

FIRST AMENDMENT LIABILITY Concerns For Disruptive Public Meetings

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Our intent is to provide local government attorneys and elected officials with an understanding of the limitations imposed by the 1st and 14th Amendments on public comment policies and practices.

First Amendment

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or **abridging the freedom of speech, or of the press; or **the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**”**

First Amendment right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. *Miller v. Goggin*, 672 F.Supp. 3d 14 (E.D. Pa. 2023)

“FORUM BASED APPROACH”

Government may restrict private speech on public property—though its latitude for doing so depends on the kind of “forum” it's regulating.

Accordingly, the “critical first step” in our First Amendment analysis is to “discern the nature of the forum at issue.” *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1236 (11th Cir. 2019).

Not every public forum is the same.

- **Traditional Public Forum**
- **Designated Public Forum**
- **Limited Public Forum**
- **Non-public Forum**

Traditional Public Forum

- Government controlled property such as public streets and parks. **“Because those settings 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.”** *McDonald v. City of Pompano Beach, Florida*, 20-60297-CIV, 2021 WL 3741646 (S.D. Fla. Aug. 24, 2021). In fairness, the McDonald court was quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).
- Any infringement on free speech rights must serve a **compelling** state interest and must be **narrowly drawn** to achieve that end.



Non-Public Forum

Government-controlled property that is not open to the public for expressive activity.

Airports and military bases are examples.



Designated Public Forum

- Government property that has **not traditionally** been regarded as a public forum, even though it has been **intentionally opened up for that purpose**.
- Supreme Court has held that this includes college campus meeting rooms, municipally-owned theater, and school board meetings. Facebook and X are also examples, according to the 2nd Circuit.
- As with traditional public forum, government can impose **time, place, and manner** restrictions in designated public forum so long as regulations are **content-neutral, narrowly tailored** to achieve significant government interest, and leave open ample **alternative channels** of communication. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46(1983).
- Designating a portion of the agenda for public comment can be considered a designated public forum, or a limited public forum.



Limited Public Forum

- The “limited public forum,” consists of places in which “a government has reserved a forum for certain groups or for the discussion of certain topics.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015) (cleaned up).
- Unlike a designated public forum, which “grants general access to the designated class,” a limited public forum “can be set up to grant only selective access to that class.” *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017).
- Some courts have also referred to the limited public forum as a “subset” of the designated public forum. See *Hotel Emps. & Rest. Emps. Union, Loc. 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002).



Limited Public Forum, cont.

- In a limited public forum, certain restrictions on speech are permitted under the First Amendment, so long as they are reasonable and viewpoint-neutral. *Madsen v. City of Lincoln*, 4:21CV3075, 2021 WL 6201232 (D. Neb. Dec. 8, 2021)
- Reasonable time, place, and manner restrictions are allowed in the furtherance of the governing body's significant governmental interest in conducting orderly, efficient, and productive meetings.
- Content-based discrimination is permissible if it preserves the purpose of the limited forum.
 - Leading the Pledge of Allegiance
 - Invocation – *Gundy v. City of Jacksonville Florida*

Allowable Limitations in Limited Public Forums – Time, Place, and Manner

- **Time Limits.** Allowing for “public comment” agenda items doesn’t require a public body to allow every person to “comment.” Limiting the total time devoted for public comment as well as limiting the time of each speaker to three minutes has been deemed a reasonable time restriction. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007).
- Just don’t name the kill switch after the local gadfly.
- Enforce even-handedly.



Time Limit

You’ve reached your limit on Twitter.

One More Minute

Remind Me in 15 Minutes

Ignore Limit For Today

Cancel

Allowable Limitations in Limited Public Forums – Time, Place, and Manner

- **Place.** There is usually a place on the agenda for “Public Comment.”
 - Content-related restrictions on speech can be allowed for speakers who drift off topic when addressing the board during a specific agenda item.
 - Content based restrictions are also allowed if the public meeting is not the appropriate venue for the topic. Policies on employee complaints can be invoked to keep people from addressing a governing body during public comment to complain about specific employees due to employee policies.

Allowable Limitations in Limited Public Forums – Time, Place, and Manner

- **Manner.** Any restrictions that are not directed at **actual disruptive conduct** or the orderly administration of the meeting are subject to challenge.
- Even “hate speech” - intended to intimidate or harass another person or persons based on their actual or perceived status - is only actionable as a criminal matter if the speaker “knowingly places another person in fear of **imminent lawless action** directed at such person or that person’s property and such words or conduct are **likely to produce bodily injury to that person or damages to that person’s property.**” C.R.S. 18-9-121

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Antisemitic trolls test the limits of free speech — with Lakewood the latest target

Verbal assaults during public comment, a nationwide occurrence, have also hit Durango, Wheat Ridge



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By JOHN AGUILAR | jagular@denverpost.com | The Denver Post
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NEXT WITH KYLE CLARK

Antisemitic remarks overtake city council meeting's public comment

Speakers identified themselves with names like Andy Zemite, Judy Stroyer and Sieg Heil.



Wheat Ridge City Council meeting November 13, 2023

Author: Marshall Zeltiger
Published: 4:40 PM MST November 14, 2023
Updated: 7:40 PM MST November 14, 2023

WHEAT RIDGE, Colo. — Antisemitic rants overtook public comment during a city council meeting in Wheat Ridge.

It is the most recent example in a string of public comment takeovers by individuals promoting an antisemitic group's website.

Westword

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GOVERNMENT

Denver Elementary Students Suffer Racist Slurs During City Council Meeting

"That they had to endure these racist actions and words in our chamber brings us pain."

By Hannah Metzger May 14, 2024



Clowns, bullfrogs and spotted two-headed children plus other words met with racist slurs from a remote viewer while testifying to the Denver City Council. Denver City Council livestream

Beware Subjective Restrictions

“Abusive”

“Profane”

“Antagonistic”

“Frivolous”

“Disrespectful”

“Harassing”

“Threatening”

“Offensive”

“Intolerant”

“Inappropriate”

“Obscene”

“Personally-directed”

“Irrelevant”

Problematic Restrictions

Unless it is disruptive, **viewpoint discrimination** in limited public forums is wholly impermissible and never allowed.

- “It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592, (1969).

Signs. Signs, so long as they don’t block anyone’s view, should be welcomed. They are most certainly free speech, and holding a sign enables a speaker to express their view without the need to take up precious time at the podium.

Insisting on names and addresses. City or township is okay, but not specific address as a condition of speech.

Banning disruptive individuals from future meetings.
Quintessential prior restraint.

Problematic Restrictions

Cannot exclude someone from future meetings based only on disruptive behavior. *Walsh v. Enge*, 154 F. Supp. 3d 1113, 1128 (D. Or. 2015).

- Although - Upholding a suspension for disruptive conduct. *Dyer v. Atlanta Indep. Sch. Sys.*, 852 F. App'x 397, 402 (11th Cir.), *cert. denied*, 142 S. Ct. 484 (2021).

Can exclude someone based on safety concerns. *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 144 (3d Cir. 2017); *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999).

- Upholding restraining order for threatening statements made to City Attorney on multiple occasions which included his home address. *City of Los Angeles v. Herman*, 54 Cal. App. 5th 97, 104 (2020) (“True threats are not constitutionally protected speech”).
- Safety concerns must be documented in the record. *Reza v. Pearce*, 806 F.3d 497, 507 (9th Cir. 2015).

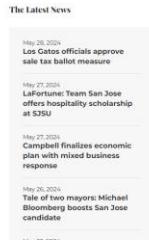
Application of Subjective Restrictions



APPLYING TIME, PLACE AND MANNER RESTRICTIONS

FORCIBLE REMOVAL

- Arrest requires **probable cause** that a **crime** has been committed, not just that a rule of decorum of civility has been broken.
 - **Disrupting lawful assembly.** 18-9-108, C.R.S. “A person commits disrupting lawful assembly if, intending to prevent or disrupt any lawful meeting... significantly obstructs or interferes with the meeting ...by physical action, verbal utterance, or any other means.” **There has to be an actual significant disruption.** *People v. Nozolino*, App.2014, 350 P.3d 940, certiorari denied 2015 WL 2394032. (Statute requires conduct that effectively impairs, interferes with, or obstructs a meeting in a ***consequential, significant or considerable manner.***)
 - **Disorderly conduct.** C.R.S. 18-9-106 “intentionally, knowingly, or recklessly... makes an ... obviously offensive utterance, gesture, or display in a public place AND the utterance, gesture, or display tends to incite an **immediate breach of the peace**; or makes an unreasonable noise in a public place
 - **Criminal tampering** - a person commits the crime of second degree criminal tampering if he tampers with property of another with intent to cause injury, inconvenience, or annoyance to that person or to another.
- Police cannot lay hands on anyone without probable cause to arrest. Don't ask them to.



POLITICS & GOVERNMENT
Bellingham City Council suspends remote public comment periods after hate speech incidents

BY ROBERT MITTENDORF
 UPDATED FEBRUARY 05, 2024 12:21 PM



APPLYING TIME, PLACE AND MANNER RESTRICTIONS

VIRTUAL MEETINGS

- Forum analysis – and allowable restrictions – remain the same.
- Pros
 - Accessibility
 - More control over content-neutral time, place, manner enforcement
- Cons
 - Accessibility
 - More contingencies to plan for (screen-sharing, chats)

Potential Rules

- Agenda items only?
- On camera only?

Liability



Government officials are generally immune from liability for civil damages so long as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harris v. City of Valdosta, Ga.*, 616 F. Supp. 2d 1310 (M.D. Ga. 2009).



Liability can attach if a “policy” is the moving force behind the deprivation, however. This is where the words in your policies and the application becomes important.

Liability

- Burden of proof is on the public body. Public body must prove the burden on free speech is narrowly tailored to serve a significant government interest. *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp 3d 760 (M.D. Tenn. 2020).
 - Boulder paid \$10,000 to a repeat speaker who was arrested after stripping to his boxer shorts while at the podium during public comment over 10 years ago.
 - Cleveland, Ohio paid to settle a federal suit (\$500 plus legal fees\$\$\$) filed after the Cleveland City Council president cut off the microphone when a speaker began reading a list of campaign contributions from the president's political action committee and when another speaker called the Mayor and councilmembers "pompous and arrogant."
 - The Pennbury, PA school board recently paid out \$300,000 to settle a federal suit stemming from comments of four parents being cut short before their time was up

AVOIDING LIABILITY

- Know your rules. Follow them.
- If you don't have rules, get some rules.
 - Is Public Comment limited in the rules to a certain amount of time?
 - Is the Public Comment portion of the agenda limited to topics that are not on the agenda? Does it say that?

AVOIDING LIABILITY

- Chair's role.
 - Remind speaker of the rules regarding time, place (on the agenda), topic, and rules regarding decorum and civility.
 - Employ the cut off switch or direct someone else to.
 - Call a recess.
 - Ask for the presence of law enforcement, but don't direct that any arrests be made.
- No one else should exercise the Chair's prerogative.

AVOIDING LIABILITY

- If the Chair is the only one who can cut off a speaker, don't jump in to help.
- Chair must follow the rules courteously.
- Chair must follow rules even-handedly. Presiding officers should not cut off only those speakers who are saying things with which the chair disagrees and allow those making positive or innocuous comments to prattle on.
- Add a provision about signs to your rules. Signs are silent free speech that don't eat up time on the agenda.
- No one else should exercise the Chair's prerogative.

AVOIDING LIABILITY

Law enforcement's role

- Arrest. Requires probable cause of a crime.
 - Disrupting lawful assembly
 - Disorderly conduct
 - Destruction of property
- Safety. Law enforcement can direct **the public body** to pause the meeting and leave the room.
- Have a plan. Let law enforcement execute it.

Free Speech Rights of Elected Officials and Staff

Municipal employees and elected officials do not relinquish their citizenship when they take on those rules, so they cannot be denied their constitutional rights. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976)

“Speech by citizens on matters of public concern lies at the heart of the First Amendment, and public employees do not renounce their citizenship when they accept employment.” *Knopf v. Williams*, 884 F. 3d 939, 952 (10th Cir.)