



# FAIRFAX COUNTY PARK AUTHORITY

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## M E M O R A N D U M

**TO:** Chairman and Members  
Park Authority Board

**VIA:** Kirk W. Kincannon, Executive Director

**FROM:** Judy Pedersen, Public Information Officer

**DATE:** February 6, 2020

### *Agenda*

**Committee of the Whole**  
**Wednesday, February 12, 2020 – 5:15 p.m.**  
**Boardroom – Herrity Building**  
**Chairman: William G. Bouie**  
**Vice Chair: Ken Quincy**

1. Understanding the Freedom of Speech in County Parks (with presentation) – Information\*
2. Closed Session

\*Enclosures



If accommodations and/or alternative formats are needed, please call (703) 324-8563. TTY (703) 803-3354

Committee Agenda Item  
February 12, 2020

## **INFORMATION – 1**

### Understanding the Freedom of Speech in County Parks

The First Amendment of the United States Constitution protects the free speech rights of all citizens. Parks, in particular, have historically offered a place where those rights are exercised and have been protected. Thus, a variety of activities are allowed in the parks: solicitation, distribution of brochures and literature, posting of signs, picketing, and demonstrations. The Park Authority cannot restrict any of these activities based on the content of the speech, but it may regulate the time, place, and manner in which they are conducted to prevent the interruption of activities or events, to preserve safety, and prevent damage to public property. This presentation will provide the Board with a better understanding of the complexity of these issues and how to balance these competing interests.

### ENCLOSE DOCUMENTS:

None

### STAFF:

Kirk W. Kincannon, Executive Director  
Aimee L. Vosper, Deputy Director/CBD  
Sara Baldwin, Deputy Director/COO  
Judy Pedersen, Public Information Officer  
Cynthia Bailey, Deputy County Attorney  
Sara Silverman, Assistant County Attorney



# FIRST AMENDMENT IN THE TRADITIONAL PUBLIC FORUM

Cynthia Bailey  
Deputy County Attorney  
Fairfax County Attorney's Office

Judy Pedersen  
Public Information Officer  
Fairfax County Park Authority

Fairfax County Park Authority Board Presentation  
February 12, 2020

# THE FIRST AMENDMENT 101

The First Amendment is multi-faceted and applicable to the work we do in parks across America.

It protects the **freedom of religion** and **freedom of expression** from government interference. In fact, It prohibits any laws that establish a national religion, impede the free exercise of religion, abridge the **freedom of speech**, infringe upon the **freedom of the press**, interfere with **the right to peaceably assemble**, or prohibit citizens from **petitioning for a governmental redress of grievances**.

It was adopted into the Bill of Rights in 1791.

The Supreme Court interprets the extent of the protection afforded to these rights.

Most commonly addresses:

- ▶ Freedom of Religion
- ▶ Freedom of Speech
- ▶ Freedom of the Press
- ▶ Right to Assemble / Right to Petition

**THE FIRST AMENDMENT**  
CONGRESS SHALL MAKE NO LAW RESPECT-  
ING 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.  
PROTECT THE FIRST AMENDMENT, SUPPORT THE CBLDF



## WORKING WITH THE FIRST AMENDMENT EVERY DAY

- ▶ Political activities at concerts or Farmers Markets
- ▶ Signage in parks
- ▶ Public safety versus freedom of expression
- ▶ Social Media interactions
- ▶ Lending Library content
- ▶ Photography limits
- ▶ Program sponsorship concerns
- ▶ Facility usage

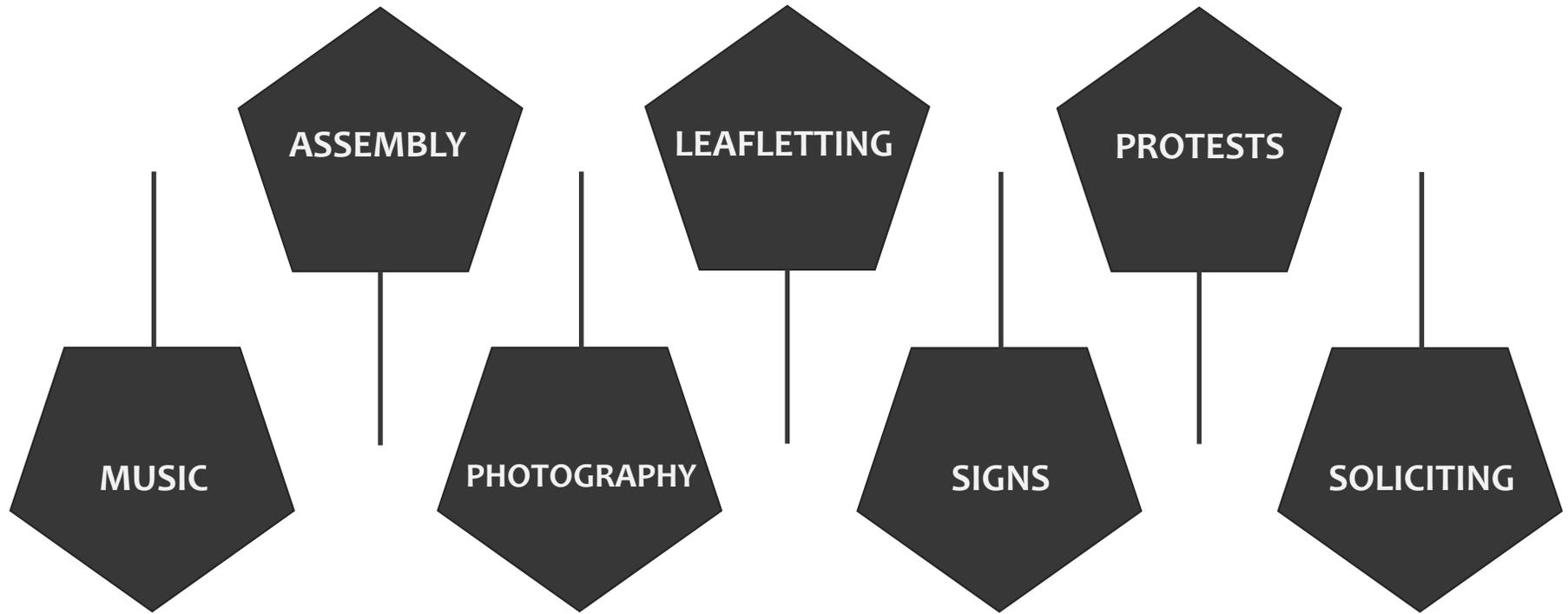


# GOVERNMENT PROPERTY



# WHAT IS SPEECH?

More than words can say...



# IS THE SPEECH PROTECTED?

The First Amendment protects controversial, unpopular and sensitive speech.



The First Amendment DOES NOT Protect:

- Fighting words
- Incitement to imminent lawless action
- True threats
- Solicitation to commit crimes
- Obscenity/vulgarity

# STARTING POINT

Where is the speech taking place?

## FORUM ANALYSIS



# NON-PUBLIC FORUM

- **Government property not historically used for assembly or intentionally opened by the state.**
- **Restriction of access must be reasonable and viewpoint neutral.**

## EXAMPLES:

- Polling Places
- Prisons
- Military Bases
- Government Offices



# LIMITED PUBLIC FORUM

A non-public forum that is intentionally opened to certain groups or for certain purposes.



## EXAMPLES:

- Meetings of the elected officials like County boards and town councils
- Libraries
- Meeting rooms in community centers or schools
- Government-owned theaters and music halls



# TRADITIONAL PUBLIC FORUM

- Government-owned property;
- Held in trust for the public;
- Historically used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.



## TRADITIONAL PUBLIC FORUM

Parks

Sidewalks

Streets

Farmers Markets

## LIMITED PUBLIC FORUM

Baseball fields

Government-owned conference centers

Libraries

Concert Venues

## NON-PUBLIC FORUM

Government offices

Military installations

Prisons



# TRADITIONAL PUBLIC FORUM

## Regulation of Speech

First Amendment regulations must be Content Neutral.

### Intermediate Scrutiny:

- Narrowly tailored;
- Serves significant governmental interest; and
- Leaves open ample alternative channels for communication.



# REGULATIONS MUST BE CONTENT-NEUTRAL



- Not based on its subject-matter or type.
- Does not reflect a disagreement with the message.
- Does not target the messenger

# CONTENT NEUTRAL

## Time, Place and Manner



**Where**

**When**

**How**



**Who**

**What**

**Why**

# CONTENT NEUTRAL

## WHERE

- Only on the plaza
- Keep off the grass
- In front of the building



## WHEN

- What days
- What hours
- How long



## HOW

- Don't block access
- Number of people
- How loud
- Size of signs



# CONTENT NEUTRAL REGULATION EXAMPLES

- **NEUTRAL REGULATION:**  
Prohibiting amplified sound to prevent excessive noise.
- **NOT NEUTRAL REGULATION:**  
No Rock Music



# NARROWLY TAILORED

## Narrowly Tailored

- ✓ Proportionality
- ✓ Fit
- ✓ Reasonableness



## Examples:

- ▶ Restricting leafletting to certain times or locations
- ▶ Prohibiting affixing a sign, banner, or other material to a building or structure

## Slide 17

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**CB2** You mentioned you would have some examples here. We need to edit this slide.  
Cramer, Brittany, 5/20/2019

# NARROWLY TAILORED

Complete prohibitions or bans are not likely to be upheld.



# REGULATIONS MUST SERVE A SIGNIFICANT INTEREST

Significant  
Governmental  
Interest

- Noise
- Traffic
- Crowd Control
- Parking
- Access to recreational programming



# REGULATIONS MUST PROVIDE AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION



## EXAMPLES:

- Putting tables or booths in a fixed area at a state fair.
- Allowing individualized leafletting
- Complete bans or prohibitions likely will not be sustained.



# INTERMEDIATE SCRUTINY REAL EXAMPLES

## The Analysis

- ✓ Content Neutral
- ✓ Narrowly Tailored
- ✓ Significant Governmental Interest
- ✓ Ample Alternative Channels of Communication

## The Regulation

- ✓ Closed After Dark
- ✓ No Torches
- ✓ All assemblies or protests require a permit
- ✓ No leafletting



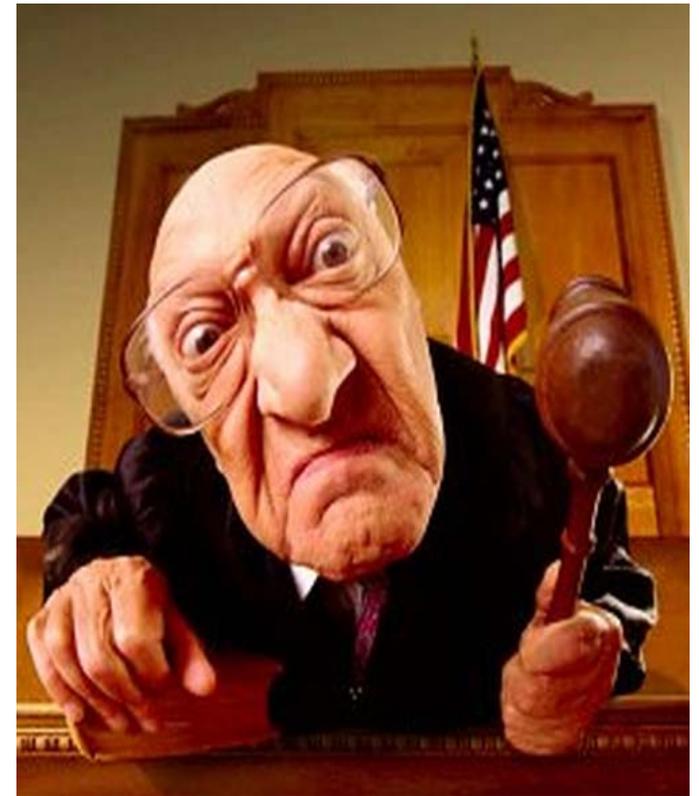
# STRICT SCRUTINY

- Not Content Neutral; or
- Based on who the speaker is

## Different Standard applies:

Regulation must be

- 1) narrowly tailored
- 2) to serve a **compelling governmental interest**; and
- 3) must be the **least restrictive means** of doing so.



# COMPELLING GOVERNMENT INTEREST

Compelling  
Governmental  
Interest

- National Security
- Public Safety



# LEAST RESTRICTIVE MEANS

- ▶ Can't burden more speech than necessary
- ▶ “Fit” isn't merely proportional or reasonable—it must be exact
- ▶ If any other method is conceivable that would burden less speech, the test is not satisfied



# COMPARE THE STANDARDS

## Intermediate Scrutiny

- Content Neutral
- Person Neutral

Narrowly tailored to serve a **significant** governmental interest;

AND

Leave open ample **alternative channels** for communication.

## Strict Scrutiny

- Not Content Neutral
- Based on the who speaker is

Narrowly tailored to serve a **compelling** governmental interest;

AND

It must be the **least restrictive means** of doing so.



# **STRICT SCRUTINY MEANS YOU LOSE!**



**If a court is reviewing a regulation under strict scrutiny—the regulation will likely be struck down.**



# MEETING THE CHALLENGES

- ▶ **Creation of reasonable policies and rules – then consistently applying them**
- ▶ **Providing clear direction to the public and to staff**
- ▶ **Content neutral policies and regulations**
- ▶ **Timely, efficient process for permits/permissions**





QUESTIONS?



Committee Agenda Item  
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**CLOSED SESSION**

- a) Consultation with legal counsel and briefings by staff members or consultants pertaining to actual or probable litigation, where such consultation or briefing in open meeting would adversely affect the negotiating or litigating posture of the public body, pursuant to VA Code §2.2-3711 (A)(7).