

# **First Amendment Issues for Counties**

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# The First Amendment

## *Freedom of Speech*

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County Attorneys Association of the State of New York

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*“Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.”*

William O. Douglas

# The First Amendment

## TEXT

### Freedom of Speech

Congress shall make no law respecting 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 redress of grievances.

## CORE POINT

### Government action only

The First Amendment restrains government, not private speakers or private platforms.

## INCORPORATION

### State and local governments

Applied to the states and local governments through the Fourteenth Amendment.

## PRACTICAL LENS

### Simple text. Complex doctrine.

A short constitutional command has produced one of the broadest and most contested bodies of law in public-sector practice.

# Types of Free Speech Claims

## MOST COMMON IN LOCAL GOVERNMENT PRACTICE

### Retaliation claims

- Adverse employment actions
- Student speech
- Police encounters

## REGULATION AND RESTRAINT

### Speech restrictions

- Time, place, and manner restrictions
- Sign ordinances
- Social media policies

*For local government defense, prevention often starts with policy review before litigation begins.*

# Free Speech Protection Is Expansive

OVERVIEW

## PROTECTED EVEN WHEN OFFENSIVE

### Examples

- Flag burning
- Funeral protests
- Nazi or KKK marches

## UNPROTECTED OR REGULABLE CATEGORIES

### Narrow exceptions

- Clear and present danger
- Fighting words and true threats
- Obscenity
- Defamation

*The rule is broad. The categories outside protection are relatively narrow.*

# Free Speech Protection Is Expansive

## EXPRESSION

### Speech can be conduct

Words, symbols, clothing, armbands, and silent protest can all carry expressive meaning.

## COMPELLED SPEECH

### The right to speak includes the right not to speak

The First Amendment protects the freedom not to speak or endorse a message.

## CONTEXT MATTERS

### Some settings allow more regulation

- Schools: legitimate pedagogical concerns
- Prisons: legitimate penological interests
- Parades and protests: time, place, and manner

# Public Employee Speech

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*The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting upon a matter of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.*

*Pickering v. Board of Education, 391 U.S. 563, 568 (1968)*

The core tension: government is both sovereign and employer.

# Elements of First Amendment Retaliation

## ELEMENT 1

### Protected speech

Speaking as a citizen on a matter of public concern.

## ELEMENT 2

### Adverse action

An employment action that would deter a similarly situated employee of ordinary firmness.

## ELEMENT 3

### Causation

The speech was a motivating factor in the adverse employment decision.

## ADVERSE ACTION STANDARD

### Objective test

The focus is whether the employer response would deter ordinary firmness.

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*retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.*

*Zelnik v. Fashion Institute of Technology, 464 F.3d 217, 225 (2d Cir. 2006)*

## DEFENSE 1

### Same-decision defense

Would the defendant have taken the same adverse action regardless of the protected speech?

## DEFENSE 2

### Pickering balancing

Is the speech likely to disrupt government operations, and does that disruption outweigh the value of the expression?

Practical defense point: gather policies, public records, and collateral proceedings early.

# Garcetti v. Ceballos

LANDMARK

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*When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.*

547 U.S. 410 (2006)

Official duties became the key limiting principle in the public-employment cases.

# Post-Garcetti Guideposts

*Key cases shaping the official-duties analysis*

2010

## Weintraub

Union grievance about classroom discipline was within a teacher's core duties.

2011

## Jackler

Refusal to retract a truthful police report was treated as citizen speech.

2011

## Bowie

D.C. Circuit criticized a broad civilian-analogue approach.

2014

## Lane

Subpoenaed, truthful testimony outside ordinary duties was protected.

2016

## Gibson

Reporting misconduct within job duties was not protected activity.

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**Plaintiff must also show she was “actually chilled” in the exercise of her First Amendment rights.**

## EMPLOYMENT CONTEXT

### **Chilling is usually presumed**

The relationship between employer and employee does much of the work.

## ARREST CONTEXT

### **The arrest itself can establish chill**

In police-encounter cases, the chilling effect is typically presumed from the arrest.

# Government Regulation of Speech

## QUESTION 1

Is the speech protected by the First Amendment?

## QUESTION 2

What is the forum or place where the speech occurs?

## QUESTION 3

Does the challenged restriction satisfy the applicable standard?

*Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985)*

## REGULABLE CATEGORIES

### Speech may be restricted when it is

- Obscene
- Defamatory
- A clear and present danger
- Fighting words
- A true threat

## VIRGINIA V. BLACK

### True threats

A serious expression of an intent to commit unlawful violence to a particular individual or group. The speaker need not actually intend to carry out the threat.

*Context is crucial to identifying a true threat.*

# Levels of Scrutiny

## Rational Basis

Rationally related to a legitimate government purpose.

## Intermediate Scrutiny

Substantially related to an important government purpose.

## Strict Scrutiny

Narrowly tailored to a compelling government interest, with no less restrictive alternative.

# Four Categories of Public Forums

## Traditional Public Forum

Streets, sidewalks, and parks.  
Content-based: strict scrutiny.  
Content-neutral: intermediate scrutiny.

## Designated Public Forum

Places opened by government for expressive activity.  
Same standards as traditional public forums.

## Limited Public Forum

Opened only for certain groups or topics.  
Restriction must be viewpoint neutral and reasonable.

## Nonpublic Forum

Not opened to public expression.  
Restriction must be viewpoint neutral and reasonable.

## DEFINITION

### **Classic public spaces**

Streets, sidewalks, and parks are the paradigmatic forums for public expression.

## CONTENT BASED

### **Strict scrutiny**

The restriction must be narrowly tailored to a compelling government interest.

## CONTENT NEUTRAL

### **Intermediate scrutiny**

Government may impose reasonable time, place, and manner restrictions.

# Traditional Public Forum Example

## Grand Canyon National Park

Example of a content-neutral, reasonable restriction on the location of speech.



# Designated Public Forum

## DEFINITION

### Opened by the government

Places not traditionally open to assembly and debate, but opened by government for expressive activity, such as a school or village hall.

## CONTENT BASED

### Strict scrutiny

Same rule as traditional public forums.

## CONTENT NEUTRAL

### Intermediate scrutiny

Government may regulate time, place, and manner in a reasonable way.

## DEFINITION

### **Not opened to public expression**

Public property not traditionally opened for expressive activity, such as a school or office building.

## STANDARD

### **Reasonableness + viewpoint neutrality**

Restrictions must be viewpoint neutral and reasonable in light of the forum's purpose.

## NOTE

This is a more demanding inquiry than ordinary rational basis review.

## DEFINITION

### **Open, but only for limited purposes**

Government opens a nonpublic forum but limits expressive activity to certain groups or certain topics.

## EXAMPLE

### **Public comment at a school board meeting**

The forum is open for speech, but only within the bounds the government has defined.

## STANDARD

### **Same test as a nonpublic forum**

Restrictions must be viewpoint neutral and reasonable in light of the forum's purpose.

**The First Amendment does not regulate government speech.**

When the government retains final approval authority over a message, the Free Speech Clause may be inapplicable.

*Pleasant Grove City v. Summum, 555 U.S. 460 (2009)*

# Sign Ordinances After Reed

*Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015)*

## KEY HOLDING

### **Message-based distinctions are content based**

Treating ideological, political, and temporary directional signs differently triggered strict scrutiny.

## PRACTICAL CONSEQUENCE

### **Most message-based categories will fail**

If an ordinance turns on what a sign says, the municipality should expect strict scrutiny and substantial constitutional risk.

For local government counsel: review sign ordinances for message-based distinctions now, not after suit is filed.

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*“It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion.”*

*New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)*

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