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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

BLUERIBBON COALITION,

*Plaintiff,*

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States; DEBRA A. HAALAND, in her official capacity as Secretary of the Interior; THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; TRACY STONE-MANNING, in her official capacity as Director of the Bureau of Land Management; CHARLES F. SAMS III, in his official capacity as Director of the National Park Service; and, RANDY MOORE, in his official capacity as Chief of the United States Forest Service,.

*Defendants.*

Case No. 4:23-cv-00505-DKG

**BRIEF OF AMICUS CURIAE THE  
CENTER FOR AMERICAN  
LIBERTY IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

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## INTEREST OF AMICUS CURIAE

The Center for American Liberty (“CAL”) is a nonprofit law firm dedicated to protecting civil liberties and enforcing constitutional limitations on government power. CAL represents litigants in courts across the country and has an interest in ensuring application of the correct legal standard in First Amendment cases.<sup>1</sup>

CAL also represents journalists in matters involving newsgathering activity. For example, CAL is counsel of record in *Ateba v. Jean-Pierre, et al.*, No. 1:23-cv-02321-JDB (D.D.C.), a case involving a First Amendment challenge to the press-credentialing scheme in place at the White House. In that case, CAL represents a journalist who seeks to engage in newsgathering activity in a designated press area—the White House press facilities—on equal terms as other journalists. The government in *Ateba* relies substantially on *Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022), which involved a challenge to the same permitting regime at issue in this case. CAL is familiar with the constitutional questions at issue in *Price* and seeks to advance greater protections for newsgathering activity in this case.

For the following reasons, CAL urges the Court to grant Plaintiff’s motion for a preliminary injunction.

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<sup>1</sup> Amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.



## INTRODUCTION

Newsgathering today is a far cry from what it was during the time of Walter Cronkite and Ted Koppel. The proliferation of online blogs, Substack newsletters, and large social media platforms means mass audiences are instantly available to any person with a smartphone and an internet connection. The news happens all around us, and with a few taps on a screen, anyone can capture it, package it, and deliver it to millions across the planet in a matter of seconds. This is the modern journalist.

Newsgathering has long enjoyed First Amendment protections given its integral relationship with speech and press activity. But the nature of newsgathering today requires a reassessment of how the First Amendment shields this central constitutional liberty. Filming for newsgathering purposes is protected by the First Amendment—and virtually anyone can do it at any given moment. Citizen and independent journalists therefore must enjoy the same protections as traditional journalists when gathering and distributing newsworthy content. Regulations burdening this type of filming are subject to specific constitutional constraints applicable to newsgathering.

Here, Congress has commanded that the Secretaries of Agriculture and the Interior (the “Secretaries”) impose a permit and fee requirement (the “Permitting Regime”) on all commercial filming that takes place on most federal land. The Permitting Regime is outdated and impermissibly burdens a wide swath of newsgathering activity protected by the First Amendment. It requires citizen and independent journalists to obtain a permit and pay a fee before they can film for the

purpose of newsgathering. This process can take weeks, effectively prohibiting journalists from engaging in spontaneous newsgathering on public land. A prior restraint like this does not satisfy any level of scrutiny.

Though the Permitting Regime attempts to exempt “newsgathering” from its reach, the exemption is impermissible. Excluding “the news” from the permitting requirement renders to regulations content based—and it does not satisfy strict scrutiny. In addition, the exemption is a plain attempt to provide special privileges to the “institutional press,” which the Supreme Court has repeatedly rejected. And given the vague definitions of “news,” “breaking news,” and “newsgathering,” the Permitting Regime both fails to provide adequate notice as to what conduct is prohibited and is susceptible to arbitrary enforcement. This overbroad regulation has a chilling effect on protected activity—including that of Plaintiff and its members. The Court should grant Plaintiff’s motion for a preliminary injunction.

## **ARGUMENT**

### **I. THE FIRST AMENDMENT PROTECTS FILMING AS A FORM OF NEWSGATHERING, REGARDLESS OF WHO DOES IT**

Filming is one of the most effective forms of newsgathering—an indispensable tool in the modern journalist’s toolbelt. It enjoys the same First Amendment protections as other forms of newsgathering. And because modern technology allows almost anyone to do it, the First Amendment protections for filming extend to non-traditional journalists.

**A. Filming is a Form of Newsgathering Protected by The First Amendment**

The First Amendment protects newsgathering. U.S. Const. Amend. 1; *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg*, 408 U.S. at 707. Protection for seeking out newsworthy information is necessary for journalists to communicate it. *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (observing that “news gathering is essential to a free press”).

Protection for newsgathering flows naturally from the First Amendment. Though not explicitly mentioned, newsgathering enjoys First Amendment protection because it is an essential component for exercising other constitutional liberties like freedom of speech, *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), freedom of the press, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975), and “the right to receive” information, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.”). Indeed, there is “no fixed First Amendment line between the act of creating speech and the speech itself.” *Turner v. Driver*, 848 F.3d 678, 689 (5th Cir. 2017). Courts should “not attempt[] to disconnect the end product from the act of creation.” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010).

Filming matters of public interest and concern with the intent to distribute to a broader audience is a form of newsgathering. *See Project Veritas v. Schmidt*, 72 F.4th 1043, 1054 (9th Cir. 2023) (“[M]aking an audio or video recording [qualifies] as speech entitled to the protection of the First Amendment.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (observing that the First Amendment protects the “right to film matters of public interest”). The “act of making an audio or visual recording [itself] is necessarily included within the First Amendment’s guarantee of speech and press rights.” *Am. C.L. Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). And because reporting on matters of public concern “must be timely to be newsworthy,” courts should be especially skeptical of restrictions that impair newsgathering activity. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 594 (9th Cir. 2020) (enjoining practice of delaying release of civil complaints to media until they have been served on the defendant).

The right to film for newsgathering purposes is at its zenith when filming public officials conducting public business on public property in public view. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 832 (1st Cir. 2020) (filming police officer interactions in public); *see also Fields v. City of Phila.*, 862 F.3d 353, 355-56 (3d Cir. 2017) (same); *Gericke v. Begin*, 753 F.3d 1, 7–8 (1st Cir. 2014) (same); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (same). But this right is not limited to filming public officials on government property. *See, e.g., Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04 (9th Cir. 2018) (filming factory farming

conductions on private property protected by the First Amendment); *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023), *cert. denied sub nom*, No. 22-1148, 2023 WL 6797724 (U.S. Oct. 16, 2023) (same).

The right to engage in newsgathering of course has its limits. The government can regulate *access* to government property, *see Zemel v. Rusk*, 381 U.S. 1 (1965) (holding no right to access White House property that has not been opened up for newsgathering purposes); *John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602, 607, 612 (7th Cir. 2020) (holding no right to invitation-only interview in governor's private conference room), and the government may prohibit filming and other electronic recording on government property altogether in certain circumstances, *see, e.g., Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 182–84 (3d Cir. 1999) (collecting cases). But once the government has opened up government property to some filming, it must allow filming for the purpose of newsgathering on equal terms. *Estes v. Texas*, 381 U.S. 532, 540 (1965) (“All [journalists] are entitled to the same rights [of access] as the general public.”); *Planet*, 947 F.3d at 595 n.8 (“Favoring one media organization over another would present serious First Amendment concerns.”) (quotation omitted).

How much protection a particular form of newsgathering enjoys varies depending on the regulation and government property at issue. For example, just like the pure speech context, content-neutral restrictions on newsgathering in public places

are subject to intermediate scrutiny. *Rollins*, 982 F.3d at 835.<sup>2</sup> Such “time, place, and manner restrictions” will pass constitutional muster only if they are “narrowly tailored to serve a significant governmental interest” and “leave open ample alternative channels for communication of the information.” *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011). If the restriction “forecloses an entire medium of public expression across the landscape of a particular community or setting” it “fails to leave open ample alternatives.” *Schmidt*, 72 F.4th at 1064 (cleaned up). And if the restriction allows activity for non-newsgathering purposes but not for newsgathering itself, the government will have a difficult time demonstrating that it is sufficiently tailored. *See Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (observing that the Court is “deeply skeptical” of laws that allow “speech by some but not others”).

Moreover, fee requirements for newsgathering are almost never permissible. *Fernandes v. Limmer*, 663 F.2d 619, 632 (5th Cir. 1981) (“Exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court.”). While the government may impose a fee if necessary to recuperate costs to the public caused by the newsgathering, *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941), the government may not “impose a charge for the enjoyment of a right granted by the federal constitution,” *Murdock v. Pennsylvania*, 319 U.S. 105, 113

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<sup>2</sup> Though a forum analysis can be helpful in identifying the appropriate level of scrutiny to apply, protection for newsgathering is not tethered to a public forum analysis. *Rollins*, 982 F.3d at 835.

(1943). Thus, fees unrelated to any cost borne by the government as a result of the newsgathering activity are impermissible. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (exercising fundamental rights “may not constitutionally be conditioned upon the payment of a tax or fee”).

Similarly, permitting requirements for newsgathering are constitutionally suspect. “[A]dvance notice or registration requirements [can] drastically burden free speech.” *Rosen v. Port of Portland*, 641 F.2d 1243, 1250 (9th Cir. 1981). A permitting regime constitutes a “prior restraint” and thus carries “a ‘heavy presumption’ against its constitutional validity.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 558 (1976) (citation omitted). And when a permit can take weeks to process—effectively eliminating the ability to engage in spontaneous newsgathering—the regime is almost certainly impermissible. See *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009) (holding twenty-four-hour notice requirement for “spontaneous event” permit was not narrowly tailored). Permitting schemes involving significant delays violate the First Amendment’s requirement that “restrictions on newsgathering be no more arduous than necessary.” *Sherrill v. Knight*, 569 F.2d 124, 129–30 (D.C. Cir. 1977).

“The struggle for the freedom of the press was primarily directed against the power of the licensor.” *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938). Restrictions on filming for newsgathering purposes that take the form of a licensing and fee regime

are nearly always impermissible. Courts should be especially skeptical of such regulations absent a clear, compelling reason for their existence.

**B. Citizen and Independent Journalists Enjoy First Amendment Protections for Newsgathering Activity**

In the age of iPhones, iPads, GoPros, and Gimbals anyone can be a journalist. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).<sup>3</sup> When matters of public concern happen spontaneously, the citizen on the street who records the event with their smartphone is the functional equivalent of the professional news crew twenty years ago.<sup>4</sup> The constitutional protections for newsgathering enjoyed by Christiane Amanpour, Clarissa Ward, and their professional staff at CNN apply with equal force to John Smith on the street with his iPhone.<sup>5</sup>

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<sup>3</sup> See also Sonny Albarado, *Definition: Citizen Journalism*, Britannica (last visited Nov. 18, 2023), available at, <https://www.britannica.com/topic/citizen-journalism> (defining ‘Citizen Journalism’ as “journalism that is conducted by people who are not professional journalists but who disseminate information using Web sites, blogs, and social media.”).

<sup>4</sup> See, e.g., Anne ,Christiansen-Bullers, *The Rise of Citizen Journalism*, Kansas Medicine + Science (2023), available at, <https://www.kumc.edu/communications/about/publications/kansas-medicine-and-science/fall-winter-2023/the-rise-of-citizen-journalism.html> (describing the work of citizen journalists in the Kansas City area in covering racial justice protests).

<sup>5</sup> See generally, Joel Simon, *The Presumption of Journalism*, Knight Institute, (June 20, 2023), available at <https://knightcolumbia.org/content/ch-5-a-presumption-of-journalism> (discussing the presumption that individuals covering public events with the intent of informing a mass audience are engaged in journalistic newsgathering,



What constitutes “the media” for purposes of First Amendment protections is by no means a controversy limited to the digital age. Indeed, for decades courts have recognized the challenge of defining who falls within this category. *See, e.g., Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011) (noting “the difficulty of defining with precision who belongs to the ‘media’”); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (“[A] distinction drawn according to whether the defendant is a member of the media or not is untenable.”); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986) (“To recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with [the First Amendment].”) (citation omitted); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985) (“First amendment protection should not depend on whether the criticism is in the form of speech by a private individual or publication by the institutional press.”).

At the founding, freedom “of the press” was generally understood to apply to a form of activity and not a class of individuals. *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Penn. L. Rev. 459 (2012) (explaining the original public meaning of the Press Clause). The Constitution did not “erect the press into a privileged institution but

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regardless of whether they work for a news outlet).

... protect[s] all persons in their right to print what they will.” *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). The First Amendment’s protections for a free press apply to the act of using available technology for press activity. See Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 597-98 (1979) (“Those who called for ‘freedom of the press’ in the seventeenth and eighteenth centuries had in mind books and pamphlets and all kinds of occasional literature as much as newspapers.”); Rollo G. Silver, *The American Printer, 1787–1825*, at 97 (1967) (“Printed authors were of necessity amateurs with some dependable [outside] income.”).

This, of course, is by design. The First Amendment aimed to protect “the lonely pamphleteer” on his mission to win over the hearts and minds of the masses. *Branzburg*, 408 U.S. at 704. And it “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.), *aff’d*, 326 U.S. 1 (1945). For this reason, the First Amendment “does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.” *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring). All individuals exercising freedoms protected by the First Amendment fall within its reach.

Attempts by the government to give special privileges to “the media” are therefore impermissible, especially when dependent on whether the newsgatherer works for a “media outlet.” Such a limitation excludes citizen and independent

journalists who may not work for an established news entity but are nonetheless engaging in newsgathering and press activity. The Supreme Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Citizens United*, 558 U.S. at 352–53. Any attempt by the government to provide a special regulatory exemption for “the media” is inevitably too narrow to encompass the panoply of on-the-spot journalists prevalent in the digital age. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (“What makes journalism journalism is not its format but its content.”).<sup>6</sup> Courts should be cautious when reviewing regulations attempting to define who is—and who is not—a journalist.

The blogger, Substack writer, freelance reporter, and citizen journalist are the modern versions of “the lonely pamphleteer.” *Branzburg*, 408 U.S. at 703-04; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (“When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world.”).<sup>7</sup> Many

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<sup>6</sup> See generally Nadine Jurrat, *Citizen Journalism and the Internet—An Overview*, Open Society Foundations (April 2011), available at <https://www.opensocietyfoundations.org/uploads/ce357846-eeef-4114-a3e4-500ce863fbe6/mapping-digital-media-citizen-journalism-and-internet-20110712.pdf> (“Citizen journalists have become regular contributors to mainstream news, providing information and some of today’s most iconic images, especially where professional journalists have limited access or none at all.”).

<sup>7</sup> See Falon Fatemi, *The Rise of Substack – And What’s Behind It*, Forbes (Jan. 20, 2021), available at, <https://www.forbes.com/sites/falonfatemi/2021/01/20/the-rise-of-substack-and-whats-behind-it/?sh=1a4a8a2c159f> (discussing how some Substacks have “250,000 paying subscribers,” and the top 10 accounts brought in “\$7 million in

may not have formal training as a journalist or work for a traditional corporate news outlet. Many may lack a résumé full of impressive apprenticeships and years of experience battling through crowded press scrums. Many may not even follow AP Style. But the “protections of the First Amendment do not turn on whether [a reporter] was a trained journalist, formally affiliated with traditional news entities.” *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014). Any person—from the seasoned veteran to the impromptu Woodward or Bernstein—is protected by the First Amendment when they engage in newsgathering.

## **II. THE PERMITTING REGIME IS FACIALLY INVALID**

Because the Permitting Regime requires any person engaging in commercial filming to obtain a permit and pay a fee, much of modern newsgathering falls within the Regime’s ambit. And while the regulations attempt to create a carveout for newsgathering, this exemption is impermissible. Taken together these constitutional deficiencies render the entire Permitting Regime unenforceable as written. The Court should enjoin it.

### **A. The Permitting Regime Impermissibly Burdens Newsgathering Activity**

The statutes at issue require the Secretaries to adopt a permitting regime for all “commercial filming activities.” 54 U.S.C. § 100905; 16 U.S.C. § 4601-6d. The statutes do not define “commercial,” nor do they provide an exemption for newsgathering. *Id.*

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revenue” in 2020).

On their face, the statutes contemplate the prohibition of all filming for newsgathering on public land without a permit if done for a commercial purpose.

Apparently realizing the constitutional infirmity of such a paradigm, the Secretaries created a regulatory exemption for newsgathering. The regulations 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.” 43 C.F.R. § 5.12. Newsgathering is “filming, videography, and still photography activities carried out by a representative of the news media.” *Id.* “Representative of the news media means any person or entity that 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.” *Id.* Examples of news-media entities include “television or radio stations broadcasting to the general public and publishers of periodicals.” *Id.* Individuals who do not work for a media outlet may still qualify for the exemption, but they must “demonstrate a solid basis for expecting publication through [a news entity], even if the journalist is not actually employed by the entity.” *Id.*

This exemption is impermissible for at least three reasons. *First*, as Plaintiff argues, it is content based, thus subjecting the Permitting Regime to strict scrutiny. *See* Pl.’s Mem. Supp. Mot. Prelim. Inj. (“PI Mem.”) at 13–14. By requiring a permit for some commercial filming but not other commercial filming depending on whether it

is “news,” the regulations burden First Amendment activity based on its content. And for the reasons Plaintiff identifies, this does not satisfy strict scrutiny. *Id.*

*Second*, even if the newsgathering exemption did not render the regulation content based, it applies only to “representatives of the news media,” leaving a broad swath of newsgathering activity subject to the permitting and fee requirement. In effect, the exemption provides preferential treatment for the “institutional press,” which the Supreme Court has repeatedly rejected. *See, e.g., Citizens United*, 558 U.S. at 352. Journalists not considered a part of “the institutional press” are left exposed to the Permitting Regime. This is impermissible. *Id.*; *see also Sherrill*, 569 F.2d at 129–30 (holding the government may not deny equal access to newsgathering for arbitrary reasons).<sup>8</sup>

*Third*, the newsgathering exemption is unconstitutionally vague. It is “a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605, at \*2 (9th Cir. Aug. 3, 2023) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). A regulation is vague when it “fails to give ordinary people fair notice of the conduct

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<sup>8</sup> The United States Forest Service’s regulations exempt “breaking news” from the permitting requirement. *See* 36 C.F.R. § 251.51; U.S. Forest Serv. Handbook § 2709.11, Ch. 40 (Sept. 18, 2008). This exemption does not appear to be limited to “representatives of the news media.” However, it does not allow for newsgathering unless it involves an “event or incident that arises suddenly, evolves quickly, and rapidly ceases to be newsworthy.” § 2709.11, Ch. 40. This narrow definition plainly excludes constitutionally protected activity from the exemption. It also raises the same vagueness concerns as the Interior regulations identified below.

it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). “When vagueness permeates the text of such a law, it is subject to facial attack.” *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

The Permitting Regime’s definitions of “news,” “breaking news,” and “newsgathering” are standardless and susceptible to abuse. What constitutes “information about current events” or “of current interest to the public” will vary from person to person, region to region, and application to application. There is no way for an applicant to know whether the specific government agent processing their application will deem their subject matter worthy of the news media exemption. As a result, many individuals will forgo exercising their right to gather the news on public land given the extensive penalties the Permitting Regime imposes.

Plaintiff’s members’ experiences underscore this point. *See* Compl. ¶¶ 7–8. The “bulk of BlueRibbon’s content concerns matters of policy, government, and public land management.” Pl.’s PI Mem. at 9. This includes, for example, documenting impact to natural resources for the official public commenting process under NEPA. *Id.* BlueRibbon’s members have argued to government officials that their filming “qualified for the news-gathering exception, because most of [their] videos were cataloguing and telling other peoples’ stories.” *Id.* at 11. Yet the government officials disagreed, determining that the videos do not constitute “news” as defined in the regulations. *Id.* Rather than risk criminal penalties, BlueRibbon’s members opted to stop filming altogether. *Id.* at 8.

The government may not create a special carve-out from a fee-and-permit regime for specific content like “news,” the carve-out it has created is based on impermissible preferences for “the institutional press,” and implementing the exemption is impossible given its vagueness. For all of these reasons, the “newsgathering” exemption is impermissible and therefore unenforceable.

**B. The Permitting Regime Should be Enjoined in Full**

Because the newsgathering exemption is unenforceable, the Permitting Regime fails as a whole under the overbreadth doctrine. A statute is unconstitutionally overbroad when “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2376 (2021). Courts should enjoin overbroad regulatory regimes when “the threat of enforcement” “may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

Because the newsgathering exemption is unenforceable, the Permitting Regime is substantially overbroad. Its permitting requirement for commercial activity would require a license and fee for a substantial amount of constitutionally protected newsgathering. And because of its criminal penalties, the Permitting Regime has a severe chilling effect on this constitutionally protected activity. Indeed, the specter of enforcement has already chilled Plaintiff and its members. Pl.’s PI Mem. at 9. Given the Permitting Regime’s fatal deficiencies, the proper remedy is to enjoin it in full.



## CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Motion for a Preliminary Injunction.

DATED: November 22, 2023.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was filed via the Court's electronic filing system on this 22nd day of November 2023, to be served by operation of the electronic filing system on all ECF-registered counsel of record.

/s/ Timothy Longfield  
Timothy Longfield