Constitutional Issues in Municipal Governance

Adam Stephens, Deputy City Attorney, City of Thornton

First Amendment protections

- Speech
- Press
- Freedom from Religion, Establishment Clause
- Freedom of Religion, Free Exercise Clause
- Freedom of Assembly
- Right to Petition Government
- Implicit Right to Association to engage in First Amendment protected activities

First Amendment – Basic Forum Analysis

- Traditional public fora of parks, streets, and sidewalks, receive the most protection.
- Designated public fora, such as city hall atrium and community center meeting rooms, are designated by the city to permit free speech activities, although content-neutral time, place, manner regulations may regulate their use.
- Limited public fora, such as the three-minute audience participation time at City Council meetings. Must be view-point neutral and reasonable.
- Non-public fora, such as department offices, equipment garages, secured parking lots, etc., are city-owned property and facilities that are generally not open to the public speech activities.

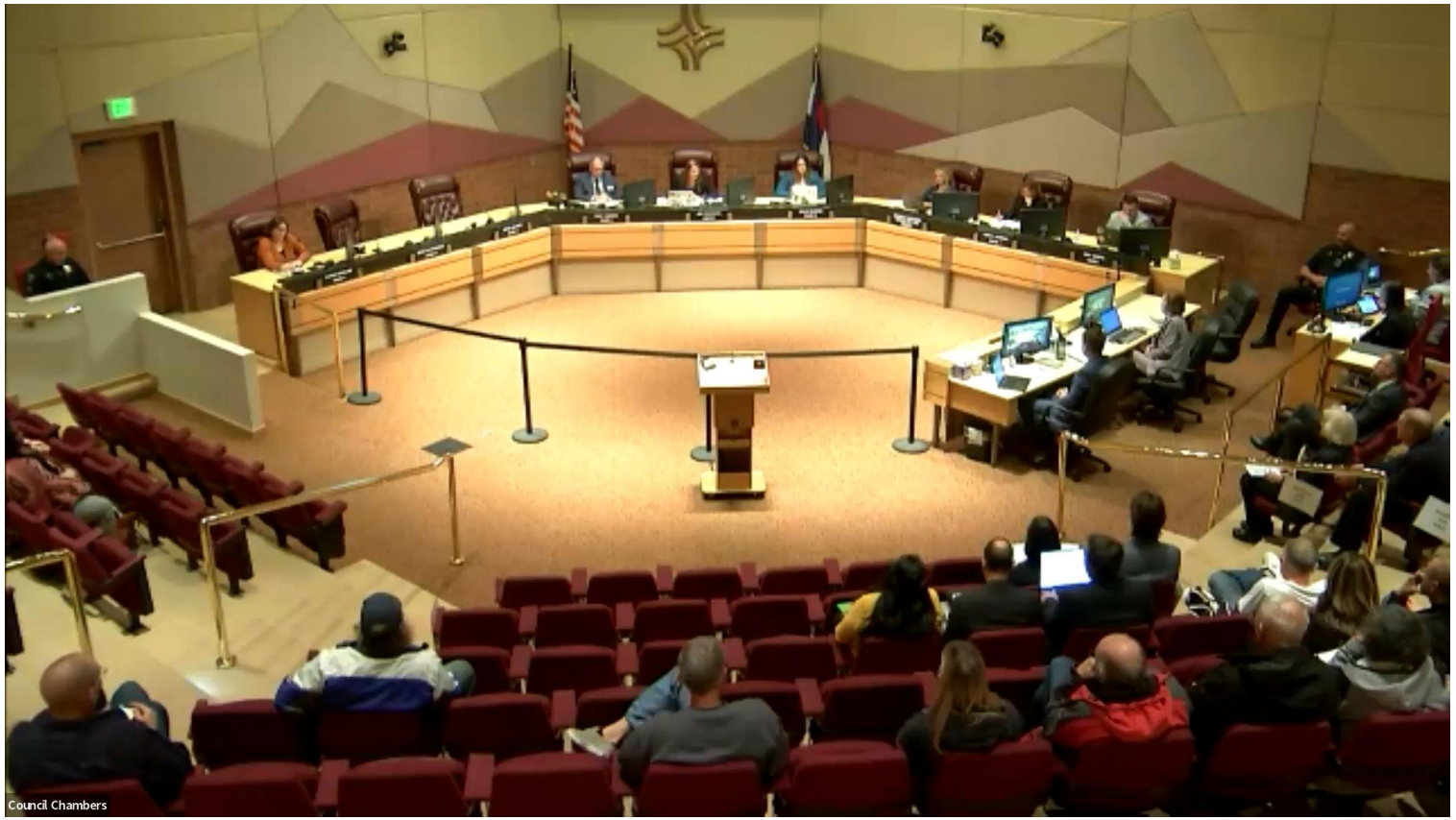
The First Amendment & Free Speech

The First Amendment of the United States Constitution and Article II, Section 10 of the Colorado Constitution protects the freedom of speech. Caselaw interpreting free speech has long stated that censorship based upon the content of the communication is highly disfavored.

The First Amendment prohibits laws "abridging the freedom of speech." One obvious implication of that rule is that the government usually may not impose prior restraints on speech." *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). Generally speaking, the concept of "prior restraint" is simply censorship before the message is communicated

However, governments have some latitude in regulating the time, place, and manner of protected speech provided that the regulation is narrowly tailored, content-neutral, and there are ample alternative avenues of communication. See generally, *Ward v. Rock against Racism*, 491 U.S. 781 (1989).

First Amendment @ Public Meetings



Disrupting Lawful Assembly, CRS § 18-9-108 (petty offense) & Public Building Interference, CRS § 18-9-108 (class 2 misdemeanor)

First Amendment Right to Assemble & Petition

Permits for protests, demonstrations, rallies and parades may reasonably regulate time, place and manner, but must be timely granted and content-neutral.

Be wary of “Sight and Sound” and “Heckler’s Veto” arguments.

CML COLORADO MUNICIPAL LEAGUE

First Amendment Auditors

Can they go anywhere they want in public buildings?

- The public areas of public buildings are public spaces open to the public.
- For these areas, there's no basis for "trespassing" against a person in open areas during business hours and there's no requirement the visitor demonstrate they are there for "official business."
- A First Amendment audit is not the first time to tell the visitor a publicly accessible area is "off limits." Rather, non-public areas should be secured and marked in advance.
- Wherever the public may go unescorted, a protester or auditor may go.

BUT,

- Police may remove individuals from properly posted government offices for Trespass after a warning to leave is given and ignored.
- Loud or disorderly behavior that disrupts office activity is unacceptable, and individuals may be ordered to leave facility or face arrest for Trespass if they continue that behavior.
- Some public buildings are restricted by membership or fee. City Staff may request police assistance to remove someone from the facility.
- It is up to city staff to ensure confidential information is shielded from view/recording by the public. Recordings by auditors may not be seized because they might have recorded something they "shouldn't" have.

First Amendment & Sign Regulations

- *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). the U.S. Supreme Court reviewed a challenge to a town's sign ordinance that restricted the size, duration, and location of temporary directional signs. The ordinance prohibited "display of outdoor signs anywhere within the Town without a permit" with a handful of exemptions. The Court highlighted three categories of exemptions: ideological signs, political signs, and temporary directional signs relating to a qualifying event. The code treated these categories of signs differently from one another, with ideological signs being the most favorably treated and temporary directional signs the least favorably treated. Temporary directional signs had stricter limits on how large they could be, the number of them that could be placed on a single property, and how long they could be up as related to the event. In contrast, ideological signs could be much larger, placed in all zoning districts, and did not have temporal limits. The Court held that this land development code, which distinguished between categories of signs explicitly based on the type of information the signs conveyed, was content-based and could not survive strict scrutiny. The town's distinctions, the Court explained, were "hopelessly underinclusive" to serve its purported interests of aesthetic appeal and traffic safety.
- *City of Austin v. Reagan Nat'l Advertising of Austin*, LLC, ––– U.S. ––––, 142 S. Ct. 1464, 212 L.Ed.2d 418 (2022). In that case, the U.S. Supreme Court pulled back from *Reed* and affirmed a municipal ordinance that distinguished between "on-premises" and "off-premises" signs by finding that distinction content-neutral due to long-standing precedent.
- *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243 (10th Cir. 2023), Tenth Circuit Court of Appeals discussed *Reed* & *Austin* and determined that the State of Colorado's regulatory scheme for highway billboards that distinguished between compensated messages and non-compensated messages (such as public service announcements) was a constitutionally permissible policy choice furthering Colorado's objectives of promoting roadside safety and aesthetics.

Neighborhood Sign Complaints

First Amendment retaliation claims by employees

To evaluate whether a public employer violated the First Amendment by retaliating against an employee, five elements must be established under the *Garcetti/Pickering* test:

1) Was speech made pursuant to an employee's official duties? If yes, not protected speech.

2) Did the protected speech address a matter of public concern?

3) Do the government's interests as an employer outweigh the employee's free-speech interests?*

*Impair discipline? Impair co-worker harmony? Or close working relationships? Impedes performance? Interferes with operation of agency? Undermines mission of agency? Communicated in public or private? Conflicts with responsibilities? Makes use of employee's authority and public accountability role? *Rankin v. McPherson*, 483 U.S. 378 (1987))

4) Was the protected speech a motivating factor in the adverse employment action?

5) Would the defendant employer have made the same employment decision in the absence of the protected speech?

See, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); and, *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Note recent case involving publicly-employed lawyer in Colorado, *Timmins v Plotkin,* 157 F.4th 1275 (10th Cir. 2025): Public water district general counsel did not speak to press and private citizens pursuant to her official duties when she told them that she believed board members had engaged in corrupt and potentially unlawful behavior, for purposes of determining whether her speech was protected by First Amendment because there was no reason to believe she had official duty to publicly criticize board for rejecting her advice.

Panhandling is protected speech*

- *Evans v. Sandy City,* 944 F.3d 847 (10th Cir. 2019) – affirming restriction of standing or sitting on narrow (<36") median. "Evans received two citations for standing on a paved 17-inch median. A mere ten feet away from where he was cited, the median is wider than 36 inches and is therefore unaffected by the Ordinance. We simply cannot accept this ten-foot difference on the same median as a substantial burden on speech." (Assumes without deciding that panhandling is protected speech, see *Brewer*…).
- *McCraw v. City of Oklahoma City,* 973 F.3d 1057 (10th Cir. 2020) –striking down OKC median ordinance as not narrowly tailored. The "record is devoid of evidence that accidents involving vehicles and pedestrians on medians in Oklahoma City is an actual issue, as opposed to a hypothetical concern. There is neither evidence of any accident involving a pedestrian on a median, fatal or not, nor evidence that a pedestrian on a median caused an accident or distracted a driver enough to compromise the safety of the pedestrian or the driver."
- *Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021) – striking down restrictions for pedestrians standing on most medians less than six feet wide and banning physical exchanges between pedestrians and drivers or occupants of vehicles within a travel lane. City data summarizing statistics and anecdotes regarding safety risks offered no concrete evidence that the restrictions city chose to enact were actually tailored to address the issue.

Fourth Amendment

- Prohibits unreasonable searches and seizures
- Requires (judicial) warrants issued upon probable cause
- Common exceptions to warrant requirement to conduct searches include consent, plain view, exigency, incident to arrest…
- Protects (objectively) reasonable expectations of privacy.

Fourth Amendment Issues in Law Enforcement

Code enforcement inspections & curtilage

- Curtilage and the home receive same Fourth Amendment protection. *United States v. Ronquillo*, 94 F.4th 1169, 1174 (10th Cir. 2024). Curtilage is determined by considering four factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Id*.
- Unpublished Tenth Circuit decision affirmed district court finding that code enforcement officer did not conduct search in curtilage when attempting to make contact with homeowner at the back door regarding off-site sign violations when the pathway to the front door was partially blocked and officer left when owner told him to leave. *Clark v. City of Williamsburg, Kansas,* 844 Fed. Appx. 4 (10th Cir., 01/14/2021).
- "[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that." *Florida v. Jardines*, 569 U.S. 1, 9, n.4 (2013).

Police Legal Advising

- Civil Rights (42 USC §1983 and state) claims and litigation
- Police Academy & In-Service trainings
- Automated License Plate Reader programs
- School Resource Officer programs
- Homeless Encampments
- Park Facility trespass

Fourth Amendment Considerations in Municipal Court warrants

Special Inspection Warrants

- *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967). "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id*. at 539.
- Colorado Municipal Court Rules of Procedure, Rule 241. Authorized if violation is 1) Charter or Ordinance violation involving serious threat to public safety or order; and 2) Not also a state statute violation for which district or county court could issue search warrant.

Abatement Orders

- CRS § 31-15-401(1)(c), Governing bodies of municipalities have power to declare what is a nuisance and abate the same and to impose fines upon parties who may create or continue nuisances or suffer nuisances to exist… but offers no specific judicial warrant abatement process.

Fourth Amendment Considerations in Public Employment

Public employers should have a policy and give lots of notice that employees should have no expectation of privacy in city-supplied workspace and equipment.

- Offices, desks, vehicles…
- Emails, Teams chats, laptops, phones…
- What about city-subsidized personal phones?

Fifth & Fourteenth Amendments

Fifth Amendment

- Self-Incrimination may not be compelled
- Due Process protection of property (and life & liberty)
- Takings Clause- “nor shall private property be taken for public use, without just compensation.”

Fourteenth Amendment

- Privileges & Immunities
- Due Process protection of property (and life & liberty) applicable to States
- Equal Protection

Substantive & Procedural Due Process

Due Process in public employment

- Garrity warnings (*Garrity v. State of N.J.*, 385 U.S. 493 (1967)) are common in police internal affairs investigations but are not limited to law enforcement. Critical Incident Response Team (CIRT) investigations may also review conduct of fire department paramedics and EMTs.
- Property interest in continued public employment created by law or policy and is different for at-will vs. career service public employees.
- Procedural Due Process requires notice and an opportunity to respond, *Cleveland Bd. Of Educ. V. Laudermill*, 470 U.S. 532 (1985).
- Substantive Due Process requires termination decision to not be arbitrary. *City of Colorado Springs v. Givan*, 897 P.2d 753 (1995).

Procedural Due Process in Licensing and Land Use Contexts

- Quasi-Judicial Hearings
  - Decisions made regarding individual circumstances rather than broad, legislative decisions affecting the entire community.
  - Notice
  - Opportunity to be heard
  - Fair procedure
  - Neutral and impartial decisionmaker
  - Cross-examination
  - Ability to review evidence
- Prohibition on *ex parte* communications between applicants, decisionmakers, and interested witnesses offering evidence, sometimes runs counter to elected officials' interest in building consensus and communicating with constituents.
- Stay tuned for Lori Strand's land use law presentation…

Eminent Domain & Condemnation

Colorado Constitution Article XX, Section 7 (Home Rule Municipalities): "[T]he power, within or without its territorial limits, to . . . condemn . . .acquire . . . maintain, conduct, and operate water works . . . and any other public utilities . . . for use of said city and the inhabitants thereof . . . And which said city may enforce such purchase by proceeding at law as in taking land for public use by right of eminent domain . . . ."

CRS § 38-6-101. Power of towns and cities ("to take, damage, condemn, or appropriate by right of eminent domain such private property as may be required…").

Condemnation is the taking of property for a public purpose without the owner's consent for just compensation.

- The taking can be a taking in fee, e.g., ROW expansion, redevelop blighted property
- Partial taking, easements for water pipelines, flumes, utility lines
- Temporary taking, such as temporary construction easement

Legal prerequisites for exercising the power of eminent domain include:

- Public use
- Good faith negotiations and a failure to agree.

Courts will deny right to condemn and dismiss eminent domain case if any element not met.

Regulatory Takings

- *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)-Diminution in property value, standing alone, does not establish taking requiring just compensation.
- *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)- California Coastal Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property.
- *Dolan v. City of Tigard*, 512 U.S. 374 (1994)- "Rough proportionality" test applied in determining whether degree of exactions required by city's building permit conditions bore required relationship to projected impact on proposed development to satisfy takings clause.
- *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)- Total deprivation of economic value is category of compensable regulatory action despite public interest.

Thank you!

Adam Stephens

Adam.Stephens@ThorntonCO.gov

CML COLORADO MUNICIPAL LEAGUE