The First Amendment and Section 1983 for Cities

IMLA 2024 Mid-Year Seminar

April 18-21, 2024

Washington, D.C.

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The First Amendment to the U.S. Constitution:

> 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.

42 U.S.C. § 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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Top Reasons that municipalities and their employees get accused of violating the First Amendment

1. The city terminated an employee or engaged in some action making an employee believe they would soon be terminated – The employee then alleges their termination was caused by their First Amendment protected activity. Terminated employees are desperate for causes of action. First Amendment is appealing because it bypasses the EEOC process.

Pickering Balancing Test and **Connick Public Concern Test**: In 1968, the U.S. Supreme Court created the first test in a two-tiered analysis: the *Pickering* balancing test. *Pickering v. Bd. of Education.*, 391 U.S. 563, 568 (1968). In 1983, the Supreme Court added the second test to the two-tiered analysis: the *Connick* public concern test. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

Pickering Balancing Test Vs Connick Public Concern Test. –

***Pickering* test -** the interests of the public employee in commenting on matters of public concern is balanced against the interests of the public employer in promoting the efficiency of the public services it is providing.

***Connick v Myers* test --** When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices.

- Employees often win the *Pickering* test and lose the *Connick v Myers* test because complaints about personnel matters, especially with respect to the employee themselves are usually not a "public concern"
- Allegations of violations of laws are usually a "public concern"
- Notable case - *City of San Diego v. Roe*, 543 U.S. 77 (2004). Making a video of oneself stripping off his police uniform and masturbating does not qualify as a matter of public concern.

- ***Garcetti* defense** - job-related speech is not protected by the 1st Amendment—If speech is made pursuant to one's duties, then it is not actionable as 1st-Amendment protected activity.

- ***Paske v. Fitzgerald***, 785 F.3d 977, 984 (5th Cir.[Tex.]2015). A police officer's speech at a meeting of higher ranking officers was not protected by the First Amendment, when he was invited to the meeting in his role as a police officer, his attendance was part of his job, he spoke in response to an invitation from his supervisor for job-related questions, and he contributed to the formation and execution of official policy by participating in internal discussions of the police department's operations.

Corn v. Mississippi. Dep't of Pub. Safety, 954 F.3d 268, 278 (5th Cir. 2020). Employee of Mississippi DPS who were allegedly fired for reporting to their own heirarchy and the federal Nat'l Highway Safety Administration an internal investigation into non-existent traffic violations were not protected because their initial speech (to their own heirarchy) occurred in the context of their law enforcement duties.

In general, law enforcement officers generally have an obligation to communicate law enforcement matters, so *Garcetti* effectively defeats many cases by law enforcement officers

Policies that govern employee speech can be constitutionally infirm by being non-viewpoint neutral or by being overbroad. Terminated or otherwise aggrieved employees will often review employee policies for illegal provisions.

- *Westbrook v. Teton Cty. Sch. Dist. No. 1*, 918 F. Supp. 1475 (D. Wyo. 1996)- finding school district's policy forbidding criticism of co-workers or supervisors, including members of the school board, outside of limited settings to be unconstitutionally overbroad.

- *Providence Firefighters Local 799 v. City of Providence*, 26 F. Supp. 2d 350, 352, 357 (D.R.I. 1998). Fire Department regulation requiring the fire chief's pre-approval before making any comments for publication is unconstitutionally overbroad.

2. The city arrested someone who made offensive statements to the police. Arrests are sometimes accompanied by the arrestee's allegation that the arrest was caused, at least in part, by the First Amendment-protected expression of the arrestee. Common in disorderly conduct arrests and arrests for public intoxication. To prevail in a 1st Amendment retaliation claim under § 1983, against an arresting officer, a plaintiff must prove that:

- the plaintiff engaged in constitutionally protected speech;
- the arresting officer caused the plaintiff to be arrested;
- the defendant's actions were motivated by the plaintiff's engagement in constitutionally protected conduct, and
- **the arrest was <u>not</u> supported by probable cause or was a crime for which arrests rarely occur. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)**

***Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).** During a winter sports festival, Sgt Nieves was asking some partygoers to move their beer keg inside their RV because minors had been making off with alcohol. According to Sgt Nieves, Bartlett, who was intoxicated, began belligerently yelling to the RV owners that they should not speak with the police. After stepping between a trooper and an underage party-goer, Bartlett was arrested. His charges were ultimately dismissed. Bartlett sued, alleging that his arrest was retaliation for telling RV'ers not to talk to police. **The Supreme Court stated that Bartlett's retaliatory arrest claim against both officers could not succeed because they had probable cause to arrest him.** There remains a qualification that the no-probable-cause requirement should not apply when a plaintiff presents **objective evidence** that he was arrested when similarly-situated individuals not engaged in the same sort of protected speech would not have been arrested.

3. The city regulated the content of signs, especially billboards.

Twin cases define parameters of billboard regulation. ***Reed v. Gilbert*** 135 S. Ct. 2218 (2015) and ***City of Austin v. Reagan Nat'l Advert. of Austin, LLC.*** In *Reed,* the Good News Community Church in Gilbert, Arizona challenged the constitutionality of the town's sign code, arguing that it interfered with the church's ability to advertise its weekly meetings. The code imposed different size & duration requirements based on the subject matter of the signs. The code specified 23 categories of signs. Three were at issue in *Reed*: "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event." The church's signs fell under "temporary directional signs" category. The Court unanimously struck down the law for violating the First Amendment, with a majority finding that the law was content-based on its face and failed strict scrutiny.

After *Reed v. Gilbert*, the rule effectively was 'if you have to read the sign to regulate it, then the regulation is unconstitutional. *Reed v. Gilbert* led to many sign ordinances being invalidated because cities often have a challenge in drafting content-neutral sign ordinances established by the competing interests of on-premise sign owners, billboard owners, and city planners.

City of Austin v. Reagan National Advertising of Austin, LLC, 142 S. Ct. 1464 (2022). The city of Austin prohibited new off-premise digital signs (chiefly billboards) or digitization of existing ones while allowing digital signs on the premise of a business that advertised goods or services offered at the business. Reagan National Advertising sought to convert their billboards to digital billboards under Austin's rules relating to on-premise advertising.

Following *Reed*, the 5th Circuit held that the on-premises/off-premises distinction was content-based and subject to strict scrutiny invalidation. The U.S. Supreme Court said it would be "too extreme an interpretation of this Court's precedent" to say that Austin's regulation was content-based simply because someone had to determine whether a sign did or did not relate to a good or service being offered on the premises.

4. The city or one of its officials blocked someone's offensive comment on social media.--Highly offensive people often get their comments blocked on social media. If a City opens a social media account that is open to comments, then it has opened a limited public forum, in which it cannot engage in viewpoint discrimination. The question with blocking comments is often whether the social media site is being operated by the government (which cannot discriminate unlawfully) or by a private person who merely works for the government (in which the government cannot interfere).

Balancing test:

- Whether official presents himself on social media account with his government title
- Whether account is used to communicate about the official's duties & activities
- Whether third parties interact with the account as thought it belonged to government
- **Whether the social media account was initially created as a campaign device rather than a tool of governance. *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021)**

New Supreme Court Case on Blocking Offensive Commenters on Social Media.—On March 15, 2024, in *Lindke v. Freed*, No. 22-611, 2024 U.S. LEXIS 1214. the U.S. Supreme Court issued a new ruling on social media blocking as follows: "A public official's social-media activity constituted state action for purposes of 42 U.S.C.S. § 1983 and the First Amendment only if the official possessed actual authority to speak on the State's behalf and purported to exercise that authority when he spoke on social media."

In *Lindke*, James Freed maintained a facebook page that predated his appointment as City Manager. In the page, he posted information about his personal life, photos of his daughter, outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston. James Freed also posted information about his job, like visiting local high schools, starting reconstruction of the city's boat launch, news about the city's efforts to streamline leaf pickup, and news about water intake from a local river.

4. (*Lindke v. Freed* cont'd)

On his facebook page, Freed also highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public-for instance, he once posted a link to a city survey about housing and encouraged his audience to complete it. Kevin Lindke posted comments complaining about Freed. As a result, he was blocked from commenting.

Lindke sued, claiming that Freed had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The Supreme Court emphasized that "Freed did not relinquish his First Amendment rights when he became city manager," and stated "**state action exists only when the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." The Court also stated that "If the State did not entrust Freed with these responsibilities, it cannot "fairly be blamed" for the way he discharged them."**

5. The city arrested a person who was filming police or other government employees. In almost all federal circuits, cities may not arrest persons who are merely filming police or other government actors in a public place. Nonetheless, such arrests are a common occurrence.

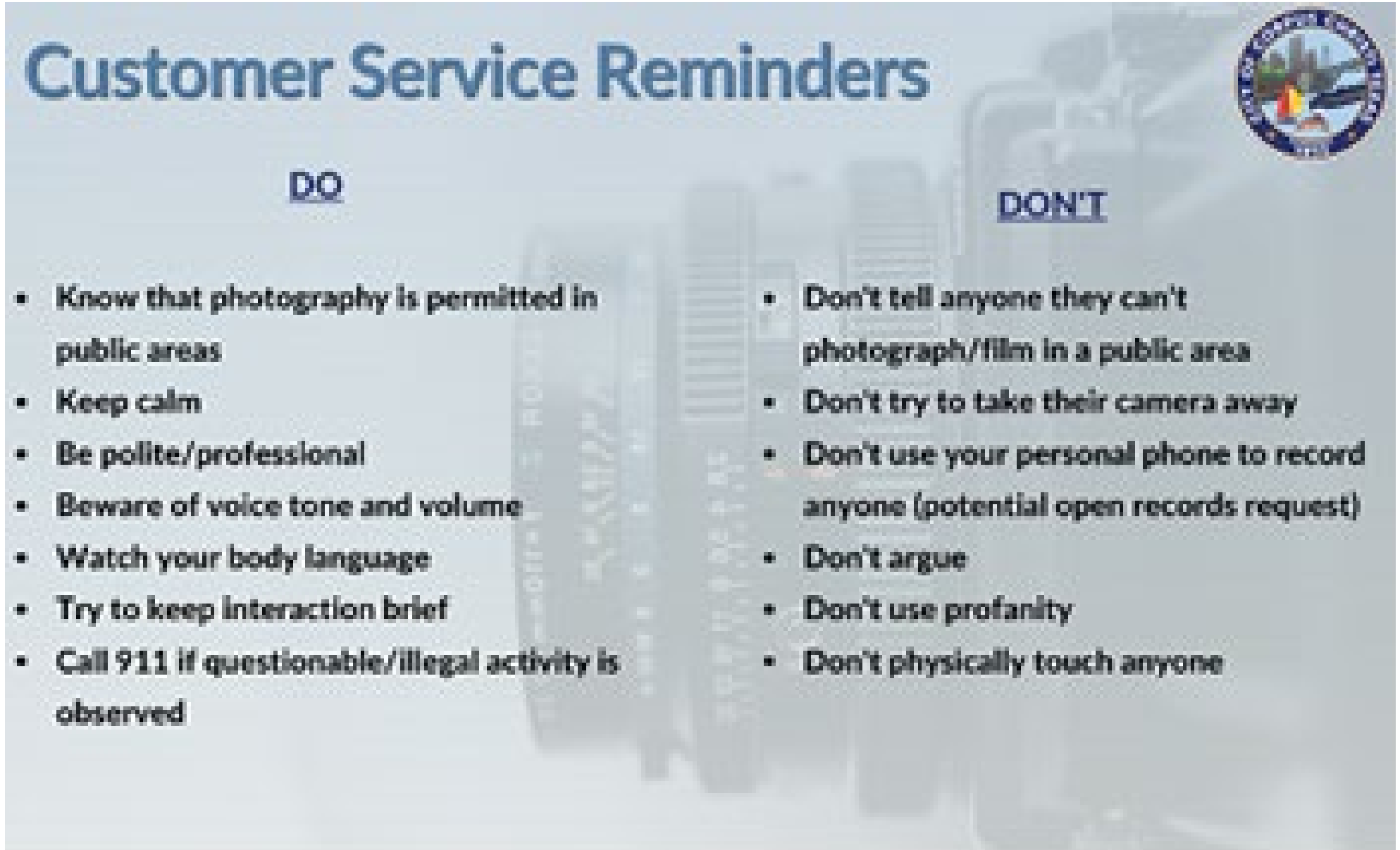
Some social media influencers are building a cottage industry from agitating City officials into arresting them by filming aggressively. These are "First Amendment auditors". A violent interaction between an auditor and government officials can result in a video that generates millions of views on YouTube and thousands of donations to the auditor.

Best defense against First Amendment auditors is informing field-level government employees about the rights of persons with cameras & cellphones and encouraging tolerance and relentless professionalism.

The City of Corpus Christi distributes information cards to its employees:



Back


Customer Service Reminders
DO
DON'T
• Know that photography is permitted in public areas
• Keep calm
• Be polite/professional
• Beware of voice tone and volume
• Watch your body language
• Try to keep interaction brief
• Call 911 if questionable/illegal activity is observed
• Don't tell anyone they can't photograph/film in a public area
• Don't try to take their camera away
• Don't use your personal phone to record anyone (potential open records request)
• Don't argue
• Don't use profanity
• Don't physically touch anyone

6. The city broke up a protest. The right of the public to demonstrate and protest in public spaces is a constitutionally guaranteed free speech right under the First Amendment. the First Amendment does not bar states and municipalities from arresting protestors who are committing crimes, such as trespassing or damaging property.

Law enforcement officers and officials are permitted to disperse public demonstrations if there appears to be a clear and present danger of a riot, public disorder, impeding of traffic on public streets, or threats to public safety, peace, or order. See *What Acts Constitute Excessive Force in Violation of the U.S. Constitution when used against Demonstrators or Protesters*, 64 A.L.R. Fed. 3d 5.

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7. The city established a permit system for protests and/or parades. There are five principles that must be followed when setting up a permit system for protests and parades:

- Government may not require prior submission of content of expression to the government prior to issuance of permit.
- Prior restraints of 1st Amendment protected activities require clear, narrow, objective, and definite standards. No unbridled discretion.
- Governments do not have unbridled discretion to assess parade/demonstration permit fees and the fee may not be assessed based on reaction of audience to demonstration. (ie. no heckler's veto).
- Use of public forum must be content-neutral. A licensor may not pass judgment on the content of the speech.
- Door-to-door religious canvassers who are not soliciting funds may not be required to obtain permits.

8. The city restricted a Sexually Oriented Businesses (SOB). Federal case law allows cities to establish the following restrictions on SOB's IF supported by adequate studies:

- Ban nude dancing
- Prohibit SOB's from being established within 1000 feet of residential zones, churches, parks, and schools
- Establish no-touch buffer zones between entertainers and customers
- Restrict hours of operation of SOB's
- Prohibit SOB's from selling alcohol
- Require female dancers to cover their breasts and genitals

9. The city limited (or arrested) a commenter in a City Council meeting.

Public comment sessions in city council meetings are limited public forums, where cities may establish **viewpoint-neutral** limits on commenting, such as limiting time, limiting comments to "City business" or limiting the comments to the subject matter of the meeting.

Content-based restrictions are permitted so long as they are designed to confine the "forum to the limited and legitimate purposes for which it was created." However, a common prohibition on "personal attacks" is unlikely to be constitutional if the attacks are related to the attacked person's official duties. In *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811 (1999), the court issued an injunction requiring a City to allow a commenter to publicly comment on an alleged affair between a Police Chief and his subordinate's wife.

Griffin v. Bryant, 30 F. Supp. 3d 1139, 1173 (D.N.M. 2014). A policy prohibiting "negative mention ...of any Village personnel, staff or the Governing Body" was facially unconstitutional because it "permit[ted] praise and neutral feedback, but not criticism, of both government employees and, worse, the Governing Body itself."

Marshall v. Amuso, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021). Policy restrictions on the use of "abusive" and "offensive" comments were impermissible viewpoint discrimination.

Eichenlaub v. Township of Indiana, 385 F.3d 274, 281 (3rd Cir. 2004). A city may limit the "public forum" to comments that address specified city concerns (For example, the city may eliminate public comment on items unrelated to city business).

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Defensive Considerations if Sued under 42 USC 1983.

- To state a claim for municipal liability under § 1983, "a plaintiff must show the deprivation of a federally protected right caused by action taken 'pursuant to an official municipal policy.'"
- A plaintiff must identify: (1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom.'" *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010) (citing *Monell*, 436 U.S. At 691).
- A municipality cannot be liable under § 1983 based on a theory of *respondeat superior,* rather, plaintiffs must prove that their injury was caused by action pursuant to official municipal policy or custom. 42 U.S.C.A. § 1983.

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Statute of Limitations for 42 USC § 1983 action

- The time limit for state and local employees to file a lawsuit for violating the First Amendment varies from state to state. The U.S. Supreme Court has said that federal courts should use the time limit for personal injury claims in the state where the court is located. This is the same time limit set by each state for automobile accident claims.

- While state law controls which statute of limitations is applied in a § 1983 action, federal law determines when a cause of action accrues. *Elliott Reihner Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund*, 161 F. Supp. 2d 413 (3d Cir. 2002).



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