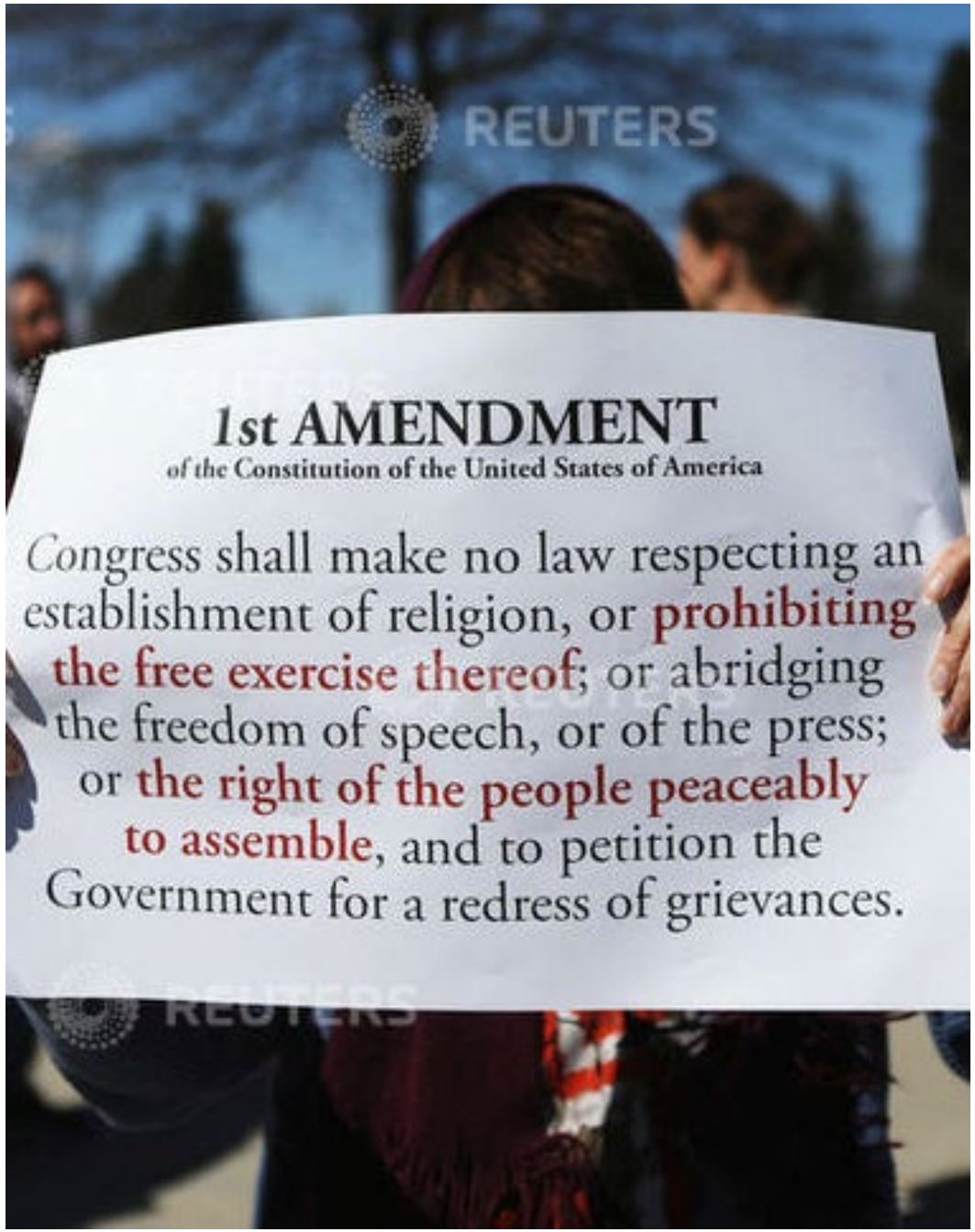
REUTERS: Jim Urquhart



What Every Municipal Attorney Should Know About the First Amendment

Ian Williams and Roger Horner
Practical Law, Government Practice

2024 IMLA Mid-Year Seminar
Washington, DC

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Blackacre Falls

Office of the City Manager

City Council Public Meeting

Honorable Mayor Roger Horner and City Councilmember Ian Williams (Zone 5)

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Meeting Invocation



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City of Blackacre Falls City Council Meeting Agenda

Call to Order

INVOCATION By: Councilmember Williams

1. EMPLOYEE TERMINATION APPEAL

- Human Resources A. FILE NUMBER BAF1001 Appeal of employee termination

2. PUBLIC WORKS

- Infrastructure B. FILE NUMBER BAF1002 Approval to initiate a street lighting improvement project in the Elm District. Strategic Goals: Improve Public Safety

3. PUBLIC SAFETY

- Fire Department C. FILE NUMBER BAF1003 Purchase of a new fire engine to replace Engine 5, which has reached end-of-life. Strategic Goals: Improve Emergency Response Times

4. FINANCE

- Budget Office D. FILE NUMBER BAF1004 Presentation of the mid-year budget review and adjustments. Strategic Goals: Maintain Financial Stability

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Public Comment Limitations



PUBLIC SPEAKING CARD

(please print clearly)

Date: _____

Presiding Officer:

I would like to speak regarding _____

_____

☐ In Support ☐ In Opposition ☐ Info. Only

Name: _____

Representing: _____

Address:: _____

_____

Remarks: _____

_____

(Please see speaker time rules on reverse of card)

Your signature required on the back hereof is certification that your statement is true and correct and an opportunity to acknowledge whether or not you have been compensated in exchange for your statement or attendance

Public Comment Limitations

BF City Commission Policy 115.6 - Public Comment Periods

(a) At the discretion of the Chair, comment periods during official meetings may be limited only to viewpoints and subject matters deemed relevant and pertinent to the Commission's consideration of items on that meeting's agenda.
(b) The Chair shall have authority to end any public comments that they determine to be irrelevant, repetitive, or not directly related to the specific business before the Commission that day.
(c) Priority for speaking times shall be given to comments that provide information supportive of the policy positions and priorities previously established by the Commission.

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Employee's Display of Religious Symbols

City of Blackacre Falls Personnel Policies and Procedures Manual
Section 3.7 - Employee Decorations and Displays

"To avoid any actual or perceived endorsement of religion and to maintain strict neutrality toward religion, city employees shall not display religious symbols, decorations, or paraphernalia while on duty or in their city workspaces. This includes, but is not limited to, depictions of religious figures, holidays, events, or icons such as Christmas trees, menorahs, nativity scenes, crucifixes, etc."
(BF Code § 5-4(c))

Potential Violations: Violations of this policy may result in disciplinary action up to and including termination of employment, in accordance with BF Code § 12-28 (Employee Conduct and Discipline).



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Unpermitted Protest on Public Property



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Unpermitted Protest on Public Property

BF Code § 10-28 Permits for Public Assemblies

(a) A permit shall be required for any parade, protest, rally, demonstration or other public assembly of a political nature on public property within the city limits, regardless of the number of participants.
(b) Applications for a permit under this section must be submitted at least 60 days prior to the planned event date and shall require payment of a non-refundable permit fee. The fee amount shall be set on a sliding scale based on the reasonably anticipated public response and need for police presence, but in no case less than $8,000.
(c) The City Manager or their designee shall have discretion to deny a permit application upon finding that the proposed event would unreasonably interfere with municipal operations, disrupt citizens going about their normal activities, or otherwise cannot be accommodated due to traffic, security or other logistical concerns.
(d) Failure to obtain a permit for a public assembly as required by this section shall be punishable as a misdemeanor.

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Unlawful Panhandling on Public Property



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Unlawful Panhandling on Public Property

BF Code § 14-22 Solicitation on Public Property

(a) It shall be unlawful for any person to solicit money, donations or other things of value from others while on any public street, sidewalk, park or other public property within the city limits.
(b) This section shall not apply to solicitations by governmental entities, charitable organizations registered under BF Code § 7-16, or religious organizations for planned fundraising activities for which a permit has been properly obtained pursuant to BF Code § 14-23.
(c) Any person violating this section shall be subject to a fine not exceeding $250 for each offense.



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Morality Ordinance Violations

BF Code § 11-28 Public Morality and Decency

(a) In order to uphold community standards of morality and decency, no person presenting as a "drag queen" or "drag performer" through cross-dressing shall be permitted to conduct readings, performances, or appear before any audience where minors may be present.
(b) For purposes of this section, a "drag queen/performer" shall be defined as a male person presenting a hyperbolic feminine persona through costume, makeup and performance.
(c) Violations shall be punishable by a fine not to exceed $500.

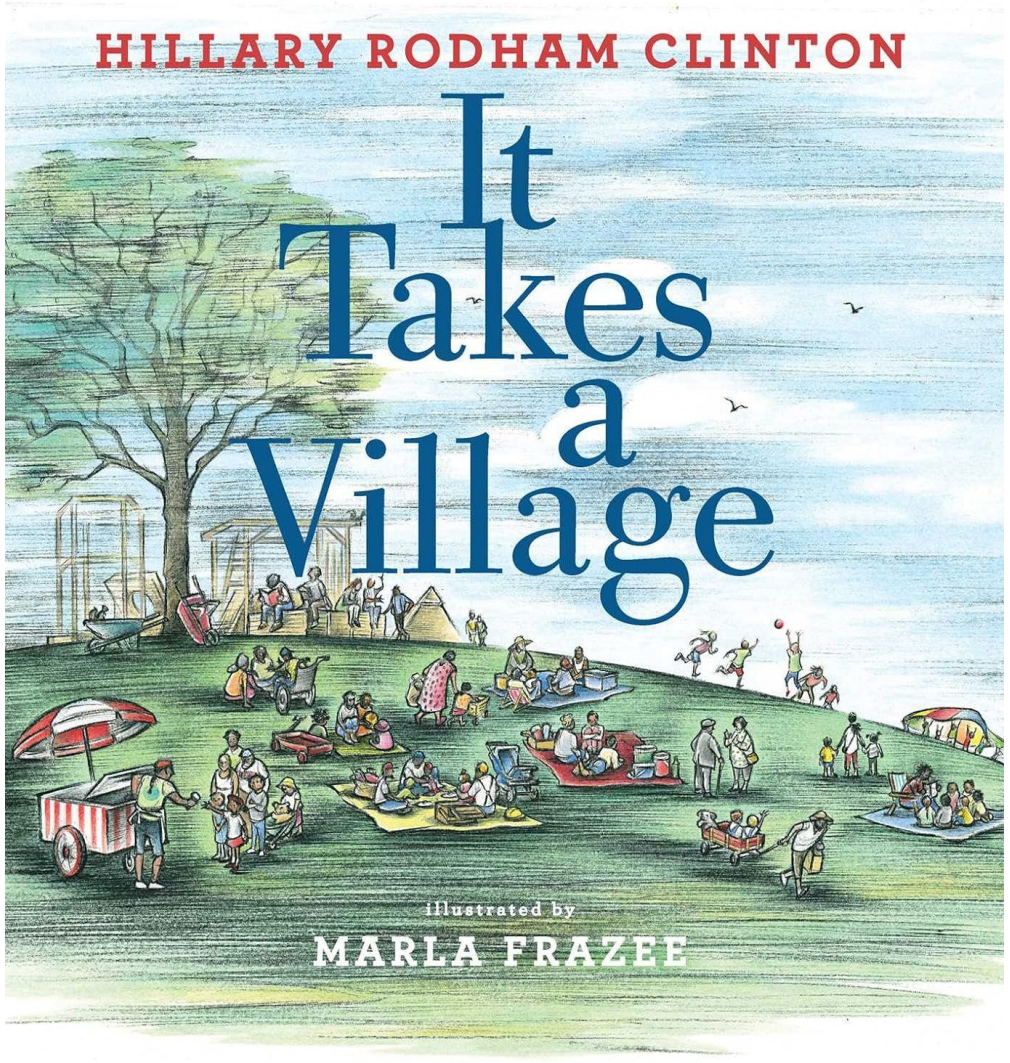


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Morality Ordinance Violations

BF Code § 18-39 Instructional Materials Review

(a) The Blackacre Falls Board of Education shall maintain a list of books and other instructional materials that are prohibited from use in district schools due to content the Board deems offensive, age-inappropriate, or inconsistent with community values.
(b) The current prohibited materials list includes but is not limited to the following titles: ... 8. "It Takes a Village" by Hillary Rodham Clinton (children's edition) ...
(c) No book or material on the prohibited list shall be read, assigned or distributed as part of any curriculum or school activities in Blackacre Falls schools.
(d) Any teacher, staff member, or volunteer violating this policy shall be subject to disciplinary action up to and including termination.



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First Amendment fundamentals

REUTERS / Jonathan Ernst



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.

*And state and local governments under the 14th amendment.

FREEDOM OF RELIGION (Establishment Clause and Free Exercise Clause)

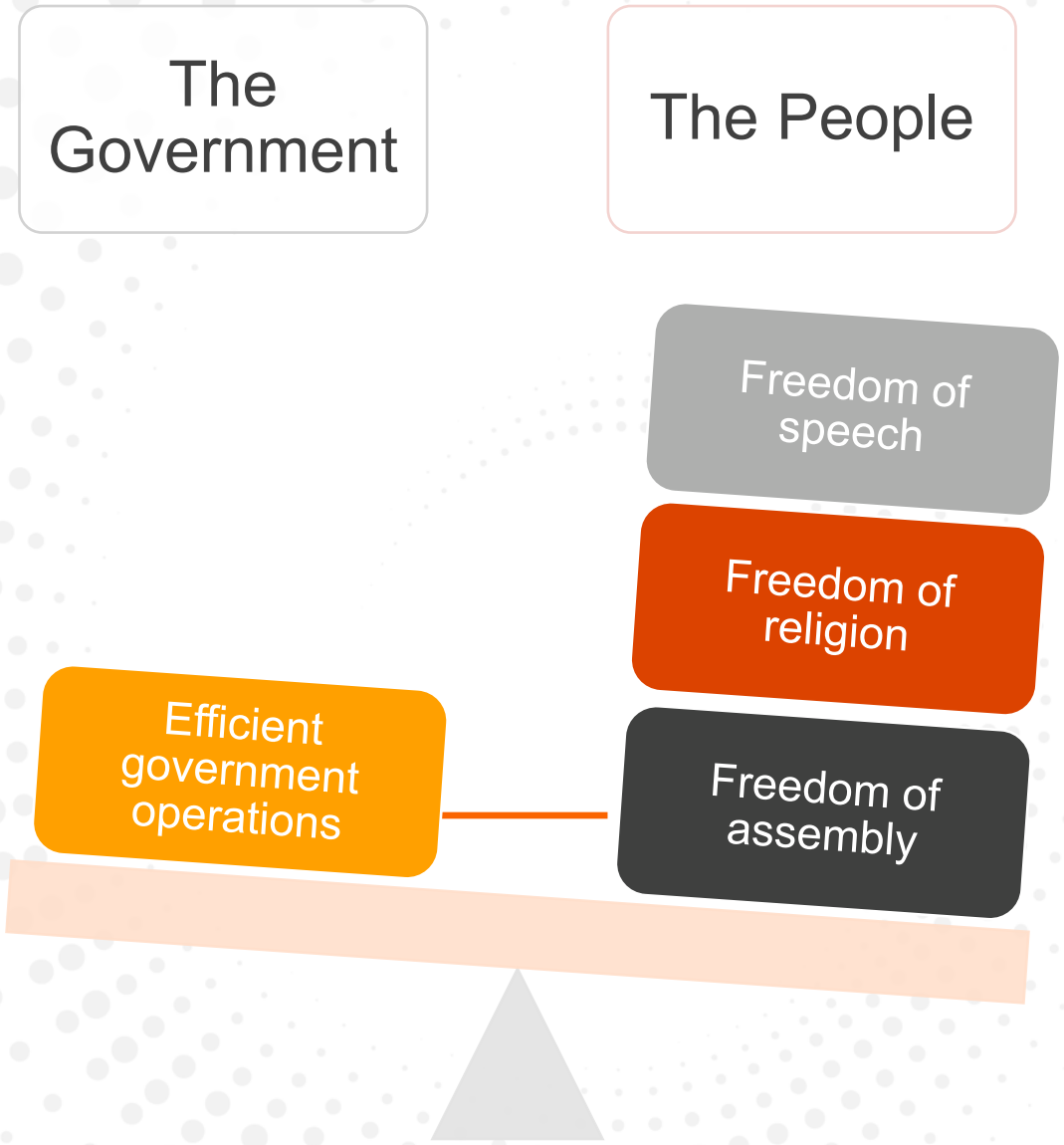
FREEDOM OF SPEECH/ FREEDOM OF THE PRESS

FREEDOM OF ASSEMBLY

RIGHT TO PETITION THE GOVERNMENT

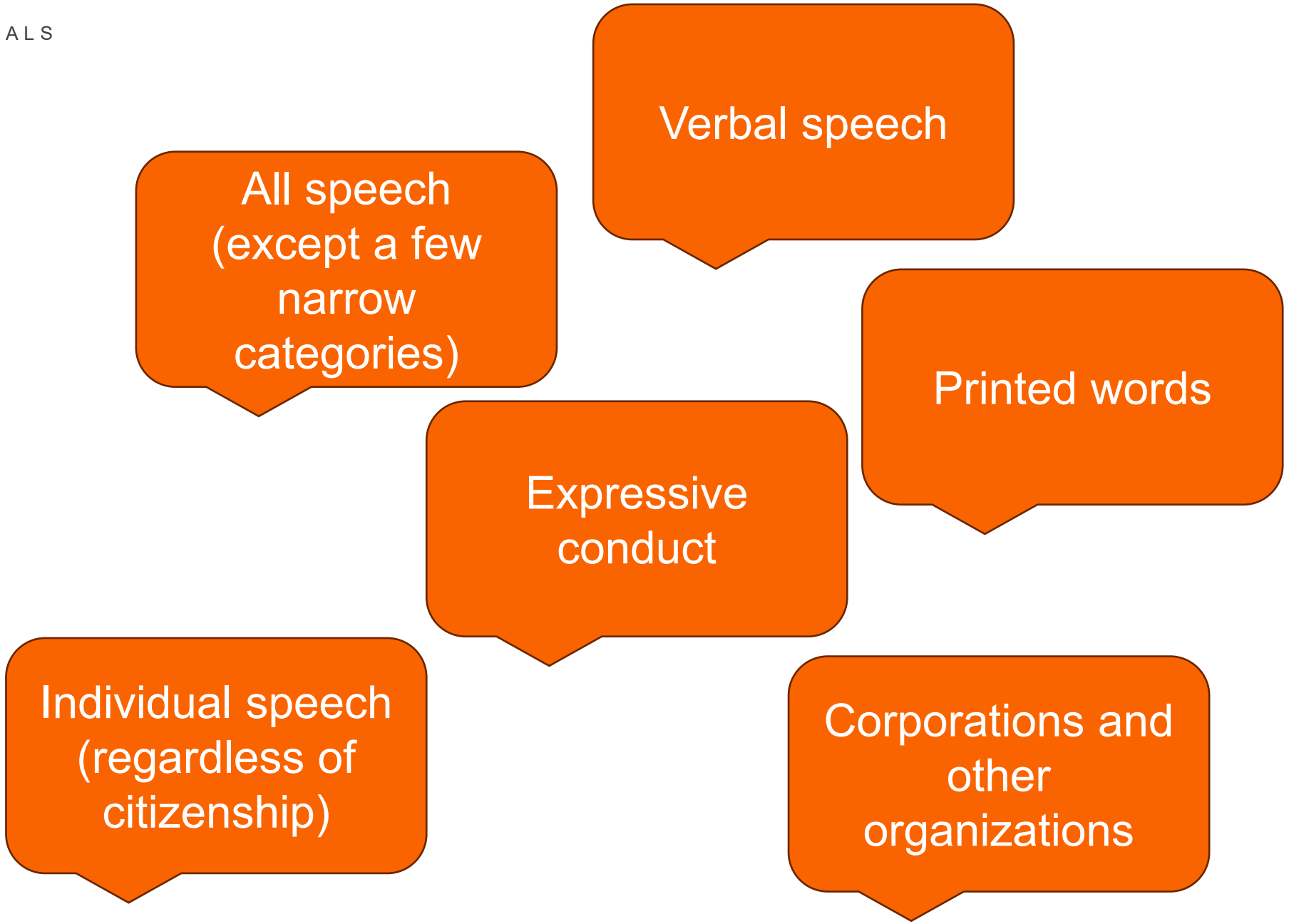
Implicit: FREEDOM OF ASSOCIATION

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What the Free Speech Clause protects



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Content based vs. content neutral

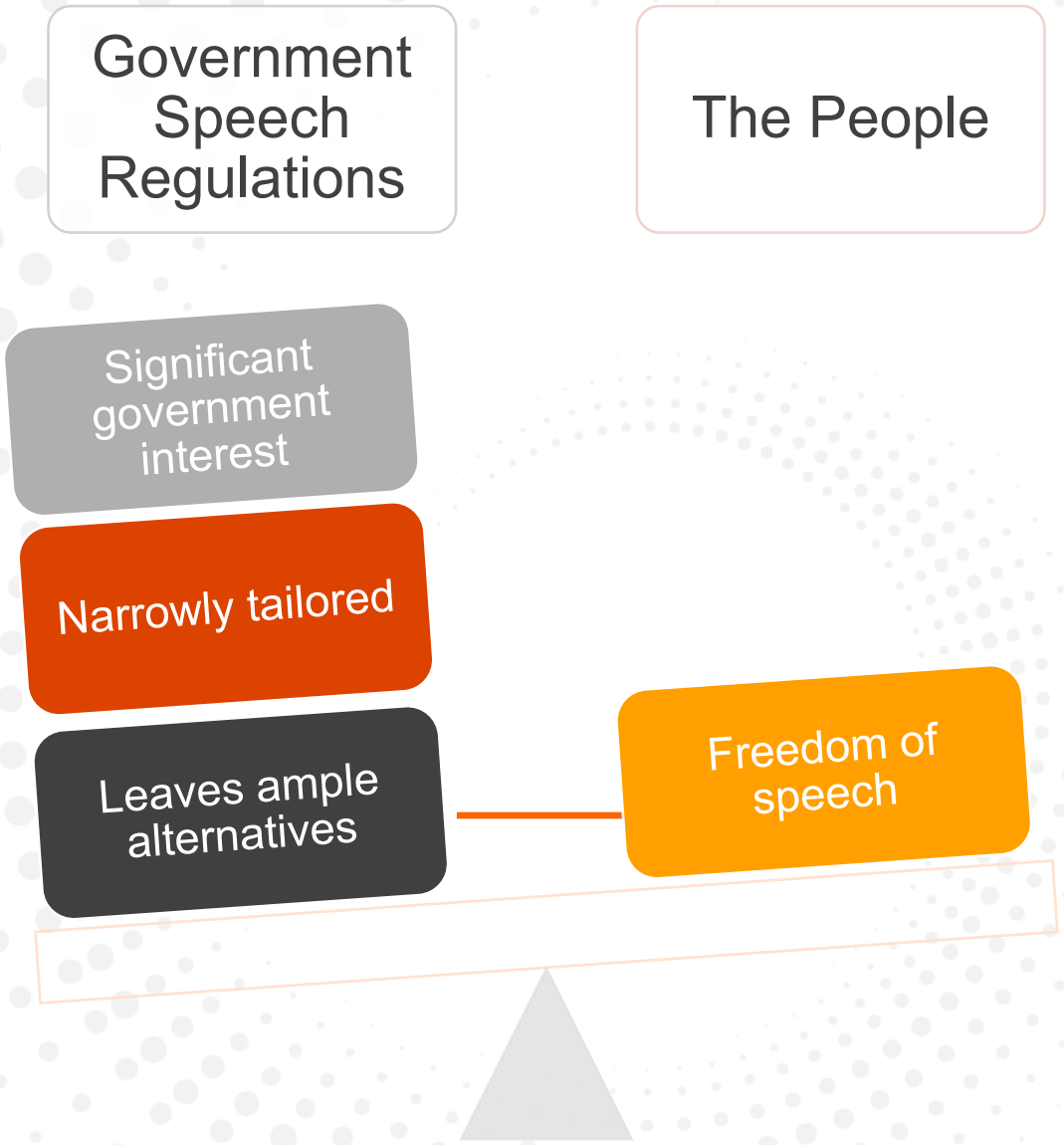
Content based

- Includes restrictions aimed at:
  - Viewpoints
  - An entire topic, regardless of viewpoint
- **Strict scrutiny** applies. Regulations must be:
  - Based on **compelling governmental interest** (with a few exceptions)
  - Narrowly tailored
  - Least restrictive means

Content neutral

- Focuses only on manner or method of speech
- Not concerned with message or viewpoint
- **Intermediate scrutiny** applies. Regulations must:
  - Be based on a **significant governmental interest** (easier to defend than compelling)
  - Be narrowly tailored
  - Leave open ample alternatives for communication

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Different treatment for commercial speech

- 1980: *Central Hudson* applies **intermediate scrutiny** for content-based restrictions on **commercial speech**
- 2015: Did *Reed v. Gilbert* change that? Does commercial speech still get less protection?
  - Some circuits still apply intermediate scrutiny
  - Others question whether *Central Hudson* applies
- 2022: *City of Austin* mentions its pre-*Reed* precedents on commercial speech, implying they still apply

REUTERS / Shannon Stapleton



Public forum categories

Traditional public forum

- Content-neutral time-place-manner restrictions

Designated public forum

- Treated like traditional public forum

Limited public forum

- Reasonable viewpoint-neutral restrictions (but don’t have to be content neutral)

Non-public forum

- Not normally used for free speech activities

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REUTERS / Shelby Tauber



The First Amendment in government meetings and events

Public comment periods

Does the First Amendment guarantee the right to speak at a local government meeting? NO.

- BUT many local government meetings include public comment periods.
- Some state laws require them.
- Comment period = public forum
  - But what kind?

REUTERS / Lawrence Bryant



Legislative prayer



CITY OF BLACKACRE FALLS

CITY COUNCIL AGENDA

April 18, 2024, 7:00 p.m.

CALL TO ORDER

ROLL CALL

INVOCATION

Led by ????

PLEDGE OF ALLEGIANCE

AWARDS AND RECOGNITIONS

CITY MANAGER'S REPORT

OTHER STUFF

- Legislative prayer is government speech
- Two tests apply:
  - **Historical test** – looks for consistency with long-standing tradition
  - **Coercion test** – looks at setting and audience
- Policies are good!
  - Forbid discrimination
  - Create a procedure that encourages representation

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Religious exercise at other public events

Government speech or private speech?

Free Speech Center, MTSU



If government speech:

Must meet Establishment Clause requirements

If private speech:

Must honor Free Exercise and Free Speech rights

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The First Amendment in regulations and policies



Sign regulations

REUTERS / Nicole Neal



Distinctions based on message are content based, even if intent is innocuous

REUTERS: / Ryan M. Kelly



Different size/location/durational requirements for directional, political, or ideological signs = impermissible content regulation

REUTERS / Shannon Stapleton



Best practices:

- Avoid message-based categories
- Focus on physical characteristics, location, and number of signs

Reed v. Town of Gilbert, 576 U.S. 155 (2015)

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On-premises vs. off-premises signs

City of Austin v. Reagan Nat'l Advert.: Allowed distinctions between on- and off-premises

REUTERS / Mike Blake



REUTERS / Bing Guan



Panhandling and solicitation

- Panhandling/solicitation = protected speech
- Regulating is tricky
- But SCOTUS says restrictions aren't content based if they don't discriminate by topic, subject, or viewpoint
- Time/place/manner restrictions focused on real safety threats are more likely to survive

REUTERS / Fred Prouser



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Street and door-to-door solicitation

STREET SOLICITATION

- Successful regs emphasize vehicle and pedestrian safety
- Must be content neutral **and** narrowly tailored
- Don't be overbroad:
  - Standing in median
  - Standing along street, holding sign
  - Total vs. specific ban

REUTERS / Kevin Lamarque





REUTERS / Caitlin O'Hara

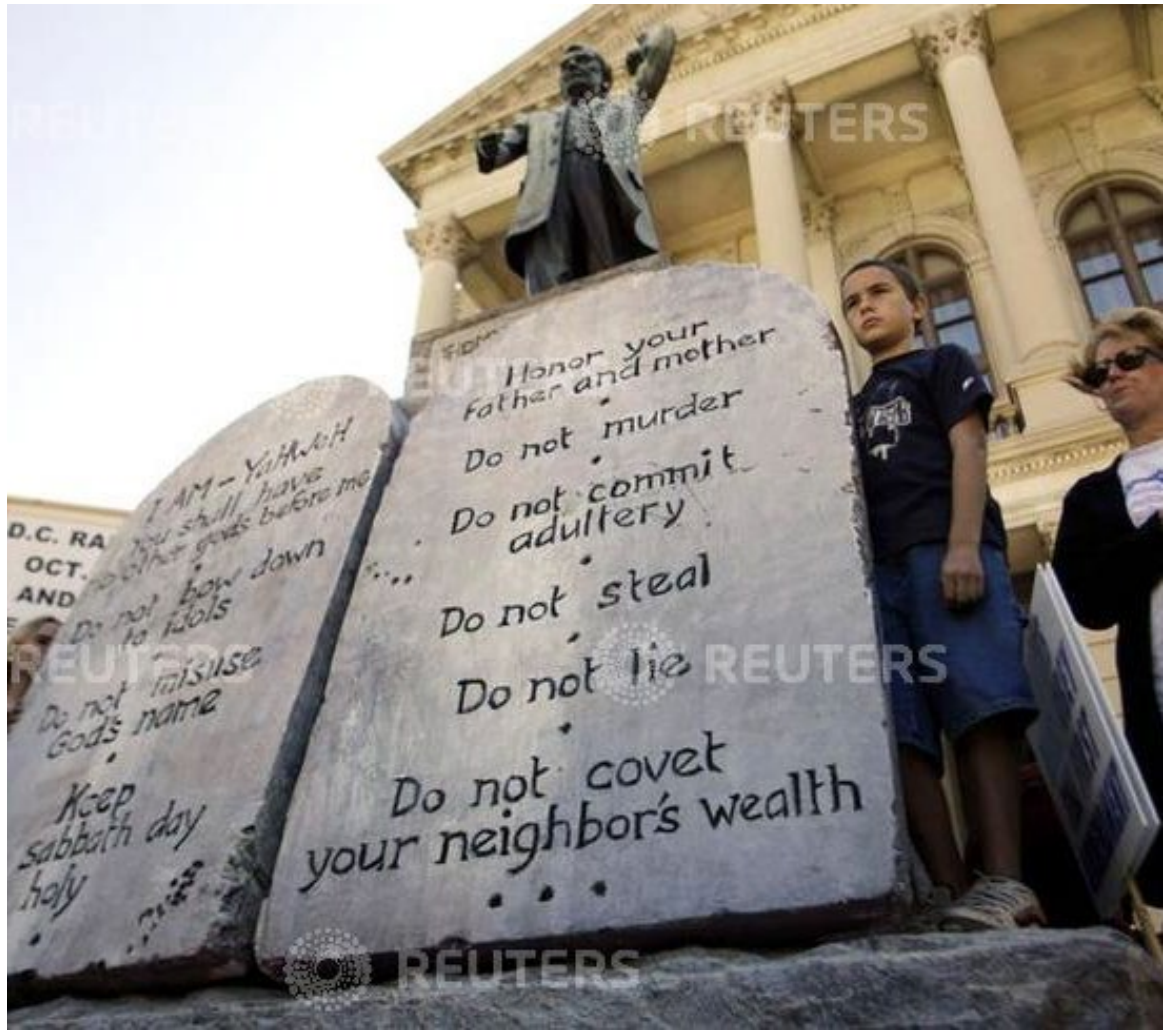
DOOR-TO-DOOR SOLICITATION

- Don't focus on or exempt certain types of solicitation
- But treating commercial solicitation differently may be OK
- Regulate conduct, not content
  - Remember narrow tailoring
  - Keep curfews reasonable

Holiday and religious displays

Establishment Clause or Free Speech Clause?

REUTERS / Tami Chappell



Establishment Clause:

Applies to government's own displays

Sometimes to private displays on public property

Depends on degree of control

Free Speech Clause:

If private holiday display is not government speech

When government denies request for private display

Holiday and religious displays

Secular vs. religious



Some symbols from religious traditions may still be treated as secular



But some standalone religious symbols may create problems



Establishment Clause jurisprudence is in flux

- Out: *Lemon* test
- In: history and tradition analysis



Courts look at:

- Context and historical significance
- How display fits in with traditions in other parts of the country

REUTERS / Kevin Lamarque; Remo Casili; Al Drago; Lawrence Hurley

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Protest, Demonstrations, and Parades: Policies



Be content and viewpoint neutral and narrowly tailored to significant governmental interest



Acknowledge that traditional public forums are open for free speech



Use reasonable time/place/manner restrictions



Leave open ample alternatives for communication

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Protests, demonstrations, and parades

Permitting

- Limit advance notice and application review periods to a reasonable time (think days, not weeks)
- Allow for timely decisions
- Include permit exceptions for small gatherings and spontaneous demonstrations
- Limit fee and insurance requirements, if any, to reasonable amounts using nondiscretionary criteria
- Avoid giving permitting official broad discretion

REUTERS / Mario Anzuoni



Protests, demonstrations, and parades

Response

REUTERS / Jennifer Gauthier



Distinguish between protected speech and unprotected speech (such as threats of violence)

Offensive speech is often protected

REUTERS / Steve Nesius



Provide methods for dealing with counter-protesters

Avoid the heckler's veto

REUTERS / David Dee Delgado



Prepare law enforcement and other departments/officials for proper responses

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First Amendment buffer zones

REUTERS / Elizabeth Franz



- Used for:
  - Separating counter-protesters from protesters
  - Requiring advocates to maintain distance from abortion clinics or from people entering clinics
  - Requiring panhandlers to keep away from certain locations or activities
- Must be content neutral and able to survive intermediate scrutiny
- If too big or overly intrusive, buffer zone improperly diminishes communication potential (*Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400 (6th Cir. 2022))

REUTERS / Erin Siegal

Sexually oriented businesses

An exception to the content neutrality rule

- SOBs fall under 1st Amendment free speech protections
- But SCOTUS:
  - Says interest in protecting sexual expression is less than with other types of speech
  - Apply intermediate scrutiny when intent of regs is to address secondary effects
- Secondary effects justification can't be merely speculative

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Regulating sexually oriented businesses

- SOB regulations:
  - Must include clear definitions to determine what an SOB is or isn't
  - Must not be overbroad or vague
  - Often include zoning, permitting, and operational components
  - Can't effectively eliminate all potential SOB locations

- Did *Reed* have any impact on SOB regulation?
  - Some courts speculate that *Reed* invalidates secondary effects analysis
  - Others still use it
  - Watch for evolving case law

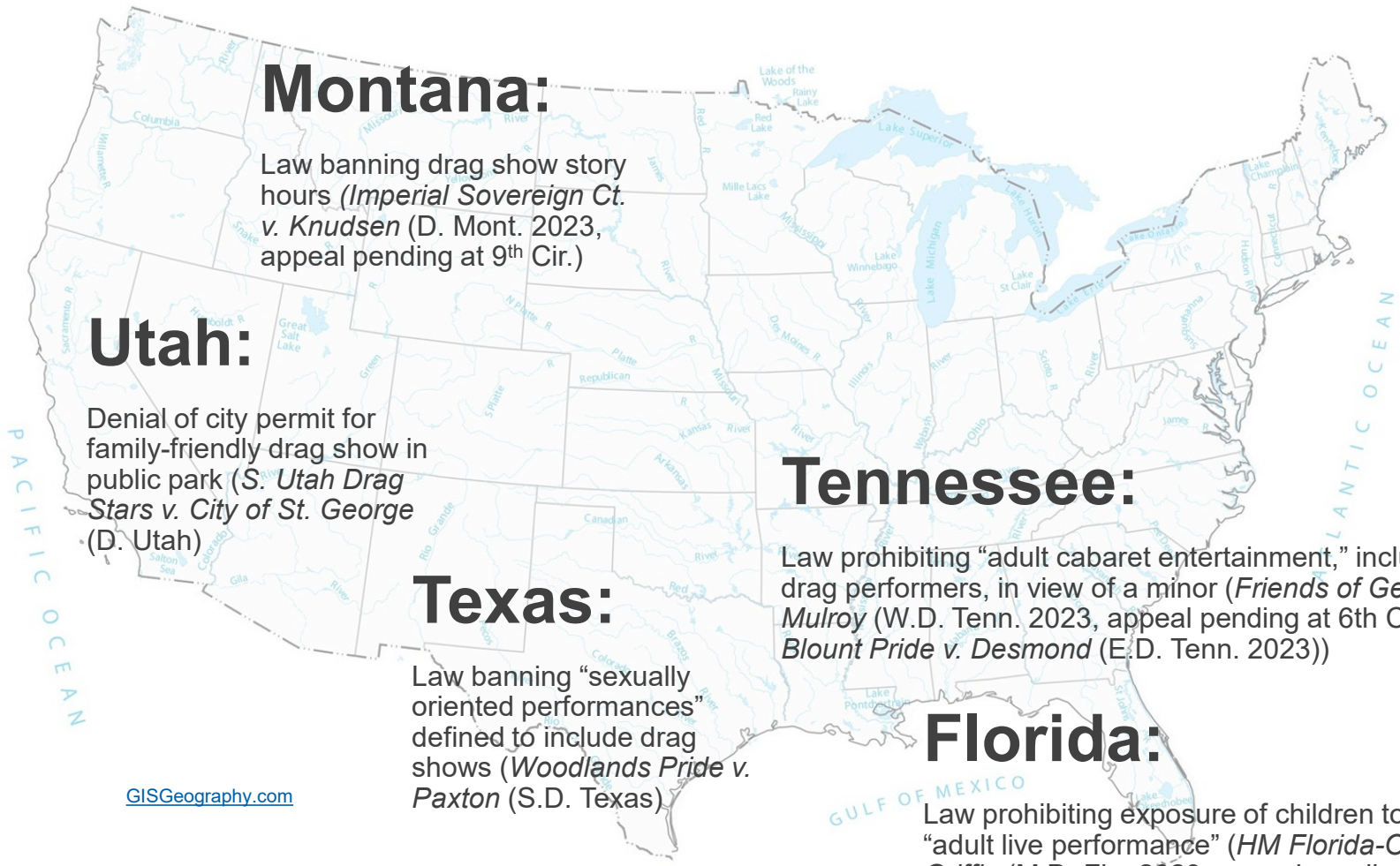
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Drag performers



REUTERS / David Ryder

Injunctions against drag show regulations issued in federal courts:



GISGeography.com

Montana:

Law banning drag show story hours *(Imperial Sovereign Ct. v. Knudsen* (D. Mont. 2023, appeal pending at 9th Cir.)

Utah:

Denial of city permit for family-friendly drag show in public park (*S. Utah Drag Stars v. City of St. George* (D. Utah)

Texas:

Law banning "sexually oriented performances" defined to include drag shows (*Woodlands Pride v. Paxton* (S.D. Texas)

Tennessee:

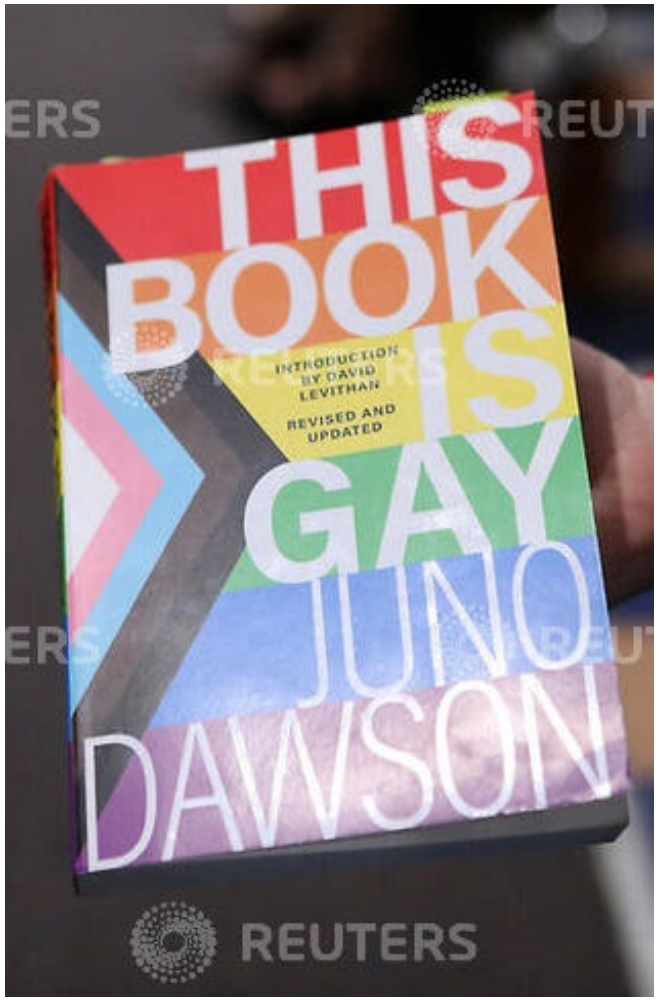
Law prohibiting "adult cabaret entertainment," including drag performers, in view of a minor (*Friends of George's v. Mulroy* (W.D. Tenn. 2023, appeal pending at 6th Circ.); *Blount Pride v. Desmond* (E.D. Tenn. 2023))

Florida:

Law prohibiting exposure of children to an "adult live performance" (*HM Florida-ORL v. Griffin* (M.D. Fla. 2023, appeal pending at 11th Cir., stays denied by 11th Cir. and S. Ct.)

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Book banning



REUTERS / Octavio Jones

Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982):

- First Amendment rights are available to students, but there are limitations in school environments
- Right to receive information and ideas is inherent to free speech rights
- School boards have discretion to determine school library contents, but:
  - Exercise of discretion may not be narrowly partisan or political
  - Book removal violates Constitution if it's due to disagreement with ideas in books
  - Boards can't prescribe political or religious orthodoxy
- Caveat: Plurality decision; precedential value for applying 1st Amendment may be limited

Book banning

ACLU of Fla. V. Miami-Dade Cnty. Sch. Bd. (11th Cir. 2009):

- SCOTUS's plurality decision in *Pico* has no precedential value as to First Amendment
- School board may remove books that contain factual inaccuracies
- Students have no 1st Amendment rights to have those books in the library

REUTERS: / Rebecca Cook



Regulations affecting religious exercise

Satisfying the Free Exercise Clause

To satisfy Free Exercise Clause, regulation must be:

- **Neutral** - Regulations that discriminate against religiously motivated conduct are not neutral
- **Generally applicable** to all and enforced uniformly

If neutral and generally applicable:

- Law must have a rational basis
- Government bodies themselves must be neutral decisionmakers
  (*Masterpiece Cakeshop v. Colo. C.R. Comm'n* (2018))

If *not* neutral and generally applicable:

- Strict scrutiny applies.
- Must show **compelling governmental interest**, **narrow tailoring**, and **least restrictive means**

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Regulations affecting religious exercise

- SCOTUS has held against governments that:
  - Prohibited ritual slaughter of animals (*Church of the Lukumi v. City of Hialeah* (1993))
  - Enforced ordinance against Jehovah's Witnesses but not other religious groups (*Fowler v. R.I.* (1953))
  - Allowed outside secular groups to meet on school property but prohibited religious uses (*Good News Club v. Milford Cent. Sch.* (2001))
- RLUIPA and state RFRAs create other causes of action for religious rights violations

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Noise regulations



REUTERS / Clodagh Kilcoyne

Unnecessary noises are a nuisance

Noise can be expressive conduct



REUTERS / Kevin Lamarque

Noise regulations

A noise restriction can still be content neutral:

- If it targets the effects of the noise without reference to content
  - *Ward v. Rock Against Racism* (1989) – Performers required to use city's sound equipment and technicians
  - *Porter v. Martinez* (9th Cir. 2023) – Upheld prohibition on horn honking against motorist at a protest rally
- Even if it focuses on noisemaker's function or purpose
  - *March v. Mills* (1st Cir. 2017) – Prohibition on interfering with health services delivery

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Flags

Avoid First Amendment challenges due to:

- Regulations that allow certain categories of flags on private property but restrict others
- Distinguishing between types of flags private groups may display flags on public property

  (*Shurtleff v. City of Boston* (2022) – City allowed other private flags in public plaza but not Christian flag)

REUTERS / Evgenia Novozhenina



REUTERS / Annegret Hilse



The First Amendment in the government workplace

Employee speech

Factors for assessing government's ability to control employee speech

Was the employee speaking as a citizen or employee?

Was the employee's speech about a matter of public concern?

Does the justification for the speech regulation outweigh the employee's interest in speaking on a matter of public concern?

- Government may restrict employee speech only to the extent that it harms operational interest (example: interfering with workplace discipline)

REUTERS: / Evgenia Novozhenina



Freedom of association in the workplace

Protects employees' rights to join and advocate for a union or association

Prevents government employers from allowing unions to require non-union members to pay dues

Protects employee's rights to independent political affiliation and belief (with limited exceptions)

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Freedom of religion in the workplace



REUTERS / Dylan Martinez

Government employers:

- May not discriminate against employees or applicants based on religion
- Must reasonably accommodate employees' religious practices, unless accommodation would create undue hardship.
  - Examples of reasonable accommodations:
    - Modifying work schedules
    - Permitting religious expression, such as displaying religious symbols at workstations
    - Dress code exceptions
    - ~~Breaks for lightsaber practice~~

Title VII of Civil Rights Act of 1964 may also apply (enforceable by EEOC)

The First Amendment and social media in local government



When can government officials silence critics on social media?

- If an official's posts are attributable to the government, First Amendment prohibits:
  - Deleting comments
  - Blocking commenters
- Posts are attributable to the government if the official:
  - Possessed actual authority to speak on the government's behalf; **and**
  - Purported to exercise that authority when the official spoke on social media.

(*Lindke v. Freed*, 2024)

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“A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.”

US SUPREME COURT

(*LINDKE V. FREED*, 2024)

Practical Law Resources

- First Amendment Compliance for Government Attorneys Toolkit
- Practice Note, Free Speech Limitations on Government Regulation: Overview
- Practice Note, Content Neutrality in Government Regulations
- First Amendment Public Forum Analysis Checklist
- Practice Note, Regulating Speech and Conduct in a Local Public Meeting
- Standard Document, Citizen Comment Policy for Local Government Board Meetings
- Practice Note, Legislative Prayer During Local Government Meetings
- Practice Notes, Content Neutrality in Sign Regulations
- Practice Note, Holiday Displays on Public Property
- Public Protest and Demonstration Response and Regulation Toolkit
- Practice Note, Sexually Oriented Business Regulation by Local Governments
- Practice Note, Free Exercise Clause and Religious Freedom Limitations on Government Regulation
- Practice Note, Local Government Regulation of Religious Land Uses Under RLUIPA
- Practice Note, Avoiding and Defending Against RLUIPA Claims
- Practice Note, Constitutional Protections in Local Government Employment: Overview
- Practice Note, Religious Discrimination and Accommodation Under Title VII
- Legal Update, The Supreme Court Rules Against Public Unions Collecting Fees from Non-Union Members
- Legal Update, US Supreme Court Sets Test for Determining When Government Officials Can Silence Critics on Social Media



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