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Top 10 First Amendment Sources of Litigation for Cities

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The **First Amendment** to the U.S. Constitution reads:

> 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.

First Amendment is Enforceable via 42 U.S.C. § 1983. Civil action for deprivation of rights: "Every person who, under color of any statute, ordinance, regulation, custom, or usage. . . subjects, . . . any person . . 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 . . ."

Top 10 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: the *Pickering* balancing test. *Pickering v. Bd. of Education.*, 391 U.S. 563, 568 (1968).

In 1983, the Supreme Court added the second test, 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.

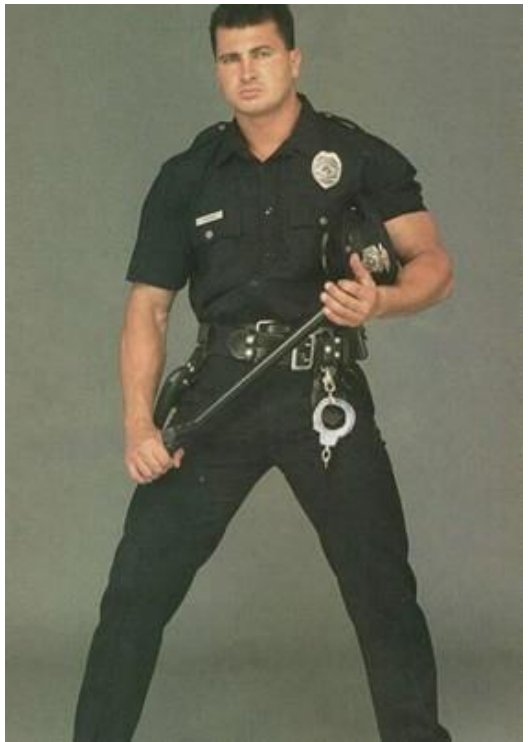
Employees often win the *Pickering* test and lose the *Connick v Myers* test because complaints about personnel matters, especially with respect to the employee themselves are usually not a "public concern"

Allegations of violations of laws are usually a "public concern"

Holland v. Rimmer, 25 F.3d 1251, 1255 (4th Cir. 1994). When a county administrator was fired on account of his manner of disciplining subordinates, his First Amendment claim failed because "[s]uch **internal personnel matters are not likely to arouse the public's interest and do not become matters of public concern merely because they occur in a public agency**.“

Smith v. Fruin, 28 F.3d 646, 653 (7th Cir. 1994). Complaint about secondhand smoke in office is not public concern speech.

City of San Diego v. Roe, 543 U.S. 77 (2004). A police officer selling videos of himself 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. In general, law enforcement officers generally have an obligation to communicate law enforcement matters, so *Garcetti v. Ceballos* effectively defeats many cases by law enforcement officers. 126 S. Ct. 1951 (2006)

Corn v. Mississippi. Dep't of Pub. Safety, 954 F.3d 268 (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.

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) --- beware of new Supreme Court precedent of *Sylvia Gonzalez v. Edward Trevino (2024)***

***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. Bartlett, who was intoxicated, began yelling to 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 <u>probable cause to arrest</u> him.** However, the Supreme Court mentioned 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.**

Gonzalez v. Trevino, 602 U.S.____ (2024). In *Gonzalez*, the Supreme Court overruled the 5th Circuit's application of Nieves v. Bartlett's when it held that **a plaintiff will have an actionable retaliatory arrest claim if he produces "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."**

In 2019, Sylvia Gonzales was on the city council of Castle Hills, Texas. Gonzalez gathered 300 signatures on a petition to remove the city manager and presented the petition at a city council meeting. After two days of City Council discussions, Gonzalez gathered her belongings, and the Mayor requested the petition from her. She initially stated she did not have it. Eventually, the petition was found in her binder. Upon discovery, Gonzalez expressed surprise, asserting she had not knowingly placed it there.

The Mayor reported the incident to local law enforcement, prompting an investigation, which was performed by a private attorney. This attorney-investigator determined that Gonzalez had likely violated a Texas anti-tampering statute that prohibits, among other things, a person from intentionally removing a government record. At the attorney's request, a local magistrate issued a warrant for Gonzalez's arrest. She turned herself in and spent an evening in jail. She alleged she had examined the county's misdemeanor and felony records for the past ten years and found that the Texas anti-tampering statute had never been used to "criminally charge someone for trying to steal a nonbinding or expressive document."

Other lesson---First Amendment will be interpreted strictly against a City official who attempts to prosecute a little old lady for carrying off a copy of a document she-herself brought to the meeting.

3. The city regulated the content of 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) 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 regulated the content of signs other than billboards. After *Reed v. Gilbert*, Cities began removing content-based distinctions from sign ordinances involving many types of signs. ***Reagan National Advertising*** removed much of the urgency, because traditional content-based restrictions were again in constitutional play. The following exemptions are often made to City regulation of advertising:

- **Real estate signs**. In *Linmark Assocs., Inc. v. Township of Willingboro*, the Supreme Court invalidated an ordinance that prohibited "for sale" lawn signs, but did not restrict other lawn signs. 431 U.S. 85 (1977).
- **Directional Signs.** Some local sign ordinances carve out special exceptions for off-site directional signs for businesses. Temporary directional signs provided the core facts and framed the issue before the Supreme Court in *Reed v. Gilbert.*135 S. Ct. 2218 (2015).
- **Logo/identification signs.** Some local ordinances limit the message on freestanding signs to a logo or name of a business, prohibiting any message regarding products, services or price.
- **Political signs.** Many local ordinances offer special treatment to political signs. Although probably intended to offer liberal treatment to political signs, many local ordinances impose more restrictive limits than those applicable to real estate signs, triggering a potential constitutional problem in many places. Texas Election Code § 259.003, which preempts municipal regulation of political signs on private property that are less than 36 square feet, effectively prevents much potential Constitutional litigation against cities in this state.

5. 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).

Old Balancing test:

- Whether the public official presents himself on social media account with his government title
- Whether the public official' social media account is used to communicate about the official's duties & activities
- Whether third parties interact with the public official's social media account as though 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 "s**tate 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.**" – **The blocked attempted commenter must prove authority of public actor to make facebook changes on behalf of the City to survive dismissal of the claim against the public official.**

6. 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:

Camera Use at City Facilities

Except for staff work areas, persons entering municipal facilities are permitted to take video/photos unrestricted. However, people photographing cannot impede public access to municipal facilities.

EXAMPLES OF PERMITTED PUBLIC SPACES

- Customer services areas/ entry ways
- Publicly accessible halls/corridors
- Publicly accessible streets/sidewalks/parks/plazas

EXAMPLES OF SPACES NOT OPEN TO THE PUBLIC

- Offices/meeting rooms/staff halls/staff corridors
- Areas restricted by membership or tickets
- Non-publicly accessible areas at recreation facilities
- Non-publicly accessible areas at performance venues
- Staff work areas located behind closed doors or staff only areas

WHAT TO DO IF APPROACHED BY INDIVIDUAL TAKING PHOTO/VIDEO:

- Be professional and polite
- Acknowledge but do not engage/argue
- Concentrate on job function/duty
- Call 911 if questionable/illegal activity is observed

Back


Customer Service Reminders
DO
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
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

7. 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.

8. 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.

9. 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

Texas has a wealth of litigated SOB ordinances:

M.E.F. Enterprises Inc. v. City of Houston, 489 U.S. 1052 (1989). Upheld Houston's SOB location restrictions, amortization provisions, notice requirements, structural, visibility and lighting requirements, signage restrictions, entertainer and manager permits, etc.

Hosseini v. State, 447 S.W.3d 359, 365 (Tex. App.—Houston [14th Dist.] 2014). Held that Houston's requirement that "manager" obtain permit was not vague.

SWZ, Inc. v. Board of Adjustment, 985 S.W.2d 268 (Tex. App.—Fort Worth 1999) Upheld 1,000-foot distance limitation.

Community Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764 (W.D. Tex. 2000). Upheld distance requirement.

LLEH, Inc. v. Wichita County, 121 F. Supp. 2d 513 (N.D. Tex. 2000). Upheld distance requirement, 6-foot buffer zone, prohibition of dancing on platforms, requirements for employee licenses and unobstructed view of premises, and prohibition of tipping without touching.

Baby Dolls Topless Saloons, Inc. v. City of Dallas, 114 F. Supp. 2d 550 (N.D. Tex. 2000). Held lack of time limit and moratorium on permits to be a prior restraint.

Rosenblatt v. City of Houston, 31 S.W.3d 399 (Tex. App.-Corpus Christi 2000). Upheld requirement for line-of-sight view and video cameras.

Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471(5th Cir. 2002). SOB ordinances do not violate the First Amendment merely by requiring licenses if dancers perform topless or in pasties but not if they wear bikini tops. The city did not have to show "a correlation between the bikini top requirement and the amelioration of deleterious secondary effects" in either case. Notably, the court relied on a limiting construction issued by the City Attorney that precluded the classification of mainstream businesses as sexually oriented businesses even if such businesses feature an article or activity that display a specified anatomical area, (such as breasts below the top of the areola, that are often seen in ordinary articles of clothing outside of sexually oriented businesses).

10. 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).

Defensive Considerations if sued under 42 USC 1983 for First Amendment Violations:

- 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.