

Thursday, January 7, 2021



Idaho State Capitol Commission
c/o Keith Reynolds, Director
Idaho Department of Administration
By email to: Keith.Reynolds@adm.idaho.gov

URGENT

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Richard Eppink
Legal Director

RE: Proposed temporary Rules Governing use of Idaho State Capitol

Dear Commissioners and Director Reynolds:

Barely 20 hours ago—yesterday at 5:15 pm—we received a copy of major proposed changes to rules governing the Idaho Capitol. Apparently, the Capitol Commission plans to vote on these rules today at about 3:00 pm.

The ACLU of Idaho has extensively litigated rules governing public use of the Capitol grounds and Capitol Mall. Through that litigation, Idaho’s federal District Court struck down multiple rules as unconstitutional. *Watters v. Otter*, 986 F. Supp. 2d 1162 (D. Idaho 2013). The State had to pay attorneys’ fees to the ACLU of Idaho because of those unconstitutional rules. *Watters v. Otter*, No. 1:12-CV-76-BLW, 2015 WL 848303, at *1 (D. Idaho Feb. 26, 2015).

Following that litigation, the ACLU of Idaho came close to litigating against State officials over the Idaho State Capitol Building “Guidelines and Policies for Public Usage,” regulating public use of interior spaces inside the Statehouse. Wisely, legislative leaders revised those policies after meeting with us. They excised unconstitutional restrictions on public use from the Guidelines, avoiding litigation and additional cost to the State.

Whatever the motivation of the temporary proposed rules the Commission considers today, these proposed rules raise serious constitutional problems as well. They are overly broad, unnecessarily restrictive and punitive, and fail to meaningfully ensure accessibility and equitable public participation at the Capitol. Although a full analysis of these proposed rules deserves more time than we have had with them, we can highlight several concerns that are enough alone to postpone approval of any proposed rules beyond today.



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First, proposed rule 315.02 (“Removal”) would permit arbitrary, punitive control over the public in the statehouse. Even for moving a chair in a committee room so that a person could sit down or skirt past someone (proposed rule 311.10), a committee chair could ask police to have a person removed from the grounds entirely. And if the person did not comply immediately, they could be criminally charged, barred from the Capitol for a whole year (Idaho Code § 18-7008(2)(a)), arrested, and jailed. Though rules violations in this Administrative Code chapter have long been civil infractions (Idaho Code § 67-5709(1)), proposed rule 315.02 would turn them all into bases for criminal charges and arrests. Police can already remove people suspected of violating criminal laws in the Statehouse. Indeed, they recently have. *See* “Ammon Bundy, 3 others arrested at Idaho Capitol on trespassing charges,” Idaho Press, Aug. 25, 2020, *archived at* <https://perma.cc/PKL5-XTT4>. Adopting this rule would allow legislative leaders to forcibly remove people from the Capitol grounds for moving a chair, or chalking the sidewalk (IDAPA 38.04.08.311.08), or hydrating without permission (proposed rule 308.01), and many other trivial acts. The proposed removal rule is unnecessary and grants too much discretion to legislative leadership to remove people from the grounds. *Watters*, 986 F. Supp. 2d at 1177 (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of supporting a particular point of view.” (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992))). The proposed rule is unconstitutional and the Commission should reject it.

Second, proposed rule 302.01 (“Interior Hours”) provides that the hours of public use and access to the interior of the Capitol shall be determined by the Director’s discretion in consultation with the Presiding Officers or their designees. The language of the proposed rule provides the Director with uncabined discretion to determine the hours of operation and exclude the public from public business. *Watters*, 986 F. Supp. 2d at 1177 (“[R]estrictions on the right to free speech or assembly must not be so vague as to afford unbridled discretion to the government authority seeking to abridge those rights.”). As written, the rule merely suggests consultation with Presiding Officers or their designees. The rule must establish criteria in which normal operating hours may be curtailed, limit unfettered discretion by the Director, and require written, contestable rationale for excluding the public.

Moreover, the existing language provides that the hours “may be posted to the website containing official Idaho State Capitol Information or at the public entrances to the interior.” It is vital that the public is informed when there is a decision to limit the interior hours of the Capitol. Accordingly, any closure must be posted on both the website and the public entrances to the interior, as well as announced clearly to members of the public already inside.

Finally for now, if the intent of this rule proposal is to ensure safe and equitable access and participation at the Idaho State Capitol, then the Capitol Commission should instead adopt the following safety practices and measures to decrease risk of exposure for those engaging in the session on-site during an ongoing pandemic:

- Require people who enter the capitol to wear a face covering over their mouth and nose.
- Identify problem areas for physical distancing.
- Remove or block seating to allow for distancing in communal areas (e.g. gallery seating, conference and break rooms, wings, etc.).
- Provide signage to reinforce safe practices.
- Post printer and copier usage and cleaning instructions and ensure that sanitizing supplies are provided.
- Post instructions for elevator use, including limiting the number of users, marked waiting area, and cleaning for touch points.
- Mark areas such as tight stairways or hallways to only allow for “one-way passage” to limit face to face interactions.
- Ensure that ventilation and filtration systems are updated consistent with CDC guidelines.
- Support respiratory etiquette and hand hygiene. This includes, for example, placing hand sanitizers in multiple locations, and displaying posters to remind individuals to wash their hands and refrain from touching their faces or masks.
- Require routine environmental cleaning and disinfection, particularly of surfaces that are frequently touched.

Our comments today cannot encompass all of the potential legal problems with these rules, nor the improvements to them essential during the deadly and ongoing COVID-19 pandemic. Instead of considering these problematic rules today, the Capitol Commission, like the Legislature and other government officials in Idaho, should focus their efforts on postponing in-person activity in the Statehouse until Idaho’s public health stabilizes and on ensuring all Idahoans can meaningfully participate remotely and safely in the business of Idaho government until then.

Yours respectfully,

/s/ Ritchie Eppink

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