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Quick and Dirty Guide to the Top 10 First Amendment Sources of Litigation for Cities

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Curriculum Vitae

Miles Risley is the City Attorney of Corpus Christi, Texas. He received his law degree from the University of Texas in 1992. He graduated summa cum laude from West Texas State University in 1989.

Mr. Risley has practiced municipal law since 1994. He became City Attorney of Corpus Christi in 2014. He was City Attorney of Wichita Falls between 2009 and 2014. Prior to his service in Wichita Falls, he was the City Attorney of Victoria, Texas. Before coming to Victoria, he practiced with the law firm of Byington, Easton, and Risley, PC in Austin, Texas. He has also been an adjunct instructor at Victoria College and has served as a U.S. Army Military Intelligence Officer.

Mr. Risley has been a municipal attorney for approximately 30 years. Mr. Risley is also a Local Government Fellow of the International Municipal Lawyer's Association (IMLA). In addition, Mr. Risley is a fellow of the Texas State Bar College and has made presentations to IMLA, the TCAA, the National Contract Management Association, and various local organizations. His presentations and papers have discussed First Amendment law, land use law, municipal court, economic development, the Fair Housing Act, the Texas Open Meetings Act, the Texas Public Information Act, government contracting, gang injunctions, the Fair Labor Standards Act, and tow truck regulation. He has also previously served as the President of the Texas Coalition for Affordable Power, which advocates for the interests of electricity consumers and purchases electricity for more than 170 cities and other political subdivisions.

Mr. Risley has extensive experience dealing with the First Amendment and 42 USC 1983 lawsuits. He has served as attorney in more than 1,000 public meetings. He has drafted or reviewed more than 5,000 ordinances, many of which touch upon First Amendment issues. Also, the cities for which he has served as City Attorney for the last 15 years handle their own civil rights lawsuits, and have dealt with more than 100 civil rights lawsuits during that time, many of which involved alleged First Amendment violations.

Quick and Dirty Guide to the Top 10 First Amendment Sources of Litigation for Cities

1. **The city terminated an employee or engaged in some action making an employee believe they would soon be terminated.** Terminated employees often allege their termination is in retaliation for exercise of their free speech rights. They are desperate for causes of action, especially in employment at will situations. These terminated employees will often claim that their termination was retaliation for their exercise of their First Amendment right to express themselves. They will face multiple formidable challenges:

   (a) Pickering/Connick Balancing Tests: The Court created the first test in the two-tiered analysis: the Pickering balancing test. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Fifteen years later, in 1983, the 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); *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights* [*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)], 46 Washburn L.J. 603, 610 (Spring, 2007).

   - ***Pickering Balancing Test.*** An employee's speech disrupts the efficiency of a public employer when it: (1) adversely affects the employee's own performance; (2) disturbs harmony and discipline in the workplace; (3) interferes with the regular operation of the government office or agency; or (4) undermines public trust in the office or agency by disseminating false information in such a way that renders the government employer unable to effectively counter the employee's speech. **The Pickering Balancing Test often favors the employee.**

   - ***Connick Public Concern Test.*** A public employee's free speech rights only extend to speech regarding matters of public concern. *Connick v. Myers*, 461 U.S. 138, 147. **Under the Connick Public Concern Test, the employee usually loses. The following case holdings and dictum demonstrate this:**

     - *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."

     - *Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1234 (10th Cir. 1998). A high school football coach's "self-serving" comments about his supervisors's treatment of him was deemed "of a personal nature,"

     - *Ayoub v. Tex. A & M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991) & *Khuans v. Sch. Dist.*, 123 F.3d 1010, 1016-17 (7th Cir. 1997). A professor's complaint of discriminatory treatment in setting his salary and a school psychologist's criticism of the management of the school were private matters.

- *Taylor v. FDIC*, 132 F.3d 753, 769 (D.C. Cir. 1997) (noting that motion filed in lawsuit, "purpose [of which] was to avoid personal sanctions, not to expose wrongdoing" does not address matter of public concern).

- *Valot v. Southeast Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997) (stating that part-time bus drivers' request for unemployment benefits "during the summer months while they were unemployed is far more a matter of private interest than public concern").

- *Withiam v. Baptist Health Care of Okla.*, 98 F.3d 581, 583 (10th Cir. 1996). "bald, unadorned and nonspecific endorsement" of current managers of hospital "offered nothing at all to inform the public about the management of the hospital" and, thus, "did not involve a matter of public concern").

- *Hanton v. Gilbert*, 36 F.3d 4, 7 (4th Cir. 1994). Complaints about one's job duties and about new policy of charging user fee for use of university microscope do not address issues of public concern).

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

- *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060 (2d Cir. 1993) (recognizing that "demands and complaints seeking an increase in towing referrals" is not public concern speech).

- *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.

The following cases found employee speech to be a matter of "public concern" under the *Connick* test. See the following cases:

- *Thomas v. Whalen*, 51 F.3d 1285, 1290 (6th Cir. 1995). Opposing gun control legislation is a matter of public concern.

- *Paradis v. Montrose Mem'l Hosp.*, 157 F.3d 815, 818 (10th Cir. 1998). Accusing a hospital administrator of unethical and illegal conduct is a public concern.

- Cragg v. City of Osawatomie, 143 F.3d 1343, 1345-46 (10th Cir. 1998). Putting up a yard sign opposing the recall of city council members is a public concern.

- *Campbell v. Ark. Dep't of Corr.*, 155 F.3d 950, 958-59 (8th Cir. 1998). Corruption and lack of security at a prison is a public concern.

- *Dill v. City of Edmond*, 155 F.3d 1193, 1202 (10th Cir. 1998). Publicly alleging other officers are withholding exculpatory evidence is a matter of public concern.

- *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 168-70 (1st Cir. 1995). Teacher's

allegations at a school board meeting that the school's placement of special education students violated state and federal regulations was a matter of public concern that outweighed interests of efficiency).

(b) Speech is part of Employee's Duties. When government employees make statements as part of their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their statements from employer discipline. See *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951 (2006). In *Garcetti*, the Supreme Court declared that job-related speech is not protected by the First Amendment. The Court in *Garcetti* emphasized that the employee admittedly wrote the critical memorandum pursuant to his duties as an employee, and not as a citizen. Some cases that applied *Garcetti* are as follows:

- *Foerster v. Bleess*, 2022 U.S. App. LEXIS 127, *8 (5th Cir. 2022). An employees' expressions were made pursuant to his duties as police chief).

- *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.

- *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. [Tex.] 2007). A city police officer's speech at the scene of an accident criticizing the police department's high-speed chase policy and statements later made to the media, for which he was subsequently suspended, were held to be made pursuant to his official duties and during the course of performing his job and, therefore, he was not protected against retaliation by the police department under the First Amendment. The fact that the officer's statement was not authorized by the police department and that speaking to the media was not part of his regular job duties was not dispositive.

(c) 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. Cities need to be careful to avoid employee policies that violate free speech rights of employees. An example of non-viewpoint neutral policy is a policy prohibiting only critical or unfavorable speech about the employer. *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). They can also be overly broad, such as a Fire Department regulation requiring the fire chief's pre-approval before making any comments for publication. *Providence Firefighters Local 799 v. City of Providence*, 26 F. Supp. 2d 350, 352, 357 (D.R.I. 1998).

(d) Be aware that the plaintiff may attempt to shift the burden of proof from the plaintiff to the defendant via *Mt. Healthy* Burden Shifting. In *Mt. Healthy,* Fred Doyle, a teacher for the Mt. Healthy school district, was the president of the local

teacher's association who was openly and publicly critical of the Mt. Healthy Board of Education. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281 (1977). As a teacher, Doyle argued with school employees in the cafeteria, referred to students in a derogatory manner within a disciplinary complaint, and made obscene gestures to two female students. In one incident, Doyle's school circulated a memo specifying standards for teacher dress and appearance. Doyle objected, calling into a local radio show detailing and critiquing that memo. The superintendent of the Mt. Healthy Board of Education recommended that Doyle not be rehired due to, in the superintendent's opinion, Doyle's unprofessional handling of the matter. The U.S. Supreme Court held that Doyle had the burden to prove that the Board of Education considered his protected speech a "motivating factor" in the decision not to rehire him. After Doyle proved that one of the causes of his termination was retaliation for exercising his First Amendment rights, the burden shifted to the defendant to prove that the termination would not have occurred but for Doyle's exercise of those rights.

(e) Be aware of other employment claims. Discrimination complaints have administrative pre-requisites that are difficult for many attorneys to navigate. A plaintiff with multiple causes of action may pursue a 1983 case as a desperate last effort to compensate for their failure to meet the administrative prerequisites (ie. EEOC claim deadlines) of an employment discrimination complaint. Failure to exhaust administrative remedies does not deprive a trial court of jurisdiction over a Section 1983 claim. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2D 172 (1982).

(f) If an employee has not yet been terminated, think about whether his claim involves any other kind of "adverse employment action". Adverse employment actions for purposes of stating a Section 1983 claim include discharges, demotions, refusals to hire, refusals to promote, and reprimands. See *Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. [Tex.] 2011); *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 634 (S.D. Tex. 2014)]. A job transfer, even without a cut in pay or other tangible benefits, may constitute an adverse employment action under Section 1983. It can be deemed a demotion if the new position is objectively worse. The employee's subjective perception that a demotion has occurred is insufficient. The employee must show that the transfer makes the job "objectively worse" See *Scott v. Godwin,* 147 S.W.3d 609, 617 (Tex. App.—Corpus Christi 2004, no pet.); see also *Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. [Tex.] 2014) (transfer can be adverse action even without accompanying pay cut or other tangible benefit loss when it is objectively equivalent to discharge, demotion, or reprimand)]. The following actions were held **not** to be adverse employment actions in an associate professor's First Amendment retaliation action against a university: requests to retire; discouraging her attempts to secure promotion; providing her lower compensation than that provided to her peers; disqualifying her from serving on committees and in other academic activities; personal disparagement; and giving her heavier teaching loads. *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 635 (S.D. Tex. 2014).

2. The city arrested someone who made offensive statements to the police. Police deal with many people who are demonstrating their worst selves. Often, they are drunk, angry, depressed, otherwise-inebriated, or simply expressing their most offensive personality traits. They often

express themselves to the police in a manner that might be protected by the First Amendment except for their other violations of the law. Further, many disorderly conduct-type charges contain elements that are expressive in nature. It is natural that many arrests are accompanied by the arrestee's allegation that the arrest was caused, at least in part, by the First Amendment-protected expression of the arrestee.

To prevail in a retaliation claim under § 1983, a plaintiff must prove that (1) the plaintiff engaged in constitutionally protected speech; (2) the arresting officer caused the plaintiff to be arrested; (3) the defendant's actions were motivated by the plaintiff's engagement in constitutionally protected conduct, and (4) the arrest was not supported by probable cause or was not a crime for which arrests rarely occurred. Prior to 2019, if plaintiffs could prove the first three of these elements, defendants then had the burden to prove that they would have taken the same action absent the protected conduct. See *Choose Your Words Carefully: Reimagining Retaliatory Arrest After Nieves V. Bartlett*, 90 Fordham L. Rev. 873, 881 (November 2021). In 2019, the U.S. Supreme Court issued the opinion of *Nieves v. Bartlett*, which further required the plaintiff to prove that probable cause was absent or that the arrest was not for a crime for which an arrest of a person in similar circumstances would generally not occur. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

Unfortunately for cities, *Nieves v. Bartlett* was limited this year in the Supreme Court opinion of *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 other words, the Court established an exception for situations where officers possess probable cause for an arrest but generally choose not to proceed.

Gonzalez v. Trevino stemmed from the following events: 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.

Gonzalez filed a 1983 claim, alleging her arrest was in retaliation for her efforts to organize the petition for the City Manager's removal, which infringed on her First Amendment rights. To bolster her claim, she alleged that she had examined the county's misdemeanor and felony records for the past 10 years and showed that the Texas anti-tampering statute had never been used to "criminally charge someone for trying to steal a nonbinding or expressive document." She claimed this evidence demonstrated that the "defendants had engaged in a political vendetta by bringing a 'sham charge' against her." Defendants moved to dismiss the complaint, arguing that the presence of probable cause defeated the retaliatory arrest claims. Although Gonzalez conceded that probable cause supported her arrest, the district court denied the motion, finding that Gonzalez's claim fell within the exception to the probable cause rule recognized in *Nieves*.

The 5th Circuit reversed applying *Nieves* only to situations where comparative evidence was presented of 'otherwise similarly situated individuals who engaged in the same criminal conduct but were not arrested.'"

The U.S. Supreme Court reversed the 5th Circuit, reiterating the *Nieves* exception for situations where officers possess probable cause for an arrest but generally choose not to proceed. For a plaintiff to qualify for this exception, she must provide evidence demonstrating that her arrest occurred under such circumstances. The Court said that the survey Gonzalez provided was the type permissible under the *Nieves* exception because "the fact that no one has ever been arrested for engaging in a certain kind of conduct especially when the criminal prohibition is longstanding and the conduct at issue is not novel makes it more likely that an officer has declined to arrest someone for engaging in such conduct in the past."

3. **The city regulated the content of billboards.** Cities are incentivized to regulate signs that advertise off-premise activity more strictly than signs that advertise on-premise activity. Local businessmen who erect signs to increase business engage fully in the democratic process, give to local campaigns, and directly sponsor and host local politicians who pass local ordinances. In contrast, advertisers of activity occurring off the premises of the sign are often introducing outside competition to a town and are often owned by out-of-town interests who have little to gain or lose from business in the town. Therefore, cities normally desire to regulate off-premise signs (billboards) more strictly than on-premise signs. Establishing this stricter regulation for billboards requires distinguishing between on-premise and off-premise signs. This distinction often mirrors state law distinctions and exceptions to the application of federal highway beautification laws, which require states to regulate billboards within 660 feet of federally funded highways. See 23 U.S. Code § 131(j) which excepts signs that "advertise activities conducted on the property on which they are located" from the mandates of the U.S. Highway Beautification Act.

   Municipalities are often sued by billboard companies because billboard companies have the money and incentive to sue cities. The primary issue is whether cities can regulate billboards (off-premise signs) more strictly than signs advertising activities on the property.

   In *Reed v. Gilbert*, the town of Gilbert, Arizona, adopted a comprehensive sign code that applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015). The *Reed* Court rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015). *City of Austin v. Reagan Nat'l Advert. of Austin, LLC* distinguished *Reed* to uphold on-premise/off-premises distinction by stating:

   > Unlike the sign code in *Reed*, the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on-premises/off-premises distinction is more like an ordinary time, place, or manner restriction, which does not require the application of strict scrutiny. See *Frisby* v.

Schultz, 487 U. S. 474, 482. Pp. 6-8, 108 S. Ct. 2495, 101 L. Ed. 2D 420.

City of Austin v. Reagan Nat'l Advert. of Austin, LLC 142 S. Ct. 1464, 1467 (2022).

City of Austin v. Reagan Nat'l Advert. of Austin, LLC was a 5-4 opinion with multiple concurring opinions and dissents. Therefore, it is unlikely to resolve the matter for the future.

A significant problem with discriminating against billboards is that political and religious non-commercial messages should be accorded greater 1st Amendment protection than commercial messages. Non-commercial messages may be incapable of being placed on on-premise signs because they are not aimed at a specific property. The convoluted opinions of the Supreme Court in *Metromedia, Inc. v. City of San Diego,* evolved from the difficulties inherent in trying to distinguish billboards from other signs based on the on-premises, off-premises distinction. *See Regulation of Signs Using Content-Based Distinctions,* 3 Zoning and Land Use Controls § 17.02 (2023). This tension will lead to future cases in this area. This problem was highlighted in *Auspro Enters., LP v. Tex. DOT*, 506 S.W.3d 688 (Tex. App. 2016), which held that Texas Highway Beautification Act [which regulates billboards near state highways] was unconstitutional as applied to noncommercial signs.

4. **The city regulated the content of signs other than billboards.** Cities have regulated a wide variety of signs with content-based distinctions. These content-based distinctions often lead to litigation. *Regulation of Signs Using Content-Based Distinctions,* 3 Zoning and Land Use Controls § 17.02 (2024):

- **Real estate signs** are a popular (and probably useful) content-based category of signs often exempted from regulation or given special treatment. 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, 97 S. Ct. 1614, 52 L. Ed. 2D 155 (1977)

- **Construction signs.** Signs identifying contractors and design professionals involved in a project often receive the same sort of exemption or special treatment as real estate signs, although the public purpose in favoring this category is far less clear.

- **Directional Signs.** Although standard directional signs to such things as hospitals or particular highways are usually public signs and not regulated through a sign ordinance, many local sign ordinances carve out special provisions for off-site directional signs for businesses or for particular uses, often institutional uses such as churches and schools. Temporary directional signs provided the core facts and framed the issue before the Supreme Court in *Reed v. Gilbert.*135 S. Ct. 2218, 192 L. Ed. 2d 236 (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 limits on them far more restrictive than those applicable to real estate

signs, thus triggering a major constitutional problem.

- **Price signs.** Some local ordinances offer special treatment to signs stating the prices of particular goods (usually gasoline).

- **Time and temperature signs.** Some local sign ordinances carve out an exception from limitations on "moving" or "flashing" signs to allow these in commercial areas.

5. **The city or one of its officials blocked someone's offensive comment on social media.** When a government agency social media site invites public comment, comments should not be blocked, deleted, or hidden based on viewpoint expressed. 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. *See Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 Marq. L. Rev. 1045, 1069-1070 (Summer 2019).

   The First Amendment prohibition on viewpoint discrimination is not simple to apply to social media because many social media sites are not the "official" site of a municipality, but are merely sites initiated or operated by different public officials. The typical struggle is whether an account is the public official's personal account for which he/she is engaging in First Amendment protected activity as an individual or is the public entity's means of informing the public of the activities of the office.

   In 2019, three United States Circuit Courts of Appeal issued opinions concluding that social media blocking by government officials violates the First Amendment. *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019). *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220-21, 1227 (2021) *Robinson v. Hunt Cnty.*, 921 F.3d 440, 449, 452 (5th Cir. 2019). These courts held that: (1) public officials who operate interactive social media accounts in their official capacity have created government-controlled public forums for speech and (2) the officials cannot then engage in viewpoint-based regulation of private speech in those forums by blocking people or deleting their comments based on the perspective being expressed. If, instead, the official controls the account in her private capacity, then there is no state action, the First Amendment does not apply, and the official is free to censor or block people, at will. Since 2019, many federal district courts and four additional Circuit Courts of Appeal have concurred with this basic framework. See *Campbell v. Reisch: The Dangers Of The Campaign Loophole In Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 147, 148-149 (March, 2023).

   Determining the threshold question of whether a public official operates the relevant social media account in his/her official capacity (i.e.,"under color of state law") has led to different approaches by the circuits. Most circuit courts apply a totality-of-the-circumstances approach. This approach takes into account the following factors in determining whether a government official's publicly accessible social media account is operated in an official, versus personal, capacity:

   - whether the official presents herself on the social media account as a government actor by using her government title and address, linking to her government website, or displaying photographs of herself engaged in government business;

- whether the official uses the account to communicate with the public about her official duties and activities; and

- whether third parties, such as other government actors and members of the public, interact with the account as though it belonged to a government official.

See Knight Institute to Represent Plaintiff in the First Social-Media-Blocking Lawsuit to Reach Appellate Court, Knight First Amend. Inst. (May 2, 2018).

In January 2021, the 8th Circuit in *Campbell v. Reisch* prioritized a fourth consideration of whether the account was initially created as a campaign device, rather than as a tool of governance, and whether it continues to aid in any future re-election by creating a favorable impression of the official's job performance. *Campbell v. Reisch: The Dangers Of The Campaign Loophole In Social-Media-Blocking Litigation*, 25 U. Pa. J. Const. L. 147, 148-149 (March, 2023). *Campbell v. Reisch* indicates that the most effective way for a public official to keep a social media account private is to tie it to his/her campaign. In keeping the account private, the government official should not use the account for any official purpose or in a way that appears an extension of the public office in which they serve. *Technological Transformation of the Public Square: Government Officials Use of Social Media and the First Amendment*, 47 Mitchell Hamline L. Rev. 510, 530 (2021).

This year, the U.S. Supreme Court simplified this multi-factor approach in its opinion in *Lindke v. Freed*, No. 22-611, 2024 U.S. LEXIS 1214, issued on March 15, 2024. In this case, the U.S. Supreme Court held that 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.

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."

The Supreme Court then summarily overturned the 9th Circuit in *O'Connor-Ratcliff v. Garnier* No. 22-324, 2024 U.S. LEXIS 1216 (March 15, 2024), where it sent back a social media blocking case for using an approach inconsistent with its precedent. In that case, two school trustees, who created their Facebook pages to assist in their campaigns, were determined to have engaged in state action by the 9th Circuit's test, which held that an off-duty state employee acts under color of law if she (1) "purports to or pretends to act under color of law"; (2) her "pretense of acting in the performance of [her] duties had the purpose and effect of influencing the behavior of others"; and (3) the "harm inflicted in plaintiff related in some meaningful way either to the officer's governmental status or to the performance of [her] duties". The 9th Circuit approach declared that a government official's social media action was state-action if "there was a close nexus between the [official's] use of their social media pages and their official positions."

6. **The city arrested a person who was filming police or other government employees.** 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. There are many section 1983 cases involving a private citizen's claim of First Amendment retaliation for filming the police. *See, e.g., Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011); see also *Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 363-66 (2011).

   Most federal circuits have recognized a First Amendment right to record on-duty peace officers. However, the 3rd and 4th Circuits have cases to the contrary. See *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-63 (3d Cir. 2010) (finding the defendant officer did not lack probable cause and acted in good faith when he detained a civilian because the civilian did not have a constitutional right to film the officer without the officer's consent); see also *Syzmecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009) (failing to find a clearly established right to film police activity in a public forum). In *Syzmecki v. Houck*,the 4th Circuit upheld the lower court's ruling in favor of the defendant police officer in a 42 U.S.C. § 1983 complaint. The court agreed with the lower court's finding that a citizen's assertion to First Amendment protection of her conduct – recording police activity in a public venue - was unfounded as said right had not been clearly established within the Fourth Circuit when the alleged conduct occurred. See *Filming the Police: An Interference or a Public Service*, 48 St. Mary's L. J. 145, 153-154 (2016).

   In *Irizarry v. Yehia*,a police officer tried to block a journalist from filming, shone his flashlight into the camera, and then drove his cruiser at the journalist. The journalist brought a First Amendment retaliation claim under 42 U.S.C.S. § 1983. *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022). In that case, 10th Circuit held that, under the First Amendment, filming the police performing their duties in public is a clearly established protected activity, noting that the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all concluded in published opinions that the First Amendment protects a right to film the police performing their duties in public. See 2 Police Civil Liability § 8A.11 (2023).

   Nonetheless, police still use many theories of criminal jurisprudence against persons filming them. Many state statutes originally drafted to regulate wiretapping prohibit more generally the

recording or interception of oral communications unless all parties to the conversation consent. Police officers regularly rely on these statutes to arrest citizens who insist on recording the officers without their consent, often after the citizens have used the records to file complaints against the police. See *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 358 (January 2011). Also see *Recording Calls and Conversations*, JUSTIA (last updated Oct. 2021), https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/[https://perma.cc/N3ND-7XK7].

Another group of arrested filmers involves persons who were purposely agitating government actors into arresting them for filming, such as "First Amendment Auditors". See *1st Amendment auditors make police walk the line between enforcement, constitutionality*, Sara Cardine, L.A. TIMES, July 16, 2022. First Amendment auditors frequently seek to incite confrontation or aggression through harassing or argumentative behavior that stems from a motivation other than the protection of individual liberties, such as obtaining "clicks, popularity, and/or money from social media views. Indeed, the rising popularity of First Amendment auditor videos has led to a competition among auditors, leading to attempts to create more dramatic videos in order to attract more clicks and subscribers for advertising revenue**.** 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. *First Amendment Audits*, 46 Los Angeles Lawyer 20, 22 (July-August 2023).

First Amendment auditors will attempt to leverage the limited knowledge of field-level government employees by pushing the boundaries of limited public forums. They will attempt to protest and film publicly visible activities in a manner that make public officials uncomfortable. Countering these tactics requires briefing the field-level employees on the rights of these purposely offensive actors. See Teri Webster, *First Amendment 'Auditors' Filming Public Buildings, Police, Called 'Terrorists' But Are They Really*?, Blaze (Jan. 13, 2019), **[https://perma.cc/9AVT-6CJP].** Such a briefing can be achieved simply with a briefing card for employees likely to encounter First Amendment Auditors. A sample briefing card is as follows:

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7. **The city broke up a protest.** Generally, the right of the public to demonstrate and protest in public spaces is a constitutionally guaranteed free speech right under the First Amendment. *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* 64 A.L.R. Fed. 3D 5. Nonetheless, the First Amendment does not bar states and municipalities from arresting protestors who are committing crimes, such as trespassing or damaging property. Additionally, 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. Nonetheless, breaking up a large group must be done carefully to minimize dangers to law enforcement officers as well as protesters.

   The chief danger in breaking up protests is using excessive force. Police use of force violates the Fourth Amendment if it is objectively unreasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Protestors have brought challenges to a wide variety of practices utilized by law enforcement officers, such as their use of sound devices, particularly to disperse crowds, choking, beating, or striking demonstrators, roughly handling protestors, utilizing pain compliance techniques, shooting rubber bullets or other projectiles, striking protestors with a vehicle, using a taser on demonstrators, tightening handcuffs or zip ties on arrestees, confining detainees in a locked police vehicles, depriving protestors of food or water, or spraying demonstrators with chemical agents such as mace or pepper spray. *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.

   Unless a police action in question is a "seizure," a defendant can argue that the Fourth Amendment simply does not apply. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Further, Litigants who fail to assert Fourth Amendment excessive force claims may still proceed with Due Process claims under the Fifth or Fourteenth Amendment under a “conscience shocking” standard. *Tierney v. Davidson, 133 F.3d 189, 199 (2d Cir. 1998).* Finally, a plaintiff may argue

that a police action against a protest violates his First Amendment right to peaceful assembly. *Protest Policing and the First Amendment*, 55 U.C. Davis L. Rev. 347, 392 (November, 2021).

8. **The city established a permit system for protests and/or parades.** Cities may require permits for parades and protests. However, they must be justified without reference to the content of the regulated speech, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. A content-neutral time, place, or manner restriction can be imposed in a public forum, but only if it is a "narrowly drawn and precise enactment that aims at specific conduct." See *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 Drake L. Rev. 381, 406 (Winter, 2008). The U.S. Supreme Court has laid out certain legal boundaries for permit schemes in five crucial cases:

    - *Freedman v. Maryland*, 380 U.S. 51 (1965). Government may not require prior submission of content of expression to the government prior to issuance of permit.

    - *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Prior restraints of 1st Amendment protected activities require clear, narrow, objective, and definite standards. No unbridled discretion.

    - *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). 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).

    - *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). Use of public forum must be content-neutral. A licensor may not pass judgment on the content of the speech.

    - *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002). Door-to-door religious canvassers who are not soliciting funds may not be required to obtain permits.

    See Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?, 56 Drake L. Rev. 381, (Winter 2008).

9. **The city restricted a Sexually Oriented Business (SOB).** Much First Amendment jurisprudence is based on the regulation of SOB's. These businesses include sexually oriented book, video, or novelty stores or arcades, live performance or nude dancing cabarets, motion picture theatres or video viewing facilities, escort or outcall agencies, and other types of sexually oriented businesses. *Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses -- Types of Businesses Regulated*, 21 A.L.R.6th 425. Like billboard companies, SOB's have the funds and incentive to sue cities to maintain their lucrative operations that depend on their public spectacle. Further, many politically powerful groups oppose SOB's and pressure local politicians to be creative in their restrictions. Consequently, most municipal attorneys will encounter SOB regulation as a regular part of their careers.

The general allowable framework for municipal regulation of SOB's is as follows:

- Cities may ban nude dancing in establishments that sell alcoholic beverages. *California v. LaRue*, 409 U.S. 109 (1972). Cities must be careful not to run afoul of state preemption when doing so.

- Cities may prohibit SOB's from locating within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, park, or school. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986).

- SOB regulation requires generally requires a City to include findings referencing studies relating the SOB regulation in question to the effects of the regulated type of SOB on municipal crime rates, property values, neighborhoods, or other vices. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002).

- Cities may establish no-touch buffer zones between entertainers and customers. *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002).

- Local governments may restrict the hours of operation of SOB's. *Ctr. for Fair Pub. Policy v. Maricopa Cty.*, 336 F.3d 1153 (9th Cir. 2003).

- Cities must leave open "ample alternative means of communication" and may not effectively zone SOB's out of existence. *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251 (11th Cir. 2003).

- Cities may prohibit SOB's from selling alcohol. *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003).

- Cities may not establish distance limitations on SOB's that are merely adult video stores or adult book stores. *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003).

- Cities may require female dancers to cover their breasts and genitals while performing. *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003).

When regulating SOB's, a municipal attorney is wise to rely on a tried-and-true ordinance that has withheld constitutional scrutiny, preferably in the same state, and should be careful to include all of the latest studies in his/her findings as justification for an SOB ordinance. Texas has a wealth of litigated SOB ordinances. They include the following cases:

- *SDJ Inc. v. City of Houston* 837 F.2d 1268 (5th Cir. 1988). The court applied intermediate level (not strict) scrutiny, and required as justification "objective evidence of purpose—a study or findings" to ensure that the ordinance was aimed at preventing undesirable secondary effects, and not at regulating content. The court found the ordinance "narrowly tailored" as judged by a test that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest."

- *M.E.F. Enterprises Inc. v. City of Houston*, 489 U.S. 1052 (1989). *See also N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162 (5th Cir. 2003),*aff'd in part, rev'd*

in part, 2004 U.S. App. LEXIS 10607 (5th Cir. 2004). Upheld major amendments to Houston's SOB ordinances, including location restrictions, amortization provisions, notice requirements, structural, visibility and lighting requirements, signage restrictions, entertainer and manager permits, etc.

- *Kaczmarek v. State*, 986 S.W.2d 287 (Tex. App.—Waco 1999). Upheld Houston ordinance against attacks based on vagueness and mental element.

- *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.

- *8100 N. Freeway, Ltd. v. City of Houston, 363 S.W.3d 849* (Tex. App.—Houston [14th Dist.] 2012). Rejected claim based on "unfettered discretion" of police chief in issuing permits.

- *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.

- *BGHA, LLC v. City of Universal City*, 340 F.3d 295 (5th Cir. 2003). Upheld various distance requirements.

- *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2007). Upheld buffer zone, stage height, and demarcation requirements.

- *Smartt v. City of Laredo*, 239 S.W.3d 869 (Tex. App.-Amarillo 2007, pet. denied). Upheld 1000-foot minimum distance from residential areas.

- *Doe v. Landry*, 909 F.3d 99 (5th Cir. 2018). Allowed a state official to narrow a state statute by stating it "does not apply to venues such as theatres, ballets, or other mainstream performance arts venues," thereby saving the statute from an overbreadth challenge and rejected a vagueness challenge based on lack of definitions for "breasts and buttock.

- *Fantasy Ranch, Inc. v. City of Arlington*, 459 F3d 546 (5th Cir. 2006). Upheld a

spacing ordinance and held that, where two cabarets were too close to each other, the first cabaret established was the "conforming use."

- *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995). Upheld regulation of proximity to dancers and prohibitions on consumption of alcohol where performances are given, direct tipping and employee permits.

- *Ex parte Sedigas*, 2016 Tex. App. LEXIS 11101 (Tex. App.—Waco, Oct. 12, 2016. Held that a no-touch" rule forbidding touching by employees while nude or semi-nude was not unconstitutionally overbroad.

- *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471(5th Cir. 2002) and 35 Bar & Grille, LLC v. City of San Antonio, 2013 U.S. Dist. LEXIS 65756 (W.D. Tex. Apr. 29, 2013). Held that 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, in *Baby Dolls*, 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).

See 1 Texas Municipal Zoning Law § 10.500 (2024)

10. **The city limited (or arrested) a commenter in a City Council meeting.** Cities often are sued for violating the First Amendment rights of commenters at City Council meetings. These suits are becoming more common as persons seeking fame on social media often appear at City Council meetings for the sole purpose of making outrageous statements that will prompt a government response. Cities may limit comments to the subjects of the meetings. However, many other prohibitions are sought by governing officials that are more Constitutionally problematic.

    A city council meeting has been held to be a limited public forum. *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). By creating a "public comment" item on the agenda, a city creates a "public forum" where First Amendment protections are afforded. Because of the "public forum," the council cannot exclude a person from speaking because it does not like the viewpoint of the speaker. Reasonable time, place and manner regulations are permissible, but any content-based prohibition must be viewpoint neutral and be narrowly drawn to effectuate a compelling state interest. *Perry Educ. Ass'n v. Perry Local Educators' Assn*., 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983). Viewpoint discrimination is impermissible in any forum. *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021).

    By creating a public forum by allowing public comment, it is a violation of the First Amendment to selectively prohibit others from similarly addressing the council as to the same matters based on their speech. See *Gault v. City of Battle Creek*, 73 F.Supp.2d 811, 814 (W.D. Michigan 1999). Recent U.S. Supreme Court opinions indicate that regulation of a limited

forum, such as public comments may survive under a test that is less strict than the one above stated. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 121 S. Ct. 2093 (2001). Under the less strict test for reviewing limited forum speech, 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. *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3rd Cir. 2004). Under this reasoning, the city potentially 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). However, (i) any restrictions on speech must be viewpoint neutral; and (ii) such restrictions must be reasonable in light of the purpose served by the forum (public comment section). See *City Meetings and the First Amendment*, TCAA 2006 Summer Conference. https://www.tml.org/DocumentCenter/View/422/Open-Meetings-and-the-First-Amendment-PDF**.** Under this analysis, content-related regulation is permissible so long as the content regulation is tied to the limitations that frame the scope of the "Public Forum" e.g. the regulation is neutral as to viewpoint within the subject matter of the content.

Final Consideration. No Respondeat Superior Liability in First Amendment Cases. The First Amendment is one of the most frequent sources of constitutional litigation for cities. Cities become liable for First Amendment allegations via 42 U.S.C. § 1983. In analyzing First Amendment cases, City Attorneys should also remember a crucial basic rule in applying Section 1983. There is no respondeat superior liability in 1983 cases. Instead, plaintiffs must prove that their injury was caused by action pursuant to official municipal policy or custom. 42 U.S.C.A. § 1983; see *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2D 626 (1997); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001); *McClure v. Biesenbach*, 355 F. App'x 800, 803-04 (5th Cir. 2009). *Jones v. City of Mesquite*, Civil Action No. 3:18-CV-0117-B, 2018 U.S. Dist. LEXIS 136291, at *18 (N.D. Tex. 2018).

While §1983 claims may be brought against municipalities "where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," municipalities cannot be held liable solely for employing a tortfeasor; that is, they "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *see also Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2D 626 (1997). Local governments are responsible only for 'their *own* illegal acts.'" and they are not vicariously liable under § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60, 131 S. Ct. 1350, 179 L. Ed. 2D 417 (2011). S*ee* also *Pembaur v. City of Cincinnati*, 475 U.S. 469 at 479 (1986).

Requiring municipal-liability plaintiffs to identify an allegedly unconstitutional municipal policy or custom "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of County Comm'rs v. Brown*, *520 U.S.* 397 (1997) at 403-04 (citing *Monell*, 436 U.S. At 694). "To prevent municipal liability . . . from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Board of County Comm'rs v. Brown*, *520 U.S.* 397 at 410 (1997).

To state a claim for municipal liability under Section 1983, "a plaintiff must show the deprivation of

a federally protected right caused by action taken 'pursuant to an official municipal policy.'" *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010) (citing *Monell*, 436 U.S. At 691). "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.'" *Id.* at 541. (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)). Isolated unconstitutional actions by municipal employees will almost never trigger [municipal] liability." *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001). Nonetheless, informal or unrecorded governmental policies can establish 1983 liability against individuals acting in their official capacity. See *Juarez v. Aguilar*, 666 F.3d 325, 335 (5th Cir. [Tex.] 2011).