UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

GOVERNOR KRISTI NOEM, in her official capacity as the Governor of South Dakota; and SOUTH DAKOTA,

Plaintiffs,

vs.

DEBRA HAALAND, in her official capacity as the United States Secretary of the Interior, et al.,

Defendants.

3:21-CV-03009

DEFENDANTS' BRIEF IN SUPPORT OF OBJECTION TO MOTION FOR PRELIMINARY INJUNCTION

Comes now the Acting U.S. Attorney for the District of South Dakota, Dennis R. Holmes and Assistant U.S. Attorney Diana Ryan and files this objection to Plaintiffs' Motion for Preliminary Injunction.

This litigation arises from the decision of the United States Department of the Interior, National Park Service ("NPS") to deny the State of South Dakota a discretionary special use permit for a fireworks display at Mount Rushmore National Memorial ("the Memorial") on July 3, 2021. There is no further action the NPS intends to take, so there is no action to be enjoined.

Rather, Plaintiffs ask the Court to order Defendants to "approve Plaintiffs' request for a permit." That is not an ordinary injunction request. Rather, it is a request to compel an agency action, akin to a writ of mandamus. Plaintiffs' motion fails to acknowledge the extraordinary nature of this remedy, much less justify its issuance here.

However it is characterized, the motion should be denied. The decision of the NPS to deny the 2021 fireworks permit was based upon the factors stated in its permit regulation, and clearly explained by the NPS's letter. Those factors included the health and safety of the public and employees during a pandemic, as well as ongoing concerns related to a tribal cultural preservation survey requested by affiliated tribes, uncertainty about perchlorate contamination and wildfire risk, and the need to complete an ongoing construction project that had already been significantly delayed because of the previous year's fireworks permit. The NPS's permit denial need only be based on one of these factors, but here it was based on five.

These reasons are not arbitrary and capricious, nor is the denial of a permit by NPS contrary to law. Nor does Plaintiffs' request show any irreparable harm or balance of hardships in their favor. A fireworks permit does not warrant extraordinary judicial intervention. Plaintiffs' motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

The 1,278-acre Mount Rushmore National Memorial is located in the central Black Hills in southwestern South Dakota, 2 miles southwest of Keystone, along State Highway 244. Declaration of Herbert C. Frost ("Frost Decl.") at ¶3. The majority of the landscape is composed of massive granite outcrops intermingled with old growth ponderosa pine forest. Id. The Memorial is a symbol for freedom and democracy and a special place for all people and

cultures. Id. The majority of visitation is for purposes of seeing the carved mountain and associated visitor facilities. Id.

The Memorial came under the stewardship of the National Park Service in 1933. Id. Since that time, the National Park Service has managed the granite peaks, pine forest, historic buildings and archeological sites, streams and wetlands, and flora and fauna, representing five different biomes. Id. The land encompassing Mount Rushmore National Memorial reflects human habitation and development for thousands of years, from the earliest stone tools of tribal populations to the first homesteads in the Black Hills. Id. There are also several historic sites related to the mining boom of the area and sites related to the early development and tourism of the park. Id. Mount Rushmore National Memorial and the Black Hills are also sacred spaces for living cultures whose legacies still thrive today. Id.

Starting in 1998 and continuing for eleven years, the Memorial had an annual fireworks display to celebrate the July 4th holiday.[1] The NPS stopped having fireworks displays at the Memorial for a number of reasons. One of the reasons the fireworks ceased was because the annual event had become a chaotic "free-for-all," bringing in far more people than the facilities could handle, creating an unsanitary and potentially dangerous situation. *See*, Statement of Mount Rushmore Supervisory Park Ranger/Program Manager Brad Eggers at the January 15, 2020 Government to Government Tribal Consultation Meeting,

[1] The 2020 FONSI indicates there was no fireworks show in 2002 due to elevated fire risk. DE 3-2, Ex. H at 4.

Frost Decl. Ex. 2 at 28: 25-29:1-4. The Memorial's parking lot with 1100 parking spaces was full by nine o'clock in the morning. Id., 29:5-7. Visitors often blocked the road, hiked off trail and posed security threats to the firework detonation area itself. *See* Frost Decl., ¶20. Some years saw upwards of 30,000 visitors within the grounds of the Memorial and the surrounding lands, with 8-10,000 people in the developed area of the Memorial. Id.

On May 6, 2019, then Secretary of the Interior, David Bernhardt, signed a Memorandum of Understanding with the Governor of the State of South Dakota, Kristi Noem, to explore bringing fireworks back to the Memorial. *See* Memorandum of Agreement Between the Department of the Interior of the United States of America and The State of South Dakota ("MOA"), at Hruska Decl., docket 3-2, Ex. B. The Secretary of the Interior and Governor of South Dakota agreed to, "exercise their full authorities under State and Federal law to work to return fireworks to Mount Rushmore National Memorial in a safe and responsible manner on July 3, July 4, or July 5, beginning in the year 2020." Id.

In September 2019, Herbert C. Frost became the Regional Director for Regions 3, 4, and 5 of the National Park Service. Frost Decl., ¶1. Frost's educational background includes a Ph.D. in Wildlife Ecology from the University of Maine Orono. Id., ¶2. He also holds a Master of Science degree in Zoology and Bachelor of Science degree in Wildlife and Range Management, both from Brigham Young University, Provo, Utah. Id.

Region 3 covers the Great Lakes, Region 4 covers the Mississippi Basin, and Region 5 covers the Missouri Basin. Frost Decl., ¶1. Region 5 was formerly

known as the Midwest Region of the NPS and includes the state of South Dakota and Mount Rushmore National Memorial. Id. His duty station is Omaha, NE. Id., ¶3.

As Regional Director for DOI Regions 3, 4, and 5, Frost leads all NPS operations in 13 states, which encompasses 58 park units, 8 heritage areas, 3 national trails, and over 1,900 employees and a budget of about $300 million that provides an economic benefit for the area of approximately $1.57 billion annually. Id., ¶5. He provides leadership to programs in natural and cultural resource management and protection, planning and compliance, partnership and outreach programs, recreation, facility management, and all aspects of park operations, including law enforcement, concessions management, and wildfire management. Id.

Prior to becoming the Regional Director for Regions 3, 4, and 5, Frost was the NPS Regional Director for DOI Region 11 (Alaska), stationed in Anchorage, Alaska. Id., ¶4. He held that position from April 2014 through September 2019. Id. Before becoming the Regional Director for DOI Region 11, he was the NPS Associate Director for Natural Resource Stewardship and Science ("NRSS") and Chief Scientist for the NPS, stationed in Washington D.C. Id. Frost held that position from June 2008 through April 2014. Id. He has been a member of the Senior Executive Service ("SES") since June 2008. Id. Frost has worked for the NPS for over 25 years, 13 of those years as a member of the Senior Executive Service and in senior leadership positions. Id.

From January 2017 to July 2017, Frost served as acting Deputy Director of Operations for the NPS overseeing all seven NPS regions and 417 park units throughout the NPS. As Associate Director of NRSS, he administered programs in air resources, soundscapes, night skies, geologic resources, climate change, social science, environmental compliance, resource damage assessment and restoration, biological resources, water resources, and the NPS inventory and monitoring program. Id., ¶7. Furthermore, he oversaw issues relating to climate change, renewable and traditional energy development, transmission lines, air tour management, ungulate overabundance, bison conservation, landscape conservation, and working to protect park resources for this and future generations. Id.

On July 3, 2020, a fireworks display was permitted at the Memorial. Frost Decl. at ¶8. The fireworks display corresponded with a presidential visit. Over 7,000 people attended the event, in the middle of the COVID-19 pandemic. Id. The 2020 Permit expressly stated, "Issuance of this permit is for the current year 2020 and does not mean an automatic renewal of the event in the future." Id., Ex. 14.

On October 19, 2020, the State of South Dakota requested "a special use permit for the dates of June 15-July 15, 2021 to include the setup, event, and takedown for an Independence Day celebration." Id., ¶9; referencing Hruska Decl., docket 3-2, Ex. D. This application referenced the 2019 MOA, and stated, "Additional information and requests will be forthcoming once the fireworks vendor is chosen and program details are finalized." Id.

Following the receipt of the special use permit ("SUP") request, Frost worked with NPS staff at the Memorial, as well as regional and national level employees and subject matter experts to discuss the SUP application. Id., ¶10. After considering a number of factors, including: tribal concerns, the state of the COVID-19 virus, fire danger, perchlorate levels in the water at MORU, an ongoing construction project, public visitation concerns, and NPS staffing requirements for such an event, as well as discussing the issue with NPS and DOI leadership, Frost decided to deny the State's SUP application. Id.

In his capacity as Regional Director for DOI Regions 3, 4, and 5, Frost signed a letter dated March 11, 2021 denying the permit to hold an Independence Day celebration in July 2021. Hruska Decl., docket 3-2, Ex. F. In drafting the denial letter, Frost relied on park and regional staff as well as subject matter expects to provide content and a first draft of the letter. Id., ¶11. After consulting with NPS and DOI leadership, Frost signed the letter. Id.

I. The NPS Properly Denied the Permit in Order to Conduct a Tribal Cultural Properties Survey and Build Stronger Relationships with the Tribes.

Pursuant to 54 U.S.C. § 306108, commonly referred to as § 106 of the National Historic Preservation Act,[2] the NPS invited 20 tribal nations to consult

[2] "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108.

on the proposed fireworks event in 2020. Eleven of these tribes attended one or both consultation meetings and/or sent a letter of opposition to the event. Id., ¶12; Ex. 2 (Transcript of Tribal Consultation Meeting Jan 15, 2020); Ex. 3 (Transcript of Tribal Consultation Meeting February 20, 2020); Ex. 4 (Transcript of Tribal Consultation Meeting February 21, 2020); Ex. 5 (Letter from Lower Brule Sioux Tribe); Ex. 6 (Letter from Yankton Sioux Tribe); Exhibit 7 (Letter from Standing Rock Sioux Tribe); Exhibit 8 (Letter from Rosebud Sioux Tribe).

The first Government-to-Government Tribal Consultation meeting was held on January 15, 2020. Frost Decl., Ex. 2 at 1-2. During the meeting, NPS invited tribal historic cultural preservation officers to conduct an on-site Tribal Cultural Properties survey ("TCP survey") in order to identify significant tribal cultural resources. The TCP survey was needed for the Tribes to provide recommendations as part of the 2020 Environmental Assessment related to whether recommencing the fireworks would have a significant impact upon tribal cultural resources. Ex. 2 at 25-28:1-9.

Tribal representatives were advised that a 2006-2008 archeological survey of the Memorial identified two prehistoric cultural sites, and an isolated artifact listed as a prehistoric lithic found within the Memorial's boundaries. *See*, Frost Decl., Ex. 2 at 8:10-25; Ex. 3 at 117-125. The Memorial also contains remnants of one Indian Camp cultural site, where the American Indian Movement occupation occurred in the 1970s. Ex. 2 at 8:16-19; Ex. 3 at 121:24-15-122:1-8. There is a second site purportedly used by the FBI during the AIM occupation. Id. No tribal cultural preservation officer or tribal archeologist participated in the

previous archeological survey. Ex. 2 at 28:7-9 (noting no archeologists on staff); Ex. 3 at 132:24-25. (noting rangers are not trained cultural archeologists).

The tribal representatives present at the January 15, 2020 meeting asked for a full tribal cultural survey of the lands making up the Memorial and an additional government-to-government meeting, at which time the Tribes would present a recommendation based upon the results of the TCP survey to be included in the EA. Frost Decl. Ex. 2 at 60:12-24, 63:22-24, 64:3-6, 24-25. One THPO representing the Spirit Lake Sioux Tribe, summarized the tribe's objection to the NPS trying to rush through the tribal consultation process. He compared the consultation process initiated after the MOA had been signed to being forced to eat a rotten meat sandwich:

> You can put all the lettuce and tomatoes and cheese on a rotten piece of meat, but that meat is still rotten. That's what happens at some of these meetings. All this is, is dressing and we have to eat that rotten sandwich. Just once it would be good to walk away from a meeting and knowing that the Federal agency actually listened to us and takes our comments and concerns seriously and do that. That would be great.

Ex. 2 at 54:23-25-55:1-6. Later that afternoon the tribes learned of comments by President Donald Trump assuring Governor Noem that there would be a "big fireworks display" at the Memorial on for the 4th of July. Ex. 3 at 9:22-25-10:1-2 (referring to a press conference on January 15, 2020). https://twitter.com/thehill/status/1217508169301266432?lang=en

Tribal representatives attended a second meeting to discuss the Tribal Cultural Property Survey related to the Mount Rushmore National Memorial Independence Day Holiday Fireworks Event Environmental Assessment (2020

EA) on February 20-21, 2020. Frost Decl., Ex. 3 at 1-2. Ex. 4 at 1-2. The meeting began with mistrust that the decision had already been made by NPS to allow the fireworks. Nevertheless, the THPOs wished to proceed with a Tribal Cultural Preservation survey of the Memorial. Id. at 60:12-24. NPS officials in attendance assured the tribal representatives that no final agency decision had been made. Id. at 62:17-21; 63:3-15.

During the consultation, the Tribes raised the following concerns:

1. The NPS was not following proper protocol in initiating consultation; Ex. 3 at 82:11-19.

2. A TCP Survey should be done safely and methodically with tribal specialists; Id. at 82:20-23.

3. The TCP survey results are to be included as an important factor as to what is significant in the Environmental Assessment; Id. at 83:10-12, 22-25.

4. The 2020 EA should recognize that the Memorial landscape is a traditional, cultural property, meaning the Black Hills is sacred, original, cultural property of over 30 tribes; Id. at 84:1-9.

5. An environmental impact may be present even if nothing is found in the TCP survey because fireworks have the potential to alter the landscape and its resources; Id. at 85:1-6, 23-25; 86:1

6. The Memorial is a Traditional Cultural Landscape (TCL) that is a sacred part of the Indian culture. This TCL represents belief of life, a way of creation to the Lakota, Dakota, Nakota and other tribes who were here at one time and have geographically removed themselves from the area; Id. at 86:3-8.

7. Many tribes require government to government consultations to occur before their respective Tribal Councils and feel the NPS meetings do not comply with consultation protocols. Id. at 86:13-17.

8. There are historical disturbances from mining, logging, road building, camping, and tourism in the Black Hills that adversely affect the TCP survey; Id. at 86:18-24.

9. What will be determined to be an adverse effect surface, subsurface, and plants is to be determined; Id. at 87:4-7.

10. What is the timeline for the EA submission? How will the TCP survey be factored into the decision to allow fireworks? Id. at 88:14-17, 20-24.

11. What if human remains are discovered? Id. at 89:1-9.

12. Are fireworks a violation of the Organic Act of 1897 that makes it a crime to intentionally set or cause a fire? Id. at 89:22-25, 90:1-2.

13. Who will be held accountable if a fire starts by setting off fireworks in the height of fire season? Id. at 90:3-8.

During the 2020 tribal consultation efforts, THPOs indicated that a TCP survey of the Memorial needed to be conducted by tribal archaeologists to more fully document potential impacts of fireworks on any tribal cultural resources within the boundaries of the Memorial. Frost Decl., ¶13. The 2020 EA recognized the need for a TCP survey, and the intention was to have it occur prior to the fireworks event in order to protect any tribal cultural property sites that were documented during the survey. Id., Ex. 1 at 38, 41.

The TCP survey was originally scheduled for May 2020, but was postponed due to COVID-19 as many tribal governments were shut down during the pandemic, and travel was restricted. Frost Decl., ¶13. Ex. 4 at 67:9-18, 68:4-6. At the time that Frost denied the 2021 permit, the TCP survey had still not taken place, and had been delayed until the spring or summer of 2021. Id. This

important TCP survey work needs to be completed to help inform and guide permitting decisions at the Memorial. Frost Decl., ¶13.

Representatives from these tribes described the proposed fireworks display as a desecration and an adverse effect to tribal cultural resources under Section 106 of the National Historic Preservation Act. Id., ¶12. Mount Rushmore is known to the Lakota as the Six Grandfathers, and is located in the Black Hills (He Sapa / Paha Sapa), the "heart of everything that is." Id., referencing the Mount Rushmore National Memorial Independence Day Holiday Fireworks Event Environmental Assessment (the 2020 EA) Frost Decl. Ex. 1, at 36. The Black Hills are considered a sacred Traditional Cultural Property (TCP) to many tribes, and are disputed treaty land. Id., Ex. 5-8.

Tribal partners have expressed concern to NPS about the process that was followed to permit the fireworks event in 2020, and disappointment that the event was permitted after their strong objections and before the TCP survey could take place. Frost Decl., ¶14. Frost is committed to building stronger relationships with the tribes associated with the Memorial, and the 2020 fireworks decision continues to strain these relationships. Id.

II. The NPS Properly Denied the Permit Out of Concern for the Health and Safety of the Public and Employees.

COVID-19 transmission, also known as confirmed cases, were expected to rise slightly moving into the first part of July 2021 according to the Centers for Disease Control and Prevention ("CDC"). Frost Decl., ¶15. COVID-19 transmission rates for the month of March 2021, at the one year anniversary marking the declaration of a national emergency, ranged from High to

Substantial, which are defined terms used by the CDC. Id.; Ex. 9. High Transmission means greater than or equal to 100 cases per 100,000 persons in the past seven days, and Substantial Transmission means 50-99.99 cases per 100,000 persons in the past seven days. Id.

In addition, Frost was concerned about the lack of social distancing at the prior fireworks show on July 3, 2020. A photograph of the event showing crowd density is attached as Ex. 10. Given this information, and in consultation with [NPS's] U.S. Public Health Officers, Frost could not in good faith encourage large gatherings where people cannot social distance and are not wearing face coverings well into July of 2021. Id., ¶15.

Although the 2020 fireworks event limited the number of visitors at the memorial, a fireworks event still creates a critical health and safety issue. It is difficult to hold a fireworks event at the Memorial without endangering public health because the Memorial and the area around the Memorial have very limited egress, even if visitors are limited. Id., ¶22. In the event of an emergency, there are few options to safely evacuate large numbers of visitors. Id.

III. The NPS Properly Denied the Permit Because the Memorial Was under Construction.

In July 2019, extensive construction began at the Memorial, eliminating access to the Grand View Terrace and the Avenue of Flags. Id., ¶16. Multiple visitor enhancement projects were addressed including the rehabilitation of the Lincoln Borglum Visitor Center and the plaza paver walkway system. Repairs addressed water intrusion along the exterior walls and improving drainage. Visitor Center improvement included roof replacement, an enhanced

waterproofing system and new stairwells. Also scheduled was the replacement of the plaza paver walkway system from the new visitor center roof down the Avenue of Flags. The Avenue of Flags was widened and the existing columns removed. Id. The second phase was focused on the plaza paver walkway system from the Avenue of Flags to the parking garage. The original anticipated completion date for all projects was late 2020.

The 2020 event caused damage due to too much weight on concrete that had not cured long enough. Id., ¶17. The cost of replacement concrete is estimated at $60,000. Id. As of early 2021, the construction contractor working on the plaza and paver project at the Memorial was scheduled to complete the project on the revised contractual date of June 18, 2021. This date was revised due to the requirements to re-sequence the entire project for safe public access for the July 3, 2020 Independence Day Celebration event. Id. The remaining work scope for spring and early summer 2021 consists mostly of site work and concrete placement. In January and February of 2021, it was too early to predict if the contract would be completed on time with typical spring weather ahead. The date to prepare for the fireworks show was June 15, 2021, which is three days before the final concrete project is scheduled for completion. Those final three days are often critical to a construction project, and we would again expect significant construction delays from another fireworks show in 2021. This would result in additional taxpayer costs. Id.

IV. The NPS Properly Denied the Permit Due to Continuing Monitoring of Perchlorate Contamination.

High levels of perchlorate (a contaminant that can cause human thyroid dysfunction) were first detected in soils, surface water, and groundwater at the Memorial by the United States Geological Survey in 2011. Id., ¶18; Ex. 1 at 28. The fireworks events from 1998-2009 were identified as the most probable source for the perchlorate contamination. Ex 1 at 30. "The potential exists that levels of [perchlorate] in drinking water could become elevated following a fireworks display, especially when considering the existing levels of perchlorate in the Memorial's drinking water." Id. at 32.

The Memorial's drinking water has been monitored for perchlorate regularly since 2013, with concentrations ranging from 12 ppb to 29 ppb. Frost Decl., ¶19. The Environmental Protection Agency ("EPA")'s Drinking Water Health Advisory level for perchlorate is 15 ppb. At the time that the 2021 permit was denied, the level of perchlorate in the Memorial's drinking water was above the EPA's Drinking Water Health Advisory level. Id., referencing Perchlorate Test Results: 2022-2020 at Ex. 11. While perchlorate concentrations have generally been trending downward since monitoring began in 2013 (after fireworks were halted), data collected after the 2020 fireworks event registered an increase in perchlorate at some sites (relative to levels before the event), including in the park's drinking water. Ex. 11. Additional monitoring is planned throughout 2021 to continue evaluating perchlorate trends. Frost Decl., ¶19.

As described in the 2020 EA, "future [fireworks] displays may reverse the natural attenuation that has been observed in perchlorate concentrations in

groundwater and surface water since fireworks ceased." Id., ¶20; Ex. 1 at 35. The 2020 EA stated that data collected through monitoring would be used to aid in decision making for any future fireworks events at the Memorial, and that if monitoring showed that conditions had changed meaningfully, additional analysis may be necessary to evaluate future events. Ex.1 at 8. The 2020 EA also indicated that an additional reverse osmosis treatment system would be added as needed to protect human health, which would require additional infrastructure and expense. Id., at 32. Permitting fireworks at the Memorial in 2021 could put NPS employees and the visiting public at risk through drinking water contamination and could lead to impairment of resources by contaminating surface water as well as groundwater. Frost Decl., ¶20.

V. The NPS Properly Denied the Permit To Allow More Visitors Access to the Memorial on July 3.

The NPS wants to keep the Memorial open to the public during the July 4th holiday. Having a fireworks display stops normal operations and denies access to many visitors. The Memorial historically hosts between 20,000-39,000 visitors on July 3rd during non-fireworks years. Id., ¶21. At the 2020 fireworks event, a closed, ticketed system managed through Recreation.Gov was determined to be the only way to safely manage the crowds for a fireworks event, which necessitated a total park closure. Id. The 2020 fireworks event limited visitation to approximately 7,500 according to the road traffic counters. Id. Because the Memorial used the ticketing system in 2020 on July 3rd, there was a reduction in holiday attendance at the Memorial.

VI. The NPS Properly Denied the Permit due to the Dry Fire Outlook Forecasted for this Summer.

Finally, fire danger in the Black Hills of South Dakota has been elevated over the past several months. During the months of February, March, and April of 2021 the Black Hills were in and continue to be in a state of severe drought. Id., ¶25. This trend is forecasted to continue through July 2021. Additionally, the Climate Prediction Center's Three-Month Outlook for temperature and precipitation has the Black Hills in above average temperature levels and below average precipitation levels through July 2021. Id.; Ex. 13.

It is important to note that not only is the Black Hills Region of South Dakota in a severe drought, but most of the Western United States is in some type of drought status. Frost Decl. ¶26. There is a potential for an active and destructive fire season that could come earlier than normal. This will exert extreme pressure on firefighting personnel and equipment causing potential shortages of fire personnel to assist with wildfire efforts. Id.

On March 29, 2021, South Dakota experienced several wildfires that started due to a combination of extremely dry conditions, low relative humidity, and extremely high winds. Id. ¶26. The Memorial was one of the places that had a wildfire ignition. The fire burned over 130 acres and threatened the housing complex at the Memorial. Id. While this fire event occurred after Frost's decision to deny the permit, it validates his concern about the elevated fire risk as one factor in denying the 2021 fireworks event permit. All indications are that these conditions will persist into the summer. Id.

VII. The NPS Will Suffer Harm If It Is Ordered to Grant the Permit.

The Memorial currently has 35 permanent employees, around 4-5 vacant positions, and numerous unfunded positions. Id., ¶23. An additional 20 seasonal employees are brought on every year for a total of approximately 55 employees. Id. The 2020 fireworks event had 188 NPS employees assigned to it via a special official resource order. Id.; Ex. 12. There were numerous additional NPS employees working the event who were not on the official resource order. In addition, there were multiple mutual aid agencies working the event. Id. In short, with over three times the number of permanent and seasonal personnel required for the fireworks show in 2020, staffing alone presents significant demands on NPS. This contributed to Frost's decision to deny the 2021 permit. Id., ¶23.

If the court were to order the NPS to approve a special use permit to allow a fireworks show in time for the Independence Day weekend in 2021, it would be virtually impossible to plan the event, assess resource availability and constraints, and hire the NPS personnel necessary to ensure a safe holiday. Id., ¶24.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO ASK THE COURT TO COMPEL ISSUANCE OF A PERMIT

Plaintiffs argue that this Court should "compel" NPS to issue the permit under the Administrative Procedure Act, 5 U.S.C. § 706(1). Such a claim is akin to a writ of mandamus and must be analyzed as such. As the Eighth Circuit has observed, "whether [such a] claim is reviewed under § 706(1) or as a petition for a writ of mandamus," it is "an extraordinary remedy reserved for extraordinary

situations." Organization for Competitive Markets v. U.S. Department of Agriculture, 912 F.3d 455, 462 (8th Cir. 2018) (citing In re MidAmerican Energy Co., 286 F.3d 483, 486 (8th Cir. 2002)); see also Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). The Eighth Circuit has held that a court may issue a writ of mandamus against an officer of the United States "only if a petitioner is able to establish a clear and indisputable right to the relief sought, the defendant has a nondiscretionary duty to honor that right, and the petitioner has no other adequate alternative administrative or judicial remedy." In re Lane, 801 F.2d 1040, 1042 (8th Cir. 1986) (quotations and citations omitted); Borntrager v. Stevas, 772 F.2d 419 (8th Cir. 1985); see also Piledrivers' Local Union No. 2375 v. Smith, 695 F.2d 390, 392 (9th Cir. 1982).

Plaintiffs appear to have confused 5 U.S.C. § 706(1) with the more commonly invoked 5 U.S.C. § 706(2), under which a court may "set aside" agency action. Section 706(2) does not require the same showing of extraordinary circumstances as writ of mandamus or action under section 706(1), but also carries a lesser remedy—ordinarily simply a remand to the agency for further consideration and action. It does not allow the Court to compel issuance of a permit. Even under the most favorable reading, Plaintiffs' various arguments amount to disagreements with various statements in the NPS letter, and unsupported speculations about harm. There is no showing of the sort of "extraordinary circumstances" that would be required to justify the remedy they seek.

The Eighth Circuit, like other courts, has applied "a great deal of deference" to NPS decisions to close areas and foreclose certain uses. Mausolf v. Babbitt, 125 F.3d 661, 666 (8th Cir. 1997) (upholding NPS closure of snowmobile routes). The denial of Plaintiffs' request for a permit, which is not a legal right and is subject to NPS discretion under its regulations, is no less subject to this standard. Because Plaintiffs have not shown anything akin to extraordinary circumstances, this Court should deny their request for mandamus relief.

II. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Even if Plaintiffs' requested relief is characterized as an injunction, it would require an affirmative action by the NPS and accordingly is subject to a greatly heightened standard. "A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion." Morrison v. Work, 266 U.S. 481, 490 (1925). See also Heckler v. Lopez, 463 U.S. 1328, 1332 (1983); Ahmad v. City of St. Louis, --- F.3d ----, 2021 WL 1619496 (8th Cir. Apr. 27, 2021). The ordinary function of a preliminary injunction is merely to preserve the status quo; requiring an affirmative action by the defendant goes beyond that purpose and must meet a "heavy" burden. See Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 490 (8th Cir. 1993).

The Eighth Circuit's test for an ordinary preliminary injunction is as follows:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict

> on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). The Dataphase court adopted what appears to be the "sliding scale" approach of Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979), so that where a movant has raised a substantial question and the equities are otherwise strongly in his or her favor, less of a showing of success on the merits need be made. See also Harris v. Blue Cross Blue Shield of Mo., 995 F.2d 877, 879 (8th Cir. 1993); Nordin v. Nutri/System, Inc., 897 F.2d 339, 345 (8th Cir. 1990). When applying this test, however, the burden on the movant is heavy, in particular where, as here, granting the preliminary injunction will give the movant substantially the relief it would obtain after a trial on the merits. "Caution must therefore be exercised in a court's deliberation, and the essential inquiry in weighing the propriety of issuing a preliminary injunction is whether the balance of other factors tip decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for more deliberate investigation." United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998) (citation omitted).

A preliminary injunction may be denied under the doctrine of laches, which applies "when a claimant inexcusably delays in asserting its claim and thereby unduly prejudices the party against whom the claim ultimately is asserted." Hubbard Feeds v. Animal Feed Supplement, 182 F.3d 598, 602 (8th Cir. 1999). Here, Plaintiffs delayed seven weeks after the Permit Denial Letter before filing this action—nearly half of the then-remaining time before July 4.

They have offered no excuse for that delay—Defendants had no further contact from Plaintiffs after sending the Permit Denial Letter. Defendants learned that Plaintiffs sent President Biden a letter dated April 13, 2021. They did not copy the DOI or NPS. Meanwhile Defendants have been significantly prejudiced by Plaintiffs' delay in filing, because if the Court were now to grant their requested relief, NPS would face the nearly impossible task of preparing for this major event in about four weeks. Frost Decl. ¶¶ 23-24.

While in some contexts seven weeks may not be a long delay, courts have applied laches to deny injunctions based on delays less serious than this one. See Memphis A. Phillip Randolph Institute v. Hargett, 473 F. Supp. 3d 789 (M.D. Tenn. 2020) (applying laches to deny injunction where plaintiff waited seven weeks to file election law challenge when election was six months away). In any event, whether Plaintiffs' delay in filing is deemed laches or simply weighed as part of the balance of harms, the Court should deny Plaintiffs' request based on it.

A. No Irreparable Harm Will Result from the Denial of Fireworks at the Memorial

Proof of irreparable injury is an essential prerequisite to obtaining injunctive relief. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Sampson v. Murray, 415 U.S. 61, 189-90 n.63 (1974). The absence of a finding of irreparable injury is sufficient grounds for denying a preliminary injunction. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987). Plaintiffs face the difficult task of proving that cancelling approximately fifteen minutes of entertainment causes irreparable injury, and fail to do so.

Plaintiffs' argument relies on three points: lost business income and tax revenue, lost "publicity and good will," and "reputational harm" related to public safety. Pls. Memo at 22-23. Plaintiffs lack standing to rely on the first of these arguments, and all three rely on unfounded speculation.

Plaintiffs lack standing to assert harm based on lost income to private businesses, or based on speculation about future tax revenues. See Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220, 1231-35 (10th Cir. 2012). Under the parens patriae doctrine, states do not have standing to sue the federal government on behalf of private businesses, and a state's loss of tax revenue can only provide standing if the state offers concrete evidence of *specific* losses. Id. Mere speculative allegations of the sort offered here do not support standing. In Wyoming v. U.S. Department of Interior, Wyoming relied on declarations and argument very similar to Plaintiffs' here, with general speculations about losses of tax revenues due to possible reduced tourism, and it was held to lack standing. Id. While Defendants concede that Plaintiffs, as a permit applicant, have standing to make certain claims in this case, that does not mean that they may rely on arguments such as these, which they lack standing to assert.

Even if Plaintiffs had standing to raise their lost business and tax arguments, they offer no proof of actual harm. As noted in the Permit Denial Letter and above, visitation to the Memorial ultimately *decreased* greatly as a result of last year's show, rather than increased. Frost Decl. ¶21. That concrete fact seems to undermine all of Plaintiffs' speculations. Moreover, Plaintiffs' argument fails to acknowledge that last year's show was also accompanied by a

high-profile Presidential visit. Frost Decl., ¶8. Since there is no evidence that such a visit will occur again, any comparison of last year's event to a future one is by its very nature speculative. Id., ¶24. Plaintiffs offer no explanation, let alone proof, of why their alleged harms are attributable to the lack of a fireworks show, as opposed to the lack of a Presidential visit. Indeed, Plaintiffs bear the burden of proof and offer nothing concrete to support any of their speculations.

Plaintiffs' second argument relies on even more speculative statements about "incalculable publicity and good will" and "intangible benefit." Pls. Memo at 22. Their only purported factual support appears to be some coincidental increases in web traffic to a state website and in Google searches for "Mount Rushmore." Id. But they offer nothing that concretely connects these upticks to the fireworks show, as opposed to the Presidential visit or some other factor. Nor do they offer any facts actually proving that these upticks in web traffic last year somehow translate into irreparable harm to Plaintiffs if there is no fireworks show this year. Plaintiffs merely offer Secretary Hagen's unsupported assumptions and speculations about future visitation.

Plaintiffs' third argument concerns "reputational harm" to the State's efforts to assure visitors that travel to the State is safe. Pls. Memo at 23. Absent from this similarly speculative argument is any explanation of how *Defendants* are responsible for it. Defendants took no public action: their sole action at issue here was to send a letter to Secretary Hagen denying a permit. It defies logic that such a letter could somehow cause all of the broad "reputational harm" that Plaintiffs allege. The most that Plaintiffs say about the actual permit denial is

that it "will contradict the State's own efforts to encourage tourism," Pls. Memo at 23, Hagen Decl. ¶ 13, but mere disagreement is not harm. There is no explanation, let alone proof, that this mere "contradiction" causes actual harm. Moreover, all of the various speculations in this argument again fail to address the concrete facts about last year's fireworks show. As previously noted, that show decreased actual Memorial visitation, rather than increasing it. And it coincided with a high-profile Presidential visit, so to the extent the broader region experienced some benefits, there is no evidence attributing those benefits specifically to a fireworks show.

Finally, it bears emphasis that Plaintiffs have been denied a permit for a single year of an annual observance. To the extent they have suffered any harm, it is plainly not "irreparable," because there are many ways to celebrate Independence Day at the Memorial without fireworks. A review of the past is also instructive: if a lack of Independence Day fireworks actually caused these sorts of harms, Plaintiffs would presumably have been able to offer evidence of past harm from the years after the fireworks ended in 2009. Their failure to do so is telling. And since, as discussed above, last year's fireworks show significantly *decreased* visitation, it appears likely that without such a show visitation will be much higher, resulting in *benefits* to all of Plaintiffs' various interests, not harms.

B. The Balance of Harms Favors the Denial of an Injunction

As stated above, Plaintiffs have not met their burden to prove any irreparable harm from the denial of the permit. It is therefore simple to show that

the balance of the equities favors denial of the preliminary injunction. Defendants outlined the harms that would result from granting a permit for a fireworks show for this year in the Permit Denial Letter, and provide further elaboration in the Herbert Frost Declaration. Those harms clearly outweigh Plaintiffs' minimal and unproven assertions.

As stated in the letter, public and employee health and safety remain a serious concern during the COVID-19 pandemic. Plaintiffs offer no actual evidence about public health or epidemiology, instead relying on the Declaration of Kennedy Noem, a former policy analyst and federal liaison who worked on last year's show. Noem Decl. ¶ 2. While it is fortunate that last year's show may not have resulted in any documented transmission of COVID-19, Noem Decl. ¶ 11, that is far from the only relevant consideration for NPS. At the time of the decision, NPS was required to manage mask wearing and other aspects of an event like this differently than last year, as mentioned in the Permit Denial Letter, due to Executive Order 13991 and other federal guidance. 86 Fed. Reg. 7045 (Jan 25, 2021).

And it remains far from certain that the 2021 event would be nearly as safe as Plaintiffs contend. In fact, CDC data show cases continuing to rise slightly into July 2021, and CDC data shows transmission in the substantial to high range. Frost Decl. ¶15; Ex. 9. The fireworks show would gather a large number of people into a space where social distancing is not possible for a concentrated period of time.

Nor can the other factors mentioned in the Permit Denial Letter be blithely ignored, as Plaintiffs do. NPS is charged to "conserve the scenery, natural and historic objects, and wild life" of the Memorial, "provide for their enjoyment," and "leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101. That, not a fireworks show, is NPS's core mission and the purpose for which Congress established the Memorial. NPS is thus obligated to give serious consideration to the cultural resource and perchlorate concerns stated in its letter, and not sweep them under the rug, as Plaintiffs urge.

The concerns of the consulting tribes, who have described the fireworks as a "desecration," must also be weighed. Frost Decl. at ¶12. They have expressed strong objections to the event as a whole, as well as to the fact that the 2020 event was allowed to proceed before the TCP cultural survey was completed, all of which has already "strain[ed]" NPS relationship with them. Id. at ¶14. See also Exs. 2-8. Compelling another fireworks event this year would thus compound that harm.

NPS was also obligated to consider whether it would be a wise use of taxpayer funds to further delay its construction project, which was already delayed and incurred an extra $60,000 repair cost due to damage from last year's show. Frost Decl. at ¶17. Compelling a fireworks event now would likely add to these delays and incur further costs for the Memorial's budget, ultimately borne by the taxpayers.

In addition to these harms asserted in the Permit Denial Letter, NPS would suffer substantial additional harms if it were now, in May, suddenly compelled

to issue the permit and allow the show. It would be virtually impossible to plan the event, assess resource availability and constraints, and hire the NPS personnel necessary to ensure a safe holiday event. Frost Decl. at ¶24.

In sum, NPS has demonstrated it would suffer significant harm if the Court were to issue Plaintiffs' extraordinary requested remedy and order NPS to issue the permit and allow the fireworks show. These harms clearly outweigh the unproven minimal harms asserted by Plaintiffs.

C. Plaintiffs Are Unlikely to Succeed on the Merits

1. NPS Prevails on Count I Because the Permit Denial Was Not Arbitrary and Capricious, an Abuse of Discretion, or Otherwise Contrary to Law

Under the APA, the proper standard of review will be whether the agency was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law when they denied Plaintiffs' special use permit for the fireworks over the Memorial. 5 U.S.C. § 706(2)(A); Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Instead, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see Friends of the Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1121 (8th Cir. 1999).

The arbitrary and capricious standard is one of deference to the agency. Marsh v. Oregon Natural Res. Council, 490 U.S. at 375-78. A court:

> must consider whether the decision was based on consideration of the relevant factors and whether there was a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. [We are] not empowered to substitute [our] judgment for that of the agency.

Guar. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1343 (8th Cir. 1986) (quoting Citizens to Preserve Overton Park, 401 U.S. at 416).

An arbitrary and capricious action "is one in which the agency has relied upon factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 628 (8th Cir. 2005). Although the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" a court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. "If an agency's determination is supportable on *any* rational basis, we must uphold it." Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004) (emphasis added).

"Agency determinations involving very technical areas of expertise are accorded a high degree of deference." Story v. Marsh, 732 F.2d 1375, 1381 (8th

Cir. 1984); see also Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983); In re Operation of the Mo. River Sys. Litig., 421 F.3d at 628 (when analysis requires a high level of technical expertise, courts defer to the responsible federal agencies).

Accordingly, with respect to the National Park System, courts have generally recognized that "[b]ecause the Organic Act is silent as to the specifics of park management, the Secretary has especially broad discretion on how to implement his statutory mandate." Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000) (citing Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 446 (D.C. Cir.1994)); Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996); Organized Fishermen of Fla. v. Hodel, 775 F.2d 1544, 1550 (11th Cir. 1985). See also Mausolf, supra, 125 F.3d at 667-669. In this case, determining how best to balance the risks to staff and the public during a pandemic, provide access for all Memorial visitors during the July 4th holiday, continue the effort to identify and protect tribal cultural resources, address the risks of perchlorate contamination and wildfire, and prevent any further interference with completion of an ongoing construction project is the type of decision for which NPS's expertise warrants deference.

Plaintiffs' brief concedes that the Permit Denial Letter provides five justifications for NPS's decision. Pls. Memo at 9-10, 15. Those justifications are clearly tied to the relevant factors under NPS's permit regulation, 36 C.F.R. § 1.6. Under the APA, that really should be the beginning and the end of the Court's analysis.

Instead, Plaintiffs ignore the standard of review under the APA and the NPS caselaw, and effectively ask the Court to punish NPS for being concise. Plaintiffs devote several pages of argument to various arguments about "evidence," as if the APA somehow required NPS to adduce pages of evidence to its letter. Obviously, it does not, nor could NPS reasonably be expected to manage the National Park System if every permit denial letter had to meet this impossible standard. The letter must merely state its reasons and be supported by the record, which it is. The burden of proof to provide contrary "evidence" here rests on Plaintiffs, not Defendants, and they have not met it.

NPS's permit regulation provides, in relevant part, as follows:

> (a) When authorized by regulations set forth in this chapter, the superintendent may issue a permit to authorize an otherwise prohibited or restricted activity or impose a public use limit. The activity authorized by a permit shall be consistent with applicable legislation, Federal regulations and administrative policies, and based upon a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted.
>
> ***
>
> (d) Unless otherwise provided for by the regulations in this chapter, the superintendent shall deny a permit that has been properly applied for only upon a determination that the designated capacity for an area or facility would be exceeded; or that one or more of the factors set forth in paragraph (a) of this section would be adversely impacted. The basis for denial shall be provided to the applicant upon request.
>
> 36 C.F.R. § 1.6.

The Permit Denial Letter clearly followed this regulation and relied on the factors in paragraph (a) in denying the permit request. First, it discusses the adverse impact on the "health and safety of the public and our employees" during

the COVID-19 pandemic, which obviously ties to "public health and safety" in the regulation. See Permit Denial Letter, Hruska Decl. Ex. F, at 1; 36 C.F.R. § 1.6(a). Second, it discusses tribal relations and the TCP survey, which relate to impacts on "cultural resources," and also affect the "implementation of management responsibilities" and "avoidance of conflict among visitor use activities," due to NPS's obligations to the affiliated tribes and their use of the Memorial. Third, it discusses NPS's concern with perchlorate contamination, an impact on "environmental … values" and "natural … resources." Id., at 2; 36 C.F.R. § 1.6(a). Fourth, it discusses NPS's concern with wildfire risk, which relates to many of the regulatory factors, including "public health and safety," resources, and "management responsibilities." Id. Fifth, it discusses how the 2020 fireworks event decreased visitation and caused visitors to be turned away, which relates to "implementation of management responsibilities, proper allocation and use of facilities, [and] the avoidance of conflict among visitor use activities." Id. And finally, it discusses the impact of last year's event on the Memorial's major construction project, and the further impact an event this year would have, which relates to these same three factors. Id.

It is thus clear that the Permit Denial Letter was "based on consideration of the relevant factors" set forth in 36 C.F.R. § 1.6(a). Guar. Sav. & Loan Ass'n, supra. The APA requires nothing further. Plaintiffs cannot argue to the contrary, so they instead argue that the letter should have been longer, that it did not satisfy some sort of non-existent evidentiary requirement, or that they would have reached different conclusions. None of these arguments are sufficient under

the APA, particularly given the "broad discretion" afforded NPS in its protection and management of the National Park System.

Plaintiffs fault the letter's references to tribal opposition, perchlorate contamination, wildfire risks, visitation, and construction delays, arguing that it should have provided fuller explanations connecting the dots between those issues and the denial of the permit. Pls. Memo at 15-16. As discussed above, the underlying record is replete with evidence of tribal opposition to fireworks at the Memorial. Frost Decl. ¶¶ 12-14. The record also clearly shows that perchlorate pollution due to fireworks at the Memorial has long been known to be a problem, and that last year's show led to a recurrence. See Frost Decl. ¶18-19; Ex. 1 at 28, 30, 32; Ex 11. Plaintiffs argue that this is somehow inconsistent with the 2020 FONSI, Pls. Memo at 19, but the record demonstrates that conditions may indeed have "changed meaningfully," and that NPS will need to continue to analyze the issue before it can allow further events. See Frost Decl. ¶20. The record similarly shows that NPS understands wildfire risk this year to be substantial, due to severe drought, both at the time of this decision in March and expected to continue into July. See Frost Decl. ¶25-26; Ex. 1 at 15; Ex. 13. As discussed above and in the underlying record, park visitation was greatly reduced by last year's fireworks event, mainly because the event required a ticketing system to protect Memorial visitors and resources, and such a system would be needed again if an event were held this year. See Frost Decl. ¶21. And the record shows that the Memorial's plaza and paver project, which was delayed by last year's event, would be further delayed by another event this year. See

Frost Decl. ¶ 16-17. Part of that delay occurred because last year's event damaged then-new concrete, incurring $60,000 of additional cost to taxpayers. Id., ¶17.

Since the record clearly shows these factors supported the denial, Plaintiffs' opposition seems to boil down to the fact that the letter discussed them in a sentence or two, rather than paragraphs or pages. This is of no consequence. The APA merely requires that NPS's "path may reasonably be discerned." Motor Vehicle Mfrs. Ass'n, supra, 463 U.S. at 43. As long as it is "supportable on any rational basis," it "must be upheld." Voyageurs Nat'l Park Ass'n v. Norton, supra, 381 F.3d at 763. The Permit Denial Letter provided multiple reasons for the decision, all or many of which might have been sufficient on their own, and thus clearly illuminated NPS's "path." It was required to do no more.

It also bears mention that the purpose of the Permit Denial Letter was simply to deny the permit, and to notify the State of that fact. In that context, it would have been highly impractical and rather odd for NPS to provide the sort of encyclopedic response Plaintiffs seem to suggest. Nor would it be feasible for NPS to do that for every single permit response it sends.

Plaintiffs next turn to disputing Defendants' health and safety concerns about the COVID-19 pandemic. Those concerns are fully explained in the Permit Denial Letter and supported by the record. Hruska Decl, Ex. F; Frost Decl. at ¶15 and Ex. 9. Plaintiffs begin with a confusing argument that a fireworks event

would lower COVID-19 risk by reducing visitor numbers,[3] and arguing that the Permit Denial Letter somehow contradicted itself on this issue. Pls. Memo at 17. It did nothing of the sort. Plaintiffs apparently misunderstand or ignore the Permit Denial Letter's repeated references to "social distancing." NPS's point in the letter is that at a fireworks event, thousands of visitors will be packed together in tight quarters, with no possibility of social distancing, as occurred in 2020. Frost Decl. at ¶15 and Ex. 10. Without a fireworks event, this obviously would not occur.[4]

Plaintiffs next argue that NPS did not "explain why it changed positions," or "display awareness" that it was, citing Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). As an initial matter, Encino Motorcars and related cases, such as FCC v. Fox Television Stations, 556 U.S. 502 (2009), are not applicable here. Those cases apply when agencies "change their existing policies," such as regulations or guidance documents. Encino Motorcars, 136 S. Ct. at 2125. No policy has changed here. NPS received a permit application and

[3] This is the only place where Plaintiffs acknowledge that the 2020 fireworks event actually reduced visitation, contradicting their previously-mentioned arguments on irreparable harm and the balance of harms, which assume that fireworks events lead to increased visitation.

[4] Plaintiffs' quotation of Scholl v. Mnuchin, 489 F. Supp. 3d 1008, 1037 (N.D. Cal. 2020), concerning the APA during the COVID-19 pandemic is highly misleading. Pls. Memo at 17. That case stands for the unremarkable proposition that the pandemic does not excuse standard actions by federal agencies (in that case, the Internal Revenue Service) from complying with the APA. But that case has nothing to do with a situation like this one, where the agency action at issue was directly *driven* by the pandemic, and the need to protect visitors and employees from it.

decided it under the same regulation as it did last year. The facts and the outcome changed, but not a "policy."

In any event, even if Plaintiffs' citation were correct, the Permit Denial Letter expressly mentions "the 2020 event," cites the 2019 MOA, and applies its "safe and responsible" standard. Hruska Decl., Ex. F at 1. It is thus unclear what further "awareness" Plaintiffs are seeking from NPS. And as discussed above, the letter goes on to clearly state its reasons for denying the permit for 2021, obviously a "change" from 2020. Ultimately, this argument appears to do little more than repeat Plaintiffs' wish that the letter was longer.

Finally, Plaintiffs second-guess Defendants' judgment about COVID-19 risks, arguing that because the event occurred last year, it should be able to occur this year when much of the pandemic situation appears to be improving. Pls. Memo at 18, 20-21. But these arguments rely largely on post-decisional documents, which are not part of the administrative record and are irrelevant to their APA claim. Under the APA, Defendants' decision must be evaluated on the record as it existed in March, when the projected risk of such a large gathering was unacceptable. See Frost Decl. at ¶15; Ex. 9.

Even though more recent CDC guidance has relaxed restrictions for vaccinated people, Pls. Memo at 21, that would only be relevant if NPS were somehow able to police vaccination for thousands of people at the event. Given that the CDC also still projects substantial to high transmission into July, NPS is well within its discretion in March of 2021 to conclude that the risks to employee and visitor safety are unwarranted for this event this year. Frost Decl.

at ¶15. NPS's decisions as to visitor and employee health and safety and its ability to manage an event safely are entitled to a great deal of deference, and just because Plaintiffs disagree does not entitle them to ask the Court to substitute its judgment for NPS's.

2. Count II Constitutional Challenge to NPS Permits

Plaintiffs' Memo offers no argument in support of Count II of its Complaint, thus conceding that this theory has no chance of success on the merits. Because they failed to mention it in their opening brief, the Court should afford it no weight in its consideration of their likelihood of success.

Even if the Court reaches it, Plaintiffs have no likelihood of success on the merits with respect to this count, which asserts that Congress unconstitutionally delegated power to NPS. The Complaint alleges that Congress did not provide an "intelligible principle" to guide NPS's use of its authority. Complaint at ¶ 64. While the nondelegation doctrine is rooted in the concept of separation of powers, the Supreme Court has explained that "[a]pplying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta v. United States, 488 U.S. 361, 372 (1989).

Indeed, the Supreme Court has only twice in its history found that Congress's delegation to a federal agency was unconstitutional. Both instances occurred in 1935, in A.L.A. Schechter Poultry Corporation v. United States, 295

U.S. 495, 529 (1935) and Panama Refining Company v. Ryan, 293 U.S. 388 (1935), where the Court found "Congress failed to articulate *any* policy or standard to confine discretion." See Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (citing Mistretta, 488 U.S. at 373 n.7). While Plaintiffs' Complaint appears to contend that the Supreme Court might revisit the legal standard for determining the constitutionality of a delegation by Congress to a federal agency, the Court has not yet done so. And the current standards, which require either that Congress articulate an "intelligible principle" to guide the agency's use of authority or that Congress make clear the "general policy" the agency must pursue and the "boundaries of its authority," are not demanding. Gundy, 139 S. Ct. at 2129. This threshold is easily met here.

Congress's delegation to NPS in the National Park Service's core mandate, 54 U.S.C. § 100101, passes this test. It provides that:

> (a) In General.—
>
> The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.
>
> (b) Declarations.—
>
> (1) 1970 declarations.—Congress declares that—
>
> (A) the National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States and its territories and possessions;

> (B)these areas, though distinct in character, are united through their interrelated purposes and resources into one National Park System as cumulative expressions of a single national heritage;
>
> (C)individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one System preserved and managed for the benefit and inspiration of all the people of the United States; and
>
> (D)it is the purpose of this division to include all these areas in the System and to clarify the authorities applicable to the System.
>
> (2)1978 reaffirmation.—
>
> Congress reaffirms, declares, and directs that the promotion and regulation of the various System units shall be consistent with and founded in the purpose established by subsection (a), to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.

Id.[5] The statute provides an intelligible principle in subpart (a), stating that regulations shall conform to the purpose, which is "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). The other relevant statute, 54 U.S.C. § 100751, empowers NPS to "prescribe regulations" for the management of System units under the mandate of § 100101. Thus, the delegation to the NPS

[5] Subsection (a) was originally enacted as part of the statute that established the NPS in 1916, which is known as the National Park Service Organic Act. 54 U.S.C. § 100101 note.

passes constitutional muster because it conveys Congress's general policy that the NPS manage national parks with the goals of conservation of the scenery, natural and historic objects, and wildlife in order to preserve them for future generations.[6]

Congress has provided an "intelligible principle" to guide NPS in issuing special use permits. While this principle affords the NPS discretion in issuing special use permits, that discretion is required in order to permit Congress to do its job. The Court has long recognized that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta, 488 U.S. at 372. Even the dissent in Mistretta agreed that "some judgments . . . must be left to the officers executing the law." Id. at 415 (Scalia, J.). The issuance or denial of a special use permit by a federal agency charged with overseeing federal lands is clearly such a judgment.

The Supreme Court has upheld broader delegations than this one. See Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001) (affirming delegation to Environmental Protection Agency under Clean Air Act to issue air quality standards "requisite to protect the public health"); Yakus v. United States, 321 U.S. 414, 422, 427 (1944) (sustaining delegation to Office of Price Administration to set "fair and equitable prices"); FPC v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission

[6] Plaintiffs' Complaint also contains erroneous allegations related to a third statute, 54 U.S.C. § 320102(i), which does not generally apply to the management of the Memorial or the action at issue in this case. That statute, part of what is commonly known as the Historic Sites Act of 1935, only applies to sites under that Act and is not applicable to the entire National Park System.

under Natural Gas Act to set "just and reasonable rates"); National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (upholding delegation to Federal Radio Commission to make regulations governing radio stations "in the public interest"); New York Cent. Securities Corp. v. United States, 287 U.S. 12, 24 (1932) (upholding delegation to Interstate Commerce Commission to permit acquisition of control of one railroad by another in "in the public interest"). Given this precedential framework, Plaintiffs' delegation claim is unlikely to succeed on the merits.

Moreover, even one of the 1935 cases relied on by Plaintiffs in their Complaint notes that the nondelegation doctrine is not intended to apply to certain types of situations. In Panama Refining Company, 293 U.S. at 428-29, the Court specifically noted that "[s]o also from the beginning of the government, Congress has conferred upon executive officers the power to make regulations—'not for the government of their departments, but for administering the laws which did govern.' " Id. (quoting United States v. Grimaud, 220 U.S. 506, 517 (1911)). Thus, a regulation permitting the Secretary of Agriculture to require permits for grazing sheep on federal forest lands under statutory authority "to regulate their occupancy and use and preserve the forests thereon from destruction" was a permissible delegation. Id. at 429. That factual situation is much more closely analogous to the delegation at issue here—permitting the NPS to issue or deny special use permits for events within the Memorial—than any of the regulations at issue in Plaintiffs' authorities.

Finally, it bears mention that of the many courts that have analyzed NPS's core mandate since 1916, none have ever raised the possibility that it might be an unconstitutional delegation. That includes the U.S. Supreme Court, which in 2019—the same term as Gundy—saw no reason to raise any such question in a case directly concerning NPS's regulatory authority. Sturgeon v. Frost, 139 S. Ct. 1066 (2019). Plaintiffs' Complaint falsely alleges that "[c]ourts have already recognized these statutes provide DOI with no meaningful guardrails on the regulations that it can issue," but neither of their two cited cases suggests any such thing. Complaint at ¶ 68. Notwithstanding Plaintiffs' misleading and out-of-context quotations, neither case mentions the nondelegation doctrine or any other constitutional issue, and both of them uphold the validity of NPS's broad—and fully constitutional—statutory discretion under its authorities. See Sierra Club v. Andrus, 487 F. Supp. 443, 448 (D.D.C. 1980)("defendants have broad discretion in determining what actions are best calculated to protect Park resources"); S. Utah Wilderness All. v. Dabney, 222 F.3d 819, 828-30 (10th Cir. 2000)(holding that NPS had authority to interpret its Organic Act to define "impairment," and remanding so that it could complete the process of doing so).

Consequently, Plaintiffs fail to demonstrate a likelihood of success on the merits. This factor weighs against granting the requested preliminary injunction.

D. The Public Interest Is Best Served by Denial of the Injunction

The public interest does not favor issuance of an injunction here. While Defendants certainly do not dispute Plaintiffs' point that attendees (and television viewers, if this year's show were to be televised) would likely enjoy the

fireworks show, the public interest requires broader considerations, such as those already taken into account by NPS here. For one, less than half as many visitors as usual were able to visit the Memorial due to last year's event, so the attendees' enjoyment comes at high cost to others who wish to visit. Frost Decl. at ¶21.

The Memorial was established by Congress to be carefully managed by NPS for conservation and enjoyment of its resources within its discretion. The Court should allow NPS to manage the Memorial within that discretion, not compel it to grant a permit that NPS has denied for reasonable and clearly-stated reasons, and then attempt to accommodate an event of this magnitude with mere weeks to prepare.

The interests of the Memorial's affiliated tribes also need to be respected. Eleven tribes opposed last year's show, some describing it as a "desecration." Frost Decl. ¶ 12. Until NPS completes its TCP survey, it will not have complete information about the effects of these fireworks shows. Id. NPS seeks to improve its relationships with these tribes, and to avoid the strong opposition they had to last year's show. Id.

Finally, public safety remains a paramount concern due to the ongoing COVID-19 pandemic. As mentioned above, CDC data show cases continuing to rise slightly into July 2021, and CDC shows transmission in the substantial to high range. Id. ¶15; Ex. 9. The NPS properly considered such conditions, deciding that holding a mass gathering where people cannot socially distance,

and where use of face coverings may be limited, was not warranted and was not in the public interest.

Dated this 18th day of May, 2021.

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Certification of Word Count

Pursuant to D.S.D. Civ. LR 56.1(A), counsel certifies that this brief does not exceed 12,000 words as the word-processing system indicates the word-count is 11,916.

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