ACLJ
American Center
for Law & Justice
Jay Alan Sekulow, J.D., Ph.D.
Chief Counsel

October 4, 2013

VIA OVERNIGHT DELIVERY SERVICE

Jonathan Jarvis
Director
National Park Service
[redacted]

Dear Mr. Jarvis:

By way of introduction, the American Center for Law and Justice (ACLJ) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States.[1]

The purpose of this letter is to demand that the National Park Service discontinue immediately its unconstitutional enforcement measures with respect to access to the World War II Memorial which are violating the First and Fifth Amendment rights of World War II veterans, their families, as well as other citizens interested in visiting the Memorial.

STATEMENT OF RELEVANT FACTS

It has been widely reported on the news that, allegedly due to the current budget impasse, the various Memorials on the Mall, including the World War II Memorial, have been closed to World War II veterans, their families, and the public. It has been further reported that citizens may risk arrest if they breach the barricades to get to the Memorial. The World War II Memorial traditionally has been open to the public 24 hours per day and is not normally surrounded by

[1] *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8–1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

fences or barricades. As such, in order to keep the public and veterans out, barricades had to be specially procured and money spent to erect and guard the barricades around the Memorial.

On October 3, 2013, at around 12:10 p.m. EDT, dozens of World War II veterans, Iraq War veterans, and members of the general public were denied entry into the Memorial in violation of their First Amendment rights to free speech, assembly, and association. News media also report that some individuals and groups, such as Honor Flight groups, have recently been given permission to enter the Memorial, while most other individuals and groups have been denied entry.

When queried about public access to the World War II Memorial, Ms. Carol Johnson, a National Park Service (NPS) agent, initially indicated that individuals could visit the Memorial because they did not need a permit, which is required for a group of more than twenty-five people. However, when one individual entered the Memorial in reliance on Ms. Johnson's statement, two other NPS agents stopped him and immediately escorted him out. NPS personnel at the Memorial had conflicting understandings about what was and was not permitted. While one of the two agents said that the single individual had the First Amendment right to visit the Memorial, the other agent said he did not. In addition to the NPS agents, there were at least two federal police agents present who also prohibited the public from entering the Memorial.

STATEMENT OF RELEVANT LAW

I. FIRST AMENDMENT

The First Amendment to the United States Constitution prohibits the government from, inter alia, abridging the freedom of speech or the right of the people to peaceably assemble. The National Mall and the World War II Memorial are public fora.[2] They are therefore subject to the Supreme Court's First Amendment jurisprudence concerning access to public fora.

In *Hague v. C.I.O.*, 307 U.S. 496 (1939), the Supreme Court recognized that streets, sidewalks, and parks represent quintessential public fora, and that the right of assembly in such places belongs to the people:

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

[2]In *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992), the court held that the sidewalks adjacent to the Viet Nam Memorial were a public forum. The court focused on the fact that (1) the sidewalks were physically indistinguishable from ordinary sidewalks "used for the full gamut of urban walking"; (2) the sidewalks "are used by thousands of pedestrians every year, including not only the Memorial visitors, but also people going to other places"; and (3) the record did not indicate the sidewalks at issue had a specialized use. *Id.* at 1182. The World War II Memorial is configured similar to the Viet Nam memorial in the sense that the Memorial is viewed primarily from public sidewalks. The NPS is denying access to those public sidewalks surrounding the Memorial.

> privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; ... *but it must not, in the guise of regulation, be abridged or denied.*

Id. at 515-16 (plurality opinion) (emphasis added).

A. *Any Restrictions on the Right to Peaceably Assemble and Speak In a Traditional Public Forum Must Be Reasonable as To Time, Place, and Manner.*

A government may only restrict First Amendment rights in a traditional public forum if the restriction is reasonable as to the time, place, and manner of the speech. A three-part test governs this inquiry:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] that the restrictions "are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation omitted). For example, a city may enforce a rule against obstructing passage on a public sidewalk or against excessive noise. The Supreme Court has said that the right to engage in expressive activities in public places is not an absolute right and that it "must be exercised in . . . peace and good order." *Hague*, 307 U.S. at 516. The rights to freedom of speech and assembly are "delicate and vulnerable, as well as supremely precious . . . and [b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

To determine whether a regulation is "narrowly tailored to serve a significant governmental interest," courts examine the restrictions in light of the governmental interests that justify them. An ordinance is narrowly tailored *only if* it "target[ed] and eliminate[d] no more than the exact source of the 'evil' it [sought] to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (emphasis added). In other words, regulations must further a "substantial government interest that would be achieved less effectively absent the regulation," but they cannot "burden substantially more speech than is necessary to further the government's legitimate interest." *Ward*, 491 U.S. at 799.

In the current matter, the NPS's ban on all First Amendment activity at the World War II Memorial, except by those visiting with Honor Flight groups, is not a reasonable time, place, or manner regulation but rather an outright prohibition of First Amendment rights to a significant portion of the population which serves no legitimate government interest. There is no credible argument that the NPS ban furthers the government's interest in saving money during the shutdown because it cost more money to erect the barricades to isolate the Memorial from its surroundings and pay the wages of NPS guards not previously needed than it would have cost to allow the free access to the Memorial that obtains at all other times.

Even if the ban served any valid government interest, it is not narrowly tailored. Allowing some citizens access, but not others, is arbitrary and treads on much more First Amendment activity than is necessary to achieve any legitimate government interest in saving money.

B. *NPS's Arbitrary And Discriminatory Selectivity About Who Can Visit The World War II Memorial Constitutes A Prior Restraint on First Amendment Rights.*

The Constitution demands reasonably certain standards as to who can exercise First Amendment liberties in a public forum. Vague or nonexistent standards constitute a prior restraint on those freedoms. A prior restraint on expression or speech occurs when the "government can deny access to a forum for expression before the expression occurs." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) (National Park Service regulation requiring a permit prior to a protest was an unconstitutional restraint because it vested unbridled discretion in an NPS official). A government regulation that allows arbitrary application—like the one currently being applied to the World War II Memorial, as indicated by the contradictory advice given by the NPS agents about access—is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). Further, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

The standards by which access to a public forum is granted must be "reasonably specific and objective" and not left to the "whim of the administrator." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324 (2002). Giving administrators such broad discretion to grant or deny permission based on their own formulations of fact and opinions jeopardizes First Amendment freedoms, creating a risk of censorship and an "abridgment of our precious First Amendment freedoms too great to be permitted." *Nationalist Movement*, 505 U.S. at 131 (internal quotations omitted). In order to curtail the risk of prior restraint in granting or denying permission for use, there must be "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 133. There are no such standards in this instance.

II. DUE PROCESS CLAUSE – VAGUENESS

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67 (D.D.C. 2001) (vague standards about who can access Public Library violate the Due Process Clause). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A rule may be impermissibly vague if it "requires a person to conform his conduct to an imprecise but comprehensible normative standard," but also if "no standard of conduct is specified at all." *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). The NPS's selective denial of access to the World War II Memorial due to the application of unspecified or non-existent criteria violates the constitutional command that rules be sufficiently clear and capable of uniform application.

III. EQUAL PROTECTION – ARBITRARY CLASSIFICATION

Discriminatory access to public fora based on arbitrary or vague criteria also violates the Equal Protection Clause. *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598 (2008) (citing the "traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications").[3] When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." *Id.* at 603. "Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a rational basis for the difference in treatment." *Id.* at 602; *see also Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Here, the NPS lacks a rational reason for denying access to the Memorial to some Americans, including some veterans, but not others.

IV. CONCLUSION

The NPS' discriminatory access policy to the World War II Memorial, which is normally open at all times to all members of the public, is a clear violation of the First Amendment. Whatever the terms of the current NPS policy dealing with access to the World War II Memorial during the

[3]The federal government's conduct is subject to equal protection principles via the equal protection component of the Due Process Clause of the Fifth Amendment. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-33 & n.5 (1973).

ongoing budget impasse are, such terms are sufficiently *unclear* to those charged with their execution that NPS employees cannot agree on whether the policy permits or forbids access to the Memorial by interested individuals. Accordingly, such a policy is unconstitutionally void for vagueness. As the events of October 3, 2013, show, a citizen may be allowed in by one NPS guard, only to be told to leave minutes later by another NPS guard, with no explanation. World War II veterans with Honor Flight groups are allowed access, but World War II veterans who come alone are denied. There are no reasonably specific and objective guidelines, only the unfettered discretion of the NPS guards at the Memorial, which has been exercised in an egregiously arbitrary and discriminatory manner. Such unfettered discretion violates the First Amendment, the Due Process Clause, and the Equal Protection component of the Fifth Amendment.

DEMAND

For the reasons stated herein, the NPS has violated and will continue to violate the First Amendment, due process, and equal protection rights of persons seeking access to the World War II Memorial. We, therefore, demand that the NPS desist immediately from barring access to the World War II Memorial for all persons seeking to visit the Memorial. Should the closure of the Memorial continue, we will be obligated to file a federal lawsuit seeking an injunction against the National Park Service.

Respectfully yours,

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