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October 15, 2018

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

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

Dear Mr. Joyner:

This letter provides the comments of Public Citizen on proposed changes to the regulations. As described below, several aspects of the proposal would limit citizens' use of public sidewalk and parks in the District of Columbia to engage in the constitutional right to protest against the elected leaders of the federal government and top appointees of federal agencies.

Public Citizen is a public-interest organization based in Washington, D.C., with members and supporters in all fifty states and the District of Columbia. Since 1971, Public Citizen has encouraged public participation in civic affairs, and has appeared as amicus curiae in many cases involving the First Amendment rights of citizens who participate in civic affairs. Public Citizen has also sponsored rallies and demonstrations held in areas of the District of Columbia that are subject to the control of the National Park Service (NPS), including both small gatherings for which no permit was required, and larger gatherings for which Public Citizen sought and obtained permits from NPS. Public Citizen has supported many demonstrations organized by other groups, and has assisted groups based in other parts of the country organizing protest activities in NPS-controlled areas in Washington, D.C.

In that regard, the NPS proposed changes must be considered against the significant background fact that President Donald Trump does not like protesters. He has said that protesting ought to be illegal,¹ and he has called for protesters at his campaign events to be ejected and/or

¹ Sonmez, *Trump suggests that protesting should be illegal*, Washington Post (Sept. 5, 2018), available at https://www.washingtonpost.com/politics/trump-suggests-protesting-should-be-illegal/2018/09/04/11cfd9be-b0a0-11e8-aed9-001309990777_story.html.

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attacked.²

The streets and parks of our country, and particularly in the national's capital, however, are public forums where the First Amendment protects the right to engage in political protest. The protections for the right to protest in iconic locations throughout Washington D.C., and to do so without financial and unnecessary regulatory constraint, has long been recognized by a series of Supreme Court and D.C. Circuit precedents. *E.g.*, *United States v. Grace*, 461 U.S. 171 (1983); *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992); *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975). Together with the National Mall, the sidewalks and parks along Pennsylvania Avenue and adjoining the White House have been recognized as a “symbol of American democracy,” as “the preeminent civic stage for our country,” Record of Decision on National Mall Plan / Environmental Impact Statement (2010), at 1, and as the “primary assembly point for First Amendment activity aimed at influencing national policies.” *United States v. Doe*, 968 F.2d at 89. Yet, in numerous ways, the Notice of Proposed Rulemaking seeks to erect barriers to the public's right to use these facilities for the purpose of expressing political views.

Public Citizen objects to several of these barriers, generally in agreement with the objections filed last week by the American Civil Liberties Union Foundation of the District of Columbia and by the Partnership for Civil Justice. In particular, we object to the proposal to charge substantial fees for permit applications for marches and rallies being held for the expression of political views, for the claimed purpose of compensating for repairs to the turf on grassy areas such at the Ellipse and National Mall, for the erection of fencing and barriers, and for wages of providing police supervision. Under the changes proposed in the new regulations, fees could be imposed either directly, by charging fees for First Amendment activities, or indirectly, under the proposal to charge fees for “special event” activities such as musical performances and other forms of entertainment, insofar as they may occur in the course of a rally that is being held for purposed of political expression. For example, under the current proposal, the organizers of the 1963 March on Washington for Jobs and Freedom would have been charged for allowing the songs of Mahalia Jackson, Marian Anderson, Joan Baez, Peter Paul and Mary, Bob Dylan, and others. Neither route to the charging of fees for political demonstrations should be adopted. Charging more than nominal fees for the holding of political demonstrations is a violation of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

The charging of security fees is particularly problematic from a First Amendment perspective. *See Forsyth County v. Nationalist Movement*, 505 US 123 (1992); *Sonnier v. Crain*, 613 F. 3d 436 (5th Cir. 2010). It is the government's obligation to protect demonstrators, *Brown*

² Maguill, *Did Donald Trump Encourage Violence at His Rallies?* Snopes (Feb. 21, 2018), available at <https://www.snopes.com/fact-check/donald-trump-incitement-violence/>.

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v. State of Louisiana, 383 U.S. 131, 133 (1966), and imposing fees based on estimates of the cost of providing such security amounts to an impermissible heckler's veto. *Forsyth County*, 505 U.S. at 132; *Brandt v. Village of Winnetka, Ill.*, 612 F.3d 647, 649 (7th Cir. 2010), and amount to limiting speech. It would be particularly inappropriate, for example, to force demonstrators objecting to the cozy relationship between the Trump International Hotel and the federal government, and to the propensity of lobbyists and foreign diplomats seeking to influence the Trump Administration to spend their dollars at President Trump's own family business along the Pennsylvania Avenue Historic District, to pay for security measures and barricades provided by the Park Service at the behest of that business.

In addition, Public Citizen objects to the imposition of new limits on specific areas that have historically been open for permitted and non-permitted expressions of political views. The proposals for categorical prohibitions on the use of the greater part of the sidewalk in front of the White House, and the permanent closure of portions of the Ellipse along the south fence of the White House that have been closed on the "temporary" basis for reasons relating the construction activities, are unacceptable efforts to screen the President from seeing and hearing members of the public who want to express to him dissatisfaction with his policies. The White House sidewalk, as the Secret Service has admitted "is in fact a quintessential First Amendment site."³ Given the large size of the White House lawn and the high fence, there is no security justification for giving members of the public no more than a five-foot strip of the sidewalk on which to conduct protests and demonstrations. The government would bear a high burden of providing specific evidence in the rulemaking record that would justify the exclusion of demonstrators from the bulk of the White House sidewalk. The Notice of Proposed Rulemaking refers vaguely to closures along the **south** fence line as having been "requested by the United States Secret Service" based on that agency having "determined that [areas on the vicinity of that fence] present a significant potential area of risk" of people trying to jump that fence." These requests are too vague to justify closing off demonstrations in that part of the Ellipse and, in any event, provide no justifications for the new limits on protests on the White House sidewalk.

Public Citizen agrees with the ACLU that the size of gatherings that can be held without a permit should be increased from the current level of twenty-five. At the same time, Public Citizen objects to the proposed new standards for small gatherings that would forbid the use of mobile sound equipment and structures larger than a three-foot cube — barely large enough to provide an elevated platform for a single speaker. For example, small platforms 4x4 feet to 6x6 feet that are open

³ Sands and Date, *White House Fence Re-Design Proposal Unveiled by Secret Service and National Park Service*, ABC News (Apr. 21, 2016), available at <https://abcnews.go.com/US/white-house-fence-design-proposal-unveiled-secret-service/story?id=38585939> (quoting Secret Service Chief Strategic Officer Thomas Dougherty).

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underneath are necessary for demonstrations or rallies responding to emerging controversies, enabling attendees to hear and see the speakers and ideally allow for a podium. At the last event Public Citizen held outside the White House, the 4x4 stage was the minimum size to allow at least one elderly Member of Congress to have a stable and safe spot to stand at the podium.

Moreover, in Public Citizen's experience, temporary platforms large enough to elevate several speakers over the crowd, using rolling amplifiers, can be brought into and removed from a demonstration area, and erected and dismantled as needed, without causing any harm to the location, and without unduly interfering with other uses of the space. Platforms of this size can be obtained that are lightweight, easily collapsible, and moveable, which is a primary concern for Park Police and Secret Service in our experience when, for example, the President or other top-level officials or dignitaries are leaving or arriving at the White House.

Finally, Public Citizen joins with other commenters in objecting to the proposal to revoke unilaterally the twenty-four hour deadline for responding to requests for permits for political demonstrations, pursuant to which failure to respond to the request results in the permit being deemed granted. At the same time, in light of the fact that NPS reserves the right to modify or revoke permits after they are granted (including after they have been "deemed granted" under the 24-hour rule, NPS needs to be much better at dealing with permittees during the period between the application and the holding of the permitted rally. Public Citizen's experience is that NPS staff often let issues linger, and that it often takes a personal visit to the permitting office to remind NPS staff that there are issues pending and to jostle them into paying attention to issues requiring decision.

For example, one Public Citizen staff member recalled the organization's experience applying in October 2014 for a permit for a rally planned to be held in January 2015. Public Citizen submitted its application by mail. The staff member called a few times to follow up to see if it had been received and mostly got voicemail and no clear response when she did speak with a staff member. Then she re-applied in person with the same application and was able to set up a meeting in person. Once that meeting had been held, a permit number was issued, but the permit was not approved until shortly before the event. This is the normal process of delay to which staff became accustomed.

Moreover, although Public Citizen can address those problems with relative ease given the fact that it is headquartered in Washington, the need for in-person visits is more problematic for other groups that are based in other parts of the country. When such groups want to hold a free speech event on premises subject to NPS permitting, they have to hire a local group to run interference for them by visiting the NPS office. That effective requirement erects an unnecessary barrier for out-of-town groups.

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As individual Public Citizen staff have become regular participants in the permit-seeking process, they have found NPS personnel to be more responsive, which is useful for Public Citizen's own institutional purposes, but still the process is harder for groups that are newcomers to the process and especially for groups applying from out of town.

In the final analysis, there are so many serious issues with the proposed changes in the regulations, of which these comments have only scratched the surface, that the best course would be for NPS to accept the suggestion submitted last week by the National Mall Coalition to shelve the current proposed rule-making and to start the process again from the beginning, consulting with the many stakeholders with interests affected by the change, instead of proceeding based on a unilateral proposal and only responding to public comments after the fact. Public Citizen wishes to be considered a consulting party in such a review if it is held.

Sincerely yours,



Robert Weissman, President



Paul Alan Levy, Senior Attorney