Comment of the Foundation for Individual Rights and Expression in response to December 1, 2022 Rule Hearing on Proposed Rule 60H-6.008, Florida Administrative Code

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Introduction

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought — the essential qualities of liberty.

The First Amendment protects political speech, including peaceful protest.[1] Indeed, speech concerning politics is "an area in which the importance of First Amendment protections is at its zenith."[2] Accordingly, FIRE writes today to share our serious concern that proposed rule 60H-6.008 will restrict and chill precisely this essential form of protected speech at the Florida Capitol Grounds.

[1] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *see also Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.").

[2] *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (internal quotation omitted).

We urge the Department of Management Services to abandon or amend the proposed rule to ensure the State does not censor political speech.

I. The proposed rule violates the First Amendment.

Proposed rule 60H-6.008(1) states:

> Because the Capitol Complex is often a destination for children learning about their State government, visual displays, sounds, and other actions that are indecent, including gratuitious [*sic*] 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.

The government may regulate speech in traditional or designated public forums by implementing reasonable content- and viewpoint-neutral rules that are narrowly tailored in furtherance of a significant government interest and leave open ample alternatives for expression.[3] Appropriately, the proposed rule expressly does not apply in the Capitol Grounds' traditional public forums. But the First Amendment also precludes the proposed rule's application in designated public forums — that is, other areas of the Capitol Grounds that the government has opened to public expression. The proposed rule references at least one type of designated public forum: meeting rooms available for non-governmental individuals or organizations.[4] Accordingly, the proposed rule violates the First Amendment in several ways.

a. The proposed rule is not content- or viewpoint-neutral.

It is well-established that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[5]

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[3] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (government may impose "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated 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'").

[4] Because the proposed rule seeks to limit only certain categories of speech in nonpublic forums — thereby permitting other categories of speech in nonpublic forums — it would paradoxically turn those nonpublic forums into public forums, or at least designated public forums. If the proposed rule is adopted, these newly created designated public forums would now be subject to the content-based speech restrictions imposed by the rule. The Department can consider, consistent with its longstanding purpose, certain areas of the Capitol Complex to be nonpublic forums, but it cannot impose content- or viewpoint-discriminatory rules in those areas in which it allows public expression.

[5] *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[6] Because it identifies only certain types of speech for prohibition — for example, "indecent" "sounds" — the proposed rule is an impermissible content-based restriction on speech.

FIRE reminds the Department that it is a "bedrock principle" underlying freedom of expression that an idea may not be limited "simply because society finds the idea itself offensive or disagreeable[.]"[7] This counter-majoritarian principle protects "insulting, and even outrageous, speech in order to provide adequate breathing space" for public debate,[8] recognizing those with authority "cannot make principled distinctions" in determining what speech is sufficiently "gratuitous" or "indecent" to suppress.[9] It is not up to the State of Florida to dictate what viewpoints are acceptable to express in the halls of democracy.

Further, the rule serves as a viewpoint-based restriction on speech. The government cannot prohibit "indecent" speech simply because it occurs on government property. In *Cohen v. California*, the Supreme Court limited the government's ability to limit "vulgar, profane, or indecent" speech in government buildings.[10] Robert Cohen was criminally charged after he wore a jacket with the words "Fuck the Draft" in a Los Angeles courthouse in 1968.[11] The Supreme Court rejected arguments that Cohen's jacket constituted unprotected speech — such as obscenity or fighting words — and found that those offended by Cohen's jacket could simply "[avert] their eyes."[12]

The proposal is squarely at odds with this controlling precedent and the Department should remove it from any final rule.

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[6] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

[7] *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

[8] *Boos v. Barry*, 485 U.S. 312, 322 (1988) (cleaned up).

[9] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[10] *Id.* at 16, n.1.

[11] *Id.* at 16.

[12] *Id.* at 21.

b. The proposed rule is not narrowly tailored in furtherance of a significant government interest.

The government may not restrict the political speech of adults by only permitting speech that is fit for children. The proposed rule would restrict the speech of adults by forbidding any speech that may be "indecent, including gratuitious [*sic*] violence, gore, and material that arouses prurient interests" in order to shield children from that content. The Supreme Court of the United States has long held that government cannot restrict the expressive rights of adults to "what is fit for children."[13] In *Butler v. Michigan,* the Court struck down a Michigan law that prohibited the distribution of publications that contributed "to the corruption of the morals of youth."[14] Graphic depictions of violence are protected by the First Amendment, even when they are visible to minors.[15]

In 1975, the Supreme Court in *Ernoznik v. Jacksonville* — a case about whether government could prohibit drive-in movie theaters from displaying movies containing nudity if the movie could be seen from a public roadway — held "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[16]

Not only is the proposed rule not narrowly tailored, but it also fails to further any legitimate governmental interest, let alone a significant one. As the Supreme Court has made clear, "the suppression of free expression" is not a legitimate governmental interest. *United States v. Eichman*, 496 U.S. 310, 315 (1990).

c. The proposed rule suffers from overbreadth and vagueness.

A government restriction on speech is overbroad when it not only restricts speech that can be proscribed but also restricts speech that enjoys constitutional protection.[17] Further, overbroad restrictions create a chilling effect on speech, and lead individuals to self-censor rather than risk government sanction. In the

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[13] *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

[14] *Id.* at 383.

[15] *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804–05 (2011).

[16] 422 U.S. 205, 213–14 (1975).

[17] *See U.S. v. Stevens*, 559 U.S. (2010) (In the First Amendment context, a law may be invalidated as overbroad if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" (citing *Wash. State Grange v. Wash. State Republican Party*, 522 U.S. 442, 449, n.6 (2008))).

context of speech on Capitol Grounds, an overbroad regulation on speech risks limiting and therefore harming our political discourse.

In *Gooding v. Wilson*, the Supreme Court found that a city's ordinance that prohibited individuals from uttering "opprobrious words or abusive language" was overbroad because the ordinance reached speech outside of the unprotected category of speech of "'fighting' words."[18] The types of speech that could be prohibited by the proposed rule — "gratuitious [*sic*] violence, gore, and material that arouses prurient interests" — go far beyond the strictly delineated boundaries of the categorical exceptions to the First Amendment.

Because the proposed rule does not track the narrowly defined categories of speech that are exempted from First Amendment protection, the rule is overbroad. A great deal of speech may be "gratuitously violent" without losing First Amendment protection. For example, a citizen testifying in support of a piece of legislation banning assault weapons may want to show or describe the damage that can be done by people wielding those weapons. Alternatively, a supporter of restrictions on abortion may want to use imagery of aborted fetuses in support of arguments that that practice should be banned. Some may describe either one of those depictions as "gory," but that alone is an insufficient reason to censor either at Florida's Capitol.

The proposed rule is vague because it fails to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[19] There is no way to discern what speech might be restricted on the grounds that it is "gratuitious [*sic*] violence, gore, and material that arouses prurient interests." What depictions of violence may be permitted before something becomes sanctionable "gratuitous violence"? What is the difference between displaying images of victims of wars and "gore"? How will the state make these determinations? These questions show that the proposed rule's prohibition on expression is impermissibly vague.

[18] 408 U.S. 518, 519, 528 (1972).

[19] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Conclusion

Given the serious First Amendment concerns outlined above, the Department must not adopt the proposal in its current form.

FIRE thanks the Department for its attention to our concerns. Of course, we would be happy to discuss our concerns with the Department further at its convenience.

Respectfully submitted,

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