

November 28, 2022

DELIVERED VIA EMAIL

Secretary Pedro Allende
Department of Management Services
4050 Esplanade Way
Tallahassee, FL 32399

Re: ACLU of Florida Comments in Opposition to Department of Management Services (DMS) Proposed Rules 60H-6.004, .005, .007, .008, .0085, and .011

Dear Secretary Allende and Department of Management Services:



On behalf of our more than 180,000 members and supporters, the American Civil Liberties Union (ACLU) of Florida submits these comments regarding the Department of Management Services' Proposed Rules 60H-6.004, .005, .007, .008, .0085, and .011. We respectfully request that these comments be included in the record of this rule hearing.

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The ACLU of Florida is a nonpartisan organization whose mission is to protect, defend, strengthen, and promote the constitutional rights and civil liberties of all people in Florida. The ACLU of Florida is committed to preserving First Amendment rights, including the right to protest and criticize the government. Such rights are crucial to a functioning democracy and have historically and recently been exercised to bring about meaningful change in Florida. To name a few: in the 1960s, students from Florida A&M University and local high schools held sit-ins at the Woolworth on Monroe Street to protest segregation.¹ In 2012, the Dream Defenders held a month-long sit-in at the Florida Capitol following George Zimmerman's acquittal in the shooting of Trayvon Martin.² Last year, Floridians held a rally outside the Florida State Capitol building to protest against vaccine and mask mandates.³ And just last month, protestors from across Florida gathered on the steps of the Old Florida State Capitol Building to protest life-sentences for non-violent crimes.⁴ Such protests are a crucial means of expressing

¹ Madison Finley and Olivia Lanaghan, *Black History Month: The Story of the Tallahassee Sit-in*, Florida State University Department of History (Feb. 13, 2021), <https://history.fsu.edu/article/black-history-month-story-tallahassee-sit>.

² Jim Rosica, *Dream Defenders Declare Social Media Time-Out*, Florida Politics (Sept. 29, 2015), <https://floridapolitics.com/archives/191369-dream-defenders-declare-social-media-time-out/>.

³ Valerie Crowder, *Hundreds Protest COVID Vaccine Mandates at Florida Capitol*, Health News Florida (Nov. 17, 2021), <https://health.wusf.usf.edu/health-news-florida/2021-11-17/hundreds-protest-covid-19-vaccine-mandates-at-florida-capitol>.

⁴ Brandon Spencer, *Protesters Take to the Florida Old State Capitol Building to Protest Against Unjust Life-sentences for Non-violent Crimes*, WCTV (Oct. 13, 2022), <https://www.wctv.tv/2022/10/13/protesters-take-florida-old-state-capitol-building-protest-against-unjust-life-sentences-non-violent-crimes/>.

disagreement or dissatisfaction with those in power and sparking thought and change, and they should be encouraged—not suppressed.

The Proposed Rules as written are unconstitutionally overbroad and vague, and would proscribe and chill a vast amount of speech protected under the First Amendment. Even in a nonpublic forum, speech restrictions must be “reasonable” and “capable of reasoned application.” *Minn. Voters All. V. Mansky*, 138 S. Ct. 1876, 1888, 1892 (2018). The Proposed Rules are not.

Below are a few of our concerns:



Section 60H-6.005(2) permits Capitol Police to remove for trespassing anyone in Buildings in the Florida Facilities Pool who “creat[es] a disturbance that is likely to impede or disrupt the performance of official duties or functions of public employees or officers.” This provision is incapable of reasoned application, because it targets speech *likely* to disrupt the performance of official duties. It leaves police to predict the future, and unconstitutionally allows them to remove people based on purely speculative harm. Moreover, a “disruption” could be any “interruption in the normal course or continuation of some activity, process, etc.”⁵ This could include anything that could make any employee pause, no matter how briefly. As the aforementioned protests demonstrate, nonviolent disruption is sometimes necessary to make government actors aware of—and responsive to—issues affecting people. Section 60H-6.005(2) grants Capitol Police unbridled discretion to silence any expression they believe might have any effect on public employees’ normal duties, and should be stricken.

Section **60H-6.005(4)** similarly allows for suppression of speech when “an individual or group is causing a disturbance that is likely to impede or disrupt the performance of official duties or functions of employees or officers working in the building or is likely to disrupt or prevent access by members of the public.” This provision suffers the same defects as Section (2), and could encompass anything from a demonstrator’s sign that an employee finds subjectively offensive to a protestor’s loud sneeze that distracts an employee who is on a call.

Additionally, the text of the provision itself indicates that reasoned application will be difficult, because it applies to Buildings in the Florida Facilities Pool, which is defined to include “the curtilage” of each building in the pool established by the Department, along with “any state-owned lands adjacent thereto.” 60H-6.004(2). The provision acknowledges that there are areas included in that definition that qualify as traditional public forums, and purports to exempt those areas from its prohibitions. But it leaves the public—and those tasked with enforcing the Rules—to figure out for themselves which areas are actually covered. For clarity and consistency, the definition of Buildings in the Florida

⁵ *Disruption*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/disruption>.



Facilities Pool should include only indoor offices and meeting spaces actively being used to conduct official business.

Section 60H-6.008 prohibits “visual displays, sounds, and other actions that are indecent,” which could include anything from an audible burp to a jacket bearing the words “Fuck the Draft.” In 1971, the Supreme Court in *Cohen v. California* held that the State could not constitutionally punish a man for wearing such a jacket in the hallway of a courthouse, where women and children were present. 403 U.S. 15, 16 (1971). The First Amendment simply does not tolerate the prohibition of “speech capable of giving offense” based solely on “the mere presumed presence of unwitting listeners or viewers.” *Id.* at 21. Furthermore, the prohibition on speech or actions that are “indecent” is too vague to put the public on notice as to what is prohibited. *Cf. id.* at 19 (“No fair reading of the phrase ‘offensive conduct’ can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.”).

Moreover, this provision applies to the entire Capitol Complex, which “includes that portion of Tallahassee, Leon County, Florida, commonly referred to as the Capitol.” Florida Statutes Section 943.60. It encompasses the whole “area bounded by and including Monroe Street, Jefferson Street, Duval Street, and Gaines Street.” Section 60H-6.008(1) exempts—as it must—those portions of the Capitol Complex that are “traditional public for[a].” But, as with the qualification applied to Buildings in the Florida Facilities Pool, it leaves the public, and the Capitol Police who are responsible for the Capitol Complex’s security, to determine which areas are covered.

Section 60H-6.011(2)(a) prohibits “[a]ll conduct in or on any Building in the Florida Facilities Pool that” “creates loud or unusual noise.” And **Section 60H-6.011(2)(3)** prohibits anyone from “establish[ing] a freestanding . . . sign . . . in a Building in the Florida Facilities Pool” without government approval. Like the other provisions discussed, these provisions serve no governmental purpose and can only lead to selective enforcement.

It is particularly important that the Department eliminate the vague and overbroad language from the Proposed Rules because it gives Capitol Police unbridled discretion to determine which speech is permissible and which must be censored. With such discretion, officers can eliminate any expression they disfavor, while permitting expression that supports their own personal views—or those of the public employees working in the affected areas. This viewpoint discrimination is not permitted even in nonpublic fora. Additionally, the breadth and vagueness of the Proposed Rules will chill protestors from gathering and expressing their views, out of fear they will be punished for doing so. Our democracy thrives and relies on the freedom to express dissident, unpopular, and even abhorrent viewpoints. While the government has some authority to regulate speech in nonpublic fora, the Proposed Rules exceed the bounds of such authority.

Thank you for your consideration of the above and please do not hesitate to contact me at kgross@aclufl.org if you have any questions or would like any additional information.

Sincerely,



Kara Gross
Legislative Director &
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