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Brian D. Joyner
Chief of Staff
National Mall and Memorial Parks
National Park Service
900 Ohio Drive, SW
Washington, DC 20024

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

Re: Proposed rule regarding demonstrations and special events in the
National Capital Region, 83 Fed. Reg. 40460 (Aug. 15, 2018)
Regulation Identifier No. 1024-AE45

Dear Mr. Joyner:

The American Civil Liberties Union of the District of Columbia (ACLU-DC) is the Washington, D.C. affiliate of the American Civil Liberties Union, the nation's oldest and largest organization devoted to protecting civil liberties and civil rights. The ACLU-DC has a particular interest in this proposed rule for two reasons. First, because the public lands administered by the National Park Service (NPS) 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); second, because of the ACLU-DC's active involvement over the last 50 years in protecting the rights of individuals to protest in these areas.

From the 1960s through the 1990s, the ACLU-DC frequently had to sue over the Park Service's attempts to impose unconstitutional restrictions on the right to protest. *See, e.g., Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973); *A Quaker Action*

Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975); *Saffron v. Wilson*, 481 F. Supp. 228 (D.D.C. 1979); *O’Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (amicus); *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992) (amicus); *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992) (amicus); *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997) (amicus); *Torossian v. Hayo*, 45 F. Supp. 2d 63 (D.D.C. 1999).

In more recent years, the rules have been stable, and NPS has generally respected First Amendment rights. Indeed, the Park Service’s own Foundation Document for the National Mall and Memorial Parks, issued just last year, recognizes that these areas are the “**National Stage of Public Expression**,” which “serves as the premier national civic space for public gatherings including First Amendment activities It is at National Mall and Memorial Parks that the constitutional rights of speech and peaceful assembly find their fullest expression” National Park Service, *Foundation Document: National Mall and Memorial Parks* at 17 (August 2017) (boldface in original) (available at https://www.nps.gov/nama/learn/management/upload/NAMA_FD_SP2.pdf).

But the amendments now proposed harken back to the era in which the courts had to be called upon to protect the right to dissent in the nation’s capital. As detailed below, many of the proposed amendments would be unconstitutional if adopted. In addition, several of the proposed rule changes would violate court orders that were issued in ACLU-DC cases cited above and that remain in effect. At the same time, the Federal Register notice suggests that NPS is open to considering regulatory changes that could enhance the exercise of First Amendment rights in a few respects, and we would welcome such changes. Accordingly, ACLU-DC and the National ACLU now submit the following comments on the proposed rule.

Summary

This summary highlights only the major points contained in our comments. We trust that NPS will pay equal attention to our other points, which may be smaller in scope but are no less important.

1. NPS fails to explain its proposal to eliminate the dichotomy between “demonstrations” and “special events,” and therefore violates the Administrative Procedure Act’s requirement of reasoned rulemaking. Moreover, if the proposal is designed to treat activities such as singing and dancing, and the use of costumes and props, in the context of a demonstration

as less-than-fully-protected by the First Amendment, it would be unconstitutional.

2. NPS should amend the general rule that groups of up to 25 persons may demonstrate without a permit to provide that groups of up to 60 persons—the approximate capacity of the tourist or school buses that regularly unload on NPS lands without issue—may demonstrate without a permit. NPS should also increase the size of demonstrations that can be accommodated without permits in designated areas (such as McPherson Square and Franklin Park) because their capacity is greater than the current rules allow, and experience has shown that larger groups can be accommodated without a permit. And NPS should add additional areas (such as Dupont Circle and Farragut Square) to the list of designated areas where large demonstrations can take place without a permit.

3. NPS should amend the definition of “small” structures that do not require permits so as to exclude only those structures that might actually create the problems about which NPS is concerned, such as damage to turf, paving, or underground water lines. And objects that tourists and picnickers are free to use on NPS properties certainly should not be banned for demonstrators.

4. NPS lacks statutory or constitutional authority to charge fees for demonstrations; NPS cannot balance its budget on the backs of people seeking to exercise their constitutional rights. And while any fee policy (assuming one could be lawful) must include a waiver for those who cannot afford to pay, such a waiver program would quickly become unworkable in practice, for reasons explained in our comments.

5. The stealth proposal to close 80% of the White House sidewalk cannot go forward because it is not even mentioned in the Federal Register discussion. Even if it had been discussed, the closure would violate the court order in *A Quaker Action Group v. Kleppe*, Civ. No. 688-69 (D.D.C. Nov. 21, 1975), which remains binding on NPS. The proposal is also inconsistent with the ongoing project to replace the White House fence with a new, significantly taller fence with special anti-climbing features that was specifically designed to allow the public continued access to this “quintessential First Amendment site” while meeting “contemporary security standards.”

6. The proposed change in language regarding availability of resources for spontaneous demonstrations suggests that NPS may no longer seek to make necessary resources available; such a change would be unconstitutional. And NPS cannot justify the proposed prohibition of even

modest structures as part of spontaneous demonstrations on the ground that 48 hours' notice is required to determine whether any structure will create safety and resource problems. The availability of large areas of pavement and hardscape in most venues, and NPS's extensive experience with structures, means it can easily approve the use of modest structures on short notice.

7. The rule that a permit is "deemed granted" unless denied within 24 hours is required by court order and cannot unilaterally be revoked. But the "deemed granted" status does not provide an applicant with much real assurance, because the permit can later be revoked for any reason for which it could have been denied in the first place. Applications are filed months, weeks, or days in advance, for demonstrations that are large, medium, or small; a one-size-fits-all rule may not be the best rule. We propose a system that we think will better accommodate the needs of both demonstrators and the Park Service.

8. Proposed rules limiting the use or height of structures in various places rest on a "visual impact analysis" showing how structures of various heights in various locations would appear to viewers in various locations. But NPS apparently conducted no *First Amendment impact analysis* of its proposed restrictions. First Amendment values are at least as important in these preeminent public forums as protection of the "viewshed."

9. NPS's attempt to expand the severe security-based restrictions on the size and composition of signs and sign supports that apply on the White House sidewalk and in Lafayette Park to areas where no such restrictions can be justified, simply because some demonstrators will walk from one area to another, cannot satisfy the First Amendment's core requirement that, in a public forum, regulations must be narrowly tailored.

For convenience, we have organized our comments below according to the order of the "Proposed Change" numbers that NPS uses in its Federal Register Notice. That organization does not reflect the significance of the proposed changes or of our comments.

Proposed Change No. 2 (Definitions of demonstrations and special events)

A. Eliminating the dichotomy between "demonstrations" and "special events" is unexplained and problematic.

Historically, NPS has treated "demonstrations" and "special events" as separate, exclusive categories. NPS now proposes to define the term "events"

to “mean 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. NPS attempts to justify this change by stating that “some demonstrations have elements that are special events,” but it gives no examples to support or illustrate its assertion, making it impossible to know what “elements” NPS may have in mind.

The suggestion that a unitary activity may be treated as both a demonstration and a special event is quite troubling, for at least three reasons. First, special events always require permits, while demonstrations involving 25 or fewer persons, and much larger demonstrations in certain areas, require no permits. Second, NPS currently charges substantial fees for special events, but not for demonstrations; designating some demonstrations as being also (or in part) special events would presumably open the door to requiring permits and charging fees for such events, even if the NPS proposal to charge fees for demonstrations is rejected, as we believe it must be (see our comment on Proposed Change No. 6, below). Third, under Proposed Change No. 9, applications for demonstration permits would receive priority in processing over applications for special event permits, but the special event “elements” of a demonstration would not receive priority, so an applicant seeking a permit for a demonstration that NPS unilaterally decides includes such “elements” could be forced to wait indefinitely for action on its full request.

Moreover, to the extent that this proposed change would treat demonstrations that include such “elements” as expressive singing or dancing, or costumes or props, as less than fully protected by the First Amendment, it would violate clear law. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (dance); *Schacht v. United States*, 398 U.S. 58, 62-63 (1970) (skits using military uniforms); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (styrofoam tombstones).

NPS “specifically seeks comments on how it might further differentiate between the demonstration element(s) and the special event element(s) of a single activity,” 83 Fed. Reg. 40463, but because NPS has provided no hint of what it means when it states that “some demonstrations have elements that are special events,” neither we nor others can submit useful comments in response to that request. We trust that if NPS decides to propose any substantive changes in these definitions or in their meaning, NPS will publish those proposed changes, with appropriate explanation, for public comment at a later date. Meanwhile, the content-free discussion in the August 15 Federal Register notice does not provide adequate notice of what

NPS may have in mind, nor would amended regulations that simply delete the phrase stating that special events “are not demonstrations” provide constitutionally adequate clarity to applicants or administrators.

B. Incorporation of other regulations by reference is user-unfriendly.

We oppose the separate proposal to eliminate the definitions of “demonstration” and “special event” in 36 C.F.R. § 7.96(g)(1) and replace them with cross-references to 36 C.F.R. § 2.51 and § 2.50(a), respectively. Even though the definitions are similar (and even though NPS states that it “does not regard them as substantively different,” 83 Fed. Reg. 40463), cross-references to distant sources are user-unfriendly. If NPS wishes to revise the definition of “special event” in § 7.96(g)(1) to match the definition in § 2.50(a), it can do that. A person considering an activity in the areas covered by § 7.96, and who has a copy of § 7.96, should not have to search in two other places to find out what these key terms mean. Printing the same few lines twice in the Code of Federal Regulations is hardly a burden on the NPS budget.

C. The definition of the MLK Memorial is unclear.

We note that the new definition of the Martin Luther King, Jr., Memorial, at § 7.96(g)(1), to mean “most of the interior plaza . . .,” is inherently vague and incapable of lawful application. A demarcation that can be enforced by arrest, *see Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011), must be clear and understandable by both members of the public and the Park Police.

**Proposed Change No. 4
(Demonstrations not requiring permits)**

NPS seeks comment on the rules governing demonstrations that can take place without the need for a permit. 83 Fed. Reg. 40464. We have several suggestions for improvement in that regard.

A. The general small-group rule should be increased from 25 to 60 persons.

The First Amendment’s guarantee that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” makes clear that in traditional public forums, such as the areas governed by 36 C.F.R. § 7.96, “permitting” a demonstration is not a discretionary act like deciding whether

to license a souvenir vendor. To the contrary, “[t]he First Amendment protects [speakers’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer v. Grant*, 486 U.S. 414, 424 (1993); “[t]he First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it.” *Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988). Thus, permit systems do not exist because citizens need the government’s permission to demonstrate on the public streets, sidewalks and parks. They emphatically *do not* need such permission. Indeed, a requirement that a person obtain a permit before speaking is a prior restraint on speech. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (“The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies . . . is a prior restraint on speech”). Permit systems are constitutionally permissible only so long as they are “no more restrictive than necessary” to protect the government’s legitimate interests in enforcing appropriate content-neutral limitations of time, place and manner, allocating time and space among competing applicants, and assigning appropriate resources to an event. *See A Quaker Action Group v. Morton*, 516 F.2d 717, 727 (D.C. Cir. 1975); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (“in fixing time and place, the license served to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder”) (internal quotation marks omitted).

Years ago, NPS was compelled to recognize these constitutional rules by court decisions in litigation pursued by the ACLU-DC. Following those decisions, NPS issued the existing regulations (amended in various ways in the intervening years), which permit groups of certain sizes to demonstrate without permits in certain locations: up to 25 people anywhere, up to 100 people in U.S. Reservation No. 31 (north of the World Bank building), up to 500 people in Franklin Park and McPherson Square, and up to 1,000 people at Rock Creek and Potomac Parkway (the “E Street Beach”). *See* 36 CFR § 7.96(g)(2)(ii). As far as we know, NPS has not experienced any significant problems on account of these provisions, which have been in effect for more than 42 years, since their publication at 41 Fed. Reg. 12879 (Mar. 29, 1976).

Additionally, countless school groups and tourist groups of substantially more than 25 people have routinely used NPS properties without the need for permits, and most small demonstrations have not drawn significant numbers of onlookers or required any pre-arranged management or public safety response. District of Columbia law requires no notice for demonstrations of fewer than 50 persons that will not occupy a public street, *see* D.C. Code § 5-331.05(d)(2); that law has been in place for more than a

decade without creating difficulty. All of this experience supports raising the general no-permit rule from 25 to 60 persons, the approximate capacity of a typical school or tourist bus. If experience shows that a 60-person rule creates problems, it can be reconsidered, but we think this is unlikely.

B. The size of demonstrations that can be accommodated without permits in designated areas should be increased.

NPS does not suggest that the rule allowing demonstrations by 500 people in McPherson Square has created any problems. That being so, Franklin Park, which is approximately three times the size, should be able to accommodate at least 1,500 people. And the allowed numbers in other designated areas should also be adjusted upward to better reflect the capacity of those areas.

NPS should not place the outer limit for unpermitted demonstrations at 2,500 people. Its justification for this limit—that a demonstration of that size requires “a medical station with advanced life support,” 83 Fed. Reg. 40464—is difficult to understand. With all due respect to NPS’s experience, and with no lack of concern for the well-being of demonstrators, it is not clear how ambulances are any less available for people who suffer medical emergencies in Franklin Park or McPherson Square than they are for people who suffer medical emergencies in large hotels, office buildings, or housing developments. Indeed, there is a D.C. Fire and EMS station on 13th Street, NW, between K and L Streets, about half a block from Franklin Park and 3 blocks from McPherson Square, and it would be much faster and easier for EMS personnel to drive an ambulance into a street-level park than to get to an upper floor of a hotel or office building or apartment building. Spontaneous demonstrations with well in excess of 2,500 participants have taken place a number of times in recent years, without advanced life support stations and without medical emergencies. We therefore question NPS’s position that 2,500 people is the “outer limit” of demonstrations that can be accommodated without a permit.

C. Additional places should be added to the list of designated areas where large numbers of people can demonstrate without a permit.

NPS seeks comment on whether Farragut Square and Dupont Circle should be added to the list of areas where large numbers of people can demonstrate without permits. 83 Fed. Reg. 40464. The answer is yes. These venues are often more convenient for demonstrations than some of the other

listed areas, and they have plenty of room to accommodate hundreds of people without disruption.

Additional places should also be added to the list. For example, there is no reason why Malcolm X/Meridian Hill Park, Washington Circle, and Pershing Park cannot accommodate groups much larger than 60 persons without difficulty or the need for a permit. And in particular, the Ellipse and Lafayette Park are especially suitable and important venues for public assembly where the regular nearby presence of large numbers of Park Police, Uniformed Secret Service, and Metropolitan Police officers would make it easy to accommodate large groups without the need for advance permits. Spontaneous demonstrations—which necessarily means demonstrations without advance permits—are specifically protected by the First Amendment. *See, e.g., NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1355-57 (9th Cir. 1984) And in fact, spontaneous demonstrations have taken place in Lafayette Park on a number of occasions in recent years, and have been accommodated by NPS. That constitutionally-required practice ought to be codified.

D. The use of sound amplification must be allowed as part of events that do not require a permit.

Finally, we note that proposed § 7.96(g)(5)(iv) provides that “[s]ound amplification equipment is allowed in connection with permitted demonstrations or special events, provided prior notice has been given to the Regional Director[.]” There is no good reason to limit the use of sound amplification equipment to permitted events; non-permitted events with hundreds of people obviously require sound amplification, and its use is constitutionally protected. *See Saia v. New York*, 334 U.S. 558, 561 (1948) (“Loud-speakers are today indispensable instruments of effective public speech”). This provision should be revised to allow sound amplification at non-permitted events, subject to reasonable restrictions on volume and perhaps, in some areas, on time of day.

**Proposed Change No. 5
(Requiring permits for structures in more situations)**

NPS proposes to “require a permit in order to erect structures, other than small lecterns or speakers’ platforms, during any demonstration or special event—even those demonstrations that would not otherwise require a permit because of their small size or location.” 83 Fed. Reg. 40464.

We appreciate NPS's concerns about the use of structures that may damage turf, paving, or underground water lines, or that may themselves be unsafe, *see id.*, and we do not object to a permit requirement for structures of a size, shape, or weight that could cause such harm. We recognize that requiring a permit for structures may even be appropriate when they are used in connection with large un-permitted demonstrations, especially if the limits on the sizes and locations of un-permitted demonstrations are relaxed, as we recommend in our comment on Proposed Change No. 4.

Nevertheless, the definition of "small" structures that do not require a permit when used in connection with a demonstration that does not itself require a permit should be modified to exclude only those structures that might actually create the problems about which NPS is concerned. For example, the speakers' platform that NPS proposes to allow without a permit—a three-foot cube—is large enough for only one person, or two if they are close friends. It is essentially a "soapbox," as NPS accurately describes it. *See id.* It would not even comfortably accommodate one person holding a megaphone for another to use. Even if such a platform were adequate for a demonstration of 25 people, which might not require a megaphone for speakers to be heard or much elevation for speakers to be seen, it would not be adequate for a demonstration of one hundred or more people, as is currently allowed without a permit in three designated areas. Nor is it likely that a portable platform with, *e.g.*, a 36 square-foot surface (6' x 6' or 8' x 4' or 12' x 3') and 5-foot elevation, used for a short time, would be unsafe or damage underground water lines, turf, or pavement. The more relevant characteristics with respect to potential damage would seem to be the weight of the structure, whether the structure will be placed on pavement or other hardscape, whether (and if so, how) the structure must be anchored into the ground, and how long the structure will remain in one place. Accordingly, we think it would make more sense for the regulations to focus on those relevant characteristics, allowing without a permit a speakers' platform of (for example) the dimensions mentioned above, so long as it does not weigh more than a specified amount, is not anchored into the ground, and is not used in one location for more than a specified number of hours or days.

NPS bears the burden of demonstrating the need for restrictions on First Amendment activities in these traditional public forums. Its general statements that some structures can cause some harms therefore fails to justify the proposed requirements.

Similarly, the NPS Notice indicates that a permit would continue not to be required for "individuals engaging in casual park use with objects such as small chairs, wheelchairs, picnic shelters, beach umbrellas, or small

tables.” 83 Fed. Reg. 40465. If such objects are unobjectionable when used by picnickers, we do not see why they would become objectionable when used by individuals exercising the right to freedom of assembly. A folding table and some portable chairs for people sitting at the table could be very useful for displaying literature or collecting names on petitions or mailing lists. Elderly people or others who find it difficult to stand for extended times often do bring beach chairs or other portable seats to demonstrations without causing problems; there is no good reason not to make their use as lawful at demonstrations as they are at picnics.

Proposed Change No. 6 (Charging fees for demonstrations)

NPS seeks comment on “the merits of recovering costs associated with permitted demonstrations” and on “whether it should establish an indigency waiver for permittees who cannot afford to pay cost recovery.” 83 Fed. Reg. 40465. We strongly oppose any such regulation, which we believe cannot lawfully be imposed, either with or without a waiver for indigent applicants. And even if a waiver system were legally adequate to legitimize such a fee system, it would be inherently impracticable.

A. NPS lacks legal authority to impose fees for First Amendment activities.

NPS states that 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. § 103014). But neither that statutory provision, nor any other section of Title 54 of the U.S. Code (which governs the National Park Service), defines what constitutes a “special use” requiring a “special use permit.”

As we have explained above, permits for constitutionally-protected assemblies and demonstrations are not issued at the Park Service’s discretion. They are allowed only for the limited purposes of protecting the government’s legitimate interests in enforcing appropriate content-neutral limitations of time, place and manner, allocating time and space among competing applicants, and assigning appropriate resources to an event. For constitutional purposes, therefore, demonstrations in traditional public forums are not some sort of “special use” but are a constitutionally guaranteed use: “Public assembly for First Amendment purposes is as surely a ‘park use’ as any tourist or recreational activity.” *A Quaker Action Group v. Morton*, 516 F.2d 717, 724 (D.C. Cir. 1975). NPS may choose to label a First Amendment demonstration or assembly a “special use” if it wishes to do so

for its own administrative purposes, but that administrative label cannot manufacture a statutory authorization to charge Americans a fee to exercise their constitutional rights.

The National Park Service has itself recognized as much. *NPS Reference Manual 53: Special Park Uses*, defines a “special park use.” The first criterion for such a use is that it “[p]rovides a benefit to an individual, group or organization, rather than the public at large.” *Id.* at 1 (available at <https://www.nps.gov/policy/DOrders/RM53.pdf>). First Amendment activities do not provide a benefit to an individual, group or organization, *rather than* the public at large. They provide the public at large, as well as elected and appointed government officials, with crucial information about public sentiment essential to national and local democratic self-governance. *See, e.g., Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression . . . put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity”); *Invisible Empire, KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988) (“It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared”) (quoting *Invisible Empire Knights of KKK v. City of West Haven*, 600 F. Supp. 1427, 1434 (D. Conn. 1985)); *Whitney v. California*, 274 U.S. 357, 375 (1927) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”) (Brandeis, J., dissenting). First Amendment assemblies are therefore not properly considered a “special park use,” at least not in the traditional public forums that are regulated by 39 C.F.R. § 7.96.

The chief legal officer of the Department of the Interior (NPS’s parent cabinet agency) has also recognized that fees cannot lawfully be charged to persons applying for permits for First Amendment activities. As summarized in Appendix 3 of the *NPS Reference Manual* cited above:

When the requested use is a right involving access to park land for the exercise of First Amendment rights including freedom of assembly, speech, religion and press, the superintendent will issue a permit without any requirement for fees, cost recovery, bonding or insurance. The solicitor has ruled that to charge or require bond or insurance for these types of activities might be beyond the means of some applicants and prohibit them from exercising their rights. This would constitute an infringement of rights and be considered a form of restraint on the exercise of those rights.

Id. at A3-2. NPS is not free to disregard the Solicitor’s ruling, or to change its policy in this regard without “provid[ing] a reasoned explanation for the change,” and “show[ing] that there are good reasons for the new policy.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). NPS has not attempted to do that here.

In any event, the Solicitor’s opinion is correct as a matter of law. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Supreme Court struck down a local ordinance imposing a license fee on any person canvassing or soliciting within the town. The Court held that the fee was unconstitutional because it conditioned First Amendment activity on payment: “Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.” *Id.* at 111. The Court distinguished *Cox v. New Hampshire*, 312 U.S. 569 (1941), which had upheld a fee for a parade permit, on the ground that the fee in *Murdock* was “not a nominal one.” 319 U.S. at 116.¹ While some lower courts have subsequently upheld non-nominal permit fees for First Amendment activities, the District of Columbia Circuit has not done so, and *Murdock* remains good law.² Accordingly, any fee imposed by NPS for a demonstration permit must be nominal.

While we appreciate that carrying out agency functions costs money, managing public lands for the benefit of the American people is what NPS is funded to do. If a “cost recovery” requirement for demonstrations had been in effect in 1963, the historic March on Washington for Jobs and Freedom, with its “I have a dream” speech by Rev. Martin Luther King, Jr., probably couldn’t have happened. The National Park Service cannot seek to balance its budget on the backs of people seeking to exercise their constitutional rights.

B. Any fee policy must include an indigency waiver.

As noted above, NPS also “requests comment on whether it should establish an indigency waiver for permittees who cannot afford to pay cost

¹ The fee in *Cox* was arguably not nominal, but the Supreme Court’s characterization of it as nominal, for the purpose of reconciling it with the subsequent decision in *Murdock*, is dispositive regarding the meaning of *Cox*.

² In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Supreme Court granted certiorari to consider whether the First Amendment permitted greater-than-nominal fees. *See id.* at 137 (Rehnquist, C.J., dissenting) (quoting the petition for certiorari). But the Court did not decide that question, striking down the county’s fee on other grounds.

recovery, and how this waiver program could be implemented to safeguard the financial information of permittees.” 83 Fed. Reg. 40465. Our response to this specific request for comment should not be understood as modifying our position that charging any non-nominal fees for First Amendment activities would be unauthorized and unconstitutional.

Should NPS nevertheless seek to impose such fees, there must of course be a waiver for permittees who cannot afford to pay. The Supreme Court long ago explained that public “streets and parks . . . 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.” *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). That necessarily means such places are held in trust for *all* citizens, not just wealthy citizens; the rich and poor alike are the beneficiaries of this constitutional trust. And while the use of streets and parks may be regulated, “it must not, in the guise of regulation, be abridged or denied.” *Id.* at 516. Charging an unaffordable fee for the exercise of First Amendment rights would effectively function as an explicit ban, and would be just as unconstitutional. *See Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1985); *The Nationalist Movement v. City of York*, 481 F.3d 178, 184 (3rd Cir. 2007).

We believe that the courts would hold that the government can no more impose such an obstacle to the right of petition and assembly than it could charge a substantial fee for a marriage license without an indigency waiver, or a substantial fee for a voter registration card without an indigency waiver, or a substantial fee for an abortion without an indigency waiver. *Cf. Harris v. McRae*, 448 U.S. 297, 316 (1980) (the government is not required to fund abortions for poor women, but it “may not place obstacles in the path of a woman’s exercise of her freedom of choice”).

Some courts have upheld parade permit fees without waivers on the ground that indigent demonstrators could use nearby sidewalks and parks, which were available in the relevant communities without payment of a fee. *See, e.g., Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1137 (6th Cir. 1991); *Sullivan v. City of Augusta*, 511 F.3d 16, 43-44 (1st Cir. 2007). *But see id.* at 45 (Lipez, J., dissenting) (“I do not agree that the City’s parade ordinance complies with the First Amendment without an indigency exception.”). Even if those courts were correct, their reasoning does not apply to places like the White House sidewalk, Lafayette Park, the Ellipse, and the National Mall, which are unique forums for assembly and protest. They cannot be replaced by picket lines on city sidewalks, and there are actually no municipal parks in the District of Columbia.

C. An indigency waiver program would create serious new difficulties.

Even if an indigency waiver program were theoretically sufficient to validate a non-nominal fee system for demonstration permits, its implementation would be highly problematic. Few applicants for demonstration permits are established corporations or other legal entities that file tax returns or produce annual audited financial statements; reliably ascertaining the financial status of many applicants would be difficult or impossible. Many applicants are *ad hoc* organizations that raise funds for the purpose of conducting a demonstration, and that cannot predict their financial situation from one day to the next; even if such an *ad hoc* organization is able to raise substantial funds, it has no *extra* money, and charging it a substantial fee would directly reduce its ability to carry out its demonstration. At what point would such an entity be considered non-indigent? And what would prevent an indigent entity or individual from applying for a permit for an event in which non-indigent entities or individuals would also participate? If a group of indigent home-schooled high-school students and their parents obtained a permit for a large demonstration, would they become subject to payment of a large fee if Betsy DeVos agreed to speak at their event? What if she became involved in the planning? If the National Homeschool Association became a co-sponsor of the event, would a large fee become due? What if the Association endorsed the event but did not become a co-sponsor? And what would prevent a person or entity with resources from causing a non-profit entity without resources to come into being and apply for a permit? It seems to us that such a program would very quickly become unworkable.

**Proposed Change No. 7
(Closure of White House sidewalk and other areas)**

NPS proposes to close certain areas where demonstrations are currently allowed, most notably the White House sidewalk. 83 Fed. Reg. 40465. We strongly oppose that proposal.

A. The proposed closure of the White House sidewalk cannot be justified.

Without any discussion of this change in the Federal Register notice, NPS is proposing to close 80% of the White House sidewalk to First Amendment activity. This attempt to hide the ball will not pass muster under the Administrative Procedure Act, much less under the First Amendment.

In its notice, NPS discusses closing “certain park areas 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 (emphasis added). And the White House area map at 83 Fed. Reg. 40476 shows these closed areas, including the closure of E Street, NW and its sidewalk adjacent to the *south* fence line of the White House.

But the actual proposed regulations state that “public access is not allowed on the south sidewalk of Pennsylvania Avenue NW, adjacent to the *North Fence Line of the White House Complex.*” Proposed § 7.96(g)(3)(i)(D), 83 Fed. Reg. 40475 (emphasis added). That subsection later clarifies that a five-foot portion of the sidewalk adjacent to Pennsylvania Avenue will remain open for pedestrian access. *See id.* The area to be closed is the area known as the White House sidewalk, which has long been recognized as perhaps the most iconic public forum in the nation, one that has enabled We the People to express our views directly to the nation’s Chief Executive, going back at least to the Women’s Suffrage movement 100 years ago:



The National Park Service has provided no justification of any kind for this proposed closure, and it therefore cannot proceed.

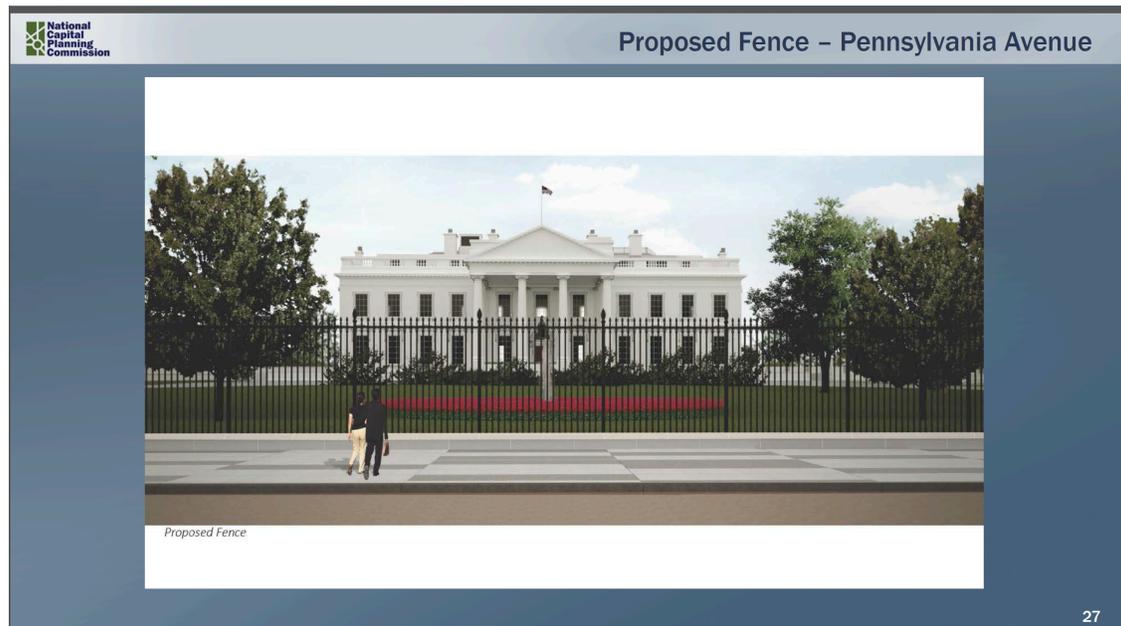
Even if NPS had provided some explanation, that would not suffice, because “Congress . . . may not by its own *ipse dixit* destroy the “public forum” status of streets and parks which have historically been public forums.” *United States v. Grace*, 461 U.S. 171, 180 (1983) (quoting *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 133 (1981)). “Nor,” the Court explained, “may the government transform the character of the property by the expedient of including it within the statutory

definition of what might be considered a nonpublic forum parcel of property.” *Id.* If Congress cannot do this by statute, certainly the National Park Service cannot do it by mere regulation.

Moreover, any such action would violate the final order entered against the Secretary of the Interior in the *Quaker Action Group* litigation, discussed in detail in our comment on Proposed Change No. 9, below. That order, which remains in effect, provides that the Secretary must issue regulations permitting demonstrations by no less than 750 people on the White House sidewalk, and declaring that any smaller limitation is “invalid and void as an unconstitutional infringement of plaintiffs’ rights to freedom of speech and to assemble peaceably and to petition the Government for a redress of grievances.” Order on Mandate at 1-2, *A Quaker Action Group v. Kleppe*, Civ. No. 688-69 (D.D.C. Nov. 21, 1975) (*reproduced at* 40 Fed. Reg. 58651 (Dec. 18, 1975)). Reducing the available space to a five-foot sliver would necessarily violate this order.

Additionally, even if security interests had been asserted, they could not justify the proposed closure because NPS and the Secret Service are in the process of replacing the White House fence with a new, significantly taller fence with special anti-climbing features, approved last year by the National Capital Planning Commission. *See White House Fence Design Receives Final Approval*, Feb. 2, 2017 (available at <https://www.nps.gov/whho/learn/news/white-house-fence-design-receives-final-approval.htm>). PowerPoint slides accompanying the recommendation to approve the new fence illustrate the dramatic change:





NCPC, Executive Director’s Recommendation, at 26-27 (available at https://www.ncpc.gov/docs/actions/2017February/White_House_Fence_Phase_1_Recommendation_7776_Feb2017.pdf).

As the Executive Director’s Recommendation noted, “The proposed improvements seek to meet contemporary security standards while recognizing the historic and symbolic importance of the White House and the surrounding grounds.” *Id.* at 3. And as the Chief Strategic Officer of the U.S. Secret Service acknowledged when the fence project was submitted for approval, “Our priority is to maintain the public’s access and their enjoyment of the residence because of the democratic connotations of all of that. . . . It is in fact a quintessential First Amendment site.” ABC News, *White House Fence Re-Design Proposal Unveiled by Secret Service and National Park Service*, Apr. 21, 2016 (available at <https://abcnews.go.com/US/white-house-fence-design-proposal-unveiled-secret-service/story?id=38585939>).

It is inexplicable that NPS did not take into account, or even mention, this highly relevant development.

B. The proposed closures of First Division Memorial Park and Sherman Park are unjustified.

NPS states that because these areas, south of the Eisenhower Executive Office Building and the Treasury Department, respectively, have been “subject to closures on a temporary and recurring basis” in recent years, closing them permanently “would not remove these areas from the public

forum.” 83 Fed. Reg. 40465. That is an incorrect statement of the law. Any public forum may require temporary closure from time to time; a temporary closure does not thereby terminate a public forum’s status as a public forum.

NPS indicates that the Secret Service desires “a clear visual break” in these areas “to enable Secret Service personnel to identify any individuals attempting to scale the White House fence.” *Id.* But these are large areas and a clear visual break around the fence line can obviously be maintained without closing these areas as a whole. And the imminent construction of a new fence specifically designed to prevent scaling will certainly reduce this threat.

Proposed Change No. 8 (Additional restricted zones at memorials)

NPS proposes to create new “restricted zones,” where demonstrations and special events are prohibited, at several memorials, and an enlarged restricted zone at the Washington Monument. 83 Fed. Reg. 40466. We oppose the latter.

The restricted zones at the Washington Monument and the Jefferson and Lincoln Memorials were established in conjunction with the regulatory revision ordered by the court in the *Quaker Action* litigation. *See* 40 Fed. Reg. 58651, 58654 (Dec. 18, 1975); *see also* 41 Fed. Reg. 12879 (Mar. 29, 1976) (reduction in size of restricted zone at Lincoln Memorial as suggested by ACLU-DC). The courts have recognized that the maintenance of a “tranquil, contemplative mood” in such narrowly-tailored locations is a legitimate government interest. *Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992) (Vietnam Veterans Memorial wall); *see also Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (Jefferson Memorial). We do not object to the creation of similarly limited restricted areas at the new World War II, Korean War Veterans, and Martin Luther King, Jr., Memorials, as reflected in maps at proposed § 7.96(g)(3)(ii)(H).

We note that the large-scale map showing the proposed restrictions on the height of structures, at 83 Fed. Reg. 40482, appears to show a restricted area at the Franklin Delano Roosevelt Memorial, but no such area is discussed in the Notice, is listed in proposed § 7.96(g)(3)(ii), or is shown in a large-scale map at § 7.96(g)(3)(ii)(H). Accordingly we are unable to comment on the propriety of that restricted area, assuming one is intended.

NPS also proposes to increase the size of the restricted area around the Washington Monument. *See* 83 Fed. Reg. at 40467. In our experience, this is

not even remotely an area of tranquility in which people contemplate the memory of George Washington. To the contrary, it is a wide-open, wind-swept area occupied by nothing but pavement; individuals wishing to contemplate the Washington Monument are more likely to do so from much further away. Nor is such a large restricted area needed to accommodate people waiting to enter the Monument, on those occasions when it is open. We suggest that a smaller restricted area would adequately serve the government's legitimate purpose in providing a protected area for individuals waiting in line to enter the Monument.

Proposed Change No. 9 (Changes in the permit application process)

NPS proposes a variety of changes in the process for obtaining permits for demonstrations and special events. 83 Fed. Reg. 40467. Because the details of that process can make an enormous difference in an applicant's practical ability to engage in First Amendment activity, we have comments on several important aspects of this proposal.

A. The accommodation of spontaneous demonstrations should not be diminished.

NPS states that its proposed changes to § 7.96(g)(3) will "provide more flexibility for spontaneous demonstrations." 83 Fed. Reg. 40467. We strongly support that goal, because "[t]imeliness is essential to effective dissent. Delay may stifle protest as effectively as outright censorship." *Women Strike for Peace v. Hickel*, 420 F.2d 597, 605 (D.C. Cir. 1969) (Wright, J., concurring); see also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury"). But it appears to us that the proposed changes may move in the opposite direction, and unconstitutionally so.

First, the existing regulations provide that applications must ordinarily be submitted 48 hours in advance of a proposed demonstration, but that the 48-hour period will be waived "if the size and nature of the activity will not reasonably require the commitment of park resources or personnel in excess of that which are normally available *or which can reasonably be made available* within the necessary time period." § 7.96(g)(3) (emphasis added). The proposed regulation would provide that NPS "will reasonably seek to accommodate spontaneous demonstrations . . . provided the NPS *has* the resources and personnel available to manage the activity." Proposed § 7.96(g)(3), 83 Fed. Reg. 40475 (emphasis added). By replacing the language about *making* resources available with language about resources that *are*

available, the amendment suggests that NPS will not seek to make necessary resources available. That would be a major, and in our view an unconstitutional, step in the wrong direction. If it was not intended, the language should be clarified.

Second, the new proposed regulation would provide “that structures may not be used for events that are not requested at least 48 hours in advance. This is the minimum amount of time NPS needs to evaluate the safety concerns and resource impacts associated with the use of structures.” 83 Fed. Reg. 40467-68. While it may be that NPS needs 48 hours to evaluate the use of large, heavy, or unusual structures, its blanket statement about the need for 48 hours in all cases cannot be accurate, especially given the expansive new definition of “structure” in § 7.96(g)(1). For example, if a spontaneous demonstration wishes to use “[p]rops . . . such as coffins,” which will be set on the ground temporarily, or a small table and a few chairs, NPS surely does not require 48 hours to evaluate the “safety concerns and resource impacts” that such structures may implicate. Large portions of the National Mall are hardscape, and significant portions of other areas such as McPherson Square and Franklin Square are paved. NPS has extensive experience with the use of structures; it does not need 48 hours to know that placing modest structures that require no ground penetration on the hardscape or the pavement will create no “safety concerns and resource impacts.” Proposed § 7.96(g)(3) should accordingly be revised to provide that the Regional Director will reasonably seek to accommodate spontaneous demonstrations that include structures, if the nature of the structures and their proposed placement are such that NPS can determine on short notice that they will not create unreasonable safety concerns or resource impacts.

B. The “Deemed Granted” rule cannot unilaterally be repealed.

“NPS proposes to remove the ‘deemed granted’ language in section 7.96(g)(3).” 83 Fed. Reg. 40468. NPS is not free to do that. NPS adopted the rule that applications for demonstration permits are deemed granted 24 hours after receipt under compulsion of a court order in litigation brought by the ACLU-DC. In *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975), the court of appeals observed that the NPS regulations then in effect “contain no deadline for administrative action by the Park Service.” *Id.* at 735. The court went on to explain:

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.

If there is disagreement on this point, the parties may apply to the District Court to formulate a different deadline. In view of the interests at stake, however, and of the possibility of procedural abuse, we conclude that the Park Service must revise the regulation to provide explicitly that a permit application not acted upon when the administrative deadline has expired is to be deemed granted.

Id. (footnotes omitted). Indeed, the court noted, the Superintendent of the National Capital Parks-Central had actually recommended that “a reasonable period of time for issuance of these permits . . . be defined as six hours.” *Id.* at 735 n.59. Following issuance of the court of appeals’ mandate, the district court entered an Order on Mandate, which directed NPS to amend its regulations in various ways. Specifically, the order required that the amendments:

shall provide that an application for a permit is to be deemed granted unless within 24 hours after submission a written statement of reasons for denial is furnished.

A Quaker Action Group v. Kleppe, Civ. No. 688-69 (D.D.C., Order of Nov. 21, 1975, at 4) (reproduced at 40 Fed. Reg. 58651 (Dec. 18, 1975)). That court order remains in effect, and NPS is not free to ignore it.

Even aside from court orders, however, NPS has not justified an increase in the time it requires for responding to applications for demonstration permits. In the Federal Register Notice, NPS presents statistics showing large increases in the overall volume of permit applications received in recent years compared to prior years, and asserts that this change necessitates a slower response. 83 Fed. Reg. 40468. But more detailed statistics show that the number of applications for *demonstration* permits (as opposed to applications for special events, sporting events, picnics, weddings, military concerts, and the like) has actually *decreased* in recent years. Thus, for example, the average number of applications for demonstration permits processed in the years 2001–2009 was 955, but the average number of applications for demonstration permits processed in the years 2010–2017 was only 658, a decrease of 31%. In 2017, the total number of applications processed was 4,658; out of these, the number of demonstration applications was 728, or just 15.6%. The most explosive growth has been in applications for volleyball permits, which reached 1,032 in 2017.

While NPS has to process all applications it receives, applications for demonstration permits are the only ones whose expeditious processing is

mandated by the Constitution, as well as by court order. The statistics presented in the Federal Register Notice provide no basis for increasing the time needed to process applications for demonstration permits.

We nevertheless agree with NPS that the “deemed granted” provision has not always worked as smoothly as the court of appeals anticipated, for the reasons explained at 83 Fed. Reg. 40468. Although a permit is “deemed granted” unless denied within 24 hours, that status does not provide an applicant with much assurance, because the permit can later be revoked for any reason for which it could have been denied in the first place. *See* § 7.96(g)(6). We doubt that this is what the Court of Appeals had in mind when it ruled that applicants were entitled to prompt action on applications for demonstration permits, but as counsel for the plaintiffs in the *Quaker Action Group* case, we are prepared to join NPS in seeking a modification of that order, if we can agree with NPS on appropriate modifications, as discussed in the next section of these comments.

C. The permit-processing rules should be improved in several important ways.

Demonstrations range in size from those just large enough to require a permit to those involving hundreds of thousands of people. Some involve nothing but people holding signs and banners, while others involve the use of light towers, Jumbotrons and medical tents. Applications are received between a year and a few days in advance, and applicants’ plans may change over time, as funding becomes (or fails to become) available and as attendance estimates become more concrete. For larger demonstrations, coordination with many other agencies becomes a necessary part of planning. We believe that a fair and effective permit processing system should take these differences into account, as outlined below.

1. We agree that for some applications, an initial response of “Approved, Provisionally Reserved, or Denied,” within three business days would be adequate. But while such a response would be adequate for an application submitted several months in advance of the desired date, it would obviously not be adequate for an application submitted on Wednesday for a demonstration on Sunday. Such an application is entitled to approval or denial (with reasons) within 24 hours, and any necessary consultations about details or modifications needs to occur as quickly as possible. Any new regulation should provide for prioritization of NPS action when necessary; perhaps application forms should include a space where the applicant can indicate whether a response in three business days, or even a week, is adequate for its needs, or why a faster response is needed. Courts prioritize

cases depending on whether a plaintiff seeks a temporary restraining order, or a preliminary injunction, or no emergency relief. NPS can prioritize demonstration applications in a similar way. Of course any delay in NPS's response time should not change an applicant's position in the queue for a particular place and time for its demonstration.

2. For applications that are provisionally reserved, NPS indicates that it will "work diligently" with the applicant "to resolve all outstanding questions," 83 Fed. Reg. 40469, and that if an application is received more than 60 days prior to a requested event, NPS will provide a list of outstanding issues no later than 40 days before the requested event and will "make all reasonable efforts" to approve or deny the application at least 30 days in advance of the event. *Id.*; see also proposed § 7.96(g)(4)(B), 83 Fed. Reg. 40480. For some applications this timeline may be adequate, but for others it will not be: for large demonstrations drawing thousands of people from out of town who need to make transportation and lodging arrangements, approval 30 days before the event may be too late, and receipt of NPS's list of outstanding issues only 40 days before the event often will not allow enough time for all issues to be resolved by 30 days before the event. Even for a smaller demonstration, if an application is submitted months in advance, the applicant should not have to wait until 40 days before the event to learn that NPS has issues, and until 30 days (or less) before its event to learn whether its "deemed granted" application has *actually* been granted.

In our view, therefore, applicants who apply early (say, one year to 70 days before an event) should be entitled to learn of NPS's issues (if any) in a more timely manner. We suggest 30 days after applying or 90 days before the event, whichever is later. Under such a timetable, an applicant filing between 120 and 365 days in advance will get NPS's list at least 90 days in advance, and an applicant filing between 70 and 120 days in advance will get NPS's list 30 days after filing.

Similarly, if NPS provides its list of issues to an applicant 90 days in advance of the requested event and the applicant responds promptly, it should not be NPS's goal to approve or deny the permit 30 days in advance. Since NPS believes it can generally move from providing its list to a final decision in ten days (40 days in advance to 30 days in advance), its goal should be to approve or deny a requested permit ten days after an applicant provides the requested information.

We know from experience that the permit process is often iterative, especially for large demonstrations, and as NPS notes, the exchange of information can occur "through written correspondence, or through one or

more logistical meetings among the NPS and the applicant.” 83 Fed. Reg. 40469. Especially where an applicant’s own plans are still evolving, the applicant may be content to remain in Provisionally Reserved status for a longer period, and NPS should certainly be free to accommodate an applicant in that way. But if an applicant has applied months in advance of an event and wants a final decision more than 30 days in advance, it should be able to get one.

3. We agree that applications for special events can be handled in a slower time frame, and that NPS can apply the regulatory criteria to determine whether a proposed event is a demonstration or a special event regardless of how an applicant characterizes it. *See* 83 Fed. Reg. 40468. But as noted in our comment on Proposed Change No. 2, we do not understand what NPS has in mind when it refers to “events that contain elements of both demonstrations and special events,” 83 Fed. Reg. 40468, because NPS has made no effort to explain what it means. And we certainly do not understand what NPS means when it says that for events that contain elements of both, “only the demonstration elements will be approved if NPS fails to notify the applicant” within the relevant timeframe for demonstrations. *Id.* NPS cannot move forward with this proposal unless it provides intelligible public notice of its meaning and a reasonable opportunity for comment.

4. NPS states that it may require an applicant to agree to new permit conditions, even after approval, “in order to accommodate . . . the . . . notoriety of participants.” 83 Fed. Reg. 40469. This statement gives us great concern, because “notoriety” is often a euphemism for “unpopularity,” and it is clear that NPS cannot impose conditions on a First Amendment activity because of the unpopularity of the views expressed or because of the participation of people who are known for such views. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (“Giving offense is a viewpoint.”); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation”). If NPS is using “notoriety” in a viewpoint- and content-neutral manner, *e.g.*, if a popular entertainer is also considered “notorious,” and if the relevant new permit conditions would involve, *e.g.*, providing for secure ingress to and egress from the stage, NPS should make this clear. Perhaps it would be better to say something like, “NPS may require an applicant to agree to new permit conditions, even after approval, in order to accommodate the security needs of the participants.”

We note that NPS’s statement also appears to be contrary to the existing regulations, which it does not propose to amend in this respect. Under the existing regulations, a permit holder can be required to amend its

permit only for a reason that would justify revocation, and a permit can be revoked only for a violation of the permit's terms or conditions or if the event presents a "clear and present danger to the public safety, good order or health or for any violation of applicable law or regulation." § 7.96(g)(6). The "notoriety" of a participant does not meet those criteria.

5. NPS "seeks comment on whether the regulations should state that it may only revoke a permit for 'material' violations of permit conditions." 83 Fed. Reg. 40469. Of course the answer is yes. An immaterial violation is by definition *immaterial*, meaning it doesn't matter. Revocation of a permit for immaterial violations would therefore violate the permit-holder's First Amendment rights.

Proposed Change No. 10
(Incorporating by reference certain permitting criteria from
36 C.F.R. Part 2)

NPS proposes to incorporate by reference into 36 C.F.R. § 7.96 certain permitting criteria that appear in 36 C.F.R. Part 2. 83 Fed. Reg. 40469. This proposal is presented as a matter of "simplif[ication] and streamlin[ing]," *id.*, but it seems to us that it will have exactly the opposite effect, and makes no sense.

Currently, all permitting criteria applicable to NPS areas subject to 36 C.F.R § 7.96 are contained in 36 C.F.R § 7.96. That makes them easy for applicants to find, and makes it (relatively) easy to see how they work together. Under the proposed change, *some* of the permitting criteria applicable to NPS areas subject to § 7.96 will remain in § 7.96, but *other* permitting criteria applicable to NPS areas subject to § 7.96 will be found only in 36 C.F.R § 2.50(a). This is not simplifying; it is confusing. Even if the regulations were identical, it would still make more sense to include all the permitting criteria applicable to NPS areas subject to 36 C.F.R § 7.96 in 36 C.F.R § 7.96. Members of the public do not have the booklet containing Title 36 on their bookshelves.

Proposed Change No. 11
(Changing the maximum permit period to 30 days, renewable)

NPS proposes to establish a maximum permit period of 30 days (renewable) for all permits. 83 Fed. Reg. 40470. We support this proposal for most areas, but have reservations about its application to Lafayette Park.

Current regulations authorize renewable permits in most areas (including the Ellipse) for up to four months, and in the White House area excluding the Ellipse (which essentially means Lafayette Park and Pershing Park) for up to seven days. NPS proposes to adopt a uniform, renewable limit of 30 days plus reasonable set-up and take-down time.

We support this change with respect to most areas, because it will allow a larger and more diverse set of individuals and organizations to obtain permits for desirable locations and times, and will, as now, allow groups that wish to remain longer to do so if others do not seek the same locations. Allowing just three groups to monopolize a prime location for a full calendar year, when others wish to use it, gives an unnecessary advantage to organizations that have the ability to plan far in advance and the resources to maintain an event for months at a time, disadvantaging those that work on a shorter timeline and have fewer resources.

On the other hand, we have reservations about expanding the permit period for Lafayette Park from 7 to 30 days, because it may have exactly the opposite effect. We do not know enough about the number and duration of permits that have been issued for Lafayette Park in recent years to reach a conclusion about that. If experience has shown that the issuance of 30-day permits would not result in other applicants being denied permits for their preferred times because the Park can reasonably accommodate all applicants on their desired dates, then we would not oppose this change. But if experience suggests that Lafayette Park is operating at near-capacity, especially at desirable times or seasons, then we would oppose a change that would result in many applicants being told that they must wait weeks for a desired space to become available because a single permittee has reserved it for a month. If NPS wishes to proceed with this proposed change, we look forward to seeing its careful analysis of the likely effect on the use of Lafayette Park.

Proposed Change No. 12
(Additional restrictions on structures)

NPS proposes a variety of new restrictions on the use of structures, including new areas in which *no* structures can be used and various new limits on the height of structures that can be used in other areas. 83 Fed. Reg. 40471-72; proposed § 7.96(g)(5)(iii).

A. Protection of First Amendment rights is not secondary to protection of the “viewshed.”

These proposed restrictions are mostly justified by the need to preserve the “viewshed,” meaning various lines of sight, but there is no indication in the Federal Register discussion that the importance of structures for First Amendment activity was given any significant weight. To the contrary, it appears that First Amendment interests played no role in determining where structures should be permitted or how tall they may be. NPS conducted an extensive, and no doubt very expensive, “visual impact analysis,” showing how structures of various heights in various locations would appear to viewers in various locations. *See* 83 Fed. Reg. 40472. But NPS apparently conducted no *First Amendment impact analysis* of how its proposed restrictions on structures would affect demonstrations.

This was improper. While scenic views are important, the use of the National Mall and nearby areas for First Amendment activity is equally or more important. NPS cites Secretarial Order 3326 (“Management of the National Mall and its Historic Landscape”) for its recognition that the National Mall is one of the most important landscapes in the United States. 83 Fed. Reg. 40472. But that Order (available at <https://www.nps.gov/nationalmallplan/Documents/letters/Secretarial-Order-3326-National-Mall-Signed.pdf>) equally recognizes that

usage of the National Mall is uniquely anchored in the U.S. Constitution. As a critical public forum in our Nation’s capital, the National Mall is a well-recognized venue for those engaging in the exercise of freedom of assembly, speech, religion, and press. Courts have repeatedly recognized these rights as well as the NPS’s ability to impose reasonable time, place, and manner restrictions.

Id. at 1. While it is true that structures on the National Mall and the Ellipse will be visible to individuals looking down the Mall or across the Ellipse, it is also true that structures accompanying demonstrations are temporary, and that their visibility can often be minimized by a viewer’s moving to the left or the right or moving so that the structure is behind him or her. It is also true that when a temporary structure is part of an ongoing demonstration, many people viewing the structure will be there because of the demonstration, and will be more interested in the success of the demonstration than in an unobstructed view of the memorials. And even individuals who do not expressly come for a demonstration “come to these areas to participate in American democracy, celebrate freedom, and experience our nation’s history

and culture,” 83 Fed. Reg. 40461, which involves more than just looking at monuments.

Nothing in the Federal Register notice suggests that NPS seriously considered the importance of structures to demonstrations. They are important in two ways. First, a structure can be an element of symbolic speech—for example, labor unions sometimes use giant inflatable rats to portray the management or the scabs that are the targets of their protests. Second, and at least equally important, structures can be facilitative. Large demonstrations need stages, sound towers, light towers, and Jumbotrons so that distant participants can see and hear the proceedings. While some limits on the height of structures may be justifiable, they need to be “narrowly tailored to serve a compelling government interest,” *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009). The proposed height limitations have not been developed with this constitutional test in mind, nor would they satisfy it.

B. The ban on structures in the tree panels is not supported by any discussion in the Notice.

Proposed § 7.96(g)(5)(iii)(A) would entirely ban the use of structures in the tree panels adjacent to Madison Drive, NW, and Jefferson Drive, SW. *See* 83 Fed. Reg. 40481 and map on 40482. But no explanation in the Federal Register Notice supports such a ban. NPS states only that “restrictions may include permit conditions regarding structures that are consistent with the turf management and event operations guidance related to duration, weight, equipment, and materials used.” 83 Fed. Reg. 40472.

We are aware of the formal comment filed by the Secretary of the Smithsonian Institution regarding the very damaging effect the proposed ban would have on the annual Smithsonian Folklife Festival, and we are aware of the extensive measures the Festival has taken to minimize the impact of its tents and other facilities on the tree panels. While the Folklife Festival is not itself a First Amendment event, the activities of its participants very much partake of First Amendment values—teaching, demonstrating, explaining, singing, dancing, storytelling—and members of the public who visit the Festival do so in large part to exercise their First Amendment right to receive information. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). NPS has not made the case that a total ban on structures in the tree panels is necessary despite the minimization efforts of the Folklife Festival. If such minimization measures are necessary, then other users could of course be required to take similar measures.

**Proposed Change No. 13
(Additional restrictions on signs)**

NPS proposes to apply the severe restrictions on signs that apply on the White House sidewalk and in Lafayette Park to signs in all other park areas if demonstrators either move from the White House sidewalk or Lafayette Park to other park areas, or move from other park areas to the White House sidewalk or Lafayette Park. 83 Fed. Reg. 40472. We believe such rules would be unconstitutional, impractical, and unnecessary.

In 1983, NPS implemented significant new restrictions on the size and physical composition of signs and sign supports used on the White House sidewalk. Signs were required to be made only of cardboard, posterboard or cloth and not be larger than three feet in height, twenty feet in length, and one-quarter inch in thickness, with sign supports made only of wood having cross-sections not larger than $\frac{3}{4}$ " x $\frac{3}{4}$ ". Individuals were required to be in physical contact with their signs at all times. *See* 36 C.F.R. § 50.19(e)(9) (1983). NPS made clear that "the restrictions apply only to the sidewalk contiguous to the White House; they are not applicable to any other park in the Memorial Core." 48 Fed Reg. 28058, 28060 (June 17, 1983). When challenged by the ACLU-DC, NPS defended those restrictions as being narrowly tailored to the special security concerns present only on the White House sidewalk, and the court upheld the restrictions on the narrow ground that "as part of a larger effort to safeguard the [Executive] Mansion and its occupants, the sign provisions clearly represent an appropriate means of promoting the substantial governmental interest at stake." *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1533 (D.C. Cir. 1984).

In 1985, NPS issued new restrictions on signs used in Lafayette Park. Reacting to a situation in which Lafayette Park "has been increasingly dominated by large, semi-permanent signs and structures of every sort which are often unattended by their owners," 51 Fed. Reg. 7556, 7558 (Mar. 5, 1986), NPS placed no limits on the size of hand-carried signs, but restricted signs that were not hand-carried to 4' x 4' x $\frac{1}{4}$ " thick and limited any individual to having two such signs and being within three feet of his or her signs at all times. *See* 36 C.F.R. § 50.19(e)(11)(ii) (1986). When the three-foot rule was challenged, the court noted "the important rights involved and the nature of the forum," but upheld the rule in light of the special security concerns "across the street from the White House." *United States v. Musser*, 873 F.2d 1513, 1517-18 (D.C. Cir. 1989).

NPS now proposes to impose the same Draconian restrictions on signs used in all other NPS areas if demonstrators plan to move from other areas to

Lafayette Park or the White House sidewalk, or if demonstrators in Lafayette Park or on the White House sidewalk plan to move to other NPS areas. 83 Fed. Reg. 40472. NPS explains that these changes would “create a more uniform regulatory scheme that will promote public safety,” *id.*, would “simplify event planning,” 83 Fed. Reg. 40473, and would prevent “negative interactions with law enforcement.” *Id.* Those grounds do not justify the proposed changes, which are in any event quite impractical.

First, the government’s desire for the administrative convenience of a “more uniform regulatory scheme” cannot overcome the important First Amendment interests involved in using signs as part of demonstrations, which were recognized by the courts in the cases cited above. The notion that the proposed rules would “simplify event planning” obviously rests on the same notion of uniformity and fails for the same reason. If a permit applicant wishes to simplify its own planning for its own reasons, that is its choice, but the government cannot impose “simplification” on a demonstrator’s choice to engage in conduct protected by the First Amendment. *See Riley v. National Federation of the Blind*, 487 U.S. 789, 790-91 (1988) (“The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it.”).

Second, occasional “negative interactions” with civilians is part of any law enforcement officer’s job, and NPS has not suggested that U.S. Park Police officers and Uniformed Secret Service agents have been unable to enforce the sign regulations applicable to Lafayette Park and the White House sidewalk, or that this task has been unduly difficult. Again, administrative convenience cannot trump First Amendment rights.

Third, NPS is ignoring the fact that many—probably the large majority—of demonstrations that proceed to or from Lafayette Park and the White House sidewalk do not come from or go to other NPS park areas. They arrive from or depart to city streets, for example, in feeder marches from neighborhoods or Metro stations to Lafayette Park, or from Lafayette Park down 15th Street to Pennsylvania Avenue to the Department of Justice or to Capitol Hill, to give some recent examples. NPS will therefore have no control over most demonstrators’ signs before or after the demonstrators are in Lafayette Park or on the White House sidewalk.

This attempt to severely restrict the size and composition of signs and sign supports in areas where no such restrictions can be justified cannot pass the First Amendment’s core requirement that, in a public forum, regulations must be narrowly tailored. *See, e.g., Pleasant Grove City v. Summum*, 555

U.S. 460, 469 (2009) (In “traditional public fora,” speech restrictions must be “narrowly tailored to serve a compelling government interest.”).

Requirement for Public Consultation Under the National Historic Preservation Act

We anticipate that the National Mall Coalition, and perhaps other commenters, will state that these proposed changes require review, including a public consultative process, under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, because the proposed changes would fundamentally alter the historic and cultural character of the National Mall, which was intended from the very beginning to be a place for active public cultural, civic, and recreational *use*.

We are not sufficiently familiar with National Historic Preservation Act and the regulations and caselaw thereunder to express an opinion on whether such a review is required, but we agree that some of the proposed changes—especially the proposal to close 80% of the White House sidewalk and the consideration of charging fees (or “cost recovery”) for demonstrations—would fundamentally alter the character and use of these historic areas, and we urge NPS to give careful attention to the comments of the National Mall Coalition and others who have expertise in this area, and to include ACLU-DC as a consulting party in any such review.

The Absence of Confirmed Leadership at the National Park Service and the Department of the Interior

We note that there is no Regional Director of the National Capital Region of the National Park Service. Nor is there a Senate-confirmed Director of the National Park Service. Nor is there a Senate-confirmed Assistant Secretary of the Interior for Fish, Wildlife, and Parks, who would supervise the National Park Service, or a Senate-confirmed Solicitor of the Department of the Interior, who would supervise the Solicitor’s Office’s legal advice and counsel to the National Park Service. All of these positions are currently in the hands of acting personnel. It is puzzling to us that such far-ranging proposed amendments to these important regulations would be issued in the absence of duly appointed leadership, and that final decisions on adoption might be made in the absence of duly appointed leadership. We therefore urge NPS to put off any decision-making on this matter until full-fledged leaders and legal counsel are in place.

We appreciate the National Park Service's attention to our comments.

Very truly yours,

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