PACIFIC LEGAL FOUNDATION

November 26, 2014

Chief Tom Tidwell
Forest Service
U.S. Department of Agriculture
201 14th Street SW
Washington, D.C. 20250-1124
Attn: Wilderness & Wild and Scenic Rivers

SUBMITTED VIA http://www.regulations.gov

Re: Pacific Legal Foundation's Comments on the United States Forest Service's Proposed Permit Criteria for Still Photography and Commercial Filming on Forest Service Lands

Dear Chief Tidwell:

Pacific Legal Foundation (PLF) hereby submits these comments on the United States Forest Service's proposed photography and filming directive.[1] PLF is a non-profit law firm that litigates in defense of a balanced approach to environmental protection, respecting property and other constitutional rights. PLF has extensive experience litigating environmental and First Amendment issues in courts nationwide. It has regularly participated in the administrative process by commenting on proposed regulations, rules, and directives.

The nation's 36 million acres of wilderness areas are an important resource and subject of public policy and debate. PLF believes that human access to these areas should be maximized so that all persons can enjoy America's natural heritage. Similarly, all persons should be able to participate in the debate over how these lands are used and managed. Lamentably, the Service's proposal to forbid access to these areas to filmmakers and photographers frustrates these objectives by restricting access to wilderness areas. It also makes it more difficult to produce photos and film to help the public appreciate our nation's wilderness and the many policy debates surrounding its use and protection. The proposal requires a permit for "commercial" filming and still photography in the nation's wilderness areas.[2] This permit is triggered solely by speech, regardless of any impact on the

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1 *See* 79 Fed. Reg. 52,626 (Sept. 4, 2014).

2 *See id.*

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environment or on anyone's enjoyment of the environment.[3] The requirements to obtain a permit include: (a) the Service's approval of the film's or photo's message; (b) proof that the speech could not take place outside of the wilderness area; and (c) proof that the speech will not be used for a commercial purpose.

The Service's proposal is not only objectionable policy, it is unconstitutional.[4] In violation of the First Amendment, the proposal unjustifiably targets speech rather than impacts to the wilderness, and regulates that speech based on its content. Further, the proposal inadequately protects constitutionally protected commercial speech, and improperly privileges the institutional press over ordinary Americans. Notwithstanding Chief Tidwell's recent statements,[5] the proposal's First Amendment problems should be addressed *now*, rather than be deferred indefinitely on the vain (and legally inadequate) hope that discretionary enforcement after-the-fact will cure the proposal's legal infirmities. For these reasons, discussed below, the Service should abandon its constitutionally defective proposal.

I

THE PROPOSAL IMPROPERLY TARGETS SPEECH RATHER THAN IMPACTS TO THE FOREST

If the Service's goal is to protect wilderness areas from activities that cause adverse impacts, the agency should regulate those impacts directly. For example, the Service could require a special use permit for any still photography or commercial filming *likely to have a substantial impact on the environment*. Or the Service could incorporate adverse effects on the environment into the definitions of still photography and commercial filming. Further, the Service could require a permit for *any* activity likely to have a substantial impact on the environment, rather than direct its regulation at speech.

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[3] *See id.*

[4] *See* Jonathan Wood, *If a tree falls in the forest, don't take a selfie with it*, PLF Liberty Blog (Oct. 6, 2014), *available at* http://blog.pacificlegal.org/2014/tree-falls-forest-make-sure-don't-take-picture/ (last visited Nov. 20, 2014).

[5] News Release, U.S. Forest Service, *US Forest Service Chief: I will ensure the First Amendment is upheld under agency commercial filming directives* (Sept. 25, 2014), *available at* http://www.fs.fed.us/news/releases/us-forest-service-chief-i-will-ensure-first-amendment-upheld-under-agency-commercial (last visited Nov. 20, 2014).

Under the Service's proposal, however, the requirement to obtain a special use permit would be solely by an individual's desire to engage in constitutionally protected speech. But the First Amendment does not allow the government to use permits to regulate speech.[6] Because the Service has articulated only its interest in protecting the wilderness as justification for the proposal, the agency's decision to regulate speech—rather than environmental impacts—cannot survive First Amendment scrutiny.

The Service's proposal is constitutionally defective in other ways as well. For example, the government cannot condition a benefit, such as access to the nation's forests, on the "voluntary" forfeiture of a person's free speech right.[7] Rather, the unconstitutional conditions doctrine[8] forbids the government from withholding such a discretionary benefit on *any* basis that infringes a constitutionally protected right.[9] Thus, the Service cannot leverage its control over access to this nation's wilderness to censor speech, any more than city officials can deny access to municipal parks to their critics.

II

THE PROPOSED CRITERIA AND PERMIT REGULATIONS ARE UNCONSTITUTIONALLY VAGUE

Even if, as the Service contends, its proposal does not regulate all of the speech that it appears to regulate, the proposal is nevertheless unconstitutionally vague. The media maelstrom surrounding the proposal, coupled with the Service's repeated assertions that its proposal does not mean what it appears to mean, demonstrate that ordinary people can only guess what the Service is prohibiting and

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[6] *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010) (First Amendment applies when "the conduct triggering coverage under the statute consists of communicating a message."); *see also Abramson v. Gonzalez*, 949 F.2d 1567, 1574 (11th Cir. 1992); *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009); *Parker v. Kentucky, Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987).

[7] *See Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321 (2013) (government cannot condition participation in federal program on requirement that participants expressly oppose prostitution).

[8] *See Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013).

[9] *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

what they must do to satisfy the permitting criteria.[10] Such vague speech regulation is particularly dangerous here: when people "of common intelligence must necessarily guess at [the law's] meaning[,]" their speech will be chilled.[11]

An example of this chilling effect can be found in the proposal's regulation of so-called "commercial filming." The Service's existing regulations define "commercial filming" broadly to include any video or audio recording "that involves the advertisement of a product or service, the creation of a product for sale, or the use of models, actors, sets, or props."[12] The conjunction "or" gives this definition sweeping scope. Any recording that uses "models, actors, sets, or props" is beyond what most people would think of as commercial filming. This text, read literally, would reach any recording that includes a person or object that is not natural to the wilderness.[13] Not even the reference to "commercial" filming adequately limits the definition for, according to the Service, something can be commercial "regardless of whether the use or activity is intended to produce a profit."[14] Thus, under the proposal's incorporation of this broad definition, a nonprofit entity wishing to film a speaker in a wilderness area to advocate for its policy position would have to obtain the Service's approval to disseminate its message before it could be allowed to proceed with its "commercial" filming.

The proposal produces similar problems in its incorporation of the existing broad regulatory definition of "[s]till photography." That definition encompasses any use of: (a) photography equipment where members of the public generally are not allowed; (b) photography equipment where additional administrative costs are likely; or (c) models, sets, or props that are not a part of the site's natural or cultural resources or administrative facilities.[15] Under the Service's proposal, the hypothetical nonprofit discussed in the preceding paragraph would need Service approval simply to take cellphone photos as part of its advocacy.

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[10] *See* Wood, *supra*, note 4 (cataloguing many of the negative press reports on the proposal).

[11] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

[12] 36 C.F.R. § 251.51.

[13] *See* Wood, *supra*, note 4.

[14] 36 C.F.R. § 251.51 (definition of "commercial use or activity").

[15] 36 C.F.R. § 251.51.

Not surprisingly, the media as well as the general public have voiced significant concern to the Service about its proposal's incorporation of these broad definitions.[16] If the proposal is finalized, much speech that has no adverse impact on the environment, and which the Service probably never intended to regulate, will be chilled. According to media reports, the Service has claimed that the regulations and permit criteria are not as broad as they would be if literally construed.[17] But the Service cannot cure its proposal's fatal overbreadth by leaving the proposal unconstitutionally vague.

III

THE PROPOSED PERMIT CRITERIA ARE UNCONSTITUTIONAL REGULATIONS OF PROTECTED SPEECH

Many of the Service's proposed permit criteria concern a special use's impacts to the environment.[18] PLF agrees that such criteria are appropriate. But many of the proposed criteria are *not* limited to such constitutional considerations. In particular, the requirements that still photography and commercial filming (a) have "a primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, education, scenic, or historical value," (b) be "wilderness-dependent" such that "no suitable locations outside of a wilderness area" exist, and (c) "[w]ould not advertise any product or service," all impinge on First Amendment rights without any corresponding benefit to the environment.[19]

A. The Service Cannot Limit Speech Based on Whether the Agency Agrees with the Message

The proposal's requirement that allowable speech have as its primary objective "dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features

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[16] *See* Wood, *supra*, note 4.

[17] Scott Martelle, *Parsing the Forest Service's (bad) proposed photo regulations*, L.A. Times (Sept. 30, 2014), *available at* http://www.latimes.com/opinion/opinion-la/la-ol-forest-service-parks-photography-first-amendment-20140930-story.html (last visited Nov. 24, 2014).

[18] *See* 79 Fed. Reg. 52,626 ("A special use permit may be issued . . . when the proposed activity: . . . (2) would not cause unacceptable resource damage . . . .").

[19] *Id.*

of scientific, education, scenic, or historical value" is a content-based restriction.[20] Government regulation of speech based on the disapproval of the ideas expressed raises the most significant First Amendment concerns.[21] For this reason, such restrictions are presumptively invalid and subject to the strictest of scrutiny.[22] This scrutiny is so strict that many commentators describe it as "'strict' in theory and fatal in fact."[23] Such content-based speech regulation is tolerated in just a few extremely limited areas, where the speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality,"[24] such as obscenity,[25] defamation,[26] and "fighting words."[27] And even these traditional categories have been narrowed in recent decades.[28]

The proposed criteria, however, are nothing like the traditional exceptions. Rather, they only allow for permits for speech that supports the Service.[29] If, in contrast, a speaker wishes to create a photo

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[20] *Id.*

[21] *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (striking down a content-based restriction on racist hate speech and overturning a cross-burning prosecution); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (declaring prosecution of flag-burning unconstitutional content-based regulation).

[22] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-14 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

[23] Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

[24] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[25] *Roth v. United States*, 354 U.S. 476 (1957).

[26] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

[27] *Chaplinsky*, 315 U.S. at 573.

[28] *See R.A.V.*, 505 U.S. at 382.

[29] Images and video are particularly powerful forms of speech, making them uniquely vulnerable to government interference. As an example, controversy recently erupted over the Obama administration's exclusion of photojournalists from events in favor of its own photographers.

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or film critical of the Service for being, for example, too protective of wilderness areas or for not allowing adequate human access, the Service's proposed criteria would compel a permit denial.[30]

There is no other apparent justification for this restriction other than to censor speech inconsistent with Service policy. And PLF is not alone in interpreting the criteria this way. The American Civil Liberties Union, perhaps the most prominent free speech advocacy organization in the country, reads the proposed criteria as allowing Service agents to censor speech of which they disapprove.[31] So too, apparently, does Liz Close, the Service's acting wilderness director: Ms. Close was quoted recently by *The Oregonian*[32] that, "[i]f you were engaged on reporting that was *in support of wilderness characteristics*, that would be permitted."

Supporting this interpretation of the proposal is the Service's own informal enforcement history. As reported recently by *The Seattle Times*, the Service violated Idaho Public Television's First Amendment rights when the latter tried to film a documentary about the fiftieth anniversary of the Wilderness Act.[33] This request led to a months-long negotiation in which the station "had to

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[29] (...continued)
See Todd Krainin, *The New Presidential Propaganda*, Reason (2014), *available at* http://reason.com/archives/2014/10/26/the-new-presidential-propaganda (last visited Nov. 20, 2014).

Or, better yet, watch the video (it's a lot more interesting). *Reality Show President: Inside the White House PR Machine*, ReasonTV (May 12, 2014), *available at* https://www.youtube.com/watch?v=1WrZKgTNE0g (last visited Nov. 20, 2014).

[30] For an example of such speech, *see* Pacific Legal Foundation, *PLF takes on the U.S. Forest Service's illegal closure of recreational trails*, youtube.com (July 17, 2012), *available at* https://www.youtube.com/watch?v=A394k8KtnMM (last visited Nov. 20, 2014).

[31] *See* Gabe Rottman, *Smokey Says, Get a Permit, Shutterbug*, aclu.org (Sept. 26, 2014), *available at* https://www.aclu.org/blog/free-speech/smokey-says-get-permit-shutterbug (last visited Nov. 20, 2014).

[32] Rob Davis, *Forest Service says media needs photography permit in wilderness areas, alarming First Amendment advocates*, The Oregonian (Sept. 23, 2014) (emphasis added), *available at* http://www.oregonlive.com/environment/index.ssf/2014/09/forest_service_says_media_need.html (last visited Nov. 20, 2014).

[33] Craig Welch, *Journalists slam Forest Service over wilderness permits*, Seattle Times (Sept. 25, 2014), *available at* http://seattletimes.com/html/localnews/2024629853_forestpermitxml.html (last
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convince [Service rangers] our stories would be in keeping with their interpretation of the values of wilderness."[34] The station eventually obtained the permit, but nevertheless strongly objected to the process: "Our role is not to be a PR office for the Forest Service. It's to cover stories how we see fit."[35]

Given this history, the proposed permit criteria should not be written with the assumption that all of the Service's 30,000+ employees will apply them in good faith and in a constitutionally sound manner. It is inevitable that at least some of the agency's employees will use the proposed permitting power to the full (and unconstitutional) extent evidently authorized.[36] Yet such regulation of speech—based on whether the government likes the message—cannot survive strict scrutiny.

B. There Is No Reason for the Service to Second-Guess a Speaker's Choice to Speak in the Forest If There Is No Environmental Impact

The Service's proposed requirement that a would-be speaker demonstrate that no other suitable place for the photography or filming exists raises serious constitutional problems. If speech will not have any significant adverse impact, the speaker should be free to choose the location of the speech. The

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[33] (...continued)
visited Nov. 20, 2014). This was not the only time the station faced permitting difficulties. In 2010, the Forest Service prohibited it from filming a student group fixing trails in the Salmon-Challis National Forest. The Service didn't relent until the governor intervened on behalf of the state-owned station—too late for the filming to occur. *See* Letter from C.L. "Butch" Otter, Governor of Idaho, to Frank Guzman, Forest Supervisor for the Salmon-Challis National Forest (May 19, 2010), *available at* https://www.documentcloud.org/documents/1305729-0519134234-001.html (last visited Nov. 20, 2014).

[34] *See* Welch, *supra* note 33.

[35] *Id.*

[36] *See id.* (giving numerous examples of Forest Rangers abusing this authority). Michael Kodas, director of the Center for Environmental Journalism summarized it like this:

> "That kind of outrageous behavior, where you're just leaving it to individual rangers to decide what they will allow and not allow, is very worrisome" . . . . "Access to agency officials and news scenes on national forest and parklands already is the worst it's been my entire career. This is yet another reflection of that."

Id.

most obvious impact of this permit requirement is on journalists and producers of documentaries. Reports on forest or wildfire issues need not be delivered with the forest as the backdrop; the same information could be conveyed by a reporter sitting in a studio. Yet, not surprisingly, major news outlets send reporters out to film their segments in a place tied to the story. After all, the effective conveyance of *what* a person speaks is in large measure a function of *where* that person speaks.

For example, the Gettysburg Address frames the way Americans view the Civil War. Perhaps better than any other wartime oration, the Address captured both the nation's sacrifice and optimism for the "new birth of freedom." But rather than relying on mere imagery or words, President Lincoln evoked the place where he stood—a bloody battlefield where more than 20,000 men were wounded or killed defending the nation's unity. Similarly, Martin Luther King's iconic "I have a dream" speech cannot be separated from the image of him standing before the Lincoln Memorial. It is little wonder why this speech—rather than very similar speeches delivered by Dr. King in other locations—is forged into the American memory. Likewise, location was key to President Reagan's Brandenburg Gate speech. It was not the first time that a president, or even President Reagan himself, had sharply criticized the brutality of the Soviet regime. Yet it is this speech, by an American president standing mere feet from the Berlin Wall, that is as tied to the memory of the Wall's ultimate fall as the images of the long-suffering German people deconstructing it brick by brick.

None of these iconic speeches *had* to be delivered where they were given. But they would not have affected those who heard them so profoundly had it not been for the place where they were uttered. Future speakers who wish to address important public issues, such as man's relationship to nature[37] and the best use of our nation's wilderness areas, should have those same areas available as their backdrop. Speakers should not have to prove to the government that they could not engage in their speech elsewhere.

C. The First Amendment Protects Commercial as Well as Non-Commercial Speech

In defending the constitutionality of the proposed permit criteria, Chief Tidwell has relied heavily on the fact that the proposal pertains only to "commercial"[38] photography and filming.[39] Chief Tidwell is mistaken if he believes that "commercial" speech is not protected by the First Amendment. The proposal's criteria prohibiting permits for speech that will advertise a product or

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[37] *See, e.g.*, *The Ascent of Man* (BBC 1973).

[38] As explained above, Chief Tidwell's interpretation fails to account for the definition's vagueness and breadth.

[39] *See* News Release, *supra*, note 5.

service violates the First Amendment. To be sure, the Supreme Court has given[40] the government greater power to regulate commercial speech (paying a "heavy First Amendment price"[41] as a result), but it has not eliminated constitutional protection.[42] Even under the Court's relatively lax *Central Hudson* standard,[43] a commercial speech restriction will be upheld only if it directly advances a substantial government interest.

The Service's proposal cannot satisfy the *Central Hudson* standard. Although the Service has a substantial interest in protecting wilderness areas, many of the elements of its proposal fail to directly advance that interest, such that there is no "reasonable fit" between the end of wilderness area protection and the speech-squelching means that the agency's proposal adopts. For example, precisely because they are *content*-based, the proposal's permit criteria do not directly advance the Service's interest in protecting the wilderness. Similarly, the proposal's requirement that a person wishing to take still photography or to film commercially first obtain a permit does not reasonably fit with the end of wilderness protection, again because that permit requirement is triggered by factors having nothing to do with impacts on wilderness areas.

The many problems that commentors have found with the commercial speech test provides another reason for the Service not to proceed with its proposal.[44] Distinguishing between commercial and

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[40] The lesser protections afforded to commercial speech have no historical precedent but were "plucked . . . out of thin air." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 627 (1990).

[41] *Nike v. Kasky*, 539 U.S. 654, 683 (2003) (Breyer, J., dissenting).

[42] Although the Court said in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), that commercial speech receives no First Amendment protection, this aberration from First Amendment principles is no longer the law. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761-62 (1976).

[43] *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980).

[44] *See* Timothy Sandefur, *The best commercial of 2012, or, "who's afraid of commercial speech?"*, PLF Liberty Blog (Nov. 28, 2012) (noting examples of advertisements that are more like short films than traditional advertisements), *available at* http://blog.pacificlegal.org/2012/the-best-commercial-of-2012-or-whos-afraid-of-commercial-speech/ (last visited Nov. 20, 2014); Kozinski & Banner, *supra*, note 40, at 639 (describing a Diet Pepsi ad as "a thirty-second minidrama that can stand on its own as a piece of film. At no point do any of the actors advocate that television viewers go out and buy Diet Pepsi, no one mentions any of Diet Pepsi's qualities, and the commercial does

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non-commercial speech is necessarily a purely arbitrary exercise.[45] Even advertisements, which are commonly assumed to be the quintessential example of commercial speech, often have profound non-commercial, and even political, messages.[46] The proposed permit criteria are not exempt from this line-drawing problem. As Ansel Adams' grandson explained in criticizing the proposal, the "[t]ough part is where do you draw the line on commercial activity."[47] Presumably, it "seems pretty clear when a camera crew goes in to film a commercial, but does a free-lance writer or landscape photographer need a permit?"[48] Would "Henry David Thoreaux [sic] or Ralph Waldo Emerson or Ansel Adams need a permit?"[49] Adams reasonably concluded that the Service's proposal "[s]eems ludicrous."[50]

Moreover, the Service exacerbates the existing shortcomings with the commercial speech doctrine by defining "commercial" broadly to include not-for-profit speech.[51] Under the proposal, a permit would be required for a non-profit to film a video promoting its work to expand access to wilderness areas, if that video would be used for fund-raising purposes.[52] The proposal therefore would give

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[44] (...continued)
not disclose the price of Diet Pepsi or where it can be obtained."); *see also* Anastasia Boden, *PLF asks US Supreme Court to hear broadcasters out*, PLF Liberty Blog (Apr. 18, 2014) (providing even more examples of commercials that defy classification as simply "commercial" speech), *available at* http://blog.pacificlegal.org/2014/PLF-petitions-us-supreme-court-hear-broadcasters/ (last visited Nov. 20, 2014).

[45] *See* Sandefur, *supra*, note 44; Kozinski & Banner, *supra*, note 40.

[46] *See* Sandefur, *supra*, note 44; Kozinski & Banner, *supra*, note 40.

[47] Benjamin Spillman, *Don't shoot: Forest Service takes fire on photo permits*, Reno Gazette-Journal (Sept. 30, 2014), *available at* http://www.rgj.com/story/life/outdoors/recreation/2014/09/26/wilderness-photography-iphone-regulations-forest-service/16278817/ (last visited Nov. 20, 2014).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] 36 C.F.R. § 251.51.

[52] *See, e.g.*, Pacific Legal Foundation, *supra*, note 30. Tax-deductible donations to support PLF's work can be made at http://www.pacificlegal.org/donate.

the Service the power to censor non-profit public interest groups if their message were to displease the agency. It would be difficult to hypothesize a more obviously unconstitutional outcome.

IV

THE FIRST AMENDMENT PROBLEMS WITH THE PROPOSAL CANNOT BE SOLVED THROUGH DISCRETIONARY ENFORCEMENT

The general principle employed by courts that laws and regulations should be interpreted so as to avoid raising constitutional questions does not apply when the constitutional questions arise under the First Amendment.[53] A regulation that facially violates the First Amendment cannot be rendered constitutional through discretionary enforcement or interpretation.[54] That result follows because anytime a regulation forbids speech on its face, the risk arises that a speaker will refrain from speaking—the aforementioned chilling effect—rather than risk punishment.[55] When this occurs, "[s]ociety as a whole [is] the loser."[56] Therefore, Chief Tidwell's support of the First Amendment and the Service's good-faith intent to use this permitting authority to protect the forests without abridging free speech cannot make it constitutional. Because the permit requirement and the proposed criteria regulate speech on their face, based on content and without furthering the Service's legitimate environmental purposes, they are unconstitutional.

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[53] *Secretary of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984).

[54] *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.").

[55] *Munson*, 467 U.S. at 956.

[56] *Id.*

V

PRIVILEGING CERTAIN TYPES OF SPEECH AND SPEAKERS SELECTED BY THE SERVICE WOULD EXACERBATE THE PROPOSAL'S FIRST AMENDMENT PROBLEMS

According to media reports, the Service believes that an exemption for "breaking news" or journalists cures the proposal's constitutional problems.[57] If that is the Service's view, then the agency is mistaken. The Free Press Clause does not privilege the press over the people; it simply forbids the government from licensing journalists or limiting access to mass-communication technologies.[58] Under the First Amendment, *all* persons enjoy the same broad speech rights. Hence, if the Service gives selected journalists preferential treatment, the agency will simply exacerbate rather than mitigate the proposal's constitutional defects.

CONCLUSION

PLF acknowledges the Service's authority to regulate the use of the nation's forests so that present and future generations of Americans can enjoy them. But the Service's still photography and commercial filming proposal is not the constitutional way to do so. Instead, the Service should craft a regulatory regime governed by viewpoint-neutral criteria, under which the permitting requirement is triggered by impacts to the environment, *not* by protected speech. PLF therefore urges the Service to abandon its unconstitutional proposal.

Sincerely,

JONATHAN WOOD
Attorney

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[57] Hunter Schwarz, *U.S. Forest Service to clarify wild land photography permits, says media won't be affected*, Wash. Post (Sept. 26, 2014) (quoting Chief Tidwell as saying "Based on the feedback we've made so far, we'll make changes to make sure this doesn't apply *to news gathering.*" (emphasis added)), *available at* http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/u-s-forest-service-to-clarify-wild-land-photography-permits-says-media-wont-be-affected/ (last visited Nov. 20, 2014).

[58] 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).