HOT TOPICS IN FIRST AMENDMENT LAW FOR TOWNS

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Many of the First Amendment issues discussed here involve the public forum doctrine, an analytical tool used by courts to determine the constitutionality of local government speech restrictions on government property. The public forum doctrine has been called a “complex maze of categories and subcategories” used to determine whether a government restriction on expressive use of a government place or resource is subject to strict or lax constitutional scrutiny. See Melville B. Nimmer, Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment §409[d], at 4-70 (2d ed. 1984). In making the determination of whether a forum is either public or non-public, courts examine the characteristics of the property and the context of the property’s use, including location and purpose. Courts will also consider the government’s intent in developing the space, its need to control expressive conduct on the property, as evidenced by the policies it has created to regulate the use of the space, and the historical or traditional use of the property as related to expressive activity. The various “forums” or “fora” involve the following:

1. **Traditional public fora** – like streets, sidewalks, parks, and plazas – trigger strict scrutiny analysis and the greatest level of First Amendment protection for content-based expression; any such regulation must serve a compelling state interest and be narrowly drawn to achieve that end. Any viewpoint restrictions are prohibited. The government may regulate the time, place, and manner of expressive activities so long as those regulations “are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.” *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

2. **Designated public fora** – created by the local government for expressive activity such as public meeting facilities or municipal bandstands, amphitheaters or auditoriums – will meet the same standards of judicial review. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

3. **Limited public forum** – which are places intentionally reserved for certain activity such as the public areas of city hall or after-hours at public buildings or schools – government entity may impose restrictions on expressive activity so long as they are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Summum*, 555 U.S. at 470.

4. A **nonpublic forum** is a government space that “is not by tradition or designation a forum for public communication.” *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Spaces in which “the government is acting as a proprietor, managing its internal operations” fall into this category, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015), such as jails, *Adderley v. Fla.*, 385 U.S. 39, 47–48 (1966), the interior of police departments, *First Def. Legal Aid v. City of Chi.*, 319 F.3d 967, 968 (7th Cir. 2003), administration buildings, *Lavite v. Dunstan*, 932 F.3d 1020, 1029 (7th Cir. 2019) (county administration building housing with 20 departments where evidence included it had never previously been used for political activity, assembly, or other expressive activity), as well as polling places, *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1979-1880 (2018). Here, “the government has much more flexibility to craft rules limiting speech” in a nonpublic forum “so long as the distinctions drawn are reasonable in light of the purpose served by the forum and...

I. **PUBLIC INPUT ISSUES**

A. **ISSUES**

1. One of the valued passions of many Americans is personal participation and involvement in the governmental process—which often includes speaking during government meetings. Conducting meetings in the public eye with the opportunity for citizen input provides direct access to government decision-makers. That access allows members of the community the opportunity to raise their concerns or express their opinions in front of government officials who often have a direct impact on their everyday lives and on their community.

2. Yet, when government meetings are made public and/or include “public input” or “public comment” sessions, limits may be needed so that government business can be accomplished. Preventing disturbances during public meetings is essential to achieving the dual goals of fostering citizen participation and ensuring the effective accomplishment of government business.

B. **LEGAL LANDSCAPE**

1. Wisconsin’s Open Meetings Law: “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.” Wis. Stat. § 19.81(1).

   a. Applies to every “meeting” of a “governmental body.” Wis. Stat. § 19.83.

   b. Courts presume that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987). An “open session” is defined in Wis. Stat. § 19.82(3) as “a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.”

   c. Open Session Requirements May Include Citizen Participation: In general, the open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies but does not
require a governmental body to allow members of the public to speak or actively participate in the body's meeting. Although it is not required, a governmental body may set aside a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2) and 19.84(2). Such a period must be included on the meeting notice.

2. First Amendment and Public Meetings


b. Limitations on Public Comment During Public Meetings

i. Closed Session Meetings: Here, the government will have the clearest ability to regulate that speech through both the subject matter and the speaker’s identity as long as the regulations are reasonable in light of the forum's purpose, and they are viewpoint neutral. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985); DeGrassi v. City of Glendora, 207 F.3d 636 (9th Cir. 2000).

ii. Meetings with Limited Agendas & Public Speaking Topics: Other meetings that are ripe for government limitations on speech are public meetings that are generally limited to the business of a public body. Or, public hearings directed toward one topic or class of topics, such as a zoning hearing. These types of meetings can be considered a limited public forum because the government has opened up a meeting to certain speakers on a specialized topic.

1. Mesa v. Hudson Cnty. Bd.: Chairman of a county board meeting prevented a speaker from making his statement about the budget when the budget was not on the agenda and ordered him removed when the speaker refused to cooperate and comply; the court found there to be no violation of the speaker's First Amendment rights in finding that a governmental body may confine meetings to specified subject matter and remove a speaker who is disruptive or who otherwise fails to address the topic at
issue in order to maintain orderly progression. 2011 WL 4592390 (D.N.J. 2011).

2. *Curley v. Philo*: A school board limited speech about a particular topic at a meeting; the court held that a parent’s First Amendment right to free speech was not violated, in that the meeting was a limited public forum, and the board had already heard many comments about the topic previously. 2009 WL 2152323 (N.D. N.Y 2009).

3. *Jones v. Heyman*: The Mayor attempted to confine a speaker to an agenda item in a city commission meeting, and had the speaker removed by police when the speaker appeared to become disruptive; the court held that the mayor’s action constituted a reasonable time, place, and manner regulation, and did not violate the speaker's First Amendment rights. 888 F.2d 1328 (11th Cir. 1989).

3. **Meetings with Open Public Comment**: Public meetings that have an open public comment section to discuss anything would be considered “designated public fora” entitled to the most protection.

   a. *Surita v. Hyde*: City mayor violated the First Amendment rights of an opponent of a city towing ordinance when he intentionally barred her from speaking at a city council meeting based on her prior speech, which he claimed had addressed the city's community liaison officer in a threatening manner. The mayor barred the content of the opponent’s speech, regardless of whether he agreed or disagreed with the viewpoint she was going to expound, and even if the restriction were content neutral, a total bar on her speech was not a valid time, place, or manner restriction. 665 F.3d 860 (7th Cir. 2011).


      i. Plaintiff appeared during the public comment portion of a county board meeting. Specifically, Theyerl claimed that a county employee in the County Airport Office had been watching pornography on his work computer. (Notably, only one employee worked at the Airport Office.) Plaintiff informed the presiding officer that he would provide a list of 13 witnesses who could support his allegations. After the meeting, the county investigated the allegations and discovered no evidence to support the same. Nor did plaintiff forward the list of 13 witnesses. The presiding officer feared that plaintiff would repeat the allegations during subsequent board meetings if called
on to speak during public comment. Consequently, plaintiff was informed that he could not speak at board meetings until he produced the list of 13 witnesses.

ii. An initial letter was sent to the plaintiff on July 11, 2012, indicating that the county “conducted a preliminary investigation into your allegation and have found nothing that leads it to believe that [your allegations] merit further investigation.” The letter also informed plaintiff that “in order for any investigation of your allegations to proceed, you must provide me with [among other things] the name, address, and telephone number of each of the thirteen witnesses you claim to have.” The letter concluded by informed plaintiff that “it is [his] responsibility to provide the information necessary to proceed with an investigation” and that if he “does not accept that responsibility,” the county “cannot permit [him] to continue making unsupported, defamatory allegations at county board meetings and will not recognize you to speak during public comment at any county board meeting.”

iii. After the lawsuit was initiated, the county sent a follow-up letter explaining to the plaintiff that he “may speak during public comment on matters which are not the subject of your pending lawsuit against Manitowoc County… [and that] any statements you wish to make…regarding your pending lawsuit will need to be presented through the parties’ legal counsel and the court.”

iv. The county noted that “the purpose of public input is not to provide a means for interactive debate, cross-examination, personal attacks, or name-calling, and statements made during public input should not be disruptive or unduly repetitive.”

v. The court then held the restriction was content-based and unconstitutional under the applicable standard: “the ban here went well beyond a regulation on the manner of [plaintiff’s] speech. By prohibiting [plaintiff] from speaking at all, on any subject, the restriction cannot reasonably be viewed as a regulation on the time, manner or place of the speech.” The restriction was overly broad for three reasons. First, plaintiff was denied the opportunity to speak on all topics. Second, the presiding officer could not have reasonably inferred that plaintiff would only discuss the alleged pornography because plaintiff “had a history of speaking on a wide range of topics pertaining to county government.” Third, the assumption that plaintiff’s speech would have been repetitive was unsound because plaintiff may have discussed other issues relating to the county’s investigation or his allegations.
vi. The court also found the restriction was unconstitutional even if deemed content-neutral. The restriction constituted a complete ban on anything that plaintiff might say because the presiding officer refused to recognize plaintiff until he provided contact information for the thirteen witnesses. Such a restriction was overly-broad and also failed intermediate scrutiny applicable to content-neutral restrictions.

4. **Common Issues:**

   a. **Time Limits:** Limitations on the amount of time that an individual can speak during a public meeting have been considered content-neutral restrictions that satisfy judicial scrutiny. In *O'Neill v. Richland County Bd.*, the plaintiff was given an opportunity to speak near the end of the county board meeting, but was ultimately denied the opportunity because the board adjourned the meeting after a prolonged discussion of other items on that meeting’s agenda. The Seventh Circuit affirmed the district court’s denial of the First Amendment claim, holding that adjourning a meeting when board members were tired after a long and difficult discussion was a content-neutral regulation of time and place of the plaintiff’s speech and that it “was narrowly tailored to the significant government interest in the orderly and efficient management of the board’s business.” 114 F. App’x 745, 746 (7th Cir. 2004).

   b. **Irrelevant Speech:** Removal of an individual from a public meeting for failure to restrict comments to the only topic for consideration at the meeting has been found to be a content-neutral restriction that satisfied intermediate scrutiny. *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377 (2008).

   c. **Repetitive Speech:** Bans on repetitive speech during public meetings have been found to be content-neutral restrictions that satisfied intermediate scrutiny. In *Olasz v. Welsh*, a city council president had a council member removed from the meeting and filed criminal charges against him in an attempt to constrain the member’s constant interruptions; the court held that these actions constituted appropriate time, place, and manner regulations, and thus did not violate the member's First Amendment free speech rights. 301 Fed. Appx 142 (3d Cir. 2008).

   d. **Privacy Concerns:** Rules barring speakers from discussing private issues among citizens have been found to be content-neutral restrictions. See *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004) (“[o]ne would certainly not expect the forum of a Township meeting to include ... arguments about private disputes involving town citizens”)
e. **Harassment/Insults**: Rules barring vulgar or harassing remarks about others during public meetings have been found to be content-neutral restrictions that satisfy intermediate scrutiny. In *Kirkland v. Luken*, the Mayor’s direction that council meeting attendee’s microphone be turned off and that attendee stop speaking after attendee used the term “Nigganati” during open forum did not violate attendee's right to free speech; mayor, charged with the duty to preserve order, had compelling state interest in conducting orderly meetings of the city council, mayor correctly construed the term “Nigganati” to be a highly offensive and degrading racial slur when used by any member of the public at a particularly heated government meeting, and mayor's actions taken against attendee were narrowly tailored to achieve compelling interest of preventing attendee from inciting those in attendance at the meeting to become unruly and to prevent the meeting from becoming disorderly. 536 F. Supp. 2d 857 (S.D. Ohio 2008).

f. **Residency Requirement**: Courts have held that residency requirements are content-neutral restrictions designed to promote orderly and efficient conduct of meetings. *See Rowe v. City of Cocoa, Fla.*, 358 F.3d 800 (11th Cir. 2004).

g. **Maintaining Order and Public Safety**: In *Sandefur v. Village of Hanover Park*, a correctional officer with a handgun concealed in his jacket (Sandefur) addressed a village board at a public meeting in a “very animated” way. When village officials became aware of the handgun, two village police officers escorted him out of the meeting where they searched him, examined his credentials and removed his handgun. During this search, Sandefur was “a bit loud,” upset, and “agitated,” and he was ultimately told to leave the premises under threat of arrest for trespassing and was prohibited from finishing his presentation before the board. The court noted that it was well-settled that the village had significant interest in maintaining order and public safety at its meetings, thus the initial decision to remove Sandefur was appropriate. The court also held the decision to keep Sandefur from the meeting to be appropriate because allowing a loud, agitated, and armed back into the meeting could have further disrupted the meeting. Additionally, the village left sufficient alternative channels of communication open when it told Sandefur he could speak at the next meeting or could write or e-mail the board members. 2012 WL 2062594 (N.D. Ill. June 7, 2012).

h. **Prohibiting Critical Comments**: In *Baca v. Moreno Valley Unified Sch. Dist.*, where a school board prohibited comments critical of school district employees at open session of board meetings, the policy was not narrowly drawn so as to achieve the district's purported compelling interest in regulating its own meetings thereby violating First Amendment rights. 936 F. Supp. 719 (C.D. Cal. 1996).
i. **Defamatory Comments:** In *Felton v. Griffin*, 185 Fed. Appx. 700 (9th Cir. 2006), plaintiff sued the City, Mayor, and police officers challenging the validity of the City Council’s decorum rule (“Any person making personal, impertinent, or slanderous remarks, or who becomes boisterous while addressing the Council, or who interferes with the order of business before the Council, and who fails, upon request of the presiding officer to cease such activity, shall be barred from further audience before the Council, unless permission to continue is granted by a majority vote of the Council.”). The court held “[t]he First Amendment does not protect slander. Thus, the Council’s rule banning it is permissible.” *Id.*

II. **FIRST AMENDMENT “TESTERS”**

A. **ISSUES:** Citizen “watchdog” behavior occurs in multiple ways, including two forms of videoing public employees. Some, known as “First Amendment Auditors,” have been making requests to visit municipalities in order to test or “audit” their right to video and photograph in public spaces including a public building’s interior public spaces, as well as occurrences of making *unannounced visits* of such interior public spaces in order to test their right to video or photograph (with their smartphone, camera or GoPro). In addition, citizens continue to record police activity particularly at traffic stops or other public areas. First Amendment audits have grown in recent years and simple searches on Google, YouTube and the like will reveal a wide assortment of video examples and stories. There is also a rise of claims and lawsuits when such individual feels their First Amendment rights have been infringed by the public employee’s response such as stopping them, banning them, removing them or otherwise resisting their First Amendment right.

B. **LEGAL LANDSCAPE:**

1. Auditors have typically exercised their First Amendment rights during engagement with law enforcement but in the past year have broadened their activity across other aspects of public government such as offices of clerks, treasurers, and administration as well as public libraries. Although the form of expression is more modern, it is just another step in the evolving desire of citizens to seek the right of access to government property to engage in various expressive pursuits—whether that expressive pursuit is leafletting, soliciting, wearing political buttons, or gathering information for news dissemination.

2. While such public places historically involved streets, sidewalks, parks, and public squares, they also include as pertinent here lobbies of government buildings, public hallways and corridors and other interior areas of public buildings. Various areas of public buildings are open to the public. By contrast, “nonpublic forums” can include any areas into which, under ordinary circumstances, visitors must be invited before entering such as offices, cubicles, and workspaces as well as any other hallways or areas identified and marked as being nonpublic such as “employees
only” or “authorized personnel only.” In sum, if the area, room, or building is open to the public, it has the potential to be open to filming.

3. Under the First Amendment the public has the right to film public employees in public places, whether viewed as a form of pure speech, “news gathering” and/or “information gathering.” Although the Supreme Court has not addressed it head-on, its precedent is ominous for any government prohibition or heavy restriction. The Court has recognized a “paramount public interest in a free flow of information to the people concerning public officials.” Garrison v. State of La., 379 U.S. 64, 77 (1964). “[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

4. Such protections have been recognized in the Seventh Circuit. “Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are ‘included within the free speech and free press guarantee of the First and Fourteenth Amendments.’” Am. C.L. Union v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012). The court stated:

The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or notetaking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording. Id. at 595-596.

5. Generally, the federal courts have upheld the First Amendment rights of the “testers” whose activities can be broadly seen as “news gathering” or “information gathering.” See, e.g., Askins v. U.S. Dep’t of Homeland Sec., 899 F.3d 1035, 1044 (9th Cir. 2018) (“This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places.”); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017) (as a matter of apparent first impression, recording of police activity is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions); W. Watersheds Project v Michael, 869 F.3d 1189, 1197 (10th Cir. 2017) (“We agree with the Seventh Circuit that ‘the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government.’”) (citing Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012)); Fields v. City of Phila., 862 F.3d 353, 358 (3d Cir. 2017) (“The First Amendment protects actual photos, videos, and recordings, and for this protection
to have meaning the Amendment must also protect the act of creating that material.” (citation omitted); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (“Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.”) (quotation omitted); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”).

6. Cases like *Alvarez*, *Fields*, *Glik*, and *Smith* show these protections extend to plaintiffs filming (or seeking to film) law enforcement officers engaged in carrying out their duties in traditional public forums (such as parks, streets, and sidewalks). The U.S. Department of Justice has also recognized “individuals’ First Amendment right to observe and record police officers engaged in the public discharge of their duties.” Letter from the U.S. Dep’t of Justice, Civil Rights Div., Re: Christopher Sharp v. Baltimore City Police Dep’t at 2 (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf.


For example, in *State v. Body*, the court held the officer had probable cause to arrest a bystander for obstructing even though she was located 25 feet away from the area of the traffic stop. The bystander had a history of being dangerous, parked her vehicle 25 feet away from the area of the traffic stop, and refused several orders to leave the area. *Id.* at 1028. The court held the bystander “engaged in several affirmative actions that, when taken together, rise to the level of obstructing official business. These actions include [the bystander’s] unexpected arrival at the scene of a high-risk traffic stop, as well as [her] unusual behavior following her arrival.” *Id.* at 1031. The court held there was probable cause to arrest the bystander for obstructing because she “interrupted [the officer] as he attempted to explain why she needed to leave the scene of the traffic stop. [She] also ignored [the officer’s] multiple orders instructing her to leave the scene, repeatedly asked [the officer]
questions regarding his name, badge number, and supervisor’s contact information in a dilatory manner, and continually argued her right to observe police activity.” *Id.* Such conduct required the officer to turn “his attention away from what he was doing and direct [] his attention” to the bystander, “delayed [the officer’s] ability to return to help with the traffic stop,” and “hampered or impeded [the officer] in performing his lawful duties” because “there [was] some substantial stoppage of the officer’s progress” in conducting the traffic stop. *Id.* Another example can be found in *Gonzalez v. City of Newport Beach*, 2021 WL 6618757 (C.D. Cal. 2021), where the court held the officers had probable cause to arrest two bystanders for obstructing even though they were located 15 feet away from the area of the traffic stop. The bystanders in *Gonzalez* walked towards the traffic stop and started video recording the investigation. *Id.*, *2.* When the bystanders came within 15 feet of the traffic stop, the officers ordered them to back away and indicated they would be arrested for obstructing. *Id.*, *3.* The bystanders refused to back away and were arrested for “resisting, delaying, or obstructing an officer.” *Id.*

7. There can be restrictions for filming in government buildings and locations, depending on the location or forum.

8. Prohibiting filming by First Amendment auditors has been affirmed in several cases, although it is context-specific. See, e.g., *Kerr v. City of Boulder*, 2021 WL 2514567 (U.S. Dist. Ct., D. Colo. 2021) (plaintiffs did not have a clearly established First Amendment right to film on jail property, as jail property was not a traditional public forum); *Benzing v. N.C.*, No. 3:17-CV-000619-KDB-DCK, 2020 WL 3439558, at *6 (W.D.N.C. June 23, 2020) (a probation office required that all patrons turn off cell phones before entering the office and prohibited any recording within the office); *Sheets v. City of Punta Gorda, Florida*, 415 F. Supp. 3d 1115, 1120 (M.D. Fla. 2019) (city ordinance prohibiting filming in city hall without the consent of the individuals being filmed); *Kushner v. Buhta*, No. 16-CV-2646 (SRN/SER), 2018 WL 1866033, at *9–11 (D. Minn. Apr. 18, 2018) (“The law school's rules of decorum—which prohibited unauthorized video-recording, demonstrations, and disruptive activity during the Halbertal lecture—are viewpoint neutral and reasonable in light of the purposes served by the limited public forum.”).

C. THINGS TO CONSIDER:

1. Develop policies which are clear, viewpoint neutral and do not leave discretion to employees/officials. Be leery of wholesale copying of courthouse-type policies, focusing on “auditors” or the like, prohibiting videoing for purposes of criticism or capturing negative interactions and even how a “consent” operation may operate (does it undermine policy interests? lead to disputes? etc.)

2. Consider what interest serves the restriction: limiting congestion and obstruction; preventing disruption and maintaining peace in the government workplace; protecting privacy and safety of employees or other citizens (including confidential
information or private facts); and hindering the government agency’s effectiveness in serving a particular population (i.e., social services, etc.).

3. How will this be regulated? Will the policy indicate when such videoing becomes disruptive, disorderly conduct or the like?

4. Provide notice and basic training to staff, particularly public-facing employees working close to entryways, lobbies and the like, about these issues. Key point: Unless there is a policy in place, there is nothing illegal about walking around recording in any area the person or others are permitted to occupy. Such action may be a form of protected speech, and it does not constitute a disturbance or alarm even if a public employee might be initially concerned about the person’s actions.

5. Encourage employee responses that are polite, helpful, friendly, professional; engagement of a supervisor; and avoidance of debate and confrontation.

6. Identify and mark nonpublic forums in the building (and, if necessary, outside grounds such as public vehicle parking areas). If there are areas of the building where the public shouldn’t be, then those areas shouldn’t be accessible to members of the public; non-public areas need to be secured and it’s best to have them marked that way (e.g., “employees only”) or locked to public access. This applies to parking areas; if the parking area is open to the public, meaning not fenced or clearly delineated with “Employees Only, No Entry” or similar signage, an auditor may be present and record.

III. FIRST AMENDMENT RETALIATION

A. ISSUES: In our culture of free speech, First Amendment protection takes on a special importance especially championed by Chief Justice John Roberts, whose track record reflects he “has had the most influence in shaping the overall jurisprudence” of First Amendment law more than any of his predecessors. See Collins, Ronald K. L. and Hudson, David L., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005–2021* (2021). Brooklyn Law Review, Vol. 87, pg. 13-14 (2021). “[H]e has been the prime mover of this area of the law.” *Id.* p. 7. The Roberts Court is viewed as “an exceptionally speech-protective Court, while for others it is a Court that has ‘weaponized the First Amendment’…” *Id.* p. 14. “There is also this: we live in a grievance culture, one in which many portray themselves as victims of any range of ‘injustices.’ Where grievance (however justifiable) is the touchstone, free speech is the rallying cry. As this tonic is mixed into the cultural beaker, the First Amendment takes on a new and different composition.” *Id.* p. 14

B. LEGAL LANDSCAPE:

Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.” *Id.* Retaliatory speech is actionable “in situations of threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow.” *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016) (quotation and internal marks omitted). Such claims can arise in several settings: employment, law enforcement, public meetings, and all manner of code enforcement.

2. At a general level, a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an “adverse action” in response to his speech that “would not have been taken absent the retaliatory motive.” *Houston Community College System v. Wilson*, 142 S. Ct. 1253, 1260–61 (March 2022). See also *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (a plaintiff must show (1) he engaged in activity protected by the First Amendment, (2) he suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was at least a motivating factor in the Defendants’ decision to take the retaliatory action.). In *Wilson*, the Supreme Court observed that some adverse actions may be easy to identify—an arrest, a prosecution, or a dismissal from governmental employment. “[D]eprivations less harsh than dismissal” can sometimes qualify too. At the same time, a mere frown from a supervisor does not constitute a sufficiently adverse action to give rise to an actionable First Amendment claim.” *Id.* See also *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (“retaliation need not be monstrous to be actionable under the First Amendment[.]”)

3. After the plaintiff has made out a prima facie case, the burden shifts to the defendant to rebut the causal inference created by the plaintiff’s showing and to prove it would have taken the same action regardless of the plaintiff’s protected activity. “If the defendants carry that burden, the plaintiff bears the burden of persuasion to show that the defendants’ proffered reasons were pretextual and that retaliation was the real reason for the defendants’ action.” *Rasche v. Beecher*, 336 F.3d 588, 597 (7th Cir. 2003).

4. A common fact pattern for retaliation cases arises in the employment context, where an employer threatens to terminate, or actually terminates, an employee in retaliation for the employee’s protected (but unpopular) speech. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a divided Supreme Court added an important factor to the analysis, specifically whether the public employee’s statements made “pursuant to the employee’s official duties.” That is, “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Therefore, if the speech was made pursuant to the employee’s official duties, it is not subject to protection. For example, in *Doggett v. County of Cook*, 255 Fed. Appx. 88, 90 (7th Cir. 2007), the court found that even if a nurse’s memoranda to superiors and union officials concerning hospital conditions were protected by the First Amendment, the record
showed that the nurse was discharged due to numerous violations of rules of conduct and work policies, defeating any possible First Amendment claim. But see Valentino v. Vill. of S. Chicago Heights, 575 F.3d 664, 674 (7th Cir. 2009) (municipal employee stated First Amendment claim against mayor, municipal administrator who terminated her, and municipality claiming she was fired in retaliation for speaking out against their practices of nepotism and ghost payrolling); Black v. Clark, 285 F. Supp.3d 1070 (E.D.Wis. 2018) (finding actionable allegations that sheriff retaliated against plaintiff by making mocking and threatening posts on Facebook in response to a formal complaint plaintiff made to the sheriff’s department about the sheriff directing deputies to question him without cause).

5. These cases also arise in the law enforcement setting where arrests are made when someone is engaging in some form of expression, although importantly the Supreme Court cut-off liability for most such claims if “probable cause” existed for the arrest, albeit with an exception. In Nieves v. Bartlett, 139 S.Ct. 1715 (2019), the Court ruled that a First Amendment plaintiff would have to plead and prove the absence of probable cause to arrest as an element of the claim. As a result, the presence of probable cause will defeat most claims. The Court carved out an exception to the no-probable-cause requirement. Where officers have probable cause to make an arrest “but typically exercise their discretion not to do so,” the plaintiff may still bring suit. Id. at 1727. However, a plaintiff would need to provide “objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.” Id.

6. Finally, these claims can arise in many other contexts, such as zoning and code enforcement cases where a citizen has been speaking out on certain issues. In those instances, it may be difficult to unravel a citizen’s speech from bona fide code violations. See, e.g., Brewer v. Town of Eagle, No. 20-CV-1820-JPS, 2023 WL 2592165, at *11 (E.D. Wis. Mar. 21, 2023) (retaliation claims stated where zoning enforcement citations were issued against noncompliant property owners, and contemplation was given to moving forward with enforcement action if they did not cure zoning violations, because the plaintiffs had been openly speaking out against wisdom of local zoning controls including bee-keeping ordinance). These claims also arise repeatedly in the jail context. See, e.g., Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009) (Prisoner stated a § 1983 claim for First Amendment retaliation against prison officials by alleging that he engaged in protected speech by filing an affidavit in the wrongful death action of a deceased inmate's mother, that he suffered retaliation through delays in his incoming and outgoing mail, harassment by a guard kicking his cell door, turning his cell light off an on, and opening his cell trap and slamming it shut in order to startle him, unjustified disciplinary charges, and improper dismissal of his grievances, and that the prison officials would not have harassed him but for his participation in the wrongful death action.); Watkins v. Kasper, 599 F.3d 791, 798 (7th Cir. 2010) (“A prisoner has a First Amendment right to make grievances about conditions of confinement.”); Wilson v. Greetan, 571 F. Supp. 2d 948 (W.D. Wis. 2007) (Prisoner brought § 1983
action against correctional officer who issued conduct report and officer who
presided over prisoner's disciplinary hearing, alleging that issuing officer retaliated
against him for exercising his right to free speech and to petition government for
redress of grievances, and that presiding officer was complicit in retaliation when
he found prisoner guilty at hearing.)

C. THINGS TO CONSIDER:

1. Avoid hasty, uninformed and arbitrary decisions. Claims are almost always triggered
at the first landmine – whether there was engagement in activity protected by the First
Amendment. Protected speech is that which deals with matters of “public concern”; the
inquiry is a question of law. Connick v. Myers, 461 U.S. 138, 145 (1983). It is well
established that the right to criticize public officials is at the heart of the First
prized American privilege to speak one’s mind, although not always with perfect good
taste, on all public institutions.” Bridges, 314 U.S. at 270. “[D]ebate on public issues
should be uninhibited, robust, and wideopen, and . . . it may well include vehement,
caustic, and sometimes unpleasantly sharp attacks on government and public officials.”
Sullivan, 376 U.S. at 270.

2. Do not take adverse action because the citizen or employee complained.

3. Take such claims seriously – act, do not ignore.

4. Document all aspects of the issue, communications or events including all steps taken
to prevent or minimize retaliation. Include all details and avoid documenting in a false,
incomplete or slanted way.

5. Education and training. Oftentimes, supervisors and decisionmakers are unfamiliar
with the fact that a citizen’s or an employee’s concerns/complaints may trigger
retaliation claims. They can also be unfamiliar with the fact that such a person’s
involvement in proceedings, whether internal or not, may entitle them to protection
from retaliation.

6. Avoid overly aggressive enforcement actions, discipline, suspension, review or the like
unless the full facts and circumstances are known, thoughtful consideration is given to
taking such action and even-handed enforcement.

IV. GOVERNMENT SPEECH AND COERCION

A. ISSUES: A growing battle pits two sets of free speech rights: those of private
individuals and entities and those of government officials. With respect to the latter,
the First Amendment does not impose a viewpoint-neutrality requirement on the
government’s own speech; a government official has the right to speak for herself (and
her agency) and to select the views she wishes to express. Under the government speech
document, public officials are generally free to favor certain views over others when they

B. LEGAL LANDSCAPE:

1. The fullest articulation of the government speech doctrine is *Summum v. Pleasant Grove City*, where the Court was unanimous in reaching the conclusion that the rejection of the Summum monument did not violate the Free Speech Clause of the First Amendment. 555 U.S. at 1138-42. That case arose because a Utah municipality refused to erect a monument containing the “Seven Aphorisms” of the Summum religion in a public park, even though the park already had a Ten Commandments monument. Although the Summum religious organization claimed that the park was a public forum, the Supreme Court concluded that “[p]ermanent monuments displayed on public property typically represent government speech.” *Id.* at 1132. Unlike a speech or a rally in a public park, a permanent monument conveys a “government message,” even if it is initially donated by a private organization. *Id.* at 1134. Thus, when the Utah municipality accepted the Ten Commandments monument, it was “engaging in [its] own expressive conduct,” and “the Free Speech Clause ha[d] no application.” *Id.* at 1131. As the Court summarized, “A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.” *Id.*

2. *Summum* thus stands for the proposition that the government can select a message to convey to its citizens and need not consider conflicting views or accommodate other speakers when it does so. *Id.* The Court insisted that constraints on government speech come not from the First Amendment, or at least not from the Speech Clause, but rather from the political process. *Id.* at 1132. The Court assumes that competing viewpoints will emerge from the marketplace of ideas, allowing voters or other political actors to check government speech (and government actions) with which they disagree. *Id.* at 1131.

3. In 2015, the Supreme Court considered whether the State of Texas could deny a proposal by the Sons of Confederate Veterans (SCV) for a specialty license plate that depicted the Confederate battle flag in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Texas law provides that the state has sole control over the design, color, and typeface of all license plates. There is a specific process by which the state reviews submittals of proposed specialty license plates designed by private entities, and the state had actively exercised its authority by denying at least a dozen requests in the past. With respect to the SCV plate design, the state denied it because many members of the public would find it offensive. The Supreme Court ruled that Texas’ role in approving specialty license plate designs was government speech and not regulation of the speech of others. In so doing, the Supreme Court noted the longstanding use of state slogans and emblems on license plates. Under the majority’s analysis, license plates are a form
of government-issued identification and do not constitute a traditional public forum (like streets or parks) or a limited public forum for the purpose of expression. The Free Speech Clause thus did not impact Texas’ regulation of specialty license plates. As the Supreme Court noted: “Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? ‘[I]t is not easy to imagine how government could function if it lacked th[e] freedom’ to select the messages it wishes to convey.” 135 S.Ct. at 2245.

4. By contrast, Shurtleff v. City of Boston, 142 S.Ct. 1583, 1589 (2022), reached a different result on the government speech doctrine. Shurtleff involved the flag raising controversy at Boston City Hall. There are three flagpoles in a plaza in front of Boston City Hall. The first two display flags from the United States and the State of Massachusetts and the third generally displays the flag of the City of Boston. However, the City of Boston had a practice of allowing outside groups to raise their flags on the third flagpole while holding events in the plaza below. A religious organization sought to hold a flag raising ceremony in the plaza involving what it described as a “Christian flag.” The city denied the request due to concerns that raising a religious flag on a city flagpole would violate the Establishment Clause of the First Amendment. The religious organization sued, claiming that the denial was impermissible viewpoint discrimination and a violation of its free speech rights. Boston argued the decision of what flags will fly over city hall is government speech. All the justices agreed that the denial of the flag raising request was a violation of the religious organization’s free speech rights and that the flag raising, under the facts of the case, was not government speech. The Supreme Court emphasized the importance of clear and meaningful policies when it comes to government speech: “[T]he city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech — though nothing prevents Boston from changing its policies going forward.” Id. at 1593. Thus, the Supreme Court found the denial of the flag raising request was regulation of speech, and not speech by a government entity. Nevertheless, the Court noted, “[w]hen the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say.” “The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.” Id. at 1589.

5. When it comes to government speech, the Supreme Court has found a viewpoint-neutrality requirement is antithetical to a healthy representative democracy, and when a government official embarks on a course of action, she may well embrace one viewpoint and reject others. See Matal v. Tam, 137 S. Ct. 1744, 1757 (2017).
The First Amendment does not forbid her from speaking about her preferred course of action; rather, it gives her the freedom to advocate for it. *Id.*

6. Nevertheless, in certain circumstances, some government speech may infringe on private individuals’ free speech rights. As noted by the cases above, government officials may not engage in unjustified threats or coercion to stifle speech. “Accordingly, although government officials are free to advocate for (or against) certain viewpoints, they may not encourage suppression of protected speech in a manner that ‘can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request.’” *National Rifle Association v. Vullo*, 49 F.4th 700, 715 (2022) (quoted source omitted).

7. As the *Vullo* court noted: “In determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce.” We have considered the following factors when distinguishing between attempts to convince and attempts to coerce: (1) word choice and tone, id.; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences. No one factor is dispositive. “[U]nder certain circumstances, oral or written statements made by public officials will require courts to draw fine lines between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech.” *Id.*

C. THINGS TO CONSIDER:

1. As *Shurtleff* recognized, “The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?” 142 S.Ct. at 1589.

2. Consider how policies may support the local government’s expressive viewpoint. As *Shurtleff* recognized, “Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its ‘flagpoles are not intended to serve as a forum for free expression by the public,'” and lists approved flags that may be flown ‘as an expression of the City's official sentiments.’” *Id.* at 1593.

3. Even assuming the government expression equates to government speech, there are limits, namely the Free Exercise and Establishment Clause, procedural due process and other constitutional protections in the State or U.S. Constitution.
V. SOCIAL MEDIA

A. ISSUES: Municipalities routinely use social media to communicate policy, advocate positions, introduce new legislation, and various other functions. When government officials create a designated public forum on these social media platforms, First Amendment controversies arise, particularly when government officials attempt to shut down or silence opposing viewpoints. Municipalities who invite public comment and contribution on their social media sites such as Twitter, Facebook, websites or other internet spaces may face liability for violating the First Amendment if they remove content posted by members of the public or block certain members of the public from participating. The law treats virtual spaces the same way as physical government spaces like a park or other area reserved for public expression. The government cannot prevent speech in these areas just because it disagrees with the message.

B. LEGAL LANDSCAPE: The precise forum a municipal “social media” page falls into remains in flux. One constitutional category into which government-sponsored social media might be slotted is “government speech.” Other courts have treated social media pages as designated public forum. The issue remains undecided by the Supreme Court, although notably in Packingham v. North Carolina, 137 S.Ct. 1730 (2017), the Supreme Court described “cyberspace” as a “vast democratic forums of the Internet” in general “and social media in particular” analogous to traditional public forums such as parks.

1. Under the “government speech” view, some have argued the government is permitted to use websites to communicate its views to citizens, and when it does so, it need not include opposing viewpoints. See, e.g., Sutliffe v. Town of Epping, 584 F.3d 314, 334-35 (1st Cir. 2009) (holding that town officials could set up a website and bar others from expressing themselves on that website); Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275, 278 (4th Cir. 2008) (holding that the school district’s campaign constituted free speech and that it could deny webpage access to its “informational distribution system”). However, other courts find that once the government chooses a platform that permits public comment, it has created a type of forum for nongovernmental parties’ speech such that it is bound by traditional First Amendment principles when regulating the speech.

   a. One leading case is Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), where the chair of the County Board of Supervisors created an official Facebook page as “Chair Phyllis J. Randall.” Randall also had a personal Facebook page and one devoted to her campaign as a politician. On her campaign page, Randall posted:

I really want to hear from Any Loudoun citizen on Any issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations (as opposed to onetime information items such as road closures) on my county Facebook page (Chair Phyllis j. Randall) or County email . . .

Having back and forth constituent conversations are Foible
(Freedom of Information Act) so if you could reach out to me on these mediums that would be appreciated.

Randall and Davison, a Loudoun County resident, both attended a school board meeting. At that meeting Davison submitted a question that implied that certain School Board members had acted unethically when they approved certain financial transactions. Randall volunteered to answer the question but stated that it was a “set up” question that she did not “appreciate.

Davis subsequently posted a message on Twitter, tagging Randall:

@ChairRandall ‘set up question”? you might want to strictly follow FOIA and the COIA as well.

Randall posted general information about the meeting on the Chair’s Facebook Page later that evening. Davison posted a response using one of his own Facebook profiles, which he frequently uses to post political commentary (SGP page). Randall said that post contained accusations regarding School Board members’ alleged conflicts of interests related to municipal transactions and stated that the members were taking kickback money. Randall stated that she didn’t know if the accusations were true, but determined that it was “probably not something [she] want[ed] to leave on the Chair’s Facebook page.” Randall deleted the entire post, including her own original post and all other public comments. She then banned Davison’s SGP page from the Chair’s Facebook page.

Davison filed a §1983 complaint against Randall in her official and individual capacities alleging that she engaged in viewpoint discrimination by banning Davison from commenting on the Chair’s page. Davison was successful at trial on his First Amendment claim.

Randall appealed, arguing: (1) Randall did not act under color of state law as required under §1983; (2) the Facebook page did not constitute a public forum; and (3) the Facebook page was protected government speech.

The court found that Randall acted under color of state law because: (1) Randall created and administered the Chair’s Facebook page to further her duties as a municipal officer; (2) A private citizen could not have created and used the Chair’s Facebook page in such a manner; and (3) The specific actions giving rise to Davison’s claim are linked to events that rose out of Randall’s official status.

The court also rejected Randall’s argument that the Facebook page did not constitute a public forum. Randall opened the public comment section of the page for public discourse. The page was “compatible with expressive activity,” because the internet and interactive forums offer “a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad adventures for intellectual activity.”
Randall argued that traditional public forum analysis should not apply because Facebook is a private website. The court rejected this argument, noting that the forum analysis has never been circumscribed solely to government-owned property and that Randall exercised control over the page while acting under color of state law and designated the page as belonging to a government official. And, most importantly, Randall had complete control to remove comments or ban users from the page.

The court rejected Randall’s argument that the Chair’s Facebook page constitutes government speech, noting that the argument “fails to recognize the meaningful difference between Randall’s posts and the public posts and comments she invited in the page’s interactive space. Here, Randall did control some aspects of the Chair’s Facebook page, but the space designated for ANY user to post on ANY issue was “capable of accommodating a large number of public speakers without defeating its essential function.”

The court then determined that it did not need to determine what type of forum the page constituted, because the ban of Davison amounted to viewpoint discrimination, which is prohibited in all forums.

b. Another case of note is *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019), where social media users and organizations sued President Trump, the White House Director of Social Media and White House Press Secretary for blocking social media users from accessing and interacting with his social media account because they criticized his policies. The appeals court agreed with a lower court that the interactive space associated with Trump’s Twitter account “@realDonaldTrump” is a designated public forum and that blocking individuals because of their political expression constitutes viewpoint discrimination. Although the U.S. Supreme Court ultimately vacated this decision due to mootness after Trump lost the election, the Second Circuit’s still provide guidance in this evolving area. “By blocking the individual Plaintiffs and preventing them from viewing, retweeting, replying to, and liking his tweets, the President excluded the Individual Plaintiffs from a public forum, something the First Amendment prohibits.”

Using the three-prong approach described above, the court decided:

The president acted in a governmental capacity when he blocked users from his Twitter account. Although the President argued that the account was private, the court found that the evidence to the contrary was overwhelming. The account was not independent of Trump’s presidency. Trump used the account “as a channel for communicating and interacting with the public about his administration.” White House staff post tweets and maintain the account. The account was used for matters such as rolling out changes to major national policies and cabinet-level staff changes. The account was used to engage with foreign leaders and announce foreign policy and initiatives. Further, Trump used the interactive features of the site – the “like,” “retweet,” and “reply” functions to evaluate the public’s reaction to the posts.
The court found that the Twitter account was a public forum. “The Account was intentionally opened for public discussion when the President. . . repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation.” The court went on to note that viewpoint discrimination is not permitted in any type of public forum.

Finally, the court rejected Trump’s argument that he was engaging in government speech when he blocked the individual plaintiffs. While the initial tweets amount to government speech, the interactive features of the Account result in speech from multiple individuals, not just the President. “The contents of retweets, replies, likes and mentions are controlled by the user who generates them and not by the president, except to the extent that he attempts to do so by blocking.”

c. In *One Wisconsin Now v. Kremer*, 354 F.Supp.3d 940 (W.D. Wis. 2019), Plaintiff OWN, a non-profit advocacy organization, claimed that three elected members of the Wisconsin State Assembly violated the First Amendment by blocking it from their Twitter pages. All of the members’ Twitter accounts were created around the official’s public service, not their private lives. The court found violations:

i. The Assembly members were acting under color of state law when they blocked the Plaintiff’s Twitter account: (a) The social media pages had an obvious public, not private purpose; (b). The Defendants used government resources to maintain the page; (c) For two defendants, the Twitter accounts linked to their official legislative websites; (d). The pages were “swathed . . . in the trappings of [their offices]. Defendants argued that creating the accounts was not one of their enumerated duties, that the Twitter page does not become state property when they leave office and that some of their Twitter activity takes place outside of normal working hours. The court found that these facts do support a finding that the Accounts were private because, under a totality of circumstances test, there are far more facts that support finding the Twitter accounts were operated under color of law.

ii. The interactive components of the defendants’ Twitter accounts are designated public forums. The court quoted *Packingham*: “While in the past there may have been some difficulty in identifying the most important places (in a special sense) for the exchange of views, today the answer is clear. It is cyberspace.” The court found no reasonable dispute that defendants created the accounts at issue intentionally to communicate with the public about issues related to their roles as public officials. While defendants argued that the only intention was to get their message out, the fact remained that they opened Twitter accounts, and those accounts feature interaction as a key component. The court, for the reasons described in *Davisson*, also rejected the arguments that Twitter accounts cannot be a public forum because Twitter is a private corporation, and defendants’ tweets were government speech.
iii. The court found the defendants’ blocked plaintiff’s speech based on its content. The account was blocked because of its prior speech or identity.

For instance, Kremer testified that his Twitter feed is not “for Dane County liberals to carry on conversations with me,” and while Nygren claims he blocked plaintiff for its “crude comments on Wisconsin politics,” he was unable to identify any, actual “crude” comments. Vos simply avers that he cannot recall the reason. Given the context, however, the only reasonable inference is that Vos blocked OWN because of its prior activity on his Twitter page.

The court further found the fact that each member had only selectively blocked a few accounts supported the plaintiff’s contention that its account was selectively blocked and not just a “matter of happenstance.”

The court required the defendants to unblock the plaintiff and prohibited the defendants from blocking others from their accounts for reasons that implicate the First Amendment.

2. The Supreme Court will hear oral argument in two First Amendment social media cases involving local government officials on October 31st: O’Connor-Ratcliff v. Garnier, No. 22-324 and Lindke v. Freed, No. 26-611. These two social media lawsuits arose after public officials (members of a local school board and a city manager) blocked parents and a resident who criticized them from their personal social media accounts. In Garnier, a case against members of a California school board, the Ninth Circuit ruled that the board members’ blocking of the parents constituted action by the government, and, therefore, violated the First Amendment. By contrast, in Freed, the Sixth Circuit held that because a city manager did not operate his Facebook page as part of his job duties, he did not violate the First Amendment when he blocked access by a resident. There, resident Lindke did not approve of the city manager’s handling of the COVID-19 pandemic, and left critical comments on his Facebook page. The city manager eventually blocked him.

3. Many courts like Garnier also consider whether the social media page can even be considered government action or the kind of conduct known as “color of law” to support a Section 1983 civil rights claim. Courts look to the purpose of the social media account and when it was created, how it is used (personal or official capacity), and the extent to which it provides information to the public about governmental business, solicits public input on public matters and otherwise relies on the official’s government office. For instance, in Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021), the court ruled that a Twitter account of a Missouri state representative was not an official government account or used for government business, so blocking a user was not a violation of protected free speech. Missouri State Representative Reisch maintained a Twitter account where she “routinely tweeted or retweeted about her work as a state representative and posted pictures of herself on the House floor or standing with other
elected officials.” Her profile photo showed her on the House floor. She opened the account when she announced her candidacy for the House.

a. After an appearance at a Farm Bureau event, Reisch tweeted: “Sad my opponent put her hands behind her back during the Pledge.” This tweet was about Maren Jones, Reisch’s political opponent who was also at the event. Kendrick, who was also a Representative, commented on the tweet: “Maren’s father was a Lieutenant in the Army. Two of her brothers served in the military. I don’t question (her) patriotism. That’s a low blow and unacceptable from a member of the Boone County delegation.”

b. The plaintiff retweeted Representative Kendrick’s tweet. Shortly after, he received notice that he was blocked from Defendant’s Twitter account. Reisch had blocked at least 123 other users in addition to the plaintiff.

c. The district court held that the speech was protected by the First Amendment because it did not fall within any of the categories of unprotected speech. It found Twitter’s interactive space should be analyzed under forum precedent. Since Twitter is privately owned, forum analysis applies to the defendant’s Twitter “only if the government controls it.” Since Reisch controlled the content of her tweets and could block users from accessing the interactive space on her site, she controlled the Twitter, and under the circumstances - this equated to government control. Next, the court found that the interactive spaces on defendant’s Twitter account were a designated public forum. “The touchstone of a designated public forum is government intent, which is inferred from several objective factors, including policy and practice, the nature of the property, and the property’s “compatibility with expressive activity.” Since Reisch used the account to indicate her positions on political issues and to promote her campaign and legislative agenda, and “intentionally created an avenue through which to receive communications from the public,” the interactive spaces of Reisch’s Twitter were a designated public forum. Since defendant’s Twitter was a designated public forum, Reisch could only block plaintiff from the interactive spaces of her tweets in a manner that was “content-neutral, necessary to serve a significant interest, and narrowly drawn to achieve that interest.” “Plaintiff received notice that defendant block him shortly after he retweeted a reply to Defendant that was critical of Defendant’s original tweet on a matter of public concern. This sequence gives rise to the inference that defendant has blocked plaintiff base on his expressive activity in critique of defendant.”

d. However, the Eighth Circuit held the act of a public official taken in “the ambit of their personal pursuits” does not trigger liability under U.S.C. Section 1983. Representative Reisch was acting in a private capacity and not “under the color of state law.” The Eighth Circuit distinguished Representative Reisch’s social media account from the one operated by Randall in Davison as, unlike Randall who used her social media account as a tool of governance, Representative Reisch opened and used her social media account for the limited purpose of running for public office and used the account to emphasize her suitability for public office.
The Eighth Circuit explained that Representative Reisch’s social media account was best characterized as a campaign page that acted like a campaign newsletter where it was her prerogative to “select her audience and present her page as she sees fit.” Further, “Reisch’s own Amendment right to craft her campaign materials necessarily trumps Campbell’s desire to convey a message on her Twitter page that she does not wish to convey.”

4. When government officials delete constituent posts or block constituents from their pages, it may violate the constituent’s rights under the Petition Clause.

   a. In *Leuthy v. LePage*, 2018 WL 4134628 (D. Maine 2018), the court determined that the plaintiffs’ plausibly made a claim that the Governor violated their free speech rights when he blocked their access from his Facebook page and deleted their posts.

   b. The court noted that “The right to petition allows citizens to express their ideas, hopes and concerns to their elected representatives . . . and is generally concerned with expression directed to the government seeking to redress a grievance.” The court went on to note that the right to petition is not absolute, it does not guarantee the right to petition through any channel of their choosing or to pursue baseless litigation. The plaintiffs’ communications included quoting the governor about intentionally misleading the press, questioning why the governor was not responding to reporters, and complaining about constituents being blocked from the Governor’s Facebook page.

C. THINGS TO CONSIDER:

1. Very simply, if a local official wants to hide/delete comments or block people, they should keep their social media accounts personal and not use them for official purposes, nor should they open the interactive portion of their accounts to the general public.

2. In theory, a local government can rest on the “government speech” doctrine where it publishes only select topics and argues its decision-making process constitutes the expression of the agency itself. In this regard, local governments may choose to operate social media platforms in a manner where information is only pushed out and the forum is not opened for public discussion or comments.

3. But, if you are implementing a social media account without any limitations as to subject matter, then you must not delete, block, etc. without fear of First Amendment claims. If you are creating a social media platform that looks more like a limited public forum, content-based regulation of speech is permitted so long as it is reasonable, viewpoint neutral, and fits within the parameters established when the limited public forum was created.

4. Implement a social media policy that reflects viewpoint-neutral regulations in a limited public forum, such as: prohibiting profanity and unprotected speech like
obscenity, defamation, actual threats or illegal activities (but make sure the policy and implementation tolerate speech that may be considered offensive, hateful, or even harassing); limiting comments to the original post’s subject matter; prohibiting posts that contain links to third-party websites; and prohibiting solicitation or advertisement of commercial services. The policy should also ensure that comments will not be hidden or deleted based on viewpoint; limit user blocking for repeated violations and for a limited period of time; and ensure the social media account managers/staff implement the policies in a viewpoint-neutral and non-discriminatory manner.

5. A comments policy should be administered and enforced in a consistent and non-discriminatory manner.

6. Whatever the technological platform, once the government creates a forum that allows persons to comment and criticize, the government may run into First Amendment hurdles if it tries to censor those expressions.

7. Elected officials should consider having separate Facebook pages (or other social media pages) so that they can dedicate one page to business related to their office, one page to campaign activities and one page to purely personal posts. Separating information into these different pages should allow public officials to retain more control over who posts and what is posted on their campaign pages and personal pages.