Add a comment

Comment Form: Use of the Public Areas of the Capitol Buildings and Grounds

Q1w

Do the proposed rules clearly, adequately and fairly establish a new administrative process for exclusion from the campus? Specifically, do the proposed rule updates ensure clear due process and create clear return rules?

Please see the ACLU-WA comment letter submitted by email on 9/27/22 at 4:09 PM, to Jack Zeigler of DES. 9/27/2022 05:05 PM

YES 9/1/2022 02:45 PM

No 9/1/2022 02:22 PM

Q2w

Do the proposed rules add clarity where technical edits are proposed, including making it clear the Department of Enterprise Services delegates authority to the Washington State Patrol for enforcement of statutes, rules, and policies regulating the use of the campus?

Please see the ACLU-WA comment letter submitted by email on 9/27/22 at 4:09 PM, to Jack Zeigler of DES. 9/27/2022 05:05 PM

NOT ENTIRELY 9/1/2022 02:45 PM

Yes 9/1/2022 02:22 PM

Q3w

Do the proposed rules make it clear that a DES complaint is not a prerequisite for enforcement including exclusion from use of the campus?

Please see the ACLU-WA comment letter submitted by email on 9/27/22 at 4:09 PM, to Jack Zeigler of DES. 9/27/2022 05:05 PM

YES 9/1/2022 02:45 PM

Yes 9/1/2022 02:22 PM

Q4w

Do you have any other comments on the proposed rules?

Please see the ACLU-WA comment letter submitted by email on 9/27/22 at 4:09 PM, to Jack Zeigler of DES. 9/27/2022 05:05 PM

Clean up the language that WSP will be the officers on campus; it seemed a bit nebulous. 9/1/2022 02:45 PM

Why make it easier for criminals to not be charged with crimes. The campus will soon start to look like capital lake. 9/1/2022 02:22 PM

Q5w

Optional - submit your contact information

Share

3 responses

SENT VIA ELECTRONIC MAIL

September 27, 2022

Jack Zeigler
Policy and Rules Manager
Washington State Department of Enterprise Services
jack.zeigler@des.wa.gov

RE: Comment on Proposed Updates to Rules re Use of the Capitol Campus Grounds and Public Areas of Buildings WAC Chapter 200-220

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Washington

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Seattle, WA 98111
(206) 624-2184
aclu-wa.org

Dear Mr. Zeigler:

The American Civil Liberties Union of Washington (ACLU-WA) submits the following public comment on the Department of Enterprise Services' ("the Department's") proposed updates to the Washington State Administrative Code (WAC) regulations governing use of the State Capitol Campus grounds (Chapter WAC 200-220). Please include these comments in the official record regarding the proposed rules. We previously submitted comments on the discussion draft (see attached 8/12/22 letter).

We appreciate the Department's desire to address potential trespass, harassment, or property destruction offenses on the Capitol grounds, and its intent to use the lowest level of intervention necessary. The ACLU of Washington strongly opposes government overreliance on police and punishment to respond to social challenges that could be addressed more effectively, and with greater fidelity to democratic principles, through different policy solutions. We believe the proposed rules propose a solution - formal banishment from the seat of Washington State lawmaking - that poses serious concerns under the First Amendment of the U.S. Constitution and Article I, sections 4 and 5 of the Washington State Constitution. Banishment from the Capitol threatens to deny people their right to petition government and curtail their speech.

In these times of political hyperpolarization and its resulting divisiveness, it is absolutely critical that policy makers and campus staff manage the Capitol Campus as a symbol of democracy where all people - including those with unpopular viewpoints, those at the margins, and those struggling to thrive - are seen and respected. Excluding people from the Capitol Campus undermines Washington State's commitment to being a resilient democracy that represents and is accountable to all of its residents.

Public Areas of the Capitol Campus Are Traditional Public Forums Where Constitutional Protection for Speech and the Right to Petition and Assembly Is the Strongest

The Capitol Campus is the seat of our state's democracy. As your 9/1/22 email inviting comment on the proposed rules acknowledges, it is the quintessential traditional public forum "held in trust for the public" and "devoted to assembly and debate," where constitutional protections for free speech, assembly, and the right to petition government are at their greatest. Traditional public forums include streets and parks which "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. C.I.O.,* 307 U.S. 496, 515 (1939)). They are areas where First Amendment expressive activities are afforded the strongest protection and where "the government's ability to permissibly restrict expressive conduct is extremely limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). They are places where the government may only enforce restrictions on speech that are narrowly drawn to achieve a compelling state interest, which means that the proposed speech restrictions are subject to the most stringent of tests - strict scrutiny. *Perry, supra,* at 45–46. The Supreme Court "has frequently reaffirmed that speech on public issues," particularly in a traditional public forum, "occupies the highest rung of the heirarchy [sic] of First Amendment values and is entitled to special protection." (internal quotation marks omitted)." *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

The government may impose reasonable restrictions on the time, place or manner of speech in a traditional public forum. However, to do so in compliance with constitutional protections, the government must show that the restrictions "are justified without reference to the content of the speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), (quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). Given the uniquely unparalleled nature of the Capitol Campus, there are likely no adequate alternative channels or fora for speech and expressive conduct speakers wish to engage in on the Capitol Campus.

Rules governing free speech activities in traditional public forums unconstitutionally chill speech when they are unclear or allow government officials unfettered discretion. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1070 (9th Cir. 2001). *See also, Freedman v. State of Md.,* 380 U.S. 51, 56-57 (1965). Even in the limited public forum in *Hopper,* the Court found the rules were unconstitutional because "application of the policy was left

entirely to the discretion of city administrators." 241 F.3d at 1079. Courts have time and again struck down regulations that lack "clear standards" and a clear "decision-making trail," even when the government has articulated a compelling interest that appears neutral and non-content based. *See Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 802–03 (9th Cir. 2008). Without clear and unambiguous terms, the risk of inconsistent application and content-based discrimination is significant, which is "intolerable." *Id*.

Furthermore, there is a "'heavy presumption' against the validity of a prior restraint" on speech. *Forsyth County., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). "Regulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint." *O'Day v. King County.,* 109 Wn. 2d 796, 804 (1988). Unnecessary timing and financial burdens imposed through permit requirements for free speech activities will be invalidated by the courts. *See October 22nd*, 550 F.3d at 797-98 (striking down permitting scheme that gave government officials unbridled discretion to modify speech activities).

Any additional "safety and security standards" applied to permits for speech activities in the public areas of the Capitol Campus must be clearly defined, generally applicable and objective, and narrowly tailored to the valid governmental interests involved. *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 496 (9th Cir. 2015). The United States and Washington Supreme Courts have consistently "condemned statutes and ordinances . . . [lacking] narrowly drawn, reasonable and definite standards for the officials to follow." *Niemotko v. State of Md*., 340 U.S. 268, 271 (1951). *See also, Forsyth County*, 505 U.S. 123, 133 (1992); *Coll. Republicans of Univ. of Washington v. Cauce*, No. C18-189-MJP, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018); *Kunz v. People of State of New York*, 340 U.S. 290 (1951); *Saia v. People of State of New York*, 334 U.S. 558 (1948); *Hague v. Comm. for Indus. Org*., 307 U.S. 496 (1939); and *Lovell v. City of Griffin, Ga.,* 303 U.S. 444 (1938).

Problematic Provisions of the Draft Proposed Rules on Exclusion from the Capitol Campus

WAC 200-220-600, -610, and -620

As noted above, the Capitol Campus is a traditional public forum where free speech protection is at its greatest. Correspondingly, the courts would strictly scrutinize rules allowing people to be excluded or banished from the Capitol Campus and would impose greater safeguards for exclusion in this

context than for exclusion from other types of government property. Yet, for the reasons described below, the proposed rules for exclusion from the Capitol Campus fail to comport with the requirements applicable to a traditional public forum.

Of further concern, expanding the role of law enforcement agencies in penalizing speech heightens our concerns about the constitutionality of these regulations. Use of law enforcement not only creates the specter of criminalizing free speech activities, but it also increases the risk of police use of force, and unduly chills constitutionally protected expression and conduct.

Instead of providing increased safeguards appropriate to the Capitol Campus as a traditional public forum, the proposed regulations authorize law enforcement to issue a warning and to commence the exclusion process whenever any rule violation is alleged and based simply on the officer's "reasonable belief" that a violation occurred. Similarly, all that is needed to sustain exclusion is an officer to find that there is "probable cause" that a violation occurred. By allowing such a low bar to limit speech and expressive conduct, the proposed regulations likely violate all the above-cited traditional public forum protections and fail to account for the Capitol Campus being the most important location for much free speech activity to occur.

The subsections of the proposed regulations which allow a speaker to request an exemption in order to exercise First Amendment rights fail to remedy the above discussed problems. That subsection permits broad unguided discretion in granting or denying or revoking permits; impermissibly invites content and viewpoint-based discrimination; constitutes a prior restraint; and fails to provide adequate due process protections.

Although the proposed rules provide for an appeal process, as required by due process and free speech constitutional protections, we are concerned that the procedural safeguards may also be inadequate. The proposed rules would require the appeal be submitted to the director within 10 days, which does not allow enough time for individuals to prepare and file an appeal. The rules should be revised to allow 30 days to appeal. The rules should also clarify the means by which an appeal can be submitted – email, United States Postal Service, or other means of transmission. And additional clarification would be helpful in the part of the rule discussing a stay pending an appeal of an order on exclusion/banishment.

Further, proposed regulation -620 alone raises a myriad of concerns. It fails to define what "substantial risk of damage" means and how it will be determined. There is impermissible discretion in the parts of the rule

allowing an exclusion to be extended, and in the parts allowing the exclusion issuer to decide how long the exclusion should be based on their perception of the nature of the violation. The provisions for when attending a hearing is allowed or when an exclusion still applies are very unclear. The rules do not specify if repeat violations must occur in a certain period of time, or anytime in a person's lifetime, or if the duration of exclusion is calculated concurrently in instances of multiple violations. And there is apparently no right to be heard and appeal prior to the exclusion being enforced. A post-warning hearing and appeal may be appropriate, but that is not adequate for an actual exclusion, especially one that can lead to criminal trespass charges.

The Proposed Rules on Exclusion/Banishment Exacerbate the Negative Impact of Existing Rules

The newly proposed exclusion rules allow banishment from the Capitol Campus based merely on "reasonable belief" of a rule violation. This raises additional concern about constitutional infirmities in the existing rules. We request that you consider revising the existing rules as well, to ensure that the rules do not unduly infringe upon the rights of Washingtonians who seek to have their voices heard at the seat of our democracy.

1. **WAC 200-220-030(8)** – Definition of Free Speech and Assembly Activity.

   Courts have extended free speech protection to use of tents and other structures that may be associated with camping, as well as activities like meal programs for homeless people in parks. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Students Against Apartheid Coalition v. O'Neil*, 660 F.Supp. 333 (W.D. Va. 1987); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1204-1205 (D. Utah 1986) (finding constitutional right of speech for students to maintain continuous presence with shanties over many months, enhancing their expressive character). *See also, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) (outdoor food sharing is constitutionally protected expressive conduct). The rules should be clarified to align with these protections.

2. **WAC 200-220-100**—It is likely unconstitutional to require a "permit for free speech and assembly activities involving twenty-five or more people in capitol buildings or more than seventy-five people on the capitol grounds, and for all private or commercial activities." This regulation fails to account for spontaneous gatherings in response to breaking news and instances where there isn't time to complete the permitting process, but where speakers

deem timeliness is of utmost importance to their speech activity. A permit requirement, or warnings/arrests for lack of a permit in these circumstances, is unconstitutional. *See Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1030 (9th Cir. 2009). Although **WAC 200-220-110** recognizes the "spontaneous expression exception" it still requires speakers to provide notice at least two hours in advance and only allows for such notice during working hours Monday through Friday. This does not comport with constitutional protections for free speech. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1045-1048 (9th Cir. 2006), That is because **WAC 200-220-110** fails to account for breaking news events on weekends or after working hours, which are also constitutionally protected.

3. **WAC 200-220-120(2)**—This regulation impermissibly grants the Department unfettered discretion to "require additional information" when determining whether to grant a permit.

   This provision creates significant First Amendment and due process concerns as it does not specify what additional information may be asked for or when. This open-ended discretion and lack of clarity raises concerns that some permit applicants will be surprised by a request for additional information and some may be treated differently than others, possibly based on the content or viewpoint of the speech, which is unconstitutional. Of further concern, the grant of discretion and lack of clear process raises significant due process concerns regarding when the agency may deem a request final and when a right to an appeal is triggered.

4. **WAC 200-220-210**, **-270, and -280**—These rules impermissibly grant the Department unfettered discretion to cancel or revoke a previously issued permit.

   These regulations raise concerns about unfettered discretion and the possibility that unspecified "reasonable" time, place, and manner restrictions can be added at any time. The concern arises from the fact that the rules collectively provide the agency the discretionary authority to "cancel [a] permit at any time if [the] activity does not comply with any applicable laws and rules or the terms of the permit." WAC 200-220-270. The rules further provide that if a permit is "canceled and [the speaker] persist in [the] activity, [speaker] may be subject to appropriate law enforcement action." *Id.* This is problematic because of the lack of clarity regarding when and how a permit would be revoked and how notice of revocation would be communicated to the speaker. These rules are also concerning because they grant overly broad discretion to the agency

administrator, and also because it refers to a threat that "law enforcement" may become involved. *Id.* Subsection -280 increases the concern for arbitrary and capricious action by the agency and raises heightened concerns regarding its grant of unfettered discretion to government administrators as it allows for the revocation of a permit if "necessary state government activities" are implicated—even though what constitutes such is not defined.

5. **WAC 200-220-320**—This regulation impermissibly provides unfettered discretion to administrators to limit speech and creates arbitrary limitations on speech unrelated to any reasonable time, place, and manner restrictions.

   By allowing "limits on free speech and assembly activities in the public areas of the capitol buildings and grounds, according to design, health, safety, operational or other such considerations. These may include, but are not limited to, limits designated by the director under WAC 200-220-210," the rule fails to limit or guide discretion and is problematic for that reason. Furthermore, the rule states free speech and assembly activities may not exceed 14 consecutive calendar days in duration—regardless of whether such expressive conduct has any impact on daily activities on the Capital Campus. For example, a person who wishes to engage in daily silent protest that consists solely of holding a single sign would be barred from doing so after 14 days regardless of the lack of impact on Capital Campus activities. Due to this, this subsection also raises significant constitutional concerns due to its grant of unfettered discretion to government administrators and the imposition of an arbitrary time limit for speakers to engage in expressive conduct.

6. **WAC 200-220-243**—This regulation impermissibly provides unfettered discretion to government administrators to determine when camping will be permitted.

   This regulation fails to account for camping that is expressive activity, allows unfettered discretion, and invites viewpoint or content discrimination. While the proposed regulations define camping as "for purposes of habitation," there is no definition of habitation and the plain language of the proposed regulation is unclear as to who will determine what constitutes "for the purpose of habitation" when it comes to speakers engaging in expressive conduct on the Capitol Campus.

   The proposed regulation also raises further concerns under the Ninth Circuit ruling in *Martin v Boise*, 920 F.3d 584 (9th Cir. 2019), which finds a constitutional violation when people are penalized for

> camping on public property when there is inadequate shelter available. "The practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Blake v. City of Grants Pass*, No. 1:18-CV-01823-CL, 2020 WL 4209227, at *8 (D. Or. July 22, 2020) ("Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal").

Enforcement of an exclusion order necessarily involves use of physical force by a law enforcement officer. Violation of an exclusion order will be alleged to be sufficient to establish probable cause to charge Trespass in the First Degree, regardless of the minimal due process offered in the exclusion proceedings. While at first glance, administrative exclusion proceedings may appear one of the least intrusive options for addressing unwelcome behavior, the legal hybridity of banishment—blending elements of civil and criminal law—provides "minimal avenues for contestation, thereby diminishing the rights-bearing capacity of their targets." Katherine Beckett and Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 Law & Soc. Inquiry 1, 4 (Winter, 2010) (quoting Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, Hastings Law Journal 42:1325-48, 1327).

The Proposed Rules Raise Concerns about Exceeding Constitutional Limits on Separation of Powers and the Delegation of Legislative Authority

"The Washington constitution, Art. II, § 1, as amended by the Seventh Amendment, vests the legislative power in the Senate and House of Representatives … The legislative power to make purely substantive law cannot be surrendered or delegated to or performed by any other agency." *Senior Citizens League v. Department of Social Sec. of Wash*., 38 Wn.2d 142, 152, 228 P.2d 478, 484 (1951) (citing *Uhden, Inc. v. Greenough*, 181 Wash. 412, 43 P.2d 983 (1935)).

The Washington State Legislature has delegated the following authority to the Department: "The director of enterprise services shall have custody and control of the capitol buildings and grounds, supervise and direct proper care, heating, lighting and repairing thereof, and designate rooms in the capitol buildings to be occupied by various state officials." RCW 43.19.125(1). The Legislature has **not** delegated authority to the Department to define circumstances under which members of the public may be banned from Washington's seat of government or the duration for which they may be banned. Nor has it established or delegated to the Department authority to create procedural safeguards to protect against

potential arbitrary action or abuse of discretion by the Department.

We appreciate you taking the time to consider the ACLU of Washington's comments on the proposed regulations and hope that you weigh heavily the constitutional concerns raised in this letter. If you would like to discuss further please do not hesitate to contact me.

Sincerely,

Nancy Talner
Senior Staff Attorney

Cc: Colleen Melody, Attorney General's Office Civil Rights Division