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VIA ELECTRONIC MAIL

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Re: Proposed Rules 60H-6.005 and .008

Dear Ms. Collins, Ms. McGinn, Ms. Larson, Ms. Jones, Mr. Plante, and Mr. Newman:

We write on behalf of the First Amendment Foundation to express concerns about Rules 60H-6.005 and .008 proposed by the Department of Management Services ("DMS"). The First Amendment Foundation is a highly-respected and visible non-profit committed to free speech and open government.

For decades, citizens on all points of the political spectrum supporting a host of issues of political and societal importance

have assembled to express their views both inside and outside the Florida Capitol. The proposed rules seek to alter that long-cherished dynamic protected by the rule of constitutional law. They are infected by a host of legal issues and policy problems, and are simply unnecessary. We address each rule separately below.

Rule 60H-6.005

The constitutional void for vagueness doctrine, which demands that regulated parties be able to determine what is required of them and those enforcing the law be provided with express guidance such that they do not act in an arbitrary or discriminatory way, is applied with particular rigor when speech is implicated. *F.C.C. v. Fox Television Stations, Inc.*, 576 U.S. 239, 253-54 (2012). The aim of this strict application is to ensure that vagueness or ambiguity does not lead individuals to self-censor and refrain from protected speech. See *id.*; *NAACP v. Button*, 371 U.S. 415 (1963); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Yet that is exactly what is likely to happen under the proposed language of Rule 60H-6.005: it requires individuals to make complex legal decisions, leading citizens to self-censor their speech. It also opens Capitol Police and/or other government employees to liability for enforcement decisions that violate the First Amendment.

The proposed language in 60H-6.005(2) requires Capitol Police or other enforcers to remove anyone who is “*likely* to impede or disrupt the performance of official duties . . . or is *likely* to disrupt or prevent access by members of the public.” (emphasis added). This language provides no guidance as to what behavior is or is not allowed, and allows individuals who are peacefully assembling to be removed and charged with trespass based solely on some ill-defined and subjective suspicion that they are “likely” to become disruptive. This could arguably sweep as broadly as a lost delivery person, likely to disrupt access by stopping in the middle of a hallway with a dolly of large boxes.

Further, the proposed language is vague as to which areas of the Capitol Complex may be used for certain types of speech. The rule repeatedly refers to a distinction between areas “that qualify as traditional public forums” and other areas of the Capitol Complex. A “traditional public forum” is a legal term of art which requires a complex, fact intensive legal analysis debated by courts at all levels. Thus, the rule places the burden on public citizens and Capitol Police officers to make spontaneous determinations that DMS is apparently unable to make.

A vague grant of unbridled discretion, such as the proposed language at issue, leads to fear by the public that enforcers will use the rule to remove only those whose views they disagree with. Thus, even if the officers never actually abuse the power given to

them by the rule, it is likely to lead to self-censoring of speech and increased mistrust of the Capitol Police and state government.

Rule 60H-6.008

The proposed language for rule 60H-6.008(1) states that “[b]ecause the Capitol Complex is often a destination for children learning about their State government, visual displays, sounds, and other actions that are indecent, including gratuitous violence, gore, and material that arouses prurient interests, are not permitted in any portion of the Capitol Complex that is not a traditional public forum.”

By targeting expression that is “indecent, including gratuitous violence, gore, and material that arouses prurient interests,” the rule attempts to avoid falling afoul of the Constitution by invoking an obscenity standard that falls outside the protection of the First Amendment. However, the Supreme Court has held that speech cannot qualify as obscenity unless, “taken as a whole, [it] do[es] not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

Because any expression in the State Capitol Building or other areas of the Capitol Complex is typically aimed at influencing legislation and governance, it is of serious political value and in fact constitutes the most highly protected speech. Therefore, the proposed language invites decisions to eject protestors based on a subjective judgment about what they perceive as offensive. This authorizes, and in fact encourages, government employees to engage in viewpoint discrimination through arbitrary or haphazard enforcement. Viewpoint discrimination against core political speech is the most egregious type of First Amendment Violation and is subject to strict scrutiny even in nonpublic fora. *See Holloman v. Harland*, 370 F.3d 1252, 179-80 (11th Cir. 2004).

The Supreme Court has repeatedly held that even “[s]exual expression which is indecent but not obscene is protected by the First Amendment.” *See, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (overturning a statute which precluded adult access to pornographic telephone messages which were indecent but not obscene); *Butler v. Michigan*, 352 U.S. 380 (1957) (unanimously reversing the conviction of a defendant for violating a statute which banned any literature that was obscene, immoral, lewd or lascivious and therefore “reduce[d] the adult population of [the state] to reading only what is fit for children”).

Further, in the landmark First Amendment case *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court rejected the idea that the government could prohibit the wearing of profanity in a courthouse. Justice Harlan, writing for the Court, warned that

the “government might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”

Justice Harlan’s fear apparently came true in *Rubin v. Young*, 373 F. Supp. 3d 1347 (N.D. Ga. 2019), when Capitol Police in Georgia demanded that protestors remove buttons bearing the phrase “Don’t Fuck With Us, Don’t Fuck Without Us” and the logo of a sexual health organization in any public area of the Georgia Capitol Building. The plaintiffs were told the language was considered “obscene, vulgar, or profane, [and] was worn in the presence of minors.” The State defended the officers’ actions, arguing that the language was obscene and therefore fell outside the protection of the First Amendment. Applying the *Miller* test, the court rejected this argument, stating that it did not need to decide whether the first two prongs of the test were met, because the buttons did not lack serious political and scientific value. Because the speech restriction was content based, the court therefore applied strict scrutiny and enjoined the restriction.

Fundamentally, the proposed rules are legally infirm, expose officers and the state to litigation, and are simply unnecessary as the Florida Capitol’s long history of political protest demonstrates.

We hope the Joint Administrative Procedures Committee will weigh these concerns and reject the proposed rules.

Sincerely yours,

FIRST AMENDMENT FOUNDATION, INC.