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**Testimony of Ritchie Eppink**  
**Oppose: HB 159**  
**Before the House Judiciary and Rules Committee**  
**February 17, 2021**

The ACLU of Idaho opposes House Bill 195, which would have Idahoans jailed for up to a year for exercising their First Amendment rights. The bill is contrary to Idaho's ideals of freedom and public engagement.

First of all, the legislature should not be adding more crimes to the Idaho Code and therefore more burden on our state's already overburdened criminal legal system. Just as one indicator, the most recent Performance Report from the Idaho State Appellate Public Defender's office reports that office's caseloads grossly exceed the caseload limits established by Idaho's Public Defense Commission: with an average 58 appeals per attorney, compared to the 35 appeal limit set by the PDC, those caseloads are more than 165% of limits. Idaho's criminal legal system is still in crisis, and the impacts on Idahoans, their families, communities, and economies is beyond tragic. Now is hardly the time to add another misdemeanor to the criminal code.

Second, the ACLU of Idaho has had to repeatedly challenge restrictions on free speech and assembly passed by this legislature. That litigation has been costly to Idaho taxpayers, and it has resulted in multiple laws and regulations being struck down as unconstitutional. Though perhaps the sponsors of this bill hope to rely on precedent from over thirty years ago to defend this bill from challenge, the State tried this before, without success. For instance, in *Watters v. Otter*, State officials trying to oust Occupy Boise's protest vigil near the Statehouse invoked U.S. Supreme Court precedent from the 1980s to justify a statewide ban on camping designed to chill Idahoans' free speech and assembly. Instead, the federal courts, ruling in the 21st century (not the 1900s), issued an injunction prohibiting the State from evicting Occupy Boise's 'round-the-clock demonstration. Ultimately, the plaintiffs—who we represented—prevailed in striking down a bevy of rules and state actions in that litigation, resulting in an award of over \$170,000 in attorney fees against the State.

This bill's language also goes significantly beyond those very limited restrictions on residential picketing that may be constitutional. Federal courts have upheld restrictions of this kind only upon very narrow readings—for instance, when the Supreme Court has upheld them at all, it has done so only based on the promise of counsel that the law would not actually be enforced as written. And since then, the Supreme Court struck down residential picketing restrictions because they were neither sufficiently justified nor narrow enough. This bill, to the contrary, is written far too broadly. Federal appeals courts have struck down residential picketing bans even more narrow than this one as unconstitutional. Even a ban written identically to the narrowed town ordinance, upheld by the Supreme Court more than three decades ago, has been since struck down. This bill is unconstitutional for the same reasons.



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The Idaho Constitution, too, preserves Idahoans' inalienable rights to assemble peacefully and to instruct their representatives. Especially during a pandemic, when even public officials should be staying home to promote the public health, preventing the freedom-loving residents of this state from demonstrating peacefully to their public officials when they are home is contrary not just to constitutional law, but to our foundational Idaho constitutional ideals as well.

The committee should hold this bill, and the House should not pass it.