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REGULATIONS AFFECTING THE EXERCISE OF FIRST AMENDMENT ACTIVITIES AT AIRPORTS

This report was prepared under ACRP Project 11-01, "Legal Aspects of Airport Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. The report was prepared by Jodi L. Howick, Durham Jones and Pinegar.

Background

There are over 4,000 airports in the country and most of these airports are owned by governments. A 2003 survey conducted by Airports Council International–North America concluded that city ownership accounts for 38 percent, followed by regional airports at 25 percent, single county at 17 percent, and multi-jurisdictional at 9 percent. Primary legal services to these airports are, in most cases, provided by municipal, county, and state attorneys.

Reports and summaries produced by the Airport Continuing Legal Studies Project and published as ACRP Legal Research Digests are developed to assist these attorneys seeking to deal with the myriad of legal problems encountered during airport development and operations. Such substantive areas as eminent domain, environmental concerns, leasing, contracting, security, insurance, civil rights, and tort liability present cutting-edge legal issues where research is useful and indeed needed. Airport legal research, when conducted through the TRB's legal studies process, either collects primary data that usually are not available elsewhere or performs analysis of existing literature.

Applications

Airports have been and continue to be the focus of considerable civic, religious, labor, and fundraising activities and a venue for commercial advertising. These activities intersect with the safe and secure daily operation of airports. Airport operators regulate First Amendment conduct in a variety of different ways (e.g., local regulation, ordinance, and statute). While there has been a great deal written on case law concerning the extent to which these activities are protected by the First Amendment, there has not been any focus on how airports are regulating First Amendment activities in an increasingly congested and security-conscious environment.

This digest provides an overview of the First Amendment for airport operators by discussing the different activities that occur at airports, the issues that generally affect them, and the legal challenges to airport policies, while laying out the history of case law in this arena. The appendix provides a survey of responses in a number of different states. This digest will be useful to airport directors and attorneys who want to understand how to best regulate First Amendment activities at their airport.

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By Jodi L. Howick, Durham Jones and Pinegar

INTRODUCTION

The United States Constitution, Amendment I, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[1] This simple text imposes a variety of complex restrictions on government actions. Airport proprietors in particular may face diverse First Amendment challenges when addressing the needs of their government-owned property, and those challenges can prove costly and disruptive.

This digest provides an overview of common First Amendment issues that can affect airport proprietors. The digest begins by reviewing the basic concepts that apply when members of the public (speakers) request access to an airport for expressive activity. It notes an early Supreme Court decision that airport proprietors cannot ban all First Amendment activities in their facilities. It then introduces the Court's method for reviewing speech issues on government-owned property: forum analysis. The digest then continues by discussing *International Society for Krishna Consciousness, Inc. v. Lee*, the Supreme Court case that applied forum analysis to airport terminals. That decision determined that airport terminals are nonpublic forums for First Amendment purposes, and, under the applicable test, considered whether one large airport's specific practices were reasonable and viewpoint-neutral.[2]

After *Lee*, lower courts applied the nonpublic forum test when examining many other airport circumstances. The digest thus reviews significant cases that examined whether First Amendment restrictions were reasonable at a given airport, including the use of First Amendment zones or booths and restrictions on sidewalks, parking garages, and airspace. It also discusses the importance of a given airport's individual characteristics in a forum analysis, such as whether the airport is large or small, how facilities are used, and the impact of security measures at the airport. The digest also explains viewpoint neutrality requirements, another component of the nonpublic forum test.

After discussing requests for nonprofit access to an airport, the digest considers access requests for commercial speech. The Supreme Court has determined that the Constitution provides less protection for commercial speech, but the First Amendment still limits what restrictions the government can impose. The digest thus reviews the Supreme Court tests that apply to commercial speech restrictions, whether they are imposed by general laws, the proprietor, or through private parties. It then considers how the law applies to commercial advertising at airports and to other commercial relationships.

The digest then considers a few areas of specific concern. It provides a brief overview of how the First Amendment can affect picketing and labor expression at airports, security functions, newsracks and other press activity, employment, public meetings, speech by the government entity itself, and requests affecting Internet access. These areas generally raise speech concerns and may involve association or religion rights under the First Amendment as well. The digest also briefly reviews concerns that can arise when drafting airport regulations and common types of challenges to a regulation.

The digest then reviews First Amendment concerns for religion under the Free Exercise Clause and the Establishment Clause. It summarizes Supreme Court tests in these areas, and it considers significant airport cases that can affect proprietors as they administer airport chapels and meditation rooms, holiday displays, and other issues.

Finally, every state constitution contains clauses similar to those found in the First Amendment (as summarized in the table in

[1] The First Amendment applies to state and local governments through the Fourteenth Amendment to the Constitution.

[2] *See* Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (Supreme Court case applying forum analysis to airport terminals).

Appendix A). The U.S. Supreme Court has recognized that state constitutions can create additional protections for speech and thus impose greater restrictions on government proprietors. Section I of this digest concludes by reviewing several speech cases decided under two state constitutions. One series of cases involved an airport, and the other series involved advertising on government property; in both instances, state courts determined that government proprietors have different obligations than under a Federal First Amendment forum analysis. State constitutions can impose additional speech requirements, and airport proprietors must understand both their state and federal obligations.

After the discussion in Section I of this digest, Section II summarizes examples of various First Amendment policies from over 40 large airports in the United States. This section is not comprehensive and, as with any survey, its contents will become outdated. This information, however, provides examples of airport policies at different times and in different contexts to assist in understanding how airport proprietors may respond to First Amendment issues.

I. FIRST AMENDMENT OVERVIEW FOR AIRPORTS

A. Basic Speech Concepts at Airports

Over time, the U.S. Supreme Court recognized that there is a difference between government acting as a regulator over speech in general and government acting as a proprietor to manage speech in its own facilities. The Court ultimately developed a "forum analysis" framework to address the unique circumstances that arise when applying the First Amendment to government-owned property. That framework balances the government's interest in managing the property with the public's interest in access. It first identifies the nature of the government-owned forum and then evaluates speech restrictions under a standard that is appropriate for the forum type to determine whether the restriction in that forum is constitutional. The Supreme Court developed this framework because "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[3]

Airport property is strikingly different from other types of property that the government may own. Each airport proprietor must facilitate complex transportation functions that connect the ground to the air for people and cargo, manage diverse commercial functions and urgent security concerns, respond to demanding industry regulatory requirements, and fulfill its responsibilities as a government entity. Thus, public access for First Amendment activities at airports must be evaluated in light of each airport's unique characteristics. This section provides an overview of forum analysis and discusses how it can apply to an airport proprietor's facilities.

1. Forum Analysis Basics

The courts use forum analysis "as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[4] Under forum analysis, the courts first determine that government property constitutes one of three types of forums—a traditional public forum, a designated public forum, or a nonpublic forum. They then apply the test associated with that forum type to determine whether a government proprietor's speech regulation is constitutional. These forums can range from traditional places of access where government must allow most speech to property that government has dedicated to purposes that are not compatible with speech, where government has greater latitude to impose restrictions.

Traditional public forums are places such as streets, sidewalks, and parks that "by long tradition or by government fiat have been devoted to assembly and debate."[5] These are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public

[3] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (case guiding modern forum analysis and determining that teacher mailboxes were a nonpublic forum).

[4] *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (considering whether a federal government charitable solicitation campaign was a nonpublic forum from which a legal defense fund could be excluded or whether the government intended to designate that forum as open to expression, which included participation by the legal defense fund).

[5] *See Perry Educ. Ass'n,* 460 U.S. at 45 (case introducing and discussing the forum types involved in a forum analysis).

questions."[6] The Supreme Court has determined that the government's ability to restrict speech in a public forum is largely limited, and it uses a "strict scrutiny" test to determine whether a restriction on expression is valid in this type of forum if the restriction is based on the content of the expression. Strict scrutiny requires government to show that the restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[7] If, however, restrictions in this type of forum only govern the time, place, and manner for expression, courts will consider those restrictions under an "intermediate scrutiny test" in which regulations must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[8]

A designated public forum is a venue that the government creates "by *intentionally* opening a non-traditional forum for public discourse," not by inaction.[9] Courts thus must first decide whether a designated public forum exists. When identifying what constitutes the relevant forum for this analysis, the "forum should be defined in terms of the access sought by the speaker."[10] The courts will then examine whether there is evidence of government's intent to allow expression in that forum. They determine intent by looking at the government's consistent policy and past practices for use of the relevant forum and the forum's compatibility with expressive activity.[11] The government is not required to "indefinitely retain the open character" of property that it has "opened for use by the public as a place for expressive activity," but "as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[12]

The government may open a designated public forum to all types of expressive activity, or it may designate this forum for limited purposes, which the courts normally refer to as a "limited public forum." The government has more latitude to restrict speech in a limited public forum to preserve the forum for the purposes that the government intends. Those regulations, however, must be reasonable in light of the government's intent for opening the forum to public expression and they must be viewpoint neutral (permitting all points of view on allowable topics). In recent cases, the Supreme Court has sometimes considered limited public forums without mentioning the Court's final forum type, the nonpublic forum, when the government's intent is to regulate the use of property that possesses some inherent expressive qualities (such as universities or public broadcasts).[13]

Any remaining government-owned property that "is not by tradition or designation a forum for public communication" is a nonpublic forum.[14] This property has not historically been a forum for public expression, and, unlike a designated or limited public forum, the government does not intend to open this forum for any expression. The courts thus do not determine the proprietor's intent. The government owner has reserved this property for certain functions, and speech restrictions in a nonpublic forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Thus, the government can exclude a speaker whose topic is "not encompassed within the purpose of the forum" or who is "not a member of the class of speakers for whose especial benefit the forum was created," as long as those restric-

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See Cornelius*, 473 U.S. at 802 (emphasis added). The Court noted it "will not find that a public forum has been created in the face of clear evidence of a contrary intent…nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity," especially "where the principal function of the property would be disrupted by expressive activity." *See id*. at 803–04.

[10] *See id*. at 801.

[11] *See id*. at 802. The Court also noted that "[e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *See id.* at 799–800.

[12] *See Perry Educ. Ass'n,* 460 U.S. at 46.

[13] *See* Christian Legal Soc. Chapter of the UCLA, Hastings College of Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (analyzing regulations that were claimed to restrict a group's First Amendment rights of association in light of the "special characteristics" of a school environment); Arkansas Educ. Television Commission v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed.2d 875 (1998) (analyzing regulations that limited a politician's access to broadcast journalism at a publicly owned television station).

[14] *See Perry Educ. Ass'n,* 460 U.S. at 46.

tions are reasonable measures to preserve the property's functions and are viewpoint-neutral.[15]

The courts determine whether a restriction is reasonable "in light of the purpose of the [nonpublic] forum and all the surrounding circumstances."[16] The Supreme Court has noted that a neutral access restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." When considering restrictions, there also need not be "a finding of strict incompatibility between the nature of the speech or the identity of the speaker [being restricted] and the functioning of the nonpublic forum."[17] The courts determine whether a restriction is viewpoint neutral by examining whether the restriction denies a speaker access "solely to suppress the point of view he espouses on an otherwise includible subject."[18] Viewpoint discrimination "targets not subject matter but particular views taken by speakers on a subject."[19]

2. Proprietors May Not Ban All First Amendment Rights

Without regard to the type of forum, government proprietors may not entirely deny access for all First Amendment rights in their facilities. "The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or …arbitrary, capricious, or invidious."[20]

When the Supreme Court first considered the nature of an airport terminal, it did not apply forum analysis. In *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc*., the Court considered whether an airport proprietor could constitutionally adopt a resolution that closed the airport to all First Amendment activities, whether by an individual or an entity.[21] When striking down this resolution, the Court determined that forum analysis was unnecessary. It held "virtually every individual who enters LAX [the Los Angeles International Airport] may be found to violate the resolution…we think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."[22]

The Court held that this total ban on expressive activity in an airport terminal was overly broad. The proprietor argued that the regulation was only intended to reach expressive activity that was unrelated to airport purposes and it would allow speech that was consistent with the airport's operations, but the Court did not accept that justification. It noted that "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be 'airport related,' but is still protected speech even in a nonpublic forum."[23] All such speech would be banned under the challenged regulation, and the Court found that, regardless of the purpose of the ban, an airport proprietor could not constitutionally preclude all nondisruptive expression.

The Court also found that the broad language of the prohibition was vague. "The line between airport-related speech and nonairport-related speech is, at best, murky." This claimed distinction would give airport officials alone "the power to decide in the first instance whether a given activity is airport related." [24] A vague regulation raises a basic concern for arbitrary action, and a regulation determined to be vague is unconstitutional because if an official has discretion to apply the regulation's criteria subjectively, the official can circumvent constitutional requirements through its application.

This initial Supreme Court case established that some First Amendment access rights are fundamental in an airport terminal regardless of its forum type. An airport proprietor cannot constitutionally impose a complete ban on nondisruptive

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[15] *See Cornelius*, 473 U.S. at 806.

[16] *See id*. at 809.

[17] *See id.* at 808.

[18] *See id*. at 806.

[19] *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995) (a university that provided funding to print all student publications could not deny funding to a publication presented with a Christian editorial viewpoint—the government must respect the lawful boundaries that it has itself set).

[20] *See* United States v. Kokinda*,* 497 U.S. 720, 725–726, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (determining that a sidewalk served post office property and was a nonpublic forum).

[21] *See* Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987) (finding that a resolution banning "First Amendment activities" in the terminal area was facially unconstitutional under the First Amendment's overbreadth doctrine and unconstitutionally vague).

[22] *See id.* at 575.

[23] *See id*. at 576.

[24] *See id*.

expression in airport terminals, and the proprietor cannot sanction arbitrary restrictions.

3. Forum Analysis in Airport Terminals

The Supreme Court applied forum analysis to airport terminals in 1992 in *International Society for Krishna Consciousness, Inc. v. Lee*, and it determined that the nature of an airport terminal is a nonpublic forum.[25] A plurality of the Court reached that conclusion, and it also upheld proprietor regulations that banned solicitations for the immediate receipt of funds in the airport's terminal buildings (including charitable sales of merchandise). Four justices disagreed, however, believing that the nonsecure areas of airport terminals should be a public forum and expressing various opinions under such an analysis. A plurality of the Court also rejected a portion of the proprietor's regulation that banned leafleting in the terminals. The Court determined that such a ban could not be upheld even under a nonpublic forum test.

The Court's opinion and Justice O'Connor's concurrence expressed the Court's reasoning for the *Lee* decision.[26] At the outset, the Court noted some basic First Amendment principles. It had previously determined that solicitation for the receipt of funds is a form of protected speech under the First Amendment.[27] The government, however, need not permit all forms of speech on property that it owns and controls.[28] When the "government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its action will not be subject to the heightened review to which its actions as a lawmaker may be subject."[29] In previous decisions the Court had also determined that this type of solicitation is disruptive and can be prohibited on government property that is dedicated to a particular purpose.[30] Thus the Court noted that under its precedents, "the extent to which the Government can control access depends on the nature of the relevant forum."[31]

With that background, the Court then considered the nature of an airport terminal and determined it to be a nonpublic forum and not consistent with a public forum or a designated public forum. The Court observed that airport terminals were recent developments and that their principal purpose was not traditionally for the free exchange of ideas. Soliciting in these terminals was also a recent development, and proprietors had fought against that development rather than intentionally open the terminals for public discourse. The Court noted that airport terminals are not comparable to other nodes of transportation, and it rejected attempts to draw those comparisons. Airport terminals demonstrated critical differences that the Court believed must be taken into account in a forum analysis, such as security requirements. Airports were also commercial enterprises that had to generate revenues and provide services attractive to the marketplace. The purpose of an airport terminal was to facilitate air travel, not promote expression, and the buildings were planned and constructed for that purpose. In light of all of these factors, the Court determined that an airport terminal is not a public forum by tradition or purpose.[32]

After determining that airport terminals are a nonpublic forum, the Court then considered the applicable test to evaluate whether the proprie-

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[25] *See* Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (establishing that the nature of an airport terminal is a nonpublic forum).

[26] Justice Rehnquist wrote the Court's opinion, joined by Justices White, Scalia, and Thomas. Justice O'Connor provided the swing vote in her concurrence. The Court has stated that "when no single rationale commands a majority, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest of grounds." *See* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 764 n.9, 108 S. Ct. 2138, 100 L. Ed.2d 771 (1998) (finding that a statute that gave a mayor unbridled discretion over whether to permit newsracks was unconstitutional).

[27] *See Lee,* 505 U.S. at 677, citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) (determining that the solicitation of funds is protected by the First Amendment).

[28] *See id*. at 678, citing U.S. Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981) (upholding statute prohibiting some uses of post office letterboxes where the statute was not geared toward the contents of the messages placed in the boxes).

[29] *See id.* at 677, citing *Kokinda*, 497 U.S. at 725 (holding that the government's proprietary discretion is not as great as that of a private business; valid government actions cannot be unreasonable or arbitrary, capricious, or invidious under the circumstances).

[30] *See id*. at 683.

[31] *See id.*, 505 U.S. at 678, citing *Cornelius*, 473 U.S. at 799–800 (even protected speech is not equally permissible in all places and at all times).

[32] *See id.* at 678–83.

tor's restrictions on speech were constitutional. The proprietor banned repetitive, face-to-face, nonprofit solicitations for the immediate receipt of funds in the airport's terminals (whether solicited through sales or otherwise), and the Court determined that this restriction was reasonable and viewpoint-neutral.[33] These solicitations were disruptive in general, as individuals must decide whether or not to contribute or alter their paths. Thus these solicitations could disrupt business by impeding the normal flow of traffic. This was "especially so in an airport," where travelers are often weighed down by "cumbersome baggage" or may be "hurrying to catch a plane or to arrange ground transportation," and where delays of even a few minutes can result in costly inconvenience to passengers.[34]

The Court also determined that soliciting to receive funds "presents risks of duress that are an appropriate target of regulation" due to vulnerable populations, the difficulty involved in avoiding solicitors, the potential for fraud, and tight schedules that make visitors "unlikely to stop and formally complain to airport authorities."[35] It also observed that these risks were difficult for the proprietor to monitor. The Court also noted that the proprietor had provided an alternative location by allowing solicitations on sidewalk areas that had good public access, and it observed that congestion was one of the greatest problems facing this proprietor's terminals (John F. Kennedy International Airport or JFK). The Court determined that, under the circumstances, even the incremental effect of these risks would prove disruptive, and face-to-face solicitation was incompatible with the airport's functioning. Thus it found that the proprietor's ban on these solicitations was reasonable.[36] Justice O'Connor concurred in this reasoning, while adding that the terminal in question was also similar to a shopping mall. When evaluating the reasonableness of the regulations, she believed that the terminal's relevant attributes included a deliberately created "multipurpose environment" for air travel and commerce. She believed that all of this forum's "special attributes" were relevant to her analysis because the proprietor's restrictions needed to be consistent with the "nature and function of the particular forum involved."[37]

Justice O'Connor's concurrence provided the Court's reasoning for its second, per curiam decision, which struck down the proprietor's ban on leafleting.[38] She noted that "leafleting does not entail the same kinds of problems presented by face-to-face solicitation."[39] She reasoned that it did not involve the same level of disruption even in a congested facility, and that leafleting was not "naturally incompatible with a large, multipurpose forum."[40] She noted that the Court had considered one multipurpose forum in the past, a military base, and had upheld a leafleting ban there because the government had shown that leafleting created a clear danger to military loyalty, discipline, or morale. The Court had also upheld leafleting bans when the government had shown them to interfere with the mission of the post office or to jeopardize the success of a fundraising campaign.[41] In *Lee*, however, Justice O'Connor found that the proprietor had presented no independent justification for the leafleting ban. She thus rejected the ban, but noted that the proprietor could still promulgate properly drafted time, place, and manner regulations for leafleting.[42]

Lee's concurring and dissenting opinions illustrate other perspectives on the issues that were before the Court. Justice Kennedy's concurrence disagreed with the Court's use of forum analysis

[33] *See id.* at 679.

[34] *See id*. at 683–84.

[35] *See id.* at 684.

[36] *See id.* at 684–85.

[37] *See id.* at 687–89 (O'Connor, J. concurring). Justice O'Connor noted that restrictions are valid only if they are reasonable and not a pretense, but reasonableness "must be assessed in light of the purpose of the forum and all the surrounding circumstances." The "forum's special attributes" are relevant because the "significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *See id*. citing *Cornelius*, 473 U.S. at 809; *Kokinda*, 497 U.S. at 732.

[38] *See* Lee v. Int'l Soc. for Krishna Consciousness, Inc., 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992) (per curiam decision).

[39] *See Lee*, 505 U.S. at 690.

[40] *See id.* at 690.

[41] *See id.* at 691–92 citing Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) (military base forum); *Kokinda*, 497 U.S. at 731–32 (post office forum); *Cornelius*, 473 U.S. at 810 (fundraising forum).

[42] *See id*. at 691–92 (noting that time, place, and manner regulations must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication).

in general because he believed that framework essentially allowed the government to restrict speech on its property just by articulating a nonspeech purpose for the property. He believed that government property should always be evaluated objectively based on its actual physical characteristics and uses, and he thought that the proprietor in *Lee* had not shown any real impediment to the use of a time, place, and manner test. He argued that the nonsecure areas of the airport should be treated as a public forum, and he believed that the proprietor's ban on solicitations for the immediate receipt of funds would comply with the strict scrutiny test used in such a forum except for the proprietor's ban on charitable sales, which he believed was not narrowly tailored. He also agreed that the proprietor's ban on leafleting could not be upheld under any circumstances. In general, Justice Kennedy's analysis expressed strong support for allowing public expression, and it closely examined the wording of the regulation and what that wording expressed about the proprietor's justifications. His concurrence did not discuss the proprietor's congestion concerns.[43]

Justice Souter (joined by Justices Blackmun and Stevens) dissented from the Court's decision that an airport terminal is a nonpublic forum. He agreed with Justice Kennedy that the nonsecure areas of an airport qualify as a public forum, and he believed that the Court's analysis should not rely on traditional locations but on "a conclusion that the property is no different in principle from such [traditional] examples," which constitute "archetypes…. [Thus] the enquiry may and must relate to the particular property at issue and not necessarily to the precise classification of the property."[44] He believed "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[45]

Justice Souter thus dissented from the Court's decision to uphold the proprietor's solicitation ban. He noted that "[p]recision of regulation must be the touchstone," and he did not find the proprietor's ban to be narrowly tailored under his view that airport terminals should be a public forum.[46] He argued that charitable solicitations are protected as the dissemination of ideas and that, although government regulations could be justified as a protection against coercion and fraud, the proprietor had introduced virtually no evidence of such conduct.[47] He also noted that other, less intrusive methods were available to protect against fraud, such as financial disclosures and prohibitions against fraud itself. He did not believe that the proprietor had created ample alternatives to allow this expression, but was instead shutting off "a uniquely powerful avenue of communication."[48]

Although the Court was divided, the plurality opinion in *Lee* established airport terminals as nonpublic forums and demonstrated how to apply the nonpublic forum test in these facilities. It thus resolved issues that had been unsettled in the lower courts and created clarity to help guide the practices of airport proprietors. A lower court case from that time period illustrates *Lee*'s effect. In *International Society for Krishna Consciousness of Missouri, Inc. v. City of St. Louis,* an airport proprietor's regulations had been challenged under prior law, and the proprietor had entered a settlement agreement and consent decree that allowed speakers to distribute literature and solicit donations generally at the airport.[49] After *Lee*, the proprietor created new regulations that required speakers to obtain a written permit, banned solicitations and sales in the terminals, confined speaker activities to a few booths at specified locations, and limited hours of operation. The proprietor then sought to dissolve or modify the consent decree, and the lower court held that some of the proprietor's restrictions violated the First Amendment because the airport was a hub airport and the new regulations significantly limited speakers' access to airport visitors. The state appellate court, however, found that "*Lee* is directly dispositive of this issue" and that the proprietor's restrictions were reasonable.[50] Speakers could still reach much of the public because of the proprietor's speech booths, which were "not out of the way or hidden" but were "where the traffic would flow right by them."[51]

Lee thus established the nonpublic forum test as the proper test to evaluate whether a request for First Amendment access is compatible with the unique functions and purposes of a given air-

[43] *See id.* at 694–709.

[44] *See id.* at 710–11 (citations omitted).

[45] *See id*. at 711 (citations omitted).

[46] *See id*. at 714 (citation omitted).

[47] *See id*. at 713–14.

[48] *See id*. at 715.

[49] *See* Int'l Soc. for Krishna Consciousness of Missouri, Inc. v. City of St. Louis, 890 S.W.2d 660 (Mo. Ct. App. 1995) (determining under *Lee* that the proprietor's post-*Lee* regulations were reasonable).

[50] *See id.* at 663.

[51] *See id.* at 664.

port. It created clarity that has allowed airport proprietors to more effectively manage their facilities. That clarity has also guided lower courts when upholding many proprietor restrictions on speech as reasonable measures to address the public's needs at a given facility.

4. First Amendment Zones or Booths

Prior to *Lee*, the Supreme Court determined that government could constitutionally restrict speech to specific locations on public property. In *Heffron v. International Society of Krishna Consciousness, Inc.,* a case considering fairground property, the Court held that the state could confine individuals to fixed locations on the property to sell or distribute any merchandise, including printed or written material.[52] It noted that this rule helped maintain the orderly movement of the crowd in the fairground's congested environment and that the rule was administered in a neutral way. The Court thus held that the state's interests in requiring these booth restrictions satisfied time, place, and manner requirements. The Supreme Court also implicitly upheld a location restriction for soliciting funds in *Lee*, where the proprietor had confined these activities to outdoor locations. In post-*Lee* cases, lower courts have considered and upheld airport practices that confine First Amendment activities to specific zones or booths.

For example, in *ISKCON Miami, Inc. v. Metropolitan Dade County*, the Eleventh Circuit considered a challenge to eight "First Amendment zones" for distributing free literature at the Miami International Airport.[53] The aggrieved speaker argued that these eight locations were insufficient and inadequate. Citing *Lee* and *Heffron* (the fairground case), the proprietor, however, argued that these zones were valid time, place, and manner restrictions and that the speaker had not shown them to be insufficient under the circumstances at the airport. The court agreed with the airport proprietor. The speaker also challenged the proprietor's regulations as impermissibly granting unfettered discretion to the airport director to select the zone locations. The court again upheld the proprietor's practice but noted that "discretion to set such restrictions cannot be so broad that it 'becom[es] a means of suppressing a particular point of view.'" These regulations were constitutional because they only gave the director the ability to restrict "the areas in which distribution activities may take place," not the ability to "exclude certain persons from those areas."[54]

In *Stanton v. Fort Wayne–Allen County,* an Indiana federal district court considered whether by designating "free speech zones" a proprietor had created a designated public forum in those zones that required greater access for expression.[55] The courts determine whether government has created a designated public forum by examining the "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum…[as well as] the nature of the property and its compatibility with expressive activity."[56] The court noted that designating these airport speech zones was an "attempt to *restrict* public discourse" and was "inconsistent with an intent to designate a public forum."[57] The court also considered the nature of the airport property, which it held was "consistent with an intent to limit public discourse."[58] It noted that the proprietor needed to operate a commercial enterprise that provided attractive services to customers who desired quick, efficient, and safe access to air travel, and that using the airport for public assembly and speech was not compatible with that purpose. The court thus held the airport facility to be a nonpublic forum.

The court then applied the nonpublic forum test and examined whether the proprietor's location restrictions were reasonable. First it noted it is "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the

[52] *See* Heffron v. Int'l Society of Krishna Consciousness, Inc., 452 U.S. 640, 654, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981) (upholding a regulation that restricted the sale or distribution of literature at the fairgrounds to certain fixed locations).

[53] *See* ISKCON Miami, Inc. v. Metro. Dade County, 147 F.3d 1282 (11th Cir. 1998) (determining that the proprietor's solicitations ban was reasonable, and that the airport director could select areas where speech could occur).

[54] *See id*. at 1291.

[55] *See* Stanton v. Fort Wayne-Allen County, 834 F. Supp. 2d 865 (N.D. Ind. 2011) (considering a speaker's request for greater access to conduct leafleting activities that protested against airport security measures).

[56] *See id.* at 872 citing *Cornelius*, 473 U.S. at 802.

[57] *See id.*

[58] *See id*.

forum."[59] The court then determined that the proprietor's location restrictions had to be "reasonably related to maintaining the multipurpose environment that the Port Authority had deliberately created."[60] Despite this multipurpose environment, the court determined that the airport's primary purpose was "to facilitate commercial air travel."[61] It noted that, although the proprietor offered a variety of amenities in its terminal, "most are consistent with the purpose of the Airport to facilitate air travel and to accommodate customers while they wait for flights." The court also examined the proprietor's statements of purpose and intent contained in the regulation, which stated that speech restrictions were intended to ensure security, operational efficiency, and aesthetics; ensure adequate nearby police presence to protect speakers; protect airport patrons from harassment, intimidation, and unlawful conduct; ensure the free and orderly flow of traffic; reduce congestion; and preserve desirable aesthetic qualities and features in the terminals.

After reviewing all of these purposes for the proprietor's property, the court then considered whether the proprietor's speech locations were reasonable restrictions to preserve the forum for its intended purposes. The aggrieved speaker argued that the proprietor had unreasonably confined him to "small out-of-the-way locations," but the court noted that a nonpublic forum does not need to provide unrestricted access based on a speaker's unhappiness.[62] The court also determined that these locations were "not out of sight or difficult to reach. They are adjacent to well-traveled areas."[63] The speaker claimed that better locations would not be disruptive, but the court noted that the collective impact of speakers in other locations could have that effect. It also noted that under Supreme Court precedent, a proprietor "need not wait until havoc is wreaked to restrict access to a nonpublic forum."[64] The speaker argued that most travelers did not approach him, but the court found there was no evidence that the locations themselves were insufficient or unreasonable.

Although the speaker disagreed with the proprietor's rationale for selecting speech areas, the court determined that the speaker had to demonstrate more than just disagreement. The speaker needed to establish that the location restrictions did not preserve the property for the uses to which it had been put, and the speaker had failed to do so. The court thus held that the speaker had not shown that the proprietor intended to create a designated public forum, and it held that under the nonpublic forum test, the proprietor's restrictions were reasonable.[65]

5. Locations Beyond Terminals

Prior to *Lee*, the Supreme Court had held that the government could restrict access to a sidewalk when the sidewalk was part of a proprietary property operated by the government. In *United States v. Kokinda*, a case involving the post office, the Court noted that such sidewalks do not have the characteristics of public thoroughfares, where people congregate to conduct their daily affairs. They are constructed solely to provide access to persons engaged in the business that the government operates on its proprietary property.[66]

A number of courts have applied this analysis to airport sidewalks and other locations, such as parking garages. The courts have considered these areas to be property dedicated to supporting the purpose served by the airport terminals and thus subject to the nonpublic forum test. Under this test, the courts examine the specific conditions at a given airport to determine whether a proprietor's restrictions in these locations are reasonable and thus constitutional.

For example, in *Metropolitan Dade County*, the Eleventh Circuit considered a proprietor's ban on nonprofit solicitations and sales that included sidewalk and parking lot areas outside the terminal buildings. The court first determined that *Lee's* nonpublic forum decision "was not limited to the particular airports at issue [in *Lee*], but constituted a categorical determination about airport terminals generally."[67] Consistent with that decision, the Eleventh Circuit then determined that "the sidewalks and parking lots adjacent to the Miami airport terminals are nonpublic fora; the sidewalks and parking lots are intended by the County to be used for air travel-related purposes, 'not to facilitate the daily commerce and life of the neighborhood or city.'"[68]

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[59] *See id.*

[60] *See id.* at 874.

[61] *See id.* at 875.

[62] *See id*. at 873, citing *Cornelius*, 473 U.S. at 808.

[63] *See id.* at 877.

[64] *See id*. at 877, citing *Cornelius*, 473 U.S. at 810.

[65] *See id.* The speaker did not challenge viewpoint neutrality, the second requirement under the nonpublic forum test.

[66] *See Kokinda*, 497 U.S. at 727.

[67] *See Metro. Dade County*, 147 F.3d at 1288.

[68] *See id*., quoting *Kokinda*, 497 U.S. at 735.

The court then applied the nonpublic forum test. In *Lee,* the Supreme Court had cited sidewalk speech locations as one of the factors that had led the Court to uphold that airport's ban on solicitations in the terminals. The Eleventh Circuit noted, however, that "[t]he presence of nearby physical space available for expressive activity…is merely one factor among many in assessing the reasonableness of speech restrictions in nonpublic fora."[69] It noted that the Miami International Airport's sidewalks were "narrow and extremely congested areas." It determined that these areas had to support many confusing transportation activities, and "[d]ue to the layout of the Airport, even a brief delay of persons in these areas can lead to extreme congestion and danger of an accident." The court thus held that "[i]t is certainly reasonable for the County to conclude that solicitation and sales of literature would be inconsistent with the particularly hectic nature of the airport sidewalks at MIA."[70]

In addition to sidewalks and parking lots, other facilities at an airport may also constitute a forum for First Amendment analysis. The relevant forum for a First Amendment analysis is "defined in terms of the access sought by the speaker," and there can be various "perimeters of a forum within the confines of government property."[71] Very specific physical location on airport property may constitute a forum, such as an advertising diorama or display.[72] Some courts have also found that placing a donation box on government property can create a forum for nonprofit speech.[73] A forum can also be intangible, such as access to the Internet.[74]

The airspace can also constitute a forum. In *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu,* the Ninth Circuit considered whether a city could deny a speaker access to the airspace under regulations that prohibited aerial towing operations.[75] After finding that the City's regulation was not preempted by federal law, the court reviewed the "history, purpose, and physical characteristics of the airspace at issue" to determine its forum type.[76] It found that the airspace was not a place immemorially held in trust for public assembly and communication; that aerial towing was a modern creation; that historically airspace had been highly restricted and entering it was prohibitive and required special equipment; and that airspace was not just an extension of the ground below. In this case, the City had never sanctioned expressive activity in that forum, and the forum was not naturally compatible with such activity.[77] Based on these characteristics, the Ninth Circuit held that the airspace was a nonpublic forum. It then determined that under the applicable circumstances, the City's towing ban was a reasonable measure to preserve aesthetics and promote safety in a location where visual beauty was "of paramount importance" to the community.[78]

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[69] *See id.* at 1289.

[70] *See id*. *See also Fort Wayne-Allen County*, 834 F. Supp. 2d at 873 (determining "the sidewalks adjacent to the FWA terminal, which are under the control of the Authority and subject to TSA regulations, are nonpublic fora. They are intended by the Authority to be used for air travel related purposes, 'not to facilitate the daily commerce and life of the neighborhood or city'" (citation omitted)).

[71] *See Cornelius*, 473 U.S. at 801–03 (determining that the relevant forum was not the federal workplace but a charity fund drive, a more limited channel of communication within that workplace). *See also* New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 22 (1st Cir. 2002) (considering two distinct roadway areas owned by Massport as separate forums); Hawkins v. City of Denver, 170 F.3d 1281, 1287 (10th Cir. 1999) (considering as a forum a plaza that functioned as an entrance and a gathering area for a government-owned performing arts center); Chicago Acorn v. Metro. Pier and Exposition Auth., 150 F.3d 695, 698 (7th Cir. 1998) (considering distinct areas of Chicago's Navy Pier as separate forums).

[72] *See* Section C.3, *infra* (discussing advertising).

[73] *See* Linc-Drop, Inc. v. City of Lincoln, 996 F. Supp. 2d 845, 854 (D. Neb. 2014) (a city argued that donation boxes on its property should be regulated as commercial speech, like billboards, but the court determined that donation boxes were "silent solicitors and advocates for particular charitable causes" and "perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues"), citing Nat'l Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202, 213 (5th Cir. 2011) (determining that donation bin solicitations were "characteristically intertwined with informative and perhaps persuasive speech for particular causes or for particular views on economic, political, or social issues").

[74] *See* Section D.6, *infra* (discussing the Internet).

[75] *See* Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.2d 910 (9th Cir. 2006) (upholding an aerial towing ban under the First Amendment).

[76] *See id.* at 919.

[77] *See id.* at 919–20.

[78] *See id*. at 921–23 (also determining that a city's aerial towing ban was viewpoint neutral, since the or-

Lee's analysis supplies the basis for making decisions about First Amendment access at individual airports. The courts rely on *Lee*'s determination that airport terminals by nature are a nonpublic forum and address any forum-specific challenges to a forum type. They then look at a particular airport's circumstances to determine whether that proprietor's restrictions on speech in the relevant forum are reasonable, and *Lee* provides guidance on how to apply the nonpublic forum test. The courts adapt that analysis to address differences within a given airport forum.

6. Different Circumstances Can Create Different Outcomes

An airport terminal is inherently a nonpublic forum as determined under *Lee*, but the courts use each airport forum's individual characteristics to determine whether speech restrictions in that forum are reasonable. Those individual characteristics thus determine the outcome for a given airport and may distinguish one airport case from another.

For example, in *Stanton v. Fort Wayne–Allen County*, the court noted that the Fort Wayne International Airport (FWA) was a multipurpose environment, as Justice O'Connor had concluded in *Lee*. The court, however, determined that unlike the airport in *Lee* (JFK), FWA's proprietor had not "created a huge complex open to travelers and nontravelers alike" when creating the airport's multipurpose environment. JFK was like a shopping mall because it promoted a "wide range of activities…[that were] no more directly related to facilitating air travel than are the types of activities [requested by the plaintiffs]." FWA's proprietor, however, had

> not added any features and attractions to its facilities that would make it a destination for those who do not otherwise have a reason to be at the Airport for its primary and dedicated purpose. Instead, most of the amenities existing at FWA can only be seen as complementing its primary purpose of serving air passengers.[79]

The court also concluded that no evidence suggested the general public frequented FWA to use its amenities. For example, FWA was not located near other commercially developed areas of the City, patrons had to use the airport's paid parking, and security concerns were pervasive.[80] Thus, while both FWA and JFK were multipurpose environments, the court found that the circumstances at FWA differed from those at JFK and demonstrated that the proprietor had preserved its property for air travel purposes. The court then found that FWA's restrictions were reasonable to serve the purposes to which the property was dedicated.

Small airports may operate under significantly different circumstances than those considered in *Lee*. Courts thus may determine that reasonable restrictions at a small airport differ from those that may be reasonable at a larger, more diverse facility. For example, courts considering large airports normally hold that it is not reasonable for a proprietor to impose a total ban on placing newsracks in the airport's terminals. Large airport proprietors typically seek to justify such a ban based on concerns for operational efficiency, safety, security, aesthetics, and revenue generation. The courts normally find that these concerns are legitimate but that they are insufficient to justify a large airport's total ban on newsracks.

In *Jacobsen v. City of Rapid City, South Dakota,* the Eighth Circuit considered a proprietor's total ban on newsracks at a small airport that had just constructed a new terminal building.[81] The Eighth Circuit was unpersuaded by arguments concerning efficiency, safety, security, and aesthetics, but this smaller airport had an additional circumstance that larger facilities lacked. The proprietor had banned newsracks to promote its ability to increase revenues from the airport's gift shop concession that were needed to pay for the new terminal's debt. The court agreed that selling newspapers outside the gift shop might make the gift shop concession less valuable and "reduce the City's leverage in bargaining for terms such as minimum annual concession fees and pro rata utility charges."[82] The court found that while larger airports may use different strategies to maximize revenues, this airport's revenue interests would justify banning newsracks and requiring sales through the gift shop where the shop made newspapers generally available and the plaintiff had not produced evidence of adverse impacts. The policy also needed to

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dinance limited signage in the airspace to aircraft branding information).

[79] *See id*. at 875.

[80] *See id*. at 869.

[81] *See* Jacobsen v. City of Rapid City, S.D., 128 F.3d 660 (1997) (considering a challenge raised by a small publisher seeking access to the Rapid City Regional Airport terminal).

[82] *See id.* at 663–64.

account for impacts to low-budget, controversial newspapers.[83]

An airport's own changed circumstances may also serve as a basis for examining whether different speech restrictions are reasonable. For example, in *Springfield v. San Diego Unified Port District,* a federal district court in San Diego considered whether an airport's construction activities were changed circumstances that justified a new total ban on leafleting in the terminal.[84] The proprietor justified the ban by arguing that due to the construction, the terminal was no longer a multipurpose forum. The court believed, however, that the proprietor could not justify the ban by simply claiming that it would mitigate congestion and assist with construction efforts. The court also found that in this case, outdoor speech locations would not provide adequate alternative avenues of communication. The court acknowledged that the ongoing terminal redevelopment program might justify restrictions in some areas, but it held that the terminal remained a multipurpose forum for First Amendment analysis and that the proprietor could not completely ban speech activity.[85] The court found that, if anything, the circumstances of this ban were "even less constitutionally acceptable" than the leafleting ban considered in *Lee*, which had only prohibited "continuous or repetitive" leafleting as opposed to banning the distribution of "any literature, pamphlets or other printed materials."[86] Although the court rejected the proprietor's ban, it acknowledged that the redevelopment program was a new consideration that could support some restrictions.

7. Post-Lee Changes in Security

Lee was decided before the terrorist attacks of September 11, 2001, and some cases since *Lee* have noted that increased security needs can further justify First Amendment restrictions in airport facilities. The courts consider the purpose of a forum when determining whether restrictions there are reasonable, and modern security demands underscore that airport proprietors have preserved their property to facilitate safe air travel rather than accommodate public discourse. These security demands impose many more restrictions on airport facilities than they did when *Lee* was decided. For example, nontravelers can no longer enter airport concourses, potential security threats are more diverse, and few terminal facilities were originally designed with the space required to accommodate modern security screening activities. Some courts have specifically noted the effect of these developments when considering proprietor speech policies that preserve the forum for safe air travel.

For example, in *Jews for Jesus, Inc. v. Port of Portland, Oregon*, an Oregon federal district court found that "in the post-September 11, 2001 world, air travel is more encumbered than it was when *Lee* was decided, providing airports with an even stronger interest in regulating non-travel related interferences with passengers."[87] The court noted these new security demands when upholding the proprietor's permit requirements, which required speakers to submit an application in advance and disclose the identity of the speakers who would be present. The court determined that these requirements were valid time, place, and manner restrictions that met "significant governmental interests in the need to ensure passenger safety, traffic flow, and airport security."[88] On appeal, the Ninth Circuit affirmed and noted that permitting requirements "which, by definition, must involve some identifying information, have been held constitutional by the Supreme Court."[89] As security risks evolve, and as airports continue to respond with preventive measures that impact passengers and airport staffing, technologies, and floor space, security demands may become even more prominent when evaluating the reasonableness of airport speech regulations.

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[83] *See id*. at 664–65 (dissent noting that this decision placed the burden of proof on the publisher with respect to the proprietor's policy when Supreme Court precedent placed the burden on the proprietor).

[84] *See* Springfield v. San Diego Unified Port Dist., 950 F. Supp. 1482, 1486–87 (S.D. Cal. 1996) (striking a total ban that the proprietor had adopted based on a terminal redevelopment program, and determining that some of the proprietor's regulatory language was unconstitutionally vague and overbroad and discriminated based on viewpoint).

[85] *See id*. at 1486–87.

[86] *See id*. at 1487.

[87] *See* Jews for Jesus, Inc. v. Port of Portland, Or., CV04695HU, 2005 WL 1109698 (D. Or. May 5, 2005) *aff'd sub nom*. Jews for Jesus, Inc. v. Port of Portland, 172 F. Appx. 760 (9th Cir. 2006) (both opinions upholding the proprietor's permit requirements).

[88] *See id*. at 9.

[89] *See Port of Portland*, 172 F. Appx. at 765, citing Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2001) (upholding a city's speech permit requirements for use of a municipal park).

8. Props that Accompany Expression

Typically the courts have not found that First Amendment protections for expression extend to props that speakers may wish to use while pursuing that expression. They have routinely upheld restrictions that prevent speakers from placing tables, chairs, or other structures on government property to facilitate their expressive activities. Courts normally do not place constitutional value on objects that accompany speech except in infrequent cases of "symbolic speech," where an act involving the object is determined to communicate a generally understood message without the use of words (such as flag burning).

For example, in the *Port of Portland* cases discussed in the previous section, the courts upheld the proprietor's regulations prohibiting speakers from bringing tables and chairs to the airport (the airport provided them).[90] In another example, a district court in Nevada rejected a speaker's efforts to add a crèche to the airport proprietor's holiday display, based in part on an airport regulation that prohibited persons from placing objects on airport property.[91] Normally, even if speech is protected, accompanying objects are not.

B. Viewpoint Neutrality

Any permissible constraint on speech in a nonpublic forum must be viewpoint neutral, or, in other words, must not regulate based on the speaker's point of view on a topic that is otherwise permissible in the forum. The Supreme Court has stated that when a proprietor is legitimately "acting within its power to preserve the limits it has set" for a limited forum,

> this Court has observed a distinction between, on the one hand, content discrimination—i.e., discrimination against speech because of its subject matter—which may be permissible if it preserves the limited forum's purposes, and, on the other hand, viewpoint discrimination—i.e., discrimination because of the speaker's specific motivating ideology, opinion, or perspective—which is presumed to be impermissible when directed against speech otherwise within the forum's limitations.[92]

Thus, proprietors can restrict topics of speech that are not compatible with the limitations of a nonpublic forum, but they must allow all points of view on topics that are permissible within the forum's limitations.

Viewpoint discrimination denies access "solely to suppress the point of view [that the speaker]…espouses on an otherwise includible subject," and thus the government makes distinctions based on the contents of a message.[93] For example, the Supreme Court determined that a school impermissibly discriminated based on viewpoint when it made funding available to print all student publications, but then refused to fund a publication that was presented from a religious editorial viewpoint.[94] Where the school had decided to fund all student publications, it could not exclude one because of the viewpoint of its message. Similarly, the Supreme Court found in another case that a state law could not ban all picketing near a school except for labor picketing. The state prohibited picketing and allowing an exception for labor messages discriminated against messages that were excluded.[95]

The Supreme Court has determined that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is

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[90] *See Port of Portland, Or.*, 2005 WL 1109698, at 15.

[91] *See* Grutzmacher v. County of Clark, 33 F. Supp. 2d 896 (D. Nev. 1999) (upholding the proprietor's restriction on placing any "table, chair, mechanical device, or other structure" at the airport). *See also* Am. Civil Liberties Union of Nevada v. City of Las Vegas, 13 F. Supp. 2d 1064 (D. Nev. 1998) (determining that the placement of tables, racks, chairs, and other similar structures on government property (in this case, property used for a mall) was not conduct commonly associated with expression); Int'l Caucus of Labor Comms. v. City of Chicago, 816 F.2d 337 (1987) (in an early case that examined airport property as a public forum, upholding a regulation that prohibited the placement of tables and other structures as a valid time, place, and manner restriction).

[92] *See Rosenberger*, 515 U.S. at 829–30 (where a university's policy was to fund printing for all student publications, it could not exclude a publication with a Christian viewpoint).

[93] *See Cornelius*, 473 U.S. at 806.

[94] *See Rosenberger*, 515 U.S. at 829; Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) (where a school district permitted the public to use its buildings to discuss child-rearing topics, it violated First Amendment rights by denying a church group's request for use to discuss that topic; allowing such access would not have been an establishment of religion); *Springfield*, 950 F. Supp. at 1488 (determining that an airport ordinance singled out religious viewpoints for discrimination by using the term "proselytizing" because the term was undefined, and despite the proprietor's interpretation of that term, it was generally understood to refer to religious advocacy).

[95] *See* Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) (holding that a state law impermissibly distinguished between peaceful labor picketing and other peaceful picketing).

all the more blatant…. 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."[96] A speech restriction must be "*justified* without reference to the content of the regulated speech"; in other words, restrictions must be justified based on the purposes and limitations of the forum.[97] When speech regulations consider the contents of a message, they are "presumptively unconstitutional" and subject to strict scrutiny.[98] The Supreme Court has recognized a few limited areas where the government can regulate based on the contents of a message, such as the use of "fighting words" in a message, but modern decisions have tended to limit the scope of those areas.[99]

C. Commercial Speech and Commercial Activity

1. Commercial Speech Standards

Commercial activity creates different First Amendment concerns. The courts first determine what constitutes "commercial speech." A message is commercial speech if it is an "expression related solely to the economic interests of the speaker and its audience."[100] This speech "proposes a commercial transaction."[101] A message remains commercial speech even if it blends expression related to the speaker's economic interests with some matters that are more ideological or that touch on public concern.[102]

Historically, the Supreme Court gave little weight to claimed constitutional violations for commercial speech. In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, however, the Court determined that the Constitution protects commercial speech from "unwarranted governmental regulation" and prohibits government from singling out and preventing this type of speech.[103] Although the Constitution provides less protection for this type of speech than for noncommercial messages,[104] commercial speech receives this protection as long as it "concern[s] lawful activity and [is] not …misleading."[105]

The Supreme Court applies less restrictive tests to determine the constitutional validity of commercial speech. The Court's traditional test for evaluating a commercial speech regulation, known as the *Central Hudson* test, applies four factors: 1) the commercial speech must concern lawful activity and not be misleading; 2) the asserted governmental interest must be substantial; 3) the regulation must directly advance the asserted governmental interest; and 4) the regula-

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[96] *See Rosenberger,* 515 U.S. at 829.

[97] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (determining that a noise regulation applied to the loudness of a rock band, not the content of its message).

[98] *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (where an ordinance prohibited bias-motivated disorderly conduct based in part on certain expressive conduct that the state supreme court had interpreted as unprotected speech (such as "fighting words"), the Supreme Court found that the ordinance was facially unconstitutional as viewpoint discrimination because it imposed special prohibitions on speakers who expressed views on the disfavored subjects of race, color, creed, religion, or gender while permitting other abusive expression); Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) (determining that a state's charitable solicitations statute was unconstitutional in part because it compelled fund raisers to make certain disclosures without sufficient state justification, and compelled speech (and compelled silence) constitute a content-based regulation of speech that is subject to strict scrutiny).

[99] *See R.A.V.*, 505 U.S. at 382–83. *See also* Bose Corp. v. Consumers Credit Union of United States, 466 U.S. 485, 104 S. Ct. 1946, 80 L. Ed. 2d 502 (1984) (determining that appellate courts can scrutinize findings that speech is unprotected, such as fighting words, obscenity, incitement to riot, or libel, and may independently examine the record concerning those findings).

[100] *See* Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n of N.Y., 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (determining that a state's ban on a public utility's advertising was more extensive than necessary to further the state's interests and violated the First and Fourteenth Amendments).

[101] *See* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24, 96 S.Ct. 1817, 48 L. Ed. 2d 346 (1976) (determining that a Virginia statute that prohibited advertising drug prices unconstitutionally singled out the content of speech and prevented its dissemination, although the context of commercial speech justified less protection).

[102] *See* Board of Trustees of State Univ. of N.Y. v. Fox,492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (determining that home economics presentations at Tupperware parties involved sales of household goods and did not convert these events into educational speech rather than commercial speech).

[103] *See Central Hudson*, 447 U.S. at 561.

[104] *See Virginia Bd. of Pharmacy*, 425 U.S. at 771, n.24.

[105] *See Central Hudson*, 447 U.S. at 566.

tion must not be more extensive than is necessary to serve that interest.[106] In an airport context, the courts typically apply the *Central Hudson* test when a nonproprietor government entity enacts a regulation over commercial speech that applies to commercial activities at the airport (and perhaps elsewhere).

For example, in *Sobel v. Hertz Corporation,* a Nevada federal district court considered a class action brought against a car rental company that separately charged various fees, including an airport "concession recovery fee."[107] The plaintiff claimed that the company had quoted a total charge upon reserving the car and then separately disclosed a concession recovery fee upon obtaining the car, and that this resulted in a surcharge that violated a Nevada statute interpreted as prohibiting an unbundling of the charge. The company argued that if the statute prohibited a separate disclosure of the fee, it would violate the company's First Amendment and state constitutional rights as an unwarranted governmental regulation of commercial speech. The court determined that the four-part *Central Hudson* test applied. It assumed that the speech was "only potentially misleading"; that the state had a "substantial interest in protecting consumers from misleading advertising"; that the statute ensured companies could not "deceive short-term lessees into believing they are required to pay additional charges" that were really operating costs; and that the statute was a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends." It thus found no federal constitutional violation.[108] Other courts have similarly applied the *Central Hudson* test when considering speech regulations imposed by nonproprietors.[109]

Where an airport proprietor is acting to manage its own property, however, the courts generally do not apply the *Central Hudson* test. Instead, they view the proprietor to be exercising commercial powers as a market participant, and they analyze the proprietor's restrictions on commercial speech under the nonpublic forum framework established in *Lee*. For example, in *Capital Leasing of Ohio, Inc. v. Columbus Municipal Airport Authority,* an Ohio federal district court considered whether an airport proprietor could contractually restrict what language a car rental company could use on its invoices to describe a separately stated airport fee.[110] The company argued that this contractual restriction violated its commercial speech rights under *Central Hudson*. It also argued that making this restriction a condition to entering a contract violated the "unconstitutional conditions" doctrine, which prohibits the government from denying a benefit to a person on a basis that "infringes his constitutionally protected…freedom of speech even if he has no entitlement to that benefit."[111] The proprietor argued that the First Amendment had no application to the case, and that the company could make a business decision to accept the limitation or forego being an onsite concessionaire. But the court did not agree.

The court determined that this case involved "the intersection between government regulation of commercial speech and the regulation of speech on government-owned property," and that "the proper standard to be applied in such situations is the reasonableness standard applied to the government-owned airport property in [*Lee*]."[112] It noted that the outcome in *Lee* "did not turn on the nature of the speech involved" but "on the fact that the restriction by the government agency dealt with the government agency's own property and the appropriate standard to be applied in that situation."[113] The court believed

> the Supreme Court's recognition of the right of a governmental entity, no less than a private owner of property, to preserve the property under its control for the use to which it is lawfully dedicated, is the polestar for locating the proper test or standard to determine the constitution-

[106] *See id*.

[107] *See* Sobel v. Hertz Corp., 698 F. Supp. 2d 1218 (D. Nev. 2010) (considering Nevada statute).

[108] *See id.* at 1229–30.

[109] *See, e.g.,* State of Kansas v. United States, 797 F. Supp. 1042, 1053 (D.D.C. 1992), *aff'd sub nom* State of Kan. v. United States, 16 F.3d 436 (D.C. Cir. 1994) (using the *Central Hudson* test to consider whether the Wright Amendment impermissibly limited commercial speech); Cramer v. Skinner, 931 F.2d 1020, 1033 (5th Cir. 1991) (also applying the *Central Hudson* test to consider the Wright Amendment).

[110] *See* Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth., 13 F. Supp. 2d 640 (S.D. Ohio 1998) (considering a proprietor's requirement in an airport concession agreement that was a condition for making an award of the contract and determining that the proprietor did not have an unfettered right to require concessionaires to give up First Amendment rights to obtain space in the airport terminal).

[111] *See id.* at 657 citing Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996) (unconstitutional conditions doctrine).

[112] *See id.* at 668.

[113] *See id*. at 662.

> ality of speech restrictions imposed by the government owner on persons desiring access to the owner's property.

Whether the speech was "pure" or "commercial" was only one factor to consider.[114]

The court then conducted its evaluation using *Lee*'s nonpublic forum test and examined the regulation's reasonableness in light of the purposes of the forum. It found that the proprietor's purpose for the restriction was to prevent descriptions of the fee that would mislead consumers. But this restriction, which prohibited using a number of listed words, was "so sweeping in its prohibition" that it would prohibit companies "from using any of the listed words, even if used in an accurate and non-misleading description of the surcharge."[115] The court found that the proprietor could not impose restrictions that would prevent companies from describing the surcharge in a truthful and not a misleading manner. The proprietor could require a single description, or it could leave companies to formulate their own descriptions. The regulation, however, infringed on commercial speech rights by allowing companies to create their own descriptions while also imposing "excessively broad prohibitions on the words that can be used."[116]

These two tests for commercial speech regulations govern the restrictions that may apply on an airport's campus. When the government acts as a nonproprietor, its commercial speech regulations will normally be examined under the *Central Hudson* test. When an airport proprietor creates restrictions on commercial speech, however, the courts will normally apply the nonpublic forum test from *Lee*.

2. State Action Doctrine

The state action doctrine determines when a private tenant or operator's actions will violate the First Amendment. Under the state action doctrine, the actions of a private party can create a First Amendment violation for both that party and the government if the private party's actions are sufficiently connected with the government. Normally, the conduct of private parties lies beyond the scope of the Constitution, but "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."[117] Actions by private parties, such as tenants or concessionaires, can create these violations whether they involve nonprofit or commercial speech.

There is not a mechanistic test to determine whether a private party has become a state actor. The courts examine the record to determine "whether the conduct at issue is 'fairly attributable' to the state" or "whether the claimed deprivation [of speech rights] resulted from the exercise of a right or privilege having its source in state authority," so that a party "may be appropriately characterized as [a] state actor."[118] Other factors that a court may consider include whether the government has delegated to a private party a power "traditionally exclusively reserved to the State";[119] whether a private actor is a "willful participant in joint activity with the State or its agents";[120] whether there is "pervasive entwinement" between the state and the private entity;[121] or whether a private entity "has acted together with or has obtained significant aid from state officials" to further a challenged action.[122] A mere lease or license from a government entity, without more, is insufficient to make a private party a

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[114] *See id.* at 663 (citations omitted).

[115] *See id.* at 665.

[116] *See id.* at 667. The court further analyzed the issues under the *Central Hudson* test to demonstrate that it would produce the same result.

[117] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620, 111 S. Ct. 2077, 2082, 114 L. Ed.2d 660 (1991) (determining that exercising preemptory challenges to remove black jurors in district court was done pursuant to a course of state action).

[118] *See* Wickersham v. City of Columbia, 481 F.3d 591, 597 (8th Cir. 2007) (citations omitted) (applying this test to an airshow operator), quoting Luger v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (determining that a debtor was deprived of property through state action).

[119] *See id.,* citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974) (determining that the State was not sufficiently connected with the termination of utility services to make the utility's conduct attributable to the State).

[120] *See id*., citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 151, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (determining that the plaintiff would make a state action claim by showing that a city had a state-enforced custom of segregating races in restaurants and that a denial of service was motivated by that custom).

[121] *See id.,* citing Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) (determining that a high school athletic association's regulatory enforcement action was state action for purposes of the Fourteenth Amendment).

[122] *See id.,* citing *Luger*, 457 U.S. at 937.

state actor.[123] If a private party's acts meet the requirements for state action, the same acts also qualify as actions taken "under color of state law" for purposes of a claim under 42 U.S.C. § 1983.[124]

For example, in *Wickersham v. City of Columbia,* the Eighth Circuit considered whether an airshow operator was a state actor when it would not let speakers leaflet or solicit a petition during the show, thus preventing noncommercial expressive activity.[125] The airshow operator's contract with the proprietor gave the operator temporary authority to exert this control in the area used by the show. The court determined that state action depended on whether there was a "'close nexus' not merely between the state and the private party, but between the state and the alleged deprivation itself" that exceeded "mere approval."[126] The court went on to determine that the air show operator was a state actor for a number of reasons. The show could not be held without the proprietor's cooperation; the proprietor was significantly involved in planning, advertising, managing, and operating the show; the operator represented that it was acting with the proprietor's sponsorship to obtain participation by federal aircraft; the proprietor had to continue to operate the airport during the show; and in particular, the proprietor's police force enforced the show operator's speech restrictions.[127] By determining state action, the proprietor and the operator were then both subject to the plaintiff's § 1983 action and the lower court's permanent injunction.

Advertising concessionaires may raise even more specific concerns for state action. For example, in *Air Line Pilots Association International v. Department of Aviation of City of Chicago,* the Seventh Circuit considered whether an airport advertising concessionaire acted as a state actor pursuant to its concession contract by denying a request to display union advertising that criticized a major airline tenant.[128] The court considered four factors to determine whether "governmental authority dominates an activity to such an extent that its participants must be deemed to act with the authority of the state." It considered 1) when a "symbiotic relationship" between the private actor and the state exists; 2) a "nexus test," in which the state commands or encourages a private discriminatory action; 3) when a private party carries on a traditional public function; and 4) when "the involvement of a governmental authority aggravates or contributes to the unlawful conduct."[129]

The Seventh Circuit held that under the first two of these factors, the advertising concessionaire was a state actor when it denied the advertisement. The court noted that the proprietor's contract with the concessionaire created a role for the proprietor's participation when denying advertising. It gave the proprietor a right to approve advertising or to order its removal, allowed the proprietor to exercise judgment to determine whether displays were in "good taste," and prohibited advertising that was "political, immoral, or illegal." The concessionaire further included these rights of the proprietor in its contracts with advertisers. The proprietor also had other involvement with the concessionaire. It paid for lighting in the advertising displays, paid for any construction-related relocation of advertising displays, and provided office and storage space to the concessionaire at no charge. The proprietor also had contractual authority to review the employment qualifications and assignments of the concessionaire's employees and order their removal, and the proprietor was entitled to 60 percent of the concessionaire's revenues.

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[123] *See* Gannett Satellite Information Network, Inc. v. Berger, 894 F.2d 61, 67 (3d Cir. 1990) (determining that airport retail concessionaires were not state actors when determining what newspapers to sell).

[124] *See Wickersham*, 481 F.3d at 597, citing *Luger*, 457 U.S. at 935.

[125] *See id.*

[126] *See id.,* citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961) (determining that a restaurant owner was a state actor when discriminating against black patrons based on the nature of the owner's relationship with the landlord parking authority); *Brentwood Acad.*, 531 U.S. at 295.

[127] *See id*. at 598.

[128] *See* Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chicago, 45 F.3d 1144 (7th Cir. 1995) (considering an airport advertising concessionaire's rejection of union advertising).

[129] *See id.* at 1149, citing *Burton*, 265 U.S. at 721 (determining that a symbiotic relationship existed because of a restaurant's lease in a parking garage, the government's reliance on the restaurant's revenues and parkers, and the restaurant's benefits from its tax status); Rendell-Baker v. Kohn, 457 U.S. 830, 840, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982) (former teachers failed to establish a state action claim in a civil rights complaint; significant state encouragement is a prerequisite to finding state action). *See also* Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (state action existed when a company town deprived its residents of constitutional rights).

The court found these facts to be direct evidence of a joint enterprise, constituting a symbiotic relationship between the concessionaire and the proprietor under the court's test for state action. It also found that, factually, both parties had acted to reject the advertising, and "*both* parties have an admitted interest and a stated hostility to the proposed message."[130] Regardless of these facts, however, the court also stated that it would have found state action solely on the basis of the proprietor's admitted discretion to accept or reject advertisements.[131] The court thus found state action, and under that doctrine both the concessionaire and the proprietor were responsible for the concessionaire's action.

3. Advertising

In addition to state action concerns, advertising can also raise concerns that a speaker will challenge the forum type of the airport's advertising locations. Although the Supreme Court has determined that airport terminals are a nonpublic forum, a government property owner can create designated public forums within its property by intentionally allowing expressive activity in a specific forum. The courts determine the relevant forum for analysis "in terms of the access sought by the speaker."[132] Advertising forums may be the most likely airport forums to become the subject of a forum challenge.

The courts determine whether a proprietor has designated a forum as open for some or all expression by determining the proprietor's intent. They determine that intent by looking at evidence of the consistent, actual "policy and practice of the government with respect to the underlying property" and "the nature of the property and its compatibility with expressive activity."[133] If a court's inquiry reveals that a proprietor has been willing to accept almost any message in its past advertising, that practice may serve as evidence of intent to open a particular forum for expression and may moot an argument that a specific type of advertising is incompatible with the airport.[134] Conversely, if a proprietor has a consistently enforced, written policy rejecting certain types of advertising as inconsistent with the forum's purpose (such as political or public-issue advertising), the courts may find that the proprietor's advertising space has remained a nonpublic forum.[135]

A forum analysis is a fact-intensive inquiry. For example, in *Department of Aviation of City of Chicago*, the Seventh Circuit remanded an airport advertising case to establish the forum type for the requested forum, an advertising diorama. It asked the lower court to develop factual findings to support the proper forum type based primarily on the proprietor's consistent practice and past policy in the forum, and, if that was inconclusive, whether the requested type of advertising was incompatible with the nature of the display cases in an airport concourse. The proprietor's stated policy alone was not dispositive of the proprietor's intent concerning the forum.[136]

The Seventh Circuit noted numerous factors that the lower court might consider when determining intent. Factors included:

- Whether similar advertising had been displayed in the past;
- The larger context of the airport environment where the display cases were located;
- The commercial character of the airport property;
- The airport's need to provide services attractive to the marketplace;
- The potentially disruptive effect of the advertising on the proprietor's solicitation of business;
- The potential to disrupt the proprietor's ability to provide air travel to consumers;
- The government's status as a proprietor; and
- Potential threats to the proprietor's ability to generate advertising revenue.

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[130] *See id.* at 1148–50.

[131] *See id.* at 1149. *See also* Am. Civil Liberties Union of Nevada v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006) (in a series of cases against a municipality, a mayor, a private operator of a public pedestrian shopping mall, and the executive director of the mall operator, the court determined that the government was involved in creating and enforcing speech prohibitions that violated the Constitution).

[132] *See Cornelius*, 473 U.S. at 802–03 (determining that the forum was a charity fund drive conducted in a public employment workplace).

[133] *See* Dep't of Aviation of City of Chicago, 45 F.3d at 1152 (noting that the larger context of the advertising displays was not separate from the airport's concourses; the court further noted that inaction cannot create a public forum, but the proprietor's policy statement, without supporting evidence, would not negate that status—the court sought objective indicia of intent).

[134] *See id.* at 1153 (remanding for factual findings).

[135] *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (considering the benefits of a written policy regarding bus advertising).

[136] *See* Dep't of Aviation of City of Chicago, 45 F.2d at 1153.

The proprietor argued that the court should consider whether this advertising (union criticism of an airline tenant) would undermine other commercial interests at the airport, such as those of the tenant. The court found this argument troubling because it required considering the viewpoint of the message when conducting a forum analysis. If the lower court determined that the forum was nonpublic, it could then determine the regulation's reasonableness and viewpoint neutrality.[137]

In another forum challenge case involving advertising, *Park Shuttle N Fly, Inc. v. Norfolk Airport Authority,* a Virginia federal district court considered whether an airport proprietor could refuse to allow advertising that competed with the proprietor's parking facilities.[138] The court identified the advertising spaces in question as the relevant forum, and it noted that the forum test of *Lee* applied rather than the *Central Hudson* test. The court found that the proprietor did not have a written policy concerning its advertising, but that it used the forum to advertise a variety of commercial companies, such as hotels offering courtesy shuttles. The court found no evidence that the advertising spaces in question had been used for public expression or noncommercial advertising, and it determined that disallowing competing advertising supported the proprietor's intent not to open the forum for public expression. The proprietor imposed this informal policy to prevent ads from companies in competition with the proprietor or its airline tenants and thereby "avoid diversion of revenue from the airport or concessions within it."[139] The court also noted that when government acts as a commercial participant, that factor makes finding a public forum unlikely.[140] The court thus concluded that the spaces were a nonpublic forum.[141]

The Virginia court then applied the nonpublic forum test. It determined that the proprietor's purpose for the regulation, to promote its own revenues, made the restriction reasonable, and since this was a regulation over purely commercial speech, the proprietor had more freedom than it would with a noncommercial advertisement. The court also noted that the proprietor was required to operate on a financially self-sufficient basis. The court thus concluded that the proprietor's advertising policy did not violate the First Amendment.[142]

In *N.A.A.C.P. v. City of Philadelphia,* a Pennsylvania federal district court held that it could not rule on a motion to dismiss without first establishing the forum type of advertising displays by conducting a fact-finding process.[143] Upon a subsequent motion for summary judgment, the court then determined that the proprietor's advertising spaces were a nonpublic forum and conducted the test for that forum.[144] At this stage in the case, the court questioned some aspects of the proprietor's practices. The proprietor had a newly revised written policy, and the court determined that it also had an unwritten policy under which the proprietor exercised broad discretion to determine whether an advertisement was "offensive." The court also believed that the interests

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[137] *See id.* at 1155–58 (no subsequent proceeding held).

[138] *See* Park Shuttle N Fly, Inc. v. Norfolk Airport Auth., 352 F. Supp. 2d 688 (E.D. Va. 2004) (considering challenges under the Equal Protection Clause and the First Amendment).

[139] *See id.* at 697.

[140] *See id.* at 706. *See also* Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 127–28, 115 S. Ct. 1278, 1284, 131 L. Ed. 2d 160 (1995) (in a case regarding the Administrative Procedures Act, stating that "the status of the Government as a beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator").

[141] *See id.* at 705–06.

[142] This case did not raise claims under competition laws that may apply to government when acting as a market participant. *See* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (noting that the government may not be immune from antitrust liability when acting as a market participant rather than as a regulator). *See also* COMPILATION OF STATE AIRPORT AUTHORIZING LEGISLATION (Airport Cooperative Research Program, Legal Research Digest 15, Transportation Research Board, 2012), http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_015.pdf (summarizing antitrust concerns, including the Local Government Antitrust Act of 1984, which protects local governments against damages in antitrust actions, but not against injunctive or declaratory relief).

[143] *See* N.A.A.C.P. v. City of Philadelphia, CIV.A. 11-6533, 2013 WL 2182704 (E.D. Pa. 2013) (considering a challenge to a revised airport policy that limited advertising to ads that proposed a commercial transaction).

[144] *See* N.A.A.C.P. v. City of Philadelphia, 39 F. Supp. 3d 611 (E.D. Pa. 2014) (questioning the airport proprietor's written and unwritten practices on summary judgment when the proponent of an issue advertisement raised a facial challenge).

that the proprietor pursued under its unwritten policy, promoting a family-friendly environment and a positive image of the city, constituted viewpoint discrimination. The case also questioned elements of the Supreme Court's forum analysis framework.

The court in this Pennsylvania case also cited to cases that considered forum challenges to bus advertising displays. While at first glance these cases seem to consider similar issues, bus advertising cases only determine a transit proprietor's intent relevant to buses, not an airport proprietor's intent relevant to an airport. When determining a proprietor's intent to create a designated public forum, a significant element of the test is determining the "nature of the property and its compatibility with expressive activity."[145] Transit cases thus lack that critical element of the analysis if they are applied to an airport case. As *Lee* recognized, other nodes of transportation are not relevant to considering airport forums.[146]

When the analysis in transit cases is not specific to establishing a forum type, however, those cases may offer some reasoning that is relevant to airport cases. For example, a Supreme Court transit case noted the general importance of a consistent, written policy when evaluating forums. That case upheld a transit agency's longstanding written policy that had consistently prohibited political advertising on buses for stated reasons, such as the short-term nature of these ads, disruption to other advertising accounts, the blaring nature of these ads to a captive audience on a bus, concerns for perceptions of favoritism by the agency, and difficulty in selling these ads because many candidates may want limited space.[147]

A Ninth Circuit transit case determined that if proprietors change their written policies during the course of a dispute, the court must consider that action when analyzing evidence of the proprietor's intent to restrict advertising. The court determined that a city's new policy had consistently restricted advertising to "speech which proposes a commercial transaction,"[148] and, although the city had accepted some noncommercial advertising under its previous policy, only 1 percent of the previous ads had been noncommercial.[149] It thus upheld the city's policy change. When the city later made another change to the wording of that policy, however, an Arizona state court determined that the city had altered the policy's meaning and that the policy no longer limited advertising solely to advertisements that proposed a commercial transaction.[150]

Some transit cases have also found against a transit proprietor when the proprietor lacked a clear written policy limiting permissible advertising topics, and, in practice, the proprietor had a history of accepting ads or subjectively rejecting them. For example, a Third Circuit case determined that a transit agency could not reasonably reject social issue ads when a bus policy was open-ended about which ads were permissible, the agency had a past practice of accepting all ads, and the purpose of the program was to earn concession revenues.[151] A Seventh Circuit case reached the same conclusion when a transit agency had no policy (despite its litigation claims); had accepted commercial, political, public-service, and public issue advertising in the past; and had allowed nonprofit advertisers to advertise at a nominal rate. The Seventh Circuit questioned whether a lack of written standards, coupled with a practice of subjectively rejecting "controversial" ads, could ever pass constitutional muster.[152]

Forum challenges are fact-intensive issues. As such, transit cases cannot simply be transferred to an airport setting because they do not take key forum challenge elements into account, including the nature of a given airport forum and that airport proprietor's intent. Under *Lee,* forum challenges at airports must consider the range of factors that are relevant to the questioned forum in the given airport's environment.

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[145] *See* Dep't of Aviation of City of Chicago*,* 45 F.3d at 1156.

[146] *Lee*, 505 U.S. at 678–83.

[147] *See Lehman*, 418 U.S. at 304.

[148] *See* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 975 (9th Cir. 1998) (considering bus advertising).

[149] *See id*. at 979.

[150] *See* Korwin v. Cotton, 323 P.3d 1200 (Az. Ct. App. 2014) (when the city changed its policy language to limit ads to those that proposed a commercial transaction "adequately displayed," court found that other messages were now permissible under this language as long as the commercial portion of the ad was adequately displayed).

[151] *See* Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242 (3d Cir. 1998) (considering bus advertising).

[152] *See* Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) (considering bus advertising).

4. Contractual Restrictions on Speech

Restrictions on speech that are required by contract can also result in First Amendment claims. For example, in *Capital Leasing of Ohio, Inc. v. Columbus Municipal Airport Authority*, a case affirmed by the Sixth Circuit, an Ohio federal district court determined that an airport proprietor's contractual restriction was overbroad when it prohibited car rental concessionaires from using certain terms to describe an airport fee. The proprietor thus could not impose the requirement.[153]

The court also determined that the proprietor's restrictive contract term violated the "unconstitutional conditions" doctrine. The Supreme Court has determined that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected…freedom of speech even if he has no entitlement to that benefit," such as in a contract setting.[154] The proprietor argued that it had a right to insist on a contractual condition restricting speech, and that companies could make a business decision to accept that limitation on their speech or forego the opportunity of being an onsite concessionaire. The court, however, determined that, although the proprietor, "like any other property owner, is free to insist upon the terms and conditions it imposes upon persons or entities desiring to have access to or use its property, it cannot impose conditions that are contrary to the rights granted to all citizens under the United States Constitution."[155] It found that nothing supported an "unfettered right to require Budget to give up its First Amendment right to obtain space in the terminal on a 'take it or leave it' basis."[156] The proprietor could not "condition the receipt of a benefit—a contract for an airport concession—on a curtailment of the First Amendment's right to freedom of speech."[157]

This same principle applies when government places contractual conditions on the receipt of funds. For example, Congress generally imposes obligations as a condition for accepting federal funding, but "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected…freedom of speech even if he has no entitlement to that benefit."[158] The Supreme Court further found, however, that "[i]t is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."[159] Thus, if the First Amendment would not preclude a regulatory requirement, it will not preclude a contractual requirement that is imposed as a condition of funding.

5. First Amendment Impacts on Commercial Relationships

The Supreme Court has determined that the First Amendment protects contractors and others whose business interests are affected by the government from retaliation. The government cannot retaliate against "a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance."[160] For example, the Supreme Court determined that a city violated the First Amendment by removing a tow truck company from a contracting list after its owner refused to contribute to the mayor's reelection campaign and supported another candidate. The Court found that "[i]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."[161] The Court would not sanction this political coercion, and it was irrelevant that the plaintiff was an independent contractor as opposed to an employee (who is also subject to these constitutional protections).[162]

Retaliation claims can arise in a number of commercial contexts at airports. For example, in *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission,* the California Supreme Court considered whether requiring a

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[153] *See Capital Leasing of Ohio, Inc.*, 13 F. Supp. 2d at 657. *See also* Section C.1 *supra*.

[154] *See id*. at 657, citing Bd. of County Comm'rs, Wabaunsee County, Kan., 518 U.S. at 674 (case discussing the "unconstitutional conditions" doctrine).

[155] *See id.* at 655.

[156] *See id*. at 659.

[157] *See id*. at 657.

[158] *See* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (requiring the presence of military recruiters at law schools on the same basis as other recruiters did not violate the school's First Amendment rights).

[159] *See id*.

[160] *See* O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 715, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) (the City could not remove a towing company from a contracting list after its owner refused to contribute to the mayor's reelection campaign and supported the mayor's opponent).

[161] *See id.,* citing Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (lack of tenure did not defeat a college professor's speech rights).

[162] *See id*. at 721.

project stabilization agreement between an airport and a union trade council was retaliatory and thus violated the First Amendment.[163] These agreements require signatory unions to pledge that they will not strike on a project, will arbitrate disputes, and will continue to work on the project despite the expiration of any applicable collective bargaining agreements. The proprietor required entering such a contract as part of its bid specifications for performing airport construction work, and the union claimed that the agreement violated its rights of association. The court noted that the First Amendment prohibits government retaliation against an independent contractor, but it found that these agreements did not prevent trade unions from expressing their philosophies, coerce any association, or punish unions for engaging in political activity or advocacy. The court noted that some union choices could have impacts under the agreement, but the First Amendment "does not oblige the government to minimize the financial repercussions of such a choice."[164] The court also found that the construction project warranted the use of such an agreement.

Various other parties may assert First Amendment retaliation claims against airports. Typical claimants have included car rental concessionaires, fixed base operators, and ground transportation providers, although commercial claimants are often not successful under the facts of a given case. The Supreme Court has determined that the First Amendment protects contracting parties against patronage decisions and arbitrary actions pursuant to rights of association, speech, and belief.

D. Other Speech Concerns at Airports

1. Picketing and Labor Expression at Airports

Under the First Amendment, airport proprietors can constitutionally impose restrictions on labor expression, such as picketing or leafleting, as with other speakers. The nonpublic forum test under *Lee* allows airports to create restrictions to manage their facilities and prevent disruption that are reasonable in light of the purposes of the forum and are viewpoint-neutral.[165] This includes disruption created by picketing and other labor activities. These activities can, however, create additional questions concerning the scope of First Amendment rights.

Labor activities often involve organizing efforts, whether in areas open to airport customers or private areas, and those efforts are not exempt from time, place, and manner regulation requirements to prevent disruption. The proprietor can reserve work time and resources for work-related purposes and preclude access to those resources by others, including unions.[166] The Supreme Court has noted that union organizing activity on a proprietary government property with strong security interests (in this case a prison) "must give way to the reasonable considerations of penal management," and airport environments can present similar concerns for managing safety, risks, and disruption.[167]

Picketing on airport property can involve specific concerns for the size and mobility of picketing groups and the objects that group members may carry, especially inside the terminals. Proprietors may respond with specific regulations that address the time, place, and manner of picketing to prevent disruptions to airport operations.[168] Picketing often targets a business located on the premises. The Supreme Court has not addressed picketing against establishments located at an airport, but when considering shopping malls, the Court has determined that union picketers "did not have a First Amendment right to enter [a] shopping center for the purpose of advertising their strike" against one of the stores in the mall. Instead the Court found that the National Labor Relations Act governed rights and liabilities when picketers want to target such an establishment.[169]

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[163] *See* Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n, 981 P.2d 499, 517 (Cal. 1999) (considering an agreement for the construction of a multi-billion dollar airport expansion), citing Lyng v. Automobile Workers*,* 485 U.S. 360, 368, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988) (determining a statute did not violate First Amendment rights of association concerning union members).

[164] *See id.*

[165] *See Lee*, 505 U.S. 672.

[166] *See Perry Educ. Ass'n,* 460 U.S. at 45 (teacher mailboxes were a nonpublic forum from which a rival union could be excluded as a means of ensuring labor peace); *Cornelius,* 473 U.S. at 802 (a government charitable solicitation campaign was a nonpublic forum from which the government could exclude participation by legal defense funds).

[167] *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977) (deferring to management concerns regarding union organizing and finding that prisons are not a public forum).

[168] *See* Section II *infra* (examples of airport policies).

[169] *See* Hudgens v. NLRB, 424 U.S. 507, 520–21, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) (applying the NLRA's prohibitions to a private shopping mall).

State and federal labor statutes can govern a range of issues, and they add complexity to a First Amendment analysis involving labor activities. Generally the courts try to first resolve disputes under these labor laws to avoid a need to examine First Amendment protections. For example, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Construction Trades Council,* the Supreme Court considered whether union members who peacefully distributed leaflets without picketing or other conduct had violated federal statutes prohibiting unfair labor practices that were meant to protect secondary employers (employers that are affected by labor actions but that are not the target of the strike).[170] The Supreme Court noted that peacefully distributing leaflets was an activity that likely had First Amendment implications. But first it considered the wording of the applicable statute, the nature of peaceful leafleting, the statute's legislative history, and the general presumption that Congress intends to act within the Constitution. The Court then held that the statute could be construed to permit the peaceful leafleting in question, and it thus avoided the need to determine whether the labor statute was unconstitutional under the First Amendment.[171]

Labor statutes generally prohibit unfair labor practices, or in other words, labor activity that coerces rather than persuades. While coercive activity is prohibited, persuasive activity carries First Amendment protections, and even courts can struggle to find the line between the two. For example, in *520 S. Michigan Avenue Associates, Ltd. v. Unite Here Local 1,* the Seventh Circuit considered a variety of labor activities that were claimed to violate the unfair labor prohibitions of federal statutes. The court noted recent tests for assessing whether these activities were prohibited by statute or protected under the First Amendment, and it determined that some of the challenged labor practices, although objectionable to the strike target and other businesses, were subject to First Amendment protection. Other practices, however, could not be determined at the summary judgment stage, and the court remanded the case so the lower court could determine whether those practices had crossed the line from constitutionally protected persuasion to statutorily prohibited coercion. The court noted that if conduct was statutorily prohibited, that prohibition "would pose no greater obstacle to free speech than that posed by ordinary trespass and harassment laws."[172] Thus, legally prohibited union conduct will normally not raise constitutional concerns, but determining what conduct is legally prohibited may not be clear.

2. Speech and Security

First Amendment challenges at airports have questioned whether speakers have a right to pursue expressive activities at security screening checkpoints. These cases have not always relied on forum analysis to examine the issues, and they tend to focus on whether arresting or detaining the speaker was a valid response to the speaker's actions. In general, these cases have noted a concern for arrests made in response to peaceful, nondisruptive protests. They also illustrate that a court may allow an arrest to overshadow the forum analysis principles that determine whether a proprietor's policy for expression in these areas is reasonable.

For example, in *Tobey v. Jones,* the Fourth Circuit decided not to dismiss a case in which a plaintiff claimed that he was arrested based on a peaceful protest.[173] The plaintiff had removed his clothes at an airport screening checkpoint to display the text of the Fourth Amendment written on his chest, which he stated was a protest of the Transportation Security Administration's (TSA) enhanced imaging screening measures. The proprietor argued that the officers acted reasonably under *Lee* because the government can impose reasonable restrictions on speech in an airport as a nonpublic forum. The court, however, did not conduct a First Amendment forum analysis to determine whether the proprietor could restrict protests at the screening checkpoint. Instead it was persuaded by arguments that the arrest was without probable cause because it was based on conduct that was bizarre, but peaceful, and it found that where the plaintiff had alleged a silent, peaceful, nondisruptive protest, an arrest on

[170] *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. Const. Trades Council, 485 U.S. 568, 578, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (finding that the leafleting in question did not have a coercive effect, and that the issue could be resolved under federal statutes).

[171] *See id.* at 578 (secondary boycott issues).

[172] *See* 520 S. Michigan Ave. Associates, Ltd. v. Unite Here Local 1, 760 F.3d 708 (7th Cir. 2014) (considering union practices such as an uninvited entry onto property, picketing, communications to dissuade business activity with the strike target, and other actions).

[173] *See* Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013) (considering an arrest for a protest at the screening checkpoint).

that basis was not consistent with the First Amendment even in an airport.[174]

In *George v. Rehiel,* the Third Circuit considered First Amendment implications when a passenger was handcuffed and detained because he refused to submit to additional screening and also possessed flashcards containing Arabic words, some of which discussed terrorism.[175] The court found that possessing the flashcards (and an anti-American book) were activities protected by the First Amendment, but officers were not required to ignore the content of those items and refrain from investigating further. The court noted that the First Amendment would not tolerate singling out someone for enhanced scrutiny for carrying materials critical of the United States.[176] In these circumstances, however, it found that the officers' actions were reasonable. In general, the courts avoid interpreting the First Amendment in a way that would "sweep…broadly in restricting the Government's efforts to fight terrorism."[177]

In *Mocek v. City of Albuquerque*, a New Mexico federal district court applied forum analysis under *Lee* when evaluating First Amendment issues in a security screening area.[178] In that case, an individual claimed that he could film screening activities even though he was asked to stop. The court determined that even if a citizen had a right to engage in "newsgathering" or to record the activity of government officials in public, such a right at the screening checkpoint of an airport "entails less First Amendment protection than that of the plaintiffs in [*Lee*]" because the checkpoint was an even more specific location that was dedicated to safety activities.[179] Nothing indicated that the checkpoint's primary purpose was the "free expression of ideas," that the screening checkpoint differed from the nonpublic forum of the airport terminal, or that government action had "intentionally open[ed] a nontraditional public forum for public discourse."[180]

The courts do not consider disruptive conduct to support a claimed violation of First Amendment rights. For example, in *Rendon v. Transportation Security Administration,* the Sixth Circuit considered whether TSA regulations that prohibited interference with a security screener violated First Amendment rights.[181] A passenger was asked to submit to a hand wand search at the checkpoint, and the passenger responded with loud and belligerent conduct until a supervisor and police officer had to remove him and issue a civil penalty. The passenger claimed that the TSA regulation was content-based in violation of the First Amendment because a passenger who asked a good-faith question without profanities would not be subject to a penalty, while a passenger asking with profanities would be punished. The court noted that "the regulation (on its face and as applied) is a content-neutral regulation, as it is justified without reference to the content of the regulated speech."[182] It found that the purpose of the regulation was to prohibit interference with screeners and that any impact on speech was incidental and, in this case, due to the passenger's conduct. "A content-neutral regulation that has an incidental effect on speech is upheld so long as it is narrowly tailored to advance a substantial government interest."[183] The court also found that the regulation was not overbroad but only prohibited conduct that interfered with the screeners in performing their duties.

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[174] *See id.* at 391, citing Bd. of Airport Comm'rs of City of Los Angeles, 482 U.S. at 576 (nondisruptive speech, such as wearing a T-shirt or a political button, was not airport-related, but was still protected speech even in nonpublic forum).

[175] *See* George v. Rehiel*,* 738 F.3d 562 (3d Cir. 2013) (also considering Fourth Amendment claims and a *Bivens* claim in connection with First Amendment retaliation claims).

[176] *See id.* It is unclear whether the officers argued that the arrest was based on a violation of airport regulations governing the time, place, and manner for conducting demonstrations.

[177] *See* United States v. Assi, 414 F. Supp. 2d 707, 715–16 (E.D. Mich. 2006) (rejecting a claim of impermissible guilt by association under the First Amendment when a passenger attempted to carry military equipment to a known terrorist organization in violation of a statute prohibiting such support).

[178] *See* Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002 (D. N.M. 2014) (considering action taken against a citizen claiming that he had a right to gather news and film security actions at the checkpoint).

[179] *See id.* at 20214 WL 936724, at 58–59.

[180] *See id.* at 59. The court also found that while circuit courts varied, the Tenth Circuit and the Supreme Court had not established an individual's right to gather news in this context, and even circuits that had addressed a right to film police activities had determined that it was subject to reasonable time, place, and manner limitations.

[181] *See* Rendon v. Transp. Security Admin., 424 F.3d 475 (6th Cir. 2005) (upholding a TSA screening regulation against a challenge that it was overbroad).

[182] *See id.* at 479, citing *Rock Against Racism*, 491 U.S. 781.

[183] *See id.*

3. Press at the Airport

Cases involving the press at airports typically focus on how a proprietor may constitutionally regulate the placement of newsracks. For example, in *The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority,* the Fourth Circuit considered whether an airport proprietor could ban newsracks entirely in a large commercial airport.[184] It noted preliminarily that "the First Amendment protects distribution as well as publication of newspapers" and that "modes of distribution involving permanent or semi-permanent occupation of publicly-owned property don't lose First Amendment protection because of that fact." [185] It also noted that a total ban "significantly restricted the Publishers' ability to distribute newspapers" because travelers had trouble buying them from airport shops, which were not open at certain hours or might sell out.[186]

The Fourth Circuit then considered whether a total ban was reasonable based on the airport's status as a nonpublic forum under *Lee*. It noted some of the proprietor's asserted purposes for its total ban: aesthetics, preserving revenue, preventing congestion, and security. The court found these interests were legitimate, but they did not counterbalance the ban's significant restriction on protected speech for a number of reasons. Aesthetics did not receive strong consideration in the courts, and the proprietor had offered no evidence of aesthetic harm. The court believed that the proprietor's revenue interests could be addressed through a newsrack concession, that these interests were not substantial, and that the airport's concession master plan had not even considered the effect of newsracks on airport revenues. It believed that common sense contradicted the proprietor's congestion argument, and a "limited number of carefully placed newsracks would create only trivial congestion."[187] It also found that the proprietor's security arguments indicated little about the security risk of allowing a carefully calibrated newsrack presence, and "[s]uch a risk could not be more than *de minimis.*"[188] The court thus found insufficient evidence to justify a total ban on newsracks in this large airport's terminals.

Other cases considering newsrack regulations at large airports examine similar factors.[189] But where airport regulations only prohibit commercial activity generally, they will not necessarily raise First Amendment concerns. In a First Amendment analysis, "the law in question must have a close enough nexus to expression or expressive conduct to give rise to a substantial threat of undetectable censorship."[190] The proprietor also must be involved in denying access to the publisher. Where airport retail concessionaires simply decide independently what newspapers they will sell from shops in the terminals, these concessionaires normally will not be viewed as state actors subject to First Amendment constraints.

When courts consider airport regulations under a forum analysis, they also may reach different outcomes depending on the circumstances of the airport in question. For example, in *Jacobsen v. City of Rapid City, S.D.,* the Eighth Circuit considered a total ban on newsracks at a small commercial airport.[191] It applied a forum analysis and determined that as with such bans at large airports, the proprietor's interests in operational efficiency, safety, security, and aesthetics were legitimate but insufficient to justify a total ban. The court agreed, however, that this particular proprietor could reasonably ban newsracks in its terminal to leverage a better bargain from its gift shop concession to help pay debt for the small airport's newly constructed terminal building. The court noted that the proprietor's policy would need to consider related impacts to low-budget, controversial newspapers, but the circumstances

[184] *See* The News and Observer Publishing Co. v. Raleigh-Durham Airport Auth., 597 F.3d 570, 576 (4th Cir. 2010) (considering requests to place newsracks inside the airport's terminals).

[185] *See id.* at 576.

[186] *See id*. at 579.

[187] *See id* at 580.

[188] *See id.* at 581.

[189] For example, *see* Multimedia Pub. Co of S.C., Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993) (total ban was an overly heavy burden on expressive activity, and proprietor's interests in aesthetics, preserving revenue, and security were not sufficient to justify ban).

[190] *See Gannett*, 894 F.2d at 68–69 (determining that an airport regulation that prohibited vending machines without a permit prohibited all such machines, and that this general prohibition on commercial activity was not "narrowly and specifically" directed at expression so as to "warrant judicial intervention prior to an allegation of actual misuse"; the court also determined that retail concessionaires in the terminal that independently refused to stock a given newspaper were not acting as state actors).

[191] *See* Jacobsen v. City of Rapid City, S.D., 128 F.3d 660 (1997) (considering claims by a small publisher requesting newsrack access in the Rapid City Regional Airport terminal).

present in this particular small airport made the ban in question reasonable.[192]

A series of cases involving the Hartsfield Atlanta International Airport considered several aspects of a newsrack concession under the First Amendment. Proprietors often build newsrack facilities and charge publishers a fee to use space that the proprietor allocates from time to time. A Georgia federal district court initially enjoined a proprietor from requiring publishers to use airport newsracks that also bore advertisements for other products. The injunction also prohibited the proprietor from exercising unlimited discretion when deciding which publications could be placed in which newsracks (or whether publishers could maintain their own newsracks in airport facilities). The court also initially enjoined the proprietor from charging a revenue-raising fee for the use of the newsracks.[193] Ultimately, the Eleventh Circuit agreed that the proprietor could not require publishers to use advertising-bearing newsracks and could not exercise unfettered discretion over newsrack locations. But it allowed the proprietor to charge a revenue-raising fee because the proprietor was acting in a proprietary capacity rather than as a regulator.[194] The proprietor subsequently sought fees that should have been paid during the period of the injunction, but the court only allowed payment for sums that the proprietor had requested in the litigation. It also awarded the publishers some of their attorneys' fees under 42 U.S.C. §§ 1983 and 1988 for prevailing on portions of their action.[195]

News gathering activities by members of the press are also subject to time, place, and manner restrictions. Under Supreme Court precedent, there is a "right to gather news from any source by means *within the law*." That right is thus limited to sources legally available to the public, and there is no First Amendment right to compel others, whether "private persons or government, to supply information."[196] The "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[197]

4. Employment

Government cannot condition public employment "on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[198] The Supreme Court has found that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[199] The courts thus attempt to "arrive at a balance between the interests of the… [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through

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[192] *See id*. at 664–65.

[193] *See* Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation, 6 F. Supp. 2d 1359 (N.D. Ga. 1998) (enjoining practices under an airport newsrack plan); Atlanta-Journal and Constitution v. City of Atlanta Dep't of Aviation, 107 F. Supp. 2d 1375 (noting that limiting the size of the publisher's logo on the newsrack while requiring large soft drink advertisements on the newsrack was unconstitutional, because the proprietor was compelling the publisher to associate with a soft drink company, and the purpose of the forum did not justifying drawing these distinctions for access (the reason for allowing the soft drink advertisements related to the City's relationship with the company as an underwriter of city-sponsored cultural programs)).

[194] *See* Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation, 322 F.3d 1298 (11th Cir. 2003) (remanding to allow the airport proprietor to formulate a new plan, to allow consideration of the airport's claim for fees that were previously enjoined). *See also* Phoenix Newspapers, Inc. v. Tucson Airport Auth., 842 F. Supp. 381 (1993) (the government acting in proprietary capacity can charge newsrack fees).

[195] *See* Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation, 442 F.3d 1283 (11th Cir. 2006) (also finding that the proprietor's litigation strategy was largely responsible for the long duration of the litigation).

[196] *See* Houchins v. KQED, Inc. 438 U.S. 1, 11, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (emphasis added) (determining that the news media had no constitutional right of access to a county jail, different from other persons, to conduct interviews, photograph, and otherwise gather news, and the county could deny access).

[197] *See* Branzburg v. Hayes, 408 U.S. 665, 684, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (rejecting a claimed privilege against testifying before a grand jury based on confidential sources).

[198] *See* Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (determining that the matter at issue was a private work issue).

[199] *See* Pickering v. Bd. of Ed. of Township High Sch. Dist. 2005, Will County, Ill., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (a teacher's exercise of a right to speak on issues of public importance may not furnish the basis for a dismissal from public employment).

its employees."[200] The courts first determine "whether the employee spoke as a citizen on a matter of public concern," and if so, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[201] When employees are speaking as citizens about matters of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[202]

The Supreme Court observed that this test acknowledges the need for informed, vibrant dialogue in society and that repressing such a dialogue comes at a cost. If public employees could not speak about their employers' operations, "the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[203] Airport environments involve a variety of activities that may raise matters of public concern.

For example, in *DiMartino v. Richens*, the Connecticut Supreme Court found that an airport manager was speaking on a matter of public concern when an airport official advised the manager to discuss break-ins involving an office that had access to security keys and secure areas with the police.[204] A subsequent undercover investigation revealed that this manager's supervisor and others were entering the office, and airport officials then accused the manager of "setting up" other employees and subjected him to lengthy, demeaning treatment that included effectively demoting him. The court found that the manager had spoken on a matter of public concern and suffered consequences because of his speech, and it found the officials' claims about their adverse treatment of the manager were pretextual. The court thus found for the manager on actions that involved the First Amendment, the Equal Protection Clause, and punitive damages.

The First Amendment also protects public employees against patronage practices under First Amendment rights of association and belief.[205] The Supreme Court has found that patronage dismissals cannot be justified under the First Amendment on grounds of government effectiveness, loyalty, or the preservation of the democratic process, unless those qualities are necessary to the effective performance of a given public office. The Court found that patronage dismissals are a "severe encroachment on First Amendment freedoms," and that without a clear demonstration that a given practice is the "least restrictive means" of fostering "vital" government interests, such dismissals are "unconstitutional under the First and Fourteenth Amendments."[206] It also determined that absent practices that are "narrowly tailored to further vital government interests," patronage promotions, transfers, recalls, and hiring decisions "impermissibly encroach on First Amendment freedoms."[207]

5. Public Meetings

Public meetings can also raise First Amendment concerns. Many airport proprietors operate in connection with a public board that is regularly involved in airport processes or decisions, whether as the governing body of an airport authority or as a local government advisory board. Proprietors may conduct other public meetings as well, such

[200] *See id*.

[201] *See id.*

[202] *See* Garcetti v. Ceballos, 547 U.S. 410, 418 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (determining that the matter at issue was work-related) citing *Connick*, 461 U.S. at 143.

[203] *See* City of San Diego, Cal. v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (considering off-duty speech); United States v. Nat'l Treasury Employees Unio*n,* 513 U.S. 454, 470, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995) (a government ban on employees accepting honoraria for speeches imposed a significant burden on the public's right to read and hear what employees would have said).

[204] *See* DiMartino v. Richens, 822 A.2d 205 (Conn. 2003) (awarding punitive damages to employee).

[205] *See* Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (non-civil service employee dismissals for political reasons violated the First Amendment); Branti v. Finkel, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980) (determining that dismissals for refusing a request for political and financial support were unconstitutional; continued employment cannot be conditioned on allegiance, and the question turns not on labels of whether "policymaker" or "confidential" fit a particular position but on whether the hiring authority can demonstrate that party affiliation is "an appropriate requirement for the effective performance of the public office involved").

[206] *See Elrod*, 427 U.S. at 372–73 (also noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

[207] *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990) (determining that a variety of patronage practices were unconstitutional).

as formal community meetings to discuss expansion plans. The courts are split as to the appropriate test for analyzing First Amendment access rights in connection with public meetings.

The Supreme Court has recognized that there is a First Amendment right of access to some government proceedings. When determining this right, it considers whether a "tradition of accessibility…[indicates that] the place and process has historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question."[208] Some federal courts have looked to this Supreme Court test concerning a right of public access to determine First Amendment rights in public meetings, but others have applied forum analysis to make that determination.

For example, in *Whiteland Woods, L.P v. Township of West Whiteland,* the Third Circuit considered a regulation prohibiting videotaping during meetings of a planning commission, which served in an advisory capacity only.[209] It found that the commission was intended to play an active role in municipal land use and was subject to state open meetings laws, and it determined that public access fostered public awareness, perceptions of fairness, and the community's ability to evaluate land use information and actions. These meetings were thus the type of public proceeding subject to access rights under the First Amendment.[210] The court also noted, however, that a public right of access is not absolute and may be made subject to "reasonable time, place, and manner restrictions" in the interests of fair administration. The First Amendment does not require "unfettered access to government information."[211] Thus, it upheld the planning commission's restriction on videotaping meetings because a right of public access "was not meaningfully restricted by the ban on videotaping." The plaintiff had not demonstrated "an essential nexus between the right of access and a right to videotape," and thus there was no First Amendment right to videotape.[212]

When applying this test, the Third Circuit expressly rejected the use of forum analysis. It reasoned that public meeting access claims do not allege an interference with speech or other expressive activity but a right to "receive and record information."[213] It noted, however, that other courts have found forum analysis applicable, determined a forum type for the meeting in question, and applied the appropriate test.[214]

In *Rowe v. City of Cocoa, Fla.,* the Eleventh Circuit applied forum analysis to determine that a city council meeting was a limited public forum that could be restricted by "content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest."[215] The court also determined that there is a "significant governmental interest in conducting orderly, efficient meetings of public bodies."[216] The city council could thus "confine their meetings to specified subject matter" and give the presiding officer authority to "regulate irrelevant debate and disruptive behavior at a public meeting" so that meetings would not "drag on interminably, and deny others the opportunity to voice their opinions." Council rules could limit participation to residents or taxpayers, determine when citizens could speak, limit speech to legitimate inquiries rather than "advancing arguments or repetitious questions," and limit matters "to discuss the topic at hand."[217] The court also found that none of these requirements regulated based on viewpoint.

In *Carlow v. Mruk*, a Rhode Island federal district court applied both a right of public access test and a forum analysis test to consider restrictions on meeting participation in a nonpublic forum, and it determined that their outcome was the same.[218] Both allowed a special district to limit meeting participation to persons whose attendance was relevant to the purpose of the meet-

[208] *See* Press-Enterprise Co. v. Superior Court of Cal. for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (considering rights of access to criminal proceedings in court).

[209] *See* Whiteland Woods, L.P v. Township of West Whiteland, 193 F.3d 177, 181 (3d Cir. 1999) (examining various rights in a planning commission meeting).

[210] *See id.* at 181.

[211] *See id*. at 181–82, citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (holding that a criminal trial must be open to the public); *Houchins*, 438 U.S. at 9 (holding that news media have no constitutional right to access a county jail in excess of other persons or to make recordings for broadcast).

[212] *See id*. at 183–84.

[213] *See id*. at 183.

[214] *See id*. at 182.

[215] *See* Rowe v. City of Cocoa, Fla., 358 F.3d 800, 803 (11th Cir. 2004) (considering limitations on conducting city council meetings).

[216] *See id.* at 803.

[217] *See id*.

[218] *See* Carlow v. Mruk, 425 F. Supp. 2d 225 (D. R.I. 2006) (considering an annual fire district meeting).

ing. The court also noted that First Amendment rights "do not entail any government obligation to listen," and do not "grant to members of the public generally a right to be heard by public bodies making decisions of policy."[219] Both of these tests also allowed the public body to prohibit videotaping by the public at a meeting (despite allowing the press to record meetings), because this restriction did not impact the public's right to be present, and it was reasonable under the circumstances to make distinctions for the press.[220] The court also determined that officials could remove meeting attendees for violating meeting rules.

6. Government Speech

The First Amendment applies to circumstances where third parties speak, but when government entities are "engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech, it does not regulate government speech." The government is "entitled to say what it wishes and to select the views that it wants to express." This same freedom to express the government's own views also applies "when it receives assistance from private sources for the purpose of delivering a government-controlled message."[221] Thus when government speaks, its acts are not considered to open a forum for speech by others under the Supreme Court's forum doctrine. Forum analysis "simply does not apply,"[222] and government may reject requests by others to add their speech to the government's own speech.[223]

Under the Supreme Court's holding in *Johanns v. Livestock Marketing Association,* government is speaking when two factors are met: where the "government sets the overall message to be communicated and approves every word that is disseminated."[224] Government speech thus can be determined by the "degree of governmental control over the message."[225] Others may participate in creating and funding the government speech (and may even be compelled to use the speech), but it remains government speech where government approves every word and adopts that message. For example, government is speaking when it effectively controls the messages sent, such as by retaining final approval authority over the selection of permanent monuments in a city park[226] or by owning the holiday displays that it erects at an airport and permitting no others.[227] Government is not speaking, however, when it only disseminates the speech of others, since others then determine the message.[228] Although the First Amendment does not restrict government speech, other laws may apply (such as the Establishment Clause, statutes, or regulations).[229] The Supreme Court has also stated that it is unclear whether the First Amendment provides rights to the government.[230]

7. Internet Concerns

Government practices involving the Internet can raise First Amendment concerns, and the case law in this area continues to develop. The Supreme Court considered issues that relate to Internet filtering policies in a case involving libraries, *United States v. American Library Association, Inc*.[231] The Court believed that forum

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[219] *See id.* at 244.

[220] *See id*. at 247–48 (also noting that if officials had discretion to grant permission to videotape, the regulation could be a species of viewpoint-based discrimination).

[221] *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) (determining permanent monuments that a city places in a city park are government speech, even when contributed by private persons).

[222] *See id.* at 480.

[223] *See County of Clark*, 33 F. Supp. 2d 896 (D. Nev. 1999) (upholding a proprietor's refusal to add a private crèche to its holiday display); Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Nat. Resources, 587 F. Supp. 2d 1012, 1019–20 (N.D. Ill. 2008) (a park's display racks contained materials to facilitate park visitors' recreational pursuits; public forum principles were out of place, and the plaintiff had no right to display its own materials).

[224] *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 561–62, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (the government could require the beef industry to use generic promotional statements created by a board, but approved by the government, and funded by a targeted assessment on beef producers).

[225] *See id*.

[226] *See Pleasant Grove*, 555 U.S. at 473.

[227] *See County of Clark*, 33 F. Supp. 2d at 902.

[228] *See* Matwyuk v. Johnson, 22 F. Supp. 3d 812, (W.D. Mich. 2014) (personalized license plate messages were not government speech).

[229] *See Pleasant Grove*, 555 U.S. at 468–69.

[230] *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 211, 123 S. Ct. 2297, 156 L. Ed.2d 221 (2003) (considering library Internet services).

[231] *See id. See also* Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (determining that the Child Online Protection Act's restrictions on Internet obscenity could constitutionally rely on the obscenity standards established by

analysis may not apply to the Internet. But it nonetheless considered forum analysis principles, similar to other First Amendment cases that have considered a forum that possesses some inherent expressive qualities. The Court noted that the Internet "did not exist until quite recently." It has not "immemorially been held in trust for the use of the public," and "[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking." The Court further noted that the Internet's presence as a library resource was not "an affirmative choice to open up its [the library's] property for use as a public forum," and without that intent, the Internet terminals at the library could not constitute a designated public forum.[232]

The Court then examined the purpose of the library's Internet restriction. It considered the role of libraries in society and their established task of determining what materials to make available to the public. It reasoned that similar to print materials, libraries did not acquire Internet terminals to "create a public forum for web publishers to express themselves" or to "encourage a diversity of views from private speakers," but as "simply another method for making information available." Thus consistent with that purpose, the Court determined that libraries could exercise judgment in "identifying suitable and worthwhile material" and "exclude certain categories of content."[233] The Court did not attribute its decision in this case to forum analysis. But it considered the library's setting and purpose for providing Internet access in a manner similar to other cases where a government proprietor has limited the use of a forum that possesses some inherent expressive qualities, such as media broadcasts or a university setting.[234]

The lower courts have examined issues that may arise when the government denies access to private speakers who want to post private materials or links on the government's Web page. Recent cases have analyzed these issues using forum analysis. Typically they consider whether a government Web page (including its links) constitutes government speech, or whether the government has opened a limited public forum for private speech by inviting public access to its Web page.

For example, in *Page v. Lexington County School District One,* a Fourth Circuit case, a school district created a Web page to oppose legislation.[235] The Web site included third-party materials and links to other sites, but the district selected all of those materials and links to bolster its own message. The court determined that the district's Web page was government speech under *Johanns*. The district only posted materials and links that it selected as being consistent with the district's message and it did not allow third parties to post their own materials. The court further determined that the district had retained control over its Web site by retaining the ability to exclude any link at any time. It never incorporated material from other Web sites, and it continuously and unambiguously communicated a consistent message by only posting links to sites that shared its position. The district also disclaimed the contents of any linked Web site, making it clear that only the statements on its own site should be taken as the district's speech. The court believed that if the district had transformed its own site into a "chat room" or "bulletin board" for private opinions, it may have created a limited public forum by inviting private speech. Instead it did not create such a forum but only published its own messages as government speech.[236]

In a similar First Circuit case, *Sutliffe v. Epping School District*, a town created a Web site that included hyperlinks to advocate for the approval of budget and spending issues.[237] The town denied access to residents who wanted to post opposing points of view, and the court upheld the town's practices as government speech. The court noted that if the town could open a forum

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Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and were otherwise appropriately restricted in scope).

[232] *See id*. at 205–06.

[233] *See id.* at 206–08 (determining that Congress could impose Internet filtering requirements on libraries as a condition of federal funding).

[234] *See Ark. Educ. Television*, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998) (determining that a publicly owned television station could limit a political candidate's access to broadcast journalism); *Christian Legal Soc.,* 561 US. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010) (determining that in light of the "special characteristics" of the school environment, a school could require groups to comply with the school's nondiscrimination policy without violating First Amendment rights).

[235] *See* Page v. Lexington County Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008) (determining that the district's Web site practices were government speech).

[236] *See id* at 283–85.

[237] *See* Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 334 (1st Cir. 2009) (upholding a town's denial of Web page access).

for private speech just by placing limited hyperlinks on its Web page, the "public forum doctrine could risk flooding the Town website with private links, thus making it impossible for the Town to effectively convey its own message and defeating the very purpose of the website and the hyperlinks chosen by the Town."[238] The court believed that the town had met the elements of the government speech doctrine, including a requirement that the town maintain control over its message, by retaining the right to exclude any link.[239]

E. Legal Challenges to Policies

Airport proprietors implement their First Amendment requirements through written or unwritten policies and practices, and in a commercial context, sometimes through contracts and bidding documents as well. The manner in which these requirements are drafted or implemented can create the basis for a First Amendment legal challenge. This section considers some of the key doctrines that courts use to evaluate and uphold or invalidate regulatory language and proprietor practices. First Amendment violations can also serve as the basis to pursue restraining orders or damages; this section will briefly summarize common kinds of actions.

1. Prior Restraints on Speech

The prior restraint doctrine examines whether a government restriction has the effect of improperly chilling or precluding speech in advance rather than just regulating what speech is compatible with the forum. The courts will invalidate policies and practices that effectively preclude speech. As such, prior restraint cases often focus on the proprietor's requirements for authorizing expressive activity at the airport, such as advance permit requirements, requirements to provide identifying information, or the proprietor's reasons for denying a permit.

The Supreme Court has determined that neutral advance permit requirements will pass constitutional scrutiny. In *Thomas v. Chicago Park District*, the Court considered an ordinance requiring an advance permit to use a city park for events that included more than 50 people.[240] The court determined that this requirement applied neutrally to all speakers and activities, and that the object of the permit system was

> not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event…[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.[241]

It thus upheld the advance permit requirement. Although courts will examine content-based licensing schemes more rigorously, a neutral licensing scheme only ensures safety and convenience and thus safeguards "the good order upon which [civil liberties] ultimately depend."[242]

In this same case, the Supreme Court also determined that neutral reasons to deny a permit are constitutional when they do not allow an official to subjectively exercise discretion over denying the permit. The Court noted that

> even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. …We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."[243]

In this case, the ordinance stated that the government "may deny a permit only for one or more of the reasons set forth in the ordinance," which included incomplete applications and those containing material misrepresentations; where the applicant had previously damaged park property and not paid for the damage; where another applicant was using the space; where use would present an unreasonable danger to health and safety; or where the applicant had violated the terms of a prior permit.[244] The speaker argued that this allowed permissive action by providing that an administrator "may" rather than "must" deny a permit for the stated reasons. But the Court did not believe that this wording created undue discretion absent showing "a pattern of unlawful favoritism," and it did not require more rigid draft-

[238] *See id.* at 334.

[239] *See id*. at 333 (citations omitted).

[240] Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2001) (upholding the City's permit requirement for a municipal park).

[241] *See id.* at 322 (citations omitted).

[242] *See id.* at 323. *See also* Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed.2d 649 (1965) (the Court required additional procedural safeguards for a licensing scheme that allowed regulators to reject films by determining that their contents were obscene).

[243] *See id.*

[244] *See id*. at 324.

ing.[245] The Court noted that the ordinance also contained other safeguards, such as requiring the government to process applications within a specified number of days, requiring a clear explanation of the reasons for a denial, and providing an administrative appeal process before judicial review. Thus the ordinance did not "leave the decision 'to the whim of the administrator.'"[246]

In *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, the Supreme Court considered how access to a review process after a permit is denied affects the validity of a neutral permitting or licensing scheme.[247] The Court noted that a license involving First Amendment protections "must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." Thus, if government denies a permit, the First Amendment requires the government to provide a prompt process to review that decision for error. A prompt review is a safeguard "meant to prevent 'undue delay,'…includ[ing] *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being 'issued within a reasonable period of time.'"[248] Under *Littleton*, an administrative review process must promptly provide access to the courts, and state courts will normally have the ability to provide for a prompt judicial decision "as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly."[249] The Court noted that its decision was premised on the "core policy" of an earlier case that had considered government's regulation of the content of a message. Those circumstances required strict administrative review time limits and the ability to obtain prompt judicial review using burden of proof rules that favored speech (placing the burden on the government).[250]

Airport cases have applied these principles when aggrieved speakers have challenged the validity of permit requirements. For example, *Port of Portland* considered a challenge to common permit requirements, including requirements to submit identifying information; a scheme to assign airport locations on a first-come basis for any given day; and requirements to submit permit requests no less than 2 nor more than 7 days in advance (without specifying in the regulation when a permit had to be issued).[251] A speaker challenged these requirements as imposing a prior restraint on speech. The court found that "[p]rior restraints in a nonpublic forum have been upheld as long as they were reasonable and viewpoint-neutral."[252] It also found that a "nonpublic forum by definition is characterized by 'selective access.'"[253] It concluded that "[r]equiring a permit before engaging in constitutionally protected expressive activity is not unreasonable in light of the airport's primary purpose of facilitating air travel."[254] The permit and identification requirements were not a prior restraint on speech. They allowed officials to assign space on a first-come basis, to prevent over-concentrations of activity, and to learn who would actually be on site in the airport's congested and security-conscious environment.[255]

The aggrieved speaker in *Port of Portland* also claimed that the proprietor's policy was constitutionally deficient because it lacked express procedures to provide for the prompt review of a permit denial. For example, the proprietor's policy did not state a specific time when the proprietor had to decide whether to issue a permit, or contain procedures for obtaining a judicial review after a permit denial.[256] The court, however, determined that the policy's lack of express procedures for

[245] *See id*. at 325.

[246] *See id.* at 324 (citations omitted).

[247] *See* City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S. Ct. 2219, 159 S. Ed. 2d 84 (2004) (considering the "prompt judicial review" requirement applicable to licensing schemes under the First Amendment).

[248] *See id.* at 780–81.

[249] *See id.* at 781–82.

[250] *See id*. at 779.

[251] *See Port of Portland, Or.*, 2005 WL 1109698, at 8 (upholding the proprietor's permit policy).

[252] *See id*. at 10, citing *Cornelius*, 473 U.S. at 813 (determining that the government reasonably limited participation in a charity fund drive).

[253] *See id.* citing *Ark. Educ. Television*, 523 U.S. at 679 (in a nonpublic forum, the state can select or limit speakers and content as long as the restrictions are reasonable in the forum and viewpoint-neutral).

[254] *See id.* at 11.

[255] *See id.* at 14 (noting that identification requirements allow the airport proprietor to know who is on the premises and are the only practical way to inform the applicant about when speech activities may occur).

[256] *See id.* at 14. The court found that procedural safeguards applicable to content-based licensing schemes were not applicable to a content-neutral time, place, and manner permit scheme.

these issues did not render the policy facially invalid.[257]

In another example, a speaker in *Fort Wayne-Allen County* challenged permit requirements under which the speaker had to provide identifying information, identify the subject matter of the proposed message (but not the viewpoint), state the number of participants, and obtain a permit in advance. The court found that these requirements were reasonable for the forum, so the proprietor could coordinate operations and security, and thus were constitutional. In this case, the proprietor's detailed statements of intent and findings in support of its regulations helped the court determine that the regulation was constitutional.[258]

2. Overbroad or Underinclusive Speech Policies

The overbreadth doctrine considers whether a regulation is invalid because it has been drafted in a manner that limits more speech than necessary to accomplish its purpose and thus prohibits speech that is constitutionally permissible. An overbroad regulation is said to discourage speakers from even attempting to speak in the forum. If an aggrieved speaker can show that a law punishes a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep'…[that] suffices to invalidate *all* enforcement of that law" until the law is narrowed in a manner that removes the threat of deterring constitutionally protected expression.[259] The doctrine is an "expansive remedy" provided out of concern that "an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[260] This doctrine, however, also creates societal costs by blocking the "application of a law to constitutionally unprotected speech," and thus the Court insists under this doctrine that the "law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications."[261]

The courts have considered the overbreadth doctrine in a number of contexts at airports. For example, the Supreme Court found that a total ban on all First Amendment activities in airport terminals is overbroad and thus unconstitutional. In *Board of Airport Commissioners of City of Los Angeles,* the Court determined that regardless of an airport's forum type, the First Amendment would not support a ban eliminating all speech, including speech that was not disruptive.[262]

In *San Diego Unified Port District,* a California federal district court determined that a proprietor's regulation was overbroad when it banned the distribution of "any literature, pamphlets or other printed materials" to accommodate terminal construction. The court found that despite the construction, "[s]uch sweeping language cannot withstand First Amendment scrutiny," noting that even the ban in *Lee* prohibited only "continuous or repetitive" leafleting.[263] The court also determined that a ban on carrying signs that were not related to airport business was overbroad because it was "not limited to large signs or to signs that obstruct pedestrian traffic or interfere with Airport employees' work." It thus covered "even those [signs] that have no effect on the Airport's congestion problems. …The sign prohibition, therefore, cannot survive even the deferential standards applied to non-public fora."[264] The court also questioned another aspect of the signage ban, believing it would not allow signs, T-shirts, or buttons with religious messages because they were "unrelated to airport business," even though speakers could discuss religion in speech areas.[265]

In *Port of Portland,* the Oregon federal district court upheld a proprietor's policy against a chal-

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[257] *See Port of Portland,* 2005 WL 1109698, at 14.

[258] *See Fort Wayne-Allen County*, 834 F. Supp. 2d 877–78 (considering the proprietor's permit requirements and other issues).

[259] *See* Virginia v. Hicks, 539 U.S. 113, 118–19, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (citations omitted) (considering the overbreadth doctrine).

[260] *See id.* at 119. *See also Gannett*, 894 F.2d at 66 (plaintiffs may assert a facial challenge that a regulation is overbroad irrespective of the plaintiff's particular injury).

[261] *See id*. at 119–20.

[262] *See* Bd. of Airport Comm'rs of City of L.A., 482 U.S. at 575 (a regulation banning all First Amendment activities in the terminal was determined to be overbroad and vague).

[263] *See San Diego Unified Port Dist.*, 950 F. Supp. at 1487 (determining that this airport continued to be a multipurpose forum for a First Amendment analysis during construction).

[264] *See id*. at 1489–90.

[265] *See id. at* 1490. The court noted that a message on one's person or home has a unique effect because it "provide[s] information about the identity of the 'speaker' [which is] an important component of many attempts to persuade." *See id.* quoting City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

lenge that it was overbroad. This policy applied regardless of the number of people seeking to engage in speech activities, and an aggrieved speaker claimed that small groups should not be regulated in the same manner as large groups and that the policy was "unconstitutionally overbroad because it sweeps a substantial amount of protected expression into its regulatory ambit."[266] The court, however, determined that in a nonpublic forum, "the relevant question is whether the policy is reasonable in light of the forum's primary purpose. The airport is legitimately concerned about all leafleters, whether they are in large or small groups." The court found that the policy was not overbroad because under its language, it only applied to persons desiring to engage in speech activity, regardless of their number.[267]

The courts may also find that a regulation is underinclusive if its drafting approach is overly limited, and as a result, the drafting favors some speakers by omitting others.[268] The Supreme Court has noted that in some instances, underinclusiveness may essentially be an examination of whether content discrimination is present due to omissions in a regulation's drafting.[269] In a nonpublic forum, however, a proprietor may constitutionally adopt selective regulations if they can be justified without regard to the content of a message and they are reasonable in light of the purposes of the forum.

3. Vagueness

The doctrine of vagueness applies to any type of regulation, not just those regulating speech or other First Amendment concerns. It considers whether a regulation has been drafted in a manner sufficient to provide reasonable notice of a prohibited activity, consistent with the due process requirements of the Constitution's Fifth and Fourteenth Amendments. Vague regulations are invalid. The courts can find vagueness in several ways. "[V]ague laws violate two fundamental principles of due process: (1) they leave the public guessing as to what actions are proscribed; and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to law enforcement officers."[270] In particular, standards of "permissible statutory vagueness are strict in the area of free expression. …Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[271]

For example, in *San Diego Unified Port District,* a California federal district court determined that an airport proprietor's policy regulating "proselytizing" and "speech making" raised many unanswered questions. The policy did not define these terms, and its lack of definition failed to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly…[t]his uncertainty chills Plaintiff's constitutionally protected expression."[272] The court also found that by leaving these crucial terms undefined, the policy necessarily vested the proprietor with the authority to determine when conduct fell within the terms. It found that "[s]uch unbridled discretion cannot survive constitutional scrutiny."[273] The court also noted the Supreme Court case of *Board of Airport Commissioners of City of Los Angeles*, in which an airport policy tried to distinguish between speech that was "airport related" and speech that was not. The Court in that case determined that the term "airport related" was unconstitutionally vague because "[m]uch nondisruptive speech …may not be 'airport related,' but is still protected speech even in a nonpublic forum."[274]

In *Port of Portland*, an Oregon federal district court noted that a "'void for vagueness' challenge may be brought against regulations if the terms [used] are vague and would result in arbitrary and discriminatory enforcement by law enforcement officials."[275] In that case, however, the court found with little discussion that the proprietor's

[266] *See Port of Portland*, 2005 WL 1109698, at 13, citing Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (determining that an overbroad statute's existence may cause others not before the court to refrain from protected expression).

[267] *See id.*

[268] *See* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 982 (9th Cir. 1998) (rejecting an argument that an advertising standard was underinclusive).

[269] *See R.A.V.*, 505 U.S. at 387 (noting that the First Amendment imposes not an underinclusiveness limitation but a content discrimination limitation upon a state's prohibition of proscribable speech).

[270] *See San Diego Unified Port Dist.*, 950 F. Supp. at 1488, citing Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (determining that a noise ordinance was not unconstitutionally vague).

[271] *See id.*

[272] *See id.* at 1489.

[273] *See id*., citing Bd. of Airport Comm'rs of City of L.A., 482 U.S. at 576.

[274] *See id.* at 1490, citing Bd. of Airport Comm'rs of City of L.A., 482 U.S. at 576.

[275] *See Port of Portland*, 2005 U.S. 1109698, at 13.

detailed policy "clearly spells out what a person must do before engaging in free speech activities" and was "not a regulation that 'traps the innocent' by not providing fair warning."[276]

The aggrieved speaker in *Port of Portland* also argued that the language of certain regulations was permissive rather than mandatory, and as such was too open-ended or gave the proprietor too much discretion. The regulations referred to what an official "will" do when considering a permit request, and the speaker claimed that this allowed the proprietor to exercise unfettered discretion. But the court construed this language as being "synonymous with the word 'shall'" and interpreted the policy as "not allowing Port officials discretion in granting permit applications."[277]

The speaker also argued that under the policy, the proprietor had unfettered discretion when denying permit requests. The speaker claimed that the policy's failure to expressly explain all appeal procedures created unfettered discretion, but the court found that in a facial challenge, a lack of certain express provisions would not invalidate the policy. The speaker also claimed that the proprietor could exercise unfettered discretion because under the policy, it could deny future permits for a "reasonable" period of time once a permittee had violated a permit. But the court disagreed because under this language, "there must be a prior permit violation for this provision to apply."[278] It also found that such a provision was not unconstitutional in a facial attack "absent a history of abuse. No such history is demonstrated here."[279] The court further noted that even in a public forum, a permit revocation action based on the conduct of the permittee was considered "a means through which public safety personnel may terminate an activity that becomes dangerous or comes to violate the time, place, and manner restrictions contained in the regulations." Thus such a provision "constitutes an unremarkable and ubiquitous safeguard, constitutional on its face."[280]

The Supreme Court has determined that when a government rule is open to "arbitrary application" or when "arbitrary discretion is vested in some governmental authority," it is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[281] Such a rule is contrary to rights under the First Amendment, as well as due process rights under the Fifth and Fourteenth Amendments. These challenges can arise both when regulatory language allows discretion over speech and when, in practice, the evidence shows that a proprietor has exercised discretion.[282]

4. Other First Amendment Challenges

Aggrieved speakers who claim a violation of the First Amendment can challenge whether a practice is constitutional based on the contents of a written or an unwritten policy (a "facial" challenge) or based on how the proprietor applied the policy to the speaker's request for access (an "as-applied" challenge). Facial challenges are common without regard to whether a policy is written. For example, in *City of Philadelphia*, the proprietor rejected a proposed advertisement under its written policy, then displayed the advertisement pursuant to a settlement agreement and revised its written policy. The speaker then did not resubmit the advertisement but challenged the contents of the new policy and also claimed that there was an "unwritten policy, regularly adhered to, that is unconstitutional." The speaker also claimed that under this unwritten policy, the City sought to "create an attractive environment to kind of promote tourism" and rejected airport advertising that officials believed was "controversial."[283] The court agreed that an unwritten policy existed because in depositions, airport officials had described an internal process under which they provided additional scrutiny to advertisements despite what was written in the policy. The speaker claimed that it could raise facial challenges to both the written and unwritten policies because it was "certain that the City would reject the ad under both," and the court agreed that the speaker had standing.[284]

To raise an as-applied challenge, a speaker must actually request access for speech and suffer

[276] *See id*.

[277] *See id.* at 11–12.

[278] *See id*. at 12.

[279] *See id.*

[280] *See id.*

[281] *See Heffron*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1991) (considering leafleting at state fairgrounds).

[282] *See* Pence v. City of St. Louis, Mo., 958 F. Supp. 2d 1079, 1084 (E.D. Mo. 2013) (considering permits for street musicians).

[283] *See City of Philadelphia*, 39 F. Supp. 3d 611 (E.D. Pa. 2014) (finding the plaintiff had standing to pursue a facial challenge where a policy was unwritten).

[284] *See id.* at 2.

a denial or some other adverse decision. The challenge then examines the constitutionality of the proprietor's decision. For example, in *Port of Portland*, the speakers did not have standing to pursue an as-applied challenge since they could not "show an injury in fact…because they have not yet applied for a permit."[285] The speakers claimed that they should not have to first apply for a permit because they had suffered a "credible threat of injury." The speakers had previously distributed literature at the airport without a permit, and they feared that they would be arrested if they returned. But the court determined that the evidence did not support this claim. On previous occasions when the speakers had distributed leaflets without a permit, "they were left undisturbed" and were not threatened with arrest. Thus their claims were only speculative. The facts did not excuse the speakers from applying for a permit before maintaining an as-applied challenge, and without that challenge, the speakers also could not pursue their claims for violations of due process and equal protection rights.[286]

Speaker challenges attack a policy or a decision as unconstitutional in an effort to invalidate the policy or decision, and these actions can take various forms. For example, an as-applied challenge to a permit denial will normally take the form of an appeal, first to any administrative review process and then to the courts, in an effort to reverse the proprietor's decision. The challenge may include claims that the proprietor's actions were arbitrary and capricious, such as by making decisions that were unsupported by the evidence. Claims also may allege that a decision was illegal by failing to comply with a speech policy's requirements in addition to constitutional claims. The proprietor will need to demonstrate that its actions complied with applicable requirements.[287]

Speakers may also pursue a court order to restrain the proprietor from enforcing its policies. They can pursue temporary restraining orders or injunctions under state or federal law, and the requirements to obtain these orders are generally similar under both sets of law. The key element to obtain this relief requires the speaker to demonstrate that it will suffer "immediate and irreparable injury, loss, or damage" if the court does not issue an order restraining the proprietor.[288] Normally the speaker also must show that there is a likelihood it will succeed on the merits of the underlying claim against the proprietor, and it may need to post a bond and show other grounds in its favor as well, such as injury to the speaker that outweighs harm to the proprietor or that granting the order will not harm the public interest. The courts are sensitive to First Amendment violations. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[289] Another court noted that speech rights are "constitutionally protected from censorship" and that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[290] Thus injunctive relief may be available.

When speakers pursue claims for damages, they often do so under 42 U.S.C. § 1983 based on a claimed First Amendment violation. That statute provides a remedy to individuals who have been deprived of federal rights by someone acting under color of state law, and a related statute, 42 U.S.C. § 1988, allows an award of attorney's fees for successful claims. In general, § 1983 requires the claimant to show that a person or local government entity acted under color of state law (such as under a statute, ordinance, regulation, custom, or usage), and in some manner caused the claimant to be deprived of a right, privilege, or immunity that is secured by the U.S. Constitution or by federal law. That right must be clearly established at the time of the alleged violation so officials could reasonably have known that the law was being violated. Section 1983 claims are complex actions, but they can result in awards of damages and attorney's fees against local government entities, as well as punitive damages awards against the individuals who caused the

[285] *See Port of Portland*, 2005 U.S. 1109698, at 4.

[286] *See id.* at 4–6.

[287] *See* City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 779, 124 S. Ct. 2219, 159 S. Ed. 2d 84 (2004) (considering the "prompt judicial review" requirement applicable to licensing schemes under the First Amendment).

[288] *See* FED. R. CIV. P. 65.

[289] *See* Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), citing N.Y. Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

[290] *See* San Diego Unified Port Dist. v. U.S. Citizens Patrol, 74 Cal. Rptr. 2d 364, 367–68 (Cal. Ct. App. 1998) (invalidating a lower court's injunction against two groups where only one group had caused disruption by criticizing the other, and noting that precluding one party's rights due to hostile reaction is sometimes referred to in case law as a "heckler's veto"), citing Cox v. Louisana, 379 U.S. 536, 551, 85 S. Ct. 453, 462, 13 L. Ed. 2d 471 (1965).

deprivation if they do not have immunity. Private sector individuals and entities can also be liable for damages if they are determined to be state actors, and injunctive relief is also available.

A number of other actions may also be available to remedy claimed violations of the First Amendment. For example, speakers may claim that government has retaliated against them in connection with exercising First Amendment rights and seek a remedy for the retaliation. To prove a retaliation claim, a plaintiff typically must show that the plaintiff engaged in constitutionally protected activity, and that the proprietor took adverse action against the plaintiff because of that activity.[291] If a claimed First Amendment violation involves the amendment's clauses concerning rights of belief, actions may focus on religious discrimination claims. In general, actions that provide a remedy for violations of law may be available to remedy an alleged First Amendment violation.

F. Airports and Religion

The First Amendment prohibits Congress, and through the Fourteenth Amendment the states, from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." This portion of the text imposes two requirements—the Free Exercise Clause considers whether government has unconstitutionally curtailed religious observance and the Establishment Clause considers whether government has unconstitutionally endorsed religious observance or institutions. The courts have recognized the tension between these two requirements as government works to avoid prohibitions in either direction. Consequently, Supreme Court cases in this area reflect evolving standards under these two clauses and complex issues as the First Amendment interacts with other applicable laws. This section will briefly review the Court's standards for evaluating government actions under these clauses and then provide examples of how these clauses have been applied at airports.

1. Free Exercise Clause Standards

Challenges under the Free Exercise Clause focus on whether a law prohibits religious beliefs or practices directly or, more commonly, whether a law that is facially neutral and generally applicable places an impermissible burden on those beliefs or practices. Under former Supreme Court standards, the Court considered claims under the Free Exercise Clause by applying a strict scrutiny test. A challenger needed to show that a law substantially infringed a religious practice, and government then needed to show that this impact was justified by a compelling state interest.[292] Over time, however, the Court upheld many facially neutral laws against challenges and ultimately rejected this strict scrutiny balancing test.[293] Congress then adopted legislation to require the application of a strict scrutiny test, and the legislation has been found to apply in addition to the Free Exercise Clause when federal actions substantially burden the exercise of religion.[294] Although the legislation was drafted to apply to the states as well, the Supreme Court determined that it does not apply to state and local governments except for provisions concerning land use regulations and institutionalized persons.[295]

The Court has determined that the Free Exercise Clause "does not inhibit enforcement of otherwise valid laws of general application that inci-

[291] For example, *see* Tobey v. Jones, 706 F.3d 379, 387 (4th Cir. 2013) (considering a peaceful protest at a screening checkpoint that resulted in an arrest and alleging First Amendment retaliation and a claim under 42 U.S.C. § 1983).

[292] *See* Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (the state could not apply unemployment eligibility provisions to deny benefits to a claimant who refused employment because of religious beliefs).

[293] *See* Employment Div., Dept't of Human Resources of Or. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (the Free Exercise Clause was not offended when prohibiting the exercise of religion is not the object of a regulation but merely an incidental effect of a generally applicable and otherwise valid provision; the State could disqualify employees for unemployment benefits after they were terminated from employment for a religious use of peyote).

[294] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (explaining the history of the Court's Free Exercise Clause tests and federal legislation and holding that federal regulatory restrictions must comply with the Religious Freedom Restoration Act of 1993 (RFRA) without regard to past judicial precedent under the Free Exercise Clause); RFRA, 42 U.S.C. §§ 2000bb-1(a), (b), as amended by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (RLUIPA) (these statutes incorporated and are argued to expand judicial review standards under *Sherbert* and subsequent cases).

[295] *See* Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 213, 161 L. Ed. 2d 1020 (2005) (upholding a section of RLUIPA against a facial challenge).

dentally burden religious conduct."[296] If burdening religion is "not the object" of a law but "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[297] Thus different tests will apply depending on the nature of the law in question. A law that is

> neutral and of general applicability need not be justified by a compelling governmental interest [under the Free Exercise Clause] even if the law has the incidental effect of burdening a particular religious practice.…[but a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. [298]

In addition, when an airport regulation is neutral and of general applicability, it will often comply with both the Free Exercise Clause and *Lee's* nonpublic forum requirements concerning speech.[299]

2. Establishment Clause Standards

The Supreme Court has been refining its Establishment Clause test over a period of years. The Court announced a commonly used, and often criticized, test under *Lemon v. Kurtzman,* which requires the courts to review a government accommodation of religion to determine whether the accommodation has a secular purpose, whether its primary effect neither advances nor inhibits religion, and whether the accommodation fosters an excessive government entanglement with religion.[300] Over time, the *Lemon* test has focused in particular on whether government actions "endorse" religion under the specific facts of various cases in opinions that contain vigorous discussions regarding the viability of the test. And in a 2014 case, *Town of Greece, N.Y. v. Galloway,* the Court did not cite the *Lemon* test but instead decided a case under the Establishment Clause by essentially using a "totality of the circumstances" test.[301]

Town of Greece considered a variety of factors to be relevant to an Establishment Clause analysis. Among them, the Court determined that the Establishment Clause must be interpreted "by reference to historical practices and understandings" such as, in that case, a longstanding practice of ceremonial prayer in a legislative setting expressed for the benefit of promoting harmony in the legislative process. The Court found it unnecessary "to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." It believed acts such as legislative prayer are a symbolic expression tolerating "beliefs widely held" rather than a "treacherous step towards establishment of a state church."[302] The Court did not rely on an "endorsement" of religion as the proper test to evaluate the Establishment Clause in this case, noting that such a test would condemn a host of "traditional practices that recognize the role religion plays in our society, among them legislative prayer and the 'forthrightly religious' Thanksgiving proclamations issued by nearly every President since Washington."[303] Moreover, the Court did not believe that "the constitutionality of legislative prayer turns on the neutrality of its content," provided there is "no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[304]

The Court determined that once the government invites an observance such as prayer into the public sphere, it must permit that practice unfettered by the government's own view, subject to the constraints of the occasion. It considered factors such as the specific circumstances under which the observance occurred; the purpose for including the observance; whether performing the

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[296] *See id*. at 714, citing *Smith*, 494 U.S. at 878–82.

[297] *See Smith*, 494 U.S. at 878.

[298] *See* Church of Lukumi Babalu Aye., Inc. v. Hialeah, 508 U.S. 520, 531–32, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (an ordinance criminalizing the ritual slaughter of animals was not neutral or of general applicability, and the government's interest did not justify targeting Santeria religious activity).

[299] *See Port of Portland, Or.*, 2005 WL 1109698 (determining that a leafleting regulation was generally applicable and neutral and did not violate the Free Exercise Clause).

[300] *See* Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (establishing the original Establishment Clause test); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (refining prongs of the original test).

[301] *See* Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014) (considering whether a city could constitutionally open its council meetings with a prayer by considering numerous factors, but not overrule the *Lemon* test). *See also* Elmbrook School Dist. v. Doe, 134 S. Ct. 2283 (Mem.) (2014) (denying certiorari on an Establishment Clause issue after *Town of Greece*, and the dissent noting a need to clarify the Court's use of the *Lemon* test).

[302] *See id*. at 1819.

[303] *See id.* at 1820.

[304] *See id.* at 1821–22 (noting that government may not mandate a civic religion any more than it may prescribe a religious orthodoxy).

observance demonstrated a pattern that denigrated or proselytized (such as by chastising dissenters or including lengthy religious dogma) or betrayed an impermissible government purpose; whether the government made reasonable efforts to be inclusive of the community that would be in the audience; and whether the setting and audience for the observance indicated government coercion to "support or participate in any religion or its exercise."[305] The Court noted that "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views," and the "Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree."[306] The Court thus departed from the *Lemon* test in *Town of Greece*, but it did not expressly reject that test while continuing to refine First Amendment analysis under the Establishment Clause.

3. Airport Property and Religious Observance

Cases that have considered airport chapels, meditation rooms, and other airport property impacts involving religion have typically upheld the proprietor's arrangements under the totality of the circumstances. For example, in *Hawley v. City of Cleveland,* the Sixth Circuit determined that an airport proprietor could lease space to a Catholic Diocese for an airport chapel without violating the Establishment Clause.[307] The court noted that the chapel was located in space that was undesirable as commercial space; at least 16 other airports had chapels; by itself the Diocese had invested over $300,000 to improve the space and paid rent that was consistent with nonprofit use at the airport; the chapel provided aid and comfort to airport patrons and employees; the chapel was not visually distinct from the outside; the Diocese had conducted outreach to invite other faiths to use the space; the chapel contained prayer cards for several religious faiths; the lease required making the chapel available to other religious groups and individuals regardless of the content of their worship activities; and no one had ever been denied use of the chapel. The monsignor also provided invaluable secular service to those at the airport; the public frequently made favorable comments about the chapel; and several airline representatives had written letters expressing support for the chapel services and facilities. Under the totality of those circumstances, the Sixth Circuit concluded that neither the presence of the chapel nor the airport documents authorizing it violated the Establishment Clause.

A New York federal district court reached a similar conclusion in *Brashich v. Port Authority of New York and New Jersey.* The airport proprietor in that case entered ground leases that allowed different religious tenants to construct chapels; retook the leased property for airport purposes and relocated the facilities to other locations; charged rent based on a per acre rate; occasionally bought tickets to events by these tenants, as it did with other tenants; and paid for directional signage, as it did with other tenants.[308] The court determined that these chapels accommodated the religious practices of a large number of travelers, visitors, and employees, and that the airport proprietor had made provisions for other services to this population as well, including medical, dental, pharmacy, hotel, parking, shopping, and banking services. The proprietor did not "sponsor, subsidize or interfere with the religious groups which operate the chapels at the Airport. Nor does it advise them on the conduct of their institutions." Thus, "[o]n the facts presented," the proprietor "has made accommodations for religion, it has not established religion."[309] The court reached this conclusion based on both the Establishment Clause and the Free Exercise Clause.[310]

In *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco,* the airport proprietor sought to evict a religious tenant solely out of a belief that state and federal Constitutions prohibited the lease.[311] The Ninth Circuit determined that such an eviction violated the Constitution's Equal Protection Clause

[305] *See id*. at 1819–25 (noting that appreciation by some acknowledging the divine in public institutions does not suggest that those who disagree are compelled to join the expression or approve its content).

[306] *See id.* at 1826.

[307] *See* Hawley v. City of Cleveland, 24 F.3d 814 (6th Cir. 1994) (considering a chapel at the Cleveland Hopkins International Airport).

[308] *See* Brashich v. Port Auth. of N.Y. and N.J., 484 F. Supp. 697 (S.D.N.Y. 1979) (considering three chapels at John F. Kennedy Airport).

[309] *See id.* at 703.

[310] *See id*. at 702–03 (also determining that the plaintiff lacked standing because he did not allege standing as a taxpayer (and the proprietor had no taxing authority), and he had not alleged or shown any other "direct economic or non-economic injury").

[311] *See* Christian Science Reading Room Jointly Maintained v. City and County of San Francisco, 784 F.2d 1010 (9th Cir. 1986) (considering a lease at the San Francisco International Airport).

because under the circumstances, the lease did not violate the Establishment Clause. The court determined that benefits to religion "are improper only if they are other than 'incidental.'" [312] In this case, the court found that the tenant leased space on the same terms as other tenants; the rental transaction was arms-length; the proprietor's purpose in renting was to obtain rent; the proprietor had little interaction with this tenant; airports commonly rent commercial space; citizens typically do not think of airports as symbols of government authority; and nothing suggested that similarly situated tenants were denied the opportunity to rent. The court determined that these arrangements did not violate the Establishment Clause, and that the Equal Protection Clause requires government classifications to at least be rationally related to the purposes for which they are adopted. Thus the proprietor's stated purpose for refusing to lease (constitutional compliance) was invalid, and its purpose for creating two classifications of tenants violated the Equal Protection Clause. The court noted, however, that this holding was narrow, and that it may be constitutionally acceptable to deny leaseholds to religious organizations on other grounds.[313]

A Seventh Circuit case considered a First Amendment challenge based on airport expansion plans. In *St. John's United Church of Christ v. City of Chicago,* the court upheld an airport proprietor's action to condemn property under a state statute that was enacted to give the proprietor broad condemnation powers for its expansion, including the power to condemn cemeteries.[314] The plaintiff claimed that condemning a religious cemetery violated the Free Exercise Clause and the Equal Protection Clause, and that it also violated a state statute that mirrored the federal Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act (statutes that require courts to apply a strict scrutiny test). The court, however, determined that this condemnation statute was neutral and of general applicability and thus not a violation of these laws. The statute only applied to the religious cemetery because the cemetery was located in the path of the expansion.

[312] *See id.* at 1014.

[313] *See id*.

[314] *See* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007) (considering expansion plans for the Chicago O'Hare Airport).

4. Airport Holiday Displays

Airport holiday displays involve actions taken by the airport proprietor rather than regulations that the proprietor imposes on third parties. These displays are typically considered government speech and will not be found to raise speech issues, but they may raise concerns under the First Amendment's Establishment Clause.

For example, in *Grutzmacher v. County of Clark,* a Nevada federal district court considered whether an airport proprietor had violated the Establishment Clause by displaying a Christmas tree, a menorah, and a sign saluting religious freedom.[315] The court determined that these circumstances were almost exactly the same as a display that the Supreme Court had considered and upheld in a separate case, and that as such, the display did not violate the Establishment Clause.[316]

The plaintiff also argued that by placing its own display, the proprietor had opened a forum for public expression and that the plaintiff should be allowed to add a nativity scene to the display. The court found that "[e]recting its own display, while simultaneously prohibiting private displays, does not suggest an intent to open the Airport to private speech."[317] The court determined that the proprietor's holiday display was government speech and that it did not create a forum for private speech. The proprietor also denied access to the speaker under a general regulation that prohibited private parties from placing structures at the airport, and the court determined that this general regulation was a reasonable and viewpoint-neutral way to control potential airport obstructions in a nonpublic forum. Additionally, because there was no First Amendment violation, the court found that the proprietor did not violate the Equal Protection clause.[318]

[315] *See County of Clark*, 33 F. Supp. 2d 896 (D. Nev. 1999) (considering a private request to add a crèche to the proprietor's holiday display).

[316] *See id.*, citing *County of Allegheny*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (considering the same holiday display).

[317] *See id.* at 902.

[318] *See id. See also* Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 346–48 (7th Cir. 1990) (noting that Christmas trees are secular and upholding the airport proprietor's regulation prohibiting all persons from placing private structures in nonleased spaces at the airport as a valid time, place, and manner restriction to assist with airport congestion under the public forum test that the court applied to the airport at that time).

5. Other Issues

A variety of other matters can implicate the First Amendment's clauses concerning rights of belief. For example, leafleting and soliciting can involve religious expression. But as discussed in previous sections, time, place, and manner regulations that are reasonable and viewpoint-neutral will not violate the First Amendment in a nonpublic forum. The state action doctrine can also apply to the First Amendment's clauses concerning rights of belief. For example, in *Cady v. City of Chicago,* an airport chaplain denied the plaintiff access to display literature in a rack at the airport chapel.[319] The plaintiff then asked the court to consider whether the chaplain acted as a state actor and had subjected the proprietor to liability. Prior to the court's decision, however, the proprietor determined to remove the display rack, so the court found the issue was moot.

Security cases can also raise issues under the First Amendment's clauses concerning rights of belief. For example, in an Illinois case, a plaintiff pursued a Free Exercise Clause violation after she was subjected to an "extraordinarily intrusive search" at an airport "solely because she adhered to her religious belief."[320] The court found these allegations supported a Free Exercise Clause claim under Supreme Court precedent that provided "[t]he government may not…punish the expression of religious doctrines it believes to be false…[or] impose special disabilities on the basis of religious views or religious status."[321] Speech issues originate in private expressive activity, but cases under the First Amendment's Free Exercise Clause and Establishment Clause can arise in other contexts without expressive activity.

G. Developing Issues Under State Constitutions

All state constitutions contain provisions similar to those found in the First Amendment.[322] In general, state provisions establish speech rights, rights of assembly, rights to petition government, and rights that protect individual religious practices and beliefs and prohibit government endorsements of religion. Some states have developed case law interpreting these state provisions, and a few cases have applied such provisions to airport proprietors. State constitutional provisions can impose additional obligations on airport proprietors and create a potential for conflicts under the Federal Constitution.

The Supreme Court has recognized that in general, state constitutions may create individual rights that are greater than those established under the First Amendment. If state courts determine that individuals have additional state rights, the government may have additional obligations to address those rights, and courts may determine state rights and obligations in a way that differs from a Federal First Amendment analysis. The U.S. Supreme Court can review these differences to determine whether they violate any of the U.S. Constitution's requirements. Thus an airport proprietor must comply with Federal First Amendment obligations but must also know the extent to which the proprietor's state constitution may expand those rights and obligations and how the U.S. Constitution might affect state law.

The U.S. Supreme Court has not fully considered how state constitutional speech rights might affect government property owners. But the Court has developed some law under cases that consider speech activity on private property. In an early case, the Court first considered whether a company-owned town could ban leafleting on streets and sidewalks where the private property owner provided government functions for the town. The Court determined that the private property owner was acting as the government, so federal constitutional obligations applied to the company in these circumstances and the company's ban on leafleting was unconstitutional.[323] Cases then chal-

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[319] *See* Cady v. City of Chicago, 855 F. Supp. 922 (N.D. Ill. 1993) (considering the Chicago O'Hare Airport Chapel).

[320] *See* Kaukab v. Harris*,* 2003 WL 21823752 (N.D. Ill. 2003) (considering claims by a woman wearing a hijab that she was subjected to an invasive physical search that intensified after she declined to remove her hijab in public or in front of a man for religious reasons). *See also* Shqeirat v. U.S. Airways Group, Inc., 645 F. Supp. 2d 765, 785 (D. Minn. 2009) (considering the arrest of six imams at the Minneapolis airport after, among other things, the imams engaged in public prayer).

[321] *See id.* at 7, citing *Smith*, 494 U.S. at 877.

[322] *See* State Constitutional Provisions Table at Appendix A.

[323] *See Marsh*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946) (the State permitted a company to own a town, and the town imposed a total ban on leafleting and caused the speaker's arrest; the Court determined

lenged whether a private shopping mall owner could prohibit leafleting on its commercial property. Initially, the Supreme Court found that a private mall owner must comply with federal constitutional requirements in this setting. But it subsequently determined that state action is not present in a typical shopping mall setting, and as such, private mall property is not subject to the First Amendment's requirements.[324]

Then the Court considered *Pruneyard Shopping Center v. Robins*, a case in which the California Supreme Court had determined that the California Constitution protected reasonable speech and petitioning at privately owned shopping centers.[325] The private mall owners argued that if the California Constitution created additional speech rights that allowed individuals to circulate petitions at the mall, the California Constitution then would deprive the mall owners of their federal First Amendment rights to choose what speech could occur on their property, and this state law would create a taking under the Fifth Amendment and constitute arbitrary action in violation of the Fourteenth Amendment's Due Process Clause.

The Supreme Court in *Pruneyard* noted that the California Constitution's speech rights exceeded the scope of rights under the First Amendment. But the Court found that the First Amendment did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[326] The Court further found that while the state constitutional right impacted the private owners' property, in this case the scope of that right did not "unreasonably impair the value or use of their property as a shopping center."[327] The mall was a commercial complex that was already open to the public. The Court thus found that under these circumstances, the state constitutional right did not result in a Federal Fifth Amendment taking or in an arbitrary and capricious government action that violated the Federal Due Process Clause.[328] The Court also determined that the state constitutional right had not forced the property owners to create a forum for the speech of others in deprivation of their own First Amendment rights. The circumstances of the mall did not create a risk that other speakers would be identified with the mall owners, and the owners could post signs to ensure that they would not be so identified.[329]

Subsequent California cases have considered how that state's more expansive speech rights apply to speakers at airports but without addressing concerns for how these rights might affect the government property owner. In a series of cases involving the Los Angeles International Airport, a speaker challenged a ban on solicitations for the immediate receipt of funds under both the California Constitution and the First Amendment. A federal district court enjoined the proprietor from enforcing this regulation because the court believed that the airport was a public forum under the California Constitution, and that under California law the ban in question was content-based and unconstitutional.[330] The Ninth Circuit then stayed these proceedings on appeal. At that time, the California Supreme Court was already considering in a separate case whether this type of fundraising regulation was content-based and prohibited under the California Constitution. The California Supreme Court decided that such a regulation was not content-based and was subject to reasonable time, place, and manner regula-

that the private town owner had violated the speaker's First and Fourteenth Amendment rights).

[324] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569, 92 S. Ct. 2219, 2229, 33 L. Ed. 2d 131 (1972) (determining that property does not "lose its private character merely because the public is generally invited to use it for designated purposes," and the "essentially private character of a store" and abutting private property does not change because it is "clustered with other stores" in a shopping center).

[325] *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (considering whether the Federal Constitution protected the rights of mall property owners when the California Constitution permitted speakers to access the mall's property for expression).

[326] *See id.* at 81, citing Cooper v. California, 386 U.S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed. 2d 730 (1967) (a state constitution's provisions may be more expansive than the Federal Constitution).

[327] *See id*. at 83.

[328] *See id*.

[329] *See id*. at 87.

[330] *See* Int'l Soc. for Krishna Consciousness of Cal. Inc. v. City of L.A., 966 F. Supp. 956 (C.D. Cal. 1997) (the district court found that California law defined a public forum more broadly than under federal law for purposes of speech rights, and under the state test that considered whether speech was incompatible with the forum, an airport terminal was a public forum; the court thus found that under California law in such a forum, this solicitations ban was a content-based restriction that was unconstitutional under the state constitution).

tions. Based on that state decision, the Ninth Circuit then dissolved the injunction against the Los Angeles airport and remanded the case.[331]

The district court then entered summary judgment against the airport proprietor and permanently enjoined enforcement of its solicitation ban. It again determined that airport terminals were a public forum under the California Constitution, and it found that under the applicable test, this solicitation ban was not a reasonable time, place, and manner restriction.[332] When the airport proprietor appealed, the Ninth Circuit then decided to ask the California Supreme Court to determine the forum type for the airport terminals under the California Constitution (but first it remanded to the federal district court so the parties could supplement the record with evidence based on considerations following the terrorist attacks of September 11, 2001 (9/11)).[333] The California Supreme Court then determined that it need not decide whether an airport terminal is a public forum under the state constitution. It believed that it had already addressed the issues raised in the case, because in a separate case, it had determined that the California Constitution permitted banning these kinds of solicitations even on a public street.[334] The state court had found that ban to be a reasonable time, place, and manner restriction because it was content-neutral, only regulated how the activity was conducted, and other methods of communication were available.[335]

Based on the state court's decision, the Ninth Circuit then again dissolved the district court's injunction against the airport proprietor. But it remanded the case so the district court could consider the plaintiff's remaining federal constitutional claim,[336] and subsequently both the district and appellate federal courts determined that the airport's regulation was reasonable under a First Amendment forum analysis.[337] Thus when the state supreme court did not consider the airport's forum type, it made a choice to avoid the potential for state conflicts with a federal forum analysis. As a result, the federal courts did not have occasion to consider the extent to which the U.S. Constitution might affect a different state analysis for rights that are contained in the First Amendment.

A series of Oregon cases raised clear differences between the Oregon Constitution's speech clause and a First Amendment forum analysis, but these Oregon cases did not address concerns for how a different state analysis might impact a government proprietor. In a transit case upheld by the

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[331] *See* L.A. Alliance for Survival v. City of L.A., 993 P.2d 334 (Cal. 2000) (the California Supreme Court determined that an ordinance directed at public solicitation for the immediate receipt of funds should not be considered content-based or constitutionally suspect under the California Constitution and should be evaluated under the intermediate scrutiny standard applicable to time, place, and manner regulations rather than under the strict scrutiny standard).

[332] *See* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., CV97-03616 CBM(VAPX), 2001 WL 1804795 (C.D. Cal. Aug. 2, 2001). The court applied California's time, place, and manner test, which parallels the federal test, and it determined that the proprietor adopted the ban to address potential security threats and congestion (among other things). But the court found the regulation was not narrowly tailored and burdened more speech than necessary. It determined on summary judgment that there was no evidence in the record concerning security distractions; that the airport presented evidence of peak hour congestion in the terminals but the ban applied at all times; and that there was no ample venue providing an alternative for these solicitations.

[333] *See* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 59 F. App'x 974 (9th Cir. 2003) (remanding for supplementation of the record prior to certifying the case to the California Supreme Court); Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 530 F.3d 768 (9th Cir. 2008) (certifying the forum question to the California Supreme Court after supplementation of the record). In the meantime, the airport proprietor also adopted a new ordinance under which it confined First Amendment activities to specified areas. The plaintiff challenged this ordinance as well, but the federal district court found the ordinance to be constitutional under federal law and declined to consider state law while the primary case was ongoing. *See id.* at 771–73 (discussing the procedural history of the cases).

[334] *See L.A. Alliance for Survival*, 993 P.2d 334 (allowing time, place, and manner regulation of fundraising solicitations under California law).

[335] *See* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 227 P.3d 395 (Cal. 2010) (finding that the proprietor's ban was a valid restriction in a public forum, but not deciding the forum question under the California Constitution).

[336] *See* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 386 F. App'x 669 (9th Cir. 2010) (dissolving injunction and remanding).

[337] *See* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 764 F.3d 1044 (9th Cir. 2014) (upholding the proprietor's regulation under a federal forum analysis pursuant to *Lee* after the district court found for the proprietor based on the proprietor's interests in reducing fraud, congestion, passenger-solicitor conflicts, and police distraction).

Oregon Supreme Court, *Karuk Tribe of California v. Tri-County Metropolitan Transp. Dist. of Oregon*, an Oregon state court considered whether a proprietary government transit agency could reject proposed bus advertising.[338] The court first had to decide what test to use when applying the Oregon Constitution's speech clause to this denial of access for speech: a First Amendment-type forum analysis or a longstanding test under the state speech clause that prohibited the government from regulating based on the content of speech, except when the regulation fell within limited historic exceptions. The court rejected forum analysis and adhered to the state's historic prohibitions without considering the nature or function of the government's property.

The transit agency in *Karuk* argued that as a government proprietor, and under its views of the Oregon Constitution's "wording, historical circumstances, and interpretative case law," the issues should be evaluated consistent with a First Amendment forum test.[339] The appellate court, however, rejected this argument. It noted that when interpreting the Oregon Constitution, the court's goal was one of strict construction—to "understand the wording…in light of the way that wording would have been understood and used by those who created the provision" and to "apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise."[340] The First Amendment allows the government to limit speech when reasonable in a nonpublic forum and viewpoint-neutral. But the Oregon Supreme Court had previously determined that the Oregon Constitution's speech clause "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception," such as perjury or verbal assistance involved in a crime.[341] Thus the court determined that the Oregon Constitution created greater speech rights, and under the Oregon Constitution's test, the court rejected the transit agency's advertising restriction.

The transit agency further argued that failing to take government proprietorship into account essentially violated federal constitutional requirements. It argued that there was a "fundamental inconsistency" between the state's "'noncontent' approach and 'forum analysis,'" and that it did not make sense to ask government proprietors to find a historical exception for speech restrictions when a forum was previously closed to speech. The court, however, summarily found these arguments unpersuasive in light of its traditional state analysis, and it found that by rejecting a political advertisement, the agency had impermissibly regulated based on content under the state constitution. The transit agency attempted to argue that government proprietorship was a historic exception under the state constitution, but the court found that this argument had not been preserved.[342] On appeal, the Oregon Supreme Court only stated that it affirmed the lower courts by an equally divided court.[343] Thus by not considering the purpose and function of the public property where speech was proposed, these courts did not consider factors such as how the nature of the public's interest might change in different locations or how speech activities might disrupt a proprietor's ability to conduct its public functions.

These state constitution cases point out the complexities that can arise, procedurally and substantively, when state constitutions address in a different manner the rights contained in the First Amendment. The U.S. Supreme Court has determined that states may create more expansive rights than those contained in the First Amendment, but differing rights can impose more expansive restrictions on a government proprietor's ability to conduct its public function. An airport proprietor thus must be aware of any state obligations, in addition to its obligations under the First Amendment, and consider how those obligations interact.

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[338] *See* Karuk Tribe of Cal. v. Tri-County Metro. Transp. Dist. of Or., 251 P.3d 773 (Or. Ct. App. 2011), affirmed by Karuk Tribe of Cal. v. Tri-County Metro. Transp. Dist. of Or., 323 P.3d 947 (Or. 2014) (affirming lower courts by an equally divided court).

[339] *See id*. at 546, citing Priest v. Pearce, 840 P.2d 65 (Or. 1992) (analyzing habeus corpus rights under the Oregon Constitution).

[340] *See id.* at 546.

[341] *See id.* at 543, citing State v. Robertson, 649 P.2d 569 (Or. 1982) (case developing Oregon's test when applying state constitutional speech rights).

[342] *See id.* at 778–79. The state appellate courts never considered the transit agency's First Amendment argument, having resolved the case on state constitutional grounds; the state district court rejected the transit agency under the state constitution and also found that its policy was not viewpoint-neutral under the First Amendment. *See id.* at 544.

[343] *See* Karuk Tribe of Cal. v. Tri-County Metro. Transp. Dist. of Or., 323 P.3d 947 (Or. 2014) (affirming lower courts by an equally divided court).

The U.S. Supreme Court has not yet considered whether the Federal Constitution imposes limits on what state constitutions can require when airport proprietors administer rights that are subject to the First Amendment. But precedent indicates that the purpose and function of a proprietor's property might be relevant to the Court when examining speech rights and restrictions on the property. The Court considered attributes of the property when deciding whether the California Constitution's speech requirements infringed on the federal constitutional rights of a private mall owner.[344] Forum analysis thus might continue to be relevant to such an examination when considering an airport's proprietary property.

II. SURVEY OF CERTAIN AIRPORT REGULATIONS

This section summarizes some aspects of First Amendment requirements at the airports surveyed. The survey reviewed relevant First Amendment materials that were available online, including state statutes, state administrative codes, and the airport proprietor's ordinances or other regulations. In many instances local materials were only available directly from the airport proprietor rather than from online sources. When obtained, those local materials are also noted below. Airports are dynamic environments. Proprietors thus may implement their First Amendment requirements in a variety of ways, such as through one or more regulations, permits, or contracts, or through practices. Some airport proprietors may not create written requirements for all circumstances, or they may incorporate some requirements into more general regulations that address matters such as permits or administrative reviews. Proprietors may also adjust their regulations at times to address changes in the airport's environment.

Under these diverse circumstances, a survey of airport practices cannot provide definitive information. These summaries are thus presented as examples of how some airport proprietors have addressed issues to offer an overall sense of the types of issues that proprietor's address and their approaches to providing constitutional access for speech. The survey is not meant to present a comprehensive or recommended set of practices. Due to the general constraints of surveys, these materials may also be outdated at a given airport, and those interested in researching further should obtain copies of materials from the airport in question.

State: Arizona

Airport: Sky Harbor International Airport (PHX), Phoenix, Arizona
2012 Passengers: 40,799,830

Airport: Airport Solicitation Permit Application (the "Permit Form") (published as of October 28, 2013) (available from airport).

Sponsor—City of Phoenix: Code of Phoenix, Arizona, Sec. 4-127 through 4-138 (the "Code") (published as of November 27, 2013) (available at: http://www.codepublishing.com/az/phoenix/).

Noncommercial Speech: *Authorization*: Four or more persons cannot congregate for noncommercial peripatetic expressive activity (such as picketing, distributing literature, displaying signs, and soliciting contributions) without first obtaining a permit. *See* Code Sections 4-129, 4-130. Applicants must submit a complete application at least 3 days in advance. *See* Code Section 4-130; 4-131; Permit Form. The airport acts on applications within 3 days after receipt. Code Section 4-132. A permit states limits on numbers of participants and other reasonable restrictions based on the Code and on a fact-finding determination to assure the safe and orderly use of the airport. *See* Code Section 4-134. The airport assigns designated locations on a "first come" basis, and competing requests are allocated fairly. *See* Code Section 4-133.

Denial/Termination: The airport must state grounds for denying an application, which can include a failure to fully disclose information or that the activity is commercial activity. *See* Code Section 4-132. The airport may also deny applications or may revoke a permit, with evidence of a permit violation, and it serves written notice of the action. *See* Code Section 4-135.

Appeals: An aggrieved party has 7 days to appeal a denial or revocation, and the city manager conducts a hearing as soon as reasonably practicable. *See* Code Section 4-135. Solicitations: Solicitations

[344] *See Pruneyard*, 447 U.S. 74 (examining the circumstances of a shopping mall environment to determine that in this case, the speaker's state speech rights did not result in a violation of the mall owner's federal constitutional rights under the First, Fifth, and Fourteenth Amendments).

are prohibited in the terminal. *See* Code Section 4-128.

Newsracks/Commercial Matters: *Newsracks*: Uncontrolled newsrack placements would interfere with the public, aesthetics, safety, and revenues. Placement at the airport is subject to reasonable content and viewpoint-neutral time, place, and manner regulations. Vendors must obtain an annual permit to place a machine in a designated city structure. The airport prioritizes available space based on vendors with the greatest commitment to placing machines at the airport and the highest airport circulation. *See* Code Section 4-138.

State: California

Airport: John Wayne Airport (SNA), Santa Ana, California
2012 Passengers: 8,857,944

Airport: John Wayne Airport Orange County, Airport Rules and Regulations (the "Rules") (published as of December 10, 2013) (available at http://www.ocair.com/aboutjwa/rulesand regulations/).

Regulations, Restrictions on Permit Activities (the "Regulations") (published as of December 10, 2013) (available from airport).

Filming Permit (the "Filming Permit") (published as of January 20, 2014)
(available at http://www.ocair.com/ businessandemployment/filming/).

Sponsor—Orange County, California: Code of Orange County, California, Title 2, Chapter 1 (the "Code") (available at http://www.municode.com/ Library/CA/Orange_County).

Noncommercial Speech: *Authorization*: The airport requires a permit to conduct noncommercial expressive activities, including solicitation and receipt of funds, handbills, surveys, petitions, picketing, assembling, and demonstrations. *See* Code Section 2-1-61. A permit contains permitted times, designated locations, and states other terms, and permits are distributed on a "first come" basis (permittees must register daily). *See* Code Section 2-1-63; Regulations.

Denial / Termination: The airport issues a permit unless space is unavailable, application information is incomplete, or the activity interferes with airport operations or is not consistent with airport purposes (based on ordinance findings). *See* Code Sections 2-1-63, 2-1-60. The airport may give a notice of noncompliance and a cease and desist order, and it may pursue other actions and remedies. *See* Code Section 2-1-66.

Appeals: The airport may conduct administrative hearing processes. *See* Code Section 2-1-66.

Features: The regulations include common location and conduct restrictions and other protective measures, such as specific findings, and requirements for indemnification, insurance, and badging. *See* Code Sections 2-1-64, 2-1-60, 2-1-63, 2-1-64, 2-1-65; Regulations.

Solicitations: Typical solicitation-for-value restrictions apply. *See* Code Section 2-1-64; Regulations.

Newsracks/Commercial Matters: *Newsracks*: Vendors must obtain a license to place newsrack machines in the airport's facilities, and licenses are awarded on a "first come" basis. *See* Code Sections 2-1-40, 2-1-48. *Commercial Photography*: The airport requires prior permission (except for bona fide news coverage or to stimulate interest in air travel or for general artistic purposes). *See* Code Section 2-1-45. Applicants must submit an application to obtain a filming permit at least 5 working days in advance. *See* Filming Permit.

State: California

Airport: Los Angeles International Airport (LAX), Los Angeles, California
2012 Passengers: 63,688,121

Sponsor—City of Los Angeles: Code of Los Angeles, California, Chapter XVII, Section 171 (the "Code") (published as of November 27, 2013) (available at http://www.amlegal.com/library/ca/ losangeles.shtml).

Noncommercial Speech: *Authorization.* The airport requires a permit to solicit or receive funds or to post or distribute written matter. *See* Code Sections 171.07(B), 171.02(d). The airport acts within 2 business days after receiving a fully completed application. Permits shall not exceed 30 days and are distributed on a "first come" basis

(competing requests are allocated equitably). Permits designate locations or booths and state other terms. *See* Code Section 171.07(C)-(E).

Denial/Termination: The airport issues a permit unless a desired space has already been requested or the applicant has been convicted of three or more rule violations in a 90-day period (the last of which occurred within 6 months of the application). *See* Code Section 171.07(C). Permits shall terminate if a permittee is convicted of three rule violations in a 90-day period (upon the third conviction), and the permittee is ineligible to receive permits for 6 months thereafter. Permits may be suspended immediately for emergencies. *See* Code Section 171.07(F). Persons who violate requirements may be removed from the airport and deprived of its use as necessary to ensure safety. *See* Code Section 171.02(o).

Appeals: An aggrieved party has 3 days to appeal a denial, termination, or suspension. The airport conducts an administrative evidentiary hearing within 5 days and renders a decision within 3 days. *See* Code Sections 171.07(C), (F).

Features: The regulations include common location and conduct restrictions and other protective measures, such as requirements for permit display or inspection; badging; giving receipts; accident reporting; prohibiting government endorsement claims; compliance with charitable solicitation laws; and verification of nonprofit status. *See* Code Sections 171.07(B)-(D), (G).

Solicitations: The airport prohibits solicitations for the immediate receipt of value inside airport terminals, parking areas, or on adjacent sidewalks. *See* Code Section 171.02(c). Handbills: The solicitation requirements do not prohibit the distribution of handbills when there is no intent to immediately receive funds. *See* Code Section 171.02(c).

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires a permit (except press representatives for new coverage). *See* Code Section 171.02(e).

State: California

Airport: Norman Y. Mineta San Jose International Airport (SJC), San Jose, California
2012 Passengers: 8,296,174

Airport (available from airport):

San Jose International Airport Expressive Activity Guidelines, Section 4 (the "Policies") (published as of September 6, 2013).

San Jose International Airport Expressive Activities Permit Application (the "Application") (published as of September 6, 2013).

San Jose International Airport License Agreement for Use of Newsracks (the "License Agreement") (published as of September 6, 2013).

San Jose International Airport Advertising Concession Agreement (the "Contract") (published as of September 6, 2013).

Sponsor—City of San Jose: Code of San Jose, California, Title 25 (the "Code") (published as of November 28, 2013) (available at http://sanjose.amlegal.com/library/ca/sanjose.shtml).

Noncommercial Speech: *Authorization*: The airport requires a permit to distribute or display material or to picket or engage in demonstrations. *See* Policies Section 4; Code Section 25.06.300 (handbills). Applications must be submitted 72 hours in advance. *See* Policies § 4. The authorization issued by the airport is valid for no more than 90 days (then applicants must reapply). *See* Application. Only individuals who are listed in the application may be authorized in the permit. *See* Policies Section 4. Permits designate locations and state other terms. *See* Application.

Denial/Termination: Activities are authorized on a conditional basis, and the airport reserves the right to deny or revoke permission if program requirements are not followed. *See* Policies Section 4, Application. The airport may revoke permits and order permittees to leave if they violate applicable requirements. *See* Policies Section 4.

Features: The regulations include common location and conduct restrictions. *See* Policies Section 4, Application.

Solicitations: Permittees are not allowed to sell literature or other items. *See* Policies Section 4.

Newsracks/Commercial Matters: *Advertising*: Advertising displays are contractual concessions that are used to maximize revenues. They are not a forum for public expression. Advertisements are

subject to the airport's approval and may do no more than propose the sale of goods and services for profit. The city maintains neutrality on political and religious issues, and advertisements may not be profane, obscene, or sexual, or depict tobacco products, illegal activity, or violence. *See* Contract.

Newsracks: Vendors must enter annual license agreements to place newsrack machines in the airport's facilities. *See* License Agreement.

State: California

Airport: Oakland International Airport (OAK), Oakland, California
2012 Passengers: 10,040,864

Airport—Port of Oakland: Board of Port Commissioners, City of Oakland, Port Ordinance 4091 (the "Rule") (available from port).

Noncommercial Speech: *Authorization*: The airport requires a permit to leaflet, picket, solicit, display signs, or otherwise attempt to communicate views. Applications must be submitted at least 24 hours in advance, and the airport acts within 24 hours after submission (and at least 3 hours before a proposed start time). Permits are valid up to 30 consecutive days (and are renewable month-to-month up to 1 year). Permits designate locations and state other terms and are issued on a "first come" basis (based on the permit issuance date). Competing requests are placed on a waiting list. *See* Rule Sections 9.6, 9.5.

Denial/Termination: The airport's failure to timely respond to an application constitutes a denial. *See* Rule Section 9.6. The airport may terminate a permit for any violation of the rules (effective upon mailing a notice stating the reason), and the permittee is then ineligible to receive permits for 6 months. *See* Rule Section 9.7. The airport may issue cease and desist orders for violations and can remove persons who fail to comply. *See* Rule Sections 11.1, 11.2. Activities must stop during declared emergencies. *See* Rule Section 9.9.

Appeals: After receiving an order, penalty, or permit denial, an aggrieved party has 10 days to request a review, and an official provides a decision within 10 days. The party can then request a hearing within 10 days, and the airport appoints a hearing officer within 10 days to conduct an evidentiary hearing. The party can appeal a decision to the director, who makes a final decision based on the written record. *See* Rule Section 11.3.

Features: The regulations include common location and conduct restrictions and other protective measures, such as express statements that provide the airport is not a public forum and prohibit consideration of content, and requirements for badging, giving receipts, and verifying nonprofit status. *See* Rule Section 9.6, 9.2, 9.5, 9.8-9.11, Preamble.

Solicitations: Solicitations are limited to areas in specified terminal and parking locations. *See* Rule Section 9.5.

Picketing: Picketing is similarly limited, and signs may not be attached to hard objects. *See* Rule Section 9.5.

Handbills: Handbills are similarly limited. *See* Rule Section 9.3.

Newsracks/Commercial Matters: *Newsracks*: Vendors must annually request space for a newsrack machine in the airport's facilities. Space is allocated based on accommodating all requests and considering those with the greatest circulation or publication days. *See* Rule Section 9.12. *Surveys*: Conducting polls, questionnaires, or surveys requires prior written permission. *See* Rule Section 3.6.

State: California

Airport: Sacramento International Airport (SMF), Sacramento, California
2012 Passengers: 8,296,174

Airport: Sacramento County Airport System Non-Commercial Demonstration Permits (the "Rule") (published as of December 19, 2013) (available from airport).

Sponsor—Sacramento County: Code of Sacramento County, California, Title 11 (the "Code") (published as of November 28, 2013) (available at http://qcode.us/codes/sacramentocounty/).

Noncommercial Speech: *Authorization*: The airport requires a permit for noncommercial demonstration or solicitation (including picketing, assembling, distribution of literature, and requests

for value). *See* Rule Sections A, B.1; Code Section 11.20.200. The application must be submitted at least 3 business days (but not more than 3 weeks) in advance. *See* Rule Section B.2. Permits designate locations and maximum participants and state other terms. *See* Rule Section C.3.

Denial / Termination: The airport issues permits except with notice of grounds for denial, and grounds include specified holiday dates, elevated security conditions, and past permit revocations. *See* Rule Sections B.4, C, D.2. The airport may terminate or alter permits for elevated security conditions. *See* Rule Section C.2. Permits are immediately revoked upon three or more violations of the rules or permit terms in a 10-day period (with notice of the grounds for acting), and the permittee is ineligible to receive permits for 6 months thereafter. *See* Rule Section D.2. Violation notices order the violator to refrain. *See* Code Section 11.20.260. The airport's procedures may be altered or suspended for emergencies or threats, and permits may be suspended, amended, or revoked for any exigent circumstances to preserve safety and operational needs. *See* Rule Sections A.2, D.1.

Appeals: An aggrieved person may appeal a decision to the County Board of Supervisors, which determines whether the airport's decision was correct and reasonable. *See* Code Section 11.20.270.

Features: The regulations include common location and conduct restrictions and other protective measures, such as requiring permit display or inspection, an indemnity, and a verification of nonprofit status. *See* Rule Sections C, B.2, B.3.

Solicitations: The airport prohibits solicitations for personal information and for the immediate receipt of funds. *See* Rule Sections A, C.6, C.10.

Picketing: The airport imposes various requirements, including special safety accommodations and a prohibition on using poles. *See* Rule Section C.5, C.7.

Handbills: The airport's requirements include a prohibition on obscene material. *See* Rule Section C.5.

Newsracks/Commercial Matters: *Advertising*: The airport addresses advertising contractually and does not approve certain ads such as political advertising. *See* contract available from airport. *Commercial Photography*: The airport requires written permission (except when for news coverage or to stimulate interest in air travel). *See* Code Section 11.20.210.

State: California

Airport: San Diego International Airport (SAN), San Diego, California
2012 Passengers: 17,250,265

Airport—San Diego County Regional Airport Authority.

San Diego County Regional Airport Authority Code (the "Code") (published as of August 29, 2013) (available at http://www.san.org/sdcraa/about_us/codes_policies.aspx).

San Diego County Regional Airport Authority Policies (the "Policies") (published as of August 29, 2013) (available at http://www.san.org/sdcraa/about_us/codes_policies.aspx).

San Diego International Airport Expressive Activities Authorization Policy and Application (the "EA Policy") (published as of August 29, 2013) (available from airport).

Noncommercial Speech: *Authorization:* The airport requires a permit to solicit funds or information, distribute merchandise, assemble, picket, demonstrate, or petition. *See* Code Section 8.40; EA Policy, page 1. The airport processes applications within 2 business days. EA Policy, page 2. A permit to distribute merchandise and solicit is valid for 90 days, and a permit to survey, picket, and gather petition signatures is valid for 7 days. *See* EA Policy, page 2. Permits designate locations and state other terms and are issued on a "first come" basis (they may be restricted to fairly accommodate competing requests). *See* EA Policy, page 2.

Denial / Termination: The airport issues permits unless space is being occupied. *See* EA Policy, page 2. Permits may be revoked for a violation of any provision of the permit instructions, and upon notice, the permittee must cease all activities. *See* EA Policy, page 4.

Appeals: An aggrieved party has 10 days to appeal, and an official provides a decision within

10 days. The party may then appeal to the board within 10 days, which makes a final decision (activities may not resume prior to this decision). *See* EA Policy, page 4.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly prohibiting actions based on content and requiring permit display or inspection and an indemnity. *See* EA Policy, pages 2 and 4.

Solicitations and Other: Solicitations are restricted to outside the terminal buildings, and so are conducting surveys, picketing, assembling, and seeking petition signatures. *See* Code Section 8.40; Policy, pages 1 and 4. Groups of more than 25 cannot congregate without prior approval. *See* Code Section 7.40.

Newsracks/Commercial Matters: *Advertising*: Advertising contracts are negotiated to increase airport revenues, and displays are subject to certain review to prevent interference with airport operations. *See* Policies Section 9.10. *Newsracks*: The airport identifies newsrack locations. *See* http://www.san.org/sdcraa/business/real_estate/advertising.aspx.

State: California

Airport: San Francisco International Airport (SFO), San Francisco, California
2012 Passengers: 44,399,885

Airport: San Francisco International Airport Rules and Regulations (the "Rules") (published as of November 28, 2013) (available at http://www.flysfo.com/about-sfo/the-organization/rules-and-regulations).

Noncommercial Speech: *Authorization*: The airport requires a permit to engage in free speech and expressive activities. *See* Rule Section 13.6. Applicants must give at least 72 hours written notice, and the airport acts within 72 hours (or less time if periods are not reasonable). Permits are valid only for their stated times and cannot exceed the end of each calendar month. Permits designate locations and state other terms and are issued on a "first come" basis. *See* Rule Section 13.6.

Denial / Termination: The airport may deny applications if activities are not consistent with airport operations, business, or pedestrian flows (with notice of applicable reasons). *See* Rule Section 13.6. Permits may be suspended or terminated (with notice) for violating the rules or any law. If a permit is terminated for cause, the airport revokes all issued permits, and the permittees are ineligible for 6 months. *See* Rule Section 13.8. Permits may be suspended immediately and without notice for emergencies. *See* Rule Section 13.9.

Features: The regulations include common location and conduct restrictions and other protective measures, such as provisions expressly prohibiting actions based on content and making detailed findings and requirements for badging and for verifying nonprofit status. *See* Rule Sections 13.1–13.3, 13.4, 13.6, 13.7.

Solicitations: The airport restricts solicitations to those that will be received in the future (and makes findings supporting the restriction). *See* Rule Section 13.5.

State: Colorado

Airport: Denver International Airport (DEN), Denver, Colorado
2012 Passengers: 53,156,278

Airport: Airport Rules and Regulations (the "Rule") (published as of September 17, 2013) (available at: https://business.flydenver.com/info/research/rules/index.asp).

Noncommercial Speech: *Authorization*: The airport requires a permit to engage in leafleting, display of signs, signature gathering, solicitation, and other speech-related activity. *See* Rule Sections 50.01, 50.03. Applications must be submitted at least 7 but no more than 30 days in advance. No permit is issued for more than 31 days. Permits designate locations and state other terms and are issued on a "first come" basis (competing requests can be placed on a waiting list). *See* Rule Section 50.04.

Denial / Termination: The airport issues a permit if space is available and permit requirements are met. *See* Rule Section 50.04. A permit may be revoked for a violation of the rules and may be revoked or suspended for emergencies or circum-

stances that disrupt airport operations. *See* Rule Section 50.14.

Appeals: An aggrieved party has 30 days to appeal a denial or revocation. The airport conducts hearings as expeditiously as possible in accordance with municipal code, and it may make use of a hearing officer. Final determinations are subject to judicial review pursuant to state law. *See* Rule Section 50.15.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that issuing a permit is a ministerial function and prohibiting consideration of content; requiring picketers to identify targeted employers and other measures to prevent workplace disruptions; and requiring badging, permit display or inspection, verification of nonprofit status, and compliance with charitable solicitation and political activity laws. *See* Rule Sections 50.04–50.08, 50.10–50.13, 50.16.

Solicitations: Solicitations shall be for future receipt, and no receipt of value shall take place at the airport. *See* Rule Sections 50.06, 50.08, 50.13.

Picketing: Non-labor picketing is prohibited in terminals and on roads and cannot involve more than two persons per location. *See* Rule Section 50.09.

Surveys: Speech regulations do not prohibit tenant surveys in exclusive leaseholds. *See* Rule Section 50.03.

Newsracks/Commercial Matters: *Newsracks*: Vendors must license space in the airport's common use newsrack installations, which are used to assure access, traffic flow, a pleasant atmosphere, and to meet revenue obligations. Newsstands must be uniform in type and provide a prominent display area for headlines. *See* Rule Section 60.

State: District of Columbia Service Area—Virginia (Metropolitan Washington Airports Authority)

Airport: Washington Dulles International Airport (IAD), Washington, D.C.
2012 Passengers: 22,408,105

Airport: Ronald Reagan Washington National Airport (DCA), Washington, D.C.
2012 Passengers: 19,630,213

The Metropolitan Washington Airports Regulations (the "MWAR") (published as of November 23, 2013) (available at http://www.mwaa.com/2838.htm).

Metropolitan Washington Airports Authority Orders and Instructions 7-4-1 CHG1, Commercial Photography or Video, Motion Picture, and Television Filming at Ronald Reagan Washington National Airport and Washington Dulles International Airport (Order 7-4-1) (published as of November 28, 2013) (available at http://www.mwaa.com/2838.htm).

Metropolitan Washington Airports Authority Airport Solicitation Permit Application (the "Form") (published as of September 2, 2013) (available from airport).

Metropolitan Washington Airports Authority Concession Contract (the "Contract") (published as of September 2, 2013) (available from airport).

Noncommercial Speech: *Authorization*: The airport requires a permit for soliciting funds, demonstrations or gatherings, or the distribution of literature. *See* MWAR Section 7.5; Form. The airport processes applications in the order received and acts without delay. Applications may not be submitted more than 30 days in advance, and a single organization may not reserve more than one-third of a day's permits in advance. Permits are valid for up to 48 hours. Permits designate locations, and competing requests are allocated on a "first come" basis. *See* MWAR Section 7.5.

Denial/Termination: The airport may deny applications when space is occupied, activities cannot be accommodated in the requested area (based on airport needs), requested locations are not designated for the activity, or the applicant has serious or repeated rule violations. *See* MWAR Section 7.5. The airport may revoke a permit for rule violations, for emergency circumstances, or if activities can no longer be reasonably accommodated due to changed circumstances. *See* MWAR Section 7.7.

Features: The regulations include common location and conduct restrictions and other protective measures, such as requiring a verification of fed-

eral and state nonprofit status. *See* MWAR Sections 7.4–7.6, 7.8, Form.

Solicitations: The airport prohibits solicitations for immediate payment inside the terminals or other structures (unless engaged in under a concession contract with the airport). *See* MWAR Section 7.4.

Newsracks/Commercial Matters: *Advertising*: Commercial advertising requires an airport concession contract. *See* MWAR Section 7.3. The airport approves displays, and advertising must meet guidelines generally accepted in the industry for family advertising. *See* Contract. *Commercial Photography*: Parties must submit a request for permission to film (except for news coverage or for personal use). The airport will not approve certain fictional scenes, including gun play, security breaches, and aircraft crashes, and scripts are reviewed in advance. *See* Order 7-14-1.

State: Florida

Airport: Ft. Lauderdale–Hollywood International Airport (FLL), Fort Lauderdale, Florida
2012 Passengers: 23,707,784

Sponsor—Broward County, Florida (available at http://www.municode.com/Library/FL/Broward_County).

Code of Broward County, Florida, Part II, Chapter 2 (the "Code") (published as of November 29, 2013).

Administrative Code of Broward County, Florida (the "Admin. Code") (published as of November 29, 2013).

Noncommercial Speech: *Authorization*: The airport requires an approved registration form to distribute literature, picket, and display signs. A permit is required to solicit funds. *See* Code Sections 2-40, 2-81, 2-90. A registration form is issued immediately once the application is complete, and it is effective for 1 year. Registrants can conduct activities at any time if airport badges are available when requested (badges for locations are given on a "first come" basis). *See* Code Sections 2-82, 2-84, 2-85; Admin. Code Section 26.27. For a solicitation permit, the airport may further investigate the application and shall act within 7 days. Permits are valid for 1 year, and permittees must give at least 3 days' advance notice of conducting activities (which may not exceed 1 week). Badges for locations are given on a "first come" basis. *See* Code Sections 2-92, 2-93; Admin. Code Sections 26.27.

Denial / Termination: With notice, the airport may deny a registration form application for incomplete information, commercial activity, activity that requires a solicitation permit, emergency conditions that make activities incompatible, untrue statements, and a lack of responsible supervision. It may revoke registration forms for legal violations, activities adverse to health or safety, or discovery of misrepresentation. *See* Code Sections 2-83, 2-87. Solicitation permits are subject to similar requirements for denial and revocation. *See* Code Sections 2-92, 2-97. A revocation precludes a new application for 6 months. *See* Code Sections 2-87, 2-97.

Appeal: Upon notice that a registration form is denied, the county attorney shall, within 7 days, submit the denial notice to a hearing officer, who shall conduct an evidentiary hearing within 15 days and enter a decision within 7 days (which may be judicially appealed). *See* Code Section 2-83. Solicitation permits are subject to a similar process. *See* Code Section 2-92.

Features: The regulations include common location and conduct restrictions and other protective measures, such as express findings, and requirements for badging and verification of nonprofit status. *See* Code Sections 2-80–2-82, 2-85, 2-86, 2-89–2.91, 2-94.

Solicitation: State law imposes requirements on the solicitation regulations that airports may adopt. *See* Fla. Stat. Sections 496.425, 496.4255 (through 2013 Reg. Sess.).

Newsracks/Commercial Matters: *Advertising*: Advertising is a privilege and service awarded by competitive proposal. *See* Admin. Code Section 26.4. *Newsracks*: Newsracks are a privilege and service awarded by competitive proposal. *See* Admin. Code Section 26.4.

State: Florida

Airport: Miami International Airport (MIA), Miami, Florida
2012 Passengers: 39,467,444

Sponsor—Miami-Dade County, Florida: Code of Miami–Dade County, Florida, Part II, Chapter 25 (the "Code") (published as of November 29, 2013) (available at http://www.municode.com/Library/FL/Miami_-_Dade_County).

Noncommercial Speech: *Authorization*: The airport requires parties to deliver a written notice before participating in speechmaking or distribution of written materials. Applicants must submit their notice at least 5 working days in advance, and the airport responds within 5 working days. The airport's response designates locations (and may resolve conflicting requests) and may state other restrictions after making a finding that they are necessary for the airport's safe and orderly use. *See* Code Section 25-2.2.

Denial/Termination: After giving notice, persons are permitted to conduct their activities subject only to the restrictions identified in the airport's response. The airport is empowered to restrict activities for emergencies or other conditions that disrupt airport operations, and it imposes other restriction as stated above. *See* Code Section 25-2.2.

Appeal: If an application is denied, within 5 days the county attorney files a court action to determine whether the activity may be prohibited. The county must use every reasonable effort to have the issue heard on the merits without delay. If the matter is not decided on the merits within 10 days, the applicant may engage in the activities until there is a final, non-appealed judicial determination. *See* Code Section 25-2.2.

Features: The regulations include common location and conduct restrictions and other protective measures, such as badging (identification cards). *See* Code Sections 25-2.2, 25.2-3, 25.2-7 to 25.2.10.

Solicitations: No person shall solicit and receive contributions of value for any purpose in the terminal. *See* Code Section 25-2.2. Applicable state laws do not require the airport to permit solicitations for value. *See* Fla. Stat. Sections 496.425, 496.4255 (through 2013 Reg. Sess.).

Picketing: Lawful demonstrations may only be conducted on roads, rights-of-way, or sidewalks in accordance with reasonable procedures established by the airport. Demonstrations are unlawful in the terminal. *See* Code Section 25-2.8.

Handbills: Noncommercial distribution shall only be conducted on roads and sidewalks pursuant to the airport's procedures, except as the airport may otherwise permit. *See* Code Section 25-2.1.

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires a permit or other authorization (except for news coverage). *See* Code Section 25-3.2.

State: Florida

Airport: Orlando International Airport (MCO), Orlando, Florida
2012 Passengers: 35,288,887

Airport—Greater Orlando Aviation Authority (all published as of November 29, 2013).

Policy Statement Regarding Distribution of Literature and Solicitation of Donations at Airport Facilities (the "Policy") (available from authority).

General Conditions for Picketing at the Orlando International Airport (the "GC") (available from authority).

Greater Orlando Aviation Authority Ground Transportation Rules and Regulations (the "GTRR") (available at http://orlandoairports.net/gt/docs/gt_regulations.pdf).

Noncommercial Speech: *Authorization*: The airport requires a permit to distribute noncommercial literature and picket. This allows solicitations for value by distribution of written requests, but in-person solicitations are not allowed. The airport reviews applications for sufficiency and acts within 2 business days. Permits (except a picketing authorization) are valid for 6 months. For picketing, the airport meets to discuss procedures, and following the meeting the director issues a letter authorizing specific locations and procedures (if they do not interfere with the public). *See* Policy Section B; GC Section II. Permits and authorizations designate locations and state other terms, and space is allocated on a "first come" basis (excess demand is placed on a waiting list). *See* Policy Sections D, E; GC Section II.

Denial/Termination: If the airport fails to act in 2 business days, it is considered a denial. *See* Policy Section B. The airport may suspend or revoke a permit for good cause shown, which includes pol-

icy violations, complaints that are continued and substantial, acts adverse to safety and health, and misrepresentation. If revoked, new permits may not be issued for 6 months. *See* Policy Section I. The airport withdraws authorization to picket for violations of the specified requirements. *See* GC Section III. Permits may be suspended for emergencies. *See* Policy Section H.

Appeals: An aggrieved party has 5 days to appeal a denial, suspension, or revocation. The airport gives notice of an evidentiary hearing at least 5 days in advance, and the executive director can affirm or reverse the initial decision. *See* Policy Section C.

Features: The regulations include common location and conduct restrictions and other protective measures, such as express provisions prohibiting consideration of content and providing that the airport can restrict activities to the full extent permitted by law, and requirements for accident reporting, badging, and specific picketing requirements. *See* Policy Sections B, D–G, K, L; GC Sections II, III.

Solicitations: The airport prohibits the in-person solicitation of funds. *See* Policy Sections B, G. State law imposes requirements on airport solicitations, but does not require the airport to permit the activity. *See* Fla. Stat. Sections 496.425, 496.4255 (through 2013 Reg. Sess.).

Picketing: Tenant and contractor employees may only picket in specified areas near worksites. *See* GC Section I.

State: Florida

Airport: Tampa International Airport (TPA), Tampa, Florida
2012 Passengers: 16,820,859

Airport—Hillsborough County Aviation Authority (all published as of November 29, 2013; available from airport).

Hillsborough County Aviation Authority Rules and Regulations for Tampa International Airport, No. R340 (the "Rules")

Aviation Authority Standard Procedure No. S341.01 ("Procedure S341.01").

Noncommercial Speech: *Authorization*: The airport requires a permit to conduct First Amendment activities, which include leafleting and picketing. *See* Rules Sections 4.1–4.3. Normally the airport acts within 3 hours from receipt of the application. A permit authorizes activities for up to 30 consecutive days and can be renewed month-to-month for 1 year. Permits designate locations that are assigned daily on a "first come" basis. Competing requests are decided equitably, such as by lots. *See* Rules Sections 4.3, 4.4; Procedure S341.01.

Denial / Termination: The airport reviews applications for sufficiency of information and compliance with the rules. *See* Rules Section 4.4. Permits may be terminated for violations (and permittees may be removed). Upon termination, a permittee is ineligible for new permits for 6 months. *See* Rules Section 4.6. Activities must cease in areas affected by emergencies. *See* Rules Section 4.7.

Appeals: An aggrieved party has 10 days to appeal a permit delay, denial, or termination and explain why the action should be modified. Within 10 days, a fact-finding group of airport employees reviews the request, and the CEO reviews their data and issues a decision. Within 10 days thereafter, the aggrieved party can request an informal board hearing. After hearing both sides, the board issues a final decision that a court can review. *See* Rules Section 4.8.

Features: The regulations include common location and conduct restrictions and other protective measures, such as express provisions-making findings, requiring a viewpoint-neutral consideration, and stating that the airport is not a public forum. *See* Rules Sections 2.8, 4.3.

Solicitations: Solicitation is not permitted for any purpose. *See* Rules Sections 2.5, 4.4. Applicable state laws do not require the airport to permit the activity. *See* Fla. Stat. Sections 496.425, 496.4255 (through 2013 Reg. Sess.).

Surveys: The airport requires written permission to conduct polls, questionnaires, or surveys. *See* Rules Section 2.6.

Newsracks/Commercial Matters: *Newsracks*: Vendors must obtain a permit to place a newsrack machine in the airport's facilities, and the airport has made findings in support of its guidelines. No advertising or commercial displays are permitted

on the machines. Space is available on a "first come" basis, and permit decisions will be made on a viewpoint-neutral basis. *See* Rules Section 4.5.

State: Georgia

Airport: Hartsfield–Jackson Atlanta International Airport (ATL), Atlanta, Georgia
2012 Passengers: 95,462,867

Airport: Department of Aviation Concessions Management Compliance Standards Manual (Rev. November 2010) (the "Standards") (available at http://www.atlanta-airport.com/docs/business/Concessions%20Compliance%20Standards%20Rev%2011-3-2010.pdf).

Sponsor—City of Atlanta: Code of Atlanta, Georgia, Part II, Chapter 22 (the "Code") (published as of November 19, 2013) (available at http://www.municode.com/Library/GA/Atlanta).

Noncommercial Speech: *Authorization*: The airport requires an identification card to distribute literature and solicit funds in designated locations (sales of literature are only allowed commercially). *See* Code Section 22-147. It requires a permit to picket. *See* Code Section 22.114. For cards, the airport acts forthwith, and cards are valid for 30 days unless the applicant registered for a single period of 24 hours. Cards designate assigned areas on a "first come" basis. *See* Code Section 22-150. For picketing permits, a person must apply at least 48 hours, but not more than 30 days, in advance, and the airport responds no more than 24 hours after receiving the application. Permits are valid for 30 days. *See* Code Section 22.114.

Denial / Termination: The airport may suspend or revoke authorization for violations, after giving notice of grounds and the person's right to present any defense. A defense must be submitted within 3 days (for authorizations in excess of 5 days) or 24 hours (for authorizations of less than 5 days). The airport may revoke or suspend registrations verbally for emergencies, followed by written confirmation in 24 hours. *See* Code Section 22-154.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that the airport exercises no judgment regarding content (issuance is a routine, clerical, mandatory function) and imposing requirements for badging and picketing. *See* Code Sections 22-149–22-153, 22.114.

Solicitations: Solicitations for the immediate receipt of funds can only be conducted in designated locations outside the terminals, and sales of materials are not allowed. *See* Code Sections 22-151, 22-153.

Newsracks/Commercial Matters: *Newsracks*: Newspaper boxes are a concession and the airport determines their placement. *See* Standards Section 7.2.

State: Illinois

Airport: O'Hare International Airport (ORD), Chicago, Illinois
2012 Passengers: 66,633,503

Airport: Midway International Airport (MDW), Chicago, Illinois
2012 Passengers: 19,408,167

Chicago Department of Aviation Amended Rules and Regulations Governing First Amendment Activities at the City of Chicago Airports (the "Rules") (published as of November 30, 2013) (available from airport).

Commercial Filming and Photography Approval Procedures (the "Approval Procedures") (published as of November 30, 2013) (available at: http://www.flychicago.com/business/en/media/policy-resources/FilmingPolicy/procedures/Commercial-Filming-and-Photography-Approval-Procedures.aspx).

Sponsor—City of Chicago: Code of Chicago, Illinois (the "Code") (published as of November 30, 2013) (available at http://www.amlegal.com/library/il/chicago.shtml).

Noncommercial Speech: *Authorization:* The airport requires a permit to engage in distributions, solicitations, or demonstrations. The airport acts on applications within 5 business days. A permit designates locations, and if insufficient space is available, the airport may offer substitute dates, times, and other limitations. *See* Rules Section 3.

Denial / Termination: The airport may deny permits only for noncompliance with application

requirements, insufficient space (after offering substitutes), and adverse security conditions. *See* Rules Section 3. Upon notice, activities shall cease for the duration of any emergency closure or may be limited for security reasons. *See* Rules Section 5. The airport can revoke permits for false statements, acting outside of designated locations or without a permit, violations, or for failing to cease for emergencies or security conditions. The airport may suspend the permit immediately and initiate revocation proceedings. After revocation, permittees cannot reapply for 3 months. *See* Rules Sections 7, 8.

Appeals: An aggrieved party has 5 business days to appeal a denial or limitation. The aviation commissioner then issues a final decision within 5 days that affirms or modifies the initial denial or limitation, and that decision may be appealed to a court. *See* Rules Section 4. For revocations or temporary suspensions, the airport gives notice within 1 business day of an evidentiary hearing to be held within 5 business days. The hearing officer then issues a final decision within 5 business days of the hearing, and that decision may be appealed to a court. *See* Rules Section 8.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings and requirements for badging, indemnification, and a verification of nonprofit status. *See* Rules Sections 2, 3, 3.A, 5, 6.

Handbills: Distributed materials may not be indecent, sexually explicit, portray graphic violence, or be likely to incite lawless behavior. *See* Rules Section 3.

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires a written request containing specified information, and it prohibits certain scenes (including security breaches, aircraft crashes, explosions, smoke machines, car crashes, or images identifiable with the airport without its prior consent). *See* Approval Procedures.

State: Indiana

Airport: Indianapolis International Airport (IND), Indianapolis, Indiana
2012 Passengers: 7,333,733

Ordinances of the Indianapolis Airport Authority, General Ordinance No. 3 of 1977 (the "Ordinance") (published as of November 30, 2013) (available from airport)

Noncommercial Speech: *Authorization*: The airport requires a permit to distribute literature or receive donations. *See* Ordinance Section 3. The airport acts within 5 days of a request (for specific requests, the airport will act within 24 hours). Permits shall not exceed 90 days. *See* Ordinance Section 4. Permits designate locations and state other terms, and solicitations shall only be conducted from designated booths. Competing requests for space are equitably apportioned. *See* Ordinance Sections 5, 9, 10.

Denial / Termination: The airport may deny applications for unusual or emergency conditions or other valid reasons. *See* Ordinance Section 4. Activities must be conducted strictly in conformance with the permit and the rules. *See* Ordinance Section 5.

Appeals: Within 5 days of denying an application, the airport shall file to obtain a decision in court reviewing the denial and shall exert every reasonable effort to have the issue heard on the merits without delay. *See* Ordinance Section 4. *Features*: The regulations include common location and conduct restrictions and other protective measures, such as findings, and requirements for insurance, badging, and giving receipts adequate for federal income tax purposes. *See* Ordinance Recitals, Sections 1, 2, 4, 5, 7–11, 14, 15.

State: Louisiana

Airport: Louis Armstrong New Orleans International Airport (MSY), New Orleans, Louisiana
2012 Passengers: 8,600,860

This summary includes online sources only.

Sponsor—City of New Orleans, Louisiana: Code of New Orleans, La. (the "Code") (published as of November 30, 2013) (available at http://www.municode.com/Library/LA/New_Orleans).

Noncommercial Speech: *Authorization*: Solicitors in public transportation facilities must obtain a permit from the facility. *See* La. Rev. Stat. Ann. Section 51:1906 (through 2013 Reg. Sess. Act 97).

Denial / Termination: The facility manager may terminate solicitations for emergencies based on facility conditions or may suspend or revoke for good cause (including violating facility restrictions, public complaints, acts adverse to the public, and misrepresentations). *See* La. Rev. Stat. Ann. Section 51:1909 (through 2013 Reg. Sess. Act 97).

Features: The regulations include common location and conduct restrictions and other protective measures, such as badging. *See* La. Rev. Stat. Ann. Sections 51:1905–51:1905.2, 51:1906–51:1909 (through 2013 Reg. Sess. Act 97).

State: Maryland

Airport: Baltimore/Washington International Thurgood Marshall Airport (BWI), Baltimore, Maryland
2012 Passengers: 22,679,680

Maryland Aviation Administration (all as published as of November 30, 2013):

Code of Maryland Regulations, Title 11, Subtitle 03, Chapter 01 (the "COMAR") (available at http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=11.03.01.*).

BWI Tenant Directive 601.1 ("Directive 601.1") (available from airport).

BWI Tenant Directive 602.1 ("Directive 602.1") (available from airport).

Noncommercial Speech: *Authorization*: The airport requires a written authorization to picket and to proselytize (activities to convert recruits to one's faith or cause, including distribution of literature and solicitation for value and for signatures). *See* COMAR Section 11.03.01.08(B), (E), (F); Directive 601.1(II), (III). Proselytizers must submit a written request to the airport before each 14-day period (or portion thereof) when they desire to engage in activities. The airport grants authorization for no more than 14 days, which may be renewed based on availability. *See* Directive 601.1(II). Proselytizers must "check in" each day, and designated locations are assigned on a "first come" basis. *See* Directive 601.1(III). Picketers must first meet with the airport to discuss times and procedures, and those requirements will be placed in their authorization letters. *See* Directive 602.1(III).

Denial / Termination: The airport can immediately ask proselytizers to leave for an infraction (not to exceed 24 hours). With a sworn complaint regarding repeated violations, the airport can require longer expulsions and prosecutions. *See* Directive 601.1(IV). For picketers, the airport may withdraw authorization for violations. *See* Directive 602.1(III).

Appeals: A proselytizer who is subject to expulsion for rule violations must first have an opportunity to request a hearing, and at the hearing, both parties may be represented by counsel. *See* Directive 601.1(IV).

Features: The regulations include common location and conduct restrictions and other protective measures, such as badging, prohibiting claims of government endorsement, and specific requirements for picketers. *See* COMAR Section 11.03.01.08(B), (F); Directives 601.1(II), (III); 602.1(II), (III).

Solicitations: Solicitation activities are limited solely to one location that is configured with a table. *See* Directive 601.1(III).

Picketing: Picketers who are employees of terminal tenants may picket at designated terminal locations, and other employee picketers may be near job sites (but not in secure areas). *See* Directive 602.1(II).

State: Michigan

Airport: Detroit Metropolitan Wayne County Airport (DTW), Detroit, Michigan
2012 Passengers: 32,205,358

Airport—Wayne County Airport Authority: Wayne County Airport Authority Airport Ordinance (the "Ordinance") (published as of November 30, 2013) (available at http://www.metroairport.com/Portals/0/PDF/WCAA_Airport_Ordinance_Mar2013.pdf).

Noncommercial Speech: *Authorization*: The airport requires a permit for distribution of literature, proselytizing, cause advocacy, or nonprofit solicitation of funds (for future receipt only), and a separate permit is required for picketing. *See*

Ordinance Sections 14.7, 15.4. The airport uses standard application requirements, and it also expressly requires its actions to be content neutral. Applications may not be filed more than 8 weeks in advance. *See* Ordinance Sections 14.3, 14.7, 15.3, 15.6. The airport acts within 3 business days. Permits are for the lesser of the requested period or 5 days. Permits designate locations and are issued on a "first come" basis (competing applicants may agree to divide available space, or the airport will rotate activities in between 15–60 minute increments). *See* Ordinance Section 14.9. Picketing permits are issued under similar terms, except they are renewable. *See* Ordinance Section 15.8.

Denial/Termination: Permits are issued unless the activities are not within the terms of the ordinance, there is an ordinance violation, or the activity is an incitement to crime, fighting words, a true threat, or obscene. *See* Ordinance Section 14.9. The airport may revoke a permit for any legal violation, and upon notice the permittee must immediately cease. *See* Ordinance Sections 14.14, 15.13. Activities may be suspended for the duration of an emergency. *See* Ordinance Sections 14.11, 15.10. *Appeals*: An aggrieved party may request an appeal at the time of the denial or revocation. The airport then applies for a judicial review within 2 court days and makes every reasonable effort to obtain a decision on the merits without delay. If the court does not decide the merits within 30 days (and an injunction is not entered), an interim permit is deemed granted. Proceedings may be dismissed for a permittee's failure to cooperate. *See* Ordinance Sections 14.15, 15.14.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings; an express requirement that actions be content-neutral; specific public records requirements; and requirements for badging, indemnification, and picketing. *See* Ordinance Sections 14.1–14.3, 14.7, 14.10–14.13, 14.16, 15.1–15.3, 15.6, 15.7, 15.9–15.12, 15.15, 15.17.

Solicitations: The airport prohibits in-person solicitation for immediate receipt of funds and the sale of merchandise. *See* Ordinance Section 14.5.

State: Minnesota

Airport: Minneapolis/St. Paul International Airport (MSP), Minneapolis, Minnesota
2012 Passengers: 33,215,768

Airport—Metropolitan Airports Commission (all as published as of December 1, 2013).
Ordinance Number 47, Constitutionally Protected Expression ("Ord. 47") (available at http://www.metroairports.org/Airport-Authority/Metropolitan-Airports-Commission/Administration/Bylaws-and-Ordinances.aspx).

Sample Permit ("Sample") (available from airport).

Noncommercial Speech: *Authorization*: The airport requires a permit for constitutionally protected, organized, and systematic communicative activities (including noncommercial sales, solicitations, distribution of literature, picketing, demonstrations, and seeking petitions). Applicants must file at least 3 days in advance, and the airport acts within 2 days. A permit shall not exceed 1 month, and it designates locations and states other terms. Space is available on a "first come" basis, and the airport may resolve competing requests by requiring the use of an applicant's alternate choice or another location. *See* Ord. 47 Section 2. Activities must be conducted outside the terminals. *See* Sample.

Denial/Termination: The airport issues permits unless it determines that the proposed activity is not constitutionally protected expression. *See* Ord. 47 Section 2(G). Conduct violations are a misdemeanor. *See* Ord. 47 Section 5. *Appeals*: An aggrieved party has 5 days to appeal a denial, and then within 5 days, the airport initiates legal action to enjoin the proposed activity. The airport exerts every reasonable effort to obtain a decision on the merits as soon as possible. If the matter is not heard on the merits within 15 days after filing, the airport issues an interim permit until there is a judicial decision and all appeals have expired or been decided. *See* Ord. 47 Section 2(G).

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings, and requirements for badging and verification of nonprofit status. *See* Ord. 47 Recitals, Sections 2-4; Sample.

Solicitations: Solicitations may only be conducted from booths in specified terminal locations. *See* Ord. 47 Section 2.

State: Missouri

Airport: Lambert-St. Louis International Airport (STL), St. Louis, Missouri
2012 Passengers: 12,688,726

Airport: Rules Regulating Time, Place and Manner of Expressive Activities, Literature Distribution and Solicitation in Unsecured Areas of Lambert-St. Louis International Airport (the "Rules") (published as of December 19, 2013) (available from airport).

Sponsor—City of St. Louis: Code of St. Louis, Missouri, Title 8, Chapter 84 (the "Code") (published as of December 23, 2013) (ordinances available at http://www.slpl.lib.mo.us/cco/code/).

Noncommercial Speech: *Authorization*: The airport requires a permit to conduct any protest, proselytization, propagandizement, distribution of literature, or solicitation. *See* Rules Sections 2, 3, 6. Applications must be submitted at least 7 calendar days in advance, and permittees must give daily notice upon their arrival. A permit cannot exceed 30 calendar days. Permits designate locations and state other terms, and the airport may apportion the use of space equally to accommodate all applicants. *See* Rules Section 3.

Denial / Termination: The airport can wholly or partially restrict or suspend permitted activities for emergencies that disrupt normal airport operations, threats, strikes, riots, power failures, or other circumstances that disrupt normal airport operations. *See* Rules Section 5.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings and a provision stating that applicants need not identify the viewpoint that they will communicate. *See* Rules Sections 1, 3, 4; Permit Form.

Solicitations: Solicitations are also subject to city permitting requirements (which impose additional requirements). *See* Code Sections 8.84.020, 8.84.030, 8.84.040–8.84.130.

State: Nevada

Airport: McCarran International Airport (LAS), Las Vegas, Nevada
2012 Passengers: 40,799,830

Airport: McCarran International Airport Rules and Regulations (the "Rules") (published as of December 24, 2013) (available at https://cms.mccarran.com/dsweb/Get/Document-105188/Operating%20Rules%20and%20Regulations.pdf).

Sponsor—Clark County, Nevada: Code of Clark County, Nevada (the "Code") (published as of December 24, 2013) (available at http://www.municode.com/Library/NV/Clark_County).

Noncommercial Speech: *Authorization:* The airport requires a permit for demonstrations, distributing written material, picketing, or any other First Amendment activity. The airport acts within 3 working days or, for picketing, 1 working day. Permits expire not more than 60 days from issuance. A permit designates locations and states other terms and can include restrictions necessary for the airport's safe and orderly use. *See* Rules Section IV, pages 8–12.

Denial / Termination: The airport may deny applications for a lack of full disclosure, untrue statements, a permit revocation in the past 60 days, or commercial activity. The airport may cancel a permit with 24 hours notice for violating requirements. It may cancel without notice if a violation threatens public safety. *See* Rules Section IV, pages 11–12.

Appeals: An aggrieved party has 3 working days to appeal a denial (1 working day for picketing applications). The county commissioners hear the appeal at their next regular meeting and may grant, deny, reinstate, or refuse reinstatement. *See* Rules Section IV, page 11.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings and requirements for badging, prohibiting claimed endorsements, express public records requirements, specific picketing requirements, and requirements for disclosure of past permit violations. *See* Rules Section IV, pages 8–10, 12–16; Code Section 20.04.070.

Solicitations: Solicitations and sales cannot take place inside an airport terminal building, parking area, or structure, or their adjacent sidewalks. *See* Rules Section IV, page 14. The county also imposes additional soliciting registration requirements and restrictions. *See* Code Section 6.58.020.

Picketing: Picketing must take place outside the terminal. *See* Rules Section IV, page 14.

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires authorization to make recordings for commercial, training, or education purposes (except for news coverage). *See* Rules Section IV, pages 7–8. *Ground Transportation*: Ground transportation personnel, when transferring persons at an airport, must greet potential passengers by saying "may I help you," "good morning," "good afternoon," or "good evening" (as part of a prohibition on soliciting). *See* Nev. Admin. Code Section 706.228 (through July 31, 2013).

State: New Jersey

Airport: Newark Liberty International Airport (EWR), Newark, New Jersey
2012 Passengers: 33,993,962

***See* New York, Port Authority of New York and New Jersey.**

State: New York

Airports: Port Authority of New York and New Jersey:

John F. Kennedy International Airport (JFK), New York, New York
2012 Passengers: 49,291,765

LaGuardia Airport (LGA), New York, New York
2012 Passengers: 25,712,030

Newark Liberty International Airport (EWR), Newark, New Jersey
2012 Passengers: 33,993,962

The Port Authority of New York and New Jersey Airport Rules and Regulations (the "Rules") (published as of December 24, 2013) (available at http://www.panynj.gov/airports/pdf/Rules_Regs_Revision_8_04_09.pdf).

This summary includes online sources only.

Noncommercial Speech: *Authorization:* The airport requires a permit for distributing literature. Each person must submit his or her name in writing to the airport in question at least 24 hours in advance and report arrivals and departures. *See* Rules Section XV.B. Distribution is permitted only at specified locations on a "first come" basis. *See* Rules Section XV.B.

Denial / Termination: An airport may deny or suspend any permit or permission for emergencies (dangerous conditions that substantially interfere with airport operations). *See* Rules Section XIV.A. An airport also may prohibit distribution when conditions for the use of a designated space create a danger or interfere with airport operations. *See* Rules Section XV.B.

Features: The regulations include common location and conduct restrictions and other protective measures, such as badging. *See* Rules Section XIV.D, XIV.E, XIV.F, and XV.B.

Solicitations: The solicitation and receipt of funds are prohibited in any building or structure, and the following noncommercial activities are also so prohibited: distribution of merchandise; provision of service; distribution of raffle tickets; and entry into or conducting a game of chance. *See* Rules Section XV.B.

State: North Carolina

Airport: Charlotte Douglas International Airport (CLT), Charlotte, North Carolina
2012 Passengers: 41,228,372

This summary includes online sources only.

Sponsor–City of Charlotte: Code of Charlotte, North Carolina (the "Code") (published as of December 24, 2013) (ordinances available at http://www.municode.com/Library/NC/Charlotte).

Noncommercial Speech: *Authorization:* The airport requires a permit for solicitation, distribution of literature, and demonstrating. *See* Code Sections 4-69, 4-71, 4-72. Applicants must submit their applications at least 3 days in advance. *See* Code Section 4-69. Permits are valid for 14 days. *See* Code Sections 4-72, 4-75. Permits designate

locations and state other terms. *See* Code Section 4-75.

Denial/Termination: The airport may deny applications or cancel permits for false statements on the application or violations of the terms of past permits. *See* Code Section 4-74.

Appeals: Features: The regulations include common location and conduct restrictions and other protective measures, such as findings and requirements for badging, disclosure of certain criminal convictions, picketing, and providing copies of corporate charters. *See* Code Sections 4-67, 4-69, 4-72, 4-75, 19-303.

Solicitations: Solicitation is restricted to sidewalks outside the terminal. *See* Code Section 4-75.

Picketing: Picketing limited to sidewalks outside the terminal building. *See* Code Section 4-72.

Handbills: The distribution of free literature may occur inside or outside the terminal building. *See* Code Section 4-75.

Newsracks/Commercial Matters: *Commercial Photography*: The airport must give its prior permission (except for news coverage). *See* Code Section 4-33.

State: North Carolina

Airport: Raleigh-Durham International Airport (RDU), Raleigh-Durham, North Carolina
2012 Passengers: 9,220,391

Airport—Raleigh-Durham Airport Authority (all as published as of September 9, 2013) (available from airport).

Ordinances of Raleigh-Durham Airport Authority (the "Code").

Policy Managing Publication Distribution Using Vending Devices at Raleigh-Durham International Airport and Permit Application (the "Vending Policy").

Raleigh-Durham Airport Authority Policy on Commercial Advertising (the "Advertising Policy").

Noncommercial Speech: *Authorization*: The airport requires a permit to distribute written matter and to demonstrate (including picketing and assembling). *See* Code Sections 7-4, 7.5. Applicants must submit a complete application at least 7 days in advance, and a permit is valid for up to 7 days. *See* Code Section 7-8. Permits designate locations and state other terms, and issuance is subject to availability. *See* Code Section 7-7.

Denial/Termination: The airport may deny an application for false information, a failure to comply with required times, a lack of available space, and code noncompliance, and may impose restrictions aimed at assuring the airport's safe and orderly use. *See* Code Sections 7-7, 7-8. *Appeals*: The airport's expression requirements are not exclusive, and they do not preclude the airport from proceeding under other laws or relieve any party from obligations to comply with applicable laws. Violations of requirements are unlawful and punishable as stated. *See* Code Section 7-12, 7-13.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that permits are assigned on a nondiscriminatory basis and requiring information regarding the potential for hostile actors. *See* Code Sections 7-6 to 7-9, 7-11.

Solicitations: Persons may not engage in the sale of written matter or the solicitation of funds or other value. *See* Code Sections 7-1, 7-2.

Newsracks/Commercial Matters: *Advertising*: The airport (or its concessionaire) displays advertising in the facilities to generate maximum revenues, and it does not select displays that would disrupt airport traffic, revenues, operations, or business. *See* Advertising Policy. *Newsracks*: Unmanaged newsracks would unreasonably interfere with public use of the airport, be aesthetically displeasing, constitute a safety hazard, and adversely impact airport and concessionaire revenues, and they should be governed by reasonable content- and viewpoint-neutral time, place, and manner regulations. *See* Vending Policy Section II. Vendors are subject to an annual permitting process that is administered to permit access. *See* Vending Policy Section IV. A machine may display only the publication name, a customer service number, purchase directions, and a window to display one publication. *See* Vending Policy Section III.

State: Oregon

Airport: Portland International Airport (PDX), Portland, Oregon
2012 Passengers: 14,390,627

Portland International Airport: Portland International Airport Rules (the "Rules") (published as of December 24, 2013) (available at http://www.portofportland.com/Rules_Ord_Pol.aspx).

Sponsor—Port of Portland: Airport Operations, Ordinance No. 423-R of the Port of Portland (the "Ordinance") (published as of December 24, 2013) (available at http://www.portofportland.com/Rules_Ord_Pol.aspx).

Noncommercial Speech: *Authorization:* The airport requires a permit for all free speech activities, including solicitations, petitions, and picketing. *See* Rules Section 8.2; Ordinance Section 3.3.1. Applications should be submitted at least 3 but not more than 10 business days in advance, and permits are valid for not more than 7 successive days. A permit designates locations and specifies requirements to prevent interference at the airport. Locations are assigned on a "first come" basis. *See* Rules Section 8.2.

Denial/Termination: The airport may deny applications if the activity does not constitute legally protected free speech. It may revoke permits (and deny subsequent applications) if a permittee violates a permit's terms and conditions. *See* Rules Section 8.4. The airport may suspend permits without notice for an emergency involving safety or security. *See* Rules Section 8.6. The airport may pursue additional remedies to enforce requirements, including excluding persons from the airport. *See* Rules Sections 1.2, 1.3. Sanctions take effect following an appeal (or expiration of the time to appeal) unless the airport finds they must take effect immediately. *See* Rules Section 1.7.

Appeals: An aggrieved party has 10 calendar days to appeal a decision (or 7 if the decision was delivered by hand, fax, or email). *See* Rules Sections 1.6, 8.4. The airport schedules an evidentiary hearing within 30 days (or 14 days if the sanctions take effect immediately). *See* Rules Section 1.8. The hearing officer's decision must include a factual and legal basis, and it is the airport's final decision. *See* Rules Sections 1.9, 1.10.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings, prohibiting action based on viewpoint, and a complaint process. *See* Rules Sections 8.1, 8.2, 8.3, 8.7; Ordinance Sections 3.3, 3.3.4.

Newsracks/Commercial Matters: *Advertising*: The airport does not allow certain advertising materials such as those that violate intellectual property rights, are deceptive or misleading, depict violence against persons or animals, contain legally prohibited content, or are scented. These restrictions are intended to maintain neutrality by the airport, avoid public discomfort, uphold legal requirements, and prevent the potential loss of advertising revenues. *See* Rules Section 13.2. Concessionaries must remove objectionable displays, and the airport controls advertising to avoid confusion and interference with the terminal's interior. *See* Rules Sections 13.4, 13.8. *Commercial Photography:* The airport requires a permit, prohibits the use of references to the airport without permission, and prohibits scenes involving explosives, firearms, gunshot sound effects, and weapons. News coverage does not require a permit, but permits are required for special projects. Media is permitted except where access is restricted, premises are leased, or access hinders safety or operations. *See* Rules Sections 22.1, 22.2.

State: Pennsylvania

Airport: Philadelphia International Airport (PHL), Philadelphia, Pennsylvania
2012 Passengers: 30,228,596

Airport: Airport Rules and Regulations, Section 2 and Appendix A (the "Rules") (published as of December 26, 2013) (available at http://www.phl.org/Business/Pages/Airport-Rules-and-Regulations.aspx).

Noncommercial Speech: *Authorization*: The airport requires a permit for picketing, leafleting, and solicitation. *See* Rules Section 2.A-C. Applicants must submit the application at least 72 hours in advance, and permits cannot exceed 14 business days. *See* Rules, Appendix A, Section C. A permit designates locations and states other terms, and the airport reserves the right to impose reasonable conditions as may be necessary. *See* Rules, Appendix A, Section B.

Denial / Termination: The airport may deny an application or revoke a permit for false application information; conducting commercial activity; impeding airport operations; endangering airport users; interfering with airport users' business; hindering pedestrian flow; interfering with airport announcements or signage; soliciting without approval or use of unapproved locations; content that is disruptive, instills fear, or is pornographic; legal violations; emergencies; and to protect airport operations. *See* Rules, Appendix A, Section E. The airport also may remove persons, impose fines, and deny subsequent permits for 1 year. *See* Rules, Appendix A, Section G.

Appeals: An aggrieved party has 30 days to appeal a denial or revocation. The city provides an evidentiary hearing within 10 days, and the hearing officer issues a final administrative decision within 10 days thereafter. *See* Rules, Appendix A, Section F.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly prohibiting consideration of viewpoint and stating that the airport is not a public forum, findings, and requirements for assumption of the risk, indemnification, permit display or inspection, accident reporting, and verifying nonprofit status. *See* Rules, Appendix A, Sections A–D and H.

Solicitations: Solicitations are limited to specified booths. *See* Rules, Appendix A, Section A.

Newsracks/Commercial Matters: *Advertising*: The airport will not accept certain advertisements, such as those that do not propose a commercial transaction, relate to the use of alcohol or tobacco products, or contain sexually explicit representations or relate to those businesses or products. *See* Rules Section 2.J. *Commercial Photography:* The airport requires prior written approval for commercial or student photography or filming. Requests must include a description of the project's theme, how airport scenes relate to the theme, and a complete script. News media is subject to a media policy regarding airport events and access, as well as an annual requirement to sign a release, waiver, and indemnity. *See* Rules, Appendix E.

State: Pennsylvania

Airport: Pittsburgh International Airport (PIT), Pittsburgh, Pennsylvania
2012 Passengers: 8,041,357

Airport—Allegheny County Airport Authority Solicitation/Meet and Greet Permit Guidelines (the "Guidelines") (published as of February 9, 2014) (available from airport).

Sponsor—Allegheny County: Code of Allegheny County, Pennsylvania, C. 705 (the "Code") (published as of December 26, 2013) (ordinances available at http://ecode360.com/8484940).

Noncommercial Speech: *Authorization*: The airport requires a permit to distribute literature, exchange information, solicit funds, or picket. *See* Code Section 705-50. Applicants must submit an application not more than 1 week or less than 3 days in advance, and permits are issued for a 2-week period and are renewable. *See* Guidelines Section 2. The permit designates one of six locations, where no more than five persons may participate. *See* Guidelines Sections 4-6.

Denial / Termination: The airport may deny an application or suspend or cancel a permit upon a showing that an application statement is not true, the applicant failed to provide required information, fraudulent or criminal pursuits, material code violations, or activities adverse to health or safety. *See* Code Section 705-52. The airport may cancel or suspend permits for security reasons or to facility airport passenger flow or business. *See* Guidelines Section 9. Upon revocation, a permittee may not be issued another permit for 6 months. *See* Code Section 705-53.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings in support of the rules. *See* Code Section 705-48. Permittees must possess a copy of the permit at the site, and they cannot disrupt airport business, make loud noises, or engage in other specified activities. *See* Guidelines Sections 7–8.

Newsracks/Commercial Matters: *Commercial Photography*: The airport must give permission, and accredited news services shall secure clearance for their activities from the director to ensure compliance with law. *See* Code Section 705-42.

State: Tennessee

Airport: Nashville International Airport (BNA), Nashville, Tennessee
2012 Passengers: 9,834,471

Airport—Metropolitan Nashville Airport Authority: Procedure Nos. 4-105, 5-204 (each a "Procedure") (published as of September 27, 2013) (available from airport).

Sponsor—Metro Government of Nashville and Davidson County, Tennessee: Code of Metro Government of Nashville and Davidson County, Tennessee (the "Code") (published as of December 26, 2013) (ordinances available at http://www.municode.com/Library/TN/Metro_Government_of_Nashville_and_Davidson_County).

Noncommercial Speech: *Authorization*: The airport requires a permit to solicit, distribute literature, picket, display signs, or engage in speechmaking. *See* Procedure 5-204, Section b. Applicants must submit an application at least 5 days in advance (which may be waived where activities are brief or delay will interfere with the activities' purpose). *See* Procedure 5-204, Section b. A permit shall not exceed 30 days. *See* Procedure 5-204, Section d. A permit designates locations and states other terms; restrictions can only address hindering access and normal and customary airport activities. Space is assigned on a "first come" basis, and in some cases it may be shared to accommodate competing requests. *See* Procedure 5-204, Section i.

Denial/Termination: A permit may only be delayed or denied if the applicant has not fully provided required application information, an application statement is not true, or emergency conditions exist (operational and safety concerns) that make the proposed activity incompatible with airport operations. *See* Procedure 5-204, Section d. The airport may terminate permits for rule violations. *See* Procedure 5-204, Section m. The airport may restricted a permit for emergencies or for nonemergency circumstances after finding that restrictions are necessary for safety or security. *See* Procedure 5-204, Section j.

Appeals: Within 10 days, the airport automatically conducts an evidentiary hearing to review a denial (with at least 5 days' notice). Thereafter, the airport affirms or reverses the denial within 5 days. If requested within 10 days, the airport files to obtain a judicial determination within 5 days of the request and exerts every reasonable effort to have the issue heard on the merits without delay. If the matter is not decided on the merits within 10 days, an interim permit is deemed issued and renewed every 30 days until there is a final, binding decision. *See* Procedure 5-204, Sections e, f. For a permit termination, the aggrieved party has 10 days to request a hearing, and the airport schedules an evidentiary hearing within 10 days (with at least 5 days notice). The airport may affirm, revoke, or modify a termination within 5 days (which is a final, appealable decision). *See* Procedure 5-204, Section m.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that the airport exercises no judgment over content or discretion when issuing a permit (issuance is a routine, clerical, and mandatory function); findings; and requirements for badging, updating applications, and prohibiting use of public information screens. *See* Procedure 5-204, Sections a, c, d, g, h, k; Procedure 4-105.

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires prior approval (except for tenants acting within leaseholds). *See* Code Section 2.60.230.

State: Texas

Airport: Austin-Bergstrom International Airport (AUS), Austin, Texas
2012 Passengers: 9,430,314

Airport: Austin-Bergstrom International Airport City of Austin Department of Aviation Rules, Solicitation/Display/Demonstration and Sample Permit Application (the "Rules") (published as of September 3, 2013) (available from the airport).

Sponsor—City of Austin: Code of Austin, Texas. Chapter 13 (the "Code") (published as of December 27, 2013) (ordinances available at http://www.austintexas.gov/content/city-code).

Noncommercial Speech:

Authorization: The airport requires a permit for expressive activity (distributing leaflets, soliciting funds, demonstrations, picketing, or holding public gatherings). *See* Rules Section III. Applicants

must submit applications at least 10 working days in advance (which the airport may waive for good cause shown), and they may only apply for times that they reasonably expect to use. Permits shall not exceed 2 weeks and are not extended for inclement weather. The airport may restrict permits to conform to a permittee's actual practices if use is materially less than as requested. A permit designates locations and states other terms, and space is assigned on a "first come" basis (the use of space may be allocated to address competing requests). *See* Rules Section III.

Denial / Termination: The airport may deny applications for failure to accurately complete or supplement requested information; making misrepresentations; failure to pay past damage claims or provide financial assurances (if required); lack of available space; conduct adverse to safe and orderly operations (including impacts on travel, security, congestion, health and safety, and flight operations); compliance with laws; construction and maintenance activity; airport emergencies; and permit terminations in the past 6 months. The airport may terminate permits for misrepresentations; uncured violations (no notice is required for those involving health, safety, or operations); emergencies; and legal violations. Upon termination, the airport does not approve additional permits for 6 months and the permittee must immediately leave. *See* Rules Section III.

Appeals: An aggrieved party has 5 days to appeal a denial or termination.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly requiring applications to be considered in a fair, impartial, and content-neutral manner; findings; and requirements for badging, indemnification, insurance or bonds, and repair obligations. *See* Rules Sections I, III; Sample Permit Application; Code Section 13-1-35.

State: Texas

Airport: Dallas/Fort Worth International Airport (DFW), Dallas, Texas
2012 Passengers: 58,591,842

Airport—Dallas-Fort Worth Airport Board (operates on behalf of city owners): Dallas-Fort Worth Airport Code of Rules and Regulations, Chapter 3 (the "Rules") (published as of December 27, 2013) (available at http://www.dfwairport.com/about/publications/index.php).

Noncommercial Speech: *Authorization*: A permit is required to distribute literature, solicit funds, survey, or picket. *See* Rules Section 3.3-25. Applicants must submit applications at least 3 business days in advance, and the airport acts within 3 business days. Permits are issued for not more than 30 days. *See* Rules Section 3.3-27. A permit designates airport locations and states other terms. *See* Rules Sections 3.3-26, 3.3-27.

Denial / Termination: The airport may deny applications and revoke permits if an application statement is found to be untrue. *See* Rules Section 3.3-27. The airport provides a written explanation of the reason for acting within 5 business days. *See* Rules Section 3.3-28. It is an offense to misrepresent any material fact or fail to comply with conduct requirements. *See* Rules Sections 3.3-12 to 3.3-17.

Appeals: An aggrieved party has 5 business days to appeal a denial or revocation after receiving the airport's notice. The airport then must file for a judicial determination within 5 business days. If the court does not decide the matter on the merits within 10 business days, an interim permit is deemed issued and is valid pending a decision and any appeal periods. *See* Rules Section 3.3-28.

Features: The regulations include common location and conduct restrictions and other protective measures, such as badging requirements. *See* Rules Sections 3.3-12 to 3.3-16, 3.3-26, 3.3-27.

Solicitations: The airport does not permit solicitation within the passenger terminal. *See* Rules Sections 3.3-32; 8.8-1.

Picketing: The airport does not permit picketing inside the terminal building. *See* Rules Section 3.3-34.

Surveys: No person may conduct a survey in the passenger terminal (except on behalf of the airport, or on behalf of a tenant within an exclusive leasehold). *See* Rules § 3.3-33.

Newsracks/Commercial Matters: *Newsracks:* It is an offense to sell or distribute any publication using newspaper stands or racks except by franchise, concession, or permit. *See* Rules Section

8.8-4. *Commercial Photography*: The airport prohibits still or motion pictures for commercial use or public exhibit without a permit (except for news media covering events or filming documentaries). *See* Rules Section 8.8-3.

State: Texas

Airport: Dallas Love Field (DAL), Dallas, Texas
2012 Passengers: 8,173,927

Airport: Department of Aviation Terms and Conditions for Aviation Activity Permit, Dallas Love Field, Dallas Executive Airport and Dallas Heliport and Form Applications (the "Terms") (published as of December 10, 2013) (available from the airport).

Sponsor—City of Dallas, Texas: Code of Dallas, Texas, Volume I, Chapter 5, (the "Code") (published as of December 27, 2013) (available at http://www.amlegal.com/library/tx/dallas.shtml).

Noncommercial Speech: *Authorization*: The airport requires a permit for the following nonprofit activities: to solicit value, distribute literature, conduct surveys, or engage in filming. *See* Terms, page 1. The airport acts upon receipt of the application, and permits can be issued for up to 30 days. *See* Terms, page 1. A permit designates locations and states other terms. The airport will assign available areas to conflicting requests as equitably as possible while taking measures to ensure effective airport operations. *See* Terms, page 2.

Denial/Termination: If the airport denies an application, it will provide written notice of the reasons for denial. *See* Terms, page 1. The airport has grounds to withdraw a permit for violations of applicable requirements (including approved permit terms) or if activities pose a safety hazard or impediment to airport operations. If withdrawn, a person is ineligible to reapply for 6 months. *See* Terms, pages 3, 5.

Appeals: An aggrieved party may appeal the denial of an application. *See* Terms, page 1.

Features: The regulations include common location and conduct restrictions and other protective measures, such as requirements for permit display or inspection; insurance; indemnification; repair obligations; verification of a nonprofit status, requirements to reimburse the airport for expenses it incurs on a permittee's behalf; requirements making organizations responsible for the violations of their individual members; obligations to comply with airport nondiscrimination requirements; and stating that the permit constitutes an agreement that can only be modified in writing. *See* Terms, pages 1–5.

Surveys: It is unlawful to conduct passenger interviews or opinion surveys or to circulate petitions or questionnaires to the traveling public or on any restricted airport property, including the terminal building. This does not apply to authorized government personnel or news coverage. *See* Code Section 5-47.

Newsracks/Commercial Matters: *Commercial Photography*: Both commercial and noncommercial photography require a permit. *See* Terms, pages 1, 4.

State: Texas

Airport: George Bush Intercontinental Airport (IAH), Houston, Texas
2012 Passengers: 39,891,444

Airport: W.P. Hobby Airport (HOU),
Houston, Texas
2012 Passengers: 10,040,864

Airport—Houston Airport System (all as published as of September 9, 2013, and available from airport):

Operating Instruction—Registration of Applicants for Solicitation, No. 92-02 (the "Solicitation Policy").

Operating Instructions—Picketing Registration and Guidelines, No. 95-05 (the "Picketing Policy").

Sponsor—City of Houston, Texas: Code of Houston, Texas, Chapter 9 (the "Code") (published as of December 27, 2013) (available at http://www.municode.com/Library/TX/Houston).

Noncommercial Speech: *Authorization*: The airport requires a permit to engage in soliciting or to distribute literature. *See* Code Section 9-72; Solicitation Policy Section V. Picketing may be conducted pursuant to a completed and approved picketing registration log. *See* Picketing Policy

Section V.A. The airport acts upon submission of the application requirements, and if issued, a permit is valid for not more than 7 consecutive days. A permit designates specific booth locations and states other terms, and booth space is assigned on a "first come" basis. The airport apportions available booth space equitably to accommodate competing requests. *See* Code Section 9-72; Solicitation Policy Section V. For picketing, picketers must submit a fully completed registration log not more than 10 or less than 5 days in advance. Conflicting requests for available space are decided equitably, such as by lottery. *See* Picketing Policy Section V.A.

Denial / Termination: The airport issues permits if the requirements stated in the code are met. *See* Code Section 9-72. Permits are subject to revocation for a violation of applicable requirements. *See* Solicitation Policy Section V. Picketers are subject to city code as well as airport picketing requirements. *See* Picketing Policy Section V.C.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that the airport exercises no judgment over issuance of a permit (issuance is a clerical function), requiring conspicuous display of the permit, badging requirements, and specific requirements for picketing. *See* Code Section 9-72; Solicitation Policy Section V; Picketing Policy Sections I, V.B, V.C.

Picketing: The airport requires the use of specific locations for picketers of taxicabs, ground transportation, or rental car companies. Otherwise, specific indoor and outdoor locations are available. When registering, picketers must identify what they are picketing. *See* Picketing Policy Section V.B; Picketing Policy, Form Log. Picketers must collect handbills discarded by the public in their area. *See* Picketing Policy Section V.C.

Newsracks/Commercial Matters:
Ground Transportation: It is unlawful to solicit passengers by calling out "taxicab," "limousine," "auto for hire," or other similar words or gestures. *See* Code Section 46-40.

State: Texas

Airport: San Antonio International Airport (SAT), San Antonio, Texas
2012 Passengers: 8,243,221

This summary includes online sources only.

Sponsor—City of San Antonio, Texas: Code of San Antonio, Texas, Part II, Chapter 3 (the "Code") (published as of December 27, 2013) (ordinances available at http://www.municode.com/Library/TX/San_Antonio).

Noncommercial Speech: *Authorization*: The airport requires a permit to picket, demonstrate, or distribute literature. Applicants must submit applications not more than 30 days, but not less than 2 business days, in advance, and the airport acts within 2 business days. A permit shall not exceed 10 days. Among its terms, a permit designates locations (including one booth in each terminal building), and activities must occur from that location (if a booth, from behind the booth). When there are conflicting requests, the airport may resolve issues using various procedures, such as bumping permits for up to 7 days so access for new applicants will not be blocked by those present in the past 30 days, or limiting the number of consecutive days that a designated area may be used. *See* Code Section 3-22.

Denial / Termination: Activities are permitted if they do not interfere with airport operations and are in compliance with applicable code provisions. *See* Code Section 3-22. The airport shall deny permits for a failure to furnish required information or for making false or misleading statements. *See* Code Section 3-22(c)(3). The airport may revoke permits for violating any provision of the registration form, actions that adversely affect health or safety, discovery of misrepresentation, or code violations. *See* Code Section 3-22(e). The airport can also wholly or partially restrict or suspend activities for emergencies that disrupt the airport or threaten security. *See* Code Section 3-22(d).

Appeals: An aggrieved party has 10 calendar days to appeal a permit suspension or other administrative action because of violations. The airport then has 10 calendar days to respond and determine whether any administrative action should be rescinded. *See* Code Section 3-170.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that the airport exercises no judgment over content or discretion over issuance (issuance is a routine, clerical, and mandatory function); findings; and requirements for permit display or inspection, badging, and indemnification. *See* Code Sections 3-22, 3-23, and 3-31.

Newsracks/Commercial Matters: *Commercial Photography*: The airport requires prior written consent (except when for news coverage). *See* Code Section 3-137.

State: Utah

Airport: Salt Lake City International Airport (SLC), Salt Lake City, Utah
2012 Passengers: 20,096,549

Sponsor—Salt Lake City, Utah: Code of Salt Lake City, Utah (the "Code") (published as of December 27, 2013) (ordinances at http://www.sterlingcodifiers.com/codebook/index.php?book_id=672).

This summary includes online sources only.

Noncommercial Speech: *Authorization*: The airport requires a permit for canvassing or soliciting, which includes constitutionally protected donation requests and the distribution of goods for value. *See* Code Sections 16.12.370 and 16.12.390. The airport acts upon receipt of a compliant application, and it applies only the limitations stated by ordinance. A permit shall not exceed 30 days. *See* Code Section 16.12.410. Permits designate locations if space is available (including booth space) and state other terms. *See* Code Section 16.12.420. The airport apportions available space for competing applicants on as equal a basis as possible, and when applications exceed available space, permits are granted on a "first come" basis and may be further equitably restricted to provide permittees fair opportunities while maintaining effective airport operations. *See* Code Section 16.12.430.

Denial/Termination: The airport denies an application if a solicitation interferes with airport functions, constitutes commercial activity, or if applicants have not complied with applicable charitable solicitation requirements. *See* Code Section 16.12.390. The airport may revoke a permit for refusing to comply with airport rules and regulations, and the permittee may be removed from the airport and deprived of further use. *See* Code Section 16.12.120.

Features: The regulations include common location and conduct restrictions and other protective measures, such as expressly stating that the airport does not exercise discretion and issuance is a clerical function; findings; and requirements for assumption of the risk, indemnification, and prohibitions on claiming a government endorsement. *See* Code Sections 16.12.030, 16.12.110, 16.12.270, 16.12.380, 16.12.400–16.12.420, 16.12.450, and 16.12.460.

Solicitations: Solicitations shall only be conducted from booths. *See* Code Section 16.12.420.

Newsracks/Commercial Matters: *Commercial Photography:* The airport requires prior permission for any commercial still, motion, or sound pictures. *See* Code Section 16.12.240.

State: Washington

Airport: Seattle-Tacoma International Airport (SEA), Seattle, Washington
2012 Passengers: 33,219,723

Airport—Sea-Tac International Airport: Sea-Tac International Airport Schedule of Rules and Regulations No. 4 (the "Rules") (published as of December 27, 2013) (available at http://www.portseattle.org/Business/Documents/Rulereg.pdf).

Noncommercial Speech: *Authorization*: The airport requires a permit to engage in distributing materials, solicitation, demonstrations, or conducting surveys. An applicant must submit an application no later than 72 hours in advance, and the airport acts within 72 hours. The airport issues permits for no more than 30 days. *See* Rules Section 3.18.c. The airport designates locations for activities. When there are conflicting requests, it may offer alternatives such as substitute times and sites, permitting fewer participants, and posting (when feasible). Solicitors must reserve time on a sign-up sheet for the use of specified areas. *See* Rules Section 3.18.c, e.

Denial/Termination: The airport may only deny applications for noncompliance with application requirements; lack of space; security conditions;

failure to comply with prior permits; emergency or unforeseen circumstances that relate to passengers, security, health, or safety; three or more past violations; or an egregious permit violation. *See* Rules Section 3.18.c, j. The airport may immediately temporarily suspend permits and initiate revocation proceedings for misleading material statements or omissions on an application; activities conducted outside of designated areas or without a permit; conduct rule violations; or failure to cease during emergencies or security threats. *See* Rules Section 3.18.j. All activities must cease upon any emergency closure, and they may be suspended or limited in response to security conditions. *See* Rules Section 3.18.i.

Appeals: An aggrieved party has 5 business days to appeal a full or partial denial of an application. The airport then affirms or modifies the denial within 5 business days (which is the airport's final decision). *See* Rules Section 3.18.d. For revocations, the airport includes notice of an evidentiary hearing with notice of the suspension. A permittee's failure to appear is a default. Within 5 business days of the hearing, the hearing officer issues a written decision and states grounds if the permit is revoked (this is the airport's final administrative decision for purposes of a judicial appeal). *See* Rules Section 3.18.k.

Features: The regulations include common location and conduct restrictions and other protective measures, such as findings and requirements for assumption of the risk, badging, a verification of nonprofit status, and specific picketing requirements. *See* Rules Sections 3.10, 3.17, and 3.18.b, c, e, g, h.

Picketing: Labor-related activities generally are not treated separately; employees, however, may discuss employment matters without notice or obtaining a permit if they do not interfere with airport operations or pose health and safety concerns. *See* Rules Section 3.18.f.

Newsracks/Commercial Matters: *Advertising*: The airport requires a written agreement to advertise. *See* Rules Section 3.5.4. Certain displays are not permitted, such as those that depict tobacco products or the use of illegal products or services; imply the airport's endorsement (without permission); disparage or defame any person, product, service, or cause; or violate laws or policies. *See* Rules Section 3.9. *Commercial Photography*: The airport requires prior permission (except for news coverage). *See* Rules Section 3.7.

APPENDIX A—STATE CONSTITUTIONAL PROVISIONS TABLE

Alabama	*Speech*: Freedom of speech and press. *See* Ala. Const. art. I, § 4. *Religion*: Religious freedom. *See* Ala. Const. art. I, § 3. Alabama Religious Freedom Amendment. *See* Ala. Const. art. I, § 3.01. *Assembly:* Right to Peaceably Assemble and Petition for Redress of Grievances. *See* Ala. Const. art. I, § 25.
Alaska	*Speech*: Freedom of Speech. *See* Alaska Const. art. I, § 5. *Religion*: Freedom of Religion. *See* Alaska Const. art. I, § 4. *Assembly*: Assembly; Petition. *See* Alaska Const. art. I, § 6.
Arizona	*Speech*: Freedom of Speech and Press. *See* Ariz. Const. art. II, § 6. *Religion*: Liberty of Conscience, Appropriations for Religious Purposes Prohibited; Religious Freedom. *See* Ariz. Const. art. II, § 12. Toleration of Religious Sentiment. *See* Ariz. Const. art. XX, First. *Assembly:* Right of Petition and of Assembly. *See* Ariz. Const. art. II, § 5.
Arkansas	*Speech:* Freedom of Speech, Press; Criminal Prosecutions for Libel. *See* Ark. Const. art. II, § 6. *Religion*: Freedom of Religion. *See* Ark. Const. art. II, § 24. Religious Freedom Protected. *See* Ark. Const. art. II, § 25. *Assembly*: Freedom of Assembly; Petition. *See* Ark. Const. art. II, § 4.
California	*Speech*: Liberty of speech or of the press; responsibility for abuse; right to refuse to disclose source of information by member of news media. *See* Cal. Const. art. I, § 2. *Religion*: Religious liberty. *See* Cal. Const. art. I, § 4. *Assembly*: Right to instruct representatives, petition, and assembly; right of access to government information. *See* Cal. Const. art. I, § 3.
Colorado	*Speech*: Freedom of speech and press. *See* Colo. Const. art. II, § 10. *Religion*: Religious freedom. *See* Colo. Const. art. II, § 4. *Assembly*: Right to assemble and petition. *See* Colo. Const. art. II, § 24.

Connecticut	*Speech*: Liberty of speech and the press. *See* Conn. Const. art. 1, § 4. Prohibiting laws limiting liberty of speech or press. *See* Conn. Const. art. 1, § 5. *Religion*: Right of religious liberty. *See* Conn. Const. art. 1, § 3. *Assembly*: Right to assemble and petition. *See* Conn. Const. art. 1, § 14.
Delaware	*Speech*: Freedom of press and speech; evidence in libel prosecutions; jury questions. *See* Del. Const. art. I, § 5. *Religion*: Freedom of religion. *See* Del. Const. art. I, § 1. *Assembly*: Right of assembly; petition for redress of grievances. *See* Del. Const. art. I, § 16.
Florida	*Speech*: Freedom of speech and press. *See* Fla. Const. art. I, § 4. *Religion*: Religious freedom. *See* Fla. Const. art. I, § 3. *Assembly*: Right to assemble. *See* Fla. Const. art. I, § 5.
Georgia	*Speech*: Freedom of speech and of the press guaranteed. *See* Ga. Const. art. I, § 1, ¶ V. *Religion*: Freedom of conscience. *See* Ga. Const. art. I, § 1, ¶ III. Religious opinions; freedom of religion. *See* Ga. Const. art. I, § 1, ¶ IV. Separation of church and state. *See* Ga. Const. art. I, § 2, ¶ VII. *Assembly:* Right to assemble and petition. *See* Ga. Const. art. I, § 1, ¶ IX.
Hawaii	*Speech, Religion, and Assembly*: Freedom of Religion, Speech, Press, Assembly and Petition. *See* Haw. Const. art. I, § 4.
Idaho	*Speech:* Freedom of speech. *See* Idaho Const. art. I, § 9. *Religion*: Guaranty of religious liberty. *See* Idaho Const. art. I, § 4. *Assembly*: Right of assembly. *See* Idaho Const. art. I, § 10.
Illinois	*Speech*: Freedom of Speech. *See* Illinois Compiled Statutes, Const. art. 1, § 4. *Religion*: Religious Freedom. *See* Illinois Compiled Statutes, Const. art. 1, § 3. *Assembly*: Right to Assemble and Petition. *See* Illinois Compiled Statutes, Const. art. 1, § 5.

Indiana	*Speech*: Right to free thought, speech, writing, and printing; abuse of right. Ind. Const. art. I, § 9. *Religion*: Freedom of religious opinions and rights of conscience. Ind. Const. art. I, § 3. Freedom of religion. Ind. Const. art. I, § 4. *Assembly*: Right to assemble, to instruct, and to petition. Ind. Const. art. I, § 31.
Iowa	*Speech*: Liberty of speech and press. Iowa Const. art. I, § 7. *Religion*: Religion. Iowa Const. art. I, § 3. *Assembly*: Right of assemblage—petition. Iowa Const. art. I, § 20.
Kansas	*Speech*: Liberty of press and speech; libel. Kan. Const. Bill of Rts. § 11. *Religion*: Religious liberty; property qualification for public office. Kan. Const. Bill of Rts. § 7. *Assembly*: Right of peaceable assembly; petition. Kan. Const. Bill of Rts. § 3.
Kentucky	*Speech*: Freedom of speech and of the press. Ky. Const. § 8. *Religion*: Right of religious freedom. Ky. Const. § 5. *Assembly, Speech, and Religion:* Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, bearing arms. Ky. Const. § 1.
Louisiana	*Speech*: Freedom of Expression. La. Const. art. I, § 7. *Religion*: Freedom of Religion. La. Const. art. I, § 8. *Assembly*: Right of Assembly and Petition. La. Const. art. I, § 9.
Maine	*Speech*: Freedom of speech and publication; libel; truth given in evidence; jury determines law and fact. Me. Const. art. I, § 4. *Religion*: Religious freedom; sects equal; religious tests prohibited; religious teachers. Me. Const. art. I, § 3. *Assembly*: Right of petition. Me. Const. art. I, § 15.
Maryland	*Speech*: Freedom of speech and press. Md. Const. Decl. of Rts., art. 40. *Religion*: Freedom of religion. Md. Const. Decl. of Rts., art. 36. *Assembly:* Redress of grievances by petition to legislature. Md. Const. Decl. of Rts., art. 13.

Massachusetts	*Speech*: Liberty of the press; free speech. Mass. Const. pt. 1, art. XVI. *Religion*: Right and duty of worship; freedom of religion. Mass. Const. pt. 1, art. II. *Assembly:* Right of people to assemble peaceably, to instruct representatives, and to petition legislature. Mass. Const. pt. 1, art. XIX.
Michigan	*Speech*: Freedom of speech and of press. Mich. Const. art. I, § 5. *Religion*: Freedom of worship and religious belief; appropriations. Mich. Const. art. I, § 4. *Assembly*: Assembly, consultation, instruction, petition. Mich. Const. art. I, § 3.
Minnesota	*Speech:* Liberty of the press. Minn. Const. art. I, § 3. *Religion*: Freedom of conscience; no preference to be given to any religious establishment or mode of worship. Minn. Const. art. I, § 16. *Assembly*: No state provision.
Mississippi	*Speech:* Freedom of speech and press; libel. Miss. Const. art. III, § 13. *Religion*: Freedom of religion. Miss. Const. art. III, § 18. *Assembly*: Peaceful assemblage; right to petition government. Miss. Const. art. III, § 11.
Missouri	*Speech*: Freedom of speech—evidence of truth in defamation actions—province of jury. Mo. Const. art. I, § 8. *Religion*: Religious freedom—liberty of conscience and belief—limitations. Mo. Const. art. I, § 5. Practice and support of religion not compulsory—contracts therefore enforceable. Mo. Const. art. I, § 6. Public aid for religious purposes—preferences and discriminations on religious grounds. Mo. Const. art. I, § 7. *Assembly*: Rights of peaceable assembly and petition. Mo. Const. art. I, § 9.
Montana	*Speech:* Freedom of speech, expression, and press. Mont. Const. art. II, § 7. *Religion*: Freedom of religion. Mont. Const. art. II, § 5. *Assembly*: Freedom of assembly. Mont. Const. art. II, § 6.
Nebraska	*Speech:* Freedom of speech and press. Neb. Const. art. I, § 5. *Religion:* Religious freedom. Neb. Const. art. I, § 4. *Assembly*: Right of peaceable assembly and to petition government. Neb. Const. art. I, § 19.

Nevada	*Speech*: Liberty of speech and the press. Nev. Const. art. I, § 9. *Religion*: Liberty of conscience. Nev. Const. art. I, § 4. *Assembly*: Right to assemble and to petition. Nev. Const. art. I, § 10.
New Hampshire	*Speech*: Free Speech; Liberty of the Press. N.H. Const. pt. 1, art. 22. *Religion:* Religious Freedom Recognized. N.H. Const. pt. 1, art. 5. *Assembly*: Rights of Assembly, Instruction, and Petition. N.H. Const. pt. 1, art. 32.
New Jersey	*Speech:* Liberty of speech and of the press; libel; province of jury. N.J. Const. art. I, ¶ 6. *Religion*: Rights of conscience; religious freedom. N.J. Const. art. I, ¶ 3. *Assembly*: Right of assembly and to petition. N.J. Const. art. I, ¶ 18.
New Mexico	*Speech:* Freedom of speech and of the press; libel. N.M. Const. art. II, § 17. *Religion*: Religious freedom. N.M. Const. art. II, § 11. *Assembly:* No state provision.
New York	*Speech:* Freedom of speech and press; criminal prosecutions for libel. N.Y. Const. art. I, § 8. *Religion*: Freedom of worship; religious liberty. N.Y. Const. art. I, § 3. *Assembly*: Right to assemble and petition; judicial divorces; gambling, except pari-mutuel betting, prohibited. N.Y. Const. art. I, § 9.
North Carolina	*Speech*: Freedom of speech and press. N.C. Const. art. I, § 14. *Religion*: Religious liberty. N.C. Const. art. I, § 13. *Assembly*: Right of assembly and petition. N.C. Const. art. I, § 12.
North Dakota	*Speech:* N.D. Const. art. I, § 4. *Religion*: N.D. Const. art. I, § 3. *Assembly*: N.D. Const. art. I, § 5.
Ohio	*Speech:* Freedom of speech. Ohio Const. art. I, § 11. *Religion:* Religious freedom; encouraging education. Ohio Const. art. I, § 7. *Assembly*: Rights of assembly and petition. Ohio Const. art. I, § 3.

Oklahoma	*Speech*: Liberty of speech and press—Truth as evidence in prosecution for libel. Okla. Const. art. II, § 22. *Religion*: Public money or property—Use for sectarian purposes. Okla. Const. art. II, § 5. Religious liberty—Polygamous or plural marriages. Okla. Const. art. I, § 2. *Assembly*: Right of assembly and petition. Okla. Const. art. II, § 3.
Oregon	*Speech*: Freedom of speech and press. Or. Const. art. I, § 8. *Religion*: Freedom of worship. Or. Const. art. I, § 2. Free exercise of religious opinion. Or. Const. art. I, § 3. No money appropriated for religion. Or. Const. art. I, § 5. *Assembly*: Freedom of assembly; instruction of representatives; application to legislature. Or. Const. art. I, § 26.
Pennsylvania	*Speech:* Freedom of press and speech; libels. Pa. Const. art. I, § 7. *Religion:* Religious freedom. Pa. Const. art. I, § 3. *Assembly*: Right of petition. Pa. Const. art. 1, § 20.
Rhode Island	*Speech:* Freedom of press. R.I. Const. art. I, § 20. *Religion*: Freedom of religion. R.I. Const. art. I, § 3. *Assembly and Speech*: Right to assemble—Redress of grievances—Freedom of speech. R.I. Const. art. I, § 21.
South Carolina	*Speech, Religion, and Assembly*: Religious freedom; freedom of speech; right of assembly and petition. S.C. Const. art. I, § 2.
South Dakota	*Speech*: Freedom of speech—Truth as defense—Jury trial. S.D. Const. art. VI, § 5. *Religion:* Freedom of religion—Support of religion prohibited. S.D. Const. art. VI, § 3. *Assembly:* Right of petition and peaceable assembly. S.D. Const. art. VI, § 4.

Tennessee	*Speech*: Freedom of speech and press; defamation. Tenn. Const. art. I, § 19. *Religion*: Freedom of worship. Tenn. Const. art. I, § 3. *Assembly*: Right of assembly; redress of grievances. Tenn. Const. art. I, § 23.
Texas	*Speech*: Freedom of speech and press; libel. Tex. Const. art. I, § 8. *Religion*: Freedom of worship. Tex. Const. art. I, § 6. *Assembly*: Right of assembly; petition for redress of grievances. Tex. Const. art. I, § 27.
Utah	*Speech*: Freedom of speech and of the press—Libel. Utah Const. art. I, § 15. *Religion*: Religious liberty. Utah Const. art. I, § 4. *Assembly, Speech, and Religion*: Inherent and inalienable rights. Utah Const. art I, § 1.
Vermont	*Speech*: Freedom of speech and of the press. Vt. Const. ch. I, art. 13. *Religion:* Freedom in religion; right and duty of religious worship. Vt. Const. ch. I, art. 3. *Assembly*: Right to assemble, instruct, and petition. Vt. Const. ch. I, art. 20.
Virginia	*Speech and Assembly*: Freedom of speech and of the press; right peaceably to assemble and to petition. Va. Const. art. I, § 12. *Religion*: Free exercise of religion; no establishment of religion. Va. Const. art. I, § 16.
Washington	*Speech:* Freedom of Speech. Wash. Const. art. I, § 5. *Religion:* Religious Freedom. Wash. Const. art. I, § 11. *Assembly*: Right of Petition and Assemblage. Wash. Const. art. I, § 4.
West Virginia	*Speech*: Freedom of speech and press guaranteed. W. Va. Const. art. III, § 7. *Religion*: Religious freedom guaranteed. W. Va. Const. art. III, § 15. *Assembly:* Right of public assembly held inviolate. W. Va. Const. art. III, § 16.

Wisconsin	*Speech*: Free speech; libel. Wis. Const. art. I, § 3. *Religion*: Freedom of worship; liberty of conscience; state religion; public funds. Wis. Const. art. I, § 18. *Assembly*: Right to assemble and petition. Wis. Const. art. I, § 4.
Wyoming	*Speech*: Freedom of speech and press; libel; truth a defense. Wyo. Const. art. I, § 20. *Religion*: Religious liberty. Wyo. Const. art. I, § 18. Appropriations for sectarian or religious societies or institutions prohibited. Wyo. Const. art. I, § 19. *Assembly*: Right of petition and peaceable assembly. Wyo. Const. art. I, § 21.

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