relationship to the Government's asserted interest in resource preservation, the licensing regime is unconstitutional. *Discovery Network*, 507 U.S. at 417, 419.

The Government claims that the Constitution does not preclude providing certain benefits to news organizations, App. Br. 37-38 & n.2, but *none* of its examples suggest the government may constitutionally license (or tax) some

[7] DOI rejected a proposal to exempt commercial film crews of three persons or fewer, explaining that "[t]here is no basis for an exclusion based on crew size or amount of equipment under this statute" even though "it could be assumed that crews of three people or fewer have less potential for causing resource damage or interfering with the public's use or enjoyment of the site." *Commercial Filming Rulemaking*, 78 Fed. Reg. at 52090.

speakers but not others.[8] While it is true that support of one First Amendment protected activity does not compel government subsidization of another, *DKT Mem'l Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 289 (D.C. Cir. 1989), there is a dispositive difference between providing a subsidy and imposing a tax. *Compare Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (government's refusal to subsidize certain activities does not violate the First Amendment), *with Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (tax that singled out certain newspapers violated the First Amendment).

The Government's other example of favorable treatment – the fact that some courts permit news media in their courtrooms to the exclusion of others – is equally misplaced. App Br. 38. Courtrooms are neither traditional nor designated public forums.[9] Beyond that, the First Amendment would not permit discriminatory access

[8] The Government's examples involve preferential tax benefits, *e.g.*, 7 U.S.C. § 609(g) and 26 U.S.C. § 4253(b), exemption from antitrust, labor, and transportation regulations, *e.g.*, 15 U.S.C. §§ 1801, 1803(a), 29 U.S.C. § 213(a)(8), 49 U.S.C. § 13506(a)(7), reduced FOIA processing fees, 5 U.S.C. § 552(a)(4)(A)(i), and exempting press services from registering under the Foreign Agents Registration Act. 22 U.S.C. § 611(d). The only example that could conceivably relate to preferential treatment of some speakers over others is 52 U.S.C. § 30101(9)(B), which excludes new stories from the definition of "expenditure" in the context of campaign finance laws. However, while the statute discusses the media generally, the target of the legislative scheme overall is not the media, but candidates for office. The media itself does not benefit from this exemption.

[9] *E.g.*, *Verlo v. Martinez*, 820 F.3d 1113, 1141-42 (10th Cir. 2016); *Jenevein v. Willing*, 493 F.3d 551, 560-61 (5th Cir. 2007); *Huminski v. Corsones*, 386 F.3d 116, 153-54 (2d Cir. 2004); *Braun v. Baldwin*, 346 F.3d 761, 763-64 (7th Cir. 2003);

criteria, such as excluding all "commercial" newspapers while allowing non-commercial papers. *Cf. Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) ("arbitrary or content-based criteria for press pass issuance are prohibited under the first amendment"); *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142, 1147 (N.D. Ill. 2001) (discriminatory access is presumptively unconstitutional).

NPS has never considered the news exemption as a "benefit" or "subsidy" to be provided as an exercise or legislative and regulatory grace, but as something the First Amendment *requires*. Its Guidelines state that "[s]ome filming projects fall under the category of First Amendment activities," and it lists such things as "breaking news stories" or "participants in a demonstration making their own film to record the event." Director's Order No. 53 (2010) (http://go.usa.gov/xFvB5), Appendix 13, at A13-2. For what NPS calls a "First Amendment permit," the Guidelines explain the government "shall not require the payment of fees, insurance coverage or a performance bond … nor shall it recover its costs incurred in managing the activity." *Id*. at A13-3. Here, the problem is that the Government fails to realize that commercial filmmakers are also engaged in "First Amendment activities." This also illustrates why the NPS regulations benefitting certain media cannot be compared to a "subsidy." A subsidy *benefits* some favored speakers; the

---

Sammartano v. First Jud. Dist. Ct., 303 F.3d 959, 966 (9th Cir. 2002); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997).

Permit Regime *penalizes* those not favored by the government. *Id*. at A13-18. ("A photographer or filmmaker who fails to obtain a required permit may be subject to arrest.")

Beyond the problem of the news exemption, even the standard for evaluating "commercial intent" is arbitrary, and can sometimes be determined only after the fact. For example, if a student made a film on NPS land as part of a course project, no permit would be required. *Commercial Filming Rulemaking*, 78 Fed. Reg. at 52089. However, if that student later decided the film was good enough to release commercially, he could be deemed to have violated Section 100905 even though he had no "commercial intent" at the time of filmmaking.[10] This is not unlike what happened to Mr. Price in the events that prompted this challenge. He was cited only after the fact, long after filming was complete, and only after the film was exhibited. JA 20-21. *See also id*. 57 ("To determine whether *Crawford Road* ran afoul of § 100905's permitting regime, NPS officials needed to review the film and determine *ex post* whether the content Mr. Price included therein was geared towards a 'market audience' or evinced some 'intent of generating income.'").

[10] This is not a fanciful hypothetical. The original version of George Lucas's first commercial film, *THX 1138*, was made while he was a film student at the University of Southern California. *Trends: The Student Movie Makers*, TIME MAGAZINE (Feb. 2, 1968), *available at* http://content.time.com/time/subscriber/article/0,33009,837841-1,00.html.

Regardless of his "intent" when filming, there is ultimately no difference in the impact on park resources. The prospect for this type of second-guessing of a filmmaker's intent has mushroomed in the years since the rules were adopted as many individuals have opted to monetize videos they take by posting them on social media platforms. *See, e.g.*, *Marland v. Trump*, 498 F. Supp. 3d 624, 632 (E.D. Pa. 2021) ("Fifty million … U.S. users use [TikTok] on a daily basis. This large audience gives content creators like Plaintiffs the opportunity to profit from the videos they post."). *See also* Kara and Nate, *We were fined $1000 for filming in National Parks (then everything changed)*, YOUTUBE (Apr. 7, 2021) www.youtube.com/watch?v=lEUHr4U9MgA. The temporal status of a filmmaker's "intent" is a thin and arbitrary basis on which to impose a licensing regime on constitutional rights.

Overall, the Permit Regime's standards for determining whether the agency will deny a permit, 43 C.F.R. § 5.5, are largely undefined. *See* 43 C.F.R. § 5.12. The rules say NPS may deny a permit if the commercial filming would "[u]nreasonably disrupt or conflict with the public's use or enjoyment of the site," 43 C.F.R. § 5.5(b), but provide no guidance on what sort of activity constitutes an "unreasonable disruption" or what "use or enjoyment" means in this context. This sort of discretionary power that has doomed other permit schemes. *See Kaahumanu*, 682 F.3d at 807 (finding that the phrase "necessary and appropriate" did not provide

sufficient constraint on permitting authority); *cf. Act Now to Stop War & End Racism Coal. v. Dist. of Columbia*, 846 F.3d 391, 411 (D.C. Cir. 2017) (ordinance did not permit arbitrary enforcement whether a sign was "event related" because the ordinance provided a detailed definition of the term "event"). Such boundless discretion is "inherently inconsistent with a valid time, place, and manner regulation." *Forsyth Cty.*, 505 U.S. at 130.

(c) The Government Does Not Attempt to Defend Section 100905 Under Strict Scrutiny

The District Court correctly held that Section 100905 was required to satisfy strict scrutiny and that it failed to do so. JA 59 ("Defendants do not even attempt to argue that § 100905 and its implementing regulations meet this standard."). Nothing has changed on appeal. The Government simply argues that strict scrutiny does not apply and that Section 100905 is a time, place, and manner regulation subject to a lower level of scrutiny. App. Br. 40.

If the Government is wrong about this (and, as established *supra*, it is), then the appeal is over. *See, e.g.*, *AAPC*, 140 S. Ct. at 2347 (government conceded inability for statute to satisfy strict scrutiny); *Mahoney v. Babbitt*, 105 F.3d 1452, 1458 (D.C. Cir. 1997) (government did not attempt to argue that its actions could satisfy strict scrutiny); *Santamaria v. Dist. of Col.*, 875 F. Supp. 2d 12, 16 n.3 (D.D.C. 2012) (failure to address issue concedes it).

(d) Section 100905 is Unconstitutional Even Under More Relaxed Scrutiny

The Permit Regime cannot withstand intermediate scrutiny, as it cannot be said that "it advances important governmental interests unrelated to the suppression of free speech" without "burden[ing] substantially more speech than necessary," *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997), or that it "leave[s] open ample alternative[channels] for communication." *See Boardley*, 615 F.3d at 524 (quoting *Forsyth Cty.*, 505 U.S. at 130). The Government's asserted interest of targeting commercial photographers as a source of revenue generation is not a legitimate governmental purpose, and the separate purpose of protecting park land and managing visitors is not served by Section 100905 or its implementing regulations.

In *Boardley*, this Court applied a lower level of scrutiny where the permit requirement for demonstrations and assemblies on NPS land applied to all speakers and was content-neutral. *Id.* at 516. Nevertheless, it invalidated the permit requirement because it failed to "target and eliminate no more than the exact source of the 'evil' they seek to remedy." *Id.* at 523 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1985)) (cleaned up). The Court struck down a permitting requirement because it did not exempt small groups. *Id.* at 525. The same lack of tailoring dooms Section 100905.

A time, place, or manner restriction is invalid if it is not a narrowly tailored means of achieving a substantial governmental interest, and such measures remain

unconstitutional if they "burden substantially more speech than is necessary" to achieve the asserted interest. *Id.* at 519. Courts must "closely scrutinize the regulation to determine if it indeed promotes the government's purposes in more than a speculative way." *Id.* (quoting *Cmty. for Creative Non-Violence v. Kerrigan*, 865 F.3d 382, 390 (D.C. Cir. 1989)). The Government bears the burden to prove that its regulation is narrowly tailored to address its asserted interest and that it in fact does so. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) ("the Government bears the burden of proving the constitutionality of its actions" when a law restricts speech). However, in this instance, the Government repeatedly engages in nothing more than speculation instead of offering any proof that Section 100905 serves its asserted interests. App. Br. 43, 51-53. However, "[w]here constitutionally protected activity is implicated, we cannot simply defer to the Park Service's unexplained judgment." *Doe*, 968 F.2d at 90.

The Permit Regime fails to advance any important governmental interests and it burdens substantially more speech than is necessary. The Permit Regime discriminates between commercial and noncommercial productions of like sizes, and against commercial productions that are smaller than noncommercial outfits. Under the Permit Regime, even small commercial productions must secure a permit and pay a fee while even large-scale productions need not obtain a permit (or pay a fee) so long as they are engaged in newsgathering or do not sell their films for profit.

See Commercial Filming Rulemaking, 78 Fed. Reg. at 52089 (rule "does not . . . require a permit for non-commercial filming" even "where or when members of the general public are not allowed . . . because [the statute] does not address non-commercial filming").

Imposing this sort of disparate treatment on groups of the same size that impose identical resource-protection and visitor-management burdens on federal lands is anything but "reasonable." *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack . . . will not suffice" under the First Amendment, whose "rights rest on firmer foundation."); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1043 (9th Cir. 2009) (content-neutral registration requirement failed time-place-and-manner narrow tailoring where "a group of as many as 99 [] can gather without a permit to express their views, so long as they are not . . . an artistic performance," but "an individual singing or dancing for a few friends would be required to register.").

The Government cannot show that the distinction between commercial and noncommercial filmmakers bears any relationship to the Government's interest in managing park resources. Under *Discovery Network*, it is not "reasonable" to legislate differential treatment if the "distinction bears no relationship *whatsoever* to the particular interests . . . asserted." 507 U.S. at 424. *IMS Health* similarly

invalidated—without applying heightened scrutiny—a law that "impose[d] a specific, content-based burden on protected expression" based on a commercial/noncommercial distinction. 564 U.S. at 564-79. *See also Ayres v. City of Chi.*, 125 F.3d 1010, 1017 (7th Cir. 1997) ("Congestion, for example, is no less if the T-shirts are given away rather than sold.") Speakers engaged in the same expression "at the same time, in the same place, and in the same manner" must be treated the same. *Kroll v. United States Capitol Police*, 683 F. Supp. 824, 825 (D.D.C. 1987), *rev'd on other grounds*, 847 F.2d 899 (D.C. Cir. 1988).

The Permit Regime cannot survive strict or even intermediate scrutiny because it is both overbroad and underinclusive. Even if the Government can demonstrate legitimate ends, "when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805. In the First Amendment context, "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 802.[11]

[11] As the District Court explained:

> [C]onsider the case of Mr. Price and his forthcoming film *Ten Roads*. If Mr. Price shoots *Ten Roads* at Yorktown Battlefield by himself, with no more than a hand-held camera, he would still need a permit, so long as the film was "commercial." *See* 43 C.F.R. § 5.2(a). But what if instead Mr. Price produced *Ten Roads* as a private, non-commercial

The Permit Regime also fails to leave "ample alternatives" available. *E.g.*, *Boardley*, 615 F.3d at 524. Under this element of intermediate scrutiny, an alternative must exist within the DOI/NPS managed property in question. *Id.* at 524-25 (alternative channels requirement not satisfied if "[t]here is no intra-forum alternative" to obtaining a permit) (quoting *Community for Non-Violence v. Turner*, 893 F.3d 1387, 1393 (D.C. Cir. 1990)). The Permit Regime leave no such ample alternatives for commercial filmmakers.

Here, rather than interposing a prior-restraint permitting requirement (and charging the attendant fees), the Government could simply have any necessary permit or fee apply to groups large or disruptive enough to affect public lands regardless of their commercial or noncommercial purpose, rather than focusing on the group's intended expressive activities. To address the asserted interest in land management, the relevant criteria could include group size, duration of stay, and/or type of equipment, instead of the type of speech. In fact, following the District Court's decision, NPS adopted interim guidance that addresses the asserted

---

> film, using heavy filming equipment and a crew of thirty workers? In such a case, Mr. Price's non-commercial film would pose a far greater threat to federal land, but could nonetheless proceed without a permit under § 100905.
>
> JA 63-64.

governmental interests without imposing a prior restraint for small film crews.[12] On the revenue side, the Government could just impose a general tax applicable to all visitors to NPS-managed parks. *See Minneapolis Star*, 460 U.S. at 586.

The Government's suggestion that Mr. Price should just get a permit or forgo his interest in making a commercial film is not an alternative at all—it is capitulation. First, forcing a speaker to forego a possible profit is not a valid less restrictive alternative. *Ayres*, 125 F.3d at 1016 (the fact that a group could give away T-shirts is not a less restrictive alternative when there was no possibility of selling T-shirts in the proximity of the prohibited areas). Second, the Government's position is essentially that "for someone who wishes to [engage in commercial filming] in a national park, there is no lawful alternative to a permit." *Boardley*, 615 F.3d at 525. However, this Court rejected that option in *Boardley*, and s should do so again here. *See* JA 62 ("In this case, § 100905 and its implementing regulations suffer from flaws remarkably similar to those which rendered the NPS regulations

[12] *See* NPS, Filming and Still Photography Permits, https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm (Aug. 26, 2021) (under the current guidance, low-impact filming activities involving five persons or fewer and hand-held equipment do not require a special use permit, and no distinction is made between commercial or non-commercial filming, or news gathering). Appellee offers no opinion on whether the interim guidance resolves all constitutional concerns with the Permit Regime.

unconstitutional in *Boardley*."). The District Court's order invalidating the Permit Regime should be affirmed.

II. SECTION 100905 IMPOSES AN UNCONSTITUTIONAL TAX ON EXPRESSIVE ACTIVITIES

A. The Government Cannot Tax the Exercise of a Constitutional Right

The District court correctly found that Section 100905's fee requirement for commercial filmmaking "mandates payment not only for the incidental costs of filming and permit administration, but for the act of filming itself." JA 59. It concluded that "[t]his regime is difficult to square with the longstanding rule that the government may not 'impose a charge for the enjoyment of a right granted by the federal constitution,' including the First Amendment right to free expression." *Id.* (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943)).

The First Amendment proscribes the government from raising revenue by taxing the exercise of constitutional rights, or charging fees in excess of costs of administering a legitimate regulation that governs speech. *Murdock*, 319 U.S. at 113-14; *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991). The cost of such a permit may not exceed "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Murdock*, 319 U.S. at 113-14; *see also Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (any

amount imposed to recoup the cost of regulation must be limited to "expense incident to [its] administration").

The need to restrict recovery to actual administrative costs reflects the constitutional maxim that no one may be compelled to purchase, through a license fee or tax, a right guaranteed by the Constitution. *Murdock*, 319 U.S. at 114. Nor may the government impose inconsistent or discriminatory fees on First Amendment activities, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987), with content-based taxes or fees being particularly suspect. *Simon & Schuster*, 502 U.S. at 116. Permit fees (and any associated costs) must be content and speaker neutral, and must adhere generally to First Amendment requirements. *Forsyth Cty.*, 505 U.S. at 130.

Section 100905 and its implementing rules violate these constitutional requirements. The Permit Regime applies expressly to protected speech, and the rules explicitly state that the permit fee is separate from any fees to cover costs of administering the permitting process. *See* 54 U.S.C. § 100905(b); 43 C.F.R. § 5.8(b); 36 C.F.R. § 5.5(c). And it has adopted rules that discriminate based on both content and speaker. 43 C.F.R. § 5.12. The Government has admitted—no, *insisted*—that the permit fee is not designed to do anything but send profits from the use of public lands to the NPS, and that the funds collected from the fees are used

for general agency operations having nothing to do with the permit regime. App. Br. 4-6, 21-25.

The Government argues that this body of law does not apply to it and that "[t]he government has a substantial interest in charging fees in commercial filming on its land, just like any other landowner." *Id.* at 49. The short answer, of course, is that "NPS is the government," not a private landowner, and "there is no authority for the proposition that the government may by fiat take a public forum out of the protection of the First Amendment by behaving as if it were a private actor." *Mahoney*, 105 F.3d at 1456, 1457.

B. The Government's Claim of an Interest in Charging "Rental Fees" in its Proprietary Role is Inapplicable

The Government's claim that charging a fee to engage in commercial filming is the same the "use fees" for commercial ventures conducted on federal lands—such as cattle grazing or operating a hot dog stand—is inapposite. The Government's management of the National Park System is carried out in its governmental role as a regulator, not as a proprietor, and its statutory charter calls not just for the preservation of public lands, but to open them for the maximum use of the public, including for expressive activities. It cannot transform its exercise of

governmental functions by calling them "proprietary."[13] Moreover, commercial filming is a purely expressive activity, whereas the commercial ventures described in the cases relied on the by the Government generally involved actual sales that occurred on Government property or intellectual property owned by the Government.

Commercial filmmakers like Mr. Price who photograph or film images in federal land are not engaging in a "commercial enterprise" on that property in the same sense as the entities to which the Government tries to draw a comparison. The Government's argument might be stronger if Mr. Price was actually occupying federal land by selling Blu-Rays from an in-park kiosk, or had set up a drive-in movie theater in a national park. Yet, even if Mr. Price had sold Blu-Rays at the Yorktown National Battlefield, protected speech is treated differently than non-expressive activity (like cattle grazing), and the First Amendment still applies. *See generally*, *Boardley*, 615 F.3d at 516; *ISKCON of Potomac*, 61 F.3d at 954-55.

Every case the Government cites in support of its argument that NPS and DOI can charge proprietary fees focus on either the ability to charge for space from which

[13] *Cf. Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.").

to run a store or booth for solicitations,[14] or charge for use of intellectual property owned by the Government.[15] Moreover, all of those cases involved the distribution of speech in a nonpublic forum.[16] In this case, the Government concedes that the Permit Regime covers both traditional and nonpublic forums. App. Br. 12, 41-42.

In *Atlanta Journal & Constitution*, the Eleventh Circuit clarified that "a government acting facially or impliedly in its capacity as regulator or licensor cannot profit from the exercise of First Amendment rights," and recognized a narrow exception *only* where "government acts in a proprietary capacity, that is, in a role

---

[14] *See, e.g.*, *Heffron*, 452 U.S. at 643-44 (state fair requiring "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds" and pay a rental fee); *Atlanta Journal & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003) ("[T]hese fees [for access to city owned and operated airport] are part of the general scheme the Airport to 'tax' those vendors who are granted space in the facility. Every vendor, no matter the type of goods sold, must remit to the Airport compensation for the granted right of access."); *Gannett Satellite Info. Network, Inc. v. Metro. Transit Auth.*, 745 F.2d 767, 774-76 (2d Cir. 1984) (where government is in the business of operating a railroad, it can charge a fee for selling newspapers on the premises).

[15] *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 625 (7th Cir. 2011) (government, acting as proprietor, can grant exclusive rights and charge a fee for its own media productions, and "cases addressing licensing or permitting regimes for speakers and performers or public park-goers are inapplicable").

[16] The Government's decision to cite *Ayres*, 125 F.3d 1010 (7th Cir. 1997), on this point does nothing to advance their argument. App. Br. 46. The case did not rule on admissibility of a fee arrangement, and the court enjoined Chicago's regulation of the sale of expressive T-shirts on First Amendment grounds. 125 F.3d at 1015-17.

functionally indistinguishable from a private business." 322 F.3d at 1312. In that limited circumstance, where someone is seeking access "for distribution space in a non-public forum for First Amendment activities," may the Government impose a revenue-conscious fee. *Id.* Even when Government acts in the limited role—and unlike a private business—the First Amendment *still* prohibits giving the permit authority unbridled discretion or engaging in content-based discrimination. *Id.* at 1310-11. In this regard, and especially relevant here, the Eleventh Circuit invalidated a portion of the access requirement that discriminated against advertising (a type of commercial speech) as "an unreasonable distinction based upon speaker identity." *Id.* at 1305.

Here, the Federal Government's operation of the National Park System is by no means like a proprietary business analogous to the operation of a railroad or running an airport. To the sure, the Government may authorize private parties to conduct business operations (like cattle grazing) on part of the millions of acres under its jurisdiction, but that does not convert the entire National Park System into a private park, like Disneyland. Management of the National Park System—and along with it is public fora and the wide expanses on which the public generally has access—is a traditional governmental function governed by traditional constitutional limits. *See Dunn-McCambell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 436 (5th Cir. 2011) (describing the Enabling Act as providing

the NPS with "regulatory authority"); *see also* 36 C.F.R. § 1.1(a) ("The *regulations* in this chapter provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the [NPS].").

III. FACIAL INVALIDATION OF SECTION 100905 IS APPROPRIATE

For the first time on appeal, the Government argues that a "universal remedy" is inappropriate and that any relief should be limited "to the plaintiff who brought this case." App. Br. 64. However, the District Court observed that "beyond the merits of Mr. Price's First Amendment claim, Defendants have presented no argument specifically against the propriety of injunctive relief." JA 70. This Court should decline to entertain an argument the Government failed to make below. *Shea v. Kerry*, 796 F.3d 42, 54 (D.C. Cir. 2015); *Potter v. Dist. of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009); *Henderson v. Lujan*, 964 F.2d 1179, 1183 (D.C. Cir. 1992) ("As this argument was not raised below, we do not consider it here.").

In its argument, the Government confuses the nature of facial and as-applied challenges to unconstitutional laws. It repeatedly makes the point that Mr. Price was not filming in a designated free speech zone when he was cited for violating 52 U.S.C. § 100905, and then faults the District Court for considering "hypothetical" applications of the law. App. Br. 18, 54-55, 59, 62. But that is the very nature of a

facial challenge for overbreadth in the First Amendment context. *E.g.*, *Stevens*, 559 U.S. at 489; *Berger*, 569 F.3d at 1046-48.[17]

Contrary to the Government's assumption, "facial attacks on the direction granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth Cty.*, 505 U.S. at 133 n.10. *See also Plain Dealer*, 486 U.S. at 770 n.11 (same). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the decisionmaker has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so. Although Appellants claim a broad remedy is inappropriate, App. Br. 64-66, that is exactly what is required when the plain terms of a statute restrict too much speech, as they do here. *E.g.*, *Stevens*, 559 U.S. at 480-82. *See generally Marbury v. Madison*, 5 U.S. (Cranch) 137, 180 (1803) ("a law repugnant to the constitution is void"); *Hague*

[17] The Government puts too much stock in trying to distinguish facial from as-applied challenges. The distinction "is not so well defined that it has some automatic effect or … must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 558 U.S. at 331 (2010). Certain cases have "characteristics of both" types of challenges, but "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010).

v. C.I.O., 307 U.S. 496, 516 (1939) (affirming facial invalidation of ordinance requiring permit for public speaking).

The Government claims that this case cannot be decided without analyzing "how much NPS land constitutes a public forum and how much does not." App. Br. 62. But this Court has already rejected an identical argument in *Boardley*, finding it unnecessary to decide "the forum status of all 391 national parks" in order to rule that the challenged NPS rules requiring permits for certain expressive activities were unconstitutionally overbroad. 615 F.3d at 515. For purposes of ruling on this appeal, it is enough to know that Section 100905 applies in *every* public and designated forum in *every* national park across the United States—a point the Government concedes. App. Br. 5, 15-16, 22, 25, 41, 59-60.

The Government further asserts that those affected by Section 100905 need not bring facial challenges and could "safeguard their own interests by bringing as-applied challenges." *Id.* at 63. Mr. Price tried that when he was cited for breaking the law. JA 22-23. And as the District Court for the Eastern District of Virginia noted when dismissing that case, Mr. Price could seek recourse by challenging the law on its face. *USA v. Price*, No. 4:19-po-00180-DEM (E.D. Va. 2019), ECF No. 23 at 4. And so he did.

Finally, the Government's claim that injunctive relief must be limited to "the plaintiff who brought this case," App. Br. 64-65, again misapprehends the nature of

facial challenges, particularly in the First Amendment context. *Stevens*, 559 U.S. at 473 ("In the First Amendment context, . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'") (quoting *Washington State Grange*, 552 U.S. at 449). In this context, defective permit schemes are typically invalidated wholesale. *E.g.*, *Kunz*, 340 U.S. at 294; *Saia*, 334 U.S. at 559-560; *Hague*, 307 U.S. at 515-16; *Lovell*, 303 U.S. at 451-52. The District Court was right in ordering that remedy in this case.

CONCLUSION

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

Respectfully submitted,

/s/ Robert Corn-Revere
Robert Corn-Revere
bobcornrevere@dwt.com
Patrick J. Curran Jr.
patcurran@dwt.com
Patricia J. Peña
patriciapena@dwt.com
Davis Wright Tremaine LLP
1301 K Street NW, Suite 500 East
Washington, DC 20005
(202) 973-4200

Counsel for Appellee

October 8, 2021.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32 (a)(6), and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font Times New Roman type style. According to that word processing system, this brief contains 12,864 words, excluding parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

/s/ Robert Corn-Revere
Robert Corn-Revere

CERTIFICATE OF SERVICE

I certify that on October 8, 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. Service will be accomplished by the appellate CM/ECF system.

/s/ Robert Corn-Revere
Robert Corn-Revere