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COLORADO MUNICIPAL LEAGUE

ANNUAL SEMINAR ON MUNICIPAL LAW

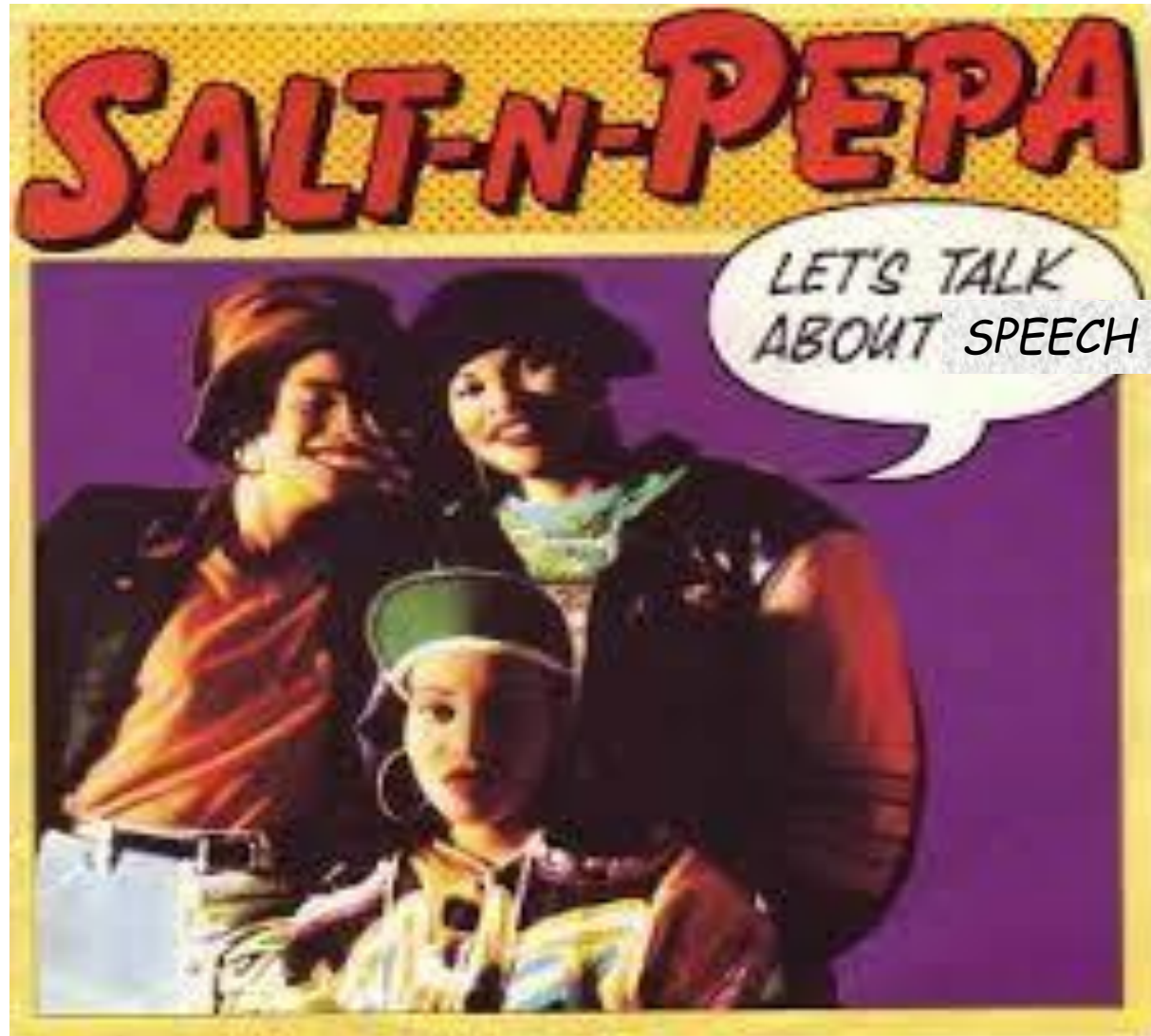
2022

THE FIRST AMENDMENT FOR MUNICIPAL ATTORNEYS

Let's Talk About Speech

Christopher Price

Widner Juran LLP

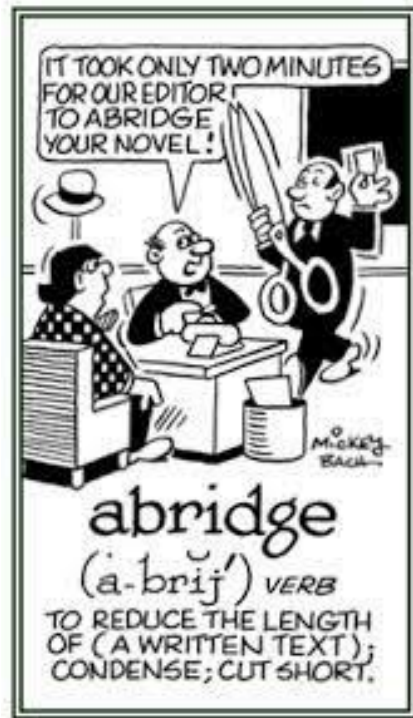


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First Amendment

Congress shall make no law . . .

abridging the freedom of speech



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First Amendment

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 to peaceably assemble, and
to petition the Government for a redress of grievances.



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First Amendment



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Ask Questions



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Ask Questions

- Who is the speaker?
 - Private v. Government
 - Employee
 - Elected Official
- What is being regulated?
 - Content v. Conduct
 - Unprotected Expression
- What is the appropriate level of review applied by courts?
- Where would the regulation apply, e.g., does this regulation apply to property owned by the government?
- How will this be implemented?
- What kind of training or education is needed?



Adopt and Implement Policies or Code Provisions

4 Public Comment

The Public Comment section offers an opportunity for any citizen to express opinions or ask questions regarding City services, policies or other matters of community concern, and any agenda items that are not a part of a scheduled public hearing. Citizens will have three minutes for comments if they are speaking as an individual, or five minutes if speaking on behalf of a group or organization. These time limits were established to provide efficiency in the conduct of the meeting and to allow equal opportunity for everyone wishing to speak. An immediate response should not be expected, as issues are typically referred to City staff for follow-up or research and are then reported back to Council and the individual who initiated the comment or inquiry.

Written materials for presentation to Council may be submitted to the City Clerk as the speaker approaches the podium. The City's computer presentation equipment is not available for general public use, although applicants are permitted to display relevant illustrations and material useful in informing the Council and public of a project. The public may, however, use the document camera for visual presentation of materials, if desired.



Adopt and Implement Policies or Code Provisions

- Be clear.
- Define terms.
- Create a legislative history.
- Limit the provisions to what is needed to address the issue.
- Do not rely on state statute.



Training / Education



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MUNIVERSITY

A leadership program for Colorado's municipal elected officials



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Training / Education

- Being in the public may require facing angry constituents.
- Apply policies and code provisions consistently.
- Avoid retaliation and overreacting.
- Everything is online.

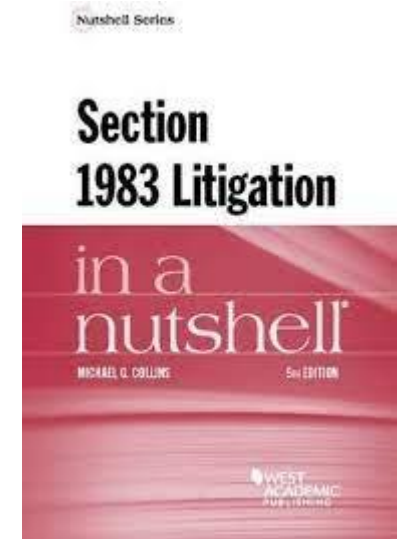


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Identify the Risks

Denver Police's War on F-Words Costs City \$128K

"Punk-Ass Bitch:" Another Colorado Town Pays Big for
Freaking Out Over Profanity



Insurers force change on police departments long resistant to it

Identify the Risks

- Does the government need to act?
- Is there a risk to inaction?
- Are there potential damages, attorney fees, costs?
- Does an individual have too much discretion to act?



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Thema Pro Hodie

- Lies
- Right to Film Police
- Government Speech
- Private Speech
- Signs – (Ugh)



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Tests

- **Content Regulation**

- **Strict scrutiny if protected speech**

- Necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest.

- **Rational basis if unprotected speech**

- Reasonably related to an important government interest.



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Unprotected Speech

- Fighting words
- Clear and present danger of imminent lawless action
- True Threats
- Obscenity (Miller test)
- Defamation
- Fraud (Lies +)



Lies

- Lies without more are protected



- U.S. v. Alvarez, 567 U.S. 709 (2012)

- U.S. v. Hamm 6:22-CR-00007E.D. Tex. June 24, 2022)



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Lies

- Lies without more are protected



- U.S. v. Alvarez, 567 U.S. 709 (2012)
 - *Dissent* from Alito, Thomas, and Scalia.
 - They would have upheld the statute.
 - It's ripe for reevaluation.



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Right to Film Police

Irizarry v. Yehia, 10th Cir., July 11, 2022

- QI – immune unless conduct unreasonable in light of clearly established law at the time
- Filming the police is a form of news gathering
- Clearly established as of May 12, 2019



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Government Speech

- The government gets to determine what it says.
- It is not discriminating on viewpoint.
- Even in a public forum, government is allowed to speak.

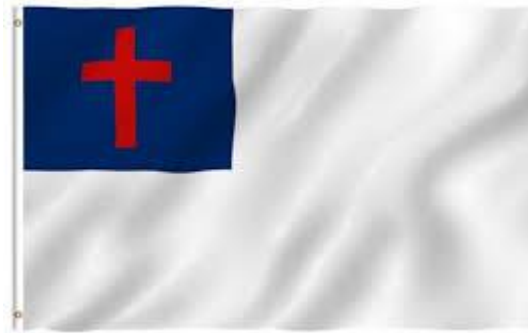


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Government Speech

Schurtleff v. Boston, May 2, 2022

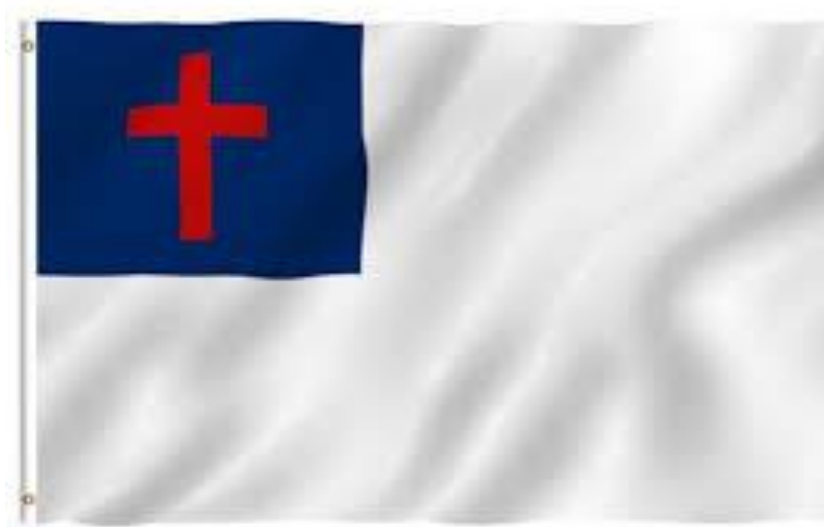
- Is a flagpole a forum, a place for public expression, government speech?



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Government Speech

- Let other flags fly for 284 ceremonies
- No policy controlling message
- No denials
- Until. . . .



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Government Speech

- Boston can adopt a policy and limit the flags based on the message.



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Private Speech

*Kennedy v. Bremerton School District,
June 27, 2022*

- Wrong facts = Bad Law
- Demonstrative prayer after football games



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Private Speech

Actions described as praying quietly by himself while students were occupied.



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Private Speech

Wrong Facts

- Under 1 year contract
- Not fired
- Wasn't recommended for rehire by head coach
- Obligated to supervise at time of prayer
- Never reapplied for a coaching position
- Was not praying quietly by himself.



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Private Speech

Actual actions by the coach

- Not student led
- Players felt pressure to participate



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Private Speech

Pickering/Garcetti – Two Step

1. What is the nature of the speech?
2. Do the interests of the government as employer outweigh an employee's private speech on a matter of public concern?



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Private Speech

- Not ordinarily within the scope of employment duties
- Not said pursuant to government policy



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Private Speech

- Establishment Clause concerns of the school district did not outweigh the private speech rights of the coach.
- No more *Lemon* excessive entanglement test.
- Is the Establishment Clause dead?



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P.S.

- District ordered to reinstate Kennedy.
- Kennedy did not accept offer or respond.
- Traveling the media circuit.



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Signs

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

- The Reed read test.
- If you have to read the sign to see what rules apply, it is a content-based regulation.
- Strict scrutiny applies.



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Signs

City of Austin v. Reagan Nat'l Advertising of Austin, April 21, 2022

- On-premises v. Off-premises
- No new off-premises signs



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Signs

Off-premises means a “sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site”



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Signs

- The definition does not include reference to
 - Size
 - Color
 - Electrification
 - Free-standing
 - Attached
 - Materials



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Signs



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Signs

- The regulations do not apply unless you read the sign.
 - Yet . . .
 - Content neutral
 - “The message on the sign matters only to the extent that it informs the sign’s relative location. The on/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions.”



Signs

- The regulations do not apply unless you read the sign.
 - Yet . . .
 - Content neutral
 - “The message on the sign matters only to the extent that it informs the sign’s relative location. The on/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions.”



Signs

- Good news for municipalities that have not updated their sign codes.
 - Otherwise . . .



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Public Forum Doctrine

- Public
- Designated
- Non-public



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Traditional Public Forum

- A place traditionally open to the public for expressive activity.



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Designated Public Forum

- A place designated by the government for expressive activity.
 - They can be turned into a non-public forum.



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Non-Public Forum

- A place where access to the public is not guaranteed and the location has not been open to expressive activity.



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Define the Forum

Questions to Ask:

- Is this private speech?
- Is this a physical space?
- How is the place used now/historically?
- What is the government's intent as to the place?
- What type of access does the public have to the place?
- Where is the place's proximity to a public street?
- How is this place separate or distinct from other places in the municipality?



Apply the Correct Test

- **Public Forum (Traditional and Designated)**
 - **Content Based**
 - **Strict Scrutiny**
The least restrictive means to meet a compelling governmental interest.
 - **Content Neutral – Time, Place and Manner**
 - **Intermediate Scrutiny**
Narrowly tailored to serve a significant governmental interest, leaving open alternative channels of communications.



Apply the Correct Test

- **Non-Public Forum**
 - **Content Regulation Ok**
 - **Rational Basis**
Rationally related to a legitimate government objective.
 - **Viewpoint Neutral**



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Thank You!

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