



October 15, 2018

Mr. 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:

Pacific Legal Foundation is one of the nation's oldest and most prolific public interest law firms dedicated to advance the principles of individual rights and limited government. PLF has long defended the right of freedom of speech. Earlier this year, PLF successfully represented Minnesota voters before the Supreme Court in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), a significant free speech case.

PLF is interested in this proposed rule because of its potential to unduly limit freedom of expression at some of our Nation's most significant and traditional sites for public demonstration and debate. As the National Park Service has identified, the National Mall and Memorial Parks "serve[] as the premier national civic space for public gatherings including First Amendment activities, national celebrations ... and national mourning. 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).<sup>1</sup> Protecting the right to freely assemble, speak, and petition at these sites is an objective of the highest national significance.

PLF shares many of the concerns raised by other organizations and individuals providing public comment to the proposed rule. PLF's comment is not intended to be a comprehensive look at all of the flaws that others have identified in the proposed rules.

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<sup>1</sup> Available at

[https://www.nps.gov/nama/learn/management/upload/NAMA\\_FD\\_SP2.pdf](https://www.nps.gov/nama/learn/management/upload/NAMA_FD_SP2.pdf).

Instead, this comment focuses on just one aspect of the proposed rule where PLF can offer a unique perspective based on its decades of experience litigating First Amendment cases.

Proposed Change No. 2 seeks public comment on a reevaluation of how the NPS treats “demonstrations” and “special events” on public land. 83 Fed. Reg. 40463. “Demonstrations” have traditionally not required a permit if smaller than a certain size, while “special events” of all sizes have always required permits. The proposed rule seeks to “streamline” the regulations by combining these terms under a single umbrella of “events.” However, the proposed rule seeks to “retain the use” of the two distinctive terms “where the distinction is necessary to ensure that NPS does not overly restrict speech that enjoyed heightened protections under the First Amendment.”

The NPS’s instinct to combine political demonstrations and other types of speech into a single protected category is praiseworthy. But the NPS proposed rule does not go far enough. As the proposed rule identifies, “some demonstrations have elements that are special events.” Indeed, the line between “demonstrations” such as celebrations or parades is often blurry. That blurriness is reason enough to treat all expressive gatherings as equally protected under the First Amendment. For example, protests may include “special event” elements such as “entertainments” or “historical reenactments.” *See e.g., Albuquerque Police Department Protestors Hold Mock Trial Against Police Chief*, Fox News/AP (June 22, 2014).<sup>2</sup> Of course, demonstrations that include elements such as singing, dancing, costumes, or props are fully protected by the First Amendment. *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) (use of military uniforms). Park regulations should treat all speech activities in the national park as protectively as demonstrations have been treated in the past, rather than reducing the protection extended to demonstrations that have elements of “special events.”

This change would eliminate any potential viewpoint discrimination that might result from bureaucratic judgment calls as to how a particular gathering is described. For example, parades can be both celebrations and politically charged. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995), the Supreme Court recognized the celebratory expressive content of an Irish-American group’s

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<sup>2</sup> <https://www.foxnews.com/world/albuquerque-police-department-protestors-hold-mock-trial-against-police-chief>.

St. Patrick's Day parade. The Court held, "[p]arades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches." *Id.* at 568. Participants, just by the fact of their participation, are engaged in this sort of expression. *Id.* at 570 (organization of gay, lesbian and bisexual Irish-Americans sought to march in the parade to "communicate its ideas"). This expression can be understood to have a political component. *See Minnesota Voters Alliance*, 138 S. Ct. at 1891 (Minnesota's ban on "political" apparel at the polls would apply to a shirt displaying a rainbow flag if an issue on the ballot related to gay rights.). Thus, political and celebratory components exist in equal measure. *See e.g., Gay pride marches across U.S. take on celebratory, political tones*, CBSNews.com/AP (June 25, 2017).<sup>3</sup> Both are equally worthy and entitled to full First Amendment protection.

The First Amendment guarantees the right to freedom of speech to all regardless of the content of the speech in question, barring extremely limited carve-outs for unprotected speech. In *Reed v. Town of Gilbert*, the Supreme Court explained that laws that treat speech differently based on "its function or purpose" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). The distinction between "demonstrations" and "special events" was likely created with the best of intentions in order to protect political speech. However, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229. There is no compelling reason that historical reenactments or parades are less worthy of constitutional protection than protests or marches.

Any distinction between "demonstrations" and "special events" also improperly requires government officials to parse through the motives of participants to determine whether the event "involve[s] the communication or expression of views or grievances." Determining whether an event "involve[s] the communication or expression of views or grievances" will invariably lead to "haphazard interpretations" and "erratic application" based on the identity of the speaker or the biases of the government official. *Minnesota Voters Alliance*, 138 S. Ct. at 1889-90. After all, different participants may share different

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<sup>3</sup> <https://www.cbsnews.com/news/gay-pride-marches-across-america-take-on-celebratory-political-tones/>

National Park Service  
October 15, 2018  
Page 4

motivations for participating at an event. *See Locurto v. Giuliani*, 447 F.3d 159, 166-167 (2d Cir. 2006) (detailing various participant reasons for participating in a parade, which included both amusing parodies and re-enactment of a notorious murder).

The National Parks Service may of course continue to apply neutral time, place, or manner restrictions to all speech events based on the size or impact of the event. And it can continue to treat events that do not have a speech component (such as perhaps a marathon or 5K) less favorably if it chooses to do so. But the selective treatment of different events protected by the First Amendment is unconstitutional and should be eliminated.

The National Park Service should adopt full and equal treatment of the panoply of speech that the First Amendment protects.

PLF appreciates the National Park Service's consideration of its comments.

Sincerely,



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