UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GORDON M. PRICE, Plaintiff, v. WILLIAM P. BARR, U.S. Attorney General, et al., Defendants.	)	Civil Action No. 19-3672 (CKK)

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND OPPOSITION TO PLAINTIFF'S CROSS MOTION

Defendants, William P. Barr, U.S. Attorney General, and others, respectfully file this reply in support of their motion for judgment on the pleadings (ECF No. 18) and opposition to Plaintiff's cross motion (ECF No. 19). Plaintiff brings a facial challenge based on the First Amendment to a statute and its implementing regulations governing commercial filmmaking in national parks. Plaintiff's nonspecific intention to film again at some point in the future is insufficient to establish standing to sue. But even if he established standing, and conceding that the filming activities at issue were expressive conduct, and the filming did not occur in a public forum, but in a limited-purpose public forum and therefore, the permit and fee requirements need only be reasonable and not favor a particular viewpoint in order to pass constitutional scrutiny. Plaintiff does not challenge the viewpoint issue and the permit and fee requirements easily pass reasonability review. Alternatively, even if the public forum framework did not apply, the permit requirement would still be subject only to intermediate scrutiny, either because the restrictions apply to commercial activity or because they are content neutral, or both. Because the permit and fee requirements pass intermediate scrutiny, the Court should uphold them. Plaintiff's remaining constitutional challenges lack merit.

Argument

I. Plaintiff Lacks Standing to Sue.

As Defendants argued in their opening brief, "[t]o establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a sufficient "causal connection between the injury and the conduct complained of, and (3) a likel[ihood] that the injury will be redressed by a favorable decision." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58 (2014) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The case law is clear that for plaintiffs who "seek forward-looking injunctive relief, past injuries alone are insufficient to establish standing" and they must show "that they face an imminent threat of future injury." In re Navy Chaplaincy, 697 F.3d 1171, 1175 (D.C. Cir. 2017).

Here, Plaintiff has failed to establish a sufficient injury in fact. Plaintiff's professed risk of future harm is too speculative because his intentions are too diffuse, particularly in light of the nature of the undertaking at issue here—filming a commercial movie. He claims only that he has "scouted locations that included the Yorktown Battlefield and the Manassas National Battlefield" and that he has not filmed there out of concern for the permit and fee requirements. Compl. ¶ 54.[1] This is comparable to the sort of "some-day" aspirations that the Supreme Court rejected as insufficient in Lujan, in which plaintiffs alleged that they intended to travel to the same place they had been to before to observe the habitat of endangered species:

> And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

[1] The Complaint, ¶ 54, describes these intentions in the past tense, reporting them to have been Plaintiff's position at the time of the criminal case.

504 U.S. at 564. By contrast, many cases have found standing where the plaintiff alleged an intention to engage in conduct likely to result in governmental sanction, but the conduct in those cases was more clearly defined and the plaintiffs demonstrated indicia of commitment or likelihood, such as continuing a course of conduct or engaging in concrete logistical planning. See, e.g., Susan B. Anthony List, 573 U.S. at 158 (finding plaintiff had standing where state law banned certain false statements in political campaigns and plaintiff alleged an intention to continue making similar statements).

Plaintiff's alleged future intention is insufficient in this case. For example, he does not specify that he seeks to engage in commercial filming, as defined by DOI regulations, in a location that is not a public forum, and what was involved in his "scouting" locations. His opening brief here (ECF No. 20) does little to fill in these details. Instead, he selectively cites case law to suggest that the standard for Article III standing is lower in the First Amendment context and he reminds the Court that the government attempted to prosecute him the first time he engaged in commercial filming, even though it later dropped the case.

Plaintiff still fails to establish standing. Plaintiff relies heavily on Woodhull Freedom Found. v. United States, 948 F.3d 363, 373 (D.C. Cir. 2020), and argues that it establishes the standard that a plaintiff need only "allege[] 'some desired conduct … that might trigger an enforcement.'" ECF No. 20 at 7. In fact, Woodhull confirms the same standards reflected in Defendants' opening brief:

> Pre-enforcement review is permitted where the threatened enforcement of a law is "sufficiently imminent." Susan B. Anthony List, 573 U.S. at 159. "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." Id. at 158. Rather, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.

948 F.3d at 370. The plaintiffs in Woodhull whose claims survived the challenge to their Article III standing were actively running a website that, in their reasonable view, would run afoul of the recently enacted statutory ban on promoting sex trafficking. See id. at 372 ("Andrews' intended future conduct involves speech. Andrews operates a website that allows sex workers to share information.").[2] That is, Andrews was continuing to engage in conduct that the statute apparently proscribed. Here, by contrast, there is no such allegation about Plaintiff's current conduct, nor anything beyond a vague effort at scouting that would show concrete steps in planning his future plans that might take his allegations beyond the "some day" aspirations held insufficient in Lujan.

Plaintiff stresses the fact that the government attempted to prosecute him, but the case law requires more than simply a non-zero possibility of prosecution. It requires a showing of a credible threat. In Susan B. Anthony List, the government initially attempted to enforce a statute governing political campaigns, and its attempt was halted only by the mooting of the issue due to the election taking place. That was not sufficient to show standing and the plaintiff was required

[2] Andrews' operation was extensive and ongoing:

> Andrews founded a sex worker-led, community forum called Rate That Rescue. Compl. ¶¶ 105–06. Rate That Rescue operates as a ratings and review website, hosting content created by both organizations that provide services to sex workers and the sex worker community. Compl. ¶ 106. Rate That Rescue allows sex workers to share information about products or services that they commonly use, such as payment processors, like PayPal. Compl. ¶ 109. Such discussions may, for example, facilitate prostitution by providing sex workers and others with tools to ensure the receipt of payment for sexual services. Because Andrews has alleged that she intends to host such discussions on her website, her intended conduct is arguably proscribed by FOSTA. And because Rate That Rescue has thousands of users, Compl. ¶ 116, Andrews' intended conduct is also arguably proscribed by the aggravated offense provision. See 18 U.S.C. § 2421A(b)(1) ("promotes or facilitates the prostitution of 5 or more persons").

948 F.3d at 372.

to show the likelihood of future activities described above. By contrast here, the attempted prosecution was dropped voluntarily. The burden remains on Plaintiff to show a "credible threat of prosecution" in order to sustain a pre-enforcement challenge. See 571 U.S. at 159. The case law does not establish that once the government began a prosecution, even if it voluntarily dropped it, Plaintiff need not make any showing regarding his future conduct. Plaintiff retains the burden of showing future conduct with sufficient specificity to meet the standards in Lujan and Susan B. Anthony List. Despite now being challenged, Plaintiff has failed to show anything more than a vague hope to film again in National Park land. That is insufficient to support standing even in a First Amendment case.

II. The Permit and Fee Requirements Should be Upheld Under Reasonableness Test.

A. In a Limited Public Forum, the Court Should Apply the Test of Reasonableness and Viewpoint Neutrality.

The case law is clear that the Court's analysis begins with the selection of the correct forum. See, e.g., Archdiocese of Washington v. WMATA, 897 F.3d 314, 321 (D.C. Cir. 2018) ("The Supreme Court recently reaffirmed its 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property.") (quoting Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018) (quoting Int'l Soc. For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992))); Oberwetter v. Hilliard, 639 F.3d 545, 551-52 (D.C. Cir. 2011). Plaintiff cites a single district court opinion from outside this jurisdiction to argue that forum analysis is inappropriate (ECF No. 20 at 13), but that suggestion is contrary to the clear weight of authority, including many of the cases that Plaintiff relies upon, such as Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Boardley v. DOI, 615 F.3d 508, 514 (D.C. Cir. 2010); and Air Line Pilots Ass'n v. Dep't of Aviation, City of Chicago, 45 F.3d 1144 (7th Cir. 1995).

Plaintiff's stronger argument is that the parkland at issue here should be treated as a "limited-purpose public forum," based on the government's encouragement of photography on park lands generally, to include the park at issue here. ECF No. 20 at 14-18. Defendants concede that, for purposes of this motion, the Court should treat the park land used by Plaintiff for his filming here as a limited-purpose public forum.[3] Nevertheless, this results in only a slight (and here immaterial) modification of the test originally posited by Defendants: instead of the test looking only at whether the restrictions are reasonable, the Court should also ascertain whether they are viewpoint neutral. See, e.g., Archdiocese of Washington, 897 F.3d at 324 (in the context of a limited purpose public forum, holding that " the government has wide latitude to restrict subject matters—including those of great First Amendment salience, see Minn. Voters Alliance v. Manksy, 138 S. Ct. 1876, 1885-86 (2018) (collecting citations on political speech); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985) (political speech); Rosenberger v. UVA, 515 U.S. 819, 831 (1995) (religious speech)—in a nonpublic forum as long as it maintains viewpoint neutrality and acts reasonably."); see also Perry, Air Line Pilots.

Neither Plaintiff nor Amicus argues that the permit and fee requirements at issue here fail the viewpoint neutrality test, nor could they reasonably make such an argument. The permit and fee requirements make no distinction based on viewpoint and do not favor any opinion, topic, belief, issue or position over any other. Accordingly, the only test that remains disputed is whether the permit and fee requirements pass the test of reasonableness, which is the test Defendants argued for in their opening brief and which is still the operative and material test for reasonableness. As explained by the D.C. Circuit in Archdiocese of Washington:

[3] Defendants continue to maintain that the Complaint alleges no facts that could be reasonably interpreted to establish that the site of the filming or the park itself is a traditional public forum. See ECF No. 18 at 16-17.

> Because WMATA's Guideline 12 is viewpoint neutral, the question remains whether "the distinctions drawn are reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806 (citing Perry, 460 U.S. at 49. The reasonability inquiry is not a demanding one, but rather is a "forgiving test." Minn. Voters Alliance, 138 S. Ct. 1876 at 1888. The challenged "restriction 'need not be the most reasonable or the only reasonable limitation,'" Hodge v. Talkin, 799 F.3d 1145, 1165 (D.C. Cir. 2015) (quoting Cornelius, 473 U.S. at 808), but the regulation must simply be reasonable as consistent with the government's legitimate interest in maintaining the property for its dedicated use, Perry, 460 U.S. at 46.

897 F.3d at 329-30. This test is effectively the same test for reasonableness that applies under Krishna Consciousness, 505 U.S. at 683, and Oberwetter, 639 F.3d at 553 ("viewpoint neutral and reasonable in light of the purpose [of] the forum").

B. The Government Interests are Legitimate and the Permit and Fee Requirements are Reasonably Related to Them.

First, DOI has a significant interest in regulating commercial filming in order to efficiently manage the lands each agency controls:

> In many circumstances it is important for land managers to know the specific time and location of certain activities so permit terms and conditions may be used to mitigate the possibility of resource damage or impact to visitors. For example, park units may have limited space, fragile resources, or experience high visitation during a specific time period. Refuges may need to protect nesting areas of threatened or endangered species during certain times of the year.

Commercial Filming & Similar Projects & Still Photography Activities, 78 Fed. Reg. 52,087-02, 52089. These interests are clearly legitimate and substantial. Plaintiff's opening brief here does not challenge this point directly, but argues instead that the permit and fee requirements cannot satisfy a reasonableness standard because they violate the First Amendment. ECF No. 20 at 19 ("it cannot satisfy a reasonableness standard, as a regulation is "per se arbitrary and capricious if it violates … constitutional rights") (ellipsis in original). This argument is circular. It also characterizes the land management concern as "secondary," id. at 19 and "a fig leaf," id. at 20. These arguments ignore Congressional intent in setting aside these public lands. The National

Park Service Organic Act expressly provides that the "fundamental purpose of [National Park] System units… is to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). The government has a clear interest in managing its park lands effectively, both to preserve them and manage the public's use of them. These interests are significant and directly advance the mission of the National Park Service.

More generally, Congress intended Section 100905 to create greater financial fairness and consistency across DOI agencies, because regulations already required a permit for commercial filming and certain commercial still photography. See 43 C.F.R. § 5.1 (1998); 36 C.F.R. § 5.5 (1998); 50 C.F.R. § 27.71. At the same time, it enabled NPS to "manage[] filming activities to ensure that the natural, historical, and cultural resources are protected, and that filming should not conflict with the public's normal use of the park." S. Rep. No. 106-67, at 2 (1999). There is no serious dispute that the government has the requisite significant interest.

As to the second requirement—that the permit and fee requirements are reasonably related to the agencies' land management purposes—Plaintiff argues that there is no nexus whatsoever between the stated purposes and the means chosen to advance them. ECF No. 20 at 20-21. Defendants noted in their opening brief that they are unaware of any cases holding that merely by distinguishing between commercial and noncommercial activities, a regulation would fail this aspect of the test of reasonableness. Plaintiff responded by citing cases that applied heightened scrutiny, effectively illustrating Defendants' point. See ECF No. 20 at 21-22. In City of Cincinnati v. Discovery Network, Inc., 507 U.S. 424, 416-17 (1993), the Court applied intermediate scrutiny and struck down the outdated regulation on passing out handbills for

having no "reasonable fit" to the city's application of the regulation to newsracks. Whatever the imperfections in the nexus between the purposes and means of the permit and fee requirements, they are far more tightly related than the scheme struck down in Discovery Network. The selection of commercial versus noncommercial activity as the key limitation in scope is reasonably related to the tendency of commercial operations, including filming, to be larger in scale than noncommercial activities and to generate income, some of which could be used to pay a fee. Note also that the NPS would require a person wishing to engage in non-commercial filming in a closed area to obtain a permit under 36 C.F.R. § 1.5(d). That suffices for the nexus requirement under the reasonableness test.

Indeed, the distinction between commercial and noncommercial activity sufficed for the intermediate scrutiny applied in Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905 (8th Cir. 2017). The Eighth Circuit upheld a challenge brought by a commercial photographer who argued that treating commercial and amateur photography differently ran afoul of the First Amendment. Even applying a standard of heightened scrutiny, the court upheld the ban's distinction between commercial and noncommercial activity.[4] Plaintiff attempts to discredit Defendants' reliance on Josephine Havlak by arguing that its ban was more broadly written to reach all commercial activity, not merely expressive activity. ECF No. 20 at 29. To the extent this distinction might matter, it does not sever the logical connection between the purposes and the means selected to advance them.

[4] In quoting from Josephine Havlak in their opening brief (ECF No. 18) at 25, Defendants mistakenly attributed the quote to the Eighth Circuit decision; instead it came from the district court decision, 195 F. Supp. 3d 1065, 1076 (E.D. Mo. 2016), that was upheld on appeal. Defendants regret any confusion caused by this inadvertent error. Defendants' opening brief correctly attributed this same language on page 36.

For these reasons, the permit and fee requirements pass the test of reasonableness and therefore the Court should uphold them and reject all of Plaintiff's First Amendment challenges.

III. Alternatively, the Permit and Fee Requirements Pass Intermediate Scrutiny.

As explained in Defendants' opening brief, even if the Court were to reject forum analysis and apply a heightened scrutiny, there are two independent reasons why the Court should reject strict scrutiny and should instead apply intermediate scrutiny. The first reason is that restrictions on commercial speech are consistently assessed under intermediate scrutiny. Second, content neutral restrictions on speech are also subject only to intermediate scrutiny.

A. Commercial Nature is Reviewed With Intermediate Scrutiny.

The Supreme Court's decision in Central Hudson created a four-part test for analyzing commercial speech. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 557 (1980). In the forty years since Central Hudson, the Supreme Court has consistently used its intermediate scrutiny test (a form of "heightened scrutiny") whenever restrictions on commercial speech have been challenged.

> Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002). To sustain the targeted, content-based burden § 4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See SUNY v. Fox, 492 U.S. 469, 480-81 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 566 (1980). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." Fox, 492 U.S. at 480 (internal quotation marks omitted). As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message. See Turner Broadcasting, 512 U.S. at 662–663.

Sorrell v. IMS Health, Inc., 565 U.S. 552, 572 (2011) (emphasis added). Here, Plaintiff's Complaint repeatedly alleges that the challenged permit and fee requirements regulate commercial speech. Accordingly, even if the forum analysis above were somehow incorrect,

Central Hudson's intermediate scrutiny would apply to restrictions on commercial speech, not strict scrutiny.[5]

Plaintiff also argues that the Central Hudson test for commercial speech applies "only to speech defined as doing no more than proposing a commercial transaction." ECF No. 20 at 30. Even under Plaintiff's reading of Discovery Network, however, the filming activity covered would not be covered at all by the regulation unless it is done "with the intent of generating income," per 43 C.F.R. § 5.12, and that necessarily implies a commercial transaction at some point in the chain of expressive conduct posited by Plaintiff, which presumably includes screening the film and charging the viewers, as described in the Complaint. ECF No. 1 ¶¶ 40-42.[6]

B. Independent of the Commercial Nature of the Regulated Activity, Intermediate Scrutiny Applies under Reed because the Permit and Fee Requirements are Content Neutral.

Independently of the commercial speech doctrine, the permit and fee requirements here would still be subject, at most, only to intermediate scrutiny because they are content neutral.

[5] Plaintiff's opening brief asserts that Sorrell compels application of heightened scrutiny whenever a regulation distinguishes between commercial and noncommercial. ECF No. 20 at 28 ("Defendants admit the Permit Regime discriminates between commercial and noncommercial speech, and, as the Supreme Court held in IMS Health, 564 U.S. at 573-74, 577-78, regulating on that basis merits heightened scrutiny."). This misunderstands the holding in Sorrell, which stated no such broad rule, and indeed nothing about its facts or holding suggests any rewriting of the public forum analysis above, which applies whenever the restriction involves a time, place or manner restriction on expression on or using government property. For the sake of the alternative argument, however, Defendant accepts intermediate scrutiny.

[6] The Complaint is silent on whether viewers paid to see the film. If they did not pay, then Plaintiff faces an even steeper challenge to establish standing, because his film would not qualify as "commercial" under 43 C.F.R. § 5.12 and he would not be subject to permit or fee requirements at all.

1. The Reed Test

As recently summarized by the D.C. Circuit, in assessing restrictions on the use of public forums, the Court must determine whether the restriction is content based to determine the level of scrutiny:

> The constitutionality of regulation of public forums depends first on whether the regulation is content based. Content-based regulations are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, -- U.S. --, 135 S. Ct. 2218, 2226 (2015). Second, because traditional public forums are vital places for speech, even a content-neutral public-forum regulation is subjected to additional First Amendment scrutiny to determine whether it is a reasonable time, place, and manner restriction "narrowly tailored to serve a significant governmental interest" that "leave[s] open ample alternative channels for communication." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

ANSWER Coal. v. Basham, 845 F.3d 1199, 1208 (D.C. Cir. 2017). Thus, in the alternative to the limited public forum analysis above, in order to qualify for intermediate scrutiny, the challenged restrictions must be content neutral. The test for determining what is content-neutral comes from Reed, again as recently explained in ANSWER Coalition:

> To be subject to evaluation under the more lenient, "intermediate" scrutiny applicable to time, place, and manner regulations, a rule must not itself be content based, see Reed, 135 S. Ct. at 2228, and must be "justified without reference to the content of the regulated speech," Ward, 491 U.S. at 791. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed, 135 S. Ct. at 2227. Facial distinctions based on message, whether they regulate the speech's subject matter, function, or purpose, are content based and so subject to strict scrutiny. Id. Meanwhile, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

Id. The Reed test thus looks at the content of regulated speech and the distinctions that the regulation makes based on the content or subject matter of the communication.

2. The Permit and Fee Requirements Are Content-Neutral Under Reed.

Applying the Reed test here, there is no allegation that the government would deny a permit for a commercial film because of its content, nor is there any language in the challenged statute or regulation that could support such an argument. Plaintiff did not allege that the government would have denied Plaintiff a filming permit because of the film's subject matter. There is no factual allegation that one type of speech is allowed and another disallowed based on point of view, subject matter or content. The only distinctions that the statute and regulations make that Plaintiff alleges to be based on content are the distinctions: (1) between commercial and noncommercial speech, here defined by whether the filming was intended to generate income, per 43 C.F.R. § 5.12, and (2) between news gathering and other activities. These distinctions are simply insufficient under Reed to qualify as content based.

In response, Plaintiff argues that the distinction between commercial and noncommercial is itself a distinction based on content. ECF No. 20 at 29. Plaintiff's argument is notably disconnected from the Reed test, which Plaintiff's opening brief nods at but then does not apply. Instead it asserts: "The fact that a 'decision to approve or deny a permit would not depend on the … subject matter filmed,' Def. Mem. 5, is irrelevant." Id. This assertion is flatly inconsistent with Reed which looks directly at whether the regulation makes distinctions based on the subject matter. Indeed, Plaintiff's opening brief generally shies away from applying Reed's test for determining what is content based, and never explains how the distinction between commercial and noncommercial fails the Reed test.

Plaintiff's opening brief embraces Reed with more vigor in arguing that the different treatment for news gathering is content based. ECF No. 20 at 28. Plaintiff's argument, however, stretches Reed too far by converting anything covered by the news media into a form of content

itself. The regulation must look more deeply into the substance of the content, into the ideas expressed, in order to be deemed content-based under the Reed test. Instead, the permit and fee requirements are plainly "justified without reference to the content of the regulated speech," see Ward, 491 U.S. at 791. The commercial filming statute and regulation prohibit the NPS from denying a permit or charging a fee because of the subject matter, function, or purpose. For these reasons, the permit and fee requirements are content neutral under Reed.

The Eighth Circuit addressed the constitutionality of a municipal regulation that treated commercial photographers differently from non-commercial photographers. Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905 (8th Cir. 2017). The court found that treating commercial and amateur photographers differently did not create a content based permit scheme because it can be justified without reference to the content of the regulated conduct. Id. at 915. The different treatment was "based on different levels of interference with use and enjoyment of the Park by all [because] commercial photographers' sessions last for longer periods of time, use more large equipment, are more intrusive, and likely involve more subjects in one group." 195 F. Supp. 3d at 1076. Section 100905 and the applicable regulations are akin to the scheme in Havlak that was found to be content neutral under Reed. Plaintiff challenges Defendants' reliance on Havlak for this point, but his argument does not invoke or apply Reed. ECF No. 20 at 29.

Plaintiff's Complaint mistakenly relies on Reed for the proposition that any statute that distinguishes between commercial and non-commercial speech is presumptively unconstitutional and subject to strict scrutiny. See Compl. ¶ 5. In fact, Reed looked much more deeply at the content of the speech, specifically at the numerous categories that the municipal ordinance at issue created based on the substance of those categories. It was the content of the speech itself

that was the distinguishing factor in establishing the numerous different rules for different types of signs. Id. at 2225. The system struck down in Reed was not uniform, and it was clear that some speech was preferred, and some kinds of signs had more restrictions than others based on subject matter. See id.

Plaintiff challenges Defendant's comparison of Reed to the facts of this case as "internally inconsistent." ECF No. 20 at 28. There is no internal inconsistency. The content of the speech at issue in Reed was determinative under the town's ordinance of how the sign would be regulated. There is no such reference to the content of the filming here.

The resource-based restrictions in the permit and fee requirements at issue here are content neutral because the record does not support, nor is there an allegation, that the government prefers some forms of filming over other filming based on a message. See, e.g., Mahoney v. Doe, 642 F.3d 1112, 1118 (2011) (finding D.C. ordinance content neutral that prohibited defacing the sidewalk near the White House). The government simply assesses fees for a commercial use of public land based on size of crew, number of days of filming, sets and other non-content based restrictions.

For these reasons, even if the Court rejects the public forum analysis above, the Court should find that the permit and fee requirements are content neutral under Reed. For that reason, and/or because the permit and fee requirements regulate commercial activity, the Court should reject strict scrutiny in favor of intermediate scrutiny.

C. The Permit and Fee Requirements Satisfy Intermediate Scrutiny.

1. The Government's Interests are Substantial and Significant.

a. Cost Recovery

As explained in Defendant's opening brief, the government has several interests in the permit and fee requirements in Section 100905 and its implementing regulations. First, "Congress declare[d] that it is the policy of the United States that . . . the United States receive fair market value of the use of the public lands and their resources[.]" 43 U.S.C. § 1701(a)(9). As Plaintiff points out in his opposition, DOI considered whether to tie the fee to profits the filming might generate, but rejected the idea as unworkable. ECF No. 20 at 19 n.20 (citing 78 Fed. Reg. at 52090). The statutory scheme and the implementing regulation are aligned to focus on filming that is intended to generate income, see 43 C.F.R. § 5.12, and the clear intent was to recover some of this income for the fair use of the public lands and to allow NPS to use the money to maintain cultural resources and improve visitor services.

b. Protection of Park Land & Management of Visitors

DOI also has an important interest in regulating the use of its land, including commercial filming. The reason why NPS issues permits is that

> In many circumstances it is important for land managers to know the specific time and location of certain activities so permit terms and conditions may be used to mitigate the possibility of resource damage or impact to visitors. For example, park units may have limited space, fragile resources, or experience high visitation during a specific time period. Refuges may need to protect nesting areas of threatened or endangered species during certain times of the year.

78 Fed. Reg. 52,087-02, 52,089.

2. The Permit and Fee Requirements are Narrowly Tailored.

a. The Permitting System Lets NPS Assess Potential Cost & Harm.

The commercial filming regulation implements the congressional mandate to "manage[] filming activities to ensure that the natural, historical, and cultural resources are protected, and that filming should not conflict with the public's normal use of the park." S. Rep. No. 106-67, at 2 (1999). As Government Accountability Office stated in a report,

> Because costs recovered from permitting activities are used by park units for managing their permit program and other park programs, failing to recover such costs decreases the financial resources park units have for processing permits and monitoring permitted activities. Unless steps are taken to ensure that units fully identify and collect administrative and management (including monitoring) costs associated with special event permits and with commercial filming and still photography permits, the Park Service will continue to deprive itself of funds important for managing and carrying out agency policy and delivering agency services.

National Park Service: Revenues Could Increase by Charging Allowed Fees for Some Special Uses Permits, at 18-19, GAO (May 2005), available at https://www.gao.gov/assets/250/246260.pdf (last visited June 5, 2020).

Plaintiff argues that the government fails to explain why the statute and regulation differentiate between commercial and noncommercial filmmaking when both impact the park resources. ECF No. 20 at 20. First, the Court should not assume, as Plaintiff apparently implies, that the respective impacts of commercial and noncommercial fimmaking are identical. Instead, as the Eighth Circuit recognized in Josephine Havlak, it is reasonable to find that commercial filmmaking is generally on a larger scale and involves more equipment than noncommercial filmmaking. Second, it should be obvious that it makes sense to charge fees for filming that is intended to generate income while not attempting to charge fees for filmmaking that is not intended to generate income. Because one purpose was to receive a fair return for use of the

land, charging only filmmaking intended to generate income makes perfect sense. The permitting requirement enables NPS to engage with filmmakers prior to their potential impact on the land and provides a valuable opportunity to inform the filmmaker about particular sensitivities in advance, an opportunity that would be lost if the scheme relied only on barring damage and after-the-fact enforcement. See 78 Fed. Reg. 52,087-02, 52,089.

b. NPS' Fee Schedule is Graduated and Reasonable.

In implementing Section 100905, the NPS set a graduated fee schedule, providing for relatively modest fees. The publicly available fee schedule provides:

Number of People	**Cost for Permittee**
1–2 people, camera & tripod only	$0/day
1–10 people	$150/day
11–30 people	$250/day
31–49 people	$500/day
Over 50 people	$750/day

See Commercial Filming and Still Photography Permits, available at https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm (last visited June 5, 2020). In practice, this means that small commercial filming groups are not required to pay a fee to film in a park. Also, the smaller the group, the lower the fee that group pays. For instance, Plaintiff's filming at Crybaby Bridge would not have required him to pay any fees because he had no more than a tripod and the film crew was no more than two people. Compl. ¶ 39. This approach is consistent with the D.C. Circuit's ruling in Boardley: NPS considers the size of a group when determining how much, if any money at all, a permittee should pay to use park resources.

Plaintiff responds again by asserting that the distinction between commercial and noncommercial makes no sense whatsoever. ECF No. 21-22. Plaintiff's argument requires the Court to assume that DOI and Congress are constitutionally required to allow noncommercial

filming involving large production crews, in order to be permitted to regulate commercial filmmaking activity. There is no reason to assume this. But the bigger problem with Plaintiff's argument is that dropping the distinction between commercial and noncommercial would make the fee schedule impact noncommercial filmmaking far more heavily than commercial filmmaking, precisely because those engaged in the former would not have access to income generation to defray the cost of the permit. Plaintiff essentially asks the Court to require that the government ignore the income-generating intent of the filmmaker and charge all filmmakers the same fee, or ignore cost recovery altogether. This is not constitutionally required. For these reasons, this Court should determine that the graduated fee schedule is narrowly tailored.

c. News-Gathering Exceptions Are Narrowly Tailored.

As explained in Defendant's opening brief, newsgathering implicates an additional First Amendment freedom – freedom of the press – that is distinct from the free speech rights asserted by Plaintiff. Newsgathering is defined as the means, methods, and mechanics of gathering information by members of the press for dissemination to the general public. See, e.g., N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); McIntyre v. Ohio Elections Comm'n , 514 U.S. 334 (1995). The permit and fee requirements here are narrowly tailored to achieve the government's stated interests while carving out exceptions to accommodate the recognized particular needs of the press. E.g., Branzburg v. Hayes, 408 US 665, 682 (1972) (charging fees could interfere with press). Accordingly, the agency tailored the newsgathering exception to avoid unnecessarily impeding the news media's "access to Federal lands to gather news." 78 Fed. Reg. 52,087-02, 52,091.

Plaintiff attacks the newsgathering exception as arbitrary, arguing that Defendants do not explain the different treatment of the press. ECF No. 20 at 20. Plaintiff ignores the explanation

provided above, largely repeated from Defendants' opening brief. The unique access that the press has to cover emerging stories would be impacted by the permit and fee requirements. The exception recognizes this and, indeed, would likely need to be created in order to avoid the sort of press censorship that Amicus complains about in its brief. For these reasons, the permit and fee requirements are narrowly tailored under the intermediate scrutiny case law.

3. The Permit and Fee Requirements Leave Open Alternative Channels.

Finally, as noted above, to survive intermediate scrutiny, a regulation must leave open alternative channels. ANSWER Coal., 845 F.3d at 1215. The permit and fee requirements here place a minimal burden on the permit applicant, who already faces other, uncontested here, restrictions on access to the park (e.g., limited visiting hours). These additional restrictions have nothing to do with the message conveyed in the final product, nor do they limit where commercial filming takes place. They prescribe only that "the agencies may not issue permits that authorize an illegal activity or activities likely to cause resource damage." 78 Fed. Reg. 52,092. The permit requirement is necessary in order to ensure that the filmmaker engages in a dialogue with NPS personnel prior to the filming activity in order to prevent possibly irreparable damage to park lands and to educate the filmmaker about particular sensitivities that may be unique to the particular site.[7] Accordingly, these alternative options included filming with a smaller crew and equipment with a lighter footprint. Without a permit, Plaintiff could also choose not to generate income from the film.

[7] Defendants respectfully disagree with the language in Boardley, 615 F. 3d at 524, that finds after-the-fact enforcement equally effective in protecting the government's interest in protecting parklands. See, e.g., S. Hrg. 105-579 at 62 (describing damage to park land in filming a commercial movie). Moreover, NPS has issued park-specific guidance, thus addressing one of the Circuit's concern regarding narrow tailoring. See https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm; and https://www.nps.gov/colo/upload/Commercial-Filming-Guidelines-2015-UpdatedA.pdf.

Therefore, the permit and fee requirements satisfy all of the elements of intermediate scrutiny, and the Court should uphold them against First Amendment challenge, even if the Court were to apply intermediate scrutiny.

IV. Plaintiff's Arguments and Counts in the Complaint All Fail to State a Claim.

A. The Complaint's Five Alleged "Violations"

Plaintiff's Complaint asserts five ways in which the permit requirement violates the Constitution. Each of these theories is incorrect, as demonstrated by the case law, and none of them establishes independent causes of action. All are controlled by the First Amendment public forum analysis described above.

First, the Complaint asserts that the permit requirement violates the First Amendment because only "certain filmmakers" must get permits, unlike the "general public," and that this necessarily means that the permit requirement "imposes a prior restraint on freedom of speech and of the press, which is 'the essence of censorship'" that is presumptively unconstitutional. Compl. ¶ 3. See also Brf. of Amicus at 20-21 (citing cases that do not involve use of government land). Because the film-making Plaintiff intends to perform is not in a public forum, the government is entitled to enact reasonable restrictions on time, place and manner of the expressive activity.

And even if the film-making here were to take place in a public forum, the case law provides that content neutral permitting schemes are not treated as prior restraints. See, e.g., Thomas v. Chi. Park District, 534 U.S. 316, 322 (2002) (upholding permit scheme for groups using municipal park); see also ANSWER Coal., 845 F.3d at 1210 (upholding the National Park Service's permitting system for the inauguration). Content neutral schemes are scrutinized only for reasonable restrictions on time, manner and place, and are not subject to the strong

presumption of unconstitutionality. Id. at 1212-13. Similarly, restrictions on commercial speech are reviewed under intermediate scrutiny and are not treated as censorship under the case law.

This analysis is further reflected in Boardley, which structured its analysis around the public forum framework described above, finding the regulations at issue there content-neutral, as they are here as well. Merely labelling the permit and fee requirements as prior restraint does not result in a different analysis. Plaintiff argues that Boardley treated the content-neutral regulation at issue there as a prior restraint, ECF No. 20 at 35, but Plaintiff overstates Boardley's treatment of the issue. It is correct that the Circuit referred to the scheme as a prior restraint in certain parts of its analysis, but the overarching analysis used by the Circuit was the public forum framework described above in Defendant's lead argument.

Plaintiff's second theory is similar—that the permit requirement constitutes "press licensing," citing City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988), and asserting that NPS has carried out its authority arbitrarily in deciding "who is and who is not covered" by the permit requirement. Compl. ¶ 4. The most direct problem with this claim is that it has nothing to do with Plaintiff, who has not held himself out to be a member of the press. But even if Plaintiff had standing to bring such a claim, and had pleaded supporting facts in his Complaint, the public forum analysis described above still controls, and it provides for the test of reasonableness. Labelling this scheme press licensing does not change the analysis.

Moreover, the permit requirement at issue here is plainly distinguishable from the annual permit at issue in City of Lakewood. In that case, the permit scheme failed to provide standards for approval but instead gave the mayor unbridled discretion to decide whether to permit the newspaper to place newsstands on public property. City of Lakewood, 486 U.S. at 757. The Lakewood ordinance imposed an annual approval requirement as well, effectively enabling the

mayor to monitor content of the newspaper at the same time as consideration of its applications for placement of newsstands. Id. at 757-58. The concerns that animated the Court in City of Lakewood are not present here because Interior's permit requirement here has objective standards related to cost and the flexibility to impose additional restrictions is clearly tied to the need to manage the use of the land and any particular impact on the specific site. Moreover, the law itself in providing for fees to be assessed for commercial film uses require that the fee be based on specific criteria, including the number of personnel, days in the park and other objective, non-content based criteria. The permit requirement here is not an example of press licensing but is instead a content neutral rule that is properly subject to reasonable limits on time, place and manner.

In response to this, Plaintiff asserts that the permit and fee requirements rely on standards that are too indefinite and so give too much discretion to the government. ECF No. 20 at 36. But the standards provided are neither indefinite nor subjective, because they relate directly to the potential impact the activity would have on the parkland and other visitors' use of the land. See https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm; and https://www.nps.gov/colo/upload/Commercial-Filming-Guidelines-2015-UpdatedA.pdf.

Third, the Complaint argues that the permit requirement arbitrarily distinguishes between filming and still photography, that it "is content based both because it discriminates between commercial and non-commercial speech, . . . and because it cannot be justified without reference to the content of the regulated speech, . . . or the identity of the speaker." Compl. ¶ 5 (citing Sorrell, 564 U.S. at 573-74, 577-78; and Reed, 135 S. Ct. at 2227, 2230). The Complaint argues that "[t]he law is thus unconstitutional because it is neither supported by a compelling governmental interest nor the least restrictive means of advancing any such interest." Id. As

explained above, however, the permit requirement is properly considered content neutral under the applicable case law standards, including Reed.

Plaintiff's opening brief attacks the lower fee schedule for still photography by asserting that NPS has not linked the fees to any benefit conferred by the permit. ECF No. 20 at 39. It asserts that a fee is impermissible even if minimal, and then cites case law referring to "sizeable price tag." Id.

Each of these points is addressed in the arguments above. As to the assertion that the law provides no explanation for the difference between commercial and still photography, the Complaint ignores both the publicly available explanation in the filming fee schedule[8] and the common-sense reality that commercial filming is generally a larger operation than still photography and thus far more likely to impact potentially sensitive areas of the park and the use of the park by others. As discussed above, the Eighth Circuit found that treating commercial and amateur photographers differently did not create a content based permit scheme because it can be justified without reference to the content of the regulated conduct. See Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 195 F. Supp. 3d 1064, 1076 (E.D. Mo. 2016), aff'd, 864 F.3d 905 (8th Cir. 2017).

Fourth, the Complaint argues that distinguishing between commercial and noncommercial speech requires a "compelling" government interest that is not present here. Compl. ¶ 6 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 789 (1985); and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)). The arguments above refute this assertion in several ways. Moreover, neither of these cited cases requires a

[8] https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm; see alsohttps://www.nps.gov/colo/upload/Commercial-Filming-Guidelines-2015-UpdatedA.pdf.

compelling government interest to support a distinction between commercial and noncommercial speech. Dun & Bradstreet was a defamation case and the cited page appears in a dissent that touches on First Amendment concerns, but certainly establishes no such rule. Joseph Burstyn struck down a public education board's rescission of a license for public exhibition of motion picture, and in its reasoning the Court rejected an argument that for-profit film-makers should receive less First Amendment protection than others. 343 U.S. at 501. This too fails to establish the rule suggested by Plaintiff's Complaint. Instead, the current case law treats the permit requirement as a content neutral scheme, subject only to a requirement of reasonableness.

Fifth, the Complaint posits that the commercial/noncommercial distinction constitutes an improper tax on expressive activities and that it violates both the First Amendment and the Equal Protection Clause. Compl. ¶ 7 (citing Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943); and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987)); Plf. Opening Brief at 37-40. Murdock involved the door-to-door sales of religious tracts by Mormons, and simply does not apply here where there is no suggestion of any infringement on religious rights. The taxation scheme struck down in Arkansas Writers' Project was explicitly content based, and so is clearly distinguishable from the permit requirement at issue here. This argument too assumes violation of the First Amendment, and does not establish an independent cause of action. Thus, none of the five alleged violations of the First Amendment states a claim.

The equal protection claim is easily rejected, because the permit requirement need only pass minimum rationality review. See FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) ("a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). The permit

requirement here does not make distinctions based on protected categories nor infringe on fundamental rights, and as explained above, it reasonably advances a legitimate government interest. Plaintiff's opening brief ignores this case law and merely relies upon his First Amendment theories to show a violation of a fundamental right. The First Amendment concerns are addressed above. There is no viable stand-alone claim under the Equal Protection Clause.

B. Each of Plaintiff's Alleged Causes of Action Fails to State a Claim.

Plaintiff's Complaint sets forth several counts in its "Claims for Relief." Most of these line up with the alleged "violations" discussed above. That is Count I (prior restraint) corresponds to Plaintiff's first theory (same); Count II ("unconstitutional licensing regime") corresponds to the second theory (press licensing); Count III (content based regulations fails strict scrutiny) corresponds to the fourth theory (discrimination between commercial and noncommercial speech); Count V (regulatory fees) corresponds to the fifth theory (unconstitutional tax); and Count VI (speaker discrimination) corresponds to the fourth theory.

Count IV alleges that the permit requirement is both unconstitutionally overbroad and under-inclusive. This claim depends on the findings, all disputed above, that the requirement is content based. It also ignores both the public forum cases and the commercial speech cases.

For these reasons, each of the Complaint's causes of action should be rejected.

Conclusion

For these reasons, Defendants respectfully ask the Court to grant this motion, deny Plaintiff's cross motion, and enter judgment for Defendants.

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Respectfully submitted,

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