



Censures, Soliciting, Social Media, & City Hall (audits)

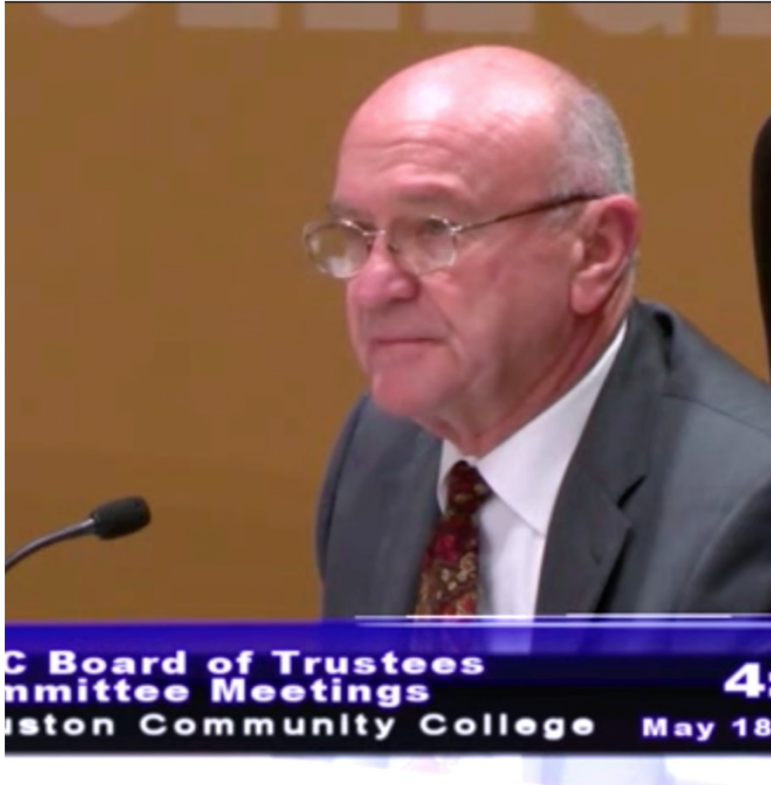
The First Amendment's
Expanding Influence

1



U.S. Constitution Amendment 1

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.



Reprimands of Public Officials

A public censure of an elected official does not amount to a First Amendment violation

- *Houston Community College System v. Wilson*, --- S.Ct. ---- (2022)



Reprimands of Public Officials

- Speech of fellow trustees was also implicated
- Wilson failed to properly appeal whether the Trustee's act of making him ineligible for "election to Board officer positions" or reimbursement for College-related travel, or requiring Board approval before he used "funds in his Board account for community affairs" constituted a violation

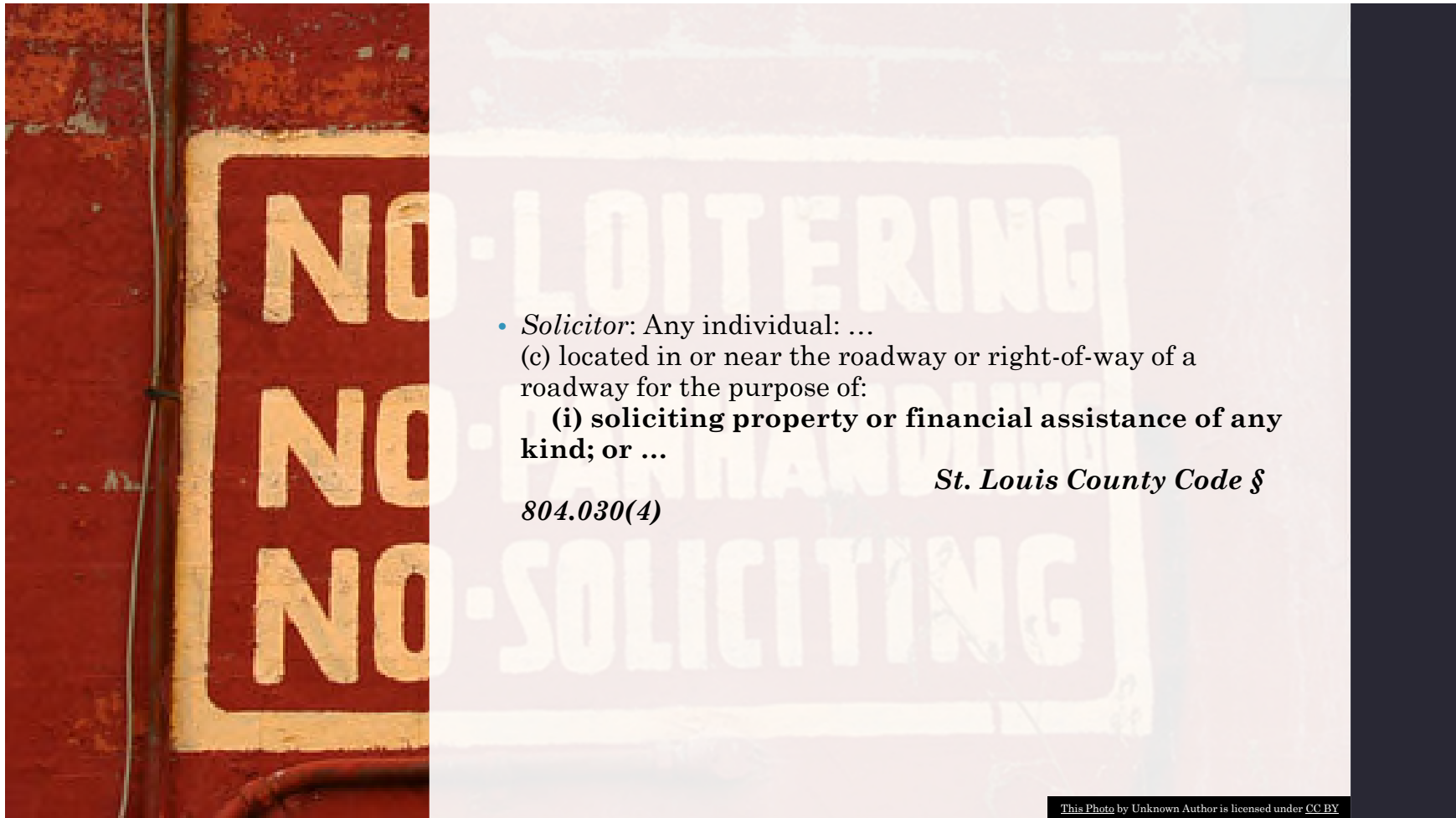
Houston Community College System v. Wilson, --- S.Ct. ----
(2022)





Activity in the
Right-of-Way

Fernandez v. St. Louis County



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Fernandez v. St. Louis County

- Content based; not narrowly tailored
- Strict scrutiny
 - “The section applies only to people who stand in the roadway to solicit four specific things: a ride, employment, charitable contributions, or business. A person cannot stand in a roadway to solicit charity; they can stand in a roadway to solicit a signature or a compliment.”



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Street Performers

Jennings v. City of University City

Jennings v. City of University City

- Ordinance against “Obstructing Public Places” -- prohibited any person from standing or remaining idle in a public place in such manner so as to obstruct any public sidewalk “by hindering or impeding or *tending to* hinder or impede the free and uninterrupted passage of ... Pedestrians”



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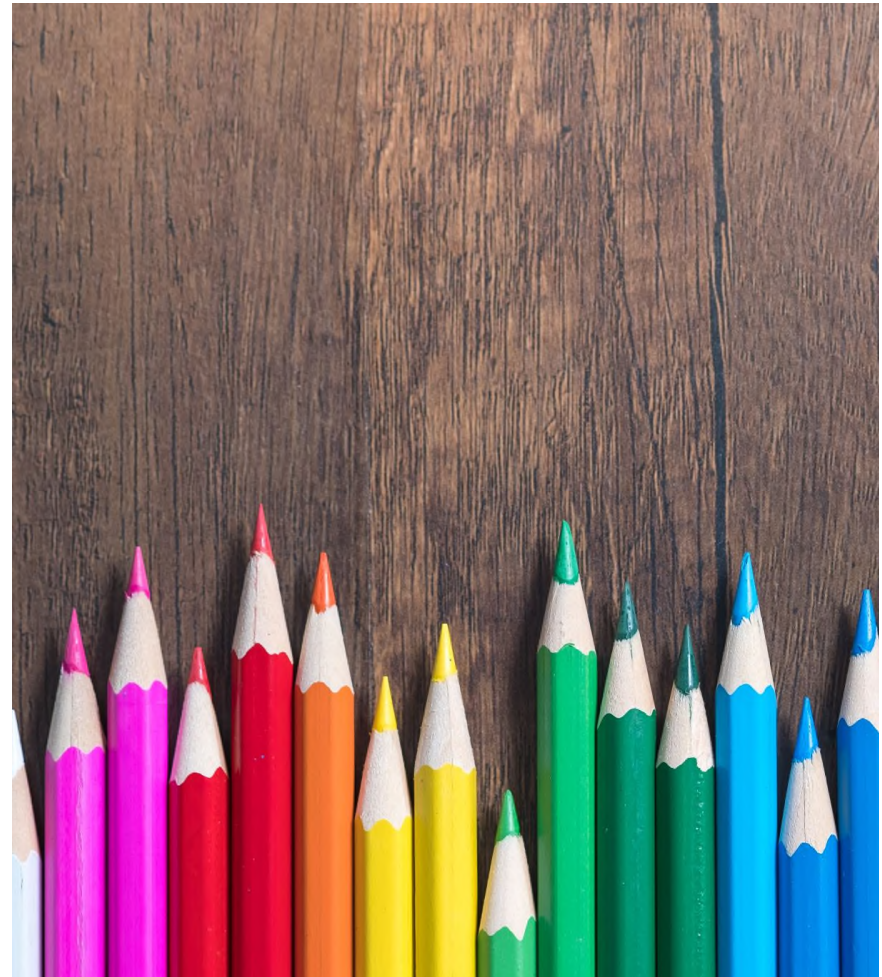


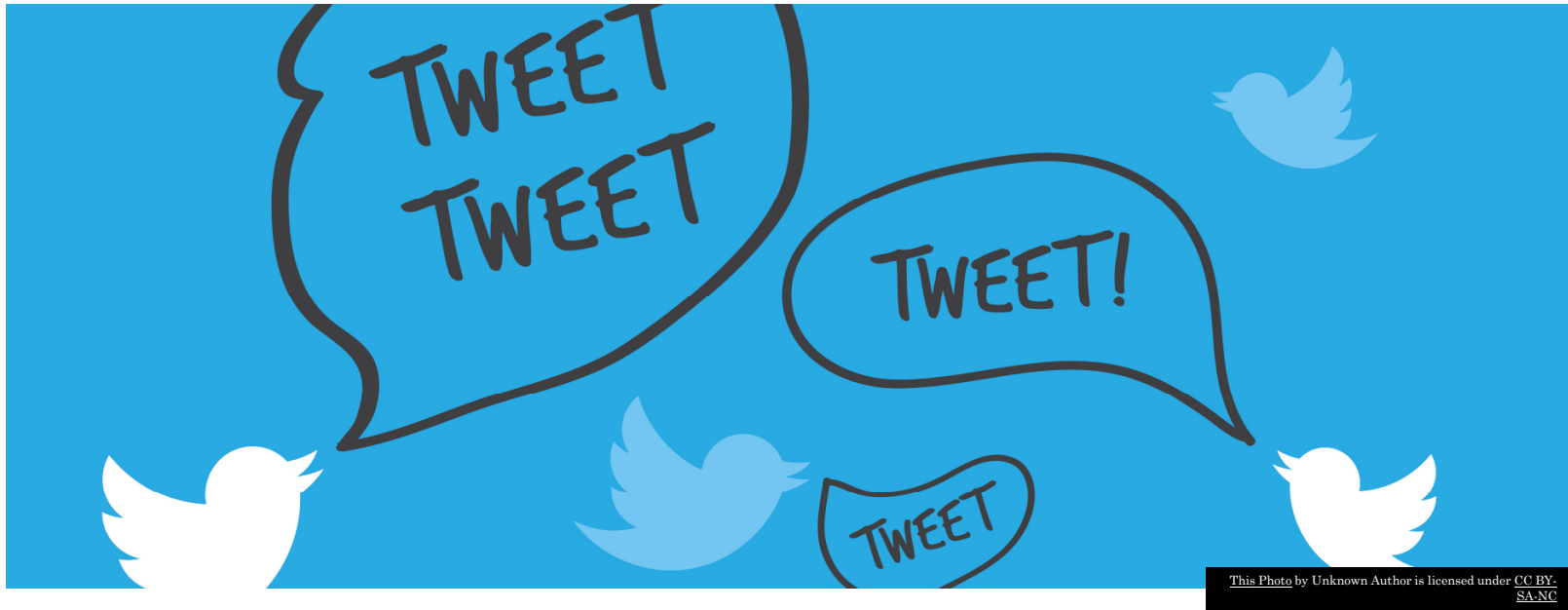
Public officials' blocking of followers

- **Block.** *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2019)
- **Block.** *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), *as amended* (Jan. 9, 2019)
- **Block.** *Felts v. Reed*, 504 F. Supp. 3d 978 (E.D. Mo. 2020)
- **Block.** *Windom v. Harshbarger*, 396 F. Supp. 3d 675 (N.D.W. Va. 2019)
- **Charge.** *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021)
- **Charge.** *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018)

Other “Government” Social Media Accounts: Public Forum?

- Color of State Law
 - 8th Circuit -- Character of the communications that matter
 - 6th Circuit – “State Official Test”
 - Is social media account part of officeholder's actual/apparent duties? Or, could running the account happen the same way without authority of office?
 - *Lindke v. Freed*, 21-2977, 2022 WL 2297875 (6th Cir. June 27, 2022)





***Governmental
Departments/Non-
Elected Officials
blocking of followers***

- **Block.** *Robinson v. Hunt County, Texas*, 921 F.3d 440 (5th Cir. 2019).
- **Block.** *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020).
- **Block.** *Tanner v. Ziegenhorn*, 4:17-cv-780-dpm, 2021 WL 4502080, (E.D. Ark. Sept. 30, 2021).
- **Charge.** *Lindke v. Freed*, 21-2977, 2022 WL 2297875 (6th Cir. June 27, 2022).



City Premises: Videorecording

- The First Amendment does not guarantee access to property just because it is owned by the government



Ordinances regulating speech in limited public forums are not subject to strict scrutiny for purposes of determining whether ordinance violates First Amendment

- City ordinance specifically allowed City Manager to determine spaces where public was allowed
- Unlawful to record video and/or sound within City-owned, controlled, and leased property, without the consent of all persons whose voice or image is being recorded

Sheets v. City of Punta Gorda, Florida, 415 F. Supp. 3d 1115, 1121 (M.D. Fla. 2019)



Public Park

“No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian.”

- Content based
- Not narrowly tailored

Ness v. City of Bloomington, 11 F.4th 914, 922 (8TH CIR. 2021).

Filming the Police

In “Public”

v.

In the Lobby of Police Station

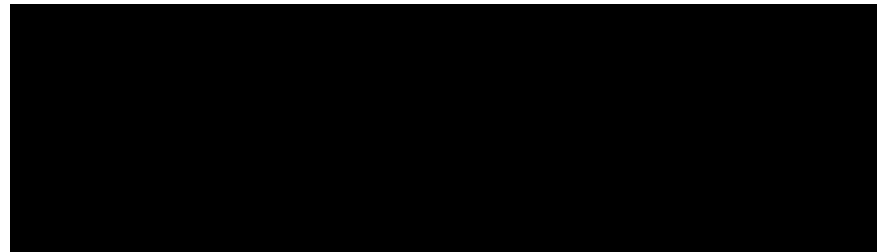


Filming the Police

Irizarry v. Yehia, --- F.4th ---
(July 11, 2022)

The First Amendment “protects the filming of a police encounter” according to “every circuit to consider whether there is a First Amendment right to film the police in public.”

i.e., the 1st, 3rd, 5th, 7th, 9th & 11th Circuits



1A Audits - Best Practices

- **Keeping Calm With First Amendment Audits –**
Municipal Association of South Carolina -
<https://www.masc.sc/Pages/newsroom/uptown/January-2020/Keeping-Calm-With-First-Amendment-Audits.aspx>
- **Reducing Risk from First Amendment Audits --**
Vermont League of Cities and Towns
<https://www.vlct.org/resource/reducing-risk-first-amendment-audits>
- **First Amendment Audits --** Kentucky League of Cities
https://www.klc.org/UserFiles/files/BluePaper_FirstAmendmentAudits.pdf



The Establishment Clause under fire

The Death of *Lemon* & the “endorsement” test

U.S. Constitution Amendment 1

Congress shall make no law
respecting an establishment
of religion, or prohibiting the
free exercise thereof; or
abridging the freedom of
speech....



Religion: Establishing or Prohibiting?

It is “a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it ...”

Shurtleff v. City of Boston, --- S.Ct. ---- at 18 (2022), (Gorsuch, J., concurring)

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Boston's denial of religious flag =
viewpoint discrimination
(*not* government speech)

Shurtleff v. City of Boston, Massachusetts, --- S.Ct. ---- (2022)

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Football coach fired for on-field prayer after game

***Kennedy v. Bremerton
School District***, --- S.Ct. ----,
No. 21-418, 2022 WL
2295034 (U.S. June 27, 2022)



Certification requirement to contract with government

Arkansas law that forbade public contracts with organizations that were boycotting Israel upheld in the face of First Amendment challenges

Arkansas Times v. Waltrip, ___ F.4th ___ (2022)

8th Circuit *en banc*

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