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**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-REB

**SECOND AMENDED VERIFIED  
COMPLAINT FOR PRELIMINARY  
AND PERMANENT INJUNCTIVE  
RELIEF**

For their second amended verified complaint against the defendants, the plaintiffs allege as follows:

1. The plaintiffs bring this action to prevent the government from taking their property without opportunity for any kind of hearing and from implementing, *post hoc*, a brand-new state statute designed to silence their extraordinarily effective *First Amendment* speech and assembly. The plaintiffs are *Occupy Boise*, some of its individual participants, and other individuals who wish to participate but are now fearful of sanctions under the new statute. They have been protesting the government and raising awareness about U.S. and Idaho economic policies for over four months. Their protest, however, only began to receive frequent and widespread attention when they adopted the now world-famous tent city protest method of the emerging *Occupy Wall Street* movement. “A straight line runs from the 1930’s sit-down strikes in Flint, Michigan, to the 1960 lunch counter sit-ins . . . to Occupy Wall Street,” CNN observed. Sonia K. Katyal and Eduardo M. Peñalver, *Occupy’s new tactic has a powerful past*, CNN.com, Dec. 16, 2011, <http://bit.ly/wjABBI>. The plaintiffs’ vigil encampment protest on the grounds of the vacant old Ada County courthouse—in direct view of the Idaho Capitol building and the office of the Speaker of the Idaho House of Representatives—is not just integral to their expression of grievances; it is their protest. The defendants will imminently tear it down and seize thousands of dollars worth of private property without due process.

## I. THE PLAINTIFFS

2. Plaintiff EDWARD WATTERS is a participant in *Occupy Boise* and the *Occupy Boise* tent city vigil. Waters is a U.S. citizen and Idaho resident, and he was instrumental in constructing the demonstration and devoted dozens of unpaid, volunteer hours in maintaining the

cleanliness, health, safety, and unobstructed pathways of the demonstration site before and since its inception on November 5, 2011. Watters has contributed substantial personal property to the demonstration, including stoves, tarps, rope, cooking and camping equipment. Watters's private property that had been located in the demonstration is irreplaceable—some of it custom built—and has a value of over \$1,800.

3. Plaintiff DEAN GUNDERSON has participated in *Occupy Boise* since its inception in September 2011 and has served as its primary liaison with government and police officials since then. Gunderson has also frequently given interviews to reporters from mass media outlets, including local and national television, newspaper, and radio concerning *Occupy Boise*, especially after the establishment of the *Occupy Boise* tent city. Gunderson provided the tent that provided shelter for the *Occupy Boise* library, located at the vigil protest site, and books for that library. Altogether, that property is worth about \$400.

4. Plaintiff STEVEN FARNWORTH wants to participate in the *Occupy Boise* tent city demonstration but suffers from advanced chronic obstructive pulmonary disease (COPD). Farnworth regularly participates in the activities and discussions of *Occupy Boise*. However, he is reliant upon therapeutic respiratory apparatus, and believes that if he were either to undergo law enforcement actions to remove him, or if he were to lose his medical equipment to confiscation by the State, it would prove fatal to him. The very threat of the passage of the legislation has curtailed his participation in the vigil encampment.

5. Plaintiff ALEX NEIWIRTH is a field representative and organizer for a public employees' union and he has been a political activist for over 15 years. He is a U.S. and Idaho resident and has participated in *Occupy Boise* since its inception in September 2011, both before and after the establishment of the *Occupy Boise* tent city demonstration at the old Ada County

courthouse. He has participated in general assemblies, working group meetings, and sometimes sleeps overnight at the tent city, although he cannot always sleep there or protect the property he has donated to the demonstration. That property includes many books and reference materials, that are part of the political library at the tent city site, and a large, 16-foot by 32-foot military tent that served as a meeting place and political assembly hall at the demonstration site. His property on site is worth about \$900.

6. Plaintiff OCCUPY BOISE is an Idaho unincorporated nonprofit association of individuals who have assembled to protest and petition the government to bring awareness to concerns about the United States political process and economic policies. *Occupy Boise* emerged in late September 2011 in response to the burgeoning *Occupy Wall Street* movement that began on September 17, 2011. *Occupy Boise* and its participants have been maintaining a peaceful, ‘round-the-clock vigil and political assembly on the historic grounds of the old Ada County courthouse since November 5, 2011.

## II. THE DEFENDANTS

7. Defendant C.L. “Butch” OTTER is the Governor of the State of Idaho and is responsible under the Idaho Constitution for seeing that the laws of the State are executed. He is sued in his official capacity only.

8. Defendant TERESA LUNA is the Director of the Idaho Department of Administration, which is tasked with governing access to the Idaho Capitol building and grounds. She is sued in her official capacity only.

9. Defendant Col. G. JERRY RUSSELL is the Director of the Idaho State Police, which has responsibility for law enforcement at and around the Idaho Capitol building. He is sued in his official capacity only.

10. All of the acts and omissions set forth in this matter were done by the defendants or the defendants' employees and agents, within the scope of their employment, and under the color of law. They were official acts of the defendants undertaken directly by policymakers, were actions caused by the policies, procedures, practices and customs of State of Idaho, or were ratified by the defendants.

### III. JURISDICTION

11. The plaintiffs bring this action to enjoin imminent violations of the *First, Fourth, Fifth, and Fourteenth Amendment* to the United States Constitution.

12. This Court has jurisdiction over the plaintiffs' 42 U.S.C. § 1983 claims under 28 U.S.C. §§ 1331 and 1343(a)(3). It has jurisdiction to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201–2202 and F.R.C.P. 65. And it has jurisdiction under 28 U.S.C. § 1367(a) over all of the plaintiffs' other claims because those claims form the same case or controversy as their claims based upon federal law.

13. Venue is proper in this Court and District, under 28 U.S.C. § 1391(b), because the defendants are subject to personal jurisdiction here and because the events and omissions giving rise to this action occurred in this District.

### IV. FACTUAL BACKGROUND

#### A. Emergence of the *Occupy* Movement

14. The *Occupy* movement is a worldwide people's movement that began when *Occupy Wall Street* commenced a peaceful, political assembly in Liberty Square in the Financial District of Manhattan, New York City, on about September 17, 2011. Since then the movement, chiefly through its now world-renowned method of erecting tents and engaging in continuous, highly visible peaceful assembly and political speech in public open spaces, has spread to over 100

major cities and hundreds of other communities through the United States and more than 1,500 cities around the world. The movement seeks to bring attention to the imbalances caused by governmental economic policies and the undue monetary influence of corporations on public policy, and to ensure that politicians are as concerned about and responsive to people with limited financial means as they are to corporations and those who benefit the most from record levels of financial inequality.

15. The core method of the *Occupy* movement is to bring awareness to elected officials and the public of the protestor's concerns through symbolic, around-the-clock peaceful tent cities, or "occupations." *Occupy* protests across the United States use the same "Occupy" identifier and use the same slogan, "We are the 99%," which refers to the difference in the United States between the wealthiest 1% and the rest of the population.

16. The *Occupy* movement employs a consensus-based, direct-democracy decision-making process used throughout the continuous assemblies ongoing at many sites and in regular "general assemblies" that resemble the First and Second Continental Congresses that gave birth to the *Declaration of Independence*, free American colonies, and ultimately the *Bill of Rights* that the plaintiffs' Complaint seeks to protect.

17. The *Occupy* protestors' 24/7 tent cities and assemblies, strategically located near centers of government and the lobbyist and financial industries, is the core component of their message.

18. The reason why the *Occupy* protests have been so controversial among elected representatives and officials is because they are the most persuasive, effective form of peaceful nonviolent protest.

## **B. *Occupy Boise* Coalesces**

19. *Occupy Boise* began on about September 30, 2011, when about 50 Idahoans came together at Julia Davis Park in Boise, Idaho, to meet and discuss their grievances and to formulate effective methods for communicating those grievances to the public and their government.

20. During the following month of October 2011, *Occupy Boise* formed as an “egalitarian, non-violent, non-partisan movement in solidarity with Occupy Together and Occupy Wall Street” with the mission of “build[ing] community among the 99% to address the problems caused by the greed and corruption of the 1%.”

21. During October 2011 *Occupy Boise* employed conventional methods of one-time political speech and assembly such as marches, rallies, and public meetings. Those activities garnered some media and governmental attention, but did not appear as effective as the *Occupy* vigil encampments that were by then taking place throughout the world.

22. Thus, during October 2011, *Occupy Boise* began planning a tent city demonstration in direct view of the Idaho statehouse, in solidarity with the similar demonstrations that had already been established throughout the world.

### **C. The *Occupy Boise* Tent City Protest**

23. On November 5, 2011, *Occupy Boise* began erecting a tent city protest on the grounds of the old Ada County courthouse, a public open space in the vibrant core of Idaho politics and government. The site has particular symbolic significance to the public and *Occupy Boise* because it is an historic landmark of the cause of the working class. At the site 105 years ago, people’s movement leader Bill Haywood, labeled an “undesirable citizen,” was acquitted by an Idaho jury. It is a place where, according to the *New York Times*, “[n]ot only the man, but the

cause triumphed.” *Haywood is Free; To Try the Others*, NEW YORK TIMES, July 29, 1907, at 1, <http://bit.ly/y5hi2s>.

24. A task force of *Occupy Boise* participants developed an “operational plan” to preserve health, safety, and peaceful assembly at the site and on October 31, 2011, delivered a letter to the Idaho Department of Administration notifying it that *Occupy Boise* would begin an “indefinite vigil” at the site on November 5, 2011, in exercise of its participants’ “freedoms of speech, assembly, association, consultation for the common good, instruction of representatives, and petition for the redress of grievances.”

25. On about November 2, 2011, *Occupy Boise* participants met with defendant Luna, among others, to discuss logistics for the vigil demonstration. Following the meeting, Luna sent plaintiff Dean Gunderson a letter confirming that the Department of Administration understood the plans for the demonstration and requesting certain conditions, which *Occupy Boise* agreed to and has complied with.

26. On about November 3, 2011, *Occupy Boise* liaisons met with Brigadier General Alan Gayhart of the Idaho National Guard and agreed to conditions on the demonstration through November 12, 2011, in honor of Veteran’s Day activities taking place at the site. About the same day, plaintiff Dean Gunderson also provided defendant Luna with a full copy of the 42-page Operational Manual for the *Occupy Boise* vigil.

27. On about November 4, 2011, *Occupy Boise* faxed and mailed letters to the Department of Administration and the Idaho State Police, among others, providing all-hours contact information for *Occupy Boise* representatives and attorneys, so that any concerns that arose in the future could be “appropriately, effectively, and constructively addressed.”



28. On about November 6, 2011, plaintiff Dean Gunderson met, on behalf of *Occupy Boise*, with a Department of Administration employee about the location of the kitchen and restroom facilities in the demonstration. *Occupy Boise* agreed to the Department's request to relocate those facilities and promptly relocated them.

29. On about November 8, 2011, *Occupy Boise* liaisons met with representatives of the Department of Administration and the Idaho State Police to address concerns about the Idaho Fallen Soldiers' Memorial. *Occupy Boise* provided again provided state officials with all-hours contact phone numbers in case further concerns arose.

30. On about November 22, 2011, plaintiff Dean Gunderson again met on behalf of *Occupy Boise* with a Department of Administration employee, who told Gunderson that power connections on site were not a problem, but requested relocation of power cords in the tent city demonstration. *Occupy Boise* agreed to the requests and immediately relocated the cord.

31. *Occupy Boise* has always made its liaisons or counsel to the Department of Administration and other state agencies and law enforcement officials. None of those agencies have ever notified *Occupy Boise* of a health, safety, or any other concern that *Occupy Boise* has not promptly addressed as requested or agreed.

32. The *Occupy Boise* vigil camp and people's assembly at the old Ada County courthouse has continued uninterrupted since November 5, 2011. It has attracted greater mass media, public, and political attention than any expressive or assembly activity *Occupy Boise* undertook before November 5, 2011. On information and belief, the *Occupy Boise* tent city vigil has been discussed by the public, politicians, and the press more than any other people's political demonstration in over two decades in the State of Idaho.

33. At about the time of the First Amended Complaint, the *Occupy Boise* protest site consisted of substantial private property assets worth thousands of dollars. There were two large military assembly tents for political meetings and general assemblies. Both had wood stoves installed in them. A kitchen and dining area, erected atop a developed picnicking pad, contained several stoves, counters, cabinetry, and a covered pantry containing hundreds of dollars worth of purchased and donated food and supplies. A “free store,” providing warm clothing, footwear, and other goods at no cost to the public and protestors was protected by a large tent. Tents also provided shelter and warmth for a community library, an art center, a medical treatment and recovery area, and a religious worship space. A communications tent housed computer equipment, a wireless transceiver providing free Internet access to the protest and the public, and other electronics. Over 25 family and individual tents for housing were located throughout the protest site. A public information tent sat near the corner of Sixth Street and Bannock Street and provided a landmark and gateway for the public and elected officials to enter and interact with the protest. In all areas of the vigil encampment, signs with political slogans and emblems were highly visible to the public and the Idaho legislature. The total value of the private property that made up the protest was about \$10,000.

34. A major national media outlet described the *Occupy Boise* protest city as “the most organized occupation out of the two dozen we have visited across the country.” Arun Gupta, *Fear and occupation in red America*, SALON, Dec. 8, 2011, <http://bit.ly/u2Bw6N>.

#### **D. House Bill 404 and I.C. § 67-1613**

35. On about January 18, 2012, a member of the Idaho House of Representatives, Scott Bedke, sponsored a bill that would prohibit “camping” on state land, including at the site of the *Occupy Boise* protest, and authorize government agents and contractors to take and destroy

private property without notice or hearing. On information and belief, when asked about the bill, Representative Bedke told the Associated Press that “the right place for people to exercise free speech is on the Capitol steps,” not via a “tent city.”

36. After revisions, a substitute bill House Bill 404 (“H0404”), with similar apparent effect, was introduced in the Idaho House of Representatives on about January 20, 2012.

37. During the legislature’s consideration of H0404, major Idaho newspapers ran editorials supporting the *Occupy Boise* tent city, and the *Idaho Statesman* printed letters to the editor from the general public—almost daily—that mostly condemned the legislature for attempting to squelch the protest, demonstrating how effective the *Occupy Boise* camp is at communicating symbolic political speech.

38. After an amendment, House Bill 404 passed the both houses of the Idaho legislature on February 17, 2012. On February 21, 2012, defendant Otter approved the bill as amended, and therefore it has become law. IDAHO CONST. Art. IV § 10.

39. With the enactment of House Bill 404 as amended, a genuine conflict has arisen between the parties. Unless adjudicated by this Court, the plaintiffs may unconstitutionally have their private property taken by the government and lose their right to continue their peaceful expressive activities in a traditional *First Amendment* public forum.

40. The suggestion has arisen that the defendants may contend that they are not on notice that the plaintiffs, in this case and through their original and amended complaint, challenge the constitutionality of House Bill 404 as interpreted, applied, and enforced. To be clear, in the claims for relief and prayer below, the plaintiffs do complain that House Bill 404 and I.C. §§ 67-1613 and 67-1613A are unconstitutional as interpreted, applied, and enforced by the defendants. The plaintiffs seek the declarations, injunctions, and other decisions and orders from this Court

necessary to prevent the defendants from “stretching” those enactments “to shut down a political message . . . .” Mem. Decision and Order 11 (Feb. 26, 2012) (Dkt. 17). The plaintiffs, accordingly, complain that “the State’s enforcement policy—that Idaho Code § [67]-1613 bans even a symbolic tent city without overnight sleeping”—is unconstitutional and pray for appropriate relief, as they have described below. *Id.*

## **V. CLAIMS FOR RELIEF**

### **1. Freedom of Assembly**

41. The defendants’ actions and threatened actions to enforce I.C. §§ 67-1613 and 67-1613A against the plaintiffs violate the freedom of assembly guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution.

42. The defendants are applying a brand-new state law *post hoc* to the plaintiffs—three months after their peaceful assembly began. This *post hoc* law is overly vague and is not addressed to regulating any abuse of the freedom of assembly, but is being applied to disperse and end the plaintiffs’ lawful assembly.

43. 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.

### **2. Freedom of Speech**

44. The defendants’ actions and threatened actions to enforce I.C. §§ 67-1613 and 67-1613A against the plaintiffs violate the freedom of speech guaranteed by the *First Amendment* and *Fourteenth Amendment* of the United States Constitution.

45. This *post hoc* law that the defendants are applying to the plaintiffs is not a lawful time, place, or manner restriction and is overly vague and it cannot be justified by a compelling interest sufficient to overcome restraints on constitutionally protected speech.

46. 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.

### **3. Unreasonable Seizure**

47. I.C. § 67-1613A permits the defendants to seize private property without a warrant and without either probable cause to believe a crime may occur or even reasonable suspicion of a crime.

48. The new statute is overly vague and violates the protections against unreasonable seizure guaranteed by the *Fourth Amendment* and *Fourteenth Amendment* of the United States Constitution.

49. 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.

### **4. Government Taking with Just Compensation**

50. I.C. § 67-1613A also permits the defendants to take private property for public use without just compensation and therefore violates the protection against takings of private property guaranteed by the *Fifth Amendment* and *Fourteenth Amendment* of the United States Constitution.

51. 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.

### **5. Due Process**

52. Under I.C. § 67-1613A, the defendants also can take and destroy private property without any opportunity for a hearing, either before or after the government seizure and destruction.

53. The complete lack of any hearing to protect private property violates the procedural due process guaranteed by the Due Process Clause of the *Fourteenth Amendment*.

54. 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.

## **VI. CONCLUSION**

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

1. Declare that I.C. §§ 67-1613–1613A and the enactment of 2012 Idaho Legislature bill H0404 as amended is unconstitutional, void, without effect, and unenforceable.

2. Declare that I.C. §§ 67-1613–1613A and the enactment of 2012 Idaho Legislature bill H0404 as amended, as applied to the plaintiffs, 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 I.C. §§ 67-1613–1613A and the enactment of 2012 Idaho Legislature bill H0404 as amended.

4. 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 I.C. §§ 67-1613–1613A and the enactment of 2012 Idaho Legislature bill H0404 as amended against any of the plaintiffs, including any member or participant in the plaintiff *Occupy Boise* unincorporated nonprofit association and any private property on the grounds of the old Ada County courthouse in Boise, Idaho, that is part of the *Occupy Boise* protest.

5. Waive the requirement for the posting of a bond as security for entry of preliminary relief.

6. Award the plaintiffs the costs of this action and reasonable attorney's fees as may be allowed by law.

7. All such other and further relief as the Court deems to be just and equitable.

DATED this 18th day of September, 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, Richard Alan Eppink, verify that I have read the new allegations contained in this Verified Complaint (that were not already verified in prior complaints filed in this case) 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 18th day of September, 2012.

/s/ Richard Alan Eppink