FIRST AMENDMENT LIABILITY CONCERNS FOR DISRUPTIVE PUBLIC MEETINGS

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Purpose of this Presentation

Our intent is to provide local government attorneys with an understanding the limitations imposed by the First and Fourteenth 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**."

“FORUM BASED” APPROACH

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).

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



Traditional Public Forum

Quintessential 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).

Strong free speech rights.
Any infringement on free speech rights must serve a **compelling** state interest and must be **narrowly drawn** to achieve that end.



Non-Public Forum



Designated Public Forum

Designated public forum, for First Amendment purposes, is government property that has not traditionally been regarded as a public forum, even though it has been intentionally opened up for that purpose.

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**.
McDonald v. City of Pompano Beach.

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).

Limited Public Forum, cont.

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

Any restriction must be reasonable in light of the purpose serve by the forum (conducting an orderly meeting within a reasonable time) and must be viewpoint neutral.

“Say whatever you want in 3 minutes or less.”

“Stay on topic.”

FOURTEENTH AMENDMENT

"No State shall …deprive any person of life, liberty, or property, without due process of law."

Follow Your Rules

Know your rules. Follow them.

Are speakers 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?

Roberts Rules

- Open the session and call members to order.
- Announce the business before the assembly in the order in which it is to be acted upon.
- Protect the assembly from annoyance from evidently frivolous or dilatory motions by refusing to recognize them.
- Assist in the expediting of business in every way compatible with the rights of the members.
- Restrain members when engaged in debate, within the rules of order.

Roberts Rules



Free Speech Rights of 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.)

Follow Your Rules

Who has authority to stop someone from speaking?

Add a provision about signs to your rules.

Suspend the rules if they are local rules.

> When procedural rules are not "prescribed by any superior authority, as by the constitution or laws of the state," they can suspended by unanimous consent of the governing body. *City of Greeley v. Hamman*, 28 P. 460, 461 (Colo. 1891)

Subjective Restrictions

"Profane"

"Abusive" "Antagonistic"

"Frivolous"

"Disrespectful" "Harassing"

"Threatening"

"Offensive"

"Intolerant"

"Inappropriate"

"Obscene"

"Personally-directed" "Irrelevant"

Application of Subjective Restrictions



– Application of Subjective Restrictions



Subjective Restrictions Can be Okay

"The use of profane, disrespectful, or threatening language or gestures will not be tolerated." *Davis v. Colerain Township* (S.D. Ohio July 30, 2021)

But prohibiting "offensive" speech is never okay. *Ison v. Madison Local Sch. Dist. Bd. of Education* (6th Cir. 2021)

Liability in General

- General Observations
  - Courts recognize the need for government bodies to do business
  - Courts are generally supportive of rules reasonably calculated to support the business of the meeting – depending on how they are applied.
  - Most courts allow discretion to be exercised, recognizing that the presiding officer must do so "without the benefit of leisure reflection." Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989).



Norse v. Santa Cruz, 629 F.3d 966 (9th Cir. 2010)(en banc)

- Mr. Norse gave a brief Nazi salute at a council meeting.
- District Court sua sponte granted summary judgment on qualified immunity
- Panel affirmed in part and reversed in part.
- En banc court reversed and remanded for trial.
- Jury found that Mr. Norse was objected for disruption and not for the content of his speech
- District Court denied motion for a new trial.
- Ninth Circuit Panel affirmed.

What a city council may not do is, in effect, close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed. As we explained in *Norwalk,* the entire city council meeting held in public is a limited public forum. But the fact that a city may impose reasonable time limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights. A limited public forum is a limited public forum. Perhaps nothing more, but certainly nothing less. The City's theory would turn the entire concept on its head.

Norse v. City of Santa Cruz, 629 F.3d 966, 975–76 (9th Cir. 2010)(en banc).

The Constitution does not require “the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.” Ramos v. Carbajal, 508 F.Supp.2d 905, 913 (D.N.M.2007) (Browning, J.) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. at 799–800, 105 S.Ct. 3439).

Reasonable Limitations

Time Limits

A time limit is a reasonable time place and manner restriction. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007); *Kindt v. Santa Monica Rent Control Bd*., 67 F.3d 266, 271 (9th Cir. 1995)

A Requirement that Comments be Relevant

Wenthold v. City of Farmers Branch, Texas, No. 3:11-CV-0748-B, 2012 WL 467325, at *10 (N.D. Tex. Feb. 14, 2012), aff'd, 532 F. App'x 474 (5th Cir. 2013)

A Requirement that Remarks be Made to the Chair

Holeton v. City of Livonia, 935 N.W.2d 601 (Mich App. 2019)

Bans on Clapping or booing

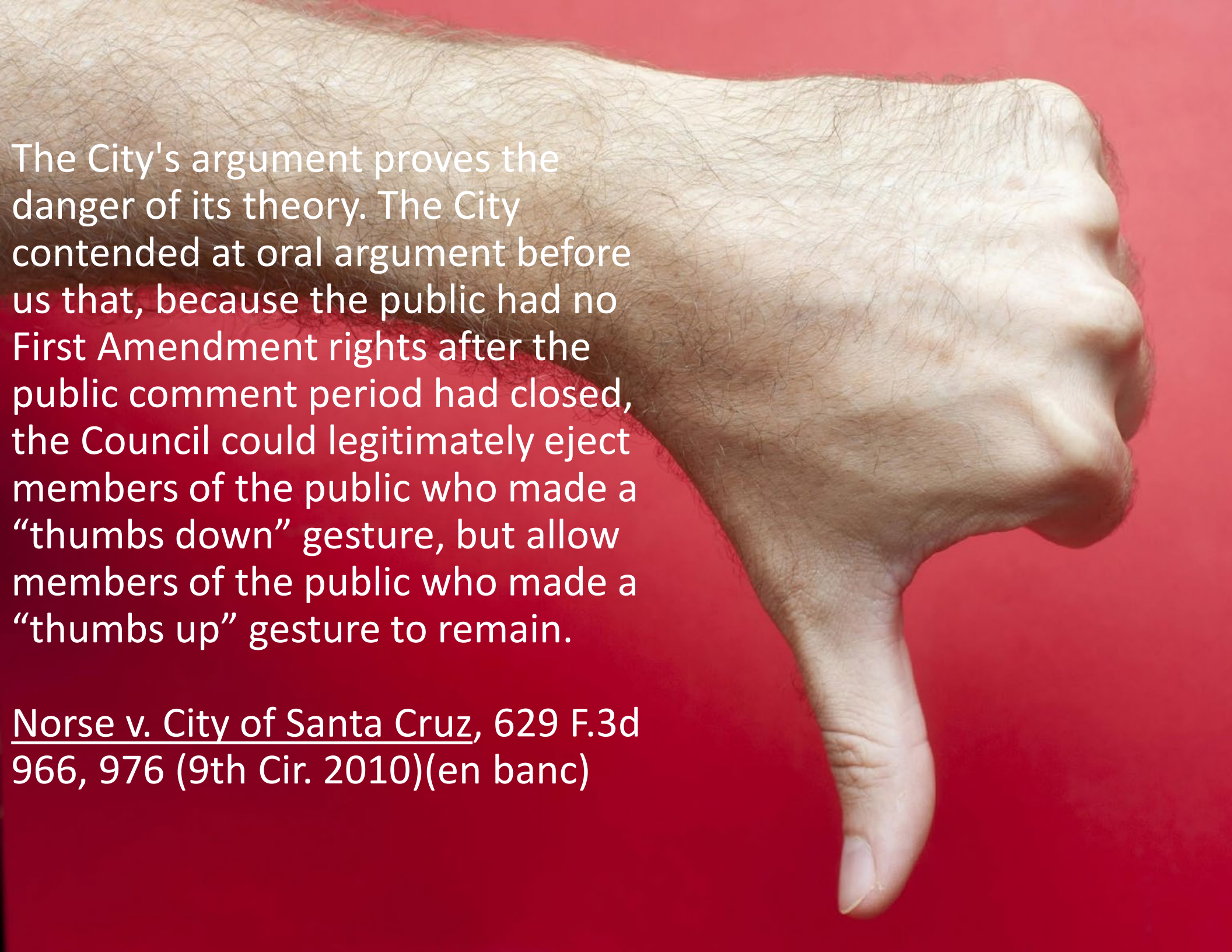




A no-applause rule was permissible because it was content-neutral, narrowly tailored to serve a significant governmental interest, and left open ample alternative channels for communication. *Taylor v. St. Louis Cmty. Coll.*, No. 4:18CV00272 SNLJ, 2020 WL 1065651, at *4 (E.D. Mo. Mar. 5, 2020), appeal dismissed, 2 F.4th 1124 (8th Cir. 2021)



Freedom of Speech



The City's argument proves the danger of its theory. The City contended at oral argument before us that, because the public had no First Amendment rights after the public comment period had closed, the Council could legitimately eject members of the public who made a "thumbs down" gesture, but allow members of the public who made a "thumbs up" gesture to remain.

Norse v. City of Santa Cruz, 629 F.3d 966, 976 (9th Cir. 2010)(en banc)

Content-based Rules

- A rule requiring that comments be on the topic is okay. *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019)(”We can think of no content-based restriction more reasonable than asking that content be relevant.”)
- Prohibition on making negative comments about council members is unconstitutional. Griffin v. Bryant, 30 F. Supp. 3d 1139 (D.N.M. 2014)
- Disparagement is a viewpoint. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)(Trademark case)(dicta) *but see Moms for Liberty - Brevard Cty., FL v. Brevard Pub. Sch.,* No. 6:21-CV-1849-RBD-GJK, 2022 WL 272940, at *3 (M.D. Fla. Jan. 24, 2022)

Clothing and Buttons



Prohibiting wearing campaign buttons and t-shirts did not violate the first amendment if it was applied evenly. *Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875, 879 (11th Cir. 2007) *but see Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transportation,* 978 F.3d 481, 495 (6th Cir. 2020)(ban on "political" ads on buses was not capable of reasonable application)



There is no reasonable basis to ban biker club symbols. *Sammartano v. First Jud. Dist. Ct., in & for Cty. of Carson City*, 303 F.3d 959 (9th Cir. 2002), *overruled on other grounds, Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008)

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- But naming the cut-off switch after a particular gadfly is not. Zinna v. Bd. of Cty. Comm'rs of Cty. of Jefferson, CIV.A.05-CV-01016-RP, 2008 WL 2185907, at *2 (D. Colo. May 23, 2008)
- County Dismissed
- $1,800 Jury award against Chair.



How do you Enforce Your Rules?



Cutting off the Microphone after time limit is exceeded is probably okay.



Gundy v. City of Jacksonville Fla., 528 F. Supp. 3d 1257, 1265 (M.D. Fla. 2021)(not a first amendment violation to cut off Pastor's microphone when invocation became political speech)

Enforcement

- Cut off the mike
- Oscar Music?
- Recess
- Arrest
- Forcible Removal
- Sit there and take it.


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Cannot shout down a person for criticizing the Mayor's husband's political activities.

Liebler v. City of Hoboken, No. 15-8182 (KM) (MAH), 2016 WL 3965198, at *1 (D.N.J. July 21, 2016)

Exclusions from Future Meetings are Difficult To Sustain Unless there is a Threat to Safety

- Cannot exclude someone from future meetings based only on disruptive behavior *Walsh v. Enge*, 154 F. Supp. 3d 1113, 1128 (D. Or. 2015).
- 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 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, 211 L. Ed. 2d 293 (2021)
- *City of Los Angeles v. Herman*, 54 Cal. App. 5th 97, 104, 266 Cal. Rptr. 3d 905, 910 (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).
- City of Boulder v. Seth Brigham.

Arrests



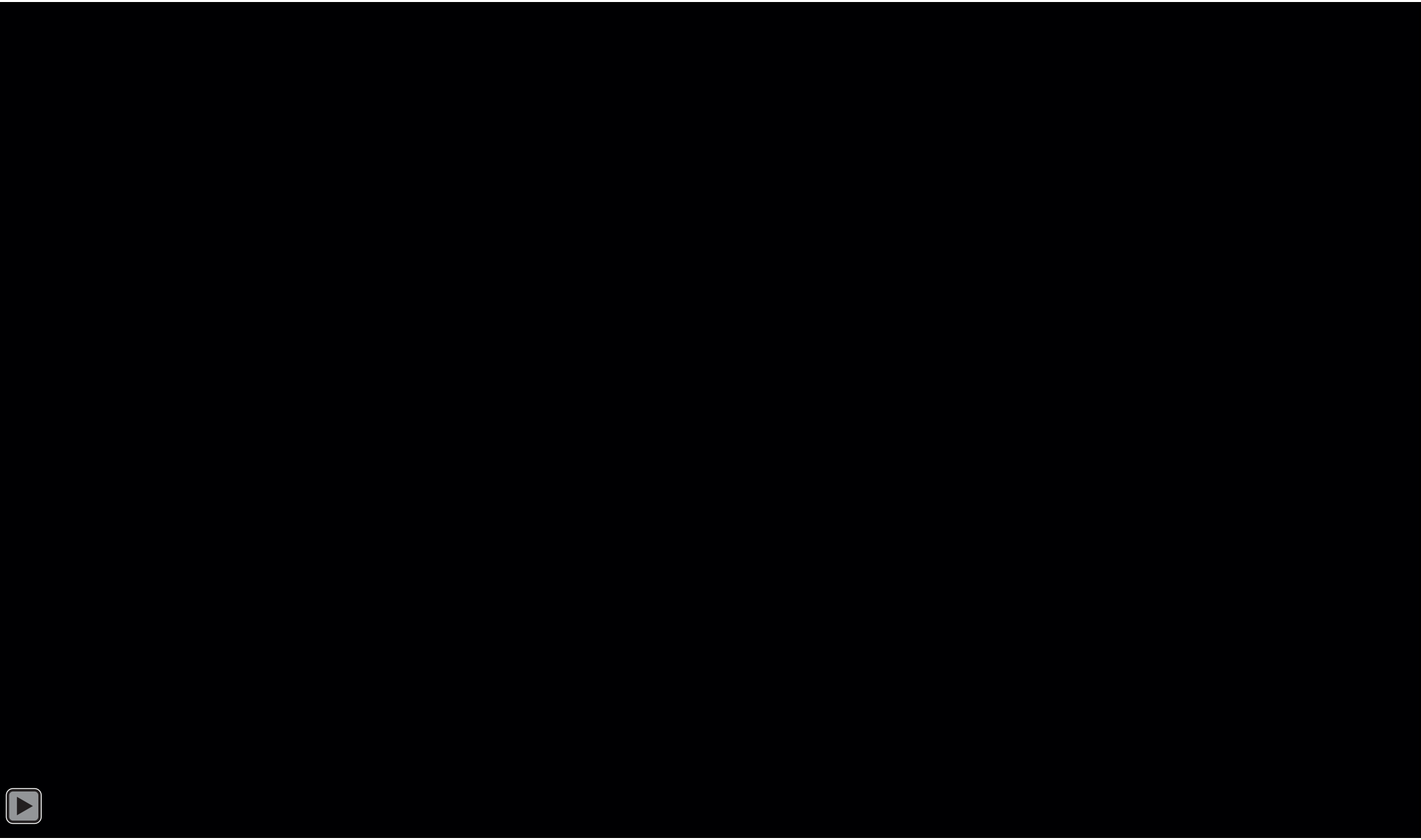




Nipples are bared at Boulder City Council meeting – and arrest follows







Before making an Arrest

- Probable Cause to believe that a law has been violated.
  - Only a peace officer can make that decision.
- Clarity on what law has been violated
  - Trespass
  - Disrupting a meeting

Probable Cause May Not Be Enough

Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945 (2018)

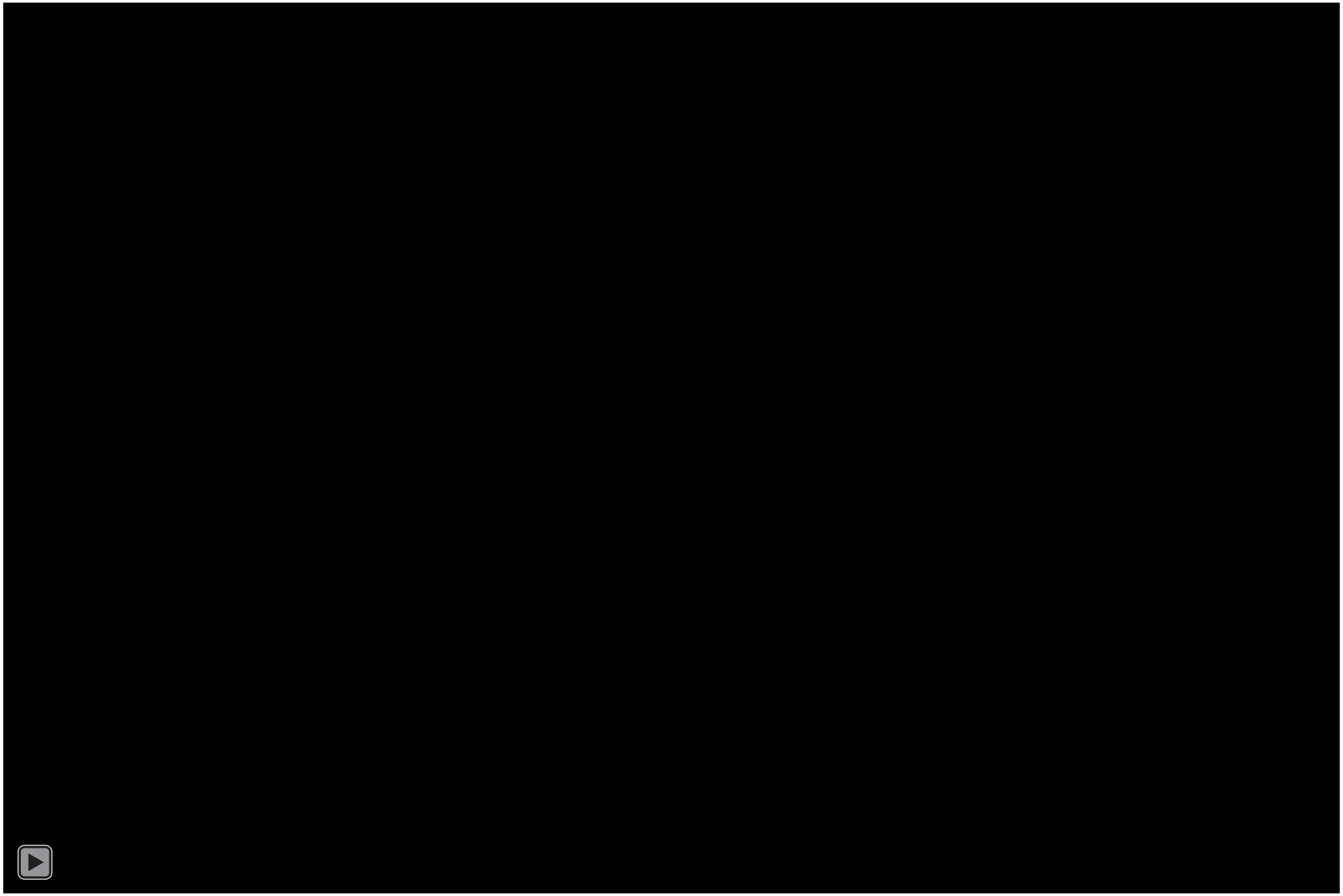
Arrest of plaintiff after council member's statements during a closed meeting about the need to intimidate the plaintiff and others who have sued the city was sufficient to state a claim under 42 U.S.C. § 1983 even though there was probable cause for an arrest.

Rules

- Do your rules allow the presiding officer to direct someone to leave?
- Is the authority clearly defined and reasonably constrained?
- When in doubt, do not arrest.

Additional Rules to Consider

- No signs that blocks the view of another person.
- No person may sit or stand in the aisle.



PowerPoints and Videos from the Public – Zoom Video

- Should you allow?
- Should you broadcast?
- What do you do about obscene materials
- Copyright infringement?
- Who decides?
- YouTube content rules?

Do you have a security plan?

- How do council members and staff exit when there is a security threat?
- Are there adequate means for the public to escape?
- How will the police be contacted?

Some generalizations

Council meetings are limited public forums unless they are not

A governmental body can act to stop a disruption at a public meeting

A body can always take a brief recess

A person cannot be excluded or prevented from speaking for reasons that are viewpoint-based.

What is viewpoint-based is in the eyes of the beholder.

Arrest should be the last resort.

Remote meetings should present opportunities but also potential pitfalls.

You can’t stop people from being jerks.

Doing nothing is generally better than doing something stupid.

The Future has arrived

- Television
- Live Tweets
- Facebook Live (with comments)
- Emojiis
- Telephone call in
- Zoom or Teams

Social Media

Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019), *cert. granted, judgment vacated sub nom*. *Biden v. Knight First Amend. Inst. At Columbia Univ*., 141 S. Ct. 1220, 209 L. Ed. 2d 519 (2021); *compare Lindke v. Freed,* No. 20-10872, 2021 WL 4427170 (E.D. Mich. Sept. 27, 2021)(appeal pending)(not state action where city manager maintained the page himself, gave no indication of public office and did not use it for official communications)

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)(Banning a constituent from a County Chair's Facebook page violated the First Amendment).