

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

GOVERNOR KRISTI NOEM, in her)	
official capacity as the Governor of)	
South Dakota, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 3:21-cv-03009
)	
DEB HAALAND, in her official capacity)	
as United States Secretary of the)	
Interior, et al.,)	
)	
Defendants.)	
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Case No. 3:21-cv-03009

**BRIEF OF AMICI CURIAE STATES OF KANSAS, ALABAMA, ARIZONA,
ARKANSAS, GEORGIA, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI,
MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, TENNESSEE,
TEXAS, AND WEST VIRGINIA IN SUPPORT OF PLAINTIFFS**

Last year’s fireworks display at Mount Rushmore drew thousands of visitors from across the country, including from *amici* States, while many more people watched the event on television. Given the importance of the Fourth of July holiday and the special role of Mount Rushmore as a national monument, *amici* States have an interest in seeing the fireworks display take place again this year.

Amici States also have an interest in ensuring that the Department of the Interior, which manages land within the States, makes reasoned permitting decisions. If an event with such a rich history and tradition like Independence Day at Mount Rushmore can be foreclosed on the arbitrary and capricious bases offered by the Department, then *amici* are concerned that events and experiences outside

national parks in their States will be the next victims of the Department's erratic decision-making.

ARGUMENT

I. There is a strong public interest in holding a Fourth of July fireworks display at Mount Rushmore.

The Fourth of July is perhaps the most important secular holiday for many Americans. It celebrates not only the independence of our country, but also the values that unite us as Americans. As Thomas Jefferson wrote about the holiday, “let the annual return of this day forever refresh our recollections of [our] rights, and an undiminished devotion to them.” Thomas Jefferson, *Letter to Roger Weightman* (June 24, 1826).¹

And there is a long history of commemorating the Fourth of July with fireworks displays, going back to the first anniversary of the signing of the Declaration of Independence celebrated at Philadelphia on July 4, 1777. According to one account of the festivities, “at night there was a grand exhibition of fireworks (which began and concluded with thirteen rockets) on the commons, and the city was beautifully illuminated. Everything was conducted with the greatest order and decorum, and the face of joy and gladness was universal.” *How the First Anniversary of the Declaration of Independence Was Celebrated in Philadelphia*, 35 Pa. Mag. of Hist. & Biography 372, 373 (1911) (quoting a Pennsylvania Evening Post story from July 5, 1777). The tradition of celebrating the Fourth “eventually

¹ <https://www.loc.gov/exhibits/jefferson/214.html>

spread to other towns, both large and small, where the day was marked with processions, oratory, picnics, contests, games, military displays and fireworks.”² Fireworks “would become an increasingly important part of the festivities in the years to come, as public safety concerns caused cannon and gunfire to be gradually phased out of celebrations.”³ Fireworks displays are now a well-established element of the holiday celebrations.

“[T]he significance of Independence Day holds special meaning at Mount Rushmore.” *Memorandum of Agreement Between the Department of the Interior of the United States of America and the State of South Dakota*, 1 (May 6, 2019). After all, the memorial includes carvings of George Washington, who played such an important role in our country’s fight for independence, and Thomas Jefferson, the author of the Declaration of Independence. The Fourth of July has been celebrated in the park for many years, with fireworks displays occurring from 1998 to 2009 (except in 2002, when there were no fireworks due to fire risk), and again last year. Given the traditional role of fireworks in Fourth of July celebrations and the special role of Mount Rushmore as a “national shrine . . . to independence” and “self-government,” Calvin Coolidge, *Speech at Mount Rushmore* (Aug. 10, 1927),⁴ there is a strong public interest in allowing a fireworks display to take place again this year.

² <https://www.pbs.org/a-capitol-fourth/history/history-independence-day/>

³ <https://www.history.com/news/july-4-fireworks-independence-day-john-adams>

⁴ <https://coolidgefoundation.org/resources/speech-at-mount-rushmore/>

II. The Department of Interior’s flimsy and unsupported rationale for refusing to allow a fireworks display is arbitrary and capricious.

In light of this strong public interest, it is particularly important that any decision not to allow a fireworks display be well-reasoned and supported by the facts. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 19, 43 (1983) (under the arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation omitted)). But in rejecting South Dakota’s permit, the Department of the Interior offered only the flimsiest of rationales, unsupported by any evidence or reasoned explanation.

Much of the letter refusing to grant South Dakota’s permit is focused on the COVID-19 pandemic. But South Dakota held a fireworks display at Mount Rushmore last year—when the pandemic was even worse and before vaccines were available—which more than seven thousand visitors attended, and contact tracing has failed to identify even *one* case of COVID-19 tied to the event. Since then, 60% of American adults have received at least one shot of the COVID vaccine, and over 47% are fully vaccinated, numbers that continue to grow each day.⁵ COVID vaccines are now available to any adult who wants one. And the CDC now reports that it is safe for fully vaccinated people to attend crowded outdoor events without wearing a

⁵ <https://covid.cdc.gov/covid-data-tracker/#vaccinations>

mask or social distancing.⁶ The pandemic does not provide an excuse for refusing to allow a fireworks display.

The Department of the Interior also raised concerns about perchlorates in the water and the potential for wildfire. But before the 2020 fireworks display, the National Park Service published a Finding of No Significant Impact that concluded the event would not have any significant adverse effect. The Department has not provided any evidence that conditions have changed since then. Instead, the Department speculates that fireworks *may* have increased perchlorate levels, but the only evidence the Department has since provided shows perchlorate levels consistent with natural fluctuations in non-fireworks years.⁷ Doc. 35-11. The Department also notes that the area is experiencing a drought but has provided no new analysis of the wildfire risks of a fireworks display, which the 2020 environmental assessment determined to be minimal. Doc. 35-1 at 18-24 (“Experience with extensive aerial fireworks in the analysis area, including large mortar-fired displays, has demonstrated that fireworks can be safely and successfully performed over a wide variety of changing weather conditions, in both average and dry years.”). And South Dakota has committed to taking extensive

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/participate-in-activities.html>

⁷ For instance, perchlorate levels at the L7 site rose by 4 ppb after the 2020 event, but they also rose by 5 ppb in 2016, when there was no fireworks display. Perchlorate levels at the L3 site initially dropped by 2 ppb following last year’s event and then rose by 5 ppb, but that is consistent with a 7 ppb rise in 2017 and a 6 ppb rise in 2018. And perchlorate levels at the L5 site actually dropped by 3.5 ppb following last year’s fireworks display. Doc. 35-11.

precautions, as they did last year, including only going forward with the event if environmental conditions are favorable.

The rest of the Department's letter is devoted to other vague and unsupported assertions, none of which are sufficient to support the agency's decision. For instance, the letter cites unspecified opposition from Indian tribes, but to the extent the tribes have reasons for their opposition, those reasons should be considered on their own terms. The mere fact that some people may oppose a fireworks display is not a sufficient justification for cancelling an important national celebration.

Likewise, the Department referred to a construction project scheduled to be completed in June 2021, before the event would take place. But the Department offered no explanation of what the project is, the likelihood that it will not be finished on time, or whether the event could be accommodated if the project is not complete by then. Even now, the Department expects that "all significant work elements will be completed by June 18, 2021," over two weeks before the fireworks display. Doc. 35 at 10. The Department's alleged fear is that crowds may damage newly laid concrete, but that is inconsistent with the Department's argument that holding a fireworks display will prevent even larger crowds from visiting the park that day.

And the Department's claim that last year's event prevented "tens of thousands" of people from visiting the memorial, Denial Letter at 2, is inconsistent with its asserted concerns about the COVID pandemic as well as its claim that a

fireworks event will pose crowd control problems. The Department argues that it will need additional staff to handle the crowds from a fireworks display but never explains why the same staffing increase would not be necessary for the even larger crowds it expects without a fireworks display. The Department's concern about limiting attendance for a fireworks display also ignores the fact that South Dakota plans to hold the fireworks event on July 3 so everyone may visit the park on July 4.

The States have a right to expect that the Department of the Interior's permitting decisions will be reasoned and supported by the evidence, particularly when those decisions infringe on our national traditions. The Court should grant South Dakota's motion for a preliminary injunction and order the Department of the Interior to grant the fireworks permit.

Respectfully submitted,

James E. Moore
Woods, Fuller, Shultz & Smith P.C.
300 S. Phillips Ave., Suite 300
Sioux Falls, SD 57104
Tel: (605) 978-0613
Email: James.Moore@WoodsFuller.com
Local Counsel for State of Kansas

DEREK SCHMIDT
Kansas Attorney General
Brant M. Laue*
Solicitor General of Kansas
Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: brant.laue@ag.ks.gov
Counsel for State of Kansas

* pro hac vice application forthcoming

STEVE MARSHALL
ALABAMA ATTORNEY GENERAL

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL

LESLIE RUTLEDGE
ARKANSAS ATTORNEY GENERAL

CHRISTOPHER M. CARR
GEORGIA ATTORNEY GENERAL

THEODORE E. ROKITA
INDIANA ATTORNEY GENERAL

DANIEL CAMERON
KENTUCKY ATTORNEY GENERAL

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL

LYNN FITCH
MISSISSIPPI ATTORNEY GENERAL

ERIC S. SCHMITT
MISSOURI ATTORNEY GENERAL

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

DOUGLAS J. PETERSON
NEBRASKA ATTORNEY GENERAL

DAVE YOST
OHIO ATTORNEY GENERAL

MIKE HUNTER
OKLAHOMA ATTORNEY GENERAL

HERBERT SLATERY
TENNESSEE ATTORNEY GENERAL

KEN PAXTON
TEXAS ATTORNEY GENERAL

PATRICK MORRISEY
WEST VIRGINIA ATTORNEY GENERAL