CONSTITUTIONALITY OF FILMMAKING REGULATIONS IN NATIONAL PARKS

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In the case of *Price v. Garland*, 2022 U.S. App. LEXIS 23486 (D.C. Cir. 8/22/2022), Plaintiff Gordon Price, an independent filmmaker, claimed a National Park Service (NPS) permit and fee requirement was "facially unconstitutional under the First Amendment to the Constitution of the United States." Price had been charged with a misdemeanor (later dismissed) for filming parts of a feature film on NPS administered land without having obtained the required permit and having paid the required fee.

Price is a part-time independent filmmaker. In 2018, he released "Crawford Road," a film about a stretch of road in York County, Virginia that was the location of unsolved murders and long rumored to be haunted. Price filmed scenes on the Yorktown Battlefield in the Colonial National Historical Park. Crawford Road premiered in October 2018 to an audience of around 250 people in Newport News, Virginia. A couple of months later, NPS officers issued Price a "violation notice" for failing to obtain the required commercial filming permit.

FEDERAL DISTRICT COURT

In federal district court, Price moved to dismiss the charge, claiming the federal law and implementing NPS regulations for his misdemeanor charge were unconstitutional. Instead of litigating this question, the federal government dismissed the charge. Price then sued to have the federal district court declare these NPS implementing regulations unconstitutional and issue an injunction prohibiting their future enforcement.

The federal district court granted Price's request for a declaratory judgment and injunction. In so doing, the district court held the NPS "permit-and-fee requirements do not satisfy the heightened scrutiny applicable to restrictions on speech in a public forum." Within the context of the First Amendment, the district court found the NPS permit and fee requirements at issue were "content-based regulations of speech" which could not withstand the required heightened intermediate or strict judicial scrutiny for speech restrictions in "traditional public forums" administered by the NPS. While Price himself had not filmed on park land in a public forum, the district court determined this NPS permit and fee regime was unconstitutional on its face because the regulations "burdens substantially more speech than is necessary to achieve the government's substantial interests." NPS appealed.

In the opinion of the federal appeals court, the federal district decision had failed to apply the required "proportionality aspect of the overbreadth doctrine." In particular, the appeals court held the federal district court had failed to consider the relative "scope of the law's plainly legitimate applications" within "the vast areas of NPS land that are not public forums." Instead, as characterized by the appeals court, the federal district court had simply concluded the entire

NPS permit and fee requirement was “facially unconstitutional” and issued “a nationwide injunction barring enforcement of the permit-and-fee requirements.”

NPS PERMIT & FEE REGULATIONS

As cited by the federal appeals court, under the applicable federal statute, the Secretary of the Interior must "require a permit and establish a reasonable fee for commercial filming activities" on land administered by the NPS. 54 U.S.C. § 100905(a)(1). Further, the court noted the implementing regulations for this statutory mandate provided “all commercial filming requires a permit," and that the NPS "will require a reasonable location fee assessed in accordance with a fee schedule published in the Federal Register." 43 C.F.R. §§ 5.2(a), 5.8(a)(1),(3).

As described by the federal appeals court, the NPS implementing regulations defined "commercial filming" as "the film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income." Further, as cited by the court, the regulations specify that a permit will be denied if, among other reasons, it is likely an activity would:

> (a) Cause resource damage; (b) unreasonably disrupt or conflict with the public's use and enjoyment of the site; (c) pose health or safety risks to the public; or (d) result in unacceptable impacts or impairment to National Park Service resources or values. 43 C.F.R. § 5.5.

According to the court, federal law also required the “location fee” to be calculated to "provide a fair return to the United States" based upon "the number of days of the filming activity, the size of the crew, the amount and type of equipment present, and any other factors the Secretary considers necessary." 54 U.S.C. § 100905(a)(1)-(2).

In addition to the location fee, the appeals court noted this federal law would also require the Secretary of the Interior to recover "any costs incurred as a result of filming activities." A person convicted of engaging in commercial filming without obtaining a permit or paying a fee faced a fine and up to six months in prison. 18 U.S.C. § 1865; 36 C.F.R. § 1.3, 5.5(a).

In order to comply with the federal district court’s decision, the NPS had indicated its intent to “update regulations addressing filming activities.” SEE: NPS, Filming and Still Photography Permits, https://www.nps.gov/aboutus/news/commercial-film-and-photo-permits.htm (Aug. 26, 2021)

COMMERCIAL ACTIVITY REGULATION

On appeal, NPS had argued the permit and fee regulations at issue were “consistent with others that apply to various types of commercial activity conducted on land administered by the NPS”:

> For instance, it is generally prohibited to "engage in or solicit any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States." 36 C.F.R. § 5.3. Similarly, a

> concessionaire must contract with the Government and pay a "franchise fee." 54 U.S.C. § 101913. Finally, a person who wishes to provide services to visitors on NPS land must obtain authorization and pay "a reasonable fee for issuance of a commercial use authorization." 54 U.S.C. § 101925(b)(2)(A).

In the view of the appeals court, all of these NPS commercial activity regulations were "consistent with and implement the Congress's declaration" 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).

FORUM ANALYSIS

While the federal appeals court acknowledged, "Filmmaking undoubtedly is protected by the First Amendment," the court further noted: "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property." On the contrary, the appeals court recognized: "the Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

The appeals court, however, noted federal courts would apply a "forum analysis" to determine "the legality of restrictions upon speech on Government property." As described by the appeals court, forum analysis generally divides government property into the following three categories: traditional public forums, designated public forums, and nonpublic forums.

TRADITIONAL PUBLIC FORUM

A traditional public forum is property that has "time out of mind" been used to assemble and to communicate with others, including public streets and city parks. Government regulation of speech on this type of property is subject to heightened scrutiny, i.e., strict scrutiny if the regulation is content-based, intermediate scrutiny if it is content-neutral.

DESIGNATED PUBLIC FORUM

A designated public forum is "government property that has not traditionally been regarded as a public forum," but the Government has "intentionally opened up for that purpose." Examples include meeting facilities maintained by state universities and municipal theaters. So long as the government chooses to "retain the open character" of the property, "it is bound by the same standards as apply in a traditional public forum."

NONPUBLIC FORUM

A nonpublic forum is government property that "is not by tradition or designation a forum for public communication," e.g., museums and offices. There, the Government has far more leeway to regulate speech: a restriction of speech in a nonpublic forum is "examined only for reasonableness." This means the restriction is constitutional if it is reasonable given "the purpose of the forum and all the surrounding circumstances,"

NONCOMMUNICATIVE SPEECH PRODUCTION

On appeal, NPS had argued the First Amendment did not provide the same benefits of "the strict speech-protective rules of a public forum" to every speech related activity. In so doing, NPS contended a filmmaker does not use the location as a "public forum" because "a filmmaker does not seek to communicate with others at the location in which he or she films." In response, Price claimed the district court had correctly found "no basis to distinguish between filmmaking and other activities protected by the First Amendment."

As characterized by the federal appeals court, the district court had held the NPS permit and fee requirements for filming to be unconstitutional based upon an assumption that the speech protective standards of a public forum applied equally to filmmaking along with other forms of protected speech. While acknowledging the term "public forum" denotes "government-controlled property on which the Government would have to tread far more lightly in regulating speech," the federal appeals court held the "speech-protective rules of a public forum" would not necessarily apply to "regulation of an activity that involves merely a noncommunicative step in the production of speech."

According to the appeals court**,** the protective speech rules for a public forum have been applied by the federal courts to public streets and parks because these places have been traditionally used "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." As a result, the federal appeals court would limit the strict speech protection rules in a public forum to such activities which discuss and communicate thoughts, not activities which are not communicative.

In this particular instance, the federal appeals court found "filmmaking, like typing a manuscript, is not itself a communicative activity." On the contrary, as characterized by the court, filmmaking is merely "a step in the creation of speech that will be communicated at some other time, usually in some other location":

> Creation of speech is not the type of activity for which streets and parks have been used "time out of mind," and therefore it cannot be said that they have "immemorially been held in trust" for such activity. There is no historical right of access to government property in order to create speech.

Accordingly, in the opinion of the federal appeals court, the district court had erred in finding First Amendment speech protection in a public forum provided "a general right to record on public property" for commercial filmmaking.

REASONABLENESS STANDARD

On appeal, Price had claimed the NPS regulation of filmmaking was subject to "heightened scrutiny" by the federal courts, particularly "when the filming takes place on NPS land considered a traditional public forum or on land designated by the NPS as a free speech area." The federal appeals court rejected this argument. In this particular instance, the federal appeals

court held “the highly-protective rules of a traditional public forum” for First Amendment protected speech did not apply to a noncommunicative activity, like filmmaking on NPS land.

Instead, in the opinion of the federal appeals court, filmmaking on all NPS land is “subject to the same degree of regulation in a traditional public forum as it would be in a nonpublic forum,” i.e., a reasonableness standard for judicial review, not heightened or strict scrutiny. Specifically, under this reasonableness standard: “The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum.”

In reviewing the constitutionality of the challenged NPS permit and fee requirements under this less strict "reasonableness" standard, the federal appeals court would, therefore, apply the following “much more limited review than are regulations subject to heightened (intermediate or strict) scrutiny”:

> [A] reasonable regulation need not be the most reasonable or the only reasonable limitation. Indeed, there is no requirement [like that under the heightened or strict scrutiny standard of judicial review] that the restriction be narrowly tailored to advance the government's interests. Crucially, the "reasonableness" of any restriction must be assessed in the light of the purpose of the forum and all the surrounding circumstances. And, finally, "reasonableness" may be established by evidence in the record or even by a commonsense inference.

In this particular case, Price had not claimed the NPS permit and fee requirements discriminated based upon viewpoint. Accordingly, the sole constitutional issue before the federal appeals court was whether the challenged the NPS permit and fee requirements were reasonable.

On appeal, NPS had argued the permit and fee requirements reasonably furthered the following “two significant interests”: (a) raising revenue to maintain and improve the parks; and (b) ensuring that filming does not harm federal lands or otherwise interfere with park visitors' enjoyment of them.

PARK FEE TO RAISE REVENUE

On appeal, Price claimed the district court had correctly concluded this revenue-raising justification by NPS “runs afoul of the well-settled rule that the Government may not impose a charge for the enjoyment of a right granted by the federal constitution." As a result, Price had argued the NPS location fee was an impermissible charge for engaging in constitutionally protected activity.

The federal appeals court, however, found the NPS location fee was analogous to a “reasonable extraction of a rent by the owner of a property.” In so doing, the court noted "reasonableness, for purposes of forum analysis, includes a commercial component." Moreover, for commercial use of park land, the court recognized "reasonable regulations may include profit-conscious fees for access for expressive conduct, in a manner similar to fees that would be charged if the forum was owned by a private party.”

Further, the court noted the NPS had not "singled out speech to charge a fee." Instead, the court found the NPS "charges a fee for all types of commercial activity on land controlled by the NPS." As cited by the court, this NPS fee requirement was also "consistent with the Congress's declaration 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 characterized by the federal appeals court, the NPS fee requirement "merely puts a commercial filmmaker on the same footing as any other person who uses park land for a commercial purpose, such as a concessionaire." Accordingly, since the NPS could reasonably charge a concessionaire a rental fee, the appeals court held the NPS could also charge the commercial filmmaker a usage fee. In so doing, however, the federal appeals court did not "suggest that any fee would be constitutionally permissible or that any as applied challenge to the fee charged by the NPS would fail." Rather, the federal appeals court simply rejected the district court's "categorical conclusion" that this particular NPS permitting regime was unjustified because there was no reasonable basis for the NPS to raise revenue through a fee requirement.

PERMIT FOR PARK PROTECTION

On appeal, Price had also argued the NPS justification for the permit requirement was unconstitutional because the distinction between commercial and noncommercial filmmaking bore no relationship to the purported significant governmental interest in protecting park land.

In general, the federal appeals court acknowledged: "Protecting and properly managing park lands are undoubtedly significant governmental interests." With regard to filmmaking, the specific issue was, therefore, "whether a small film crew with a small amount of equipment implicates those interests" for NPS in parkland protection.

The federal appeals court conceded that filmmaking "crews of three people or fewer have less potential for causing resource damage or interfering with the public's use or enjoyment of the site." The federal appeals court, however, found NPS had to necessarily exercise judgment and discretion implementing federal laws and regulations to "manage and protect some of the nation's most treasured and valuable natural and cultural resources" under "many circumstances":

> [I]t 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 may 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.

Accordingly, the federal appeals court found "no basis for second guessing the factual underpinnings of this rationale for requiring filmmakers to get a permit" in order to facilitate NPS park management and protection.

On appeal, Price had also questioned "the disparate treatment of a small commercial production, for which a permit is required, and a larger non-commercial production, which is exempt from the permit requirement." According to the federal appeals court, an otherwise valid content neutral regulation "must be found to be constitutional so long as it does not favor one side of an issue and its rationale is not undermined by its exemptions." In this particular instance, the appeals court found "no serious argument that the permit requirement favors one side of any issue."

Further, in the opinion of the court, the NPS distinction between commercial and non-commercial filming did not "undermine the NPS's rationale for requiring a permit" to manage and protect park resources:

> It follows that a commercial film production is likely to involve more activities that are disruptive to park operations and are more likely to cause damage to park resources than does a non-commercial film production. Therefore, the distinction between commercial and non-commercial filming seems reasonably related to the Government's interests.

Moreover, in the opinion of the court, the NPS permit requirement was not "facially unreasonable" based upon the mere possibility that park resource purposes may have been more effectively achieved through permit requirements that did not distinguish between commercial and non-commercial filming. In reaching this conclusion, the appeals court recognized the appropriate limited role of judicial review which lacked "the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."

CONCLUSION

While acknowledging filmmaking is protected by the First Amendment, the federal appeals court concluded the "specific speech-protective rules of a public forum apply only to communicative activity." As a result, the federal appeals court held the challenged NPS "regulations governing filmmaking on government-controlled property need only be reasonable." In this particular instance, the appeals court found the NPS the permit and fee requirements for commercial filmmaking on NPS land were indeed reasonable and, therefore, constitutional. Accordingly, rhe federal appeals court ordered the district court to vacate its earlier judgment in favor of Price and enter judgment in favor of the defendant federal government.

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