IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ALEXANDER RIENZIE, CONNOR BURKESMITH, and THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,

Plaintiffs,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of the Interior; CHARLES F. SAMS III, in his official capacity as Director of the National Park Service; MERRICK GARLAND, in his official capacity as the Attorney General; PALMER "CHIP" JENKINS, in his official capacity as superintendent of Grand Teton National Park; and AMY ALLABASTRO, in her official capacity as Revenue and Fee Business Manager and Special Park Use Coordinator of Grand Teton National Park,

Defendants.

Civil Action No.: 24-cv-00266

COMPLAINT FOR CIVIL RIGHTS VIOLATIONS

JURY TRIAL DEMANDED

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INTRODUCTION

1. Each year, tens of millions of people visit America's national parks and record their experiences by taking videos and still photographs. *Visitation Numbers*, Nat'l Park Serv., https://nps.gov/aboutus/visitation-numbers.htm (last updated Feb. 22, 2024) (325,498,646 visits in 2023). The Park Service understands that "[p]hotography is an important part of national park history," *Picturing the Parks*, Nat'l Park Serv., https://www.nps.gov/subjects/photography/ index.htm (last updated Oct. 15, 2019), and even encourages such activity by sponsoring an annual amateur photo contest with cash prizes up to $10,000. *Share the Experience,* Nat'l Park Found., https://www.sharetheexperience.org (last visited Dec. 17, 2024). The U.S. Fish and Wildlife Service also sponsors photo contests, Susan Morse, *Photo Contests,* U.S. Fish & Wildlife Serv., https://www.fws.gov/story/photo-contests (last visited Dec. 17, 2024), and describes wildlife photography as "a priority public use on national wildlife refuges." *Photography*, U.S. Fish & Wildlife Serv., https://www.fws.gov/activity/photography (last visited Dec. 17, 2024).

2. While the government broadly encourages park visitors to take photographs or videos in all areas generally accessible to the public, federal law treats commercial filmmakers differently. It requires them to first obtain a permit and pay a fee before they may press the "record" button. 54 U.S.C. § 100905(a)(1). The distinction is not based on any potentially different impact on park use or resources posed by commercial versus noncommercial filming; a lone individual recording video on his cell phone for posting on an ad-supported website must get a permit and pay a

fee, while a non-commercial film crew with heavy equipment does not. The law is purely a revenue measure designed simply to provide "a fair return to the United States." *Id.* § 100905(a)(1).

3. Plaintiffs Alexander Rienzie and Connor Burkesmith are documentary filmmakers and members of the National Press Photographers Association ("NPPA") who frequently make video recordings and take still photographs in national parks. They are subject to the federal permit and fee requirement because they often (although not always) have a commercial purpose when they film in national parks. The fee and permit laws and regulations—including the cumbersome and arbitrary permit process, the denial of permits, the costly fees, the ambiguity over when permits are required, and the potential for criminal prosecution from running afoul of these rules and regulations—chills Rienzie, Burkesmith, and other NPPA members from filming in national parks when they otherwise would.

4. In August 2024, Rienzie and Burkesmith sought a permit to film a newsworthy event—an individual's attempt to break the record for the fastest known time ascending and descending a mountain in Grand Teton National Park. Although they applied for the permit weeks in advance and proposed using equipment no more intrusive than a typical park tourist's gear, their application was categorically denied. The denial forced them to choose between foregoing documenting a potentially record-breaking athletic feat and risking prosecution for violating federal law. Rienzie and Burkesmith chose to film the event without a permit and now face an ongoing threat of criminal prosecution. This threat has impeded their ability to use the footage they

took during this event, interfered with their business activities, and hampered plans to film similar events currently in the planning stages.

5. The federal permit and fee requirements are content-based prior restraints on expressive activities that the First Amendment protects. The permitting regulations are not narrowly tailored to serve a legitimate government purpose. And they deprive Americans of the right to engage in these expressive activities without due process of law. Accordingly, Plaintiffs seek to enjoin NPS's permit and fee requirements to protect their rights and the rights of millions of Americans.

THE PARTIES

Plaintiffs

6. Plaintiff Alexander Rienzie is a documentary filmmaker who resides in Wyoming. Rienzie produces commercial and editorial content focused on adventure storytelling and outdoor photography. Rienzie is a member of the National Press Photographers Association.

7. Plaintiff Connor Burkesmith is a photographer and filmmaker who resides in Wyoming. Burkesmith runs his own business, specializing in photographing and filming athletes in beautiful outdoor spaces. Burkesmith is a member of the National Press Photographers Association.

8. Plaintiff National Press Photographers Association (NPPA) is a 501(c)(6) not-for-profit organization. Since its founding in 1946, NPPA has promoted the interests of news photographers, filmmakers, videographers, and multimedia journalists. NPPA advocates for the rights of visual journalists and other

photographers to earn a living from their work and for the freedom of the press protected by the First Amendment.

Defendants

9. Defendant Debra A. Haaland, as Secretary of the Interior, heads the U.S. Department of the Interior ("DOI" or "the Department"). DOI is charged with managing the country's federal lands and natural resources, including conditions on their access and use. The Department is responsible for implementing 54 U.S.C. § 100905, the statute that establishes the fee and permit requirements for commercial filming on federal lands. It is also responsible for adopting, maintaining, and enforcing regulations implementing the statute.

10. Defendant Charles F. Sams III is Director of the National Parks Service ("NPS"), the component of DOI responsible for care of the country's national parks. NPS adopted the regulations found in 36 C.F.R. § 5.5, which implement 54 U.S.C. § 100905.

11. Defendant Merrick Garland is the Attorney General of the United States and heads the U.S. Department of Justice ("DOJ"), the federal agency responsible for enforcing federal criminal law. Defendant Garland has ultimate responsibility over decisions about whether and how to enforce federal criminal laws.

12. Defendant Palmer "Chip" Jenkins works for the NPS as Superintendent of Grand Teton National Park ("Grand Teton"). Defendant Jenkins is responsible for managing staff and operations at Grand Teton, including directing staff on whether to grant or deny filmmaking permit applications.

13. Defendant Amy Allabastro works for the NPS as Revenue and Fee Business Manager and Special Park Use Coordinator of Grand Teton. Defendant Allabastro oversees permitting and fee collection at the park and was responsible for denying Rienzie and Burkesmith's August 2024 request for a filming permit.

14. All Defendants are sued solely in their official capacity,

JURISDICTION AND VENUE

15. This action arises under the U.S. Constitution, particularly the First and Fifth Amendments.

16. This Court has original jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

17. This Court has authority to grant the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 because this case presents an actual case or controversy within the Court's jurisdiction.

18. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(B) and (C) because, in this action against officers and employees of the United States, a substantial part of the events or omissions giving rise to these claims occurred in this judicial district and because Plaintiffs Rienzie and Burkesmith reside in this district.

FACTUAL ALLEGATIONS

Commercial Filming Restrictions in National Parks.

19. In 2000, Congress passed Public Law 106-206 (the "Act"), which regulates commercial filming on federal lands, including in national parks. The Act was motivated by the filming of major studio Hollywood productions on federal lands, but its scope is not limited to such large-scale activities.

20. The Act tasks the Secretary of the Interior with administering permitting and fee requirements for commercial filming in national parks. 54 U.S.C. § 100905.

21. The Act applies to "commercial filming activities," a term the Act does not define. 54 U.S.C. § 100905(a)(1).

22. Under the Act, the Secretary of the Interior "shall require a permit" for all commercial filming activities. *Id.* The Secretary must "establish a process to ensure" that the Secretary responds in a "timely manner to permit applicants." *Id.* § 100905(f).

23. The Act also requires the Secretary to set a "reasonable fee" for commercial filming activities. *Id.* § 100905(a)(1). The fee must "provide a fair return to the United States" based on the number of days of filming activity, the size of the film crew, and amount and type of equipment involved. *Id.*

24. The fee does not recover administrative costs associated with issuing permits or supervising park activities. It is purely a revenue measure.

25. Under the Act, the Secretary cannot require a permit or assess a fee for still photography taking place "where members of the public are generally allowed," unless the photography uses "models or props" not ordinarily present in the national park. *Id.* § 100905(c). The Secretary may require a permit and assess a fee for still photography if it takes place in areas where the public is not generally allowed or where additional administrative costs are likely. *Id.*

26. Filming or still photography may be prohibited if the Secretary determines that it would likely damage resources, unreasonably disrupt the public's use of the area, or pose health or safety risks to the public. *Id*. § 100905(d).

27. Filming in violation of any of these permit or fee requirements is a federal criminal offense subject to a fine and up to six months in prison. *See* 18 U.S.C. § 1865(a); 36 C.F.R. §§ 1.3, 5.5(a).

Implementing Regulations

28. To implement the Act, the Secretary of the Interior promulgated regulations further detailing the permitting and fee requirements. *See* Commercial Filming and Similar Projects and Still Photography Activities, 78 Fed. Reg. 52087-02, 52087 (Aug. 22, 2013).

29. The regulations define commercial filming to encompass filming "for a market audience with the intent of generating income." 43 C.F.R. § 5.12. The regulations include "television broadcast, or documentary, or other similar projects" in the definition of "commercial filming." *Id*.

30. The definition of "news-gathering activities" is remarkably similar to the definition of commercial filming. It is defined as "filming, videography, and still photography" by a person or entity who "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 43 C.F.R. § 5.12.

31. The regulations require a permit for all "commercial filming." *Id.* § 5.2(a). Park visitors are not required obtain any permit to film unless it is "commercial," as defined by the rules. *Id.* § 5.2(c).

32. "News-gathering activities involving filming, videography or still photography do not require a permit unless" a permit is needed "to protect natural and cultural resources, to avoid visitor use conflicts, to ensure public safety or to authorize entrance into a closed area." But even then, no permit is needed if obtaining one would interfere with gathering the news. *Id.* § 5.4

33. The requirement that commercial filmmakers obtain a permit and pay a fee is not based on the potential impact on park resources or visitors. The requirement is not based on the type of photo equipment to be used or the number of people involved. *See* Commercial Filming and Similar Projects and Still Photography Activities, 78 Fed. Reg. at 52090 ("There is no basis for an exclusion [from getting a permit] based on crew size or amount of equipment under this statute.").

34. The regulations establish expansive discretion for park officials to reject permit applications, including if the official believes the filming would result in "unacceptable impacts" to NPS "values." 43 C.F.R. § 5.5. The government may also impose conditions on the permits. *Id.* § 5.6. In practice, these requirements result in the denial of filming permits for arbitrary and unpredictable reasons.

35. The regulations provide no time limit for park officials to decide whether to grant or deny a commercial filming application, nor does it provide for situations

where filmmakers are not able to predict in advance that something will happen in a national park that they will want to film.

36. The regulations provide no review process in cases where a permit application is denied or subjected to limiting conditions.

37. A permit for still photography generally is not required unless (a) the photography involves a model, set, or prop; (b) occurs at a place where or a time when members of the public are not allowed; or (c) could require the government to expend money to protect national park resources or minimize conflicts with other visitors using the park. 43 C.F.R. § 5.2(b). The regulations are clear that "portrait subjects such as wedding parties and high school graduates are not considered models," and "the use of a camera on a tripod, without the use of any other equipment, is not considered a prop." *Id.* § 5.12. Accordingly, ordinary still photography does not require a permit regardless of whether or not it is considered "commercial."

38. "News-gathering activities" involving filming do not require a permit even if they are "commercial." *Id.* § 5.4. The rules define "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

39. The rules define "news-gathering activities" as "filming, videography, and still photography activities carried out by a representative of the news media." *Id.*

40. The regulations provide examples of news-media entities as including "television or radio stations broadcasting to the general public and publishers of

periodicals (but only if such entities qualify as disseminators of 'news')." 43 C.F.R. § 5.12. News media may also include electronic dissemination of newspapers through telecommunications services. *Id.*

41. To fall within the newsgathering exemption to the permit and fee requirements, a freelance filmmaker who is not employed by a "news-media entity" must "demonstrate a solid basis for expecting publication" through a news outlet. *Id.* § 5.12.

42. The exemption for representatives of the news media applies whether the news will be made available to the public for free or for profit. *Id.*

43. The rules do not limit park officials' discretion to determine what activities qualify as "news-gathering." Nor do they limit officials' discretion to determine who qualifies as a "representative of the news media."

44. Under the rules, filming breaking news in national parks is exempt from the permit requirement, even if for a commercial purpose, while filming a documentary about the same event requires a permit if done "with the intent of generating income." *Id.*

45. The permit fee for commercial filming is not for recovery of the administrative costs involved with issuing permits. Applicants seeking a permit for commercial filming must pay a "location fee" that provides "a fair return" to the government. *Id.* § 5.8. Separately, applicants must pay for the "actual costs" the government incurs in processing and administering a permit. *Id.*

Park Procedures and Practices

46. The process to apply for a permit is cumbersome and differs from park to park. NPS provides no centralized authority for processing permit applications.

47. Each park is allowed to determine for itself whether a request qualifies as "news-gathering activities" and whether the request is compatible with the park's "values."

48. Each park is authorized to determine for itself whether commercial filming permits are required, as well as how and when to process applications.

49. Although the regulations state that national parks will process applications for filming permits "in a timely manner," 43 C.F.R. § 5.9, in practice permit applications may languish for weeks or even months without a decision. This process makes it impossible for individuals to spontaneously capture footage that they intend to later monetize, or to later monetize footage that was not initially captured with that intent, unless the individual qualifies as a member of "news media" as defined in the regulations. *Id.* §§ 5.2, 5.12.

50. The law's arbitrary distinctions do not serve any legitimate governmental interest in protecting national park resources. A tourist recording video in a national park with a hand-held camera or cell phone is not required to obtain a permit, but he may become subject to the law if he later posts the video on YouTube, which pays some users for popular content.

51. A documentary filmmaker who films in a national park is not required to apply for, or obtain, a permit prior to filming if he doesn't intend to "generate

income." But the same person, using the same equipment, is required to obtain a permit if a park administrator deems his intent to be "commercial."

52. The same documentarian, who filmed for noncommercial purposes without a permit, may later be subjected to the rules if he subsequently decides to use the film for a commercial purpose. This may involve nothing more than posting the video on a website such as YouTube.

53. Modern professional cameras can shoot both still images and cinematic-quality video. Members of the National Press Photographers Association use these cameras regularly and will shoot both still images and video footage with the exact same camera. No permit is required for professional photographers using a handheld camera to take still images even if park administrator deems the activity is not "news-gathering." But the same photographer would become subject to the rules and face potential criminal liability if they flip a switch on their camera to capture video instead.

54. If a tourist, a reporter, and a documentary filmmaker each filmed the same vista or event in a national park using the same equipment, only the filmmaker would be required to obtain a permit and pay a fee, if their purpose were deemed to be "commercial" and not "news-gathering."

55. In implementing the rules, park officials have not only imposed the permit and fee requirements as a prior restraint on speech, but they have also contacted some filmmakers after the fact to demand video footage be removed from public display when they deemed it "commercial."

56. In implementing the rules, park officials have imposed permit requirements and denied permits based solely on the content or message of the work created.

57. There is no way to comply with the permit and fee requirements retroactively. If a filmmaker or videographer captures images with noncommercial intent but later wants to profit from the images, he must either risk prosecution or forego any possibility of monetizing the images.

Price v. Garland and the Interim Guidance

58. In 2019, independent filmmaker Gordon Price was criminally charged for filming a movie at the Yorktown Battlefield in the Colonial National Historical Park without obtaining a permit from the NPS. *Price v. Barr*, 514 F. Supp. 3d 171, 179 (D.D.C. 2021), *rev'd and remanded sub nom. Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2432 (2023).

59. The government dismissed its charges against Price, and he filed a civil lawsuit in the U.S. District Court for the District of Columbia challenging the constitutionality of 54 U.S.C. § 100905 and its associated regulations. *Id.* at 179–180.

60. The district court in that case held the permit regime was facially unconstitutional and enjoined its enforcement nationwide. *Id.* at 198.

61. While the nationwide injunction was in place, NPS announced interim guidance for filming in national parks. Under the interim guidance, filming that had a "low-impact" on park resources did not require a permit. *See* Nat'l Park Serv., *National Park Service Announces Interim Guidance for Filming in Parks*, NPS (Feb.

22, 2021), https://www.nps.gov/orgs/1207/02-22-21-interim-guidance-for-filming-in-parks.htm [https://perma.cc/WF32-PXVK].

62. The interim guidance defined "low-impact filming activities" as "outdoor filming activities in areas open to the public (excluding areas managed as wilderness), consisting of groups of five persons or fewer, and involving equipment that will be carried at all times—except for small tripods used to hold cameras."

63. NPS has never suggested that the interim guidance rendered it less able to protect its interest in protecting park resources or the visitor experience.

64. In August 2022, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court, holding that filming in a national park was not First Amendment-protected speech but was instead a "noncommunicative step in the production of speech." It therefore concluded that Price was not likely to succeed on the merits of his claims and rescinded the preliminary injunction. *Price*, 45 F.4th at 1068.

65. Judge Tatel issued a dissent sharply disagreeing with the panel's decision. Judge Tatel argued the panel erred by "disaggregat[ing] speech creation and dissemination, thus degrading First Amendment protection for filming, photography, and other activities essential to free expression in today's world." *Id.* at 1082 (Tatel, J., dissenting). And he agreed with the district court that the permit and fee requirements "penalize far more speech than necessary to advance the government's asserted interests" and therefore "run afoul of the First Amendment." *Id.* at 1076.

66. After the D.C. Circuit's decision, NPS scrapped its interim guidance and returned to the permit regime that predated *Price*.

The Permit and Fee Requirements Have Hampered Alexander Rienzie and Connor Burkesmith's Efforts to Film a Documentary in Grand Teton National Park.

67. Plaintiffs Rienzie and Burkesmith are documentary filmmakers and nature photographers. The two filmmakers collaborate on various projects concerning athletic endeavors in outdoor spaces. These include attempts to document athletes attempting a "fastest known time," or "FKT," which is a speed record on a particular running or hiking route. Their projects entail filming athletes attempting FKTs on routes in national parks, capturing footage they would like to use in documentary films.

68. The permit and fee requirements have materially hampered Rienzie's and Burkesmith's efforts to create documentary films. Despite Rienzie's and Burkesmith's repeated efforts to obtain permits in compliance with the requirements, their applications have been denied, subjecting them to potential criminal penalties if they engage in protected filmmaking activities with the intent to earn a living from their work.

69. Rienzie and Burkesmith face these risks of criminal prosecution for their filming even though they only go to publicly accessible areas of the parks, use only small handheld cameras and tripods, and their presence does not otherwise risk damage to park resources or interference with other visitors' use of national parks.

70. Other park visitors observing FKT attempts are free to capture footage in the same areas of the park using similar equipment, and to publish that footage so

long as they don't earn income from it. But Rienzie and Burkesmith are precluded from doing so without first obtaining a permit because the park administrators have determined that their use is "commercial."

71. Because changing weather affects safe conditions to attempt an FKT, it is difficult to predict in advance the date of an attempt. This means any delay in acting on a filming application can effectively serve as a denial of the request.

72. In August 2023, Rienzie and Burkesmith applied for filming permits for Grand Teton National Park but their applications were denied. They planned to film an athlete attempting an FKT of the tallest summit in Grand Teton National Park.

73. On August 9, 2023, Rienzie contacted the NPS to inquire about obtaining a permit to film this athlete during the week of August 12–18, 2023. Grand Teton National Park Revenue and Fee Business Manager Amy Allabastro told Rienzie he would need to apply for a permit under 43 C.F.R. §§ 5.4 and 5.12 at least 30 days in advance, and that he would have to pay a non-refundable $325 application fee. Allabastro also told Rienzie that he would have to pay an additional location fee unless his filmmaking qualified as news-gathering.

74. Because of the processing procedures and the accompanying delay, Rienzie was unable to obtain a permit in advance of the FKT attempt.

75. Rienzie and Burkesmith were forced to choose between waiting for a permit or risking possible prosecution for unauthorized commercial filming. Because of the possibility that a record-breaking event might not be captured on film, they

chose to film the athlete in Grand Teton National Park during his August 2023 FKT attempt.

76. In line with their ordinary practice, Rienzie and Burkesmith filmed this attempt from publicly accessible areas of the park using small handheld cameras and small tripods and did not damage park resources or interfere with other visitors. No permit would have been required for filming under these same conditions if Plaintiffs had been tourists, still photographers, or news reporters or if they lacked commercial intent.

77. Rienzie and Burkesmith posted some footage of the August 2023 FKT attempt on social media. But because of the chilling effect of the statute, they did not publicize the footage more widely for fear that officials might consider the filming commercial and prosecute them for failing to obtain a permit.

78. In 2024, Rienzie and Burkesmith made plans to create a documentary film of a different athlete attempting an FKT of the tallest summit in Grand Teton National Park. Given their lack of success in obtaining a permit to film in Grand Teton in 2023, they applied for the permit as far in advance as possible to allow sufficient time for the NPS to process the application.

79. In July 2024, Burkesmith and the athlete met with a company interested in sponsoring a documentary film of the FKT attempt in Grand Teton National Park. Over the next few months, Burkesmith and Rienzie continued planning the documentary film with the athlete and the sponsoring company.

80. On August 5, 2024, Burkesmith submitted an NPS Form 10-931 (Application for Special Use Permit, Commercial Filming/Still Photography) to Grand Teton National Park, seeking a permit to film the athlete's FKT attempt in early September.

81. In that application, Burkesmith noted that two to three cinematographers would be on the mountain at different locations along the 14-mile roundtrip run to film and photograph the athlete's attempt. The cinematographers would each use one small camera and one tripod. They would not use any props, backgrounds, or sets.

82. Burkesmith's application stated that the attempt was planned for early September, but that the date of the attempt was variable due to weather and safe conditions on the route. The attempt would take roughly three hours, beginning at 6:00 AM.

83. In the application, Burkesmith stated that he planned to create a short film using the footage. He also noted that he planned to use the footage in a story about the FKT attempt in a local newspaper.

84. If Burkesmith had planned to use the footage of the FKT attempt only in a manner the park determined was news-gathering, he would not have been required to seek a filming permit.

85. Along with the application, Burkesmith paid a non-refundable $325 application fee.

86. On August 7, 2024, Burkesmith received an email from Allabastro, acknowledging receipt of his application and noting he should allow "7–10 days for [the application] to be reviewed for being approved to be permitted."

87. On August 7, 2024, Burkesmith replied to Allabastro's email with a revised application. The revised application was largely the same as the original but also sought a permit to obtain a day of "B-roll" footage on the route with the athlete. The application explained that filming the FKT attempt would likely only yield a few minutes of usable footage because the athlete would be moving quickly. The B-roll footage would allow fuller illustration of the story of the attempt and provide for additional shots of the landscape. The only cinematographer for the B-roll footage would be Burkesmith with a handheld camera and tripod.

88. Allabastro called Burkesmith on August 13, 2024 and told him she would not issue a permit to film the FKT attempt under any circumstances. She said that even though the athlete was allowed to attempt the FKT, she could not allow placing two to three individual filmmakers or videographers along the route because that could be dangerous and interrupt park activities. Burkesmith explained that the cinematographers would be indistinguishable from normal visitors. Allabastro said that cinematographers would turn the FKT attempt into a "competitive event," and that she could not issue a permit for a "competitive event."

89. No permit would have been required if the athlete making the FKT attempt had arranged to have friends with no commercial interests at various places along the route to record his effort using the exact same equipment as in

Burkesmith's application. However, if those friends later licensed the footage for a use involving "a market audience with the intent of generating income," experience shows that the NPS would consider them to be in violation of the statute.

90. The documentary that Rienzie and Burkesmith are working on meets the definition of "news-gathering activities" in the regulations governing NPS film permits because they are capturing "information of potential interest to a segment of the public" and they will be using their "editorial skills to turn the raw [footage] into a distinct work, and distribut[ing] that work to an audience." 43 C.F.R. § 5.12. Nonetheless, Allabastro told them that they cannot film portions of their documentary at Grand Teton National Park without a permit and that even if the footage were used as part of "breaking news" coverage of the FKT attempt she would still deny the request.

91. During the August 13 phone conversation, Allabastro said she might be able to grant Burkesmith a permit for filming B-roll with the athlete on a day other than the FKT attempt, but they were currently booked during the entire month of September. She said she would look at possible dates and get back to Burkesmith.

92. Allabastro sent Burkesmith an email on August 15, 2024, that his application could not be processed because "there already [are] applications being processed that have the available schedule booked until early October."

93. Allabastro's email reiterated that the park would not issue the permit because Burkesmith sought to place two to three photographers along the route while an athlete attempted an FKT. She explained the proposed filming created a

"competitive event which could impact other visitor (climbers), and/or create a safety hazard."

94. Even while offering this justification for denying the permit, Allabastro's August 15 email noted "the athlete is not being restricted from the attempt itself as long as there is not impact [*sic*] other climbers/hikers which could create a safety hazard or disrupt their experience." Allabastro wrote that Burkesmith could revise his application to obtain only B-roll, not of the attempt itself, on a date after October 7.

95. No permit would have been required if Burkesmith had proposed to limit the use of his footage for "breaking news" of the FKT attempt, or if he had lacked commercial intent.

96. On September 2, 2024, the athlete attempted the FKT in Grand Teton National Park. Rienzie and Burkesmith were forced to decide whether to forego filming the attempt or to risk prosecution. Rienzie and Burkesmith chose to film and photograph the FKT attempt.

97. In line with their ordinary practice, Rienzie and Burkesmith filmed and photographed this attempt only from publicly accessible areas of the park using small handheld cameras and small tripods and did not damage park resources or interfere with other visitors.

98. Rienzie's and Burkesmith's photographs were featured in over a dozen news outlets and social media accounts covering the FKT attempt.

99. As a result of the news stories about the FKT attempt, an NPS spokesman said NPS was investigating Rienzie and Burkesmith and considering bringing criminal charges against them for filming without a permit.

100. To date, NPS has not charged Rienzie and Burkesmith for filming and photographing the FKT attempt without a permit. An NPS official, quoted in a local news article, said rangers did not believe that Rienzie and Burkesmith met all of the criteria necessary to pursue charges against them for commercial filming without a permit. The official said it would have been "less of a gray area" if the athlete's image were used "in a commercial or a catalog or something like that." This statement makes it clear that the NPS is deciding whether to prosecute Rienzie and Burkesmith based on what message they have communicated with the footage.

101. The NPS official said: "So many people are out here filming every day for their Instagram accounts or TikToks, and that's hard for our rangers nationally to enforce what's commercial, what's not."

102. Rienzie and Burkesmith have an objectively justified fear that, if they were to use their footage of the FKT in a documentary as they had originally planned, NPS officials would charge them for commercial filming without a permit.

103. Rienzie and Burkesmith want to film the athlete's next FKT attempt in Grand Teton National Park in the summer of 2025, and use footage of both the 2024 and 2025 FKT attempts in a documentary. But they would do so under the threat of criminal prosecution.

104. The permit requirement and the chilling effect of an ongoing risk of prosecution has hampered Rienzie and Burkesmith's ability to post the existing footage they have taken and to use it to attract sponsors for a documentary film involving future attempts to break the record.

105. But for the permit requirement, the threat of prosecution, and its chilling effect, Rienzie and Burkesmith would post footage of the 2024 FKT attempt on social media to generate interest from potential sponsors. They have not done so out of fear that NPS officials would then determine that their footage was taken with a profit motive and was therefore unlawful.

106. Potential sponsors have informed Rienzie and Burkesmith that they would not sponsor the film unless Rienzie and Burkesmith are able to obtain filming permits. But for the permit requirement, Rienzie and Burkesmith would be able to secure these sponsors to fund their filming.

The Permit and Fee Requirements Burden the First Amendment Rights of Other Members of the National Press Photographers Association in National Parks.

107. Plaintiff NPPA is a 501(c)(6) not-for-profit organization that "is dedicated to the advancement of visual journalism, its creation, practice, training, editing and distribution, in all news media and works to promote its role as a vital public service." NPPA Mission and Bylaws, NPPA, https://nppa.org/gov/bylaws (as amended July 31, 2022). Its purpose is "to advance visual journalism in all its forms" including by opposing "infringements of the rights of visual journalists." *Id*. NPPA regularly advocates for the interests of news photographers, filmmakers, videographers, and multimedia journalists, including the rights of its members under

the First Amendment and to earn a living from their work. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community.

108. Since its founding in 1946, NPPA has been the "Voice of Visual Journalists" and other photographers, vigorously promoting the constitutional and intellectual property rights of journalists as well as the freedom of the press in all its forms, especially as it relates to visual journalism.

109. NPPA's membership includes visual journalists and other photographers, who collectively work in every national park in the country. Plaintiffs Rienzie and Burkesmith are members of NPPA.

110. NPPA advocates for the rights of photographers to work in national parks and other federal lands, and NPPA has testified before Congress about the importance of protecting the First Amendment rights of photographers in national parks.

111. Many of NPPA's members work as freelance journalists. Although their work may ultimately be published in a newspaper or appear on a newspaper's website, at the time they are filming or photographing they may not be able to satisfy an official who questions them as to whether they are engaged in "news-gathering activities" within the meaning of the regulations or prove that they are employed by a news organization.

112. For example, an NPPA member could visit a national park without an agreement with a newspaper but with the intent to license their photographs or

videos. Once they do so their photographs and videos would then constitute news. However, prior to this licensing, at the time they film, the member might not be able to prove they are participating in "news coverage," because they potentially could have licensed the footage to a non-journalistic enterprise.

113. NPPA's members regularly photograph and record the sort of matters of public interest that exist or occur in national parks, such as documenting wildlife, environmental issues, human activity, and weather emergencies such as flooding and wildfires. Some of the footage they capture may later be deemed newsworthy even if it was not considered news at the time it was filmed. Some of the footage may be licensed for commercial use even if it was initially captured for newsgathering purposes.

114. Existing permitting regulations vest permitting officials with virtually unchecked discretion to limit or restrict journalistic activities and subject NPPA members engaged in photojournalism to arbitrary judgment.

115. In March of 2022, NPPA learned that Grand Teton National Park was planning to enact a rule requiring commercial still photographers to obtain costly special permits to take pictures in national parks regardless of the impact, location, or burden on the park. The permit requirements included an application fee of $300 and a three percent tax on all earnings from the photography. The plan further would have limited photography to "site-specific" weddings, which are not permitted during the winter season, and would have banned photographers at smaller wedding ceremonies allowed elsewhere in the park and during the winter. In addition to the

financial burden, the combination of these policies would have resulted in a complete ban on wedding photography during seven months of the year as well as a complete ban on wedding photography in many of the park locations where weddings take place.

116. After learning of the 2022 still photography permit requirement, NPPA sent a letter to Defendant Superintendent Chip Jenkins, explaining that the requirements were in direct violation of federal laws and regulations, as well as the First Amendment. Subsequently, the park walked back the requirements and reverted to the standard NPS regulations. Michael Zhang, *Grant Teton Axes Controversial Plan to Require Portrait Photo Permits*, PetaPixel (Apr. 2, 2022), https://petapixel.com/2022/04/02/grand-teton-axes-controversial-plan-to-require-portrait-photo-permits/.

117. In November 2024, Grand Teton National Park announced revised guidelines for wedding permits in 2025. The guidelines state that still photographers who shoot portraits at a wedding need a permit to use those images "to promote or sell a product or service." *Wedding and Commitment Ceremonies*, Grand Teton Nat'l Park, https://www.nps.gov/grte/planyourvisit/weddingcommitments.htm (last updated Nov. 25, 2024). NPPA members who shoot weddings often will post examples of those weddings on their website or Instagram feeds to promote their services. NPS has previously interpreted such use of wedding photos as commercial, has fined photographers, and has demanded images be taken down from the social media accounts of photographers. However, 43 C.F.R. Part 5 and 54 U.S.C. § 100905

explicitly prohibit requiring a permit for still photography in these circumstances, regardless of whether it is commercial.

118. The existing permitting and fee requirements, as well as the implementation regime impose vague and unacceptable restrictions on NPPA photojournalists' ability to collect and report the news on public lands, with a particularly harmful effect on smaller news organizations and freelance photojournalists who cannot afford to pay the required fees imposed by the permitting and fee regime.

STANDING AND REDRESSIBILITY

119. The Plaintiffs have standing to challenge 54 U.S.C. § 100905 and the regulations implementing it. The NPS permit and fee requirements for commercial filmmaking deprive Plaintiffs of their constitutional right to photograph and videotape in national parks.

120. The permit requirement of 54 U.S.C. § 100905 imposes an unlawful prior restraint on Plaintiffs' constitutionally protected expressive activity.

121. The fee requirement for commercial filming imposed on Plaintiffs is a tax on constitutionally protected expressive activity. The permit fee is unrelated to any impact that their filming has on the national parks or any costs that a national park must incur to facilitate their filming.

122. The permit process imposed on Plaintiffs as set forth in 43 C.F.R. Part 5 and 36 C.F.R. § 5.5 does not guarantee them a timely response and prevents their ability to film and photograph in the national parks without significant advanced notice.

123. The permit and fee requirements impose unconstitutional constraints on Plaintiffs based on the content of their speech. If Plaintiffs are determined by the NPS to be filming for the news media or are filming without a profit motive, they are not required to apply for a permit or pay a fee. But if the NPS arbitrarily decides that the use of the footage or photography is too commercial, the NPS can and has refused to permit a wide range of filming on matters of public concern.

124. NPPA's members have been subjected to content-based and arbitrary enforcement of the film permit regime, as well as content-based and arbitrary denial of permission to capture video and still photography in national parks and other federal lands regulated by 54 U.S.C. § 100905 and 43 C.F.R. Part 5.

125. The permit and fee requirements vest excessive administrative discretion in park officials to decide who must obtain a permit, and in deciding how and when to process filming applications. The exercise of this discretion has impeded Plaintiffs' efforts to engage in filming.

126. Because of the permit and fee requirements, Plaintiffs Rienzie and Burkesmith have been unable to secure sponsors for upcoming filming projects. If the permit requirement is enjoined, then Rienzie and Burkesmith would be able to post existing video footage and use it to secure sponsors for future events. Rienzie and Burkesmith could also use existing and future footage in documentary films about matters of public interest.

127. Absent prospective injunctive relief, Plaintiffs and other NPPA members will continue to be subject to the permit and fee requirements.

128. Absent prospective injunctive relief, Plaintiffs Rienzie and Burkesmith face an ongoing and credible threat of prosecution for filming in Grant Teton National Park in August 2023 and on September 2, 2024.

CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

FIRST CAUSE OF ACTION
Violation of the First and Fifth Amendments
(Prior Restraint)
(Facial and As-Applied Challenge Against All Defendants)

129. Plaintiffs re-allege and incorporate by reference the preceding paragraphs as though fully set forth herein.

130. The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

131. The First Amendment protects the entire speech process. This necessarily includes gathering information and the creation of speech, including photography and videorecording. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (both the "creation and dissemination of information are speech within the meaning of the First Amendment"); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) (First Amendment applies to "creating, distributing, [and] consuming speech"); *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021); *Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017).

132. Contrary to the D.C. Circuit's holding in *Price v. Garland* that filming is non-communicative conduct, the U.S. Court of Appeals for the Tenth Circuit has held that filming is protected by the First Amendment as an integral part of the communication process. *See Animal Legal Def. Fund*, 9 F.4th at 1228; *Irizarry*, 38 F.4th at 1289 ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech."); *W. Watersheds Project*, 869 F.3d at 1196 (same). Every other circuit court that has addressed the issue agrees that the First Amendment protects filming and recording as part of the speech process. *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 831 (1st Cir. 2020); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014); *Turner v. Driver*, 848 F.3d 678, 688–89 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

133. When individuals are lawfully in a public place, the First Amendment protects their ability to record what their eyes can see.

134. Filming and photography by private parties on federal lands maintained by the NPS therefore constitutes expressive activity safeguarded by protections afforded to freedom of speech and freedom of the press under the First Amendment to the U.S. Constitution. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04

(9th Cir. 2018); *Glik v. Cunniffe*, 655 F.3d 78, 82–85 (1st Cir. 2011); *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012); *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259–260 (S.D.N.Y. 2019).

135. The permit requirement burdens Plaintiffs' exercise of their First Amendment freedoms.

136. Requiring a permit in advance of filming is a prior restraint. The NPS permit requirement operates as a prior restraint by requiring photographers and filmmakers to seek advance permission to film. Filmmakers also have received take-down letters from NPS officials for footage taken in national parks and have been threatened with criminal prosecution for filming without a permit.

137. Prior restraints are "the essence of censorship," *Near v. Minnesota*, 283 U.S. 697, 713 (1931), and "the most serious and the least tolerable infringement" of the First Amendment, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Such prior restraints bear "a heavy presumption against [their] constitutional validity," *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963), and nothing in the statute, or the agency's implementation of it, purports to satisfy the extraordinary justifications required for a prior restraint.

138. The NPS photography and filming permit requirements arbitrarily distinguish between "commercial" and "noncommercial" filming. The differential treatment is not based on whether the filmmakers impose the same, or differing burdens in their use of federal lands.

139. The Constitution's protection for speech does not vary based on whether it is conducted for profit. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("[T]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being . . . safeguarded by the First Amendment.").

140. Prior restraints are subject to even more rigorous scrutiny when they allow "officials to use discretion in deciding whether to allow speech" while permitting them to consider "the subject matter of the speech." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 43 (10th Cir. 2013).

141. Under the NPS permit and fee regime, government officials are empowered to consider the content and subject matter of speech when assessing whether to grant or deny a permit. The regime rests "upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1252 (10th Cir. 2000) (quoting *Staub v. City of Baxley,* 355 U.S. 313, 322 (1958)).

142. Laws that subject First Amendment freedoms to prior restraint without narrow, objective, and definite standards to guide the licensing authority, are presumptively unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). To avoid invalidation, a licensing scheme must include definite standards and must not vest officials with excessive administrative discretion. *Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992).

143. The NPS permit requirement for commercial filmmaking lacks definitive standards and vests government officials with excessive administrative

discretion. Government officials administering the system are allowed to decide arbitrarily who must get a permit, to deny permits based on their subjective judgment about what kind of filming and activities are consistent with the park's "values," to delay permitting decisions, and to provide no recourse for when permits are denied.

144. The NPS permit regime imposes unconstitutional burdens on individuals who are similarly situated in all material ways, allowing some to engage in filmmaking without a permit while imposing permit requirements on others.

145. As a result of this prior restraint, photographers, filmmakers, and videographers, including Plaintiffs, must either forgo filming altogether or risk fines and even criminal prosecution for filming without a permit.

146. This permitting requirement is particularly burdensome for filmmakers like Rienzie and Burkesmith who attempt to record matters of public concern, like speed run attempts, that do not allow for significant advance notice. Rienzie and Burkesmith were informed they must obtain a permit to film the run and then were denied a permit based on the NPS official's assessment of the content. The permit requirement therefore significantly curtails spontaneous expressive activity.

147. Filmmakers like Rienzie and Burkesmith must either apply for a permit with no guarantee that they will get one or forgo any income from their videos which undermines the purpose of filming and makes it financially unviable. Alternatively, they must risk prosecution if they proceed with commercial filming without a permit.

148. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable

injury, including the burdening of their First Amendment-protected right to take photographs and videos in public areas of the national parks.

149. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable injury, including their right to due process and equal treatment under the law.

150. The deprivation of constitutional rights is irreparable injury per se. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The harm continues every day that Rienzie and Burke are unable to publish their footage. The harm continues every day that Rienzie and Burkesmith and other NPPA members are prevented from engaging in protected First Amendment activity in national parks.

151. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that the permit requirement violates the First and Fifth Amendments both on its face and as applied Plaintiffs' expression.

152. Plaintiffs are entitled to injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), preventing Defendants from enforcing the permit requirement.

153. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their First and Fifth Amendment rights.

154. Without declaratory and injunctive relief against the permit requirement, Defendants' actions suppressing Plaintiffs' First Amendment expressive rights will continue, and Plaintiffs will continue to suffer per se irreparable harm indefinitely.

SECOND CAUSE OF ACTION
Violation of the First Amendment
(Unconstitutional Tax on Speech)
(Facial and As-Applied Challenge Against All Defendants)

155. Plaintiffs re-allege and re-incorporate the preceding paragraphs as though fully set forth herein.

156. The First Amendment protects photography and filming on public lands, including in the national parks. *See supra* ¶¶ 130–35.

157. The First Amendment prohibits imposing a tax on the exercise of First Amendment rights. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227–28 (1987); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. at 130.

158. The provisions of 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5 operate as a content-based licensing regime that prohibits commercial filmmaking, documentary filmmaking on matters of public concern, and certain still photography unless those wishing to engage in such expressive activity first secure a permit and pay a fee to the government. This establishes a government precondition to that expressive activity. Although the First Amendment permits the government to be reimbursed for the administrative costs associated with administering a regulatory program, fees on expressive activity that exceed those costs are unconstitutional. *Murdock*, 319 U.S. at 114.

159. NPS separately collects fees to cover administrative and other costs of issuing permits. The fee requirement thus goes beyond what is necessary to cover the

costs of administering the permitting process, making it an unlawful tax on a constitutional right. 43 C.F.R. § 5.8.

160. The law confirms as much, explaining that the commercial filming permit fee is justified solely as a revenue-raising measure intended to ensure "a fair return to the United States" and bears no connection to any cost or burden imposed on federal lands or on the government body that manages them. *Id.*

161. Raising revenue and providing "a fair return to the United States" is the motivating reason the commercial filmmaking permit and fee requirements were enacted.

162. Even when the "location fee" is $0 per day, or $50 per day, filmmakers and still photographers are required to pay costly, non-refundable application fees that vary but often are hundreds of dollars higher than the location fee. *Filming & Still Photography Permits*, Nat'l Park Serv., https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm (last updated Mar. 15, 2023).

163. Grand Teton National Park and other national parks have required fees and costly permit applications for still photography in national parks based on the message being communicated, even when no props or models are involved and even when that policy violates 43 C.F.R. Part 5.

164. Grand Teton National Park and other national parks have required location fees and costly film permit application fees for filmmakers to capture footage in national parks, even when those filmmakers only use handheld equipment or

handheld equipment and a tripod—both things that tourists regularly use in national parks without needing a permit.

165. These fee requirements can add significant expense to the cost of filming in national parks and can even be prohibitively expensive, significantly chilling speech for many Americans who want to film in national parks.

166. These fee requirements are particularly burdensome for independent filmmakers like Rienzie and Burkesmith for two reasons. First, their ability to film speech is contingent on weather patterns that cannot be predicted in advance, but they are nevertheless required to pay expensive nonrefundable application fees in anticipation of a filming session that may not even occur. Second, their ability to make money from their filming depends on factors outside of their control such as the success of the athlete they are filming and their ability to attract sponsors. They must therefore pay significant expenses just to get permission to film with no guarantee that they will recoup any of these expenses.

167. These same impediments to filming affect other NPPA members across the United States.

168. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable injury, including the burdening of their First Amendment-protected right to film in public areas of the national parks.

169. The deprivation of constitutional rights is irreparable injury per se. *Elrod*, 427 U.S. at 373.

170. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that NPS's permit requirement violates the First Amendment both on their face and as applied to Plaintiffs' expression.

171. Plaintiffs are entitled to injunctive relief under *Ex parte Young*, 209 U.S. at 123, preventing the Defendants from enforcing the permit requirement.

172. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing harm to their First Amendment rights.

173. Without declaratory and injunctive relief against the NPS photography and filming permit requirements, Defendants' suppression of Plaintiffs' First Amendment expressive rights will continue, and Plaintiffs will suffer per se irreparable harm, indefinitely.

THIRD CAUSE OF ACTION
Violation of the First Amendment
(Content-Based Speech Restriction)
(Facial and As-Applied Challenge Against All Defendants)

174. Plaintiffs re-allege and re-incorporate the preceding paragraphs as though fully set forth herein.

175. The First Amendment protects photography and videography on public lands, including in the national parks. *See supra* ¶¶ 130–35.

176. The First Amendment "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citation omitted).

177. Content-based restrictions of speech, particularly those enforced by criminal penalties, are presumptively unconstitutional and "have the constant

potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

178. "[R]egulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811 (2000).

179. The provisions of 54 U.S.C. § 100905 require an advance permit and payment of fees for all "commercial motion picture photography" but impose no such requirements on filming it labels non-commercial.

180. The Act and implementing rules are content-based in three ways: First, they impermissibly impose the permitting regime based on the speaker's profit motivation. *See, e.g.*, *Joseph Burstyn, Inc.*, 343 U.S. at 501; *Sorrell*, 564 U.S. at 564–66; *see also Aptive Env't LLC v Town of Castle Rock*, 959 F.3d 961, 983 (10th Cir. 2020). Second, the implementing regulations require an advance permit and payment of fees for commercial filming but not for news-gathering conducted by the "news media" even if conducted by commercial enterprises. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). Third, in applying the law, the NPS requires and denies permits based on the message being communicated. An NPS official stated that Rienzie and Burkesmith were only denied their permit because they were filming an FKT attempt.

181. To determine whether the news gathering exemption applies, Defendants must look at both the speech (whether it is "news") and the speaker

(whether the speaker is part of the "news media"). *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993). Park officials have unbounded discretion to decide whether a given event is sufficiently newsworthy to qualify for a permit exemption, whether the photographer in any particular case qualifies as a "member of the news media," and whether the request is consistent with the park's "values."

182. Content-based speech restrictions are unconstitutional unless they can satisfy strict scrutiny. *Reed*, 576 U.S. at 164, 169; *Sorrell*, 564 U.S. at 573–74, 577–78. "A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165 (citation omitted).

183. Under the First Amendment, content-based restrictions are "presumed invalid" and "the Government bears the burden of showing their constitutionality." *Ashcroft*, 542 U.S. at 660 (citations omitted). The government must prove the law is "narrowly tailored to promote a compelling Government interest," meaning it must directly advance the stated interest and be neither overinclusive nor underinclusive, and no "less restrictive alternative would serve the Government's purpose." *Playboy Entm't Grp.*, 529 U.S. at 813.

184. The NPS photography and filming permit requirements cannot satisfy strict scrutiny.

185. The government's stated purpose in placing the additional requirements on "commercial" filming is to get the government a cut of the proceeds and generate

revenue which is not tied to any burden that the expressive activity has on public lands.

186. Taxing the exercise of First Amendment rights is not a legitimate governmental interest.

187. The NPS photography and filming permit requirements are not narrowly tailored to further any compelling interest in protecting park lands and resources. They are both underinclusive and overinclusive.

188. The NPS photography and filming permit requirements do not advance any governmental interest. The permit requirement turns on whether the speech is "commercial" or whether it can be classified as "newsgathering," rather than on any impact on park resources. It allows expressive activities without a permit that have an equal impact on park resources.

189. The permit requirement is not tailored to further the preservation of park resources. For instance, two people could be taking a video on a cellphone at the same location at a National Park, each filming the same scenic vista or event, but one will need a permit and the other not based solely on how they intend to use the video.

190. NPS also is vested with unbridled discretion to enforce the permit and fee requirements if a filmmaker later changes his use for the video. A park visitor with no present intent to use a film commercially, and therefore no obligation to obtain a permit, may later become subject to the rules if he posts the film on a monetized website or otherwise profits from its use. Nothing in the law or

implementing rules limits such post facto enforcement. Yet NPS employees have ordered photographers to take images down.

191. The law does not employ the least restrictive means because it requires for-profit filmmakers to get a permit no matter how small their impact on park resources.

192. A less restrictive alternative is feasible as demonstrated by the more narrowly tailored interim guidance that the NPS adopted after the district court's *Price* decision. *See supra* ¶¶ 58–66.

193. The NPS did not report any adverse impact on park resources or on the visitor experience in national parks during the time when the interim guidance was in effect.

194. The Act and implementing rules likewise cannot satisfy intermediate scrutiny because they were not adopted to serve an important governmental interest and are not narrowly tailored to achieve that interest. *See Berger v. City of Seattle*, 569 F.3d 1029, 1043 (9th Cir. 2009); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981).

195. The Act and implementing rules cannot satisfy any level of First Amendment scrutiny because the law is arbitrary, irrational, and unreasonable. There is no rational basis for treating two filmmakers with identical equipment differently based solely on the message to which they will attach their video, and taxing the exercise of constitutional rights is not a legitimate government interest.

196. The permit and fee regime also fails constitutional scrutiny as applied to Plaintiffs. Even though Rienzie and Burkesmith are filming newsworthy speed runs, they are denied permits to film in Grand Teton National Park because they want to use their footage in a documentary rather than on the evening news. This arbitrary content-based distinction fails any level of scrutiny when applied to Rienzie and Burkesmith's speech.

197. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable injury, including the burdening of their First Amendment-protected right to take photographs and videos in public areas of the national parks.

198. The deprivation of constitutional rights is irreparable injury per se. *Elrod*, 427 U.S. at 373.

199. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that the NPS photography and filming permit requirements violate the First Amendment both on their face and as applied to Plaintiffs' expression.

200. Plaintiffs are entitled to injunctive relief under *Ex parte Young*, 209 U.S.at 123, preventing Defendants from enforcing the permit requirement.

201. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their First Amendment rights.

202. Without declaratory and injunctive relief against 54 U.S.C. § 100905 and the NPS photography and filming permit rules, Defendants' actions that

suppress Plaintiffs First Amendment expressive rights will continue, and Plaintiffs will suffer per se irreparable harm indefinitely.

FOURTH CAUSE OF ACTION
Violation of the First Amendment
(Overbreadth)
(Facial Challenge Against All Defendants)

203. Plaintiffs re-allege and re-incorporate the preceding paragraphs as though fully set forth herein.

204. A regulation violates the First Amendment for overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quotations and citations omitted).

205. The provisions of 54 U.S.C. § 100905, 43 C.F.R. part 43, and 36 C.F.R. § 5.5 prohibit a substantial amount of protected expression. They prohibit filming on federal lands for "commercial" purposes unless the speaker first obtains a permit and pays a fee, regardless of the burden or costs—if any—that the filming imposes on the site, or on the governmental unit charged with managing it.

206. The statute does not define "commercial filming," and the regulations define it based only on whether material filmed is intended for "a market audience" with the "intent of generating income" while at the same time excluding newsgathering (even if conducted by commercial entities) and most photography.

207. The fee and permit requirements apply to a vast number of individuals who wish to photograph or video in national parks and lack *any* legitimate sweep insofar as their underlying interest is imposing a tax on the exercise of constitutional

rights. They also sweep far beyond any interest in protecting the national parks from damage.

208. The permit and fee requirements apply to a vast array of speech that has no greater impact on federal lands and/or the administration of them than other filmmaking activity not covered by the requirements.

209. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable injury, including the burdening of their First Amendment-protected right to take photographs and videos in public areas of the national parks.

210. The deprivation of constitutional rights is irreparable injury per se. *Elrod*, 427 U.S. at 373.

211. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that NPS's photography and filming permit requirements violate the First Amendment both on their face and as applied to Plaintiffs' expression.

212. Plaintiffs are entitled to injunctive relief under *Ex parte Young*, 209 U.S. at 123, preventing Defendants from enforcing the permit requirement.

213. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their First Amendment rights.

214. Without declaratory and injunctive relief against NPS's photography and filming permit requirements, Defendants' actions that suppress Plaintiffs First

Amendment expressive rights will continue, and Plaintiffs will suffer per se irreparable harm indefinitely.

FIFTH CAUSE OF ACTION
Violation of the Fifth Amendment
(Due Process)
(Facial Challenge Against All Defendants)

215. Plaintiffs re-allege and re-incorporate the preceding paragraphs as though fully set forth herein.

216. The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law." U.S. Const. Amend. V.

217. Plaintiffs have a liberty interest in filming and photographing in the national parks.

218. Under the NPS permit and fee regime, government officials are empowered to determine whether to grant or deny a permit based on their own arbitrary discretion and without being subject to narrow, objective, and definitive standards. *See supra* ¶¶ 141-43.

219. Under the NPS permit and fee regime, government officials can delay responding to a permit request and are not required to respond based on any fixed deadlines.

220. Under the NPS permit and fee regime, there is no effective recourse for when permits are denied.

221. As shown by the denial of Burkesmith's application, a permit denial may be categorical, excluding a whole content category of photography and videography indefinitely and without any recourse.

222. As shown by the denial of Burkesmith's application, NPS denies permits based solely on the content of what the filmmaker or videographer is documenting even if the activity itself is permissible.

223. Given the broad and sweeping nature of the deprivation of rights and the potential for criminal sanctions for disregarding the NPS's permitting decisions, the NPS permitting scheme falls far short of the requirements of the Due Process Clause.

224. As a direct and proximate cause of the NPS photography and filming permit requirements, Plaintiffs have suffered and continue to suffer irreparable injury, including the burdening of their Fifth Amendment right against being deprived of their liberty interest in taking photographs and videos in public areas of the national parks without due process of law.

225. The deprivation of constitutional rights is irreparable injury per se. *Elrod*, 427 U.S. at 373.

226. In addition, Plaintiffs suffer irreparable harm that cannot be remedied through money damages including being deprived of the opportunity to record and capture once-in-a-lifetime events such as record-breaking speed-runs and facing threats of criminal prosecution if they choose to film without a permit or publish that film.

227. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that the permit requirement violates the Fifth Amendment both on its face and as applied to Plaintiffs' expression.

228. Plaintiffs are entitled to injunctive relief under *Ex parte Young*, 209 U.S. at 123, preventing Defendants from enforcing the permit requirement.

229. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their First Amendment rights.

230. Without declaratory and injunctive relief against the permit requirement, Defendants' actions and suppressing Plaintiffs' First Amendment expressive rights will continue, and Plaintiffs will suffer per se irreparable harm indefinitely.

SIXTH CAUSE OF ACTION
Violation of the First and Fifth Amendments
(Due Process - Vagueness)
(Facial Challenge Against All Defendants)

231. Plaintiffs re-allege and re-incorporate the preceding paragraphs as though fully set forth herein.

232. Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution statutes must be invalidated if they are so impermissibly vague that an ordinary person would not understand what conduct the statute prohibited, or are so standardless as to invite arbitrary enforcement.

233. The unconstitutionality of a vague statute is aggravated when it operates to inhibit constitutional rights and First Amendment freedoms. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

234. 43 C.F.R. § 5.12 defines "videography, television broadcasts, or documentary or similar projects" as "commercial" but those types of films also fit the definition of "news-gathering activities" because they involve filming and videography that "gathers information of potential interest to a segment of the public" by a videographer who, uses [their] editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." When addressing the issue of whether NPS would charge Rienzie and Burkesmith, an NPS official revealed that the vague nature of "commercial" use makes it "hard for our rangers nationally to enforce what's commercial, what's not."

235. Without declaratory and injunctive relief against NPS's photography and filming permit requirements, the vague differences between commercial filming and photography and non-commercial filming and photography will continue to suppress Plaintiffs First Amendment rights, and Plaintiffs will continue to suffer per se irreparable harm indefinitely.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants and issue the following relief:

A. Declare that photography and videography in the national parks and other federal lands are protected expression under the First Amendment to the U.S. Constitution.

B. Declare that the permit and fee requirements of 54 U.S.C. § 100905 and 36 C.F.R. § 5.5 are unconstitutional on their face because they require every person who wishes to engage in commercial filming to obtain a permit and pay a fee before filming on federal land administered by the NPS.

C. Declare that the permit and fee requirements of 54 U.S.C. § 100905 and 36 C.F.R. § 5.5 are unconstitutional as applied to Plaintiffs.

D. Declare that Section 5.2 of 43 C.F.R. Part 5 is an unconstitutional prior restraint on its face because it requires all commercial filmmakers to obtain a permit before they can film on National Park Service-controlled land.

E. Declare that Section 5.2 of 43 C.F.R. Part 5 is an unconstitutional prior restraint as applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

F. Declare that Section 5.8 of 43 C.F.R. Part 5 is an unconstitutional tax on speech.

G. Declare that Section 5.12 of 43 C.F.R. Part 5 is facially unconstitutional because it discriminates based on content.

H. Declare that Section 5.12 of C.F.R. Part 5 is unconstitutional as applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

I. Declare that Sections 5.5 and 5.6 of 43 C.F.R. Part 5 are facially unconstitutional because they grant arbitrary discretion to government officials to determine whether a permit should be required or denied.

J. Declare that Sections 5.5 and 5.6 of C.F.R. Part 5 are unconstitutional as applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

K. Declare that Section 5.9 of 43 C.F.R. Part 5 is facially unconstitutional because it fails to set a time limit for responses to permits and gives park officials arbitrary discretion to shut down spontaneous speech.

L. Declare that Section 5.9 of 43 C.F.R. Part 5 is unconstitutional as applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

M. Declare that permit and fee requirements that flow from the definitions in Section 5.12 C.F.R. Part 5 are facially unconstitutional because the definitions are impermissibly vague.

N. Declare that permit and fee requirements that flow from the definitions in Section 5.12 C.F.R. Part 5 are unconstitutional as applied to low-impact videography, television broadcasts, documentary filmmaking, or "similar projects" because the definitions are impermissibly vague.

O. Preliminarily and permanently enjoin Defendants from enforcing the permit and fee requirement of 54 U.S.C. § 100905 and 36 C.F.R. § 5.5 facially and as-applied to filming conducted in areas where the public is allowed and where filming by tourists or news-gatherers or analogous non-commercial filming are permitted.

P. Preliminarily and permanently enjoin Defendants from enforcing Section 5.2 of 43 C.F.R. Part 5 facially and as-applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

Q. Preliminarily and permanently enjoin Section 5.8 of 43 C.F.R. Part 5 as an unconstitutional tax on speech both facially and as-applied to Plaintiffs' permit requests.

R. Preliminarily and permanently enjoin Defendants from enforcing Sections 5.12 of 43 C.F.R. Part 5 facially and as-applied to filming conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

S. Preliminarily and permanently enjoin Defendants from enforcing Sections 5.5 and 5.6 of 43 C.F.R. Part 5 facially and as-applied to filming and still photography conducted in areas where news-gathering activities or analogous non-commercial filming and still photography are permitted.

T. Preliminarily and permanently enjoin Defendants from enforcing Section 5.9 of 43 C.F.R. Part 5 facially and as-applied to filming and still photography conducted in areas where news-gathering activities or analogous non-commercial filming are permitted.

U. Preliminarily and permanently enjoin Defendants from ordering photographers or filmmakers to take down photographs and videos.

V. Preliminarily and permanently enjoin Defendants from requiring permits from still photographers and filmmakers capturing images and video in areas where the public is generally allowed if they don't use models or props as defined in section 5.12 of 43 C.F.R. Part 5.

W. Award reasonable attorneys' fees and costs under 28 U.S.C. § 2412(b) and any other applicable law; and,

X. Award all other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

In compliance with Federal Rule of Civil Procedure 38, Plaintiffs demand a trial by jury on all issues so triable.

Dated: December 18, 2024

Respectfully Submitted,

/s/ Mark V. Jackowski

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**Pro Hac Vice* Motions Forthcoming

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