No. 22-665

In The
Supreme Court of the United States

GORDON M. PRICE,

Petitioner,

v.

MERRICK GARLAND, ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTION(S) PRESENTED

1. Whether filmmaking is "communicative activity" protected by the First Amendment or merely "a noncommunicative step in the production of speech" subject to a diminished level of constitutional scrutiny?
2. Whether First Amendment protections in public forums can be diluted by disaggregating the constituent parts of expressive activities and applying diminished constitutional scrutiny to information gathering?
3. Whether requiring commercial filmmakers to obtain a permit and pay a fee to film on public lands without regard to their impact on public property violates the First Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Novak* v. *Parma*, No. 22-293 (Oct. 28, 2022); Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021). After defending core civil liberties at our nation's colleges and universities for more than two decades, *amicus* FIRE recently expanded its mission to protect free expression beyond campus as well.

FIRE has a direct interest in this case because the D.C. Circuit panel majority's novel and misguided analysis below threatens a broad swath of expressive activity on federally regulated public land, and potentially beyond. Those whom FIRE represents

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, *amicus* certifies that counsel for each party received timely notice of *amicus* FIRE's intent to file this brief.

routinely face unconstitutional regulation and retaliation for their expressive acts on public land, both on and off campus. FIRE files this brief in support of Petitioner to elaborate on the speech-chilling consequences that will result should the D.C. Circuit's disaggregation test be allowed to stand.

SUMMARY OF ARGUMENT

The D.C. Circuit's novel disaggregation of the steps involved in expression opens the door to less stringent review of government regulation precisely where speech has historically been at its freest: our public lands. The panel majority's opinion hacks off the finished product of any speech endeavor—in this case, a finished film—from the expressive work that went into creating it. The majority then declares that only this final speech product receives full First Amendment protection, even when created in a traditional public forum, and subjects all preceding steps in content creation to substantially lower level "reasonableness" review.

The practical implications are chilling. A modern-day Henry David Thoreau would enjoy full First Amendment protection only when publishing his own *Walden*, not when heading into the woods to actually write it. Ansel Adams would enjoy full First Amendment protection only when exhibiting his famous National Park photos, not when actually taking them. And in a less poetic but more contemporary example, an Instagram "van life" influencer could be criminally prosecuted for taking a selfie video in Yellowstone without first securing a permit and paying a fee, just because she later uploaded it online and received ad revenue for views.

This is not just a national park problem. On any public land governed by the D.C. Circuit, and on any public land in other Circuits that choose to adopt the panel majority's test, government officials will be able to impose content-based burdens on expressive activity that precedes publication with very few restrictions. For example, public college and university campuses include public fora where students have First Amendment rights, including to gather information and take photos and video. School administrators already try to suppress those rights, particularly student reportage, even though the First Amendment precludes doing so. If the D.C. Circuit's disaggregation test is allowed to stand, it will provide a blueprint to sanction these censorship attempts.

Our national parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). In these invaluable American spaces—our "quintessential public forums"—expressive activity should enjoy more First Amendment protection, not less. *Perry Educ. Ass'n* v. *Perry Educators' Ass'n*, 460 U.S. 37, 45 (1983).

This Court's review of the D.C. Circuit panel majority's novel, misbegotten rule of First Amendment law is urgently needed not only due to the Circuit split it creates, but for reasons eclipsing it. Because the panel upheld a statute and rules that apply to all federal lands, the panel's misarticulation of First Amendment principles will creep into federal law even in Circuits where the constitutional rule differs for non-federal public fora. Only this Court can

restore the correct constitutional standard and properly protect expressive activity from start to finish.

ARGUMENT

I. This Court Should Grant Review to Protect Expressive Activity In Public Parks and Resolve a Circuit Split.

A. By disaggregating speech from the activities that went into creating it, the D.C. Circuit's test leads to results inconsistent with the First Amendment.

The legal rationale employed by the D.C. Circuit in this case warrants review because it substantially lowers the First Amendment bar for those engaged in expressive activity on public land if they are not directly "speaking" to their audience in real time. The decision mistakenly disaggregates directly communicative speech from the expressive acts that precede communication. The whole of the expressive endeavor has always enjoyed full First Amendment protection, and the jurisprudence was unanimous in that regard until the D.C. Circuit panel majority's decision in this case. Absent this Court's review, this new disaggregation approach will have speech-chilling implications far beyond the imposition of permitting or fee requirements.

The majority opinion below addressed whether the permit-and-fee regime for commercial filming on federal lands violates the First Amendment. *Price* v. *Garland*, 45 F.4th 1059, 1064 (D.C. Cir. 2022). The

primary focus was whether, where national parks include traditional public fora, the content-based statute and regulations should have to withstand strict scrutiny, or rather, be "examined only for reasonableness" despite regulating public lands. *Id.* at 1067, 1068 (quoting *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990)). The majority held that the less demanding reasonableness standard governs because the act of filming "involves merely a noncommunicative step in the production of speech." *Id.* at 1068.

To justify this framework, the majority claimed to take a historical approach by examining the evolution of forum analysis from *Hague* to *Perry* and *Perry*'s progeny. *Price*, 45 F.4th at 1069–70. In its view, "every single Supreme Court case from *Perry* onward in which the application of forum analysis was at issue involved communicative activity," leading the majority to conclude that "forum analysis applies only to communicative activities." *Id.* at 1070. As such, the court continued, "filmmaking, like typing a manuscript, is not itself a communicative activity; it is merely a step in the creation of speech that will be communicated at some other time, usually in some other location." *Id.* By attempting to separate the finalized, published work from the expressive activity that created it, the Circuit slices speech too thin.

This analysis finds scant support in longstanding precedent. The D.C. Circuit neglected to consider other Supreme Court cases, including post-*Perry*, that applied strict scrutiny to steps preceding the creation of a finished work of expression. For example, just one month after *Perry*, the Court decided *Minneapolis Star & Tribune Company* v. *Minnesota Commissioner*

of Revenue, in which it invalidated under the First Amendment a special tax on newspaper ink, because the tax "singled out the press for special treatment." 460 U.S. 575, 582 (1983). The purchase of ink, clearly, is not a communicative act. Nonetheless, the Court held the tax was unconstitutional "unless the burden is necessary to achieve an overriding governmental interest," which the Court held was not met by the state's desire to raise revenue. *Id.* Notably, that is the same interest behind the statute and regulations here. *Price*, 45 F.4th at 1072. And in *Citizens United* v. *Federal Election Commission*, when opining on the government's ability to regulate distribution of a political film, this Court noted that "[t]he First Amendment underwrites the freedom to experiment *and to create* in the realm of thought and speech." 558 U.S. 310, 372 (2010) (citation omitted) (emphasis added). In that decision, this Court recognized a truth that the D.C. Circuit ignored: "Laws enacted to control or suppress speech may operate at different points in the speech process." *Id.* at 336.[2] If the D.C. Circuit's decision stands, Petitioner and the many Americans who take to our shared federal lands for creative inspiration will understand the biting accuracy of that observation all too well.

By applying only "reasonableness" review to so-called non-communicative activities like filmmaking, the D.C. Circuit's test substantially lowers the bar to

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[2] See also, *e.g.*, *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects editorial decision-making regarding the size and content of a publication); *LaRouche* v. *Nat'l Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (reading *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), as creating a limited reporter's privilege for notes and sources)).

regulate a wide swath of First Amendment activity. Whereas strict scrutiny requires that the government "adopt the least restrictive means of achieving a compelling state interest," *Americans for Prosperity Foundation* v. *Bonta*, 141 S. Ct. 2373, 2383 (2021) (cleaned up), reasonableness requires only that a speech restriction be "reasonable and viewpoint neutral." *Price*, 45 F.4th at 1068. By the panel majority's logic, all acts of filming, photography, note-taking, writing, or painting in a national park (or any other traditional public forum) could be regulated, fined, taxed, or even precipitate criminal charges so long as the justification was "reasonable." This expansive power to regulate expressive activity preceding publication is sharply at odds with long-standing First Amendment jurisprudence. *See* Pet. Cert. at 17.

Judge Tatel's dissent explained this pointedly. He noted that "for the very first time," the majority opinion "disaggregate[s] speech creation and dissemination, thus degrading First Amendment protection for filming, photography, and other activities essential to free expression." *Price*, 45 F.4th at 1082 (Tatel, J., dissenting). Judge Tatel emphasized the incongruity of providing the strictest First Amendment protection to only a small sliver of expressive activity, explaining that: "My colleagues reimagine the public forum to protect the stumping politician but not the silent photographer, to shield the shouting protester but not the note-taking reporter." *Id.* at 1081. This meager conception of First Amendment protection cannot stand.

B. This Court should grant review to resolve the split the D.C. Circuit has created with every other Circuit to address speech creation.

The D.C. Circuit is not the first court to address whether speech creation activities receive the same levels of First Amendment protection as speech itself. But the D.C. Circuit *is* the first to answer that question in the negative. Indeed, the unanimity of other circuits speaks volumes and underscores the need for this Court to grant review.

For example, the Eighth Circuit applied strict scrutiny to a content-based restriction on taking photos and recording in a public park in Bloomington, Minnesota. *Ness* v. *City of Bloomington*, 11 F.4th 914 (8th Cir. 2021). There, the city threatened a citizen journalist with a misdemeanor charge for filming minors in a municipal park without parental consent in violation of a city ordinance. *Id.* at 919. Her purpose in filming was to prove that a nearby family center and affiliated school were using the park improperly and in violation of their city permits. *Id.* at 918–19. She regularly posted her concerns, including pictures and video, on Facebook and on her internet blog. *Id.* at 919.

The Eighth Circuit acknowledged the journalist's acts of photography and recording were simply "step[s] in the 'speech process,'" like the videography at issue in *Price*. *Id.* at 923. It nevertheless held that they were still "speech protected by the First Amendment." *Id.* The court's reasoning: Those acts were "an important stage of the speech process that ends with the dissemination of information about a

public controversy." *Id.* As such, and because the photography and filming took place in a public park (a traditional public forum), the city ordinance was subject to strict scrutiny even though it didn't directly regulate a final speech product—her Facebook and blog posts. *Id.* at 923–24.

Similarly, the Ninth Circuit has held in a string of cases dating back more than a decade that there is no "distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Anderson* v. *City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (emphasis in original). Relying on this logic, that court has held the "First Amendment protects the right to photograph and record matters of public interest." *Askins* v. *U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). Accordingly, the Ninth Circuit ruled that a Customs and Border Patrol policy banning photographing and recording of CPB officers may violate the First Amendment when applied to photos and videos taken in a traditional public forum (a public pedestrian bridge). *Id.*

Likewise, circuits around the country have held that strict or intermediate scrutiny applies to government restrictions on the filming and photography of police officers in the line of duty when those activities occur in a public forum, such as on a public road. In so holding, those courts have relied upon the same First Amendment analysis as used by the *Ness*, *Anderson*, and *Askins* courts: "It is firmly established that the First Amendment's aegis . . . encompasses a range of conduct related to the gathering and dissemination of information." *Glik* v. *Cunniffe*, 655 F.3d 78, 82 (1st

Cir. 2011) (bystander arrested for recording perceived police brutality in a public park); *accord Fields* v. *City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (protestor harassed and detained for filming police in a public convention center and bystander harassed, arrested, and detained for filming police from a public sidewalk); *Turner* v. *Driver*, 848 F.3d 678 (5th Cir. 2017) (citizen handcuffed and arrested for filming police from a public sidewalk); *Am. C.L. Union of Ill.* v. *Alvarez*, 679 F.3d 583 (7th Cir. 2012) (ACLU challenge to eavesdropping statute banning them from recording police to promote "police accountability"); *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (YouTube journalist harassed for filming a DUI traffic stop); *Smith* v. *City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (similar). The D.C. Circuit's disregard for this long line of cases affirming First Amendment protections for all steps in the expressive process further highlights the need for this Court's review.

II. Absent This Court's Review, Free Speech Will Suffer On All Public Lands, Including University Campuses

The D.C. Circuit's disaggregation test is not just a public parks problem—it applies to all traditional public fora that fall under the D.C. Circuit's jurisdiction. It arguably also applies to all federal lands *outside* the D.C. Circuit that are subject to the statute and rules the panel majority upheld in this case. Moreover, if the test is allowed to stand and other Circuits follow suit, it has potential to chill freedom of expression for a wide variety of public fora, including at our nation's public colleges and universities.

Among the current generation, college students predominantly gather and disseminate campus news by taking photos and videos with smartphones. If subjecting those "noncommunicative steps in the production of speech" to lesser First Amendment scrutiny means schools can more readily restrict or ban them, speech creation on campus is in great peril.

This is not speculative: Several public colleges and universities have already attempted to ban or restrict recording and newsgathering on campus. For example, in 2010, the University of Central Florida established a "free press zone" for student reporters at KnightNews.com, a student-run online newspaper. *See FIRE Letter to UCF President John C. Hitt*, FIRE (Feb. 24, 2010), https://www.thefire.org/research-learn/fire-letter-ucf-president-john-c-hitt [perma.cc/JTR9-XK8R]. Student reporters with that publication—but not a separate student publication, the *Central Florida Future*—were threatened by school officials with possible arrest if they left a designated free speech zone to videotape or report on a Student Government Association election. *Id.* Similarly, at Los Angeles City College (LACC), after receiving negative press coverage in the school's student newspaper the *Collegian*, the college president repeatedly attempted to ban or restrict student journalists from recording public town hall meetings or publishing video and photos taken from public areas of campus. *See* Letter from Student Press Law Center, to Mona Field, President, LACC District Board of Trustees (Jan. 15, 2010), https://www.thefire.org/sites/default/files/pdfs/aec3c44d808b510efde0cb013a7100dc.pdf [perma.cc/V2HX-PDSV]. And at Sinclair Community College, a student journalist setting up his camera in a school courtyard to record man-on-the-street interviews with

students was ordered to leave by campus police. *See* David Esrati, *1st Amendment optional at Sinclair Community College*, The Esrati Report (Jan. 10, 2012, 8:45 PM), https://esrati.com/1st-amendment-optional-at-sinclair-community-college/7863 [perma.cc/V524-5P35].

Nor do public college administrators limit their overreach to student journalists. In a particularly ironic case at Jones County Junior College, university administrators targeted expressive activity on a "free speech ball." *Brown* v. *Jones Cnty. Junior Coll.*, 463 F. Supp. 3d 742, 748 (S.D. Miss. 2020). After leaders of the campus chapter of Young Americans for Liberty invited passing students to write messages on the oversized beach ball on the campus quad, that was later kicked around on the lawn in front of the administrative building, administrators directed the campus chief of police to "handle" the situation, which resulted in the students being threatened with arrest and an ongoing pattern of harassment. *Id.* at 748–49. In *Brown*, the power of the "free speech ball" was not the final product of the endeavor—a scrawled-on beach ball displayed before a campus building—but the process of inviting students to contribute to it, and using that invitation as a parley into discussing and advertising the club's free speech values to potential members. Stopping that process before it began would have rendered the entire exercise moot.

Under the current speech creation-protective legal regimes in place in at least the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, *see supra* Section I.B, the administrators' actions in each of these cases would be held unconstitutional under the First Amendment. But if a

court applied the D.C. Circuit's disaggregation test to any of these facts, it would be free to uphold administrators' attempts to target student speech creation within on-campus public fora. This Court should grant review to stop the D.C. Circuit panel majority's framework from permitting the addition of this new tool to university administrators' overused censorship toolbox.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari*.

February 21, 2023

Respectfully Submitted,

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