42nd Annual AAAE
Airport Law Workshop
Phoenix, AZ

Session #18

First Amendment Impacts on Airports



KAPLAN KIRSCH

American Association of Airport Executives
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Advancing Excellence in the practice of Local Government Law

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Agenda

- Forum Analysis
- Protests and Other First Amendment Activity
- Establishment Clause and Free Exercise Clause Issues
- First Amendment Retaliation

The First Amendment

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.

*Applicable to state and local governments through incorporation doctrine



Forum Analysis



Traditional public forums



Limited public forums



Nonpublic forums

Airports Are (Generally) Nonpublic Forums

- Airport terminals
- Areas outside airport terminals
- **Advertising areas?**

See generally International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

Regulation of Speech in Nonpublic Forums



- ✓ Viewpoint neutral
- ✓ Reasonable, in light of the purposes of the forum and the surrounding circumstances

What is Viewpoint Neutral?



"[A] ban on ads that engage in 'scorn or ridicule' is not viewpoint neutral."

- *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 978 F.3d 481, 486 (6th Cir. 2020)

"Giving offense is a viewpoint."

- *Matal v. Tam*, 582 U.S. 218, 243 (2017)



What is reasonable in light of the forum?





Is _____ reasonable in light of the forum?

Promotion of illegal goods or activities?

Competition with the airport and its services?



Ban on political or religious advertising?

Depiction of firearms, alcohol, drugs, tobacco?

Do you have a First Amendment policy?

- Policies should be in writing, not ad hoc.
- Policies cannot “confer unbridled discretion” on officials.
- There must be a reasonable opportunity to exercise rights.



Oops, we designated a public forum…

now what?

Content-neutral regulation

- Must be narrowly tailored to further a legitimate government interest while leaving open alternative channels for communication.

Content-based regulation

- Restrictions must be narrowly drawn to serve a compelling state interest.



Protest and Other Expressive Activity



Source: Denver Post



Source: Westword

***McDonnell v. City & County of Denver*, 878 F.3d 1247 (10th Cir. 2018), *rev'g*, 238 F. Supp. 3d 1279 (D. Colo. 2017)**

Clear Policies on Expressive Activity Are Key

- Courts have upheld permit requirements, speech zones, crowd/sign size, and prohibitions on voice amplification.
  - Safe and efficient movement of passengers and employees
  - Security implications
  - Coordination with parking, security, other contractors
  - No special exigent circumstances protection for spontaneous protest

The Religion Clauses

Airports often must balance **Free Exercise** with avoiding **Establishment Clause** violations.

Free Exercise

- Government may not target or unduly burden religious exercise.

Establishment Clause

- Government may not sponsor, coerce, or favor religion.



The “Lemon” Test (1971-2019)

Government practice or object is constitutional if:

1. It has a secular purpose.
2. The primary effect neither advances nor inhibits religion.
3. Government avoids “excessive entanglement” with religion.

Would a reasonable observer see a display as government endorsement of religion?



History and Tradition (2022-?)

"[T]he Establishment Clause must be interpreted by reference to **historical practices and understandings**."

"Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'"

Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022)



Key Question: Is it government speech?



1. Is this type of medium traditionally used to convey a government message?

2. Would a reasonable observer conclude that the government is speaking for itself?

3. How much control does the government exercise?

"The boundary between government speech and private expression can blur when…a government invites the people to participate in a program." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022).

First Amendment Retaliation

Where an individual **(1)** engaged in conduct protected by the First Amendment; **(2)** the government takes adverse action that would "chill a person of ordinary firmness;" and **(3)** the adverse action was substantially motivated by the individual's protected activity.



Special Rule: Public Employees/Contracts

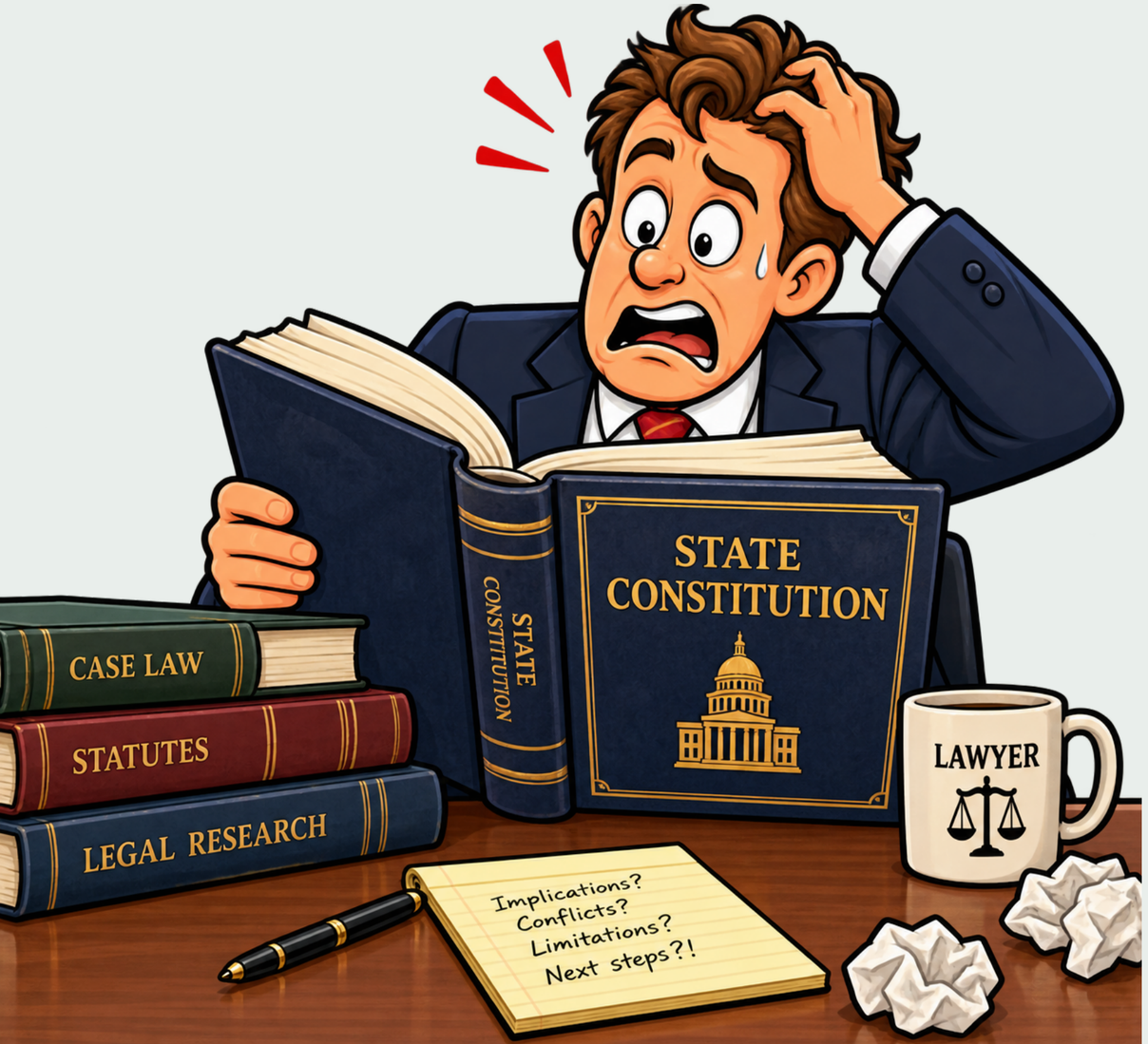
Is employee/contractor speaking as a private citizen?

↳ Is employee/contractor speaking on a matter of public concern?

↳ The employee/contractor's and the public's interests must be weighed against the government's legitimate interests.



Beware State Constitutions!



State constitutions may be more protective of free speech (and other rights) than the U.S. Constitution.

Know the law in yours...



Helpful Resources

- J. Howick, Regulations Affecting the Exercise of First Amendment Activities at Airports (2015)
  - Note more recent changes in the law!
- AAAE Member Hub
- Industry colleagues

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Questions?



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Thank You!



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