

Title of Submission: Debating Geopolitics at Local Government Meetings: Reviewing Rights and Restrictions to Public Comment Following the 2024 Election

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Debating Geopolitics at Local Government Meetings: Reviewing Rights and Restrictions to Public Comment Following the 2024 Election

Question: When a local government holds public comment, (1) what restrictions on speech can a local government institute and (2) what are the rights of the speaker?

I. Introduction

Public comment at local government meetings allows residents to give direct feedback to elected officials about government policy. Ahead of the 2024 election, residents increasingly commented on global matters despite local governments having no jurisdiction over these matters. Shia Kapos, *Chicago City Council Approves Resolution Calling for Ceasefire Between Israel and Hamas*, Politico, Jan. 31, 2024, <https://www.politico.com/news/2024/01/31/chicago-israel-hamas-ceasefire-resolution-00138950>. In some instances, speakers perceived public officials as not being responsive to public comment and violently threatened public officials. Jose Franco & Jenny Huh, *Protester Taken into Custody for Making Threat to Bakersfield City Councilmembers*, KGET, Apr. 10, 2024, <https://www.kget.com/news/local-news/protester-taken-into-custody-for-making-threat-to-bakersfield-city-councilmembers/>.

The cities of Evanston and Chicago considered reforming public comment in response to particularly rowdy or hateful public comment periods. Jonah Meadows, *Neo-Nazi Group Targets Evanston City Council, Officials Consider New Rules for Hate Speech*, Patch, Feb. 26, 2024, <https://patch.com/illinois/evanston/neo-nazi-group-targets-evanston-city-council-new-rules-considered>; Mary Ann Ahern, *City Council mulls move to move public comment to glassed-in portion of chambers*, NBC 5 Chicago, Nov 29, 2023, <https://www.nbcchicago.com/news/local/>

chicago-politics/city-council-mulls-move-to-move-public-comment-to-glassed-in-portion-of-chambers/3290837/.

Federal and statewide elected officials, who have greater jurisdiction over global matters, take questions about government policy from the media instead of from residents. Residents may comment on global matters at local government meetings—even if the local government has no jurisdiction over the matter—because it is the only government forum available for residents to debate government policy.

When residents comment on matters outside a local government’s jurisdiction, local government officials might feel compelled to institute restrictions on public comment. *Id.* In this piece, we analyze (1) federal, state, and local mandates for public comment, (2) how the court scrutinizes restrictions and protections to speech, and (3) how the mandates, restrictions, and protections apply to speakers at public comment in the Seventh Circuit.

II. Federal, State, and Local Mandates for Public Comment

Local governments may limit public participation in government meetings. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). Neither the constitution nor the federal government require local governments to offer public comment. *Id.*

Many states have “Open Meeting” or “Sunshine” laws requiring “meetings of public bodies” be open to the public. 2 Antieau on Local Government Law, Second Edition § 26.12 (2nd 2024). The Illinois Open Meetings Act requires public comment at certain public meetings. Office of the Illinois Attorney General, *Illinois Open Meetings Act: Frequently Asked Questions by the Public*, last updated: Dec., 2023, <https://www.illinoisattorneygeneral.gov/Page->

Attachments/FAQaboutOMAPublic.pdf. Even when not legally required, a local government may choose to offer public comment at a meeting.

III. Restrictions and Protections to Speech

Local governments may remove a speaker from public comment when a speaker (1) uses “unprotected speech” or (2) violates a local government’s constitutional restriction on speech. *See Helbachs Café, LLC v. City of Madison*, 571 F. Supp. 3d 999, 1013 (W.D. Wis. 2021); *see I.A. Rana Enters. v. City of Aurora*, 630 F. Supp. 2d 912, 924 (N.D. Ill. 2009). We discuss both (1) how the court defines unprotected speech and (2) how the court evaluates constitutional restrictions on speech.

a. Unprotected Speech

A local government may remove a speaker during public comment for unprotected speech, including: (1) “fighting words,” (2) “incitement,” (3) “true threats,” (4) “obscenities,” (5) “defamation,” or (6) “fraud.” *See Helbachs Café*, 571 F. Supp. 3d at 1013.

The first amendment does not protect fighting words. *Chaplinsky v. New Hampshire*, 315 U.S. 766, 770 (1942) (where the speaker intended to inspire violence by taunting another person). The first amendment does not protect speakers intending to incite imminent violence but does protect speakers advocating for general, non-imminent violence. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (where the court held that that the state could not charge a member of the Klu Klux Klan calling for general violence on television). The first amendment does not protect “true threats,” or a speaker expressing intent to harm an individual (regardless of whether the speaker

intends to cause harm). *Virginia v. Black*, 538 U.S. 343, 359 (2003) (where the court found that burning a cross with the intent to intimidate constituted a true threat).

The first amendment does not protect speech about sexual obscenities that lacks any artistic or scientific value. *Miller v. California*, 413 U.S. 2607, 2612-13 (1973) (where the court held that the first amendment did not protect a defendant who mailed unsolicited pornography). The first amendment does not protect a speaker who makes a knowingly false statement about an elected official that harms the reputation of the official. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964) (where the court held that a newspaper was not guilty of defamation for publishing false claims about an elected official because the paper did not know the claims were false). The first amendment does not protect fraud or intentional misrepresentation. *United States v. Hansen*, 599 U.S. 762, 769 (2023) (where the court found the defendant guilty for intentionally encouraging people to illegally immigrate to the United States and claiming he could help the people obtain citizenship).

b. Types of Restrictions

When assessing whether a restriction violates the First Amendment, the court considers both (1) if the restriction limits certain viewpoints or content and (2) the forum (or the speaker's location). *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677-80 (1992); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632-33 (1980). We will first analyze the different restrictions and then how the court scrutinizes restrictions in different fora. We discuss three types of restrictions: (1) viewpoint, (2) content, and (3) time, place, and manner.

Viewpoint Restrictions

Local governments cannot restrict viewpoints even if they are controversial or unpopular. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94 (1972). The court uses strict scrutiny when analyzing viewpoint restrictions; to survive strict scrutiny, viewpoint restrictions must (1) serve a compelling government interest and (2) be narrowly tailored to serve that interest. *Id.*

Viewpoint restrictions fail strict scrutiny because the court finds no compelling reason to restrict a viewpoint. *Carey v. Brown*, 447 U.S. 455, 464 (1980). When not directed at an individual, the court protects hateful or offensive viewpoints (including about protected statuses). *Matal v. Tam*, 582 U.S. 218, 243 (2017).

Content Restrictions

Depending on the forum, a local government may institute viewpoint-neutral content restrictions by limiting the class of speaker or the topics a speaker may discuss. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806, (1985). Courts submit content restrictions to either strict scrutiny or the rational basis test depending on the forum. *Id.* at 806. A restriction survives the rational basis test if the restriction (1) is viewpoint-neutral and (2) rationally furthers a legitimate state interest. *Id.* at 808.

Courts sometimes disagree whether a restriction constitutes a content or viewpoint restriction. *Id.* at 811. Courts are more likely to interpret restrictions that limit discussion to one topic as content restrictions. *Id.* Courts may interpret bans on a single topic as viewpoint restrictions. *Id.*

Time, Place, and Manner Restrictions

Local governments have long relied on reasonable time, place, and manner restrictions to maintain order during public comment periods. *Cox v. Louisiana*, 379 U.S. 536, 558 (1965). Time, place, and manner restrictions limit when, where, and how, speakers may express themselves. *Id.* Time, place, and manner restrictions must be viewpoint-neutral and applied evenly to all speakers. *Id.*

Courts submit time, place, and manner restrictions to either heightened scrutiny or the rational basis test depending on the forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-97 (1989). A restriction survives heightened scrutiny when the restriction: (1) is content-neutral, (2) serves a substantial government interest, (3) is narrowly tailored to advancing that interest, and (4) allows for ample alternate channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

c. Types of Fora

Courts analyze the speaker forum when deciding how to scrutinize a local government restriction on speech. *Id.* When scrutinizing a local government's restriction, the court decides whether the forum is (1) traditional, (2) intermediate, or (3) nonpublic. *Id.* Courts classify fora by considering (1) the location of the forum and (2) the government's intent when designating the forum. *Cornelius* 473 U.S. at 806.

Traditional Public Fora

The court guarantees the strongest protections for speech in traditional public fora. *Perry* 460 U.S. at 45. Traditional public fora include physical locations like "streets, the parks, and other public places that are an important facility for public discussion and the political process." Harry

Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 12-13. Traditional public fora extend beyond geographic locations and include “[the] metaphysical,” or intangible communication channels. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). When a location has all the physical characteristics of a traditional public forum, the court prevents local governments from permanently reclassifying the forum if the government intends to substantially restrict freedom of expression. *HAGUE v. Comm. FOR Indus. Org.*, 307 U.S. 496, 515 (1939).

Courts use strict scrutiny to analyze content and viewpoint restrictions in traditional public fora. *Perry* 460 U.S. at 45. Content and viewpoint restrictions will likely fail strict scrutiny. *Id.* Courts subject time, place, and manner restrictions in public fora to heightened scrutiny. *Id.*

Ahead of the Democratic National Convention (DNC) in Chicago, a coalition of activists alleged the city of Chicago violated their constitutional right to protest the convention by proposing an alternate parade route for the coalition to follow to protest the DNC. *Chi. All. Against Racism v. City of Chi.*, No. 24-cv-02347, 2024 U.S. Dist. LEXIS 143269, at 15 (N.D. Ill. Aug. 12, 2024) The protestors petitioned the city for a parade route near the United Center. *Id.* at 17. The city asked the court to approve an alternate route near the United Center, arguing that the alternate route was more safe and secure than the protestor’s route. *Id.*

The court determined the streets in both routes were public fora and that the alternate parade route constituted a time, place, and manner restriction. *Id.* The court applied heightened scrutiny to the city’s alternate parade route. *Id.* The court held that the city’s alternate route and time, place, and manner restrictions (1) were content-neutral, (2) served a substantial government interest, (3) were narrowly tailored to advancing that interest, and (4) allowed for ample alternate

channels of communication. *Id.* at 34. The court held that the city's alternate parade route satisfied heightened scrutiny and that the city's time, place, and manner restrictions were reasonable. *Id.*

Nonpublic Fora

The court permits the greatest restrictions on speech in nonpublic fora. *Perry* 460 U.S. at 45. Nonpublic fora are government properties where the government operates but are not traditionally open to free expression, like teacher mailboxes or post offices. *Id.*

When a local government restricts speech on government property that does not have the physical characteristics of a traditional public forum, the court is inclined to find a nonpublic forum. *Chi. Acorn, SEIU Local No. 880 v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 699 (7th Cir. 1998). The court evaluates the government's intent when crafting the restrictions and analyzes whether the government fairly applied the restrictions between different groups. *Id.* at 701-02.

The court analyzes restrictions in nonpublic fora with the rational basis test. *Cornelius* 473 U.S. at 806. The court will likely find that content and time, place, and manner restrictions pass the rational basis test in nonpublic fora. *Id.* However, even in nonpublic fora, the court holds that viewpoint restrictions violate the First Amendment. *Id.*

Intermediate Public Fora

Courts in different jurisdictions vary widely in how they identify, define, and scrutinize, intermediate public fora. See Ronnie J. Fischer, *Comment: "What's in a Name?": An Attempt To Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 Dick. L. Rev. 639, 642 (2003). Courts generally recognize two types of intermediate fora: (1) designated and (2) limited. *Id.*

The court finds a designated public forum when the government opens a property or communication channel not traditionally used as a forum for public expression. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). The court generally scrutinizes restrictions in designated fora the same as traditional fora. *Perry* 460 U.S. at 45; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993). Therefore, when the court finds a designated public forum, the court applies strict scrutiny to content restrictions and heightened scrutiny to time, place, and manner restrictions. *Widmar*, 454 U.S. 263, 267 (1981).

Circuit courts vary widely in how they define and treat limited public fora. Fischer, *Comment: "What's in a Name?"*, at 642. Courts rarely find limited public fora because higher courts provide mixed guidance on how to identify limited public fora. *Id.*

The Seventh Circuit applies strict scrutiny to content restrictions in designated public fora. *Deboer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001). When testing restrictions in limited public fora, the court applies the rational basis test to both content and time, place, and manner restrictions. *Id.* The Seventh Circuit treats restrictions in the limited public fora the same as the nonpublic fora. *Id.*

IV. Applying Protections, Restrictions, and Fora, to Public Comment in the Seventh Circuit

The Seventh Circuit holds that, when mandated by the Illinois Open Meetings Act, public comment at a local government meeting is a designated public forum. *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011); *see* 5 ILCS 120/1 (2023). The court applies strict scrutiny to viewpoint or content restrictions and heightened scrutiny to time, place, and manner restrictions. *Surita* 665 F.3d 869. Therefore, the court will likely reject any content or viewpoint restriction a local

government applies to the public comment period mandated by the Illinois Open Meetings Act. *See* 5 ILCS 120/1 (2023).

A local government can remove a speaker from public comment for (1) using unprotected speech or (2) violating the local government's constitutional restrictions on speech. *See Helbachs Café*, 571 F. Supp. 3d at 1013; *see. I.A. Rana Enters.*, 630 F. Supp. 2d at 924. To decide whether the local government's restriction on speech is constitutional, the court evaluates (1) the type of restriction and (2) the nature of the forum. *Int'l Soc'y for Krishna Consciousness* 505 U.S. 677-80. When deciding the forum, the court considers (1) state and local requirements and (2) the government's intent for holding the forum. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11-12 (2018). The court "is particularly reluctant to hold that the government intended to designate a public forum" where expressive activity would disrupt government business. *Cornelius* 473 U.S. at 804.

If the local government fails to clarify its restrictions to speech before holding public comment, the court will likely find a designated public forum and apply strict scrutiny to content restrictions. *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174 (1976) (where the court found a designated public forum when a school board offered public comment). If a local government invites certain members of the public to speak at a meeting on a specific topic or agenda item—when not required by statute—the court finds a nonpublic forum. *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 680 (1998). In a nonpublic forum, the government may (1) limit speakers to a particular class or group, or (2) remove a speaker for violating a reasonable restriction. *I.A. Rana Enters.*, 630 F. Supp. 2d at 925. Therefore, if a local government invites a speaker to comment on a specific agenda item and the speaker begins discussing an unrelated topic, the government may terminate the speaker's remarks.

Local governments cannot require speakers to state their home address before giving public comment. Ill. Att'y Gen. Pub. Acc. Op. No. 14-009 (2014). Local governments cannot ban non-residents from offering public comment. Ill. Att'y Gen. Pub. Acc. Op. No. 19-009 (2019). Local governments cannot require speakers to register for public comment several days before a meeting. Ill. Att'y Gen. Pub. Acc. Op. No. 14-012 (2014). Local governments cannot enforce “unestablished and unrecorded” rules to intentionally limit speech about contentious issues. Ill. Att'y Gen. Pub. Acc. Op. No. 19-002 (Jan. 9, 2019) (where a school board tried to enforce a 15-minute limit on public comment after hundreds of residents came to a meeting to protest the hiring of a 6th grade teacher who was charged with 9 counts of attempted murder).

V. Conclusion

Public comment at local government meetings provides members of the public with a unique opportunity to comment on government policy in a forum established by the government. Because of the unique design of public comment, members of the public might feel compelled to comment on global matters that fall outside of the body's local jurisdiction.

While the 2024 elections are behind us, candidates will soon start campaigning for the 2026 midterms. In response to the campaigns, local government officials should expect that residents will come to public comment to discuss global matters. Local government officials should exercise caution before implementing restrictions that limit speech at public comment. We hope this discussion helps local government officials balance the rights of speakers with local government interests ahead of future elections.