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**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

EDWARD WATTERS, DEAN  
GUNDERSON, STEVEN FARNWORTH,  
MATTHEW ALEXANDER NEIWIRTH,  
individuals, and OCCUPY BOISE, an Idaho  
unincorporated nonprofit association,

Plaintiffs,

vs.

C.L. (BUTCH) OTTER, in his official capacity  
as the Governor of the State of Idaho,  
TERESA LUNA, in her official capacity of the  
Director of the Idaho Department of  
Administration, and COL. G. JERRY  
RUSSELL, in his official capacity as the  
Director of the Idaho State Police,

Defendants.

CASE NO. 1:12-cv-00076-BLW

**PLAINTIFFS' SECOND  
SUPPLEMENTAL PLEADINGS**

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For pleadings supplemental to their first supplemental pleadings (Dkt. 59) and their second amended complaint (Dkt. 77), the plaintiffs allege and complain as follows, under F.R.C.P. 15(d), about transactions, occurrences, and events that happened after the dates of those pleadings:

## I. SUPPLEMENTAL FACTS

1. After the plaintiffs filed their first supplemental pleadings (Dkt. 59) challenging the administrative rules that the Idaho Department of Administration promulgated to govern the use of the Capitol Mall grounds, defendant Luna rescinded those rules and proposed two whole sets of new ones.

2. Despite that the deadline for submitting new proposed agency rules in time to have them considered by the Idaho Legislature during 2013 passed on August 31, 2012, defendant Luna did not propose the two new sets of Capitol Mall rules (under Idaho rulemaking docket nos. 38-0406-1202 and 38-0408-1202) until well past the deadline—not until about September 13, 2012.

3. The plaintiffs moved this Court for partial summary judgment declaring the new sets of rules unconstitutional, and enjoining their enforcement, on December 12, 2012. Over the course of December 2012 and January 2013, the parties on both sides briefed the issues that the plaintiffs raised in their motion for partial summary judgment.

4. On February 26, 2013, this Court held oral argument about the plaintiffs' constitutional challenges to the new rules. The following day, February 27, 2013, the Idaho Legislature printed two concurrent resolutions, each proposing to reject parts of the new rules as “not consistent with legislative intent . . . .”

5. The Legislature adopted both concurrent resolutions, rejecting parts of both sets of new rules, on about March 29, 2013.

6. Yet, within just days of the Legislature's rejection of some of the new rules, defendant Luna and the Idaho Department of Administration purported to promulgate amendments to the new rules that replaced some of the rejected portions with nearly identical provisions. The

purported amendments took effect immediately, on April 5, 2013, despite that even as of today, they have still not been published in the Idaho Administrative Bulletin.

7. The new, amended rules are codified in the Idaho Administrative Code at IDAPA 38.04.06 (“Rules Governing Use of the Exterior of State Property in the Capitol Mall and Other State Facilities”) and IDAPA 38.04.08 (“Rules Governing Use of Idaho State Capitol Exterior”).

8. The rules still strictly limit use of the grounds near and around the Idaho Statehouse. The rules restrict speech, expressive activity, association, and assembly protected by the *First Amendment* to the United States Constitution.

9. Altogether and in particulars, the rules are an unconstitutional regulation of speech, expressive activity, association, and assembly. Under I.C. § 67-5709, violations of the rules are penalized as an infraction under Idaho law, and the rules establish a permitting scheme, constituting an unconstitutional prior restraint on speech, expressive activity, association, and assembly. On information and belief, the defendants have intended to enforce the rules through arrest and threat of arrest, also. The rules, H0693, and I.C. § 67-5709, are unconstitutional in other respects and for other reasons, as well.

10. The defendants’ use of its maintenance schedule with the effect of limiting political speech, expressive activity, and assembly remains unconstitutional, because it grants the State too much discretion and violates the *First* and *Fourteenth Amendments* to the United States Constitution in other respects and for other reasons.

## **II. SUPPLEMENTAL CLAIMS FOR RELIEF**

### **9. Freedom of Assembly**

11. The State’s new rules, as amended to take effect on April 5, 2013, at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad, overly

PLAINTIFFS’ SECOND SUPPLEMENTAL PLEADINGS – Page 3

vague, and facially violate the freedom of assembly guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution. The State's use of a grounds maintenance schedule with the effect of limiting or regulating assembly also violates that freedom.

12. Under 42 U.S.C. § 1983, the plaintiffs are entitled to injunctive and prospective relief prohibiting the defendants from violating their rights, privileges, or immunities under federal law.

### **10. Freedom of Speech**

13. The State's new rules, as amended to take effect on April 5, 2013, at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad, overly vague, and facially violate the freedom of speech guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution. The State's use of a grounds maintenance schedule with the effect of limiting or regulating speech also violates that freedom.

14. Under 42 U.S.C. § 1983, the plaintiffs are entitled to injunctive and prospective relief prohibiting the defendants from violating their rights, privileges, or immunities under federal law.

### **11. Freedom of Association**

15. The State's new rules, as amended to take effect on April 5, 2013, at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad, overly vague, and facially violate the freedom of association guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution.

16. Under 42 U.S.C. § 1983, the plaintiffs are entitled to injunctive and prospective relief prohibiting the defendants from violating their rights, privileges, or immunities under federal law.

### III. CONCLUSION

WHEREFORE, the plaintiffs respectfully pray that this Court order the following supplemental relief and remedies:

1. Declare that IDAPA 38.04.06 and IDAPA 38.04.08, as amended to take effect on April 5, 2013, together with accompanying provisions of H0693 and I.C. § 67-5709, are overbroad, overly vague, unconstitutional, void, without effect, and unenforceable.
2. Declare that the State's use of a grounds maintenance schedule with the effect of limiting or regulating speech, expressive activity, or assembly, is unconstitutional.
3. Grant a temporary restraining order, preliminary injunction, and permanent injunction prohibiting the defendants, as well as their officers, agents, employees, attorneys, and all persons who are in active concert or participation with them, from enforcing IDAPA 38.04.06 and IDAPA 38.04.08, and accompanying provisions of H0693 and I.C. § 67-5709.
4. Waive the requirement for the posting of a bond as security for entry of preliminary relief.
5. Award the plaintiffs the costs of this action and reasonable attorney's fees as may be allowed by law.
6. All such other and further relief as the Court deems to be just and equitable.

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DATED this 6th day of May, 2013, at Boise, Idaho.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION  
OF IDAHO FOUNDATION

/s/ Richard Alan Eppink

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6th day of May, 2013, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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DATED this 6th day of May, 2013.

/s/ Richard Alan Eppink