FREE SPEECH PRINCIPLES

What Police Officers Should Know

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PROTECTED SPEECH

- The First Amendment protects most speech, even speech we don't agree with or that offends us.

"The hallmark of the protection of free speech is to allow 'free trade in ideas' -- even ideas that the overwhelming majority of people might find distasteful or discomforting."

Virginia v. Black, 123 S. Ct. 1536 (2003)


WE MOURN
WITH
IRAN
FREE
IRAN

SOME KINDS OF SPEECH ARE NOT PROTECTED AT ALL BY THE FIRST AMENDMENT

- Obscenity
- Defamation
- True threats
- Incitement to riot
- Fighting words

Obscenity

- Three part test to determine whether material is obscene:
  - 1. whether average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
  - 2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law (i.e. UCA 76-10-1202 – nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion); and
  - 3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Defamation

- A person must show:
  - That a statement was published (written or spoken) about him or her;
  - That the statement was false, defamatory, and not subject to any privilege
  - That the statement was published with the requisite degree of fault
  - That the statement resulted in damage

Public or Limited Public Figure

- Must demonstrate by clear and convincing evidence
- Defamatory statement was made with "actual malice" – knowledge that the statement was false or with reckless disregard of whether it was false or not

Private Figure

- Must show defamatory statement was negligently made

Defamation Per Se

In order to be presumptively actionable, a false statement must:

- Charge criminal conduct;
- Allege a loathsome disease;
- Assert conduct that is incompatible with the exercise of a lawful business, trade, profession or office; or
- Allege the unchastity of a woman

True Threats

- Statements where speaker means to communicate serious expression of intent to commit act of unlawful violence to particular individual or group of individuals
- Speaker need not actually intend to carry out threat
- Prohibition protects individuals from fear or violence and from disruption that fear engenders

"The protections afforded by the First Amendment ... are not absolute," *Virginia v. Black,* 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), and the government remains free to punish a "**true threat**." *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)

"A '**true threat**' means
'a serious threat as distinguished from words as mere political argument, idle talk, or jest.' "
United States v. Viefhaus,
168 F.3d 392, 395 (10th Cir.1999)

A **true threat** is "an expression of an intention to inflict evil, injury, or damage on another" and such speech receives no First Amendment protection.
Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir.2002)

Incitement to Riot

FIGHTING WORDS

FIGHTING WORDS

1. Words (or expressive conduct) directed at a particular person or small group or people
2. Inherently likely to cause the average person to become violent
3. Having no place in the expression of ideas

FIGHTING WORDS

- The determination is based on the facts and circumstances of the particular situation.

FIGHTING WORDS

- Factors to consider:
- - Presence of bystanders
- - Accompaniment of other aggressive behavior
- - Whether the words are repeatedly uttered

- City of Landrum v. Sarratt (2003)

DIRECTED AT A PARTICULAR PERSON

- Cohen v. California (1971)

- In a courthouse, in the presence of women and children, Cohen wore a jacket bearing the words "F___ the Draft."

- Cohen did not threaten to or engage in violent conduct.

DIRECTED AT A PARTICULAR PERSON

- Cohen did not make any loud or unusual noise.

- Cohen was arrested and convicted of disorderly conduct. The Supreme Court overturned the conviction.

DIRECTED AT A PARTICULAR PERSON

- The Supreme Court said:
- “While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’ . . . No individual . . . present could reasonably have regarded the words on appellant's jacket as a direct personal insult.”

DIRECTED AT A PARTICULAR PERSON

- State v. Ovadal (Wisconsin 2003) Men surrounded a woman and, for six minutes shouted at her "Whore, harlot, Jezebel."

- Not fighting words if a person refers to a crowd as whores or harlots

DIRECTED AT A PARTICULAR PERSON

- Gilles v. State (Indiana 1988) Preacher shouted "f___ers, sinners, whores, queers, drunkards, AIDS people, and scum of the earth." (determined not to be fighting words).

  Gilles v. Davis, 427 F.3d 197 (3rd Cir. 2005)
- Evangelist's comments on state university campus, directed at woman who identified herself as a Christian lesbian, including "Christian lesbo," "lesbian for Jesus," "bestiality lover" were fighting words that were not protected by First Amendment

AVERAGE LISTENER STANDARD

- United States v. McKinney (10th Cir. 2001)

- In response to inquiries by a military police officer, Ms. McKinney twice told the officer to "go f* * * himself."
- Fighting words?

AVERAGE LISTENER STANDARD

- The court held that the words were not fighting words. It said:

- “We also consider the totality of the circumstances surrounding Ms. McKinney's conduct and remarks. . . . One of those circumstances is that a police officer is involved, and while police officers are

AVERAGE LISTENER STANDARD

- expected to display patience and restraint, they are not required to endure " 'indignities that go far beyond what any other citizen might reasonably be expected to endure.' “
- . . . That said, we agree that no rational trier of fact could have found Ms. McKinney guilty beyond a reasonable doubt.”

AVERAGE LISTENER STANDARD

- “Ms. McKinney's remarks were the R-rated equivalent of other commonly used phrases, such as "buzz off," "go away," "leave me alone," and "get lost." Those phrases certainly would not provoke a reasonable person to violence.”

AVERAGE LISTENER STANDARD

- “Though tasteless and undoubtedly offensive to many, Ms. McKinney's language would not provoke the average person to retaliate under the circumstances. Ms. McKinney did not threaten or offer to fight the officer. She left the officer's presence both times after telling the officer to "go f* * * himself." Furthermore, there was no evidence adduced at trial that a reasonable person or officer would react violently to execrations like that uttered by Ms. McKinney . . .”

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- Cantwell v. Connecticut (1940)

- In a 90% Catholic neighborhood, Cantwell, a Jehovah's Witness, went door to door, asking people to listen to a recording.

- Two men listened to the recording, which attacked Catholicism.

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- The men became incensed and were tempted to strike Cantwell. Cantwell was convicted of breach of the peace.

- The Supreme Court overturned the conviction.

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- The court said that while the state can control riot, disorder, and other immediate threats to public safety peace, or order, “a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.”

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- "In the realm of religious faith . . . sharp differences arise. [T]he tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- But the people of this nation have ordained . . . that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- Cannon v. City and County of Denver, (10th Cir. 1993)
- Demonstrators held signs outside an abortion clinic that read “the killing place.”
- Sign containing enlarged photograph of mutilated fetus
- Fighting words?

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- “[T]he defendants have argued that the signs aroused violent feelings in some persons who viewed them. The fact that speech arouses some people to anger is simply not enough to amount to fighting words in the constitutional sense. "[A] function of free speech under our system is to invite dispute.

INHERENTLY LIKELY TO CAUSE A VIOLENT REACTION

- “It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." . . . It is only where the speaker passes the bounds of argument or persuasion and undertakes incitement to riot that the police may intervene to prevent a breach of the peace.”

FIGHTING WORDS

- Burns v. Board of County Commissioners of Jackson County, Kansas (10th Cir. 2003)

  In a face to face conversation, Burns became angry and called the other man a "lying m*****f***er." That led to a physical fight. The court held that Burns's profane epithet was a clear example of fighting words.

Fighting Words or Expressive Conduct?

EXPRESSIVE CONDUCT/SYMBOLIC SPEECH

- That kind of flag burning is a type of expressive conduct (or symbolic speech).

- Courts analyze expressive conduct in the same way it analyzes other speech.

EXPRESSIVE CONDUCT/SYMBOLIC SPEECH

- Texas v. Johnson, 491 U.S. 397 (1989)

- The court overturned a conviction for flag-burning. The court said that it was not fighting words.

EXPRESSIVE CONDUCT/SYMBOLIC SPEECH

- “No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. To conclude that the government may permit designated symbols to be used to

EXPRESSIVE CONDUCT/SYMBOLIC SPEECH

- communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries."
- Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices

EXPRESSIVE CONDUCT/SYMBOLIC SPEECH

- under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do."

- Comments on political, social, or religious topics will almost always have “place in the expression of ideas”

Symbolic Speech?


Support The Troops
Arlington Utah
Troops Killed
Utah Troops Killed
End The Occupation
Bring Our Troops

Heckler's Veto

- is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience.
- defined as "an attempt by those who dislike a speaker to create such a disturbance that the speaker must be silenced."

- A police officer has the duty not to ratify and effectuate a **heckler's veto** nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect" persons exercising their constitutional rights.

- it has long been held that "a hostile audience is not a basis for restraining otherwise legal First Amendment activity.... it is impermissible even to consider the threat of a hostile audience when ruling on a permit application..

TIME, PLACE, AND MANNER RESTRICTIONS

- Must be content-neutral
- Must further a significant governmental interest
- Must be narrowly tailored to advance that interest
- Must leave open ample alternative means of communication

CONTENT-NEUTRAL

- Restrictions not based on a disagreement with the message of the speech or based on the subject-matter of the speech

CONTENT-NEUTRAL

- Restrictions based on the hostile reaction of listeners are also treated as content-based

- In PETA v. Rasmussen (10th Cir. 2002), animal rights activists were arrested for demonstrating on a sidewalk near Eisenhower Junior High School

CONTENT-NEUTRAL

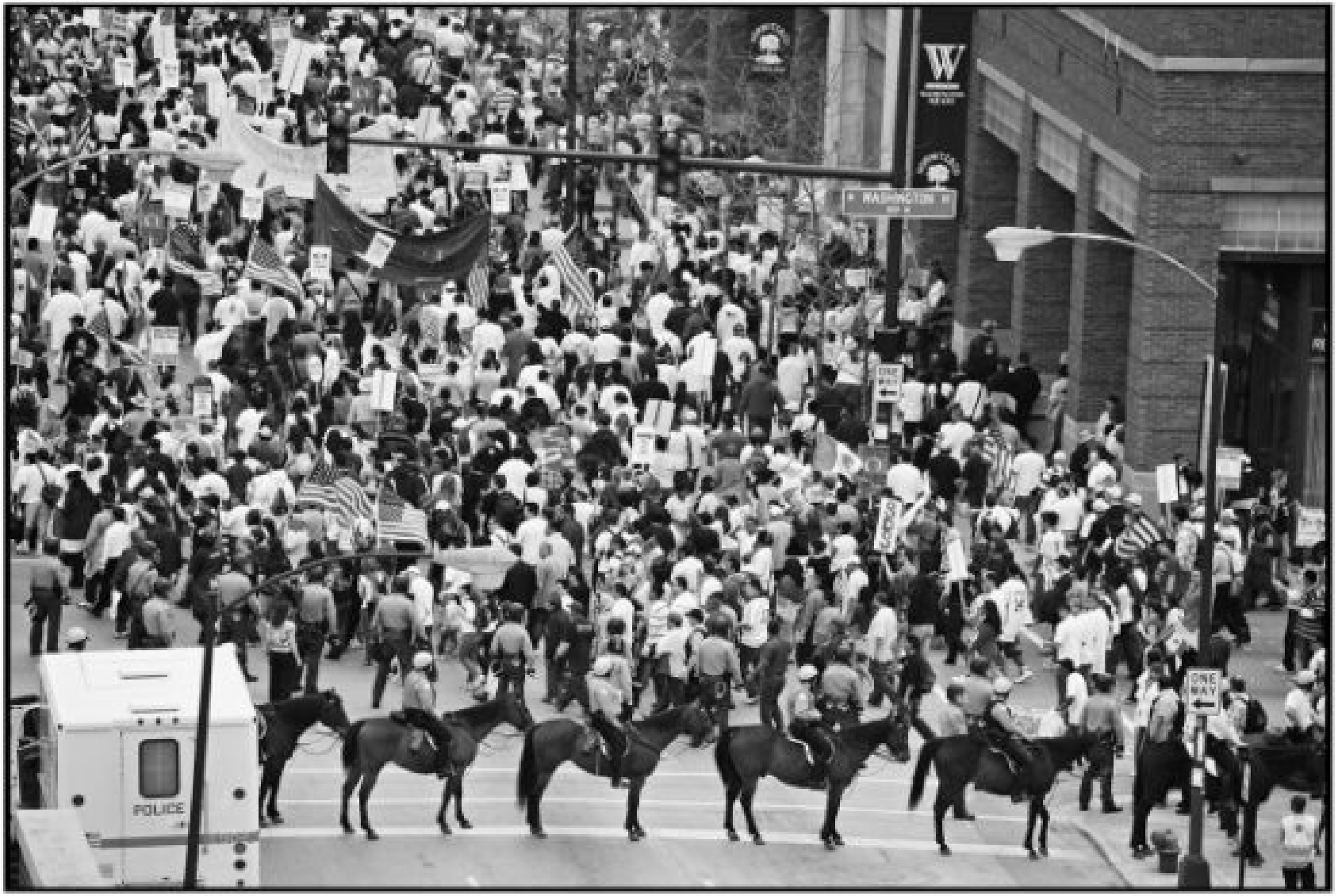
- The court said:
- "[T]he state may not prevent speech simply because it may elicit a hostile response. [In] Cox v. Louisiana . . . about 2,000 protesters peacefully demonstrated against segregation. The State contended that the conviction of a protester should be upheld because of the fear that violence was about to erupt because of the demonstration."

CONTENT-NEUTRAL

- “The Court rejected this argument, finding that the students themselves threatened no violence and that there were seventy-five to eighty armed policemen present who could have handled the crowd. The Court found that persons may not be punished "merely for peacefully expressing unpopular views."

SIGNIFICANT GOVERNMENTAL INTEREST

- Pedestrian and vehicular traffic movement – depends on size of crowds


POLICE
ONE WAY

SIGNIFICANT GOVERNMENTAL INTERESTS

- Protect the right of one group in a speech event to speak without interference from other speakers
- To justify restrictions, we need input or evidence, often from the police, about such interests

SAFETY

- “[T]he government's interest is limited to preventing actual or imminent disturbances, not "undifferentiated fear or apprehension of disturbance." In demonstrating such a disruption, "the [City] must rely on reasonable inferences drawn from concrete facts, not on the mere apprehension or speculation that disturbances . . . will occur.” PETA v. Rasmussen

AT SOME POINT THE POLICE MUST TAKE ACTION

NARROWLY TAILORED

- The regulation need not be the least restrictive means of accomplishing the goal

- A regulation is narrowly tailored if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation

NARROWLY TAILORED

- But the regulation cannot burden substantially more speech than necessary
- Example: a complete ban on a particular kind of speech in a city is never narrowly tailored
- Example: if the city's interest is in preventing excessive noise, the solution is not to prohibit all speech, but rather to limit the decibels of the speech

AMPLE ALTERNATIVE MEANS OF COMMUNICATION

- Must still allow access to the intended audience
- Sometimes a location is symbolically important to speech

DEMONSTRATION AREAS AND BUFFER ZONES

- Used to address a significant governmental interest, such as pedestrian movement, crowd congestion, or safety

Salt Lake City's "speech zone" upheld by courts as reasonable


JESUS DIED
FOR YOUR
SINS AND
AROSE FROM
THE DEAD
ONE GOD
ONE WAY
LORD JESUS
REJ THE
KING JAES BIBLE
GOD'S OLY WORD!
BLOCKADER
NATIONWIDE RENTALS
800-448-2647

REQUIRING A PERMIT

- Has the benefit of “preventing two parades in the same place at the same time”
- Only valid if the city has a need to identify speakers or schedule the use of particular locations
- Cannot require a permit for spontaneous speech

The First Amendment provides in part:

Congress shall make no law . . .

abridging the freedom of speech . . .

or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances.

United for Peace & Justice v. City of New York

323 F.3d 175 (2d Cir. 2003)

City denied request for a parade permit but allowed a stationary rally.

Decision to ban the march but permit a stationary rally was narrowly tailored to address the risks and went no further than necessary to that end.

Stationary rally allowed protesters to communicate their message at a desirable location in close proximity to the U.N.

ACLU v. Denver
569 F. Supp. 2d 1142 (D. Colo. 2008)

Traditional fora have long been recognized as places in which assembly, communication of thoughts between citizens, and discussion of public issues should be welcomed.

Government's ability to restrict expressive activity in public fora is very limited.

Regulation based upon the content of speech is subject to strict scrutiny review.

Must serve a compelling state interest and be the least restrictive means available to serve that purpose.

Content-neutral regulations are subject to a less stringent, more deferential review.

Restriction is content-neutral if its justification does not pertain to the content of the speech.

Significant governmental interests:

i) protecting public fora from excessive noise;

(ii) maintaining public places in an attractive and available condition;

(iii) preserving order and public safety, e.g., ensuring free flow of traffic on streets and sidewalks; and

(iv) maintaining physical security of persons and property involved in a high profile event.

The test to determine whether content-neutral restrictions are narrowly tailored is:

whether the restriction is substantially broader than is necessary to achieve the purpose.

The restriction must also allow ample alternatives for the speaker to communicate his or her ideas.

Factors bearing on whether alternatives for communication are ample and adequate:

(i) whether the alternative permits the speaker to reach his or her intended audience;

(ii) whether the location of the expressive activity is part of the expressive message;

(iii) whether the alternative forum is susceptible to spontaneous outpourings of expression, or whether the resort to the alternative forum requires advance notice, registration, or some other burden to spontaneous speech or assembly; and

(iv) the cost and convenience of the alternatives.

The threat posed by violent or unlawfully disruptive protestors can be important in First Amendment analysis.

Mere invocation of the need for "security" will not survive narrow tailoring review.

Significant gov't interests exist as to parades:

(i) parades obstructing emergency vehicles' access or clogging evacuation routes; and

(ii) demonstrators engaging in civil disobedience may attempt to shut down convention activities.

Court in *Coalition to March* scrupulously avoided playing a "numbers" game

Court cannot reject a city's security plan simply because the court thinks another plan might be better.

Alternative means available to protesters at 2008 DNC:

(i) permits to hold events in public parks around Denver;

(ii) permits to march in daily parades along the approved parade route;

(iii) freedom to speak, demonstrate, or leaflet on any public street in Denver outside the security perimeter (including outside Convention hotels);

(iv) communication with delegates through the leaflet table; and

(v) the myriad of traditional media channels that exist to disseminate ideas (*e.g.*, local radio, television, newspapers, the Internet).

OK to prohibit protesters from marching immediately in front of the convention site on the day before the convention was to begin.

Buck v. City of Albuquerque
549 F.3d 1269 (10th Cir. 2008)

Buck was arrested for marching without a parade permit.

Plaintiffs argued the police were actually permitting, if not sanctioning, the march and its flow into the streets.

Officers' conduct, if proven, could amount to grant of a *de facto* permit or waiver of the permit requirement.

Amnesty Int'l V. Battle

559 F.3d 1170 (11th Cir. 2009)

Police cordon 50 – 75 yards from the demonstrators.

People outside the cordon could not enter the cordon or see or hear the demonstrators.

A "right to be heard" in the First Amendment.

Right to demonstrate would be meaningless if governments could isolate a demonstration so that no one could see or hear it.

"Potential" for violence did not justify the cordon.

Section 1983 liability if supervisor:

Directed subordinates to act unlawfully or

Knew that the subordinates would act unlawfully and failed to stop them from doing so.

Clark v. Community for Creative Non-Violence
104 S. Ct. 3065 (1984)

A federal regulation provided in pertinent part:

In connection with permitted demonstrations or special events, temporary structures may be erected for the purpose of symbolizing a message or meeting logistical needs such as first aid facilities . . . . Temporary structures may not be used outside designated camping areas for living accommodation activities such as sleeping . . . .

Government has a substantial interest in maintaining parks in the Capital in an attractive and intact presence.

Preventing overnight sleeping will avoid some actual or threatened damage to the National Mall and the park.

Thus, the regulation was narrowly focused to achieve the governmental interest.

Acorn v. City of Tulsa
835 F.2d 735 (10th Cir. 1987)

Conduct intended and reasonably perceived to convey a message falls within the First Amendment's free speech guarantee.

Ordinance's license requirement in order to engage in communicative conduct must include clear guidelines for the official issuing the license.

Unfettered discretion in the licensing official raises concerns that a license may be denied for reasons unrelated to the government interest in regulating the conduct.

Thomas v. Chicago Park Dist.
122 S. Ct. 775 (2002)

Regulations regarding a public forum that ensure the safety and convenience of the people safeguard the good order upon which civil liberties depend.

Vlasak v. Superior Ct.
329 F.3d 683 (9th Cir. 2003)

Vlasak brought to the circus a "bull hook" to exemplify devices used to gain elephants' obedience.

City has a substantial interest in safeguarding its citizens against violence.

The ordinance makes parades and public gatherings safer by banning materials that are most likely to become dangerous weapons . . .

without depriving the city's residents of the opportunity to parade or protest with traditional picket signs.

Camp Legal Defense Fund, Inc. v. City of Atlanta
451 F.3d 1257 (11th Cir. 2006)

To impose "special limitations," the chief of staff may consider "traffic, public safety, and limitations contained in any Master Plan adopted by [the City] Council."

Sullivan v. City of Augusta
511 F.3d 16 (1st Cir. 2007)

Parade ordinance provided:
"The cost of the permit shall be . . . $100, plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department."

Ordinance must furnish narrowly drawn, reasonable, and definite standards

that are reasonably specific and objective and

do not leave the decision to the whim of the administrator.

Fee-setting authority assigned to the police department was not constitutionally excessive.

Government cannot profit from imposing licensing or permit fees on the exercise of a First Amendment right.

Only fees that cover the administrative expenses of the permit or license are permissible.

Notice periods restrict spontaneous free expression and assembly rights safeguarded in the First Amendment.

Advance notice requirements that have been upheld have most generally been of less than a week.