

BRYAN K. WALKER, ESQ.

OBSIDIAN LAW, PLLC

Idaho State Bar no. 5155

walkerresq.bk@gmail.com

2712 West Jefferson Street

Boise, Idaho 83702

Telephone: (208) 275-0090

Facsimile: (208) 275-0095

Richard Alan Eppink

AMERICAN CIVIL LIBERTIES UNION

OF IDAHO FOUNDATION

Idaho State Bar no. 7503

reppink@acluidaho.org

P.O. Box 1897

Boise, Idaho 83701

(208) 344-9750, ext. 206

(208) 344-7201 (fax)

Attorneys for the Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

EDWARD WATTERS, DEAN
GUNDERSON, STEVEN FARNWORTH,
MATTHEW ALEXANDER NEWIRTH,
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' VERIFIED
SUPPLEMENTAL PLEADINGS**

For pleadings supplemental to the first amended complaint (Dkt. 8) (“FAC”), the plaintiffs allege and complain as follows, under F.R.C.P. 15(d), about transactions, occurrences, and events that happened after the date of the FAC:

I. SUPPLEMENTAL FACTS

1. The defendants (“State”) expected that House Bill 404 (“H0404”) in the Idaho Legislature, which defendant Otter signed on February 21, 2012, would allow them to force the plaintiffs’ assembly and political protest off of the Capitol Annex and out of view of the plaintiffs’ elected representatives and officials.

2. In fact, on the same day he signed H0404, defendant Otter sent a letter to inform the Speaker of the Idaho House of Representatives that the Governor would be giving Occupy Boise a February 27, 2012, deadline to “vacate” the Capitol Annex. And on February 24, 2012, Lieutenant Sheldon Kelley of the Idaho State Police declared under penalty of perjury that the Idaho State Police intended to “clear the Capital [sic] Mall” and that the Idaho Department of Administration intended to “close” the site of the Occupy Boise protest to any public use, under the authority of H0404.

3. On February 26, 2012, however, this Court enjoined the State from enforcing H0404 to remove tents from the Occupy Boise protest or prevent the plaintiffs from staffing the tent city around the clock.

4. As a result, on information and belief, defendants or their agents conferred with members of the Idaho legislature to promote new legislation that could have the effect of forcing the Occupy Boise tent city protest out of view of the statehouse.

5. Moreover, on information and belief, defendants or their agents strongly urged members of the Idaho legislature to quickly pass legislation—before ending its 2012 regular session—that would eliminate the Occupy Boise tent city protest from any of the grounds near the Capitol building.

6. On March 20, 2012, defendant Luna formally presented draft legislation to the Ways and Means committee of the Idaho House of Representatives that would give her “exclusive control” of the site of the Occupy Boise protest and, at a minimum, state grounds within view of the statehouse.

7. The legislature rushed this second legislation, House Bill 693 (“H0693”), to passage, with both houses of the legislature suspending their rules to avoid the Idaho constitutional requirement that bills be read on three separate days in each house.

8. Indeed, H0693 was passed by the House on a Tuesday, by the Senate on Thursday, and signed by the Governor on Friday—all in the same week.

9. In the meantime, while H0693 was being drafted by defendant Luna and her agency with assistance from the Governor’s office and defendant Russell, the defendants were trying other strategies to make the Occupy Boise tent city protest go away.

10. First, on March 14, 2012, the defendants’ counsel sent a letter contending that the political library of books and periodicals located at the Occupy Boise tent city, as well as the tents used for political assemblies there, were “indicia of camping” that the State could seize under I.C. § 67-1613A and this Court’s injunction (Dkt. 17).

11. Second, in that same March 14, 2012, letter, defendants’ counsel demanded that the plaintiffs abide by a maintenance schedule that would require Occupy Boise to vacate their tent city and protest entirely and move it away from the Capitol Annex.

12. The plaintiffs, through their counsel, offered to move their tent city protest to another location that would not interfere with maintenance activities, so long as their protest remained in view of the Statehouse.

13. Despite multiple queries about where the Occupy Boise vigil could be moved to, the defendants never responded to the plaintiffs' offer.

14. House Bill 693 was enacted on March 30, 2012. It instructed defendant Luna to promulgate rules governing use of the Capitol Mall—including the Capitol Annex—within 30 days, but expressly provided that those rules could not take effect until 30 days after the effective date of H0693.

15. Yet, on April 17, 2012, defendant Luna issued rules (under Idaho rulemaking docket nos. 38-0406-1201 and 38-0408-1201) that took effect immediately.

16. Those rules were not published in the Idaho Administrative Bulletin until May 2, 2012.

17. On May 14, 2012, defendant Luna issued amendments to those rules that again took effect immediately.

18. The amendments to the rules were not published in the Idaho Administrative Bulletin until June 6, 2012.

19. Those 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”).

20. The rules strictly limit use of the grounds near and around the Idaho Statehouse. The rules expressly target speech, expressive activity, association, and assembly protected by the

First Amendment to the United States Constitution. Even a gathering of just two people is considered a “rally” and strictly regulated by the rules.

21. 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 arrests, also. The rules, H0693, and I.C. § 67-5709, are unconstitutional in other respects and for other reasons, as well.

22. The defendants’ use of its maintenance schedule with the effect of limiting political speech, expressive activity, and assembly is also 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

6. Freedom of Assembly

23. The State’s new rules at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad 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.

24. 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.

7. Freedom of Speech

25. The State's new rules at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad 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.

26. 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.

8. Freedom of Association

27. The State's new rules at IDAPA 38.04.06 and IDAPA 38.04.08, together with H0693, and I.C. § 67-5709, are overbroad and facially violate the freedom of association guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution.

28. 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, together with accompanying provisions of H0693 and I.C. § 67-5709, are overbroad, 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.

DATED this 9th day of July, 2012, at Boise, Idaho.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION

/s/ Richard Alan Eppink

OBSIDIAN LAW, PLLC

/s/ Bryan K. Walker

Attorneys for Plaintiffs

VERIFICATION

I, Dean Gunderson, verify that I have read the allegations contained in this Verified Complaint and that other than allegations made upon information and belief the allegations are true to the best of my knowledge and I believe that the allegations made upon information and belief are true.

Under 28 U.S.C. § 1746, I verify under penalties of perjury that the foregoing is true and correct.

EXECUTED on this 5th day of July, 2012.

/s/ Dean Gunderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of July, 2012, 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:

Carl J. Withroe carl.withroe@ag.idaho.gov
Michael S. Gilmore mike.gilmore@ag.idaho.gov
OFFICE OF THE ATTORNEY GENERAL OF IDAHO

Thomas C. Perry tom.perry@gov.idaho.gov
OFFICE OF THE GOVERNOR OF IDAHO
Attorneys for Defendants

DATED this 10th day of July, 2012.

/s/ Richard Alan Eppink