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Brian D. Joyner
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900 Ohio Drive, SW
Washington, D.C. 20024

Via the federal eRulemaking portal
http://www.regulations.gov

Re: **Comment of the Partnership for Civil Justice Fund on the Notice of Proposed Rulemaking:**
"Special Regulations, Areas of the National Park System, National Capital Region, Special Events and Demonstrations"
National Park Service, RIN 1024-AE45

Dear Mr. Joyner:

Please find herein, our comments to the above-referenced proposed rulemaking.

I. Introduction

The regulations pertaining to First Amendment protected activities, including demonstrations, on public space under the National Park Service (NPS) jurisdiction in Washington, D.C. have been forged through decades of civil rights and constitutional rights litigation, court oversight and intervention to ensure regulations were constitutional, as well as the sacrifice and efforts of all those who have come to Washington, D.C. to exercise cherished free speech rights.

With the brush of a hand, the NPS has disregarded this extensive history and issued the proposed rulemaking, the most substantial wholesale alteration of the permitting regulations undertaken by the NPS. Our organization, our constituencies, and American society as a whole would be negatively affected by these changes, the net effect of which is to roll back, impose costs upon, and restrict constitutional freedoms that are necessary for a healthy democracy.

Over 50 years the NPS has been brought before the federal courts time and again, and

subject to court orders requiring it to administer its permitting system in a constitutional manner. Years of litigation over repeated obstructions and denials of constitutionally-protected free speech rights incrementally forged the existing system put into place to guide the hand of the NPS, protect free speech and give some certainty to those who would access public space through a first come first served system.

Even with a permitting system in place, the NPS still routinely subverted it forcing the PCJF to seek judicial intervention to require it to conform to its obligations and the Constitution. *See A.N.S.W.E.R. Coalition v. Kempthorne*, 537 F. Supp. 2d 183, 206 (D.D.C. 2008) (declaring that the National Park Service policy and practice of exempting itself from compliance with the generally applicable permitting regulations is unconstitutional).

Now, the NPS seeks to overturn this carefully crafted permitting system and the obligations imposed on it, by unilaterally rewriting those obligations with wholesale and unjustified elimination of core protections for First Amendment activities on public land in the nation's capital and the creation of obstacles and burdens to the exercise of protected speech.

II. The Proposed Rulemaking Lacks Evidence or Sound Analysis to Justify the Increased Costs and Restrictions on First Amendment Protected Activity

The NPS has failed to provide evidence, analysis, justification or substantial explanation for the many proposed changes to the existing permitting system. It thus fails to provide proper notice to those who will be affected by it and makes it difficult for us to fully evaluate and comment on these proposals.

Indeed, in some areas the NPS, in its rulemaking, offers no attempted explanation or analysis whatsoever, to justify the need to rewrite the regulations governing demonstrations, nor has it explained how the revised regulations would resolve an asserted issue.

It repeatedly conflates the burdens of handling "special events" with demonstrations citing the former for restrictions on the latter. It fails to explain how each of its revisions will affect free speech activities or provide justifications or analysis that show it even considered the impact on its proposal on the exercise of First Amendment rights. It is as though the Constitution and free speech rights are an afterthought at best, and not a core element of consideration throughout the process by which these proposed rules were devised.

III. Proposed Change No. 2 (Revise Definitions of "Demonstrations" and "Special Events")

A. Proposed Regulatory Changes End the Separate Protected Track for Demonstration Activity

Historically and currently, as a matter of regulatory definition, the NPS recognizes two exclusive and distinct types of events, "special events" and "demonstrations."

The operative distinction between the two is stated by NPS as follows: "Special events differ from public assemblies and public meetings in that the latter activities are rights protected by the First Amendment." *See* NPS Director's Order #53: Special Park Uses (available at https://www.nps.gov/policy/DOrders/DO53.htm).

Special events are subject to costs, charges and restrictions as they do not have the benefit

of First Amendment constitutional protections. By definition, a special event "includes sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, parades, fairs, festivals and similar events. . . which are not demonstrations. . . " 36 C.F.R. § 7.96(g)(1)(ii); *See also* 36 C.F.R. § 2.50(a) (special events are "[s]ports events, pageants, regattas, public spectator attractions, entertainments, ceremonies, and similar events").

Once an event is deemed a demonstration, i.e., an event "that involve[s] the communication or expression of views and grievances," the event as a whole receives "heightened protections under the First Amendment," 83 Fed. Reg. 40463, and there are no charges or costs imposed by NPS for the activity.

The definition of a demonstration "includes demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views and grievances. . ." 36 C.F.R. § 7.96(g)(1)(i).

By definition, demonstrations and special events are exclusive and distinct categories. Once an event is deemed a demonstration, it is outside the regulatory definition of a "special events". 36 C.F.R. § 7.96(g)(1)(ii) (special events are activities "which are not demonstrations").

This creates a separate track for demonstrations, the consequence of which is that demonstrations, as a whole, receive constitutional protections and there are no fees or charges imposed by the NPS. Special events, which are often commercially sponsored activities or commercial film projects, are subject to charges.

NPS now proposes to end this distinctive and exclusive treatment through a change in regulatory definitions.

NPS proposes the creation of a new definition, "event," which "mean[s] both demonstrations and special events" and to "remove the text . . . that states that special events are those activities that do not qualify as demonstrations." 83 Fed. Reg. 40463.

Through the definitional changes, NPS appears to potentially authorize the imposition of charges and restrictions on demonstrations that contain "special event elements" within a larger program of protest or expression of views/grievances. 83 Fed. Reg. 40463.

If so, this would have the same adverse effects as Proposal No. 6, addressed further below, which seeks comment on the merits of assessing fees and costs directly on demonstrations. A difference between Proposal No. 6 and proposal No. 2, is that under Proposal No. 6 the NPS simply "seeks comment on the merit of recovering costs associated with permitted demonstrations," 83 Fed. Reg. 40465, and Proposal No. 2 may be intended to effect the same result immediately through a change in regulatory definition, although if that is the case it is intended *sub silentio*.

However, the rulemaking does not suggest that increased cost recovery is the basis or purpose of Proposal No. 2. The section on Proposal No. 2 is devoid of reference to cost recovery as a basis or purpose for Proposal No. 2. The section on Proposal No. 2 does not provide notice, in any way, that demonstrations deemed to contain "special event elements" are proposed to be subject to costs or fees.

Consequently, notwithstanding the proposed change in regulatory definition, the intent and effect of this change is entirely opaque - - including to the NPS, which itself poses the following questions without suggesting an answer: "What factors should the NPS consider when differentiating between the demonstration and special event elements of a single activity?" How

should the NPS regulate activities that have elements of demonstrations and special events? The NPS seeks comments on the definitions and treatment of demonstrations and special events. What additional factors should the NPS consider when determining whether an activity is a demonstration or a special event?" 83 Fed. Reg. 40463.

The NPS lacks clarity for itself and for the public, rendering the proposed rules unclear as to how they will be carried out and the effect of their intended or ultimate application. If the NPS wishes to promulgate new rules governing demonstration activity, it should know what its rules mean, and it should state with clarity the basis for them, and how they will be carried out. If the NPS wishes to ask a question of the public it may do so prior to rulemaking, but it should not simultaneously have written proposed regulations where it has no idea and cannot state, how they will be carried out and what they mean.

Aside from the effort, inexplicably and without evident basis in reason or fact, that the NPS seeks to merge these two exclusive categories, there is no notice whatsoever as to what this really means. Although we are concerned that the NPS intends to impose fees and charges and restrictions on demonstrations deemed to contain "special event elements," whatever that term actually means, the rulemaking does not so state nor does it provide any notice whatsoever of what the consequences of these proposed definitional changes entails.

The NPS has provided no basis nor can we discern any non-objectionable basis on which to end the long-standing exclusive distinction between demonstrations - - which have constitutionally protected status - - and special events, which do not have this status. Removing the text in the section 7.96 definition that states special events are those activities that do not qualify as demonstrations, 83 Fed. Reg. 40463, would remove the fundamental distinction between these two categories of conduct, that demonstrations are constitutionally protected and special events are not. Removing this distinction is in complete disregard of the function that it serves and will result in confusion, possibly in restrictions and charges improperly attempted on First Amendment protected activities, and potentially years of litigation, conflict and uncertainty.

B. The NPS Offers No Factual Basis Nor Sound Reasoning To Justify Proposal No. 2, Which is So Vague as to What Constitutes a "Special Event Element" as to Deprive Commenters of Fair Notice of What is Intended

The sole bases and purposes asserted for Proposal No. 2 is that "[e]xperience managing events has shown that some demonstrations have elements that are special events," 83 Fed. Reg. 40463, and that merging of demonstrations and special events would "streamline these regulations," *id.*

The assertion that "experience . . . has shown that some demonstrations have elements that are special events" does not make sense. As such, the commenters are left to guess what the NPS really means, and are deprived of meaningful notice as to what the NPS means or intends. The definition of a special event excludes activities that are demonstrations. 36 C.F.R. § 7.96(g)(1)(ii) (special events are activities "which are not demonstrations"). The essential element of a demonstration is not the specific activity or form of conduct which is engaged in, but that the form of conduct is related to "the expression of views and grievances".

In other words, under the current definitions, once an event is deemed a "form of conduct that involve[s] the expression of views and grievances," it is not a special event. Since the two are exclusive by definition, how can demonstrations have or contain the other?

It may be, however, that the NPS is seeking to create a system in which government officials will deconstruct a protest or demonstration and its expressive activities and assembly and decide that certain moments or "elements" just aren't political or expressive enough the presence of which would, therefore, subject a demonstration to the additional charges, restrictions and processing as if it were a special event.

It may be that the NPS is proposing that having musical performances or exhibits or anything it considers an "entertainment" will subject a demonstration to the additional charges, restrictions and processing as if it were a special event.

The NPS does not offer any sound reasoning nor factual basis for such a distinction. Is the NPS really saying that when Marian Anderson sang on the National Mall in 1939, as Hitler's troops advanced in Europe and the Depression took its toll in the U.S. and she was denied a stage at DAR Constitutional Hall because of her race (https://www.npr.org/2014/04/09/298760473/denied-a-stage-she-sang-for-a-nation), that when she sang America, an aria from *La favorite*, Ave Maria, Gospel Train, Trampin' and My Soul is Anchored in God, that these were not elements of political demonstration and expression? Or that the appearance of Ariana Grande, Common or Miley Cyrus at the 2018 March for Our Lives rally in Washington, D.C., would constitute a "special event element" rather than a performance that is supportive of the underlying political message? *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").[1]

Twenty-three years later when Ms. Anderson performed again at the Lincoln Memorial, this time at the 1963 March on Washington for Jobs and Freedom, so did Mahalia Jackson, Odetta, Joan Baez, Bob Dylan, Peter Paul and Mary and others. Legions of socially conscious cultural artists from Phil Ochs, Pete Seeger, Harry Belafonte to Patti Smith to Ariana Grande, Miley Cyrus, Lin Manuel-Miranda have added their voices, words and performances in support of political demonstrations in Washington, D.C. It is not properly within the purview of government officials to analyze the program of free speech activities to deem portions insufficient for robust First Amendment protections.

What the NPS is saying is entirely unclear and, as such, the proposed rulemaking fails to provide notice as to what the intended effect is. The NPS fails to disclose or describe how it will

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[1] "Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. [citations omitted] The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment. The parties do not appear to dispute that proposition."
Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989).

determine what constitutes a "special event element" within a demonstration or to give a description of what constitutes such elements so that the public can meaningfully understand what the rule change will entail. The NPS provides no criteria or narrow standards that will be employed in such a determination. The NPS does not describe prior events that it claims should have been subjected to this treatment, nor does it provide even a hypothetical description of a demonstration that contains "special event elements."

Indeed, the definition of special event is so unconstrained and broad as to encompass any "entertainment," *see* 36 C.F.R. § 7.96(g)(1)(ii). That same definition includes any conduct that includes an "exhibition," *id*., as if an art installation or an exhibit of posters and signs or slogans or even of culturally significant items could not be supportive of the expressive and political goals of a demonstration. Or a "celebration" or a "parade" or a "festival." *Id.* Of course these forms of conduct can all constitute or support the expression of grievances and views.

Under the NPS proposed rulemaking, it would appear that the display of AIDS quilt could be deemed an "exhibit" as it speaks through display not through vocalized word and thus is deprived of free speech protection by the NPS and subject to "special event" costs and processing. Such treatment would have prohibited the AIDS Quilt from being displayed in Washington, D.C.

To the extent the NPS seeks to deprive a demonstration of its protections or favored treatment as a demonstration because it includes, for example, a supporting or ancillary musical or cultural element or an exhibition or a celebration, we see no factual or legal basis for such adverse treatment.

C. The Proposal, Improperly, Will Inevitably Impose Fees and Costs and Restrictions on Demonstration Events

Such adverse treatment is contrary to reality. A demonstration is a demonstration. If the thrust of an event is to convey or express views and grievances, ancillary elements further that overarching goal of political expression. The existing language in the section 7.96 definitions reflects this, and should not be changed.

A demonstration as a whole is entitled to full constitutional protections and, also, to occur without charges/costs/restrictions associated with special events. If a demonstration includes elements of "entertainment," such as musical interlude along with speakers, that is supportive of the protest as a whole. If the demonstration includes a popular singer, or many popular singers whose appearances in solidarity are supportive of the message, that is a political expression. If an event includes a cultural display of indigenous performers, that is also a form of protected expression and should not be subjected to second or third-class status. Such forms of conduct wouldn't be a part of a protest were they not part of the intended political expression.

The defining feature of a demonstration is the intention to raise awareness of an issue, to address views and grievances, to speak to the government and the world about a matter of concern. No government official may constitutionally possess the discretionary authority to evaluate the content of demonstration activity and review its program to decide whether it is "political" enough.

D. The Proposal Will Not "Streamline These Regulations" But Will Endlessly Complicate Application Processing

The NPS states in conclusory fashion that these regulatory changes would "streamline these regulations," 83 Fed. Reg. 40463. There is simply no basis, no reasoning, no factual predicate for this naked assertion. The NPS has failed to provide evidence of a deleterious condition and evidence and analysis sufficient to support that this proposal would alleviated any claimed condition. As a matter of procedure and substance, these new definitions will endlessly complicate the processing of applications. It will turn NPS rangers and administrators into program content police, reviewing the content of a proposed demonstration element-by-element and imposing fees and restrictions if a demonstration contains ancillary components that, in officials' discretion, are deemed insufficiently politically expressive.

E. NPS Officials, Lacking Definite and Objective Standards as to What Constitutes a "Special Event Element," Will Be Permitted to Make Decisions About Whose Speech Will be Restricted Based on Whim, Caprice, Political Bias and Prejudice

The proposed rulemaking contains no criteria for how to distinguish a special event element from a demonstration element and, as such, fails to provide notice as to what it seeks to accomplish. Indeed, the proposal itself expressly leaves this vacant, posing the question to commentators of "how [NPS] might further differentiate between the demonstration element(s) and the special event element(s) of a single activity." 83 Fed. Reg. 40463.

Commenters are without notice. And officials are without guidance or "narrow, objective, and definite standards" to guide their decisions. This proposal, whatever it may mean, leaves a highly discretionary decision-making that can abridge constitutional rights in the hands of officials who, lacking necessary guidance, will be left to make decisions based on whim, caprice or - - should they be so inclined - - political bias and prejudice. *See Forsyth County Ga. v. Nationalist Movement*, 505 U.S. 123, 177 (1992); *Shuttlesworth v. Birmingham*¸ 394 U.S. 147, 150-151 (1969) (permitting system must contain "narrow, objective and definite standards"); *Neimetko v. Maryland*, 340 U.S. 268, 271 (1951).

IV. Proposed Change No. 4 (Changes Related to Demonstrations Permitted Without a Permit)

NPS seeks comment on the rules governing demonstrations that can take place without the need for a permit. 83 Fed. Reg. 40464.

Under current rules, demonstrations of moderate sizes are permitted in five park areas without an advance written permit, including Franklin Park (500 person limit), McPherson Park (500 person limit), U.S. Reservation No. 31 across the street from the International Monetary Fund headquarters (100 person), Rock Creek and Potomac Parkway west of 23rd Street and south of P Street NW (1,000 person limit) and U.S. Reservation No. 46 at 8th Street and D Street (25 person limit).

Additionally, under the "small group exception," groups of 25 or fewer may assemble without a permit.

Organizers are currently allowed, without a permit, to use staging or structures or sound in these areas.

A. The Small Group Exception Should Be Expanded

The NPS should enlarge its small group exception to greater than its current 25. There are crowds of persons in the public parks every day in far greater numbers. Multiple busses containing groups of tourists and school children in groups exceeding 100 are regularly present on the NPS administered parklands. The only distinction between these larger groups and the persons governed by the 25-person rule is whether the group is engaged in free speech activities.

The NPS does not require tourist operations or school principals to obtain permits to walk and assemble on public lands or risk arrest for unpermitted assembly. Four buses of tourists could unload at Lafayette Park and go over to the White House sidewalk without issue. But if they suddenly begin chanting in unison or took out signs, they would be subject to arrest. The NPS should undertake an evidence based study to determine a more appropriate number for permitless assembly for those engaged in First Amendment conduct.

B. The Maximum Number of Participants in No-Permit-Needed Parks Should be Increased

The NPS alternatively seeks comment as to whether the maximum number of participants should be increased or decreased in these no-permit-needed parks. 83 Fed. Reg. 40464.

The NPS provides no factual basis for decreasing the number of persons, other than to say that doing so "would allow the NPS to better manage and anticipate demonstrations." 83 Fed. Reg. 40464. There is no factual basis indicating or identifying an existing management problem. Nor is there is any evaluation of alternatives that might alleviate any such problem, were one identified. Had a problem been identified, commenters would have considered the factual basis presented and proposed alternatives to address any such problem, if founded in fact, without further restricting access to free speech and assembly, or burdening it with a permit requirement.

In our experience and knowledge, the availability of these parks has not posed a significant problem for the NPS.

Although the NPS has not conducted a First Amendment Impact study, it is clear that permitting more assembly without the logistical requirement of a permit facilitates the conduct of expression, free speech and assembly for protesters. We are unaware, experientially, of any adverse effects on protesters caused by the availability of sites for assembly without a permit.

As such, we support the increase of participant maximums to the maximum feasible level for each park as doing so will facilitate political expression and peaceable assembly.

C. The List of Parks In Which Demonstrations May Occur Without a Permit Should Be Expanded

From time immemorial, public parks have been places where people can speak their minds.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a

> part of the privileges, immunities, rights, and liberties of citizens.

Women Strike for Peace v. Morton, 472 F.2d 1273, 1275 (D.C. Cir. 1972) (citing *Hague v. C.I.O.*, 307 U.S. 496 (1939)).

> Parks have long been regarded as 'a particular kind of community area that, under the Anglo-American tradition, are available, at least to some extent and on a reasonable basis, for groups of citizens concerned with expression of ideas. . . [T]he Supreme Court has been consistently solicitous of the claims of groups seeking to use parks for religious or political expression. Moreover, this solicitude has extended to erection of temporary structures on park land for use in connection with communicative activity.

Women Strike for Peace v. Morton, 472 F.2d at 1287.

We support measures that facilitate use of parks for the essential public purpose of free speech and assembly, including all those that decrease logistical hurdles to usage such as permit requirements.

We support the inclusion of additional parks, especially those that experientially have been used for protest and assembly and/or are close to sites of public authority or governance and/or have physical characteristics that are conducive to group assembly. We support the inclusion of Dupont Circle as a park for which an advance written permit is not needed. *See, e.g.*, https://www.gettyimages.com/detail/news-photo/demonstrators-gather-in-dupont-circle-park-for-an-anti-war-news-photo/51673747 (images of anti-war rally in Dupont Circle in 2002). Farragut Square is also conducive for demonstration activity, given its downtown location and its dimensions. Other parks, such as Macolm X / Meridian Hill Park, likewise, should be considered for such status.

D. Sound and Stage Must Be Allowed, Without a Permit, to Facilitate Expression and Logistics in No-Permit-Needed Parks

Stage and sound are essentially facilitative of peaceful group assembly and demonstration expression.

The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. *DeJonge v. State of Oregon*, 299 U.S. 353, 364 (1937). The Supreme Court has, likewise, recognized the imperative

> need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. State of Oregon, 299 U.S. 353, 365 (1937).

"The use of parks for public assembly and airing of opinions is historic in our democratic society, and one of its cardinal values." *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 724 (D.C. Cir. 1975).

Particularly where the NPS allows demonstrations of several hundred, or a few thousand, to occur in a predesignated park without need for a permit, it is essential for the agency to also allow amplified sound and stage sufficient for an orderly demonstration, the hearing of speakers, the effective communication of expression (as well as logistical information) across those

assembled in light of the noise of the demonstration.

It is illogical for the NPS, with one hand, to allow demonstrations without a permit in designated parks and, with the other hand, to disallow sound and stage suitable for communicating with those assembled without need for an advance permit. This incongruity undermines the effective conduct of a demonstration that is allowed in these parks without a permit.

Yet, existing and proposed rule § 7.96(g)(5)(iv) provides that amplified sound is allowed only in connection with permitted demonstrations, and is silent as to its use in connection with demonstrations in no-permit-needed parks. While this does not ban amplified sound in these parks, it would be useful clarification for the regulation to expressly grant allowance of amplified sound in these no-permit-needed parks.

Parks are quintessentially appropriate venues for use of amplified sound as a matter of right and routine without resort to the logistical obstacle of a permit. The design and self-contained nature of parks render them fundamentally appropriate for amplified sound. These parks are located within bustling city areas, which tolerate substantial noise as a matter of routine with the ordinary activities of city life.

And the Proposed Change No. 5, addressed below, would ban all staging appropriate for demonstrations in these no-permit-needed parks, absent an advance written permit. Staging facilitates visibility, allows focus, facilitates projection of sound through the use of elevated loudspeakers. The D.C. Circuit and the Supreme Court have been "consistently solicitous" of the right of groups to erect temporary structures in connection with communicative activity. *See Women Strike for Peace v. Morton*, 472 F.2d at 1287 (citing *Saia v. New York*, 334 U.S. 558 (1948)). *See also Saia*, 334 U.S. at 561 ("Loud-speakers are today indispensable instruments of effective public speech.").

We suggest that for the no-permit-needed parks, amplified sound and staging (subject to default maximum dimensions) be allowed in these parks without need for a permit rather than the ban on all manner of structures that the NPS proposes. The NPS should engage in open meetings with persons who organize and engage in demonstration activities in Washington, D.C. and solicit their proposals as to structure sizes and needs that would be facilitative of activities, which could be then evaluated with a fact based analysis taking into account interests and concerns of the NPS.

V. Proposed Change No. 5 (Permit Requirement for Any Structures)

A. The Permit Requirement for Staging or Structures in Connection with Demonstrations in No-Permit-Needed Parks Undermines the Ability to Engage in Effective Free Speech to Those Engaged in the Allowed Demonstration

As discussed above, it is essential in the effective conduct of peaceable assembly, free speech and demonstration activity, all of which is constitutionally protected, to have amplified sound, staging and temporary structures to effectively communicate with the assembled crowd and to facilitate the organizing and expressive activity. A prohibition on use of sound, staging and temporary structures effectively eviscerates the ability of organizers to communicate with those assembled and to engage in the activities typically associated with a peaceable political assembly, an exchange of ideas and information, and collective expression.

B. The NPS Lacks the Factual Predicate to Justify the Severe Restriction Against Staging or Structures Absent a Permit

Regarding the no-permit-needed parks, the NPS states

> that the absence of a permit requirement before erecting a structure in these five parks poses a negative impact to park resources and visitor safety. Without a permit, demonstrators erecting structures are not aware of the location of any underground water lines in turf areas, or when and what type of matting may be necessary to protect turf, marble, or granite, or ensure that the structure is safe.

83 Fed. Reg. 40464.

The NPS states no history of demonstrators in these parks damaging water lines in turf areas or causing damage in these parks due to a lack of information. There is no suggestion of a history of damage caused by ordinary staging, tables, tents or other temporary "structures" associated with an organized demonstration.

Even presuming the hypothetical "risk" to be present, the NPS can remedy this by simply providing standard information regarding any restrictions regarding dimensions, characteristics, construct or locations of structures in these limited parks through a standardized document.

To the extent this restriction, which impairs fundamental free speech activities, is based on a purported lack of information to demonstration organizers, the NPS can cure this by providing the necessary information on its web site, physical literature, or other means of effective communication. It can include notice in the regulations, which state permission to use these parks without a permit under certain specified conditions, that any structures must conform to the maps or restrictions that are described, either in the regulations or in a URL link to an Internet based document for these parks.

The NPS identifies one prior incident, that occurred over five years ago, in which it asserts one particular group of demonstrators in McPherson Square took advantage of the absence of a permit requirement for structures to erect "a large and unsafe barn-like structure made up of a wooden frame of boards and planks." 83 Fed. Reg. 40464.

The NPS uses fundamentally unsound reasoning to justify banning all safe structures, including staging, tables, tents and other items facilitative of allowed demonstration and assembly activity, on the basis that one group sought to erect what the NPS itself asserts was an illegal building five years ago. *See* 83 Fed. Reg. 40464 (barn was unlawful under existing law and condemned as unsafe by public safety officials).

If the NPS seeks to establish by regulation that it is illegal to construct an unsafe wooden building or other structure, it can do so without restricting the use of ordinary and safe temporary structures that are facilitate of allowed demonstration activity. The referenced incident fails to justify the proposed regulation.

The NPS can do so through multiple means. It can seek comment on reasonably restricting the characteristics, dimensions and size of temporary structures and invite input so that it is well informed. Or it can promulgate regulations creating allowances to use temporary staging and other structures associated with demonstrations subject to standard restrictions based on dimension, construct, material or location or any other salient characteristic This would include stage, tables, chairs, and the like.

The NPS proposes to allow non-demonstrators to use chairs without a permit, tents or "picnic shelters" without a permit, and "small tables" without a permit. 83 Fed. Reg. 40465. The same allowance must be extended to demonstrators to avoid constitutional infirmities.

VI. Proposed Change No. 6 (Charging Fees and Costs for Demonstrations)

A. NPS Should Not Impose Fees and Costs on Permitted Demonstrations

The NPS has not in the instant promulgation of rules and proposed rulemaking expressly proposed or enacted regulations to impose fees and costs on demonstrations, which would constitute a radical change in policy of substantial dimension. Nor, as referenced above, has it justified the change in regulatory definitions by reference to cost recovery. As such, the current rulemaking fails to provide notice or a factual basis for the imposition of fees and costs on demonstrations.

NPS has, however, clearly projected the consideration and the apparent desire to do so. NPS has expressly sought comment on "the merits of recovering costs associated with permitted demonstrations, and on how any cost recovery should be done." 83 Fed. Reg. 40465.

We oppose the proposed "pay to protest" proposal whereby the NPS would charge protesters for "the Costs of Administering Permitted Activities That Contain Protected Speech." 83 Fed. Reg. 40465. *See* "The Trump administration wants to tax protests. What ever happened to free speech?," *The Washington Post*, Mara Verheyden-Hilliard and Carl Messineo, September 11, 2018.

Free speech is not a cost to society. It is a value. It is a fundamental pillar of democracy. Facilitating and handling demonstrations is part of the basic mission of the National Park Service. *See A Quaker Action Group. v. Morton*, 516 F.2d 717, 724–25 (D.C. Cir. 1975) (finding that expressive conduct and demonstration activity is part of the "basic mission" of the NPS). It is not a "special use" of park resources.

It is improper for the NPS to segment out this one of its many functions, and assert this part of its mission is an extraneous, additional or special use or cost upon NPS subject to "cost recovery" from the public when they exercise their First Amendment rights.

To maintain the vitality of democracy, we oppose any and all charges on permitted demonstrations. We oppose the NPS proposal to charge for any "event management" costs in relation to demonstration activity. This includes the cost of barricades and fencing erected at the discretion of police, the salaries of personnel deployed to monitor the protest, trash removal and sanitation charges and permit application charges.

The NPS also proposes assessing costs on "harm to turf" for engaging in free speech on our green spaces including the National Mall. As members of Congress pointed out last year in a letter to the NPS, "[T]he Mall is not a turf sanctuary—it is a public park designed to host a variety of diverse, high-traffic events. Moreover, our understanding is that the new turf on the Mall is a proprietary blend that is designed to withstand heavy use." (Letter from Representatives Norton, Cummings et al. to the Acting Director, NPS, November 14, 2017)

We reject the assertion that grass should be prioritized over the exercise of free speech or that assembly and demonstration activity is in any way inconstant or incompatible with the appropriate use of our public parklands.

In our experience, numerically, the vast majority of groups that engage in protest are grassroots groups that are not for-profit associations. They possess preciously scarce material resources and are typically focused on maximizing human resources or "human capital" in order to bring people together in common cause or expression. Their activities are socially focused, not-for-profit, and simply cannot afford fees and charges. They are not necessarily organized in a traditional structure, but often are associations which bind together based on a message, a moment, a need for collective action.

Consequently, any assessed charges will decrease and burden opportunities to assemble and speak out on matters of social import and to petition the government for a redress of grievances in the nation's capital. The NPS should seek to maximize opportunities for participatory democracy, not charge for it.

Throughout the proposed rulemaking the NPS conflates the separate categories of demonstrations, special events, and commercial filming permits (including, e.g., the new *Wonder Woman* blockbuster or the HBO, Chase and Starbucks corporate sponsored Concert for Valor) to assert a financial burden on the Agency. Indeed, in defending its proposal to charge *demonstrators* fees and costs, an NPS spokesperson was quoted in the Washington Post referencing *special events* in stating that "the federal government and taxpayers shouldn't be required to underwrite the cost of somebody's special event, whether it's a concert, wedding or gathering of some sort." (available at https://www.washingtonpost.com/opinions/the-trump-administrations-bad-plan-to-charge-for-free-speech-on-the-mall/2018/09/19/0fa6dc84-bb70-11e8-bdc0-90f81cc58c5d_story.html?utm_term=.77b039b6950b).

According to the NPS own numbers, the smallest number of permits is issued to demonstrations, which make up less than 20% of permit applications. 83 Fed. Reg. 40461. The NPS has been under a requirement to recover costs from corporate-sponsored and private use "special events" but according to its own filing it has failed to do so and instead has been allowing the taxpayer to subsidize that use of public space and resources. If the NPS needs to raise revenues and Congress refuses to appropriate funds, the agency should look to its for-profit and corporate sponsored "special event" applicants for "cost recovery," not to demonstration activity.

While the Supreme Court has addressed fees in the context of First Amendment activities, *Cox v. State of New Hampshire*, 312 U.S. 569 (1941);, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Murdock v. v. Pennsylvania*, 319 U.S. 105 (1943), no case has ever considered the imposition of fees to demonstrate at the seat of the federal government because no federal government has ever before dared to impose such a price upon free speech, assembly and petition activities.

The fees contemplated by the NPS are not nominal, but have the appearance of being potentially bankrupting. They will chill the exercise of the fundamental rights of free speech, assembly and to petition the government for redress of grievances.

The NPS offers only one justification for charging fees on demonstrations, that "[d]emonstrations can have substantial impacts on resources; resulting in a financial burden to the federal government, particularly where structures are involved." 83 Fed. Reg. 40465.

The NPS does not explain why it seeks to suddenly change well-established policy regarding cost recovery for protests. It does not articulate that it has exhausted or even implemented full cost recovery on special events or commercial filming licenses, which do not trigger the same constitutional protections as imposing charges on demonstrations.

NPS has not considered how the imposition of fees and costs, and the uncertain risk of costs for charges for damages or rehabilitation to turf, would diminish and chill the exercise of free speech. It has conducted no study to suggest that First Amendment freedoms are not cost sensitive. And, of course, we know they are. In our experience, numerically, the vast majority of demonstrations are put on by grassroots organizations which are not organized around principles of profit, but which seek to funnel and channel the expression of the citizenry.

B. The NPS Lacks Congressional Authorization to Charge Fees for Demonstrations

NPS asserts it "has the authority to recover all costs of providing necessary services associated with special use permits." 83 Fed. Reg. 40465 (citing 54 U.S.C. § 103104). However, the referenced statute does not define what constitutes a special use permit. There is no evidence that Congress intended to authorize the charging of demonstrators for the right to protest in the nation's capital.

We respectfully disagree that NPS has been granted such authority to charge for the exercise of freedom of speech, peaceable assembly or the ability of the people to petition their government for redress of grievances by this statute.

NPS has, in its internal management documents, established within the agency a definition for what constitutes a special park use. According to the NPS's own definition, the first requirement is that the use "provides a benefit to an individual, group, or organization, rather than the public at large." *See* NPS Director's Order #53: Special Park Uses (available at https://www.nps.gov/policy/DOrders/DO53.htm). A political demonstration does not provide a benefit to the protesters, any more than casting a vote provides a benefit to the voter. It is a participation in democracy. It costs money to print ballots and hold elections, but we have rejected requiring poll taxes as condition of voting.

The value of free speech, peaceable assembly, the constitutionally protected freedom to engage in the same or to petition for redress of grievances, is a societal value and a societal and democratic exercise. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (persons who refrain from free speech due to government laws that chill speech are "harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas"); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978) ("The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (rights of free speech and press "not so much for the benefit of the press so much as for the benefit of all of us"); *Invisible Empire Knights of Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985) ("It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared.").

Demonstrations are not a "special use" of parks, but a time-honored exercise of

democratic liberty in a public forum traditionally used for such expression. It is more than an ordinary use of park land. It is a protected use of parkland.

The lack of Congressional authority prohibits the NPS from imposing fees and charges on demonstration activity. Even as NPS has itself, internally, defined what constitutes a "special use" of parkland, its own operative definition only encompasses conduct that is for the benefit of an individual or group and, as reflected above, demonstration activity and free speech activity resounds to the benefit of society, regardless of the view being expressed.

Should the NPS seek to impose fees and costs on demonstrations, it must first seek and receive the Congressional statutory authority which it currently lacks.

VII. Proposed Change No. 7, Including Closure of White House Sidewalks

A. NPS Has Presented an Insufficient Factual Basis to Permanently Close Areas on the South Fence Line of the White House and near First Division Memorial and Sherman Parks

Proposed change No. 7 sets out certain closures of public space in President's Park "in the vicinity of the south fence line of the White House and in and around First Division Memorial Park and Sherman Park.' 83 Fed. Reg. 40465. These are justified in terms of perimeter security, with respect to the south fence line, and a statement that other areas "must be kept clear for security reasons."

We respectfully oppose any such closures, in the absence of a factual record establishing a genuine security need that cannot be met through alternative measures to adequately secure the perimeter of the White House. As evidenced by the enhanced perimeter security measures on the north side of the White House, perimeter security can be enhanced without resort to creation of permanent buffer zones that foreclose access to public spaces close to the White House for protester presence, free speech, peaceable assembly and petition activities.

Given the loss of space with such unique proximity to the seat of executive authority, spaces which are uniquely situated and irreplaceable for the expression of views, dissent and petition activities to the President, the loss of these spaces simply are not justified.

The NPS has failed to comply with the required processes to close a public forum nor has it presented evidence to explain the analysis and evidence that supports its determinations or analysis of the impact of a public forum closure on the First Amendment rights of the people. The NPS may not point to temporary closures, contending it already shut those spaces down, to bootstrap in permanent closures and thereby be exempted from establishing the requirements for public forum status to be permanently removed from pubic space. If that was the case, the NPS could temporarily close any and all locations under its jurisdiction across the United States and then just eventually make them off-limits in entirety without ever complying with its legal obligations. As can be seen with the White House sidewalks, while intermittent temporary restrictions may be justified while perimeter security is strengthened, once new security measures are in place the temporary closures are no longer justified - - and certainly form no basis on which to bootstrap into existence permanent closures.

B. NPS has Presented No Purpose Served by the Closure to Peaceable Assembly and Protest of the Iconic White House Sidewalk on Pennsylvania Avenue

Without any description or justification, *see* 83 Fed. Reg. 40465-40466, the proposed regulations would close the majority of the iconic White House sidewalks located along the north White House fence line along the south side of Pennsylvania Avenue, N.W., leaving only a narrow five foot band for pedestrian access. *See* 36 C.F.R. 7.96(g)(1) ("The term 'White House sidewalk' means the south sidewalk of Pennsylvania Avenue N.W. between East and West Executive Anenues SW."); 83 Fed. Reg. 40475 (proposing regulations such that "[t]he area of sidewalk to closed shall consist of a twenty (20') foot foot portion of the sidewalk, extending out from the North Fence Line, leaving a five (5') foot portion of the sidewalk for pedestrian access.") ; 83 Fed. Reg. 40476 (graphic map of closure).

This is a full closure, effectively denying access to the White House Sidewalks for demonstration assembly. As described, 80% of the sidewalk space is designated as closed. The remaining five foot sliver is designated to function as a pedestrian walkway.

Current regulations mandate that any demonstrators on the White House Sidewalks must continually be in movement, 7 C.F.R. § 7.96(g)(5)(vii). This requires protesters to form a circular or oblong picket line. The remaining width of five feet is insufficient for even this type of configuration, effectively banning assembly and demonstration on the White House sidewalks and reducing the amount of available space for pedestrian presence to a bare minimum.

The Secretary offers no justification whatsoever for the closure of the White House Sidewalks to demonstrations. He cites no interest whatsoever, let alone a claimed substantial interest. The Secretary provides no detailed disclosure as to the basis for the closure.

One might assume that security interests are the justification, but as discussed below there is no factual basis for such a justification. Indeed, substantial efforts have been undertaken to ensure the enhancement of perimeter security on the North Fence Line. It would appear another, unidentified, non-security interest motivates this closure.

C. NPS Has Presented No Factual Basis for the Effective Closure of the White House Sidewalks to Demonstration Assembly

There is no factual basis asserted for this closure. There is no disclosure as to what, if any, alternatives have been considered to advance the (also undisclosed) government interests without resort to closure.

Even if the closure is at the request of the Secret Service, public disclosures and notice should be made, particularly the factual bases for the closure request and detail to the public of all alternatives to closure that exist, have been considered or discussed, by the Secret Service, the NPS, the Office of the President and any other involved offices.

In the *Quaker Action* series of cases during the 1960s and 1970s, litigation over the NPS and Secret Service's efforts to restrict access to the White House sidewalks reached the Court of Appeals for the District of Columbia Circuit five times.

The D.C. Circuit was emphatic in its rejection of apparent biases against protest by the federal agencies charged with stewardship of parkland, specifically noting "the Park Service's continued hostility to the use of local park areas for First Amendment activity." *A Quaker Action Group v. Morton*, 516 F.2d at 724. The notable absence of any reference, purpose or factual

justification in the rulemaking gives rise to an immediate concern (if not evidence) that bias and hostility against protest is at the root of this promulgation.

The Court of Appeals was equally emphatic as to the importance of factual evidence for any restrictions upon demonstration rights on the White House sidewalks, as well as the need for the agency to present the consideration of alternatives (such as strengthening of perimeter fencing, among other measures) and that proposed regulations are "no more restrictive than necessary." *See, gen'ly, A Quaker Action v. Morton*, 516 F.2d 717 (D.C. Cir. 1975).

Against this backdrop, the absence of any factual basis for this severe foreclosure of First Amendment rights is all the more glaring.

D. The White House Sidewalks are a Unique and Irreplaceable Public Forum for Free Speech, Peaceable Assembly and Petition Activities Directed to and at the Seat of Presidential Authority

The NPS website, currently admits: "Recognizable around the world, the White House stands as a symbol of democracy. The White House and its park grounds servce not only as the seat of the executive branch of government of the United States of America, **but also as an iconic place for civil discourse."** (available at https://www.nps.gov/whho/index.htm) (emphasis added).

It cannot be denied that the White House Sidewalks "are a unique situs for the exercise of First Amendment rights." *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 736 (D.C. Cir. 1975).

Referring to the "unique symbolism" of protest on the White House sidewalks, the D.C. Circuit has held, "we cannot ignore the unique quality of demonstrations in front of the White House from the viewpoint of First Amendment interests." *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 733 n. 49a (D.C. Cir. 1975).

The proximity and symbolism of demonstrations on the White House Sidewalks are particular, irreplaceable, and of a constitutionally unique magnitude. "The general concepts of First Amendment freedoms are given added impetus as to speech and peaceful demonstration in Washington, D.C. by the clause of the Constitution which assures citizens of their right to assemble peaceably at the seat of government and present grievances." *A Quaker Action Grp. v. Morton*, 460 F.2d 854, 859 (D.C. Cir. 1971) (Quaker Action III).

The D.C. Circuit rejected the government's argument that free speech rights can be satisfied by protests on the Ellipse, with a ban on protests on the White House sidewalk. "[T]here are First Amendment values in use of the White House Sidewalk; and citizens seeking redress of grievances are not unreasonable if they propose to come to the front door of the House rather than be shunted to the back door." *A Quaker Action Grp.*, 516 F.2d at 733.

The NPS has failed to consider the impact that the proposed closure of the sidewalks will have on the availability of the sidewalks to accommodate demonstrations. It has failed to consider the significance of the loss of access to the White House sidewalks for protest, assembly and petition activities. It has failed to consider plausible alternatives to closure that would accommodate ostensible government interests, but given that the NPS has not stated any legitimate interests for this closure, the failure to consider plausible alternatives seems pre-ordained and inevitable from this fatally flawed process.

E. The Closure of the White House Sidewalks Violates the Court Rulings in *A Quaker Action Group*

The Federal Courts have ruled that First Amendment interests required the NPS to permit demonstrations of up to 750 persons on the White House Sidewalks, notwithstanding NPS and Secret Service assertions of security interests for stricter limitations. *A Quaker Action Grp. v. Morton*, 516 F.2d at 731 – 732. A waiver procedure was mandated for exceeding this soft numeric limit. *A Quaker Action Group v. Andrus*, 559 F.2d 716, 718 (D.C. Cir. 1977) (*Quaker Action V).*

Under current regulation, no more than 750 persons are permitted to conduct a demonstration on the White House sidewalk, a limit that is subject also to a waiver. 36 C.F.R. § 7.96(g)(5).

Although the proposed regulations do not nominally dislodge these same maximums, 83 Fed. Reg. 40484, the proposed regulations literally dislodge protesters from the White House sidewalks, thereby eviscerating the judicial ruling that the First Amendment requires that demonstrations of up to 750 persons be allowed.

The proposed regulations are in violation of these rulings, and the NPS has offered no justification or excuse or explanation for its evasion of these rulings.

F. Security Concerns Do Not Justify Closing the White House Sidewalks

We are cognizant of prior sporadic incidents in which individuals, typically not demonstrators, have jumped over the fence. None of these incidents justify closing the White House sidewalks to protest.

One of the most well-known such incidents involved an individual, Omar Gonzalez, who in 2014 breached the perimeter and was able to enter the White House through an unlocked front door. This breach was facilitated by a series of failures on the part of the Secret Service to follow existing protocols, including muting alarms because their noise was a disturbance, failing to lock the doors to the White House upon perimeter breach, and failure to post an officer on the exterior of the White House at the doorway. These security deviations have, reportedly, been remedied.

With respect to the fence, in May, 2015, officials installed interim security enhancements including a second layer of steel spikes on the top of the fence.

At the present time, permanent final security enhancements have been approved which, according to a joint NPS and Secret Service announcement resolve any asserted security needs. The fence that is to be erected, "accomplishes national security goals while simultaneously preserving the character of the unique public space that surrounds the Executive Residence." (NPS / USSS press release, February 2, 2017, available at https://www.nps.gov/whho/learn/news/white-house-fence-design-receives-final-approval.htm).

The fence for the White House grounds will be a taller and stronger fence that incorporates anti-climb and intrusion detection technology, while respecting the historical significance and visitor experience at the White House and President's Park. The proposed fence is an 11-foot-7-inch fence, with wider and stronger pickets, and an increase in the space between the pickets. The current fence is about 7 feet tall.

https://www.nps.gov/whho/learn/news/white-house-fence-design-receives-final-approval.htm.

The U.S. Secret Service and NPS submitted an initial design for the fence to the National Capital Planning Commission, refining it over a period of months, and received approval in February, 2017. *See* (available at Christina Sturdivant, DCist, Plan for New White House Fence Clears Final Hurdle, Feb. 3, 2017) (available at http://dcist.com/2017/02/new_white_house_fence.php?utm_source=feedly&utm_medium=webfeeds).

There is no security justification for this White House sidewalk closure, particularly upon consideration of the unique status the White House sidewalks has for demonstration activity.

We are reminded of the D.C. Circuit's ruling in *A Quaker Action Group*

> [I]n a "Position Paper" dated July 24, 1967, the Secret Service stated its strong belief: that the continuation of picketing and demonstrating by protest groups in front of the White House constitutes a threat to the safety of the President of the United States and that this activity should not be permitted.
>
> Of course it is understandable that those charged with Presidential safety would prefer, as Judge Hart put it, to take "the precautions of a dictator" to shield him (or the White House complex) from danger. This, of course, is simply not possible in a democracy, for the President cannot be kept in a steel room away from the public. We would observe, however, that the President probably faces far fewer risks from even the largest demonstration at the White House than when he moves in a parade or visits a baseball stadium or makes any sort of public appearance. This observation is supported by testimony from the Assistant Director for Protective Intelligence for the Secret Service, who rated the White House as virtually the safest place for the President.

A Quaker Action Grp. v. Morton, 516 F.2d at 731 n.40.

We respectfully oppose the NPS's proposed closure of the White House sidewalks. Should it persist in this new restriction, it should make public all documents that form the factual basis for its decision, including all documents that evaluate (or have concluded) that the new White House fence will accomplish national security goals, all documents evaluating alternatives that would meet purported government interests without restricting demonstrator access to the White House sidewalks, as well as all studies and information on which the closure decision was based, including those by or from the U.S. Secret Service. We would request, upon such disclosure, that a public hearing date by set and supplemental comments be received from the public.

VIII. Proposed Change No 8 (Restricted Zones)

The NPS proposes to prohibit demonstration activity at or near the Martin Luther King, Jr. Memorial, the World War II Memorial, and the Korean War Veterans Memorial.

Putting aside the fact that, Dr. Martin Luther King embraced demonstration activity as a means for bringing about fundamental social change, for all of these locations, the NPS has failed to provide a detailed analysis or justification for these changes, how its prohibited zones were drawn and narrowly tailored, or that shows alternative considered and evaluations made on the impact on expressive activities. Nor has the NPS undertaken the required steps necessary to transform the public forum character of these public spaces.

IX. Proposed Change No. 9 (Modifications to the Processing of Regulations)

A. The Proposed Regulations Will Obstruct, Prohibit and Burden Spontaneous Demonstrations Including By Barring All Ordinary and Safe Items That Are Not Hand-Carried

The proposed regulations restrict spontaneous demonstrations by removing the presumption that applications are deemed granted if not denied within 24 hours and replacing this system with a discretionary system that allows the NPS to refuse to authorize rapid-response assemblies if a permit is not sought at least 48 hours in advance. New regulatory language emphasizes the discretionary nature of permission for spontaneous demonstrations. Under current regulations, such permission is granted if agency resources "*can* reasonably be made available." Under proposed regulations, permission is granted on a discretionary basis "provided the NPS *has* the resources and personnel available to manage the activity," language which suggests a restriction in the circumstances under which permission will be granted. *See* 83 Fed. Reg. 40467.

Rapid response demonstrations occur in Washington, D.C. routinely after court rulings, policy announcements, military actions and many other breaking events. People flow into their public squares to have their voices heard. The NPS should works towards facilitating these actions. Its proposal far from providing "flexibility" creates greater burdens and obstacles to the lawful and orderly assembling of the public.

The proposed regulations, ostensibly to create "more flexibility for spontaneous demonstrations," will also ban the use of "structures" during spontaneous or rapid response demonstrations, those that arise or are applied for within 48 hours of the protest. 83 Fed. Reg. 40467 – 40468.

The stated purpose of this restriction is that 48 hours "is the minimum amount of time that NPS needs to evaluate the safety concerns and resource impacts associated with the use of structures." *Id*.

The term structure is expansively defined, meaning "any object that is not intended to be carried." 83 Fed. Reg. 40474 – 40475. This includes literature tables, portable amplified sound systems, chairs, or any other item. Such are typically utilized within demonstration activities and do not pose safety concerns. The NPS has provided no evidence or justification to support a broad ban on all manner of structures.

The function of spontaneous demonstrations should seem apparent in a fast-moving world of events. Whether it is an announcement that DACA is being terminated, the declaration of a military action, or any other imagined event of public import, often notice is scant and time is of the essence. "[T]iming is of the essence in politics . . . [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). "Any notice period is a substantial inhibition on speech." *American-Arab Anti-Dscrimination Comm. V. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005). "A delay of even a day or two may be intolerable when applied to political speech in which the element of timeliness is important." *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) (quoting *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968)) (quotations omitted). "Where spontaneity is part of the message, dissemination delated is dissemination denied." *Id*.

B. Removal of the 24-Hour Deemed Granted Rule and Elimination of *Any* Deadline for Final Agency Action (i.e., Approval or Denial) of a Permit Application

Under the proposed rules, the NPS would move from a system in which demonstration permit approval is deemed granted within 24 hours to one in which there are no enforceable deadlines whatsoever for issuing administrative action, i.e., final approval or denial of a demonstration permit, by the agency.

Early and timely notice of permit treatment including both approval or denial, to organizers is fundamental. Orderly demonstrations require planning. From the need to announce an event to the public, which may need to make travel arrangements to the detailed logistical planning, from protest routes to contracting or arranging for sound and stage, nearly every detail of orderly planning and mobilization requires prompt notice that a permit will be issued.

The failure of the NPS to promptly advise of the status of permit applicants is disruptive and chills protected speech activity.

In the *Quaker Action Group* series of lawsuits over these same regulations, which did not then contain a deadline for issuing approval or denial, the D.C. Circuit ruled as follows:

> "We note, however, that the regulations contain no deadline for administrative action by the Park Service. We believe such a deadline is an essential feature of a permit system. In principle, an applicant would seem entitled to notice of a proposed denial of his permit within 24 hours after submission of the application."

A Quaker Action Group, 516 F.2d at 735.

Under the proposed regulations, the NPS would rescind the 24-hour deemed-granted rule, under which permit applications are deemed granted unless denied within 24 hours of submission. In its place, it would permit the agency to respond to a permit within 72 hours *without requiring approval or denial during this expanded period*. 83 Fed. Reg. 40469.

The NPS creates a new status for applications, "provisionally reserved." It might as well be called Limbo, because the status provides the applicant little except the representation that, without any fixed deadline for approval/denial, the agency "would make all reasonable efforts to approve or deny a permit application at least 30 days in advance of a requested event." 83 Fed. Reg. 40469. This is a "reasonable efforts" provision, not a deadline for final agency action.

The "provisionally reserved" designation tolls the death knell of timely application processing.

Under the proposed rules, the agency would be required to only *begin* the process of consulting with an applicant 40 days prior to the event. 83 Fed. Reg. 40469 (for applications submitted more than 60 days and up to one year in advance of a planned event, the agency "would not approve the application" and "would provide the applicant with an initial, comprehensive list of outstanding issues and requested information no later than 40 days prior to the requested event").

For an application submitted one year in advance, the agency would be allowed to sit on the application for almost 11 months before even *beginning* to substantively advance the application.

An essential characteristic of a permit system is that an applicant who files an application well in advance should have agency action within a reasonably short fixed period of time *as measured from time of application submission*. A deadline for agency action that is framed in terms of the date of the event, i.e., allowing the agency to delay permit issuance until 30, 60 or 90 days in advance of an event, fails to account for the avoidable disruption to organizing and planning that such delay creates. For a complicated event, a large event, or one where participants must make travel and other commitments well in advance, final permit issuance even 90 days in advance of an event can be substantially disruptive. If event organizers, for example, file a permit one year in advance, and provide necessary logistical and setup information in a prompt manner, there is no reason why the agency should not promptly issue approval so that organizers and participants may act in reliance.

For applications submitted well in advance of an event, it is essential that the deadline for final written permit issuance be linked to the submission of the application and not the much later occurring event date. This will enable organizers to timely act and organize in reliance on the final written permit, and not suffer disruption from delay.

For applications received within sixty days of a planned event, the proposed rules do not even contain a requirement to timely begin the process of consulting with the applicant. There are no enforceable deadlines whatsoever on the agency. The requirement of "reasonable efforts" to act on an application within 30 days of the event date is too subjective to be enforceable.

The need is not a deadline for *beginning* the consultation process, but to be meaningful, the deadline on the agency must be for *final approval* of an application so that organizers timely know that they can make announcements to the public, begin contracting with vendors, organize and plan. This rule and the first-come first-served system has been in place for more than 40 years. Organizers routinely put in applications for use of public space and in the absence of a prior request for the same space (which is visible on a public board in the NPS permitting office) know that they can proceed with organizing apace with logistics discussion with Agency officials. The proposed rules create delay and uncertainty and will severely obstruct demonstration announcements and planning.

In current practice, notwithstanding the 24-hour deemed granted rule, the NPS has itself delayed the processing of applications, including by delaying the issuance of a final written permit until close to an event. If anything, this points to a need to strengthen the process, imposing stricter timelines mandating prompt final agency approval and issuance of a final written permit, which is what was contemplated by the *Quaker Action* Court and ruling, while maintaining the 24 hour deemed granted rule.

The proposed rules go in entirely the opposing direction. Foot-dragging and delay by the agency and disruption to organizing will become the rule under the new regimen. This is certain

to destroy organizing and planning efforts, to decrease attendance if planning is even possible, and to minimize the ability of the public or dissenters to plan peaceful, orderly mass assemblies in the nation's capital. This also enshrines by regulation a means by which the NPS can wind down the clock on the ability of organizers to bring legal challenge to improper denials or constructive denials and have judicial resolution in time to carry on with organizing a planned free speech event.

There is no legal precedent for this type of inconclusive permit status, for this systemic refusal of an agency to process permit applications. *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (in dictum, noting with approval system in which officials "must process applications within 28 days"); *A Quaker Action Group*, 516 F.2d at 735 (requiring permit approval/denial issue within 24 hours).

The NPS claims that there is a need to increase the amount of time it has to provide information back to the applicant about the status of a particular request, from 24 hours to a proposed 3 business days for an initial acknowledgment. The NPS bases this on an increase in the number of events, and the complexity of events. However, the NPS does not provide any statistical information or evidence upon which this claim may be evaluated, although it possesses this information, nor is it clear that this asserted problem, if true, is associated with demonstration activities. Throughout its rulemaking, the NPS conflates special events with demonstrations when asserted burdens on the Agency or problems that must be addressed.

The NPS should not abandon the 24 hour deemed-granted rule, nor should it permit the unsustainable creation of a new category of permit Limbo which provisionally reserves without issuance of permit approval.

These two changes, independently and in tandem, fundamentally undermine the operation of a reliable and timely permit consideration and issuance system.

C. Expansion of Bases for the Termination of Protests

Currently, police officials in charge of an event may revoke the permit for a demonstration if continuation of the event presents a clear and present danger to the public safety, good order or health or for any violation of law or regulation. 83 Fed. Reg. 40469.

The proposed regulations expand the bases for the shutdown of a demonstration, to include "any violation of [the] terms and conditions" of a permit. 83 Fed. Reg. 40469.

The NPS does not offer a purpose served or factual basis for this change. It seeks comment only on whether the violation of the permit should be required to be "material" or whether a non-material change should constitute a basis for protest shut down.

Permits typically carry myriad minor details, terms and conditions, from the number of chairs that may be present for disabled persons, to literature tables, to the number of persons who may be present, to what items may be placed where. To shut down a rally based on "any violation of [the] terms and conditions" invites police or the Regional Director to terminate demonstrations without substantial basis. In other words, by the terms of this provision, demonstration shutdown is authorized for technical violations of no consequence whatsoever. It

is a hair trigger for protest shutdown.

The proposed regulation does not specify that the violation be committed by a person who even has knowledge of the permit. Typically, while one or multiple key organizers of an event may have knowledge of a permit's terms and conditions, likely no other demonstration participants do. Nor is there any legal expectation that a person who attends a protest know what is in the details of the underlying permit. The proposal authorizes shutdown without a knowing violation or without opportunity to cure.

Because the provision does not require violation by a protest organizer or the event as a whole, it authorizes protest shutdown based even on the actions of a counter-protester or person who holds an animus against the underlying event.

Even if a genuine protest participant violates the terms of a permit - - or for that matter violates the law - - the appropriate action is for police or the NPS to cure or address that violation on a particular or individualized basis. Not to exact collective punishment, or to terminate the constitutional rights of those lawfully assembled based on the actions of, or mere proximity to, others.

Without suggesting any acquiescence to the legality or the constitutionality of the current provision, we strongly oppose the expansion as proposed.

X. Proposed Change No. 11 (Maximum Duration of 30 Days) - - The NPS Should Not Disallow Sustained Protest Presences and Vigils as Form of Expressive Activity

The proposed rules would impose a maximum duration for demonstrations of thirty days, less if a structure is used. 83 Fed. Reg. 40470 – 40471. This is a substantial decrease from the existing regulations, which permit demonstrations of up to four months. Although, as proposed, demonstration permits are possibly renewable, the proposal mandates that NPS deny requests for renewal to demonstrations that involve any use of structures. 83 Fed. Reg. 40471. The rules also encourage that NPS, in its discretion, deny renewal of permits to events without structures, if NPS deems it necessary to protect park interests. *Id.*

At the same time, NPS allows events that it co-sponsors exclusive access to public space for extended periods of time, including, for the private Presidential Inaugural Committee, the ability to sit on public spaces even if it is not using them for many months at a time during which free speech activities are barred. For Lafayette Park and White House in particular, the PIC is allowed to occupy these spaces for nearly six months around every presidential election and inauguration. At Lafayette Park it allows multiple massive structures including bleachers, bathrooms, tables, chairs and many more structures, regardless of the harm to the turf.

NPS should be addressing the major demonstrated and documented failures in its handling of permitting for the inauguration, specifically the omnibus set aside for the PIC which gives an incoming administration the ability to occupy vast swaths of Washington DC and decide whether counter-protesters would be allowed access to public space for months at a time. The NPS repeatedly stated in the period leading up to the2017 inauguration, that their hands were tied because the PIC would not tell them whether they intended to use the space the NPS set aside from them, including space outside the legal set-aside. The regulations should be amended to address actual problems, and require any entity benefiting from a set aside to advise in a set

number of days of concrete plans to use space or the spaces should be provided to the public. Nor should the NPS be allowed to set aside spaces beyond those which are identified by regulation.

XI. Proposed Change No. 12 - - The NPS Should Not Incorporate the Turf Management Guide Into the Permitting System Governing Demonstrations Without Proper Notice and Proposed Rulemaking

The NPS, by its proposed rulemaking, is seeking to write its Turf Management Guide into the permitting process as a requirement for access to public space for demonstration activities, without having ever properly put the Turf Management Guide out for public comment and rulemaking. The NPS has engaged in no explanation, evidence, justification or analysis whatsoever to embed these onerous restrictions and costs on demonstration activity into the permitting system. The Turf Management Guide must be subject to evaluation as to each of its requirements' justifications for application to demonstration activity as well as evidence that the Agency has considered alterative options.

XII. Proposed Change No. 13 (Sign Restrictions) - - The NPS Should Not Extend the Strict Limitations on Signs in the White House area to Other Park Areas

The Park Service should not extend the strict White House Sidewalk sign size and composition limits to all park areas as it proposes to if any part of the activity or day's event occurs or moves to the White House area. Fed. Reg. 40472-73.

Under this proposal, if a mass assembly was occurring on the National Mall, we would not be able to have large scale signs and banners if the participants were later going to march past the White House, or if there was an ancillary part of the day's free speech activities that was scheduled to take place in Lafayette Park. A march would not be allowed to have a traditional large lead front banner if any portion of activities included persons using Lafayette Park or the White House sidewalk for expression, even if the banner was not going to enter into areas where it would be prohibited. There is no justification that supports this extreme restriction on the First Amendment right and ability to display and communicate messages.

Large banners are allowed on Pennsylvania Avenue, which is under the jurisdiction of the District of Columbia, adjacent to the White House sidewalk. The NPS fails to explain or address whether or how its proposed rule change will affect or impact the continued ability to display large messages on banners on Pennsylvania Avenue directly in front of the White House. We object to any restriction on this right.

The NPS disingenuously states that its proposal would "simplify event planning." *Id*. To the contrary, this proposal would make planning more onerous, complicated and restrictive. We are not aware of there being an existing, ongoing or substantive problem with lack of conformance to the regulations governing signs at the White House and the NPS does not provide any concrete explanation or actual examples of such problems.

The NPS states that the proposed rule would serve to avoid "negative interactions with law enforcement." *Id*. We do not understand exactly what this phrase is intended to mean. The

NPS supervises its Park Police and has the authority, and the responsibility, to train them properly. Restricting the public's expressive rights in order to avoid "negative interactions" with law enforcement is constitutionally unsound.

Additional Included Affidavits to Be Considered Substantively by the Agency

In further support and expansion of the comments made herein, we are contemporaneously submitting the following affidavits:

Affidavit of Cleve Jones, the organizer behind the concept and the display of the AIDS Quilt which was first displayed in Washington, D.C on October 11, 1987.

Affidavit of Kimberley Propeack, Chief of Politics and Communications for CASA

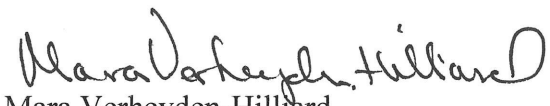
Affidavit of Brian Becker, National Director of the ANSWER Coalition

Affidavit of Yasmina Mrabet, Organizer with the ANSWER Coalition

These affidavits are incorporated by reference and should be considered by the Agency substantively in its rulemaking process.

Thank you for your consideration of these comments.

Respectfully submitted,



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