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COMPELLED SPEECH: YOU CAN'T MAKE ME SAY THAT



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Removing and Banning Individuals from Public Property

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Municipalities often must deal with members of the public who disrupt meetings, harass employees, or even threaten to harm elected officials. In such instances, officials may seek to temporarily remove that person from public property or ban them from re-entering the property.

One common strategy municipalities use to ban a person from public property is to issue that person some sort of "no-trespass letter." No-trespass letters typically prohibit a person from re-entering public property in response to that person's prohibited conduct. If a person returns to public property after receiving a no-trespass letter, municipalities may have law enforcement remove the person from the property or pursue criminal trespass charges. Another strategy municipalities may use is seeking a protective order or injunction from a court banning a person from public property for a specified period of time.

When legal challenges are brought against municipalities for removing or banning a person from their property, those are typically brought on First Amendment grounds. However, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.[1] A governmental entity has power to preserve the property under its control for the use to which it is lawfully dedicated.[2]

A person's right to continue to access public property, and the standard for limitations on that right, must be evaluated based on the circumstances of the removal and the character of the property.[3]

Removals and Bans from Traditional and Designated Public Forums

Public property that has traditionally been used by the public for assembly, debate, and other expressive activity is called a "traditional public forum."[4] Some examples included sidewalks, public streets, and parks.[5] "Designated public forums" consist of public property that has not traditionally been regarded as a public forum but has intentionally been opened up to expressive activity by a public entity (e.g. libraries, public meetings, municipal theatres).[6] As long as a municipality maintains the open character of a designated public forum, it is governed by the same standards as apply in a traditional public forum.[7]

If a municipality is considering removing or banning a person from a traditional or designated public forum, such actions should rarely (if ever) be based on the content of that person's speech. If a municipality removes or bans a person from a public forum based on the content of that person's speech and that removal is challenged in court, that action is likely to be subject to strict scrutiny and be struck down.[8]

If a person is removed from a public forum for content-neutral reasons (e.g. disruption, threats, harassment), the removal will survive legal challenge if a court determines the removal was narrowly tailored to serve a significant governmental interest (called "intermediate scrutiny") and leaves open ample alternative channels for communication.[9]

As an example, in 2011 the City of Austin's content-neutral no-trespass policy was subjected to intermediate scrutiny by a federal district court. The City had adopted a detailed criminal trespass policy that allowed the city to issue criminal trespass orders banning persons from specific property for certain periods of time based on the severity of the person's conduct. The policy also allowed for a post-issuance administrative review of the criminal-trespass notices by means of an informal review by the director of the relevant city department, and a right to appeal the notice to the City Manager.

The city used the policy to issue a criminal trespass notice to a protestor, prohibiting him from returning to any portion of the City Hall Plaza (a

traditional public forum) for a period of one year. The Plaza was later the site of an Occupy Austin protest, and protestor sued the city alleging that the ban violated his First Amendment right to participate in the protest. The court concluded that, even though the policy was content-neutral and a park across the street was available as an alternative area to protest, the city violated the protestor's First Amendment rights because it prevented him from engaging in any form of speech at the Plaza for the duration of the ban and the alternative location did not offer him an effective way to communicate to his intended audience.[11] The court reasoned that: 1) the ban was not narrowly tailored to the city's interests in preserving general use of the Plaza because the city did not avail itself to less restrictive alternatives such as enforcement of criminal trespass sanctions, and 2) the city did not provide sufficient alternative channels for communication because the Plaza was the "heart of the protest" and no other location provided an adequate means for the protestor's intended expressive activity.[12]

This case demonstrates that, even when a policy bans persons from public forums for reasons other than the content of the speech, municipalities must carefully draft and apply policies so their means of enforcement is narrowly tailored and they do not completely prohibit access to important public forums.

Removal and Bans from Nonpublic Forums

A nonpublic forum is public property which the government has not opened to public communication either by tradition or by designation. While a designated public forum is created when a municipality makes a property generally available to a certain class of speakers, a nonpublic forum is created when a municipality does no more than reserve eligibility for access to the forum to a particular class of speakers who must obtain permission to use it.[13] Some examples of nonpublic forums include the interior of police stations,[14] courthouses,[15] and city halls.[16]

Restrictions on access to a nonpublic forum will survive a legal challenge as long as they are reasonable in light of the purpose served by the forum and not an effort to suppress a specific viewpoint.[17]

An example of lawful ban occurred in *United States v. Albertini*, 472 U.S. 675 (1985). In *Albertini*, an individual was charged with trespassing on a military base after he had received a letter 9 years earlier forbidding him from reentering the base. He had originally received the no-trespass letter when he had entered the base and destroyed government property. The U.S. Supreme Court held that barring the individual from re-entering the base was reasonable because his previous receipt of the no-trespass letter was for prior acts of vandalism and the scope of the indefinite ban promoted the government's interest in assuring security of the base.[18]

However, courts have stricken down no-trespass orders barring access to nonpublic forums if they do not think the ban is proportionate to the interests served by the ban. In *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2004), local officials issued Huminski a no-trespass notice for certain nonpublic forums (courthouses and adjacent grounds) after he sent letters to a judge and other public officials that they perceived as threatening and displayed protest posters in the courthouse parking area. The court ruled the no-trespass notices were unreasonable and thus violated Huminski's First Amendment rights because the notices were so expansive as to amount to "First-Amendment-Free Zones," which are disfavored even in nonpublic forums.[19] The court also assigned significance to the lower court's conclusion that the no-trespass notices were overly broad because (unlike in *Albertini*) Huminski never committed any prior misconduct on the courthouse grounds and his actions leading up to issuance of the notices were not disruptive to official court business.[20]

Despite the Second Circuit's ruling in *Huminski* disfavoring "First-Amendment-Free Zones," other circuits appear to disagree that absolute bans from nonpublic forums automatically violate a person's First Amendment rights.[21] Courts are more likely to agree with *Huminski*'s conclusion that any ban from nonpublic forums should be proportionate to the interest it is intended to serve. For example, another federal court has concluded that banning a person from all of a city's nonpublic forum facilities during work hours because they threatened a city employee might be reasonable with regard to those facilities the threatened employee works at but unreasonable with regard to all other facilities.[22]

Public Meetings

Many of the cases involving municipalities removing or banning individuals involve public meetings, where it is common for the public to ignore the rules of decorum or disrupt discussion by the elected officials. A public meeting is typically characterized as a "limited public forum," which is property limited to use by certain groups or dedicated solely to the discussion of certain subjects.[23]

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Removing Individuals *cont'd from page 11*

When a person is removed from a public meeting based solely on their actual disruption of the meeting and challenges that removal in court, courts will apply the same intermediate scrutiny used in other public forums and typically do not conclude the removal violates the First Amendment. However, municipalities must make sure the disruptive individual is removed because of their disruptive behavior and not based on the content of their speech. If it is unclear that a person's disruptive behavior was the actual basis for their removal from a meeting, a court is more likely to find a First Amendment violation.[25]

Additionally, removal policies and practices must be applied consistently. Even if a municipality has probable cause to arrest a person for disrupting a meeting, a plaintiff may be able to overcome a presumption the arrest was constitutional with evidence showing similarly situated individuals were not arrested even though they engaged in the same sort of disruptive activity.[26] Although courts generally permit the removal of disruptive individuals from the actual meetings they are disrupting, they are far less likely to accept banning persons from attending future meetings because of prior disruptive behavior. In *Barna v. Bd. of Sch. Dirs.*, 143 F. Supp. 3d 205 (M.D. Pa. 2015), a school provided the plaintiff with a no-trespass letter saying he was permanently banned from attending school board meetings because of several incidents at meetings where he alluded to the fact that his friends have guns and that he "may have to come after all of yous;" where he raised his voice, became confrontational, and challenged the school board president to a fight; and where he "uttered '[s]on of a bitch' within earshot of meeting attendees, including some children."[27] Despite the plaintiff's inappropriate conduct and that the school district still permitted him to submit written questions to the board, the court concluded that prohibiting him from attending future meetings violated the First Amendment. The court stated that, "the government cannot prohibit future expressive activity as a result of past unlawful conduct."[28]

Numerous other courts have concluded that, although a person's disruptive behavior justified their removal from the meeting they disrupted, that behavior did not justify removal from future meetings.[29] If a municipality does feel compelled to ban an individual from a future meeting based on previous disruptive behavior, the municipality should strongly consider providing the individual with a process for requesting readmission or to challenge the ban.[30]

In addition, before removing or banning a person from a public meeting, municipalities should research whether such action conflicts with their state's open meeting laws.[31]

Due Process

Municipalities should also be cognizant of the Fourteenth Amendment when removing or banning individuals from public property. Several federal circuit courts have held that the Due Process Clause protects a person's right to travel to and remain at public places of their choice, and a government must provide a person with notice or an opportunity to be heard and present evidence prior to depriving a person of that right.[32] In these jurisdictions, municipalities should provide meaningful due process to any person before banning them from public property.

However, a plurality of circuit courts (including the Second, Seventh, and Tenth Circuits) appear to hold that the Fourteenth Amendment only protects a right to travel from place to place and does not provide a right to cross any *particular* parcel of public land or gain admittance to a *specific* government building.[33] Within these circuits, individuals do not have a due process right to access specific public places such as community centers and municipal buildings.

Therefore, municipalities should research case law from their respective circuit to determine the extent to which due process rights should be afforded to persons prior to removing or banning them from public property.

Policy Recommendations

Municipalities should strongly consider adopting policies that address the circumstances for removing or banning individuals from public property.

First, policies should not contemplate removing a person from public property based on the content of a person's speech. Instead, justifications for removals should be content-neutral, generally applicable, and not target a specific group. Some appropriate justifications include preventing disruption of public business and protecting public safety.

The policy should also clearly spell out what specific conduct can result in removal or a ban from public property in order to avoid a challenge for being void for vagueness. The prevention of the prohibited conduct should meaningfully advance important governmental interests. To the extent possible, the removals and bans should be limited to the specific public properties necessary to advance those government interests.

The policy should not grant unduly broad discretion in determining whether to remove or ban a person from public property. Instead, the policy should contain adequate standards to guide the appropriate official's decision.[35]

The policy should establish the duration of bans based on specific conduct, or list what factors will be considered in determining that duration. The policy should not use one ban duration that applies regardless of different conduct.[36]

For removals from public meetings, municipalities should outline clear, content-neutral justifications that are focused on eliminating disruptions during the meetings. Chairs and enforcing officers should be trained on these justifications, admonished to never take action based on a person's specific viewpoint, and advised to apply the policy consistently. Policies should also avoid imposing prospective bans from public meetings; however, if prospective bans are contem-

plated, individuals should be provided a process for requesting readmission or challenging the ban.

Municipalities should also consider providing meaningful due process to persons prior to removal or imposition of a ban, especially if the municipality is located within circuit that recognizes a due process right to access public property. This might include notice of the reason for the proposed ban, an opportunity to challenge the ban, and a convenient means of applying for readmission to the property.

Notes

1. United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129, (1981) (First Amendment does not guarantee access to property simply because it is owned or controlled by the government.).
2. *See* Greer v. Spock, 424 U.S. 828 (1976).
3. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
4. *Id*.
5. *Id*.
6. Koala v. Khosla, 931 F.3d 887 (9th Cir. 2019).
7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983).
8. *Id*.
9. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Sanchez v. City of Austin, No. A-11-CV-993-LY, 2012 U.S. Dist. LEXIS 190686, at *14-15 (W.D. Tex. Sep. 27, 2012).
10. Sanchez 11. Id.
12. *Id*.
13. Ark. Educ. Tv Comm'n v. Forbes, 523 U.S. 666, 679 (1998).
14. First Def. Legal Aid v. City of Chicago, 319 F.3d 967, 968 (7th Cir. 2003); *see also* Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 231 (2d Cir. 1996).
15. Huminski v. Corsones, 396 F.3d 53, 90-91 (2d Cir. 2005); s*ee also* Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005).
16. See Hansen v. Williamson, 440 F. Supp. 2d 663, 679 (E.D. Mich. 2006).
17. Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 677 (1998); *see also* Huminski v. Corsones, 396 F.3d 53, 92 (2d Cir. 2004) (constitutionality of the restrictions in the trespass notices as applied to nonpublic forums based on whether restrictions of expressive activity are reasonable and viewpoint neutral).
18. United States v. Albertini, 472 U.S. 675 (1985).
19. Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2004).
20. *Id*.
21. *See* USPS v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981); *see also* Moore v. United States Postal Serv., 159 F. App'x 265, 267 (2d Cir. 2005).
22. *See* Vincent v. City of Sulphur, 28 F. Supp. 3d 651, 657 (W.D. La. 2014) (even if the notice of trespass for nonpublic forums was reasonable with respect to city hall for the protection of elected officials, not reasonable for the courthouse, the police station, or the city business center because there is no indication that those individuals could be found there).
23. *See* Barna v. Bd. of Sch. Dirs., 143 F. Supp. 3d 205 (M.D. Pa. 2015).
24. *See* Galena v. Leone, 638 F.3d 186 (3d Cir. 2011) (temporary ejection of a disruptive participant from a municipal meeting did not violate the plaintiff's constitutional rights); see also Eichenlaub v. Twp. of Indiana, 385 F.3d 274 (3d Cir. 2004) (upholding the constitutionality of removing a speaker from a township meeting to prevent "badgering, constant interruptions, and disregard for the rules of decorum."); *see also* Brown v. City of Jacksonville, 2006 U.S. Dist. LEXIS 8162, at *8 (M.D. Fla. Feb. 16, 2006) (upholding barring a person who makes "personal, impertinent or slanderous remarks or who shall become boisterous").
25. Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *43 (D. Kan. Apr. 24, 2019) (factual dispute about whether conduct or speech caused ban resulted in court denying summary judgment as to the retaliation claim).
26. Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).
27. Barna v. Bd. of Sch. Dirs., 143 F. Supp. 3d 205, 229 (M.D. Pa. 2015).
28. *Id*. at 221.
29. *See* Brown v. City of Jacksonville, 2006 U.S. Dist. LEXIS 8162, at *8 (M.D. Fla. Feb. 16, 2006); *see also* Surita v. Hyde, 665 F.3d 860, 872 (7th Cir. 2011).
30. *See* McDonough v. Garcia, 2022 U.S. Dist. LEXIS 61082, at *26-27 (S.D. Fla. Mar. 30, 2022).
31. Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *13 (D. Kan. Apr. 24, 2019) (Kansas Open Meetings Act does not guarantee attendance for every individual).
32. *See* Lu v. Smith, 2016 U.S. Dist. LEXIS 119127, at *10-11 (D. Mass. Sep. 2, 2016) (plaintiff sufficiently alleged a property rights violation because he was on public property and he had a right to access that public property; *see also* Lutz v. City of York, Pa., 899 F.2d 255, 268 (3d Cir. 1990) (right to move freely about one's neighborhood or town, even by automobile, is a fundamental right); *see also* Willis v. Town of Marshall, 2003 U.S. Dist. LEXIS 16967, at *32-35 W.D.N.C. June 20, 2003) (Fourteenth Amendment protects the freedom to move about in public places and attend gatherings open to the general public occurring in public fora and ban from public property requires minimum measure of procedural protection); *see also* Vincent v. City of Sulphur, 28 F. Supp. 3d 626, 642 (W.D. La. 2014) (individual's procedural-due-process rights were violated when officers issued the no-trespass warning for alleged threat to kill mayor without providing him with notice and an opportunity to be heard); Sheets v. City of Punta Gorda, 415 F. Supp. 3d 1115, 1127 (M.D. Fla. 2019) (recognizing a constitutionally protected liberty interest to be in parks or other city lands).
33. Williams v. Town of Greenburgh, 535 F.3d 71, 76 (2d Cir. 2008) (right to intrastate movement does not create a "right

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Compelled Speech *cont'd from page 9*

and *Wooley,* that had determined that the government cannot compel a person to endorse a message that he does not agree with.[86] The Court also analyzed cases, such as *Keller* and *Abood*, that had found that the government cannot compel funding of private speech that a person disagrees with.[87] Distinguishing its facts from those cases, the Court found that compelled funding of government speech is permissible, whether or not the person compelled to fund the speech agrees with its message.[88]

It can be difficult to distinguish the holding in *Johanns* from *Wooley*, which found that the state cannot prohibit a citizen from covering up the state motto "Live Free or Die" on his vehicle's license plate.[89] Logically, a license plate is not dissimilar from a building permit, which must be displayed on private property. *Johanns* itself distinguishes *Wooley* by stating that the presence of the motto essentially required the citizen to use his vehicle as an advertisement or billboard for the State's ideologic message.[90] Taking that reasoning on its face, municipalities might run into problems when requiring a building permit displayed on private property. One focus in the *Wooley* decision, however, was on the interest that the state provided for requiring the message.[91] In fact, the *Wooley* decision likely would have come out differently if the citizen had covered the words "New Hampshire" or the license plate number itself. The State had provided that its interest in requiring the words to be visible was in identifying that the vehicle had the proper license plates for its type.[92] The Court found that this is not sufficient reasoning because the license plates at issue have other distinguishing features and the motto is an expression of ideology that is not needed for that purpose.[93] As long as a building permit is tailored to the government interest it is intended to support, without ideological commentary, the government can likely compel a property owner to display this government speech.

Further, the Court has previously found that a requirement to allow private speech on private property did not infringe on the property owner's First Amendment rights where it was not likely to be identified as the speech of the owner and the owner was free to dissociate himself from all such views.[94] In *PruneYard*, the Court reviewed a requirement that a privately-owned shopping center in California allow private citizens to speak and pass out petitions on the property.[95] The Court distinguished *Wooley* in stating that the shopping center had chosen to be open to the public.[96] Because it is a publicly-accessible property, it is not as likely that the views expressed by members of the public would be attributed to the property owner as they would when attached to a citizen's personal vehicle.[97] The property owners are also free to put up signage stating that they do not agree with the messaging.[98] Similarly, building permits and other postings required by municipalities tend to be placed in areas open to the public. If a property owner disagreed with the contents of the document, he would be free to express his opinion as well. Based on this analysis, it seems clear that cities would not violate the First Amendment rights of property owners when requiring these documents to be displayed.

Conclusion

Because the governing body of a municipality is generally more accessible to citizens than the state or federal legislature, direct petitions or requests from citizens are more common at city hall. When citizens request that the municipality compel speech, the city attorney's office must be careful to review the limitations that the First and Fourteenth Amendments might put on the requested action. Both the federal Constitution and preemption from the state impact the ability of a municipality to act. These limitations leave municipalities with little ability to compel the speech of others. City attorneys should be aware of these limitations both in the context of requested legislation within their municipalities and with regards to the content of government documents that private property owners are compelled to display. In the case of Corpus Christi's initiative petition, the City Attorney's Office opined that City Council did not have the authority to compel medical professionals to provide information about alternative COVID-19 treatment practices. When presenting the initiative petition to City Council, the City Attorney's Office included an ordinance without the compelled speech requirements.

Notes

1. "*Initiative*. The registered voters of the city shall have the power to propose ordinances to the city council and, if the council fails to adopt the ordinance in substantially the form in which it was presented, to adopt or reject the ordinance proposed at an election as provided herein." Corpus Christi, Tex. City Charter art. I, § 4(a)(1) (2010)
2. Corpus Christi, Tex. City Charter art. I, § 4(d) (2010).
3. U.S. Const. amend. I; U.S. Const. amend. XIV, §1.
4. Minersville School District v. Gobitis, 310 U.S. 586, 591 (1940).
5. *Id.*
6. *Id.* at 592.
7. *Id.* at 600.
8. *Id.*
9. W. Va. State Bd. of Education v. Barnette, 319 U.S. 624, 626 (1943).
10. *Id.* at 629.
11. *Id.*
12. *Id.*
13. *Id.* at 630.
14. *Id.* at 642.
15. *Id.*
16. Wooley v. Maynard, 430 U.S. 705 (1977).

17. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (finding that the government could not require a parade organizer to allow an LGBT group to participate and display a banner).
18. Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) (finding that a utility company could not be compelled to include certain information in envelopes sent to customers).
19. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (finding that state law cannot compel a newspaper to run an opposing viewpoint).
20. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000) (finding that the government cannot compel the Boy Scouts of America to hire a homosexual Scoutmaster as employment by the Boy Scouts is expressive association).
21. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 (2006).
22. *Id.*
23. *Id.* at 53.
24. "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do--afford equal access to military recruiters--not what they may or may not say." *Id.* at 60.
25. *Id.* at 69-70.
26. *Id.*
27. Abood v. Detroit Bd. of Educ., 431 US 209, 232 (1977).
28. *Id.* at 235-36.
29. Keller v. State Bar of Cal., 496 US 1, 13-14 (1990).
30. Janus v. AFSCME, Council 31, 138 S.Ct. 2448, 2467 (2018).
31. *Id.*
32. Jarchow v. State Bar, 140 S. Ct. 1720 (2020).
33. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)
34. *Id.* at 1723.
35. *Id.*
36. *Id.*
37. "If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference." Id.
38. *Id.* at 1727 (opining that while the rights of homosexuals should be recognized, "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.")
39. *Id.* at 1731-32.
40. *Id.*
41. Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019).
42. *Id.* at 747-48.
43. *Id.* at 749.
44. "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment." *Id.* at 755 (citing *Hurley*, 515 U.S. at 579).
45. *Id.*
46. *Id.* at 757-59.
47. *Id.* at 759.
48. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021).
49. *Id.* at 1169-70.
50. *Id.* at 1170.
51. *Id.* at 1181.
52. *Id.*
53. *Id.* at 1179.
54. 303 Creative LLC v. Elenis, 143 S. Ct. 77 (2022) (granting certiorari); Transcript of Oral Argument, 303 Creative LLC v. Elenis, held on December 5, 2022 (No. 21-476), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-476_n7io.pdf.
55. *See, e.g.,* Cole v. Richardson, 405 U.S. 676 (1972); Bond v. Floyd, 385 U.S. 116 (1966); Connell v. Higginbotham, 403 U.S. 207 (1971).
56. *Cole*, 405 U.S. at 680 (citing Law Students Research Council v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); *Connell*, 403 U.S. at 209 (1971) (MARSHALL, J., concurring in result)).
57. "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." *Bond*, 385 U.S. at 136.
58. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 632-34 (1985).
59. *Id.*
60. *Id.* at 647.
61. *Id.* at 651.
62. Milavetz, Gallop, & Milavetz v. United States, 559 U.S. 229, 252-53 (2010).
63. *Zauderer*, 471 U.S. at 651.
64. Whalen v. Roe, 429 U.S. 589, 602-04 (1977).
65. Planned Parenthood v. Casey, 505 U.S. 833, 882-85 (1992).
66. *Id.* at 884.
67. *Id.*
68. *Id.* at 882-83.
69. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
70. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
71. *Id.* at 2368.
72. *Id.*
73. *Id.* at 2372.
74. *Id.* at 2372-73.
75. *Id.* at 2372.
76. *Id.* at 2373.
77. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).
78. *Id.*
79. *See* Texas Occupations Code §151.003 (providing that the "primary means of licensing, regulating, and disciplining physicians" lies with

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the Texas Medical Board); and Texas Occupations Code §554.002 (providing that the Texas State Board of Pharmacy regulates the practice of pharmacy).
80. *See* Dall. Merch.'s & Concessionaires Ass'n. v. City of Dallas, 852 S.W.2d 489 (Tex. 1995).
81. *Hunter*, 207 U.S. at 178.
82. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
83. "[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000)
84. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559-60 (2005).
85. *Id*. at 553.
86. *Id*. at 557.
87. *Id*. at 557-58.
88. *Id*. at 559.
89. *Wooley*, 430 U.S. at 715.
90. *Johanns*, 544 U.S. at 557.
91. *Wooley*, 430 U.S. at 716-17.
92. *Id*. at 716.
93. *Id*.
94. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980).
95. *Id*. at 77.
96. *Id*. at 87.
97. *Id*.
98. *Id*.

Amicus *cont'd from page 23*

Notes

1. These include *Groff v. DeJoy* (a Title VII religious accommodation case); *303 Creative v. Elenis* (which involves the intersection of free speech and anti-discrimination laws); *Harper v. Moore* (the Independent State Legislature Theory case); *Tyler v. Hennepin County* (an important Takings case); *Sackett v. Environmental Protection Agency* (a WOTUS case); and National *Pork Producers Council v. Ross* (which involves the dormant commerce clause and the extraterritoriality principle).
2. Berry v. Bd. of Supervisors of Fairfax Cnty., No. 211143, 2023 WL 2604163, at *9 (Va. Mar. 23, 2023).
3. *Id*. at *1.
4. *See* Fairfax County Zoning Ordinance Modernization Project: Notable Changes from the 1978 Ordinance (April 6, 2021), available at: https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zmod/executive-summary-notable-changes.pdf.
5. Va. Code Ann. § 2.2-3707(B).
6. In 2021, the General Assembly amended Va. Code Ann. § 15.2-1413 to allow a continuity ordinance to remain in effect for twelve months rather than six months.
7. The court refers to the County's ordinance as the "Continuity Ordinance" as it was an uncodified ordinance that was adopted on April 14, 2020.
8. *Id*. at *10, citing the Continuity Ordinance 1C
9. *Id*. at 3.
10. Berry, 2023 WL 2604163, at *9.
11. *Id*. at *10.
12. *Id*.
13. *See* Board of Supervisors v. Board of Zoning Appeals, 268 Va. 441, 446 (2004) (quoting Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915)) ("a local government's exercise of its zoning authority is 'one of the most essential powers of government[.]'")
14. Berry, 2023 WL 2604163, at *11.

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to cross a particular parcel of land, enter a chosen dwelling, or gain admittance to a specific government building"); *see also* Harper v. Houston, 2017 U.S. Dist. LEXIS 214988, at *9 (W.D. Tenn. Nov. 15, 2017) ("municipalities are constitutionally permitted to limit access to facilities without impinging on the right to free movement"); *see also* Hannemann v. S. Door County Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012) (right to intrastate travel protects the right to move from place to place, not the right to access certain public places such as community centers and government office buildings); *see also* Banuelos v. Martinez, 2015 U.S. Dist. LEXIS 76039, at *7-8 (E.D. Cal. June 10, 2015) (no liberty interest to enter into any state office without restriction); *see also* McCraw v. City of Okla. City, 973 F.3d 1057, 1080-81 (10th Cir. 2020) (fundamental right to freedom of movement applies only interstate travel, not intrastate travel).
35. *See* Hirt v. Unified Sch. Dist. No. 287, 2019 U.S. Dist. LEXIS 70477, at *32 (D. Kan. Apr. 24, 2019) (policy not void for vagueness because it clearly spelled out the conduct that may lead to someone being denied access to a school).
36. Thomas v. Chi. Park Dist., 534 U.S. 316, 317 (2002).
36. *See* Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1122 (D. Or. 2004) ("A narrowly-tailored ordinance would not have a one-size-fits-all 30-day exclusion irrespective of the nature of the violation.").
37. *See* Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 552 (D. Vt. 2014) (notices against trespass deficient because they were not issued pursuant to any protocol and did not set out a process for contesting the notices); *see also* Sanchez v. City of Austin, 2012 U.S. Dist. LEXIS 190686, at *21-25 (W.D. Tex. Sep. 27, 2012) (city violated the protestor's procedural due process rights because of the broad guidelines provided for use by officials in implementing the policy, the lack of notice, and the post-deprivation-only nature and burden placed on the ban recipient for appeal process).