January 10, 2021

Hon. David L. Bernhardt
Secretary of the Interior
1849 C Street NW
Washington, DC 20240
Via email

Re: First Amendment implications of blanket denial/cancellation of Public Gathering Permits

Dear Secretary Bernhardt:

We write to you on behalf of the ACLU of the District of Columbia (ACLU-DC) to remind the Department of the Interior of its obligations under the First Amendment when addressing requests for Public Gathering Permits in the District of Columbia in the leadup to the January 20 inauguration of President-Elect Biden.

We were shocked at the invasion of the U.S. Capitol by a mob seeking to disrupt the certification of the Presidential election results on January 6. But neither that violent action nor the Presidential urgings that set it off justifies a wholesale abandonment of the First Amendment in the Nation's Capital for the next two weeks via blanket bans on Public Gathering Permits. Rather, federal and local law enforcement have all the tools they need to respond to any attempted repeat of insurrectionist violence in the coming days, without resorting to the extreme and unconstitutional measure suggested by D.C. Mayor Muriel Bowser: canceling and/or denying two weeks' worth of Public Gathering Permits in the District of Columbia.

The public lands administered by the National Park Service in the nation's capital constitute a "unique situs for the exercise of First Amendment rights," *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975). The cancellation or denial of all Public Gathering Permits on these lands for a two-week period would violate the First Amendment several times over.

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It would amount to a prior restraint on speech, which is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 559 (1976). It would run afoul of the First Amendment's specific protections for demonstrations in the absence of a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (holding unconstitutional the prosecution of Black students for engaging in a civil rights demonstration at the South Carolina statehouse). And it would fail the First Amendment requirement of "narrow tailoring" by burdening far more speech than necessary to achieve any legitimate government interest. *See, e.g., Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002) (striking down Capitol Police regulation banning certain demonstration activity as not narrowly tailored).

It simply does not follow from the fact that a violent mob stormed the Capitol on January 6 that all demonstrations for the next two weeks pose an imminent threat to public safety. Indeed, if a single violent event could trigger wholesale suppression of speech and associational activities, then the protections of the First Amendment would be worth little. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

Instead of resorting to a blanket ban, the Interior Department—and indeed, all federal and local law enforcement—should rely on the constitutional means at their disposal to prepare for and respond to threats against the people of the District and the leaders and institutions of the United States government. First, law enforcement can engage in the same careful and rigorous planning and preparation that have enabled them to protect public safety during countless demonstrations, including during Presidential inaugurations, throughout our Nation's history. Indeed, according to numerous security and law enforcement experts, appropriate planning and readiness at the Capitol could have prevented the violent incursion on January 6. Second, the First Amendment does not protect advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Given the imperatives of protecting the people of the District and the functioning of our democratic institutions and processes, these tools should be exercised with diligence and foresight.

The ACLU-DC is deeply concerned for the safety of D.C. residents and for everyone involved in the inauguration of President-Elect Biden. But we strongly reject the proposition that the requirements of First Amendment must be jettisoned to provide for adequate security in the District over the coming days.

Sincerely,

Monica Hopkins
Executive Director, ACLU-DC

Scott Michelman
Legal Director, ACLU-DC

cc: Kimberly Fondren
Office of the Solicitor, Department of Interior