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Frank D. LoMonte

Clay Calvert

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Frank D. LoMonte† *& Clay Calvert*††

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† Professor & Director of the Joseph L. Brechner Center for Freedom of Information at the University of Florida in Gainesville, Fla. B.A., 1992, Political Science, Georgia State University; J.D. (Order of the Coif), 2000, University of Georgia School of Law. The authors thank the participants at Yale Law School's Freedom of Expression Scholars Conference in April 2018 for their feedback on an early version of this Article and, in particular, Rachael Jones and RonNell Andersen Jones for their important suggestions at that event. The authors also thank Linda Riedemann Norbut for her invaluable research assistance.

†† Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University.

ABSTRACT

Perhaps the purest form of citizen political expression is addressing a government body directly during the public-comment period. Despite its salutary civic benefits, the public-comment period faces escalating threats, with local elected officials imposing rigid controls on speakers. Disturbingly, these rules sometimes are enforced via arrest. The U.S. Supreme Court recently confronted this scenario in *Lozman v. City of Riviera Beach*, involving the arrest of a citizen-critic who refused to stop using his city council's open-mic period to decry public corruption. While narrowly fact-specific, the Court's June 2018 resolution of the case reaffirms the importance of protecting speakers at government bodies against retaliation for disagreeable views. This Article surveys recent instances in which speakers addressing government bodies were silenced—at times, forcibly—and how courts address both facial and as-applied challenges to restrictions on public comment. The Article also examines the constitutionality of commercially available standard-form policies increasingly adopted by local governments to restrict "insulting" speech, "personal attacks," and other citizen criticism. It proposes taking the next logical step that the *Lozman* Court hesitated to take—namely, recognizing a framework to help courts assess all First Amendment retaliation claims by speakers punished for noncompliance with content- or viewpoint-based directives to refrain from speaking. Ultimately, the Article concludes that the simple burden-shifting analysis that the Court found applicable under Fane Lozman's unique set of facts—in which it is the speaker's burden to establish a *prima facie* case of a speech-punitive cause-and-effect—is in fact the appropriate standard for all such retaliation claims, so that the existence of an independent basis for arrest does not mechanistically defeat a speaker's claim where a retaliatory motive is proven.

INTRODUCTION

"*I found the video pretty chilling. I mean, the fellow is up there for about fifteen seconds, and the next thing he knows, he's being led off in . . . handcuffs, speaking in a very calm voice the whole time.*"[1]

1. Transcript of Oral Argument at 34, Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (No. 17-21); *see* Jane Musgrave, *U.S. Supreme Court Chief Justice Calls Fane Lozman's Arrest 'Chilling,'* PALM BEACH POST (Feb. 28, 2018, 6:03 PM), https://www.mypalmbeachpost.com/news/crime-law/supreme-court-chief-justice-calls-fane-lozman-arrest-chilling/

That's how Chief Justice John Roberts described a video[2] depicting Fane Lozman's arrest for speaking out at a 2006 meeting of the city council of Riviera Beach, Florida.[3] Lozman, "a Marine turned multi-millionaire inventor turned thorn in the side of Riviera Beach officials,"[4] relishes "rattling city cages."[5] For instance, the "indefatigable gadfly"[6] and "relentless opponent of public corruption"[7] scored a victory in 2013 before the nation's high court after Riviera Beach impermissibly classified Lozman's floating home as a "vessel" under a federal statute and destroyed it.[8]

But the images that Roberts found so "chilling" arose out of a different clash between Lozman and his hometown. This dispute involved Lozman's civil-rights claim under 42 U.S.C. § 1983[9] that he

5AMmiBHaVolLlFh0b6XLAO/ [https://perma.cc/6QMY-PYAF] (describing oral argument in the case).

2. Scanshift, *Activist Arrested at Riviera Beach City Council Meeting*, YOUTUBE (Sept. 15, 2009), https://www.youtube.com/watch?v=8Dqpvh6_z0g [https://perma.cc/6F4N-HPA4].

3. Musgrave, *supra* note 1.

4. Jane Musgrave, *Riviera Man Wins U.S. High Court Case*, PALM BEACH POST, Jan. 16, 2013, at 1A.

5. Jane Musgrave, *Supreme Court Winner Tackling Riviera Again*, PALM BEACH POST, Sept. 1, 2014, at 1A.

6. Adam Liptak, *This 'Tenacious Underdog' Won His First Supreme Court Case. Now He's Back.*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/politics/supreme-court-first-amendment-freedom-of-speech-arrest.html [https://perma.cc/JCD7-N3FS].

7. Robert Barnes, *Justices to See a Familiar Face in Battle Over Speech Rights*, WASH. POST, Feb. 26, 2018, at A1.

8. Lozman v. City of Riviera Beach, 568 U.S. 115, 118–20 (2013).

9. This statute provides, in relevant part:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1983 (2018).

was wrongfully arrested in retaliation for exercising his First Amendment[10] rights of speech and petition.[11]

Specifically, Lozman was arrested after council member Elizabeth Wade tried to stop him from talking about public corruption during a period set aside for public comments.[12] In his First Amendment challenge, Lozman argued that after he refused to quit speaking, Wade "summoned Riviera Beach Police Officer Francisco Aguirre, who was on duty at the meeting. Petitioner [Lozman] told Officer Aguirre that he was not finished speaking. Councilmember Wade then ordered the officer to carry him out. At that point petitioner was arrested, handcuffed, and removed from the meeting."[13]

Lozman, however, lost his retaliatory arrest case before a jury, and the U.S. Court of Appeals for the Eleventh Circuit issued an unpublished opinion in 2017 affirming the trial court's decision not to disturb the verdict.[14] In doing so, the Eleventh Circuit held that a finding of probable cause to arrest automatically defeats a false arrest claim brought under the First Amendment.[15] In November 2017, the Supreme Court granted Lozman's petition for a writ of certiorari.[16] It framed the issue before it simply: "Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?"[17]

Lozman's attorneys contended that while the existence of probable cause to make an arrest may be relevant in a First Amendment-based

10. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

11. *See* Brief for Petitioner at 2, Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (No. 17-21) ("This case arises from a dispute over municipal policy between petitioner and the City of Riviera Beach that culminated in petitioner's arrest in November 2006. Petitioner claims that the arrest was the product of the City's hostility toward his First Amendment-protected activity.").

12. *Id.* at 6.

13. *Id.* (internal citations omitted).

14. Lozman v. City of Riviera Beach, 681 F. App'x 746 (11th Cir. 2017), *vacated*, 138 S. Ct. 1945 (2018).

15. *Id.* at 750.

16. *Lozman*, 681 F. App'x 746 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 1945 (2018).

17. Question Presented, *Lozman*, 138 S. Ct. 1945 (2018) (No. 17-21), SUPREME COURT, https://www.supremecourt.gov/qp/17-00021qp.pdf [https://perma.cc/VWL2-57F3] (last visited Sept. 16, 2018).

retaliatory arrest case "it is not dispositive as a matter of law."[18] As Pamela Karlan told the Court during oral argument on Lozman's behalf, "[w]e think the best rule is the rule we advocated for, which is that probable cause is relevant evidence but not always dispositive."[19]

In a June 2018 ruling remarkable for its narrowness, the Court held 8-1 (only Justice Clarence Thomas dissented)[20] that the conceded presence of probable cause for a misdemeanor arrest did not foreclose a First Amendment retaliation claim.[21] The Court confined its ruling to the facts before the Court and remanded the case to give Lozman an opportunity to establish that "the existence and enforcement of an official policy motivated by retaliation" was a but-for cause of his arrest.[22]

Although Lozman's case is the one that reached the Supreme Court, many other citizen commenters have found themselves gaveled down or even hauled away in handcuffs because of either what they say or how they say it. For instance, in February 2018, a woman was forcibly removed from the West Virginia House of Delegates while testifying about industry influence behind a bill lowering the standards to obtain a permit for oil and gas drilling.[23] The speaker, Lissa Lucas, was cautioned not to make "personal comments" about members of the House Judiciary Committee, but she persisted in reading a list of industry donations to committee members until her time expired and she was dragged away.[24]

National outrage followed a Louisiana teacher's January 2018 ejection from a school-board meeting for speaking up from the audience to question the board's approval of a large pay raise for the superintendent.[25] Amateur video of a deputy ushering her out of the

18. Reply Brief for Petitioner at 2, *Lozman*, 138 S. Ct. 1945 (2018) (No. 17-21), https://www.supremecourt.gov/DocketPDF/17/17-21/35653/20180216120140682_17-21rb.pdf [https://perma.cc/7C7Q-FTRN].

19. Transcript of Oral Argument at 27–28, *Lozman*, 138 S. Ct. 1945 (2018) (No. 17-21), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_ljgm.pdf [https://perma.cc/ATU9-QTJH].

20. *Lozman*, 138 S. Ct. at 1955 (Thomas, J., dissenting).

21. *Lozman*, 138 S. Ct. at 1955 (majority opinion).

22. *Id.* at 1954–55. As Justice Anthony Kennedy wrote for the majority, "[t]he Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts." *Id.* at 1955.

23. Nick Visser, *Woman 'Dragged' From West Virginia Hearing After Listing Lawmakers' Oil and Gas Donors*, HUFFINGTON POST (Feb. 12, 2018, 3:18 AM), https://www.huffingtonpost.com/entry/lissa-lucas-west-virginia_us_5a812a88e4b0c6726e14cb0b [https://perma.cc/Y35B-MKCM].

24. *Id.*

25. Merrit Kennedy, *Outcry After Louisiana Teacher Arrested During School Board Meeting*, NPR (Jan. 10, 2018, 12:40 PM), https://www.npr.org/

meeting and then roughly handcuffing her in the hallway went viral with more than 1.7 million views on YouTube.[26]

In Scarborough, Maine, a 69-year-old man was arrested and charged with criminal trespass in November 2017 after refusing to cease his speech to a town council, ridiculing the town's courtship of an Amazon headquarters and questioning the town manager's professional background—remarks deemed "disrespectful" in violation of a municipal decorum policy.[27] A judge dismissed the trespass charge after the local prosecutor declined to pursue it.[28]

A former teacher and school-board candidate was removed[29] from a Brevard County, Florida, school board meeting and jailed in May 2016 after he refused to stop making accusations about misconduct by a school employee.[30] A school-board member said the speaker (who accused a teacher of showing a photograph of his genitals to students during a class presentation) violated a policy forbidding "talking about a teacher," which is a "personnel matter and not allowed at Board meetings due to possible slander."[31]

As these cases illustrate, government bodies with low tolerance for disagreeable speech are pushing—and sometimes crossing—constitutional boundaries in managing citizen speech. Clear standards are needed to minimize the risk of overzealous ejections and arrests.

In its 2018 term, the Court has the chance to clarify the broader constitutional question unresolved by *Lozman*: whether the existence of probable cause for any misdemeanor offense categorically defeats a speaker's First Amendment claim of retaliatory arrest. Although the case the Court accepted, *Nieves v. Bartlett*,[32] is (as discussed later) ill-

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sections/thetwo-way/2018/01/10/577010534/outcry-after-louisiana-teacher-arrested-during-school-board-meeting [https://perma.cc/397S-SJ79].

26. *Id.*

27. Juliette Laaka, *Judge Rebuffs Scarborough's Attempt to Resurrect Doyle Case*, FORECASTER (May 23, 2018), http://www.theforecaster.net/judge-rebuffs-scarboroughs-attempt-to-resurrect-doyle-case/#respond [https://perma.cc/S8D3-H9D6].

28. *Id.*

29. Jessica Chasmar, *Florida School Board Candidate Hauled Out of Public Meeting by Police After Saying 'Penis,'* WASH. TIMES (May 25, 2016), https://www.washingtontimes.com/news/2016/may/25/dean-paterakis-florida-school-board-candidate-haul [https://perma.cc/RPX3-BU5Z].

30. Ilana Kowarski, *Brevard School Board Candidate Arrested During LGBT Meeting*, FLA. TODAY (May 25, 2016, 6:40 PM), https://www.floridatoday.com/story/news/education/2016/05/24/school-board-packed-lgbt-meeting/84814172/ [https://perma.cc/QJM7-J7A7].

31. Chasmar, *supra* note 29.

32. *See* Bartlett v. Nieves, 712 F. App'x 613 (9th Cir. 2017), *cert. granted sub nom.* Nieves v. Bartlett, 138 S. Ct. 2709 (2018).

suited for broad pronouncements because of its unusual facts, it nevertheless offers the opportunity to establish some governing principles allowing speakers to pursue claims against ill-motivated government officials while simultaneously shielding rank-and-file police officers forced into spur-of-the-moment judgment calls.

Part I of this Article initially reviews the importance of political expression under the First Amendment and the strict scrutiny standard of review to which content-based restrictions on speech generally are subject.[33] Next, Part II examines the long-standing principle against viewpoint discrimination on speech, as well as the public forum doctrine.[34] Part III then considers the primary rationales for restricting speech at government meetings.[35] Part IV addresses the void for vagueness doctrine and prior restraint regimes imposed on speakers.[36] Part V then presents a brief case study of a government policy imposed on speakers at public meetings.[37] Next, Part VI turns to the heart of the Article, examining the constitutionality of punishing commenters.[38] Finally, this Article concludes by calling on the U.S. Supreme Court to offer clear guidance about when the expression of citizen-critics at public meetings can permissibly be squelched and to recognize that the burden ultimately remains on government officials to abide by such principles when confronted with speech they find disagreeable.[39]

I. Political Speech, Strict Scrutiny & the First Amendment

Safeguarding political speech is a fundamental purpose of the First Amendment.[40] The Supreme Court observed more than forty years ago that:

> [w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of

33. *Infra* notes 40–58 and accompanying text.

34. *Infra* notes 59–104 and accompanying text.

35. *Infra* notes 105–167 and accompanying text.

36. *Infra* notes 168–189 and accompanying text.

37. *Infra* notes 190–200 and accompanying text.

38. *Infra* notes 201–271 and accompanying text.

39. *Infra* notes 272–274 and accompanying text.

40. *See* Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 Ala. L. Rev. 1213, 1245 (2001) (noting that "political speech which, being necessary to democracy, lies at the heart of the constitutional protection").

> candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[41]

More recently, Justice Anthony Kennedy explained for the majority in *Citizens United v. Federal Election Commission*[42] that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[43] The recently retired justice added that "political speech must prevail against laws that would suppress it, whether by design or inadvertence" and noted that laws restricting political speech must survive the Court's typically rigorous strict scrutiny standard of review.[44]

Under strict scrutiny, a regulation will be upheld only if the government proves it has a compelling interest that is served by narrowly tailored terms[45] that restrict no more speech than is absolutely necessary to serve the interest.[46] Strict scrutiny applies when speech is restricted because of the topic or ideas in question.[47] A more relaxed form of judicial review—intermediate scrutiny—generally applies to content-neutral regulations.[48] Under intermediate scrutiny, a content-

41. Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

42. 558 U.S. 310 (2010).

43. *Id.* at 339.

44. *Id.* at 340.

45. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (observing that "content-based restrictions on speech" are permissible only "if they survive strict scrutiny," and noting that strict scrutiny requires a compelling government interest and a statute that is narrowly tailored to serve that interest); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.").

46. *See Playboy Entm't Grp.*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); Sable Commc'ns v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

47. *See Reed*, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

48. The Supreme Court has explained that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). It has emphasized that "[t]he government's purpose is the controlling consideration" in whether a regulation is content neutral. *Id.*; *see also* Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-*Reed *Landscape*, 22 COMM. L. & POL'Y 123, 124 (2017) ("If the law only

neutral regulation of speech is permissible if it is narrowly tailored to serve a substantial or significant interest and leaves open ample alternative channels of communication.[49]

Not only does the First Amendment privilege political speech under strict scrutiny, but it also safeguards dissenting political speech, which is expression critical of the government. Perhaps most significantly, the Supreme Court in *Cohen v. California*[50] protected the right of an individual to wear a jacket emblazoned with the words "Fuck the Draft" through a public courthouse to express "his feelings against the Vietnam War and the draft."[51] The Court reasoned that "so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected."[52] Significantly, the Court in *Cohen* also made it clear both that: 1) the possible offense taken at Paul Robert Cohen's message did not justify suppressing it;[53] and 2) speech is protected just as much for its emotive power as it is for its cognitive message.[54]

In addition to *Cohen*, the Court in *Texas v. Johnson*[55] famously protected political dissent in the form of burning the American flag as

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regulates the time, place or manner of speech, then the much more government-friendly intermediate scrutiny standard is applied.").

49. *Ward*, 491 U.S. at 803.

50. 403 U.S. 15 (1971).

51. *Id.* at 16.

52. *Id.* at 18.

53. Here, the Court emphasized that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.* at 25. It added that those offended had a readily available remedy: they "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21.

54. On this point, the Court reasoned:

> that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26.

55. 491 U.S. 397 (1989).

a form of symbolic expression.[56] In reaching this conclusion, Justice William Brennan reasoned for the majority that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[57] Brennan specified that the Court had "not recognized an exception to this principle even where our flag has been involved."[58]

In summary, dissenting political speech—even when intemperate and offensive—is privileged under the First Amendment. Government efforts to restrict it, in turn, are subject to review under strict scrutiny. These foundational points are especially important to keep in mind when citizens engage in such expression at local government meetings and are punished for doing so.

II. The First Amendment and Government Meetings

This part has two sections. Initially, Section A provides an overview of the general prohibition against viewpoint-based discrimination. Section B then addresses the public forum doctrine in First Amendment jurisprudence.

A. Viewpoint Discrimination

The ability to speak directly to a government board—be it a city council, a school board or a college board of trustees—is perhaps the purest and most basic form of citizen participation. It may come as a surprise, then, that the Constitution is not understood to guarantee citizens a right to be heard before their elected officials make a decision; the Supreme Court said as much in a 1984 ruling involving labor negotiations in a community college district.[59]

Once an agency does agree to accept public comment, however, the commenting system cannot be operated in a viewpoint-restrictive way. As the Supreme Court wrote more than twenty years ago, "[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[60]

That principle remains true today. Justice Kennedy explained in 2017 that viewpoint discrimination constitutes "a form of speech

56. *Id.* at 420.

57. *Id.* at 414.

58. *Id.*

59. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 292 (1984).

60. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

suppression so potent that it must be subject to rigorous constitutional scrutiny."[61] He elaborated that such discrimination occurs when "the government has singled out a subset of messages for disfavor based on the views expressed."[62]

Thus, if the relevant subject or category of speech is abortion, viewpoint censorship occurs when the government allows pro-choice views but not pro-life ones.[63] At a city council meeting, in turn, viewpoint discrimination transpires when the council stifles citizens who criticize measures the council supports but permits speech by individuals who laud them.

B. Defining the Forum

When a speaker seeks to use government-owned property as a platform for delivering a message, the degree of First Amendment protection depends partly on the nature of the property. Some property is recognized as being traditionally a "public forum" amenable to wide-open public discourse, where speech generally cannot be restricted on the basis of content, such as a park or a sidewalk.[64]

Government property can become a forum by designation or tradition. In determining whether a designated public forum exists, courts look to the government's policy and practice to assess whether a discernable intent exists to open the property for expressive purposes; courts also look to the nature of the property and its compatibility with expressive activity.[65]

Once a piece of property is declared to be a "forum" by either tradition or designation, any regulation on the content of a speaker's message is presumptively unconstitutional and is likely to be struck down if challenged.[66] Only if a judge finds under the strict-scrutiny standard that the restriction is absolutely necessary to achieve a compelling governmental purpose will the restriction be constitutional.[67] Regardless of whether property is a forum by tradition or by

61. Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring).

62. *Id.* at 1766.

63. Clay Calvert, *Beyond Trademarks and Offense: Tam and the Justices' Evolution on Free Speech*, 2016-2017 Cato Sup. Ct. Rev. 25, 50.

64. United States v. Grace, 461 U.S. 171, 177 (1983).

65. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

66. "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

67. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (citing Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)) (stating that the strict scrutiny standard analysis applies to laws regulating political speech).

designation, the government cannot pick and choose among viewpoints; once the property is opened for one opinion, it must be open on equal terms to all.

But even in a public forum, the government can enforce reasonable regulations on the use of property that are "content neutral," applying evenhandedly to all speakers.[68] A regulation is content neutral if it is "justified without reference to the content of the regulated speech."[69] A classic example of a constitutionally permissible "time, place and manner" restriction is a limit on how long speakers may occupy the podium.[70] For instance, a federal appeals court decided that a five-minute limit on speeches at a congressional hearing is a lawful, content-neutral restriction.[71] At least one federal appeals court has upheld a residency requirement for public commenters as a content-neutral time, place and manner restriction.[72] Moreover, government bodies plainly may proscribe disruptive interruptions by audience members speaking outside of designated comment periods.[73]

Confusion arises when the government seeks to restrict the subject matter that speakers can address when using a government platform. Acknowledging that not every piece of public property is amenable to wide-open discourse, the Supreme Court recognized a category of "limited" public forum, in which constitutional protections are relaxed.[74] In a limited public forum, the First Amendment right to be heard may be confined to specific speakers and subjects. Content-based restrictions in a limited forum are reasonable if they are "consistent with preserving the property for the purpose to which it is dedicated."[75]

While it is not entirely clear how (if at all) a speaker's rights in a limited public forum are superior to those in a nonforum, at least this much seems widely accepted: when the government enforces content-based restrictions on speech in a limited public forum, it must show that those restrictions are tailored to advance an important public

68. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

69. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

70. Wright v. Anthony, 733 F.2d 575, 577 (8th Cir. 1984).

71. *Id.*

72. Rowe v. City of Cocoa, 358 F.3d 800, 802 (11th Cir. 2004).

73. *See generally* Galena v. Leone, 638 F.3d 186 (3d Cir. 2011) (upholding dismissal of First Amendment claims against chair of county commission who ejected a speaker from a meeting for standing up from the audience and repeatedly objecting that the meeting was being held in violation of state open-meeting laws).

74. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

75. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 967 (9th Cir. 1999).

purpose, while no "tailoring" is required if the property is not a forum at all.[76]

The Supreme Court set forth its "forum doctrine" in a case about access to mailboxes in a public school.[77] In that case, *Perry Education*, a union wanted to place recruitment flyers in teachers' inboxes, noting that the boxes were built specifically for communicative purposes.[78] The Court, however, found that the boxes were not a "forum" open to general expressive use, but rather, were limited by their nature to communications about official school business by authorized users.[79] Therefore, non-school organizations had no constitutional right to insist on using the mailboxes.[80] Even in a nonpublic forum, however, the government cannot engage in viewpoint-based discrimination.[81]

Whether speakers have a constitutionally protected right to insist on delivering their chosen message to a public body depends, then, on how the forum doctrine applies to a governmental board meeting.

In the teacher-mailbox case, *Perry Education*, the Supreme Court itself referenced school board meetings as an example of a designated forum, subject to the same exacting level of First Amendment scrutiny as a traditional public forum.[82] That reference relied on a prior Supreme Court ruling, *City of Madison v. Wisconsin Employment Relations Commission* (hereinafter, "*WERC*"),[83] in which the justices struck down a discriminatory practice forbidding teachers from addressing the school board about labor matters if they were not official representatives of the bargaining unit.[84] Predating *Perry Education*, the *WERC* ruling did not rely on categorizing the forum status of a school board meeting. Rather, the Court evaluated the prohibition on nonunion speakers as a prior restraint, and (without using forum

76. *See, e.g.*, Dayton v. Esrati, 707 N.E.2d 1140, 1148 (Ohio Ct. App. 1997) (explaining that in a limited public forum, content-based restrictions must be narrowly tailored to serve a significant government interest, while in a nonforum, restrictions need only be reasonable and viewpoint-neutral). Quite a bit of publicly owned property is not any kind of forum because it is not amenable to any expressive use by the public, such as the interior office spaces within a courthouse, a prison, or a public hospital.

77. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

78. *Id.* at 40, 48.

79. *Id.* at 47–48.

80. *Id.*

81. *Id.* at 46; *see also* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885–86 (2018).

82. *Perry Educ. Ass'n*, 460 U.S. at 45 (citing City of Madison Joint Sch. Dist. v. Wis. Pub. Emp't Relations Comm'n, 429 U.S. 167 (1976)).

83. 429 U.S. 167, 176 (1976).

84. *Id.* at 177.

nomenclature) found the restraint impermissibly content discriminatory:

> [t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.[85]

In concurring, Justice William Brennan framed the issue in forum terms, presaging the Court's formal recognition of the doctrine in *Perry Education*. He wrote that while the First Amendment does not compel government officials to accept public input into their decisions, when a government body "open[s] its decisionmaking processes to public view and participation," First Amendment guarantees attach to the public's involvement: "In such a case, the state body has created a public forum dedicated to the expression of views by the general public."[86] And in Justice Brennan's view, speakers may not be excluded from such a "forum" based on the content of their message.[87]

If the Court's words in *Perry Education* and *WERC* were treated as the last ones, then the analysis of speakers' rights would be a simple one: speech to a government body receives the highest constitutional protection and may not be silenced or penalized based on content absent a compelling justification. Lower courts, however, have not consistently adhered to this line of thinking.

The forum doctrine's application has confounded courts, including the Supreme Court. It has produced hard-to-reconcile results as courts struggle with distinguishing between a "limited" and "designated" forum and grapple with the permissible scope of a forum's limitation.[88]

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85. *Id.* at 175–76.

86. *Id.* at 178–79 (Brennan, J., concurring).

87. *Id.* at 179. In his concurring opinion, Brennan relied principally on the Court's 1972 ruling in *Police Dept. of Chi. v. Mosley*, in which the Court held, on both First Amendment and Equal Protection grounds, that a municipality could not enforce a selective prohibition on certain types of picketing on sidewalks outside public schools. *See id.* (citing 408 U.S. 92 (1972)). In *Police Dept. of Chi.*, the Court said: "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dept. of Chi.*, 408 U.S. at 96.

88. *See* Mark Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 Nova L. Rev. 299, 306 (2009) (critiquing Supreme Court's "distinctly unhelpful" guidance in failing to clearly define what a limited public forum means); Lee Rudy, *A Procedural Approach to Limited Public Forum Cases*, 22 Fordham Urb. L.J. 1255, 1262–63 (1994-1995) (commenting

In their admirably thorough 2011 survey of cases involving speech at public meetings, Terri Day and Erin Bradford documented how courts have struggled to adapt the Supreme Court's shifting and unhelpful forum categories to governmental meetings.[89] "It is fair to say," they assert, "that the circuit courts' jurisprudence in this area is a morass of confusion."[90]

As Day and Bradford observe, there may even be subcategories of "'limited' designated" and "'unlimited' designated" forums to which different levels of protection apply.[91] One of the Supreme Court's seminal forum-speech cases, *International Society for Krishna Consciousness, Inc. v. Lee*,[92] indicates that speech within the range defining the boundaries of the limited forum receives the fullest protection of the First Amendment, just as would apply in a traditional public forum.[93]

Safeguarding the rights of speakers in a "limited" forum has proven challenging. Government agencies have adeptly convinced the courts to defer to content-based limitations that have the effect of silencing citizen critics. In an illustrative case, the U.S. Court of Appeals for the Second Circuit ruled against the editors of a high-school student newspaper in New York whose editorial cartoon mocking the school's sex-education program was censored, even though the school had manifested an intent to maintain the publication as a public forum.[94] Because the forum was "limited," the court held the school had the same authority as it would in a nonforum to remove any speech that "conflicts with the school's legitimate pedagogical concerns."[95] As a result of such ponderous interpretations, it is uncertain how much protection, if any, a speaker gains when public property is identified as a limited public forum as opposed to not being a forum at all.

The prevailing view is that a public-comment session is more akin to a limited public forum, in which content discrimination is permissible and government restrictions are viewed more deferentially. At least four circuits have categorized the open-mic period as a "limited" forum, in

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that "lower courts have struggled to apply the *Perry* standard equitably to allow expression on public property").

89. Terri Day & Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency*, 10 FIRST AMEND. L. REV. 57 (2011).

90. *Id.* at 77.

91. *Id.* at 80.

92. 505 U.S. 672 (1992).

93. *Id.* at 678.

94. Ochshorn v. Ithaca City Sch. Dist., 645 F. 3d 533 (2d Cir. 2011).

95. *Id.* at 540.

which content-based restrictions are permissible if they are reasonable and viewpoint-neutral.[96] However, other courts evaluating the claims of silenced commenters have equivocated[97] and some have gone as far as to classify public hearings as "designated" forums.[98] If a public-comment period qualifies for the more robust protection of a designated public forum in which content-based distinctions are disfavored, then silencing or removing speakers on relevance grounds becomes more difficult to justify, as relevance is a content-based rationale.

Interestingly, courts in a handful of cases have been willing to extend protection even beyond the podium.[99] Expressing dissatisfaction with remarks at a city council meeting by fleetingly making a Nazi "heil" gesture from the audience was held to be protected expressive conduct,[100] as was wearing a ninja mask while seated in the audience as a form of protest.[101] In the Nazi salute case, the Ninth Circuit expressed unwillingness to cut off the public's right of expression at the podium, noting that a contrary rule would permit ejection for non-disruptive conduct as insignificant as making a thumbs-down sign.[102]

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96. *See, e.g.*, Galena v. Leone, 638 F.3d 186, 199 (3d Cir. 2011); Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 761–62 (5th Cir. 2010); Reza v. Pearce, 806 F.3d 497, 503 (9th Cir. 2015); Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1232 (11th Cir. 2017).

97. *See, e.g.*, Lowery v. Jefferson Cty. Bd. of Educ., 586 F.3d 427, 432 (6th Cir. 2009) (using "limited" and "designated" forums as synonyms in referring to a school board meeting); Shero v. City of Grove, 510 F.3d 1196, 1202–03 (10th Cir. 2007) (stating that "it is not entirely clear whether a city council meeting should be treated as a 'designated public forum' or a 'limited public forum'" but finding that the plaintiff's challenge to a content-neutral time limitation would fail under either standard). Day and Bradford provide an excellent analysis of the confusion over limited/designated status and conclude that a hybrid is the proper way of viewing a citizen-comment period. *See* Day & Bradford, *supra* note 89, at 81–82.

98. *See, e.g.*, Zapach v. Dismuke, 134 F. Supp. 2d 682, 690 (E.D. Pa. 2001) (analyzing confusion among courts over forum status but concluding that a zoning board hearing is a "designated" public forum, a view potentially superseded by the Third Circuit's later *Galena* ruling).

99. *See, e.g.*, State v. Kane, 696 A.2d 108 (N.J. Super. Ct. App. Div. 1997) (overturning conviction of audience member who was charged with disrupting a public meeting because he made only a brief utterance from his seat asking to be heard on a point of information); *see also* City of Dayton v. Esrati, 707 N.E.2d 1140, 1149 (Ohio Ct. App. 1997) (stating that the entirety of a meeting of elected officials is a limited public forum "for discussion of subjects related to the duties of those officials").

100. *See generally* Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010).

101. *See City of Dayton*, 707 N.E.2d at 1143, 1149.

102. *Norse*, 629 F.3d at 976.

This raises intriguing possible arguments, since speakers have been removed and arrested for interrupting government meetings from the audience as well as from the podium. In one especially high-profile case, a demonstrator attending the Senate confirmation hearing of Jeff Sessions for U.S. Attorney General was prosecuted for disorderly conduct, a charge eventually dropped, because she fleetingly laughed aloud when a senator praised Sessions for "treating all Americans equally under the law."[103] If the First Amendment right to be heard encompasses the entire room, then a speaker like the Louisiana teacher dragged out of a school board meeting over an exchange with the chair from the audience could claim First Amendment protection even for prolonging a debate after her podium time has expired.[104]

III. EXAMINING THE PRIMARY JUSTIFICATIONS FOR RESTRICTING SPEECH

Because a compelling government interest may override a speaker's First Amendment rights, it is useful to consider the primary rationales that government bodies offer to justify silencing or removing speakers. They are set forth and reviewed below.

A. Avoiding "Defamation" of Government Employees

When a journalist questioned the validity of a Miami-Dade School Board policy that prohibits "individual grievances" and "personal attacks" during board meetings, the district's attorney claimed the policy was necessary to prevent members of the public from defaming school employees.[105] Avoiding defamatory remarks is perhaps the weakest of the most commonly proffered justifications for limiting citizen comments.

Although the U.S. Supreme Court has never explicitly addressed the nexus between injunctions on defamation and prior restraints,[106] it has never held that an injunction directed at defamatory speech is

103. Maya Salam, *Case Is Dropped Against Activist Who Laughed at Jeff Sessions's Hearing*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/us/jeff-sessions-laughter-protester.html [https://perma.cc/E7CR-NXAM].

104. *See supra* notes 25–26 and accompanying text (addressing this incident).

105. Rowan Moore Gerety, *Don't Say My Name Unless You're Saying Thank You*, WLRN (July 24, 2016), http://wlrn.org/post/don-t-say-my-name-unless-youre-saying-thank-you [https://perma.cc/E63P-84P2].

106. The U.S. Supreme Court was poised to address in *Tory v. Cochran*, 544 U.S. 734, 736 (2005), whether injunctions are permissible in defamation cases. It ultimately did not decide that issue because the plaintiff died shortly after oral argument. The Court thus resolved the case on narrower grounds.

constitutional.[107] Conversely, state and federal courts, alike, have widely recognized that equity will not enjoin defamation.[108]

As early as 1839, a New York state court recognized the link between injunctions on libel and prior restraints in the case of *Brandreth v. Lance*.[109] Where the plaintiff sought injunctive relief in anticipation of libelous speech, the court said that it could not "assume jurisdiction of the case presented . . . or of any other case of the like nature, without . . . attempting to exercise a power of preventive justice which . . . cannot safely be entrusted to any tribunal consistently with the principles of a free government" or without infringing on free speech.[110]

Instead, courts have long recognized that damages, not injunctions, are the appropriate remedy in defamation cases. In other words, courts view subsequent punishment of actionable defamation preferable to any prior restraint of the speech.[111] Even before the adoption of the First Amendment, "the court in *Respublica v. Oswald* explained that although 'libelling [sic] is a great crime' it is well understood that 'any attempt to fetter the press' is unacceptable. Even though the defendant's 'offence [sic] [was] great and persisted in,' the Court did not enjoin the defendant's future speech."[112]

Prior restraints used in anticipation of defamatory speech have been held unconstitutional even when the speaker has already displayed a history of engaging in such speech.[113] A district court in the District of

107. Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 119 (Del. Ch. 2017).

108. *See* RODNEY SMOLLA, LAW OF DEFAMATION § 9:85 (2d ed. 1999); Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 308–11, 324–30 (2001).

109. 8 Paige Ch. 24 (N.Y. Ch. 1839).

110. *Id.* at 26.

111. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 169 (2007).

112. *Id.* (quoting Respublica v. Oswald, 1 Dall. 319, 324–25, 328 (Pa. 1788)).

113. Gold v. Maurer, 251 F. Supp. 3d 127, 129, 134–35 (D.D.C. 2017); *see also* Demby v. English, 667 So. 2d 350, 355 (Fla. Dist. Ct. App. 1995) (calling it a "well established rule that equity will not enjoin either an actual or a threatened defamation") (quoting United Sanitation Servs. of Hillsborough, Inc. v. City of Tampa, 302 So. 2d 435 (Fla. Dist. Ct. App. 1974)); Mazur v. Szporer, No. Civ.A. 03-00042(HHK), 2004 WL 1944849, at *7 (D.D.C. June 1, 2004) ("An injunction is not available to prevent actual or threatened publications of a defamatory character absent a showing of a 'violation of some property right, or some breach of trust or contract,' or unless the defamatory language is 'used as coercion in connection with picketing; or is connected with violence or the injuring of property.'") (quoting Montgomery Ward & Co. v. United Retail, Wholesale & Dep't Store Emps. of America, 79 N.E.2d 46, 48, 50 (Ill. 1948)).

Columbia, for instance, recently held that a corporation's directors were not entitled to a gag order against a former director, even though he had already allegedly defamed them and was expected to make additional similar statements at an impending business meeting.[114] The court was particularly concerned that the gag order would be an unconstitutional prior restraint on First Amendment rights.[115]

The First Amendment strongly protects citizen speech to government officials addressing matters of public concern. Indeed, the First Amendment not only protects the freedom of speech, but also the freedom to petition government officials for a redress of grievances. A restraint on speech to elected bodies imperils both of these rights.

A city, county, or school district takes action only through the acts of its employees.[116] Criticizing the way a government agency delivers services almost always requires commenting on the performance of public employees. For this reason, restraints on using names, directing comments at particular members of an elected body, or criticizing employees' performance should never pass constitutional muster.

Defamation law recognizes that—especially when it comes to high-ranking officials—criticism of government employees occupies a uniquely protected status. The burden for a "public official" (such as a county commissioner or school superintendent) to win a defamation suit is purposefully high, recognizing the need for citizens to feel confident they can safely voice dissatisfaction with government services or dissent from government priorities.[117]

The argument that criticism of employees must be forbidden to prevent defamation fails on two legal grounds. First, not all critical speech is defamatory. Defamation requires proof of a false statement of fact.[118] Accurately describing wrongdoing by a school employee is a non-defamatory act of constitutionally protected speech.[119] Second, a

114. *Gold*, 251 F. Supp. 3d at 137.

115. *Id.* at 134–35.

116. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 79 (1989) ("The reason why States are 'bodies politic and corporate' is simple: just as a corporation is an entity that can act only through its agents, '[t]he State is a political corporate body, can act only through agents, and can command only by laws.'").

117. *See* N.Y. Times Co. v. Sullivan, 372 U.S. 254, 279–80 (1964) (holding that the First Amendment requires proof of actual malice before a publisher may be held responsible for purportedly false statements leveled against an elected public official).

118. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775–76 (1986).

119. In fact, at least one court has held that testimony at a public meeting about the conduct of a school employee is privileged on the grounds of conveying information to a government agency about a matter of public concern. Nodar v. Balbreath, 462 So. 2d 803 (Fla. 1984).

restraint on referring to identifiable individuals fails the constitutional test of "overbreadth," since it restrains far more speech than is necessary to accomplish its objective.[120]

B. Enforcing Decorum and Civility

Restrictions on commenters are somewhat more easily defensible if justified by reference to the government's interest in running a decorous meeting. Courts have at times found that "order" is a sufficiently substantial governmental interest to justify removing speakers who express themselves in harsh or confrontational ways.[121] "Decorum," however, is an expansive and elastic concept that can be abused. When government bodies appear to be insulating their own members against criticism rather than policing disorder, courts readily strike down speech-restrictive policies.[122]

Judges sometimes have difficulty assessing whether "decorum"-motivated restrictions are content-based (because they involve the speaker's choice of words) or content-neutral (because they might be triggered by an especially boisterous manner or tone). Regulations that clearly seem targeted to the substance of a speaker's message are, at times, mistakenly deemed to be "content neutral."

For example, a federal judge decided that a City of Topeka regulation prohibiting "personal, rude or slanderous remarks" at city council meetings was a constitutionally valid, content-neutral regulation.[123] But the rule should have been analyzed as content-based, because it targeted the speakers' choice of words rather than their

120. *See* United States v. Stevens, 559 U.S 460, 473 (2010) (holding that a restriction on speech may be struck down "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (internal quotation marks omitted) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

121. *See, e.g.*, Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 760 (5th Cir. 2010) (finding that avoidance of "naming or shaming" teachers was a legitimate governmental interest justifying a prohibition on speakers using the public-comment period to discuss grievances against school employees); Charnley v. Town of South Palm Beach, No. 13-81203-Civ-Rosenberg/Hopkins, 2015 WL 12999749, at *7–8 (S.D. Fla. Mar. 23, 2015) (finding that "disparaging personal remarks" were unprotected speech in the limited public forum of a town council meeting, and citing other "decorum" cases in which "truculent" behavior, including repeatedly interrupting the chair, have been treated as grounds for silencing speakers).

122. *See, e.g.*, Griffin v. Bryant, 30 F. Supp. 3d 1139, 1171–72 (D.N.M. 2014) (finding that proscription against "any negative mention" of members of the city council or their employees at municipal meeting was viewpoint discriminatory and failed the test of strict scrutiny).

123. Scroggins v. City of Topeka, 2 F. Supp. 2d 1362, 1372 (D. Kan. 1998).

method of delivery. Had the judge analyzed the rule properly, it would have been declared unconstitutional because of its excessive breadth. "Rude" and "personal" are not terms with any accepted legal definition, and any potential speaker would be unable to anticipate what speech is and is not permitted, which is a red flag of unconstitutionality.[124]

Enforcing decorum by muting a citizen commenter risks giving effect to the disfavored "heckler's veto."[125] Where the government's rationale is that a speaker's opprobrious remarks might incite others to misbehave, the constitutionally sounder response is to enforce rules against the audience's nonspeech misbehavior.

In the name of civility, board policies commonly prohibit "personal attacks" (or some variation of that formulation) during the comment period. Where "attack" is construed to mean "criticism," especially if the restriction extends to public officials such as school superintendents or board members, the restriction is vulnerable to challenge. As addressed below, courts are split as to whether a prohibition on "personal attacks" is disfavored as a restraint on content or viewpoint, or if it should be viewed as a content-neutral restraint on the speaker's "manner" of delivery.

1. "Personal Attack" Policies Struck Down

Policies against "personal attacks" do not typically survive constitutional scrutiny, but there is no clear consensus about how to analyze such policies. Typically, courts have deemed "attacks" to be a viewpoint- or content-discriminatory term that connotes an intent to suppress only disapproval but not approval.[126]

For example, the Tenth Circuit ruled in favor of a former county commissioner who claimed his First Amendment rights were violated when he was excluded from addressing the commission because he submitted a form indicating that he intended to talk about the recently appointed county manager.[127] The speaker, Gregorio Mesa, had been

124. *See* Grayned v. City of Rockford, 408 U.S 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

125. *See* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.").

126. *See, e.g.*, MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ., No. 12-1137 MCA/KBM, 2015 WL 13659218, at *5 (D.N.M. Apr. 6, 2015) (finding that "personal attacks" policy is viewpoint-based because it restricts only critical speech about government officials, including elected board members).

127. Mesa v. White, 197 F.3d 1041, 1047–48 (10th Cir. 1999).

part of a narrow majority that voted to fire the county manager, but after a new election cycle changed the makeup of the commission, the fired manager was reinstated. Because Mesa's antipathy for the manager was well known, the court found it reasonable to infer that the commission assumed his remarks would be critical.[128] Hence, his exclusion was content-based.[129]

A California federal district court struck down a school-district bylaw prohibiting "improper conduct or remarks" by public presenters, finding it content-based and inadequately tailored to protect the public's ability to debate the fitness of school leaders.[130] The district defined "improper remarks" as "complaints against an individual employee." A speaker who twice was silenced while trying to raise questions about the qualifications of the district school superintendent sued to invalidate the bylaw, and a judge found the restrictions unconstitutional:

> [d]ebate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment . . . Central to these principles is the ability to question and challenge the fitness of the administrative leader of a school district, especially in a forum created specifically to foster discussion about a community's school system.[131]

Similarly, a federal district court in New Jersey viewed a school board's prohibition on "personally directed" comments to be impermissibly content-discriminatory and insufficiently tailored to serve the purposes of the forum.[132] And a federal district court in Pennsylvania found that an offended "sense of propriety" was an unlawfully viewpoint-based reason for suppressing a speaker who mentioned the names of a present and former councilmember during remarks at a zoning hearing.[133]

Not all analyses, however, find content or viewpoint discrimination in a ban on "personal attacks." In Virginia, the state's attorney general issued an interpretation instructing the Franklin City School Board to stop enforcing a regulation banning "personal attacks against

128. *Id.*

129. *Id.* at 1048.

130. Leventhal v. Vista Unified Sch. Dist., 973 F. Supp. 951, 953, 957 (S.D. Cal. 1997).

131. *Id.* at 958 (citations omitted).

132. Moore v. Asbury Park Bd. of Educ., No. 05-2971, 2005 WL 2033687, at *9–10 (D.N.J. Aug. 23, 2005).

133. Zapach v. Dismuke, 134 F. Supp. 2d 682, 693 (E.D. Pa. 2001).

employees" and comments that "identify specific individuals" during the public portions of meetings.[134] Attorney General Mark Herring concluded that the rule was not based on content, because it prohibited all mentions of identifiable people (students as well as employees) and did not differentiate based on the speaker's message.[135] Nevertheless, even a content-neutral regulation can be struck down as invalid if it is unreasonably broad or vague—and the Franklin school board's flunked the test.

Regarding the school board comment period as a "limited public forum" for the expression of public views, Herring wrote that the school board could not bar speakers from raising "personnel issues or identifying individual school employees or officials during public session."[136] The school board's lawyers argued that speakers could request to air personnel grievances in a closed-door session, but Herring noted that there is no assurance the request will be granted: "I conclude that allowing discussion of individual school employees only during closed session does not meet the constitutional standard of 'leaving open ample channels of communication.'"[137]

Without deciding whether the policy was content- or viewpoint-based, a federal court struck down the Virginia Beach school board's policy prohibiting "personal attacks," calling it an unconstitutional prior restraint.[138] The school district defended the restriction by insisting it applied only to "personal" remarks (such as "the principal is a liar") and not to complaints about professional conduct (such as "the principal lied about spending the money").[139] But the court found that the regulation would inhibit speakers from voicing opinions about school officials because the average person would not make such a distinction and would assume that any criticism mentioning an employee's name was forbidden, essentially applying a vagueness-based analysis rather than a strict, forum-based analysis.[140]

A federal district court in California ordered a school board not to enforce a regulation prohibiting "charges or complaints against any

134. Mark R. Herring, Att'y Gen. of Va., Opinion Letter on the rules of the Franklin City School Board restricting the speech of speakers at public meetings to the Hon. Richard L. (Rick) Morris, Va. House of Delegates Member (Apr. 15, 2016), http://ag.virginia.gov/files/Opinions/2016/15-020_Morris.pdf [https://perma.cc/Y52B-RBPT].

135. *Id.* at 2.

136. *Id.* at 3.

137. *Id.*

138. Bach v. Sch. Bd. of Va. Beach, 139 F. Supp. 2d 738 (E.D. Va. 2001).

139. *Id.* at 742–43.

140. *Id.* at 743.

employee of the District" during board meetings.[141] The plaintiff, who was silenced and ultimately removed from the room by sheriffs' deputies when addressing the board about why grievances against a principal and superintendent went unaddressed, argued that the rule violated her free-speech rights.[142] The judge agreed, in a ruling that was primarily based on the California state constitution's strong free-speech protections rather than on federal law.[143] The judge found that protecting employees against speech stigmatizing them or invading their privacy was not a compelling government interest overriding the public's right to be heard.[144] (The judge also noted that the policy was not well-tailored to its purpose; for instance, a speaker could reveal intimate personal information about an employee without violating the policy, as long as the disclosure was not a "charge" or a "complaint.")[145]

2. "Personal Attack" Policies Upheld

While most courts disfavor policies against "personal attack" speech as content- or viewpoint-based, a handful of courts have found the restrictions constitutional.

For example, the Fourth Circuit rejected a facial challenge to a county policy forbidding "personal attacks" by commenters at public meetings.[146] The plaintiff, who opposed a pending rezoning proposal, was cut off when he began criticizing how members of the commission behaved during the hearing.[147] The interruption escalated into a shouting match that ended with the commenter, Robert Steinburg, being led out in handcuffs.[148] The Fourth Circuit upheld the policy against "personal attacks" as a content-neutral restriction on the manner of speech:

> Because of government's substantial interest in having such meetings conducted with relative orderliness and fairness to all, officials presiding over such meetings must have discretion, under

141. Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719, 725, 738 (C.D. Cal. 1996).

142. *Id.* at 726–27.

143. *Id.* at 727–28, 731–32.

144. *Id.* at 732–33.

145. *Id.*

146. Steinburg v. Chesterfield Cty. Planning Comm'n, 527 F.3d 377 (4th Cir. 2008).

147. *See id.* at 382 (quoting plaintiff's comments: "What you are talking about, I have no idea. Mr. Gecker, you in particular, leaning over and saying this, that, and the other thing, but I can tell you from a perception standpoint from someone who is concerned, like myself and the others in this room, it's not very flattering.").

148. *Id.* at 383.

> the 'reasonable time, place and manner' constitutional principle, to set subject matter agendas, and to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner.[149]

In a 2010 case, a federal appeals court refused to strike down a Texas school district's restrictions that forbade speakers from using the microphone to air complaints about specific district employees.[150] A three-judge panel of the Fifth Circuit analyzed the restriction as an extension of the school district's complaint-resolution process.[151] Because the district had a complaint mechanism requiring grievances to first be presented to a lower-level district employee before the board would hear them, the judges regarded the restriction on speech as a legitimate method of enforcing compliance with the complaint procedure.[152]

The ruling is fairly narrow and it can be interpreted as applying only to speech that involves disputes with employees that are subject to a formal grievance procedure. That is different from saying that a board could constitutionally prohibit the mention of any names, a much broader restriction.

C. Relevancy and Repetition

Some bodies provide a true "open mic" complaint opportunity at which speakers may address any topic, but there is no constitutional imperative to do so. The Supreme Court has said that the Constitution affords no guarantee for the public to be heard at government meetings.[153] More commonly, the public-comment period is limited to matters currently before the board for consideration—or at least within the body's jurisdiction, whether imminently pending or not.[154]

When government bodies restrict public speakers on the grounds of efficiency, courts generally defer to those judgment calls. It is widely

149. *Id.* at 385 (quoting Collinson v. Gott, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring)).

150. Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 747–48 (5th Cir. 2010).

151. *Id.* at 751, 760.

152. *Id.* at 760–61.

153. Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 285 (1984) ("However wise or practicable various levels of public participation in various kinds of policy decision may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation.").

154. *See id.* at 284.

accepted that a government body can restrict speech addressing issues beyond either the scope of the body's jurisdiction or even the scope of the agenda of imminently pending issues.[155] The Supreme Court appeared to countenance relevance-based standards in its pre-forum opinion in *WERC*, in the context of a claim that a speaker was selectively excluded on the basis of union affiliation: "Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business."[156] Courts commonly uphold the authority of government bodies to remove speakers on the grounds of unduly repetitious or irrelevant testimony.[157]

For example, a Florida mayor was found to have authority to eject a speaker who refused repeated requests from the chairman to limit his comments to the item on the agenda and responded with belligerent remarks interpreted as threatening.[158] The decision relied in part on deferring to the split-second judgments that a presiding officer must make "without the benefit of leisure reflection" in assessing whether a speaker will eventually get back on topic.[159] The U.S. Court of Appeals for the Sixth Circuit found no First Amendment violation when the parents of high school football players were denied a repeat opportunity to air grievances about purported mistreatment by the head coach.[160] Since the parents had been fully heard once, the desire to avoid wasting time with repetitious testimony qualified, in the court's view, as a content-neutral regulation of time, place and manner.[161]

Finally, a New Mexico court upheld a school board's prohibition on raising "personnel issues" during the public-comment period on relevance grounds.[162] Because the board had minimal authority over

155. *See, e.g.*, Eichenlaub v. Twp. of Ind., 385 F.3d 274, 281 (3d Cir. 2004) ("[M]atters presented at a citizen's forum may be limited to issues germane to town government."); Breslin v. Dickinson Twp., No. 1:09-CV-1396, 2012 WL 7177278, at *14 (M.D. Pa. March 23, 2012).

156. City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 176 n.8 (1976).

157. White v. City of Norwalk, 900 F.2d 1421, 1425–26 (9th Cir. 1990) (recognizing moderator's role to limit "unduly repetitious or largely irrelevant" comments).

158. Jones v. Heyman, 888 F.2d 1328, 1334 (11th Cir. 1989). The government's case for enforcing relevance standards was bolstered by the availability of a catch-all comment period at the end of each meeting, of which the speaker in *Jones* failed to take advantage of. *Id.*

159. *Id.*

160. Lowery v. Jefferson Cty. Bd. of Educ., 586 F.3d 427, 427 (6th Cir. 2009).

161. *Id.* at 433–34.

162. MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ., No. 12-1137 MCA/KBM, 2015 WL 13659218, at *3–4 (D.N.M. Apr. 6, 2015).

personnel matters except for hiring and firing the superintendent, the court found that the board could forbid discussion of personnel matters—except for commenting on the superintendent's performance—in the name of maintaining decorum and order.[163]

D. Policing Disruptive Behavior

When the speaker's behavior disrupts good order or imminently threatens to do so, the government's interest is at its highest and the speaker's is at its lowest. Regulations on the content of speech are more defensible when they are paired with some showing of disruptive conduct or effect. For instance, profanity cannot be categorically outlawed unless there is a showing that the speech was delivered in a disruptive or threatening way.[164]

A government body may remove a speaker who causes a disturbance—shouting or refusing to leave after the expiration of a time limit—without violating the First Amendment.[165] In a 1966 case, New Jersey's Supreme Court upheld the constitutionality of applying a "disorderly persons" statute to a citizen activist who made "distract[ing]" remarks from the audience, threatened to escalate those remarks, and resisted removal by locking arms with another person.[166] The line of reasoning that speakers may be removed for disruptive behavior apart from their message is rooted in the Supreme Court's *O'Brien* standard, which recognizes that speech may be "incidental[ly]" burdened by regulations aimed at nonspeech conduct, so long as the restriction furthers an important government interest and is narrowly tailored to serve that interest.[167]

IV. THE VOID FOR VAGUENESS DOCTRINE AND LICENSING REGIMES ON SPEECH

A government regulation affecting speech is unconstitutional if, as the U.S. Supreme Court observed in 2007, "it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory

163. *Id.* at *4.

164. *See* Leonard v. Robinson, 477 F.3d 347, 359 (3d Cir. 2007).

165. Kirkland v. Luken, 536 F. Supp. 2d 857, 881 (S.D. Ohio 2008); *see also* White v. City of Norwalk, 900 F.2d 1421, 1424 (9th Cir. 1990) (upholding an ordinance that prohibited speech during council meetings that "*disrupts, disturbs or otherwise impedes* the orderly conduct of the Council meeting").

166. State v. Smith, 218 A.2d 147, 148–49, 153 (N.J. 1966).

167. United States v. O'Brien, 391 U.S. 367, 376–78 (1968).

enforcement."[168] More simply put, a law is "void for vagueness if its prohibitions are not clearly defined."[169]

The void for vagueness doctrine flows from the Fifth Amendment's due process clause.[170] In applying the doctrine, the Supreme Court "consider[s] whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'"[171] Thus, as the nation's high court noted in 2010, "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others."[172]

Additionally, courts may give a narrowing construction to otherwise vague terms to save a statute.[173] That's because "[t]he Supreme Court has noted that it is a 'cardinal principle' of statutory interpretation that a federal court must accept any plausible interpretation such that a state statute need not be invalidated."[174]

Vague laws are problematic for several reasons. First, they can lead to self-censorship. As the U.S. Supreme Court observed in striking down portions of the Communications Decency Act of 1996, "[t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."[175] In other words, a vague

168. United States v. Williams, 553 U.S. 285, 304 (2007).

169. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

170. *Williams*, 553 U.S. at 304 ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.").

171. Holder v. Humanitarian Law Project, 561 U.S. 1, 18–19 (2010) (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)).

172. *Id.* at 20.

173. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1340 (2018) ("Judges almost always address issues of vagueness by giving the statute a narrowing construction, rather than invalidating it.").

174. Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 Utah L. Rev. 381, 381; *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").

175. Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

law may deter speech.[176] As Professor Frederick Schauer explained it, "[a] chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."[177] A chilling effect is constitutionally significant because, as Professor Leslie Kendrick noted, "protected expression is a particularly valuable activity toward which legal rules must show special solicitude."[178]

Second, vague laws are troubling because of "[t]he specter of arbitrary enforcement."[179] This danger exists because "[a] vague law allows the government to take advantage of the law's vague terms to discriminate in a manner not easily detected."[180] When a vague law provides the government with "unfettered discretion,"[181] unequal enforcement may occur. As the Supreme Court has written, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[182]

All of this is exceedingly important because any policy imposed on citizen commenters at government meetings is ripe for review under a vagueness challenge, particularly when open-ended terms like "personal attack" and "irrelevant" are littered throughout them. Elected officials can abuse definitional ambiguity to quash political speech at public meetings simply because they dislike the viewpoint expressed.

If the public-comment mechanism operates as a "prior restraint" on speech—that is, if a government decision-maker may deny a speaker the ability to be heard at all through a prior screening process[183]—then that permitting process is unconstitutional unless it meaningfully

176. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 689 (1978) ("The very essence of a chilling effect is an act of deterrence.").

177. *Id.* at 693.

178. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1650 (2013).

179. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 286 (2003).

180. David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1359 (2005).

181. Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1143 (2016).

182. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

183. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (defining a prior restraint as a policy or practice that gives "public officials the power to deny use of a forum in advance of actual expression").

constrains the government's ability to play favorites.[184] Licensing requirements on speech must include "narrow, objective, and definite standards" to guide the decision-maker and to give the speaker fair notice of what is prohibited.[185] Without such standards, a licensing regimen "raises the specter of content and viewpoint censorship."[186] Licensing systems regularly are struck down as unconstitutional if they confer "unbridled discretion" on the permitting authority, as the Supreme Court did in invalidating a Georgia permitting ordinance that enabled the county administrator to impose (or waive) fees to use public property for demonstrations based on a wholly subjective assessment of the event:

> The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable.[187]

Applying the Supreme Court's "unbridled discretion" cases, the U.S. Court of Appeals for the Eleventh Circuit enjoined a Georgia school district from enforcing a multi-step permitting system that required members of the public to first bring their complaints to a face-to-face meeting with the superintendent before being allowed to address the school board.[188] The court found that the policy constituted an unlawful prior restraint because it gave the superintendent complete discretion to decide whether to schedule a meeting with a complainant, which could indefinitely delay the complaint from reaching the board.[189]

184. *See, e.g.*, Bach v. Sch. Bd. of Va. Beach, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (evaluating restrictions against criticism of school officials as a form of prior restraint).

185. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969).

186. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988).

187. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992).

188. Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1214, 1230 (11th Cir. 2017).

189. *Id.* at 1229. *But see* Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747 (5th Cir. 2010). There, the Fifth Circuit summarily rejected comparisons between a licensing system that requires neutral and objective criteria versus a screening system for commenters at a school board, stating that "presenting does not require a license." *Id.* at 762 n.56.

V. A CASE STUDY: MIAMI-DADE COUNTY, FLORIDA

Restrictions on speech by concerned citizens have become an issue in Florida's Miami-Dade school system, one of the nation's largest.[190] The way the Miami-Dade School Board tries to constrain irrelevant or abusive speech is, in many ways, typical of local government efforts. As with many school districts, Miami-Dade bases its policies on a template provided by a commercial vendor of school handbooks, NEOLA. Formerly doing business as North East Ohio Learning Associates, NEOLA now claims a nationwide clientele of more than 1,500 school districts across six states.[191] It hosts the Miami-Dade school district's policies directly on its Neola.com website,[192] along with those of many other districts.

Miami-Dade school board policies[193] restrict public comment in the following ways noteworthy for First Amendment purposes:

1. Citizen's [sic] remarks should be directed to the presiding officer or the Board as a whole and not to individual Board members. Speakers may not address Board members by name and personal attacks against individual Board members, the Board as a whole, the Superintendent, or District staff are prohibited.
2. Speakers commenting on agenda items shall confine their comments solely to the agenda item being discussed. During the public hearing, speakers must limit their remarks to matters related to the business of the District. Unless it is an agenda item, speakers are prohibited from discussing their own pending court cases and filed claims or complaints against the District or District personnel. Similarly, employees are prohibited from discussing any disciplinary matter that affects them individually unless it is an agenda item.
3. Speakers may not use any form of profanity or loud abusive comments.
4. Any action or noise that causes or creates an imminent threat of a disturbance or disruption, including but not limited to, clapping, applauding, heckling, shouting comments from the audience, or verbal outbursts in support or opposition to a speaker or his/her remarks is prohibited. No signs or placards

190. Gerety, *supra* note 105 (stating that members of the school board often interrupt complaining members of the public).

191. *Mission and History*, NEOLA, http://www.neola.com/about/mission-history/ [https://perma.cc/GG8H-SS5J] (last visited Sept. 21, 2018).

192. *See* SCH. BD. OF MIAMI-DADE CTY., BYLAWS & POLICIES (2011), http://www.neola.com/miamidade-fl/ [https://perma.cc/4ETN-PGUX].

193. *See* SCH. BD. OF MIAMI-DADE CTY., BYLAWS & POLICIES § 0169.1 (2017), http://www.neola.com/miamidade-fl/ [https://perma.cc/4ETN-PGUX].

shall be allowed in the Board meeting. Persons exiting the Board meeting shall do so quietly.

5. The Chair may notify and warn speakers that their comments have gone beyond the subject matter for which they had signed up to address, address matters that are not related to the business of the School District, constitute personal attacks on individuals or otherwise violate this policy.
6. The Chair may turn off the microphone or recess the meeting if a speaker persists in addressing irrelevant topics or engaging in personal attacks. The Chair has the authority after one warning to order the removal of the speaker from the meetings.

   Following a warning, any person making impertinent or slanderous remarks or engages in boisterous behavior which the Chair or the Board determines constitutes an actual or an imminent threat of a disturbance or disruption shall be barred from further appearance before the Board for the balance of the meeting.[194]

Based on prevailing First Amendment caselaw, the Miami-Dade policy is vulnerable to constitutional challenge on several grounds. Most notably, the policy goes further than simply prohibiting criticism of school employees and even prohibits directing comments at individual school board members by name. While it is arguably unfair for a speaker to have a platform to berate a low-level employee who is not present at the meeting to defend herself, the school board members are present and have microphones of their own. Any policy that insulates elected officials from criticism is doubtfully constitutional. As a reporter monitoring Miami-Dade school board meetings observed, policies against "mentioning" names invites abuse, since a speaker almost never will be silenced for commending an employee—indeed, reporter Rowan Moore Gerety witnessed several instances of speakers thanking people by name (including school board members) without interruption.[195]

If the concern is to prevent what are commonly referred to as "personal attacks," narrower and more constitutionally sound alternatives exist. Because it is permissible for a government body to limit irrelevant speech, a firmly enforced relevancy standard should deal with legitimately proscribable speech. Remarks that are purely "personal"—for example, airing an allegedly adulterous relationship involving a low-ranking city appointee[196]—can be ruled out of order on relevance grounds. But to be constitutional, the relevance standard must apply even-handedly, so that congratulating that same city

194. *Id.* at § 0169.1(G)(1)–(6).

195. *See* Gerety, *supra* note 105.

196. *See* Scroggins v. City of Topeka, 2 F. Supp. 2d 1362, 1365 (D. Kan. 1998).

appointee on his wedding anniversary would be equally out-of-order. Dealing with "personal attacks" by way of relevancy would permit a speaker to raise "personal" matters that are also pertinent to public business. For instance, multiple personal bankruptcies or a large unpaid child-support debt might be relevant in discussing whether an applicant was fit to be hired as a county financial administrator, or it might be relevant that the nominee for county school superintendent sends her children to private school.

The policy is also vulnerable because it: (1) categorically bans profanity without regard to whether the profanity is disruptive;[197] (2) appears to prohibit clapping or applauding by audience members;[198] and (3) permits the chair to eject a speaker for "impertinent" remarks.[199] All of these forms of expression have been held to be constitutionally protected. In the view of at least one judicial circuit, a prohibition on "personal, impertinent, slanderous or profane remarks" is constitutional only if understood to apply to conduct disruptive to the meeting and not to words alone.[200]

The Miami-Dade policy, and others like it, should be reexamined in light of the growing body of constitutional caselaw disfavoring policies that invite viewpoint discrimination. In particular, policies motivated primarily by concerns for civility (such as "no-names" policies) do not belong in a mandatory speech code that can be enforced by forcible removal. Because it is unlikely that any elected board will even-handedly enforce a "no-names" policies regardless of the speaker's viewpoint, these policies are overbroad for their intended purpose and are likely to result in viewpoint discrimination. School board members, like all elected officials, must tolerate a certain amount of disagreeable speech as the "cost of doing business." Policies that penalize harmless speech in the name of decorum are ill-advised invitations to litigation.

VI. The Constitutionality of Punishing Citizen Commenters

When a speaker occupying the podium at a public meeting runs afoul of the body's standards, the options for responding are limited. Speakers may: be interrupted and told to conform to the rules; have their time to speak cut short; be physically removed from the meeting; be arrested; and even be banned from attending future meetings. Unsurprisingly, the more serious the consequences for the speech, the more justification the government will have to produce.

197. *See* Bylaws & Policies § 0169.1(G)(3).

198. *Id.* at § 0169.1(G)(4).

199. *Id.* at § 0169.1(G)(6).

200. White v. City of Norwalk, 900 F.2d 1421, 1424 (9th Cir. 1990).

A. Prospective Bans

A prospective ban from future government meetings is, in a First Amendment sense, the most serious penalty an agency can impose because it restricts future speech as well as punishing past speech. Barring a speaker from addressing a government body (or even attending the meetings at all) is functionally a prior restraint, which is presumptively unconstitutional.[201] Courts seldom, if ever, uphold directives forbidding future attendance at government meetings, even where speakers have caused a disturbance on past occasions.

When the chairman of an Illinois school board shut off the microphone in the midst of a citizen activist's speech criticizing school personnel, Komaa Mnyofu responded with a federal lawsuit.[202] Mnyofu alleged that his speech was curtailed because of his unfavorable opinion, an act of unlawful viewpoint discrimination.[203] He challenged the board's decision in U.S. district court as a violation of his First Amendment rights.[204] The district judge agreed that Mnyofu had a constitutionally protected right to use the public-comment period to criticize school employees—in fact, the judge wrote, the right is "clearly established" by decades of federal precedent.[205]

In an unusual maneuver, the school district filed a "preemptive strike" lawsuit attempting to bar Mnyofu from attending board meetings, arguing that his demeanor demonstrated a likelihood of future disruptive behavior.[206] The judge threw out the district's case, finding that a government agency cannot preemptively ban a citizen from speaking at public meetings.[207]

The U.S. Court of Appeals for the Ninth Circuit found that an Arizona state senator violated "clearly established" law in issuing an edict banning those who "interrupt" proceedings from entering the Senate office building for two to four weeks.[208] The senator ordered Capitol police to place an immigrant-rights activist on a no-entry list

201. *See* Neb. Press Assoc. v. Stuart, 427 U.S. 539, 592 (1976); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

202. Mnyofu v. Bd. of Educ. of Rich High Sch. Dist. 227, No. 15 C 8884, 2016 U.S. Dist. LEXIS 45773, at *2 (N.D. Ill. Apr. 5, 2016).

203. *Id.*

204. *Id.* at *1.

205. *Id.* at *6–7.

206. Erin Gallagher, *Federal Judge Bars School District's Effort to Limit Comments*, DAILY SOUTHTOWN (May 16, 2016, 7:32 PM), http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-criticizing-school-officials-st-0517-20160516-story.html. [https://perma.cc/R6HJ-S4W4].

207. *Id.*

208. Reza v. Pearce, 806 F.3d 497, 500–01 (9th Cir. 2015).

after the activist applauded and cheered loudly while seated in the "overflow" room watching a Senate committee hearing telecast from a nearby room. Although the rule, and its application to speaker Salvador Reza, was found to be viewpoint-neutral, it still failed the test of reasonableness because prospectively banning a speaker from a government building without proof of dangerousness interferes with the speaker's right to interact with elected representatives.[209] The rule, both on its face and as applied to Reza, was deemed unreasonable because it failed to leave adequate alternative channels for the speaker to communicate his message.[210]

A federal district judge in Oregon reached a similar conclusion in enjoining enforcement of a city ordinance that allowed the city to indefinitely ban speakers from city council chambers for disrupting council meetings.[211] The challenge was brought by a disability-rights advocate who was banned from City Hall for sixty days after shouting and pounding a table to express his distress when he was denied a chance to address a budget matter because he had briefly left the hearing room when his turn was called.[212] While the judge found that creating a disturbance at a council meeting could justify one-time removal from the room, the burden to justify a prospective exclusion was greater.[213] The court found a sixty-day exclusion unreasonable on the basis of "mere speculation that some persons may make others feel unsafe or engage in additional disruptions."[214] The city's proffered alternatives—that the speaker could watch meetings on television and could make appointments to see council members one on one—did not provide reasonably adequate channels to be heard.[215]

Similarly, a federal district judge in Michigan found a violation of "clearly established" law when the chair of a school board had a dissatisfied parent preemptively banned from attendance at future board meetings and twice directed police to arrest him after he showed up at meetings in defiance of the ban.[216] Furthermore, a federal court in Pennsylvania found that even a speaker's concededly intemperate behavior at a series of school board meetings—swearing, challenging a board member to fight, and struggling with a guard who attempted to

209. *Id.* at 504–05.

210. *Id.*

211. *See generally* Walsh v. Enge, 154 F. Supp. 3d 1113 (D. Or. 2015).

212. *Id.* at 1121–22.

213. *Id.* at 1132.

214. *Id.*

215. *Id.* at 1133.

216. *See generally* Ritchie v. Coldwater Cmty. Sch., 947 F. Supp. 2d 791 (W.D. Mich. 2013).

restrain him—was not enough to justify a lifetime ban from attending future meetings.[217] Although the directive was based on nonspeech conduct, it was not narrowly tailored to further an important government interest and did not leave the speaker with adequate alternative channels to be heard.[218]

Even a single prohibition on appearing before a municipal body can violate the First Amendment if motivated by the content of past speech. The U.S. Court of Appeals for the Seventh Circuit held that a mayor violated the First Amendment by refusing to allow a citizen activist to address the city council unless the activist first apologized for berating a city employee at a public gathering several days earlier.[219]

As these cases make clear, government bodies are constitutionally constrained from imposing retributive penalties that interfere with citizens' ability to communicate with their elected officials, even if there is good reason to suspect that those communications will be hostile.[220] The speculation that people who have acted uncivilly at past meetings will do so at future meetings is simply too attenuated to deprive citizens of their most direct and effective method of being heard on issues of public concern.

B. Arrests

1. The *Lozman* Case Kicks the Constitutional Can Down the Road

Good-government crusader Fane Lozman's second trip to the Supreme Court teed up the issue of when a speaker arrested for refusing to yield the podium at a public meeting may challenge his arrest and seek damages under 42 U.S.C. § 1983.[221]

For a person whose First Amendment rights are infringed by an unconstitutional, local-government practice, the avenues of recourse are limited. Government agencies are generally insulated by well-developed immunity doctrines from paying money damages for constitutional torts,[222] so the prevailing workaround has become suing the individual decision-makers.

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217. *See generally* Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist., 143 F. Supp. 3d 205 (M.D. Pa. 2015).

218. *Id.* at 216.

219. *See* Surita v. Hyde, 665 F.3d 860, 866, 872 (7th Cir. 2011).

220. *See generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (striking down a state's overbroad prohibition on social-media use by convicted sex offenders, in recognition that the ban would interfere with the ability to participate in harmless political, social, and professional discussions that pose no danger to potential victims).

221. *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018).

222. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 63 (1989) (holding that a state agency is not a "person" liable for money damages within the

Lozman appealed to the Supreme Court after his damages claim against the City of Riviera Beach and its then-mayor, Michael Brown, was rejected by a jury in a verdict summarily upheld by the Eleventh Circuit.[223] The appeals court held that the existence of probable cause for a misdemeanor charge of "Disturbing a Lawful Assembly" defeats a claim of retaliatory arrest as a matter of law[224] —even though that was not the charge on which Lozman was actually arrested, which prosecutors ultimately dropped anyway.[225] The Eleventh Circuit relied on its prior ruling in a 2002 case involving an Alabama woman whose retaliatory-arrest claim against a police department was dismissed because officers had probable cause to arrest her for the felony charge of bribing a witness, even though a jury ultimately acquitted her of that charge.[226]

The Supreme Court accepted certiorari and, on an 8-1 vote with only Justice Clarence Thomas dissenting, vacated the Eleventh Circuit's decision and remanded.[227] The Court found that, under the unique set of facts presented in Lozman's case, a retaliatory-arrest plaintiff should get the chance to plead and prove that his arrest was the product of a municipal policy decision motivated by animus over his exercise of constitutionally protected rights, even if genuine probable cause to arrest existed.[228] As the justices observed, the central concern that compelled the Supreme Court to recognize a categorical probable-cause bar to a retaliatory-prosecution claim in *Hartman v. Moore*[229] does not apply when, as in Lozman's case, the claim challenges a decision to arrest.[230]

In *Hartman*, tech-company executive William Moore was indicted on charges of conspiracy and fraud involving an attempt to procure a contract to sell equipment to the U.S. Postal Service.[231] Moore sued the

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meaning of 42 U.S.C. § 1983, which permits recovery of damages from any "person" who infringes constitutional rights acting under color of state law).

223. Lozman v. City of Riviera Beach, 681 F. App'x. 746 (11th Cir. 2017) (per curiam), *vacated*, 138 S. Ct. 1945.

224. *Id.* at 752.

225. *Id.* at 749.

226. *See generally* Dahl v. Holley, 312 F.3d 1228 (11th Cir. 2002) (affirming summary judgment in favor of the Dothan, Alabama and several Dothan Police Department officers).

227. *Lozman*, 138 S. Ct. 1945 (2018).

228. *Id.* at 1955.

229. 547 U.S. 250 (2006).

230. *Lozman*, 138 S. Ct. at 1953–54.

231. *Hartman*, 547 U.S. at 253–54.

federal agents who initiated the prosecution after the trial judge found the charges lacking in factual support and directed a judgment of acquittal.[232] The trial court and circuit court refused to grant the federal agents' motion for summary judgment in Moore's retaliatory-prosecution suit, which landed the case at the Supreme Court.[233]

Moore's attorneys urged the justices to apply the traditional burden-shifting framework recognized for First Amendment retaliation cases in *Mt. Healthy City School District Board of Education v. Doyle*,[234] discussed in greater detail later. But because of the unique concerns when a First Amendment claim challenges a decision to prosecute, the justices declined to apply *Mt. Healthy* and instead imposed a higher initial burden to plead a retaliatory-prosecution case. The *Hartman* Court found that probable cause conclusively forecloses a claim that a law-enforcement agent wrongfully induced a prosecutor to bring criminal charges, in part because of the unique problems of proof in trying to draw a cause-and-effect between the retaliatory animus of the agent and the prosecutor's independent decision to charge.[235] Because prosecutors are immune from damages actions for their decision to bring charges, Justice David Souter wrote, a lawsuit will necessarily be against someone a step removed from the decision to prosecute, which is entitled to a strong presumption of regularity.[236] The *Hartman* Court found that it was fair to assign a plaintiff in a retaliatory-prosecution case the burden of pleading and proving a lack of probable cause because it would ultimately be the plaintiff's burden to demonstrate that retaliation motivated the charging decision and because the existence of probable cause would (as a practical matter) foreclose a finding that the prosecution would not have occurred but-for the invidious motive.[237]

In *Lozman*, the justices distinguished *Hartman* and found that the standard *Mt. Healthy* analysis for First Amendment retaliation cases provided adequate protection in the specific factual setting that Lozman presented.[238] In *Mt. Healthy*, the Court developed a burden-shifting framework for addressing First Amendment retaliation claims within the context of employer-employee relationships.[239] Under this test, plaintiffs initially carry the burden of demonstrating that they were

232. *Id.* at 254–55.

233. *Id.* at 255–56.

234. 429 U.S. 274 (1977).

235. *Hartman*, 547 U.S. at 261–62.

236. *Id.* at 263.

237. *Id.* at 265–66.

238. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1955 (2018).

239. *Mt. Healthy*, 429 U.S. at 287.

exercising a constitutionally protected right and that, in turn, the exercise of this right was a motivating factor for a meaningfully adverse retaliatory action taken by the government.[240] More simply put, plaintiffs must show three elements in a First Amendment retaliation case—speech, causation and injury. In other words, the plaintiffs' exercise of a protected First Amendment right (speech) was a motivating factor (causation) that resulted in harm (injury) suffered at the hands of the government.

Clearing this threshold in the face of a government motion to dismiss is not a simple matter for plaintiffs. Since the Supreme Court heightened the standard for a complaint to withstand a motion to dismiss, Plaintiffs now must plead something greater than just "labels and conclusions" and something "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[241] In fact, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[242] To reach this crucial threshold of plausibility—a level higher than mere conceivability—plaintiffs must set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[243]

If plaintiffs satisfy these steps of the *Mt. Healthy* test, then the burden shifts to the government to show "by a preponderance of the evidence that it would have reached the same decision" against the plaintiffs "even in the absence of the protected conduct."[244] The government is welcome here to raise the issue of probable cause to make an arrest as evidence that it would have arrested an individual regardless of her exercising First Amendment protected rights. But the existence of probable cause here under a *Mt. Healthy* analysis is not outcome determinative or case killing.

In *Lozman*, Justice Kennedy's majority opinion emphasized the unique set of facts justifying application of the more forgiving *Mt. Healthy* standard: Lozman provided evidence of a premeditated municipal policy decision to punish him for constitutionally protected acts of expression and petition that predated his arrest, the policy bore little relation to the putative grounds for his arrest, and his speech was of great constitutional dignity (addressing elected officials on matters of public concern).[245] "On facts like these," Justice Kennedy wrote, "*Mt.*

240. *Id.*

241. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–49 (2007).

242. *Iqbal*, 556 U.S. at 679.

243. *Id.* at 678.

244. *Mt. Healthy*, 429 U.S. at 287.

245. *Lozman*, 138 S. Ct. at 1954–55.

Healthy provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts."[246]

Analysts immediately seized on the somewhat logically circular qualifier—"facts like these"—to question the helpfulness of the Court's guidance. Writing for SCOTUSblog, law professor Heidi Kitrosser observed that the rhetorical shrug of "facts like these" might have been at home in a spoof article about judicial indecision on a satire website: "As for what happens next, our friends at *The Onion* might say, 'It depends.'"[247]

More frustrating still for those seeking categorical guidance, *Lozman* represents the Court's second "punt" on the issue in less than a decade. In a 2012 case involving the arrest of a Bush administration critic who confronted then-Vice President Dick Cheney during a public appearance at a shopping center, the Court declined to decide the underlying issue of the purportedly retaliatory arrest.[248] Rather, the Court simply resolved the case in favor of the defendant Secret Service officers on qualified immunity grounds, finding the law insufficiently clear to put a reasonable law enforcement officer on notice.[249]

The Court's hesitancy to coin a broadly applicable legal standard where a narrow one would dispose of the case is consistent with Chief Justice John Roberts' adherence to the "avoidance" doctrine.[250] That adherence was present throughout the Court's 2018 term, as seen in the Court's standing-based dismissal of a much-awaited (and as yet unresolved on the merits) case involving partisan-based gerrymandering in the Wisconsin legislature.[251]

2. The *Nieves* Case: Avoiding Avoidance

In its 2018 term, the Court has an opportunity to decide whether, outside the scenario presented in *Lozman*, the existence of probable cause normally will deprive a plaintiff of the opportunity to argue that

246. *Id.* at 1955.

247. Heidi Kitrosser, *Opinion Analysis: With Facts Like These . . .*, SCOTUSBLOG (June 19, 2018, 10:38 AM), http://www.scotusblog.com/2018/06/opinion-analysis-with-facts-like-these/ [https://perma.cc/7RNW-MXFQ].

248. Reichle v. Howards, 566 U.S. 658, 663 (2012).

249. *Id.* at 664, 670.

250. *See generally* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943 (2016) (reviewing the role of avoidance in First Amendment free speech cases under the leadership of Chief Justice Roberts).

251. Gill v. Whitford, 138 S. Ct. 1916 (2018).

his arrest was retaliatory. The case, *Nieves v. Bartlett*,[252] involves a partygoer arrested during a dispute with Alaska State Patrol officers in which he interjected his opinion as the officers were questioning an underage-drinking suspect.[253]

If Fane Lozman's case presented uniquely sympathetic facts in the speaker's favor—speech directed to elected officials on matters of public concern and a documented history of longstanding animus against the speaker—the *Nieves* case offers its mirror image. The "expression" that the plaintiff claims as the provocation for the retaliation was his refusal to talk to the officer.[254] The decision-maker was not a body of elected officials but a rank-and-file police officer. And the setting was not the staid confines of a commission meeting room, but a campsite party where alcohol was being consumed.[255] In sum, *Nieves* involves the on-the-spot decision of a police officer with no history of animus toward the speaker to make an arrest in a potentially volatile setting where safety was a concern—the scenario in which judges will be most inclined to defer to the officer's judgment call.[256] The case comes to the Court from the Ninth Circuit's reversal of partial summary judgment to two defendant officers, relying on Ninth Circuit precedent that the existence of probable cause for arrest does not automatically divest a plaintiff of a First Amendment retaliation claim.[257]

That Fane Lozman's and Russell Bartlett's dissimilar cases present the same constitutional issue demonstrates the need for a flexible standard to assess speakers' retaliation claims. The *Mt. Healthy* analytic framework supplies that standard. *Mt. Healthy* appropriately balances the interests in retaliatory arrest cases. It initially imposes burdens on

252. Bartlett v. Nieves, 712 F. App'x. 613 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 2709 (2018).

253. *Id.* at 615.

254. Bartlett v. Nieves, No. 4:15-cv-00004-SLG, 2016 WL 3702952, at *11 (D. Alaska July 7, 2016), *aff'd in part and rev'd in part*, 712 F. App'x 613, *cert. granted*, 138 S. Ct. 2709.

255. *See id.* at *1.

256. *See* Reichle v. Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge.").

257. *Bartlett*, 712 F. App'x. at 616 (citing Ford v. City of Yakima, 706 F.3d 1188, 1195–96 (9th Cir. 2013)).

the plaintiff.[258] Only if the plaintiff satisfies those hurdles does the burden eventually shift to the government.[259]

The *Mt. Healthy* framework substantially tracks the formula deployed by most state statutes designed to counteract the chilling effect of strategic lawsuits against public participation ("SLAPPs"). At bottom, a retaliatory arrest based on the exercise of the First Amendment rights of free speech or petition is tantamount to a criminal, rather than civil, SLAPP suit. Its purpose is to squelch criticism on issues of public concern. With a SLAPP suit, "[c]itizen-activists lose because they become disenfranchised from the democratic process by lawsuits."[260] Indeed, just as the endgame of a SLAPP is to stifle First Amendment rights, in a "claim for retaliatory arrest, the injury occurs not because of the arrest itself, but by the suppression of a constitutionally guaranteed right through means of an arrest."[261]

For instance, California's anti-SLAPP statute allows the victim of a SLAPP to make a speedy motion to strike a complaint if, initially, the victim can demonstrate that she was exercising the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."[262] If the target of a SLAPP satisfies this hurdle, then the burden shifts to the plaintiff—the SLAPPer, as it were—to establish "there is a probability" that it will prevail on the underlying claim.[263] This burden shifting is consistent with that embraced in the *Mt. Healthy* test for retaliatory First Amendment claims.

Imposing any greater burden on plaintiffs is counterintuitive where the defendant is a government agency accused of suppressing citizen speech addressing a matter of public concern, which is subject to rigorous judicial review.[264] To impose the hurdle of probable cause as an insurmountable burden for Section 1983 plaintiffs contradicts the intensive, searching scrutiny to which exclusions from a public forum should rightly be subjected.

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258. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

259. *Id.*

260. ROBERT D. RICHARDS, FREEDOM'S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT 26 (1998).

261. Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENVER U. L. REV. 499, 514 (2012).

262. CAL. CIV. PROC. CODE § 425.16(b)(1) (2018).

263. *Id.*

264. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

In rejecting Lozman's claim, the Eleventh Circuit relied on case law developed in the context of damages claims directly against the arresting officers or their law-enforcement agencies.[265] Courts understandably hesitate to second guess the arrest or don't-arrest decisions made by rank-and-file law-enforcement personnel at the scene of a volatile situation, which is part of the rationale for recognizing the immunity bar. But where the challenge is brought against an elected official who is both in the chain of command of law enforcement and also is the complainant who initiates the arrest, different equities apply. The inability to tailor the analysis to a situation, such as Lozman's, illustrates why the categorical probable-cause bar rejected by the *Lozman* Court was an invitation to injustice.

Because the *Mt. Healthy* burden-shifting formulation enables a defendant to obtain summary judgment by showing that the same arrest decision would have been made even absent a retaliatory motive, the framework provides a sufficient safety valve to insulate police against unfounded claims. If the grounds for arrest are overwhelmingly obvious, the defendant will obtain summary dismissal and will qualify under 42 U.S.C. § 1988 for an award of attorney fees if the claim is deemed "frivolous, unreasonable, or without foundation."[266]

In a recent gloss on anti-retaliation law, *Heffernan v. City of Paterson*,[267] the Supreme Court held that a government employer could be liable for unlawful retaliation even where there is no act of legally protected expression, if the victim was punished for what the decision-maker mistakenly believed he said.[268] That the victim did not intend to convey a message at all—in that case, carrying a political yard sign merely as an errand for a family member—was beside the point, Justice Stephen Breyer wrote for the *Heffernan* majority.[269] What mattered was that the government acted with a wrongfully speech-punitive motivation, and that if word got around the workplace that the agency had a practice of firing employees who engaged in protected political speech, it would chill other speakers.[270]

The same logic applies to the arrested public commenter as well: when a government decision-maker acts with the purpose of preventing or punishing constitutionally protected speech, and that action causes the speaker harm, all the elements of a retaliation claim are satisfied,

265. *See* Lozman v. City of Riviera Beach, 681 F. App'x. 746, 750–51 (11th Cir. 2017) (citing Rankin v. Evans, 133 F.3d 1425, 1435 (11th Cir. 1998) and Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002)).

266. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

267. 136 S. Ct. 1412 (2016).

268. *See id.*

269. *Id.* at 1418.

270. *Id.* at 1419.

regardless of the form the retaliation takes. Indeed, it has been said that even an act of retaliation as immaterial as canceling a public employee's birthday party might qualify as unlawfully retaliatory if intended to send a speech-suppressive message.[271] Given that seemingly trivial slights can be actionable acts of retaliation, it strains credulity that ordering the arrest of the speaker could be the only government response to speech impervious to legal review.

Damages actions under Section 1983 carry self-evident deterrent value. Because an elected body will, in all likelihood, have completed whatever decision was ongoing at the time a speaker lost the ability to be heard, and the courts will not compel a "do-over" of a completed decision, after-the-fact recompense may be the only remedy left for a speaker wrongfully excluded from a government forum.

Conclusion

Locally elected officials regularly trespass into constitutionally protected territory in the name of maintaining decorum and civility at government meetings. Policies that forbid mentioning proper names or otherwise impermissibly restrict speech are common. These policies reflect an inadequate appreciation for the fractious messiness of participatory democracy. As the Supreme Court memorably opined in striking down restrictions on political speech in public schools:

> undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[272]

The most troubling situations are those like Fane Lozman's—ones in which a commenter's refusal to refrain from irrelevant remarks escalates into a confrontation on the grounds of defiance of the chair's instructions. "Irrelevance" alone should never be grounds for an

271. Rutan v. Republican Party of Ill., 497 U.S. 62, 75 n.8 (1990) (quoting Rutan v. Republican Party of Ill., 868 F.2d 944, 954 n.4 (7th Cir. 1989)).

272. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

arrest,[273] so it is difficult to see how even a full three minutes of refusing to refrain from irrelevancy could be a criminally punishable disturbance. Irrelevant speech is not constitutionally unprotected, and a speaker's failure to conform to the chair's relevancy standards, without more (such as shouting or other defiant behavior) should never be sufficient to sustain a criminal conviction. Given the apparent confusion over how heavily citizen commenters may be restricted, clear guidance from the Supreme Court in *Bartlett* or a future case about the level of protection afforded to speech at local-government meetings is badly needed.

As a practical matter, managing the use of open-mic periods is often as simple as developing a thicker skin and strictly enforcing adherence to content-neutral time limits. *Lozman* illustrates how an unwillingness to tolerate disagreeable but harmless speech can itself disrupt a public meeting far more than the speech itself could have. When Fane Lozman was silenced by the chair of the city council, he was describing corruption charges brought against a former commissioner for the county that encompasses Riviera Beach.[274] The comments were questionably relevant to any issue before the city council or within the city council's jurisdiction, but if Lozman was preparing to connect his story to the matter before the council, he was not given that chance. Had the council simply "tuned out" the irrelevancies and allowed Lozman's time to expire without incident, a dozen years of federal litigation could have been averted and, in turn, countless taxpayer dollars saved. Ultimately, even if courts develop a coherent consensus regarding when citizens can permissibly be stifled at government meetings, the onus rests squarely on government officials to heed those rules and, in the process, to recognize the importance of the First Amendment rights of both free speech and petition in a self-governing democracy.

273. *See* White v. City of Norwalk, 900 F.2d 1421, 1424 (9th Cir. 1990) (recognizing that "impertinent" speech may be regarded as unprotected only if accompanied by disruptive conduct).

274. *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1949 (2018) ("He began to discuss the recent arrest of a former county official. Councilmember Wade interrupted Lozman, directing him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach.").