Managing Free-Speech Risks in City Government: Three High-Impact Areas

Aaron Landau, Miller Nash LLP
Christine Taylor, Miller Nash LLP

League of Oregon Cities, Annual Conference
October 16, 2026

Speakers

Aaron Landau

Special Counsel
Miller Nash LLP



Christine Taylor

Special Counsel
Miller Nash LLP



The Scope of First Amendment Freedoms

Text

- "Congress shall make no law … 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."

Two Key Points

- The First Amendment constrains only governments; and First Amendment rights are never absolute rights.

MILLER NASH LLP

The Scope of First Amendment Freedoms

- **First: The First Amendment constrains only governments from abridging the rights described.** It doesn't keep private individuals, businesses, or other private organizations from enacting private restrictions.
- So, ask at each point: Who is imposing the constraint?
  - Public body or government official: First Amendment applies.
  - Private individual or business: First Amendment generally doesn't apply.

MILLER NASH LLP

The Scope of First Amendment Freedoms

- **Second: First Amendment rights are not absolute rights.** They may be lawfully constrained in certain circumstances, particularly where their exercise conflicts with (1) certain governmental interests or (2) the rights of others.
- **So:** The key inquiry is not simply, "Does this person have a First Amendment right to act?" Rather: "In this circumstance, does the government have the power to constrain the exercise of that right?"

MILLER NASH LLP

The Scope of First Amendment Freedoms

- **How much the government is permitted to restrict exercise of free-speech rights always depends on the circumstances. Today we'll examine three scenarios:**

1. Public employee speech
2. Public officials' use of social media
3. Comment sessions during public meetings

MILLER NASH LLP

The Three Most Important Principles

1. **Government can generally impose reasonable time, place, and manner restrictions. That's the floor.** These are content-neutral rules that limit when, where, and how speech can take place, regardless of what's said or who says it.

2. **Content-based restrictions depend chiefly on what role the government is playing.** Enforcer/regulator? Property owner? Employer? Different roles permit different governmental powers.

3. **Viewpoint discrimination is the hard-stop at the ceiling. It's always prohibited.**

MILLER NASH LLP

The Three Most Important Principles

- **The Floor: What's a "time, place, manner" restriction?**
  - A regulation of the circumstances of expression – when, where, how – rather than the content of expression. Should be pre-announced (not ad-hoc) and stated in narrow, objective terms to accomplish a significant city government interest.
  - Whether a given T/P/M restriction is reasonable depends on the government interest.
  - Examples:
    - Noise ordinances that limit sound level and set quiet hours
    - Laws that limit where outdoor signage can be located (e.g., not on utility poles)
    - Laws that require obtaining a permit before staging a parade that blocks streets

MILLER NASH LLP

The Three Most Important Principles

- **The ceiling: What's viewpoint discrimination?**
  - Viewpoint discrimination is treating some speech differently because of the position it takes. Not the subject it addresses, but the side it comes down on. (This can be a very tricky distinction. It's not just you.)
- **Why is this the hard-stop?**
  - Below viewpoint discrimination, everything else in First Amendment law is a question of degree, depending on circumstances. What role is the government acting in? What interests does it have in that role? Does the limit serve those interests?
  - But government can never limit the opinions other people can state. That isn't a matter of degree, and it doesn't depend on circumstances or government interest.

MILLER NASH LLP

1: The Public Employee With Very Public Opinions



Scenario

Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?

1: The Public Employee With Very Public Opinions



Scenario

Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?



Answer

Probably. But it will depend on the circumstances.

1: The Public Employee With Very Public Opinions

- **Scenario:** Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?

1) **Time/place/manner question?** No, because the concern is inherently content-based. T/P/M limits must not depend on content.

1: The Public Employee With Very Public Opinions

- **Scenario:** Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?

1) **Time/place/manner question?** No, because the concern is inherently content-based. T/P/M limits must not depend on content.
2) **What’s the government’s role?** Here it’s an employer, giving it additional interests and powers. *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

1: The Public Employee With Very Public Opinions

- **Scenario:** Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?
  - **Government as employer:** To determine the extent of the government’s power to limit employee speech, we ask three questions.
    1) Was the person speaking as an individual rather than as an employee? (If speaking as an employee, employer has broad control.)
    2) If the person was speaking as an individual, was the subject a matter of public concern?
    3) If so, how does the employee’s interest in the speech compare to the city’s interest in controlling operations as an employer?

1: The Public Employee With Very Public Opinions

- **Scenario:** Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?

3) **Ensure the government’s action stops short of viewpoint discrimination.** For any given issue, sides must be treated alike: “for” and “against”; “right” and “left”; etc. Ensure rules are neutral, announced beforehand, and enforced consistently across the board.

1: The Public Employee With Very Public Opinions

- **Scenario:** Your city finance clerk wears a button that reads, “Free Palestine.” Another employee wears a red “MAGA” hat. Both interact with the public. Can the city prohibit both?

3) **Ensure the government’s action stops short of viewpoint discrimination.** For any given issue, sides must be treated alike: “for” and “against”; “right” and “left”; etc. Ensure rules are neutral, announced beforehand, and enforced consistently across the board.

   - **Thus, the answer:** *Probably* – provided the government doesn’t engage in viewpoint discrimination.

1: The Public Employee With Very Public Opinions

- ***What constitutes a "viewpoint"?***
  - "Thin Blue Line" / "Back the Blue"
  - Rainbow Pride Pin
  - "Yes on Library Levy"
  - "Pro Choice"
  - Union local insignia
  - "Secure the Border"
  - "Abolish ICE"/ "Defund the Police"
  - "One Man, One Woman" Pin
  - "No on Library Levy"
  - "Pro-Life"
  - "Right to Work" pin
  - "No Human is Illegal"

1: The Public Employee With Very Public Opinions

- ***…what about these?***
  - Girl Scouts t-shirt
  - Pink Ribbon / Komen Logo
  - Chamber of Commerce / Oregon Farm Bureau pin
  - “Hate Has No Home Here”
  - American Flag lapel pin *(What about a Ukrainian flag? Russian? Palestinian?)*
  - “You Are on Native Land”

2: The Social Media Problem



Scenario

City Councilor Pam runs the Council's official social media page and uses it to notify constituents of City business. On a post, a user comments, "Councilor Pam is a corrupt liar and everyone on the Council is bought and paid for." May Pam delete the comment?



Answer

Probably not.

2: The Social Media Problem

- **Scenario:** City Councilor Pam runs the Council's official social media page and uses it to notify constituents of Council business. A user comments, "Councilor Pam is a corrupt liar and everyone on this Council is bought and paid for." May Pam delete the comment?
  - **Preliminary Question:** Is this "government" action in the first place?
    - Two-part test: (1) Did the official have actual authority to speak for the government on the matter? (2) If so, did they purport to exercise that authority in the relevant posts? *Lindke v. Freed*, 601 U.S. 187 (2024). Here, it's *probably* government action. But it's a post-by-post inquiry.
  - **Takeaway:** Pick a lane. An official should decide clearly and in advance whether their page is official or personal. In the grey-area in between, outcomes are harder to predict.

2: The Social Media Problem

- **Scenario:** City Councilor Pam runs the Council's official social media page and uses it to notify constituents of Council business. A user comments, "Councilor Pam is a corrupt liar and everyone on this Council is bought and paid for." May Pam delete the comment?

1) **Time/Place/Manner issue?** No. If the government allows comments at all, then deleting one comment is inherently a content-based decision.
    - But the Council *could* create reasonable pre-announced time/place/manner limits on comments (e.g., one comment per user per thread) and enforce them broadly.

2: The Social Media Problem

- **Scenario:** City Councilor Pam runs the Council's official social media page and uses it to notify constituents of Council business. A user comments, "Councilor Pam is a corrupt liar and everyone on this Council is bought and paid for." May Pam delete the comment?

2) **What's the government's role?** If comments are permitted, courts generally view the government's role in this context as the operator of a "public forum."

- *How much the government can limit "public forum" activity depends on forum type:*
  - **Traditional/designated:** Open for general discourse. Allows almost no content-based limits on expressive activity. Example: town square.
  - **Limited:** Open for only a limited purpose. Allows content-based limits that are reasonable in light of the forum's stated purpose and are viewpoint neutral. Example: public university meeting rooms.
- **The government can set the type – and thus the limits – in advance.**

2: The Social Media Problem

- **Scenario:** City Councilor Pam runs the Council's official social media page and uses it to notify constituents of Council business. A user comments, "Councilor Pam is a corrupt liar and everyone on this Council is bought and paid for." May Pam delete the comment?

3) **Ensure viewpoint neutrality.** Even with sensible comment limitations in place, this comment likely can't be deleted without offending viewpoint neutrality principles. Criticism of public officials in their official role, true or not, is protected. A rule barring such comments ("no accusing officials of corruption") would likely be unlawful.

   Protected speech can include even "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *NYT v. Sullivan*, 376 U.S. 254 (1964).

   What if it's defamatory? That's for a court to decide, not City Council.

2: The Social Media Problem

- **Scenario:** City Councilor Pam runs the Council's official social media page and uses it to notify constituents of Council business. A user comments, "Councilor Pam is a corrupt liar and everyone on this Council is bought and paid for." May Pam delete the comment?
  - **The Takeaways:**
    1) City officials should distinguish personal and professional social media activity, ideally using different accounts. Create clear distinction between "personal" and "official."
    2) For "official" accounts, decide comment limits in advance, announce them clearly, and enforce them consistently.
    3) Know the kinds of comments that cannot be prohibited even with well-drafted and pre-announced policies.

3: Public Comment Periods



Scenario

A City Council meeting concerning a proposed city health facility includes a public comment period on that subject.

1) Speaker is on-topic but uses obscenities in his remarks.
2) Speaker says the health facility problems are the fault of certain racial and religious groups, which he describes with derogatory slurs.
3) A coordinated group in the back row stands and gives a Nazi salute together.
4) Speaker attacks a Councilor by falsely alleging that she's taken a bribe from a health provider to support the health facility.
5) Speaker exceeds his allotted time and will not leave the microphone.
6) Speaker is off-topic entirely, and advocates for abolishing the city police.

MILLER NASH LLP

3: Public Comment Periods

- **Governing principles:**
  - **Although the public has the right to attend public meetings, there is no requirement, under the First Amendment or under Oregon law, that the public be permitted to speak at a meeting.**
    - *Exception:* Oregon statutes create a right of public comment in a few specific contexts. Examples include some land use and local budget decisions.
  - **But to the extent public participation is permitted, the three familiar governing principles apply.** This includes even silent gestures.
  - **The city need not tolerate actual disruption of government business,** but "disruption" doesn't mean merely being offended.

MILLER NASH LLP

3: Public Comment Periods

- **Three familiar rules:**
  1) **Reasonable time, place, and manner restrictions are permitted.** For example, the city can require that public commenters sign up in advance, and can prohibit signs that block sightlines.
  2) **Content limits: A public meeting is a "limited public forum."** Thus, the government can impose content-based limits on speech that are reasonable in light of the forum's limited purpose. The city can set that purpose in advance.
  3) **As always, viewpoint discrimination is prohibited.** But what the courts consider a "viewpoint" might be broader than you think.

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: Speaker is on-topic, but uses profanity.**
  - **Profanity as such is protected.** *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013) (city could not prohibit merely "personal, impertinent, profane, insolent, or slanderous remarks").
  - **Disrupting or impeding government business is <u>not</u> protected.** *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010). But "actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."
  - Profanity is <u>content</u>. Disruption is <u>conduct</u>.

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: Speaker says health facility problems are the fault of certain racial and religious groups, which he describes with derogatory slurs.**
  - **Even hate speech is protected speech.** *Matal v. Tam*, 582 U.S. 218 (2017).
    - "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* at 246.
    - "Giving offense is a viewpoint." *Id.* at 243.

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: A coordinated group in the back row stands and gives a Nazi salute together.**
  - **Same result.** This is similar to the facts of *Norse v. Santa Cruz*. Even though the group isn't at the dais, they have rights of expression (short of actual disruption).
  - **What should Council do?**
    - **Keep going.** An unacknowledged gesture lasts seconds. An ejection could mean litigation.
    - **Counter-speech.** Example: A councilmember could state that the gesture was repugnant and not representative of the community.
    - **Manage the meeting, not the gesturer.** Enforce pre-existing rules neutrally. If necessary, recess temporarily.

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: Speaker falsely accuses that a Councilor took a bribe from a health provider to support the health facility.**
  - **Even false speech is protected.** *U.S. v. Alvarez*, 567 U.S. 709 (2012).
  - **Remember that criticism of officials' official conduct is core protected speech.** *NYT v. Sullivan*, 376 U.S. 254 (1964).
  - ***But isn't this defamatory?*** Whether speech could be actionable defamation is for a court to decide. The Council can't adjudicate that in advance.
  - **The Councilor <u>can</u> respond on the record.** Her response as an official is the speech of the government itself, which isn't subject to viewpoint neutrality.

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: Speaker exceeds time and won't leave the microphone.**
  - **Can be stopped** on the basis of reasonable time, place, and manner limits.
    - "The Board regulations restricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place, and manner restrictions that preserve a board's legitimate interest in conducting efficient, orderly meetings." *Kindt v. Santa Monica Rent Control Bd*, 67 F.3d 266 (1995).
  - **If severe enough,** can be ejected on grounds of actual disruption.
    - "A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner." *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).

MILLER NASH LLP

3: Public Comment Periods

- **Scenario: Speaker is off-topic in a limited-topic meeting.**
  - **Can be stopped** on "limited public forum" grounds.
    - "In dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand." *Kindt v. Santa Monica Rent Control Bd*, 67 F.3d 266 (9th Cir. 1995).
  - **If severe enough,** the speaker could be ejected on the basis of "actual disruption," just as with the speaker who won't leave the microphone.

What you can and should do:

- **Adopt written time/place/manner rules in advance**, in narrow and objective terms. Time limits, sign-ups, sightline rules, etc.
- **Separate official / personal social media accounts** in advance. Turn comments off, or limit them by posted policy.
- **Limit employee expression by role and public contact**, not viewpoint. Ensure employee expression rules are clear, objective, and evenhanded.
- **Limit comment period topics where appropriate.** Announce in advance.

MILLER NASH LLP

What you can and should do:

- **In the event of public comment problems:**
  - Warn, name the rule, and allow a chance to cure. *Then* act by ending their turn.
  - If their conduct becomes actual disruption: recess, adjourn, or remove. *And say why*, on the record.
  - Officials may answer speech with speech of their own. The city's own voice is largely unconstrained by the First Amendment.

MILLER NASH LLP

What you <u>should not</u> do:

- **Invent new time/place/manner rules** the moment they're needed
- **Enforce rules selectively** against those whose opinions you disagree with, but not those you agree with
- **Operate social media accounts that are simultaneously personal and official**
- **Limit expression** (e.g., cut off a speaker or delete an online comment) due to criticism of officials
- **Silence a public commenter** for mere profanity, slurs, or other offense (racism, sexism, etc.)
- **Eject a public commenter** without "actual disruption," accurately reflected on the record

MILLER NASH LLP

The Final Takeaway:

- **Nearly every power** the city has in this context – and nearly every decision that upheld that power – is based in advance decisions made before the city knows who's speaking or what they'll say.

- **Nearly every loss** rests in a decision/rule that an official made in the moment.

MILLER NASH LLP

Questions?

Thank You

Aaron Landau
Miller Nash LLP

Aaron.Landau@MillerNash.com
541.234.7622



Christine Taylor
Miller Nash LLP

Christine.Taylor@MillerNash.com
503.205.2417

