REGULATING AND ENFORCING SPEAKER RIGHTS IN THE PUBLIC FORUM

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I. INTRODUCTION

Retaining the appropriate level of control over areas under local government jurisdiction is becoming a more critical issue in these days of greater political and social activism through increased civil protests in the streets, citizen speech at public meetings, and single-issue leafletting in and around public buildings. Elected officials, government boards and those tasked with enforcing laws, rules, and regulations affecting the exercise of these constitutional rights, should have a clear understanding of their authority to maintain proper limits and controls over these areas for the benefit of the whole community. Extensive public forum caselaw along with more recent updates to public officer liability standards provide a path toward balancing the public's First Amendment rights against the powers of the government to maintain orderly operations. Practitioners must take care to strike this balance when setting standards limiting these protected rights in order to provide necessary oversight and controls for the most efficient and orderly functioning of society.

Challenges to laws, policies, and rules limiting citizen First Amendment rights are brought through civil actions under 42 U.S.C. § 1983 based on a theory that constitutionally protected rights are being deprived by the government.[1] As noted, the standard for violating these protected rights is founded in caselaw, but just as important are the protections in place for government actors enforcing rules affecting speaker rights.[2] As such, we will

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1. Leake v. Drinkard, 14 F.4th 1242, 1247 (11th Cir. 2021) (explaining that to succeed on a § 1983 claim, a plaintiff must show that a government defendant was "a person acting under color of state law" that deprived the citizen plaintiff of a federal right).

2. *See* Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998).

begin with an examination of the viable claims that can be brought against individual enforcement officials.

Malicious prosecution, false imprisonment, and retaliation claims are the primary vehicles used for directly challenging the actions and decisions of enforcement officers, whether law enforcement, elected officials, or prosecutors.[3] The lion's share of claims will be asserted as § 1983 retaliation claims as compared to the more antiquated false imprisonment and malicious prosecution torts, but it is useful to be familiar with these latter claims.[4]

Malicious prosecution generally requires a plaintiff to show that the criminal or civil charges, issued and/or filed, are unfounded, made without reasonable or probable cause and that the defendant took such action with malice.[5] False imprisonment is defined by Florida Statute as forcibly restraining a person, without lawful authority, against that person's will.[6] In comparison, retaliation, both for arrest and prosecution, requires that a plaintiff show that the enforcing official subjected the plaintiff to a retaliatory action based on the content of the plaintiff's speech.[7] Of these options, retaliatory claims are the most commonly asserted, particularly in the context of alleged violations of First Amendment rights.[8]

Part II of this Article reviews the court-created "Public Forum Analysis," as applied to the public's First Amendment rights when speaking in a public forum. Part III of the Article examines the intersection of local government regulation and protecting citizens' First Amendment rights. Finally, Part IV looks at the applicable parameters of government authority and recent seminal cases

3. *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1719–26 (2019) (explaining that malicious prosecution and false imprisonment claims are the closest analogies to retaliation claims in regards to § 1983 claims).

4. *See id.* (indicating that retaliation claims are currently and commonly used, whereas malicious prosecution and false imprisonment were used before the tort for retaliatory arrest was created).

5. Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974) (citing Duval Jewelry Co. v. Smith, 136 So. 878, 880 (Fla. 1931)).

6. FLA. STAT. § 787.02 (2022); *see* Carnley v. Wilson, 300 So. 2d 291 (Fla. 4th Dist. Ct. App. 1974) (Rudnick, J., dissenting) (analyzing the distinction between malicious prosecution and false imprisonment, noting that "[i]f the imprisonment is under legal authority it may be malicious but it cannot be false").

7. *See* Hartman v. Moore, 547 U.S. 250, 256–60 (2006).

8. Egbert v. Boule, 142 S. Ct. 1793, 1808 (2022).

highlighting the standards and considerations of the viability of First Amendment retaliation claims.

II. THE PUBLIC FORUM ANALYSIS

Protecting the streets, roadways, and access to public buildings are critical responsibilities of local government, and the Supreme Court created the public forum analysis to provide a vehicle for this enforcement.[9] Because this field of jurisprudence is court-created, it is subject to amendment through subsequent interpretations which over time have attempted to further define its application—resulting in some hard and fast rules. The following examines the nature of the distinct fora and the analysis undertaken by the courts for each.

Initially, be aware that the public forum analysis applies only in the context of protecting the First Amendment right of the public to speak or conduct expressive activities in certain areas of the public domain.[10] As such, the first inquiry to consider is whether the party complaining about government action limiting their speech is actually engaged in protected speech.[11] Non-First Amendment protected speech receives no protection in the public forum.[12] Threatening speech, fighting words and obscenities fall within this category.[13] Secondarily, it is important to note that the First Amendment does not guarantee access to government property: "The Government, like any private landowner, may 'preserve the property under its control for the use to which it is lawfully dedicated.'"[14]

With these nostrums in mind, we can look at the different public forum categories in order to understand authorized enforcement options for public officials. A full review of available caselaw makes clear that four categories of public forum exist and

9. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); United Mine Workers of Am. v. Parsons, 305 S.E.2d 343, 349–50 (W. Va. 1983) (quoting Hague v. C.I.O., 307 U.S. 496, 515–16 (1939)).

10. *See Cornelius*, 473 U.S. at 797.

11. *Id.*

12. *See id.*

13. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that there is no right to incite actions that would harm others); Miller v. California, 413 U.S. 15, 23–29 (1973) (holding hard-core, highly sexually explicit pornography is obscene and not protected, respectively).

14. Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1201 (11th Cir. 1991) (quoting United States v. Gilbert, 920 F.2d 878, 884 (11th Cir. 1991)).

their applicable standards of review break one of two ways: strict scrutiny or reasonableness.[15] The following provides a condensed review and analysis of public forum law; facts are critical, so the practitioner will need to examine their individual jurisdiction's laws, practices, and historical uses in order to determine the applicable designation of a forum.

A. Traditional Public Forum

Traditional public fora are areas within a jurisdiction that have historically been held open for political speech and debate.[16] Public streets,[17] sidewalks,[18] and parks[19] are the most acknowledged areas in this context and any restriction or regulation placed on speech or expression receives the highest level of scrutiny. In a traditional public forum, the first question to ask is whether the applicable restriction is content based or content neutral.[20] Where the nature of the regulation is premised on limiting the specific speech or expression of an individual or group, the regulation must be narrowly tailored to serve a compelling government interest.[21] This level of strict scrutiny—which places the highest level of scrutiny on laws, rules, or policies that limit the use of the public forum—is almost impossible to satisfy.[22] The

15. *See* Rutgers 1000 Alumni Council v. Rutgers, 803 A.2d 679, 688–89 (N.J. Super. Ct. App. Div. 2002); McDonald v. City of Pompano Beach, 556 F. Supp. 3d 1334, 1351 (S.D. Fla 2021) (noting that the Supreme Court has recognized four categories of government fora).

16. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

17. *See* Jamison v. Texas, 318 U.S. 413, 416 (1943) (reversing the conviction of Jehovah's Witnesses member cited for violating city ordinance prohibiting a list of expressive activities in Dallas city streets); Nationalist Movement v. City of Cumming, 92 F.3d 1135, 1139 (11th Cir. 1996) (citing *Perry Educ. Ass'n*, 460 U.S. at 45, where the court noted that the streets in the city are quintessential public fora).

18. Boos v. Barry, 485 U.S. 312, 318 (1988) (regarding the First Amendment rights of picketers using sidewalks within 500 feet of foreign government embassies); United States v. Grace, 461 U.S. 171, 177–79 (1983) (regarding right to distribute leaflets on the sidewalk in front of the United States Supreme Court building); One World One Fam. Now v. City of Miami Beach, 990 F. Supp. 1437, 1441 (S.D. Fla. 1997) (regarding Miami Beach ordinance restricting hours and location of non-profit vending table from sidewalks in Art Deco neighborhood).

19. *See* Ward v. Rock Against Racism, 491 U.S. 781, 784–91 (1989) (regarding public forum status of Central Park in New York City).

20. *Id.* at 791; *see also* Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1316 (11th Cir. 2020).

21. *Grace*, 461 U.S. at 177.

22. Texas v. Johnson, 491 U.S. 397, 412 (1989) (noting that strict scrutiny is "the most exacting form of judicial review" (quoting *Boos*, 485 U.S. at 322)); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (referencing the "exceptional" circumstances that would allow content based suppression of speech by government).

governmental body must show the highest level of need in order to impose restrictions in this context.[23] Furthermore, limiting speech based on content raises equal protection concerns, thereby heightening the government's standard of proof.[24] For example, in *Police Department of Chicago v. Mosley*,[25] the Court overturned a City of Chicago ordinance limiting picketing in the area surrounding primary or secondary school buildings, because it allowed an exception exempting certain groups from the law.

Conversely, where limits are placed consistently without exception in a content neutral manner, the courts apply the time, place, and manner test, which provides that any regulation be narrowly tailored to address a significant government interest and provide ample alternatives for achieving the desired speech.[26] The seminal case on point is *Grayned v. City of Rockford*.[27]

In part, *Grayned* involved a noise ordinance conviction for participating in demonstrations outside of a high school, similar to the facts of *Mosely*.[28] However, the *Grayned* noise ordinance was upheld because it did not distinguish the nature or content of speech being regulated.[29] The Court explained that the crucial question to consider was whether the manner of expression was compatible with the normal activity of the place at a particular time.[30] This is the essence of the time, place, and manner test and it has not changed.[31]

B. Nonpublic Forum

Nonpublic fora are those areas of public space that are not specifically held aside for First Amendment activity nor are considered to be quintessential public fora.[32] These can be areas of government property that are reserved for the public body's

23. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983).
24. *Johnson*, 491 U.S. at 403.
25. 408 U.S. 92, 102–03 (1972).
26. *See* City of Austin v. Reagan Nat'l. Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022).
27. 408 U.S. 104 (1972).
28. *Compare id.* at 105–06, *with Mosley*, 408 U.S. at 93–94.
29. *Grayned*, 408 U.S. at 119–20.
30. *Id.* at 116.
31. *See id.*
32. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

intended purpose.[33] Examples include courthouse lobbies,[34] entryways to government offices,[35] and interstate rest areas.[36] In nonpublic fora the reasonable basis standard of review applies requiring only that the government regulation be reasonable, with no attempt to suppress the speaker based on a disagreement with their views.[37]

Between the two extremes, the Court provides two intermediate levels: designated and limited public forums,[38] but for purposes of review, these two take on identical characteristics of their more dominant partner.

C. Designated Public Forum

Designated public forums are areas of public property that have been opened for use by the public body as a place for expressive activity.[39] This is an intentional act by the government. Inaction or permitting limited use is not sufficient to create this forum; only a policy or practice of the public body creates this designation.[40] Examples include a municipal auditorium,[41] a bulletin board at a state university that is held open to the public,[42] or government public access channels.[43] A review of caselaw confirms that restrictions on speech in a designated public forum receive the same standard of review as to the traditional public forum.[44] It is important though to be aware of major distinctions between the traditional and designated public forum. The

33. *Id.* at 45.

34. Sefick v. Gardner, 163 F.3d 370, 373 (7th Cir. 1998) (prohibiting the display of artwork in the lobby of the Dirksen Courthouse after finding that the lobby of a courthouse is not a public forum); Schmidter v. State, 103 So. 3d 263, 270–71 (Fla. 5th Dist. Ct. App. 2012) (upholding court administrative order prohibiting "jury nullification" leafleting at the Orange County, Florida Courthouse).

35. United States v. Kokinda, 497 U.S. 720, 733 (1990) (holding that a public street leading up to a post office is not a forum subject to Free Speech activity).

36. Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1204 (1991) (holding that a state can prohibit newspaper boxes in rest areas because of the character of these public spaces).

37. Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885 (2018).

38. *Perry Educ. Ass'n*, 460 U.S. at 45.

39. *Id.* at 45–46.

40. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1212–13 (11th Cir. 2004).

41. Se. Promotions v. Conrad, 420 U.S. 546, 548 (1975).

42. Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001).

43. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring).

44. *Perry Educ. Ass'n*, 460 U.S. at 46 (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).

government is not required to indefinitely hold open a designated public forum to the public, whereas a traditional public forum remains open to the public so long as it retains its character.[45] This is a critical distinction as it will allow a public body to terminate the status of the designated forum resulting in a change to the public's First Amendment rights in the forum.[46] Traditional public fora, on the other hand, are designated as such based on their characteristics. The burden is placed on the governmental entity to avoid this characterization by showing that the: (1) physical characteristics; (2) original purpose of the forum; and (3) historical and traditional use of the space are not consistent with that of a traditional public forum.[47] Practically speaking, it is also very difficult to change the physical characteristics of parks, sidewalks, and public streets.

D. Limited Public Forum

Limited public forums are those areas of public space set aside by government for only a limited purpose or use by certain groups or for certain topics of discussion.[48] Examples include public school meeting rooms,[49] council meetings,[50] or publicly funded publications.[51] The consensus regarding these fora is that they will be examined under a more relaxed reasonableness standard which only requires government regulation to be reasonable and viewpoint neutral.[52] In *Bloedorn v. Grube*, the Eleventh Circuit provided an example of a court's analysis in making the distinction between designated and limited public fora.[53] *Bloedorn* involved a challenge by an evangelical preacher to a Georgia Southern University policy requiring speakers to obtain a permit before speaking on campus and limiting access to designated zones within

45. *Id.* at 44–46.
46. *Id.* at 45–46.
47. Frisby v. Schultz, 487 U.S. 474, 481 (1988).
48. White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).
49. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 668 (2010).
50. *White*, 900 F.2d at 1425; *accord* Steinburg v. Chesterfield Cnty. Plan. Comm'n, 527 F.3d 377, 385 (4th Cir. 2008); Eichenlaub v. Township of Indiana, 385 F.3d 274, 281 (3d Cir. 2004).
51. Rosenberger v. Univ. of Va., 515 U.S. 819, 829–30 (1995) (holding that the University created a limited public forum by funding the cost of student group publications through a separate fund, and thus it could not deny funding to student organizations whose message they did not agree with).
52. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001).
53. 631 F.3d 1218, 1231 (11th Cir. 2011).

the campus.[54] The Eleventh Circuit rejected arguments that the University's campus and its facilities were traditional public fora because the educational mission of the University distinguished its open areas from public parks and other traditional public fora.[55] This left the court with two options: apply the designated public forum standard, or the limited.[56] In its analysis, the court determined that a bifurcation was necessary as between sidewalks, pedestrian mall, and the rotunda of the University versus the Free Speech zones designated in policy by the school.[57] The analysis found that the sidewalks and other areas not specifically designated for free speech were limited public fora because their use was limited for a discrete group who use the campus for its educational purpose.[58] Conversely, the Free Speech Area fell into the designated public forum category because the University's Speech Policy opened that area for public discourse with no restrictions on the content.[59]

E. Viewpoint Discrimination

Not included in the forum analysis, but an important doctrine to be aware of, is the more novel theory of viewpoint discrimination.[60] This is a form of content based regulation that singles out a particular position or opinion of the speaker.[61] As the Court has noted, "[w]hen the government targets not the subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[62] Applying this in the context of laws, ordinances, or rules, policymakers must avoid allowing such considerations in the decision-making process, because where a court finds viewpoint discrimination, there is a presumption of unconstitutionality regardless of forum status.[63]

54. *Id.* at 1227.
55. *Id.* at 1230 (citing Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981)).
56. *Id.* at 1232.
57. *Id.*
58. *Id.*
59. *Id.* at 1234.
60. Rosenberger v. Univ. of Va., 515 U.S. 819, 828–29 (1995).
61. *Id.* at 829.
62. *Id.*
63. *Id.* at 828–29.

F. Government Speech

A final category to consider is the application of the government speech doctrine.[64] Whereas the Free Speech Clause severely limits the ability of government to limit the ability of the public to speak, there is no such limitation on its control of its own speech.[65] This is a common sense approach, but its impacts are supported by the distinction between government and private speech. Most recently in *Pleasant Grove v. Summum*,[66] the Court examined a Free Speech Clause challenge by Summum[67] against Pleasant Grove City based on the City's refusal to allow Summum to erect a monument in a public park wherein other monuments were displayed.[68] The Court in its analysis of this distinction determined that the nature of the monuments allowed to be displayed in the park constituted government speech and as such the forum analysis promoted by the Respondent, Summum, did not apply.[69] The Court explained that under the government speech doctrine the government is "entitled to say what it wishes,"[70] and "select the views that it wants to express."[71] This authority is limited only by conflicts with the Constitution, laws, or regulations—and of course, public sentiment.[72] The effect of this interpretation is that the public forum analysis will not apply because there is no First Amendment issue in play. The government is speaking on its own behalf, not limiting private speech. A caveat in this instance exists though because the challenger did not avail itself of a potential First Amendment argument by not raising an Establishment Clause claim.[73] Indeed, had the Establishment Clause claim been raised the result may

64. Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

65. Rust v. Sullivan, 500 U.S. 173, 194 (1991); Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998).

66. *Summum*, 555 U.S. at 461.

67. Summum is a 501(c)(3) tax exempt organization with philosophical and religious undertones. *See About Summum,* SUMMUM, https://www.summum.us/about/ (last visited Apr. 18, 2023).

68. *Summum*, 555 U.S. at 465.

69. *Id.* at 472–73.

70. *Id.* at 467 (quoting Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995)).

71. *Id.* at 468 (first citing Rust v. Sullivan, 500 U.S. 173, 194 (1991); then citing Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

72. *Id.* at 467–68; *see also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (stating that a governmental entity has the right to "speak for itself").

73. *Summum*, 555 U.S. at 485 (Souter, J., concurring).

have been different.[74] Though the Court itself even questioned the viability of this doctrine,[75] it is a useful doctrine to apply in the context of government Internet use because it eliminates public forum considerations and allows the government to select the views that it wants to express. This interpretation provides public bodies a great deal of discretion so long as their statements remain in the realm of government speech.

III. PRACTICAL APPLICATION OF LOCAL GOVERNMENT OVERSIGHT

Parks, streets, and public buildings are areas of most common concern regarding the intersection of First Amendment rights with the local government's oversight and control.[76] The following examination focuses on the application of the previous standards discussed in the context of government limitations based on laws, rules, or policies enacted for the purpose of governments exercising their public duties as stewards and proprietors of public spaces. It is important though to first consider several theories of legal interpretation by courts that will be examined when implementing regulations that affect First Amendment activities.

A. Legal Theories of Interpretation Used to Analyze Government Regulated First Amendment Activities

1. Prior Restraint

Simply put, a prior restraint occurs when a law or policy prohibits First Amendment protected activity prior to it being exercised.[77] The doctrine primarily applies in the context of governmental licensing or permitting schemes, but the most seminal cases discussing the doctrine involve government restriction of speech through publication.[78] More applicable to current use, the Court's decisions in *Freedman v. Maryland*[79] and

74. *Id.* at 468–69 (majority opinion).
75. *Id.* at 481 (Stevens, J., concurring).
76. United States v. Frandsen, 212 F.3d 1231, 1237 (11th Cir. 2000).
77. *Id.* at 1236–37.
78. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720–23 (1931); N.Y. Times v. United States, 403 U.S. 713, 717 (1971); Reno v. ACLU, 521 U.S. 844, 844 (1997).
79. Freedman v. Maryland, 380 U.S. 51, 58–60 (1965).

subsequently *FW/PBS, Inc. v. City of Dallas*,[80] helped provide standards for local government licensing schemes. In short, the Court in *Freedman,* which considered the authority of a local government film censorship committee, explained that any approval decision is a prior restraint and can be imposed: (1) only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[81] *FW/PBS* further refined this standard in the context of licensing requirements for "sexually oriented business," by removing the requirement for the licensing body to bear the burden of going to court and prove, based on the theory that in this context, the decision-making process of the governmental body is more ministerial than censorious and as such a lower standard for procedural safeguards should apply.[82]

2. Excessive Administrative Discretion

This doctrine also applies in the context of licensing and permitting, focusing on the requirement that such laws are prohibited from allowing excessive discretion to agency officials in making their determination as to whether to grant or deny an application.[83] The most important factor to consider in this context is to examine applicable policy and procedure documents to assure that adequate limits are placed on the agency decision maker.[84] Providing greater detail in the controlling rules for making approval decisions will promote a reduced level of administrative discretion and frustrate challenges to those decisions.

3. Heightened Strict Scrutiny

Though there is no court acknowledged doctrine under this name, in practical application this standard applies to those cases

80. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990).
81. *Freedman*, 380 U.S. at 58–60.
82. *FW/PBS, Inc.*, 493 U.S. at 227–30.
83. *See* Forsyth County. v. Nationalist Movement, 505 U.S. 123, 131 (1992).
84. *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 271–73 (1951).

in which an unfettered strict scrutiny applies.[85] Specifically, to survive, the challenged law must be "narrowly tailored" to achieve a "compelling government interest."[86] Although this standard is similar to other strict scrutiny applications—such as the time, place, and manner test—it will almost always result in a finding against the government regulation.[87] Government actions deemed to be content based trigger the application of this heightened standard, and such a determination dooms the challenged policy, rule, or law to failure.[88]

B. Public Parks and Recreational Spaces (Assembly)

From the very beginnings of our nation, providing for parks and open spaces has been an important government function.[89] This function grew to include the provision of swimming pools, ball fields, gymnasiums, and playgrounds over time with the intent to provide recreational activities for children.[90] Concomitantly, these new government functions required adequate administrative funding in order to protect the integrity of the physical property and assure that the full purpose of intended use was achieved.[91] This duty grew to include governmental entities creating laws, ordinances, and policies specifically designed to assure appropriate use.[92] In this context and based on the traditional use of parks as places specifically set aside for public speech and assembly, regulations and permitting in parks are subject to the highest level of scrutiny under the public forum analysis.[93]

A seminal case on point regarding local government authority to require permits for use of public parks is *Thomas v. Chicago*

85. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 16 U.S. 535, 541(1942).

86. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 521.

87. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).

88. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that the Town's ordinance was content based because it provided different restrictions to signs based on the signs' communicative content).

89. *See* Margaret Walls, *Parks and Recreation in the United States: Local Park Systems*, RES. FOR THE FUTURE (June 2009), https://media.rff.org/documents/RFF-BCK-ORRG_Local20Parks.pdf (referencing that in 1634 the Boston Common was designated as what is considered the first city park in the United States.).

90. *Id.*

91. *Id.*

92. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984).

93. Swart v. City of Chicago, 440 F. Supp. 3d 926, 938–39 (N.D. Ill. 2020).

Park District.[94] *Thomas* involved a challenge to Chicago's ordinance requiring a permit for conducting events that exceed fifty persons.[95] In order to satisfy the requirements for prior restraints and to sufficiently limit administrative discretion in making the decision to grant or deny an application to use a park, Chicago provided thirteen specific grounds for denying the permit request, required the administrative decision to be made within fourteen days unless an additional fourteen days is required to make the determination and notice is provided to the applicant, and provided a right to appeal the final outcome.[96] The Court's analysis, in further explaining its ruling in *Freedman*, distinguished that whereas *Freedman* involved a content based regulatory scheme, the Chicago ordinance was content neutral in its decision-making and therefore the lower, or more accurately, non-heightened time, place, and manner standard of review applied,[97] which requires that to satisfy a First Amendment challenge a subject regulation must: (1) be content neutral; (2) narrowly tailored; (3) to serve a significant government interest; and (4) leave open ample opportunities to communicate the speaker's message.[98] The Court in its examination of the facts looked specifically to the language and application of the ordinance finding that: (1) the ordinance was content neutral because its denial standards did not consider what the speaker might say; (2) the fifty-person limit was sufficiently limited in application, therefore it was narrowly tailored; and (3) Chicago had a significant government interest in coordinating multiple uses of the parks to preserve its facilities and prevent dangerous conditions.[99] The ample alternatives provided by the ordinance were not in question by either party and therefore were not

94. Thomas v. Chi. Park Dist., 534 U.S. 316, 324 (2002).

95. *Id.* at 317–18.

96. *Id.* at 318–19. The third factor regarding the right to appeal raises an additional issue regarding the nature of the appeal, but this standard will not be discussed in this Article. For a fuller discussion on the standards required for providing judicial review including the competing court interpretations regarding whether ordinances must provide prompt judicial determination or prompt commencement to judicial proceedings under the prior restraint analysis, see Carl E. Brody, Jr., *Prompt Judicial Review of Administrative Decisions: Providing Due Process in Unsure Waters*, 87 FLA. BAR J. 32, 34 (2013).

97. *Thomas*, 534 U.S. at 322–25.

98. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989). *Ward* actually combined elements 2 and 3, but for clarity these have been separated in order to focus review on each distinct factor to be considered.

99. *Thomas*, 534 U.S. at 324–26.

addressed by the Court.[100] A plethora of caselaw examines this analysis and in each case the specific facts regarding the language and application of the ordinance, policy, or rule control the outcome, but following the standards set forth in *Thomas* along with a comparison to subsequent caselaw on the issue will provide direction for imposing a valid permitting law.[101]

Similarly, it is critical to consider the nature of the activity being regulated. Specifically, courts have consistently allowed for greater regulation of commercial activity, even to the extent that it implicates First Amendment activity.[102] The United States Court of Appeals for the District of Columbia Circuit provides a recent example in its *Price v. Garland* decision.[103] *Price* involved a challenge to a federal statute requiring a fee for commercial filming in federal parks.[104] *Price* successfully convinced the district court that such a regulation is content based because it distinguishes based on the nature of the filming. Specifically, the challenged statute allowed exceptions for news gathering filmmaking and it did not apply at all to non-commercial filming. In addition, the challengers successfully argued that the statute was not narrowly tailored as there was no direct connection between the statute's burden on commercial filming and negative effects on national parks' land.[105] In reversing this decision, the appellate court focused on the nature of the protected activity finding that the act of filmmaking in itself is not communicative

100. *Id.* at 323.

101. *See, e.g.*, Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011); Boardley v. U.S. Dep't of Interior, 615 F.3d 508 (D.C. Cir. 2010).

102. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (holding that a National Park Service regulation prohibiting demonstrators from sleeping in Lafayette Park did not violate the First Amendment); United States v. Kokinda, 497 U.S. 720, 721 (1990) (finding that Postal Service regulation prohibiting solicitation on postal premises did not violate First Amendment free speech protection); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 37 (1983) (declaring that a state may regulate a public property not designated as a forum for public communication as long as it is reasonable and not an effort to suppress the speaker's view).

103. Price v. Garland, 45 F.4th 1059, 1075 (D.C. Cir. 2022).

104. *See* Price v. Barr, 514 F. Supp. 3d 171, 177 (D.C. Cir. 2021) (citing the challenged statute 54 U.S.C. § 100905; 43 C.F.R. § 5.2 (2022); and 36 C.F.R. § 5.5 (2021)).

105. *Id.* (citing *Boardley*, 615 F.3d at 522). The court found that the time, place, and manner standard was not satisfied where a similar national parks permitting scheme required a permit for public assemblies, meetings, gatherings parades and other forms of expression in national parks. *Id.* Further, the court in *Boardley* found that the reach of the statute was too broad as it included protected activities that had no nexus to the government interest of protecting the parks. *Boardley*, 615 F.3d at 519–24.

activity.[106] As noted, the court suggested that "filmmaking, like typing a manuscript, is not itself a communicative activity; it is merely a step in the creation of speech that will be communicated at some other time."[107]

The impact of this decision provides a powerful cudgel for government regulation of parks and other traditional public forums. Particularly in the context of permitting photography and any other activities that are not actually communicative, this *Price* interpretation along with long held distinctions for commercial speech,[108] will increase governments' authority to protect its parks and other sensitive lands from activities that are not directly communicative.

C. Government Sponsored Events

Fairs, parades, and festivals are a few of the common special events that local governments sponsor for the benefit of the public and to increase community involvement and cohesiveness. Fortunately, the recent trend provides more clear direction regarding the parameters of conducting these events. For example, in the context of parades, the Eleventh Circuit recently issued an opinion upholding the right of the City of Alpharetta to prohibit parade participants from displaying the confederate flag as part of their presentation in the parade.[109]

Leake involved a challenge by a civil war veterans' nonprofit organization to a city condition of approval for participation in the annual war veteran's parade. Specifically, the challenged condition prohibited parade participants from displaying the confederate flag or doing anything that would distract from the event's goal of uniting the community.[110] In its defense, the City responded that the parade constituted government speech and as such was not subject to the forum analysis or First Amendment restrictions.[111]

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106. *Price*, 45 F.4th at 1070 (citing *Perry Educ. Ass'n*, 460 U.S. at 45 for the proposition that forum analysis cases require the protected right involve communicative activity).

107. *Id.*

108. *See, e.g.*, Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 864 F.3d 905 (8th Cir. 2017) (upholding a city ordinance prohibiting commercial activity, including photography, in the parks). Critical to its determination, the court explained that the ordinance was not content based because it applied to all commercial activity across the board. *Id.* at 914–16.

109. Leake v. Drinkard, 14 F.4th 1242, 1253 (11th Cir. 2021).

110. *Id.* at 1246.

111. *Id.* at 1247.

The court in its review agreed with the City's position explaining further the three factors used to whether the government speech doctrine applies.[112] First, the court will look to the history to determine whether the type of speech being proffered has been typically communicated by the government.[113] Second, the court will look to the endorsement factor which examines whether observers would believe that the government endorsed the message projected.[114] Control is the final factor and it examines whether the government maintains direct control over the messages conveyed.[115]

In applying these factors, the *Leake* court explained that as to the history prong, it is a long-held practice for governments to commemorate military victories and sacrifices;[116] therefore, that factor weighed in favor of finding the parade to be government speech. The endorsement prong was similarly satisfied through city sponsored advertising and promoting the event publicly and on its website and publicly declaring that the parade was a celebration of American war veterans in recognition of their service to our country.[117] Appellants urged the court that accepting private funding to support the event converted the endorsement analysis, but this aspect of the event was insufficient to defeat the overall government endorsement.[118] Indeed, the fact that private parties take part in the planning and propagation of an event does not remove the governmental nature of the activity.[119] Finally, the control factor was found to be strongly supported because participation in the parade required submission and approval of an application to the City, and that application specifically required applicants to describe the messages they intended to display.[120] The final outcome—upon a determination that government speech applied—resulted in a finding in favor of the

112. *Id.* at 1248.
113. *Id.* (citing Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc., 942 F.3d 1215 (11th Cir. 2019)).
114. *Id.*
115. *Id.*
116. *Id.* (citing Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).
117. *Id.* at 1249.
118. *Id.*
119. *Id.* (citing Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 217 (2015)).
120. *Id.* at 1250.

city because as previously noted, First Amendment protections of speech do not apply in this context.[121]

D. Streets, Sidewalks and Public Spaces

Streets, sidewalks, and other public spaces are quintessential traditional public forums, but even in these protected areas, proper regulation of use and access is appropriate.

An excellent example to consider can be found in the matter of *Keister v. Bell*.[122] *Keister* involved a University of Alabama Grounds Use Policy that controlled use and access to the grounds of the University including sidewalks and other public thoroughfares.[123] Mr. Keister was a Christian evangelist who was prohibited from preaching, holding a banner, and passing out religious literature on the University campus including a public street on the outskirts of the campus.[124] The Eleventh Circuit in its review applied a forum analysis to determine the rights of the parties.[125] Citing to *Bloedorn,*[126] the court explained that the sidewalk in question should be considered a limited public forum, which may properly be limited to use by certain groups or for the discussion of certain subjects.[127] The key factor to consider in this context is the government's intended use of the property which in this case was clearly set out in the University policy.[128] Additional objective indications such as University signage and landscaping fences supported the interpretation that the sidewalks at issue were intended to have limited use and access.[129] As a result, the court applied the lower reasonableness standard of review which the university grounds use policy easily survived.[130] As an aside, the university policy would have also survived any prior restraint

121. *See supra* pt. II.F (referencing *Summum* and the government speech standard). For a more recent application of the doctrine, see McGriff v. City of Miami Beach, 594 F. Supp. 3d 1302, 1315 (S.D. Fla. 2022) (applying the doctrine in the context of the City of Miami Beach sponsoring a series of art installations and controlling the messages of artists).

122. 879 F.3d 1282, 1290 (11th Cir. 2018).

123. *Id.* at 1286.

124. *See id.* at 1284–85 (holding that the street on which Keister attempted to speak was a public road with private and University buildings interspersed).

125. *Id.* at 1288; *see* Cornelius v. NAACP, 473 U.S. 788, 803 (1985).

126. *See supra* pt. II.D.

127. *Keister*, 879 F.3d at 1289–90 (quoting Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 679 n.11 (2010)).

128. *Id.* at 1286.

129. *Id.* at 1291.

130. *Id.*

challenge based on its internal rules requiring the administrative decision to grant or deny the request to speak within ten working days or no more than twenty-four hours the issue to be discussed was occasioned by news or issues coming to public knowledge within the previous two days.[131] The clear, well-thought out policy and physical structures providing visual common sense barriers combined to provide sufficient support for a finding that the area in controversy was a limited government forum and therefore the lower reasonableness level of scrutiny applied.

The character and use of public areas is another practical factor to consider when determining the ability of public bodies to regulate access and use of public spaces. In *Powell v. Noble*,[132] the Eighth Circuit dealt with a challenge by a religious advocate who was ejected from the streets and sidewalks adjacent to the Iowa State Fairgrounds. In upholding the District Court denial of a Request for Injunctive Relief, the court looked to the character and use of the property being regulated, relying on the seminal *United States v. Kokinda* case,[133] in which the Court explained, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum."[134] In applying this standard, the *Powell* court opined that the state could properly limit speaker use of the adjacent sidewalks because, specifically during the time of the State Fair, the purpose of those sidewalks was to provide ingress and egress by fair participants to the fairgrounds and as such, those sidewalks constituted a limited public forum.[135] This specific factual analysis and interpretation of the nature of the public space is critical as can be seen in *McMahon v. City of Panama Beach*.[136]

In *McMahon*, the court found that the city could not remove an evangelist from a city park during an event organized by a

131. *Compare id.* at 1286, *with* United States v. Barnes, 481 F. Supp. 3d 15, 18–19 (D.D.C. 2020) (upholding the enforcement of a federal statute distinguishing between sidewalks outside of the Supreme Court from the physical grounds of the Court). Additionally in *Barnes,* the court upheld citations issued to demonstrators who left the sidewalk to give their speeches from the plaza area of the Supreme Court. *Barnes*, 481 F. Supp. 3d at 27; *see also* Ball v. City of Lincoln, 197 F. Supp. 3d 1177, 1183–89 (D. Neb. 2016), *aff'd*, 870 F.3d 722 (8th Cir. 2017).

132. 798 F.3d 690, 693–94 (8th Cir. 2015).

133. *Id.* at 699–700; *see* United States v. Kokinda, 497 U.S. 720, 728–29 (1990).

134. *Kokinda*, 497 U.S. at 728–29.

135. *Powell*, 798 F.3d at 700.

136. 180 F. Supp. 3d 1076, 1095 (N.D. Fla. 2016).

private corporation.[137] Unlike cases upholding the distinct forum status of public property as in *Powell* and *Keister*, the *McMahon* court upheld the traditional public forum status of the park area holding the event because even in the context of a private event sponsor who received an "exclusive use permit" from the city, the event itself was open to the public and no barriers or other implements of separation were in place which could easily designate those areas not intended to be accessible for public access and use.[138] The fact that the city issued an "exclusive use permit" to the event organizers did not control; instead, the totality of the factors supported a finding that the park retained its traditional public forum status.[139] The factors included that over 200 acres of the park were dedicated to outdoor recreational activity, the festival site was located in a "wide open grassy area," on the day of the event other parts of the park were being used for alternative activities, and the actual festival site allowed for unfettered access to its grounds.[140] Furthermore, the festival was open to the public unlike the State Fair in Iowa which was a ticketed event.[141] Under these facts, the Northern District held that the park, including the site of the festival, retained its natural status and as such the lesser strict scrutiny, time, place, and manner standard of review applied.[142]

Finally, based on the above character and use considerations, public participation in government owned spaces can be properly regulated based on the purpose of the property affected and the reasonableness of the controlling rules or policies.[143] Specifically, city halls,[144] council assembly rooms,[145] and the interior lobbies of

137. *Id.* at 1113.
138. *Id.* at 1096.
139. *Id.* at 1100.
140. *Id.* at 1082–83.
141. *Id.* at 1096–97. The court compared the event in question to a separate event on the same site, but which required ticketing in order to participate, suggesting that this distinction transformed the compared event site into a limited public forum even though the physical site was the same. *Id.*
142. *Id.* at 1105.
143. Sheets v. City of Punta Gorda, 415 F. Supp. 3d 1115, 1122 (M.D. Fla. 2019).
144. *Id.* at 1128 (upholding a city ordinance prohibiting video and sound recording without consent within the boundaries of city hall under a limited public forum analysis). The challenged ordinance included an exception for public meetings and law enforcement activities. *Id.*
145. FLA. STAT. § 286.0114(2) (2022) (allowing boards or commissions specifically to maintain orderly conduct and proper decorum at public meetings subject to board or

government agencies,[146] may be properly limited under the public forum analysis.

To be clear, limiting speaker rights in public fora is not an exercise to be taken lightly. Innumerable ordinances regulating First Amendment activity in streets, sidewalks, and other public spaces have been found lacking,[147] but also be aware that under the proper conditions, the courts will support limitations that are consistent with the purpose of these spaces.

IV. ENFORCEMENT

This understanding of the applicable fora and parameters of government authority when regulating public spaces, allows a more informed examination for enforcement of these laws. A critical initial component to consider though, is the definition and application of probable cause.

A. Probable Cause

Probable cause is not defined by the Fourth Amendment, state, or federal statutes, resulting in another area of court-created law. The Fourth Amendment requires that any arrest be based on probable cause,[148] and court interpretation of this requirement looks to a totality of the circumstances based on everything the arresting officer knows or reasonably believes at the time of the arrest.[149] Florida courts have specifically provided that probable

commission adopted rules or policies); *id.* § 286.0114(3) (allowing no public comment on emergency, ministerial, exempt, or quasi-judicial matters); *id.* § 286.0114(4) (providing limitations on the breadth of the public meeting rules or policies); *see* Jenner v. Sch. Bd. of Lee Cnty., No. 2:22-cv-85, 2022 WL 1747522, at *7–8 (M.D. Fla. May 31, 2022) (dismissing a challenge to the school board's imposition of the statutory limitations to speak).

146. Freedom Found. v. Wash. Dep't of Ecology, 426 F. Supp. 3d 793, 802 (W.D. Wash. 2019) (upholding a prohibition on loitering, canvassing or other expressive activity in the lobby of a government building based on interpretation that lobby constituted a non-public forum and reasonable restrictive policies controlling access and use must be upheld).

147. *See* Messina v. City of Fort Lauderdale, 546 F. Supp. 3d 1227, 1237 (S.D. Fla. 2021) (holding that panhandling is protected First Amendment speech and regulation based on the fact that its message is content based and subject to heightened strict scrutiny); *accord* Indian Civ. Liberties Union Found., Inc. v. Superintendent, Ind. State Police, 470 F. Supp. 3d 888, 902 (S.D. Ind. 2020) (applying traditional public forum analysis in the context of plaintiffs seeking to panhandle on public sidewalks); *cf.* Henderson v. McMurray, 987 F.3d. 997, 1002 (11th Cir. 2021) (upholding a city special events ordinance and noise provision required for "events" held on public streets under the lesser time, place, and manner test).

148. U.S. CONST. amend. IV.

149. Illinois v. Gates, 462 U.S. 213, 230 (1983); State v. Exantus, 59 So. 3d 359, 361 (Fla. 2d Dist. Ct. App. 2011).

cause is "a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged."[150] In the instant context this standard is based on a combination of an officer's observations and the specific law or ordinance alleged to have been violated.[151]

B. Immunities

As previously noted, individual challenges to state and local laws limiting First Amendment rights are brought under § 1983 for alleged violation of rights protected under the U.S. Constitution.[152] These claims assert that the underlying law prevents the claimant from fully exercising their First Amendment rights—and in certain cases results in the imposition of a government sanction—be it arrest, fine, or prohibition from undertaking a preferred action such as receiving a permit.[153] For government leaders, so long as they are acting in their legislative capacity, there is absolute immunity from liability for their decisions; particularly in relation to their approval of ordinances.[154] The governmental entity itself may be subject to damages resulting from losses incurred from a law subsequently determined to be unconstitutional and payment of attorney fees may be imposed, but direct liability for the official is foreclosed.[155] Prosecutors are also absolutely immune from acts taken within the scope of performing their duties which leaves the actual enforcers as the only parties whose immunity is not absolute.[156] Court-created law on this subject has been evolving, but recently the Supreme Court made its most clear declaration regarding the protection afforded enforcing agencies and their officers when

150. Schmitt v. State, 590 So. 2d 404, 409 (Fla. 1991) (quoting Dunnavant v. State, 46 So. 2d 871 (Fla. 1950)).

151. *See* McMahon v. City of Panama City Beach, 180 F. Supp. 3d 1076, 1102 (N.D. Fla. 2016).

152. *See* Leake v. Drinkard, 14 F.4th 1242, 1247 (11th Cir. 2021).

153. *See* Bogan v. Scott-Harris, 523 U.S. 44, 47 (1998).

154. *Id.* at 54–56 (clarifying that absolute immunity applies to legislators at all levels of government); *see also* Quintero v. Diaz, 300 So. 3d 288, 291 (Fla. 3d Dist. Ct. App. 2020) (finding that the mayor was absolutely immune from the defamation claim based on a letter written within the scope of his duties).

155. *Bogan*, 523 U.S. at 51.

156. Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

enforcing laws that limit First Amendment activity.[157] A quick look at three more recent seminal cases will help illuminate the applicable standards and considerations that control an analysis of the viability of First Amendment retaliation claims.

1. Hartman v. Moore

Hartman involved a challenge by a corporate executive charged criminally for his alleged role in a kickback scandal and improper involvement in the search for a new Postmaster General.[158] Postal Inspectors urged federal prosecutors to bring charges against the executive and the prosecutors agreed but failed to obtain a conviction.[159] The executive responded by filing an action against the prosecutors and inspectors claiming that the charges were brought in retaliation for the executive's lobbying efforts regarding the Postmaster General appointment and attempts to receive a contract for services with the Postal Service.[160] The lower court properly dismissed the claim against the prosecutors based on their absolute immunity when applying prosecutorial judgment, but the claim for retaliatory prosecution against the inspectors survived summary judgment.[161] The inspectors in response appealed to the Supreme Court claiming qualified immunity protection because the underlying criminal charges were supported by probable cause.[162]

2. Lozman v. City of Riviera Beach

Lozman involved a challenge by a Florida city resident who was arrested for speaking at a public meeting on matters outside the scope allowable pursuant to decorum rules set by the city council and refusing to leave the podium at the request of the Council Chair.[163] The plaintiff's retaliation challenge was based on a claim that the Council colluded against him in order to achieve their desired result.[164] Plaintiff acknowledged that law

157. Nieves v. Bartlett, 139 S. Ct. 1715, 1725–26 (2019).
158. Hartman v. Moore, 547 U.S. 250, 252–54 (2006).
159. *Id.* at 254.
160. *Id.*
161. *Id.* at 255.
162. *Id.* at 256–57.
163. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1949 (2018).
164. *Id.*

enforcement had probable cause to effect the arrest but argued that the retaliatory animus of the City Council breached their immunity from liability.[165]

3. Nieves v. Bartlett

Finally, and most recently, in *Nieves*, an unruly participant at a party claimed that his arrest was based on retaliation by a law enforcement officer because of the plaintiff Nieves's speech.[166] In this case, the plaintiff made derogatory comments to the officer and advised fellow party goers to not talk with law enforcement officers.[167]

This troika of cases provides an updated foundation for the Court's analysis of First Amendment retaliatory claims. In the circumstance of challenging the recommendation to prosecute an individual for potential statutory violations, the *Hartman* Court upheld the postal inspectors' authority to take such action so long as there is no animus toward the accused and found that probable cause to recommend prosecution was validated by the prosecutor agreeing to file the charge.[168] In the Court's view, the prosecutorial decision defeated the animus claim because of "prosecutorial regularity," a doctrine that assumes that a prosecutor's decision to move forward on a case is devoid of animus.[169] Therefore, any action taken that results in approval to file charges provides evidence that there was probable cause to bring the charges initially—which defeats the retaliation claim. This fact scenario is analogous to the authority of code enforcement officers in the local government context, as both postal inspectors and code enforcement officers, while not provided the same status as law enforcement, receive the same prosecutorial regularity protections and deference against claims of retaliation.[170]

Lozman provides a more unique set of circumstances and thus a unique outcome, as referenced by Justice Thomas in his dissent.[171] Regardless, the ambit of the majority decision leads to an otherwise consistent result. A closer analysis of the majority

165. *Id.* at 1951.
166. Nieves v. Bartlett, 139 S. Ct. 1715, 1720–21 (2019).
167. *Id.* at 1720.
168. Hartman v. Moore, 547 US 250, 265 (2006).
169. *Id.* at 263.
170. *Id.* at 262.
171. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1956 (Thomas, J., dissenting).

opinion suggests that but-for internal colluding by city council members, probable cause to cite a speaker for failure to comply with decorum rules would have been sufficient to insulate the council members from personal liability.[172] The released Sunshine shade discussion created a cloud of potential animus toward the speaker, Mr. Lozman, thereby stripping the council of what otherwise would have been absolute immunity.[173] The obvious import here is that boards should be careful about the conversations they have and words they use in all meetings subject to the Sunshine.[174] A second observation is to note that the law enforcement officer directed by the Council Chair to arrest the plaintiff was not subject to the retaliation claim and because his actions were taken at the direction of the City Council to enforce their rules, any attempt to include him in the retaliation claim would have failed because he had probable cause to effect the arrest based on observation, the request of the council, and violation of the council rule.[175] This projected outcome would have occurred based on the Court's reaffirmation that probable cause will defeat a First Amendment retaliation claim and is consistent with court opinions holding that law enforcement officers may rely on the government property owners' judgment in directing them to effect an arrest for trespass violations.[176]

Finally, the *Nieves* decision clarifies this point further by addressing the question in the context of a retaliatory arrest claim against a law enforcement officer.[177] While *Hartman* was buttressed through the benefit of prosecutorial regularity regarding the effect of animus in the alleged retaliatory act, *Nieves* provided "a more representative case." As noted, *Nieves* provides the more conventional fact scenario of an officer arresting a suspect for violating a statutory provision with the deprivation of the arrestee's First Amendment rights as a backdrop.[178] Consistent with its *Hartman* analysis, the Court explained that "establishing the causal connection between a defendant, law enforcement's

172. *Id.* at 1954 (majority opinion).
173. *Id.*
174. *See* FLA. STAT. § 871.01 (2022).
175. *Lozman*, 138 S. Ct. at 1954.
176. *See* Moran v. Cameron, 362 F. App'x 88, 96 (11th Cir. 2010); Paff v. Kaltenbach, 204 F.3d 425, 434 (3d Cir. 2000).
177. Nieves v. Bartlett, 139 S. Ct. 1715, 1720 (2019).
178. *Id.* at 1721.

animus and plaintiff's injury is straightforward."[179] The civil plaintiff must show an absence of probable cause in their arrest or injury in order to create a presumption in favor of finding the existence of a retaliatory motive.[180] In the Court's analysis, showing the absence of probable cause in the arrest supports the argument that animus is the "but-for" basis for the underlying punitive action.[181]

The Court further explained that an arresting officer's subjective intent should not be a factor in determining law enforcement's liability, comparing this to their Fourth Amendment analysis wherein the Court has "almost uniformly rejected invitations to probe subjective intent,"[182] "when reviewing arrest, we ask 'whether the circumstances, viewed objectively, justify the challenged action,' and if so, conclude 'that action was reasonable.'"[183] Based on this comparative analysis, the Court agreed to primarily apply the *Hartman* requirement that a plaintiff in a First Amendment retaliatory arrest case show lack of probable cause to make the arrest in order to proceed.[184] The Court did provide one caveat though "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[185] When a plaintiff provides objective evidence that they were arrested when others similarly situated were not, the requirement to show lack of probable cause is abated.[186] In sum though, so long as a law enforcement officer applies enforcement of applicable laws consistently, a retaliatory arrest plaintiff will be required to show lack of probable cause.

V. CONCLUSION

Applying these court-made standards to protesters, speakers, and petitioners in the public forum, it becomes clear that individual liability of government actors will be protected unless there is a showing of bad intent in taking the punitive action. As such, properly drafted ordinances, resolutions, or policy documents

179. *Id.* at 1722.
180. *Id.*
181. *Id.* at 1724.
182. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 737 (2011)).
183. *Id.* at 1725 (quoting *al-Kidd*, 563 U.S. at 736).
184. *Id.*
185. *Id.* at 1727.
186. *Id.*

that satisfy the previously discussed public forum standards, will both survive legal challenge and avoid liability for the enforcing parties. Most importantly, take time to assure that all forum designations are accurate and consistent with the applicable government interest. Designating distinct public spaces should be documented with sufficient predicate to support the designation.[187] Haphazardly created forums will be especially vulnerable to challenge under the forum analysis and they increase the potential for successful claims of animus for lack of a reasonable basis. As such, legislative bodies should be primarily responsible for designating the status of distinct public forum zones, as they are in the best position to provide the necessary predicate to support the designations through their normal law and policymaking function.

Consistent enforcement, whether in the First Amendment context or not, is also a valuable practice. Trespass, roadway solicitation, and other similarly proscriptive laws, so long as enforced in a "quiet" environment, may be properly enforced under more "active" conditions.[188] These laws, along with properly created speech zones, will allow local governments to retain their public safety, health, and welfare responsibilities without being subject to liability, while simultaneously respecting and protecting the First Amendment rights of the public. Just as important, enforcement officials should be aware that they are protected from liability when enforcing laws, rules, and policies of local governments so long as they are relying on the judgment of the local government entity when taking the enforcement action.[189] Finally, avoiding viewpoint discrimination or suggestions that enforcement is based on animus toward the arrestee, as in *Lozman*, will provide the final layer of protection against liability for local governments.

Protecting First Amendment rights is at the core of our constitutional jurisprudence, but these rights are not absolute. Regulating and enforcing properly crafted laws that protect the public and allow efficient operation of government activities against conflicting First Amendment activities is appropriate and will withstand constitutional challenge so long as the action taken

187. *See* Thomas v. Chi. Park Dist., 534 U.S. 316 (2002).
188. *See Nieves*, 139 S. Ct. at 1715.
189. *See* Paff v. Kaltenbach, 204 F.3d 425 (3d Cir. 2000).

is consistent with the standards discussed herein. As practitioners, we can protect our enforcement agencies by assuring that the imposition of laws, policies, and rules are consistent with the applicable public forum.