

# THE UNIVERSITY OF ARIZONA®

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### MEMORANDUM

**Re: First Amendment Free Speech and Assembly:  
The Public Forum Doctrine**

The First Amendment to the United States Constitution requires that “Congress shall make no law...abridging the freedom of speech....” The Fourteenth Amendment makes this prohibition applicable to the states. The United States Supreme Court has determined that “the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.” Thus the First Amendment’s protections apply when the University regulates speech or expression on public property.

The First Amendment “forum analysis” is the most commonly used test to determine the level of restriction that the government may place on free speech. The forum analysis examines the nature and purpose of the property or location where the speech occurs, the subject matter of the speech, and any restriction being imposed on the speech. The level of scrutiny that a court will place on a speech restriction will depend upon the conclusions derived from the forum analysis.

#### **I. Permissible Government Restrictions on the Content or Expression of Speech**

The First Amendment does not protect speech or expression that threatens the health, safety or welfare of persons in the University community.

**1. General Restrictions on Speech:** The regulation or restriction of speech based upon its content is permissible to stop: (i) incitements (provocation to engage in immediate violence); (ii) fighting words (confrontational words or threats likely to lead to immediate fighting); (iii) obscenity (appeals to carnal interests, clearly offensive, and without redeeming social value); (iv) defamation (falsehoods that harm a person’s reputation); (v) commercial speech that is false or misleading; and (vi) speech by public employees related to matters not of public concern. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538 (1992), *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983).

**2. Threats:** Threatening behavior is not protected by the First Amendment and is prohibited by University policy (see policies prohibiting threatening behavior by students and by employees: <http://web.arizona.edu/~policy/threatening.pdf> and <http://www.hr.arizona.edu/policy/401.1>). “True threats” are prohibited and encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536 (2003). True threats are evaluated based upon an objective standard, which is “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” *U.S. v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990), *overruled in*

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*part on other grounds, United States v. Hanna*, 293 F.3d 1080 (9th Cir.2002). True threats are not protected by the First Amendment. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733 (1969).

**3. Disruptions:** Disruptive behavior is prohibited by University policy (see for example, the Policy on Disruptive Behavior in an Instructional Setting: <http://policy.web.arizona.edu/disruptive.pdf>). Disruptive speech or expressive activity is not immunized by the constitutional guarantee of freedom of speech and may be prohibited if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others....” *Tinker v. Des Moines School District*, 393 U.S. at 513, 89 S.Ct. at 740.

**4. Harassment:** Harassment is prohibited by Arizona criminal law and by University Policy (see the University’s Nondiscrimination and Anti-harassment Policy: <http://policy.web.arizona.edu/Non-discrim-interim.pdf>). Under the University’s Anti-harassment Policy, harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic, electronic, and written statements, or conduct that is physically offensive, harmful, threatening, or humiliating. In order to constitute prohibited harassment, the behavior must be unwelcome, based upon a protected classification, and sufficiently severe or pervasive to create an intimidating, hostile, or offensive environment for academic pursuits, employment, or participation in University sponsored activities. Protected classification includes race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, gender identity, or other protected category.

To appropriately protect free speech rights, however, prohibited harassment cannot be premised solely upon the bare expression of speech with which some may disagree or find offensive. In its July 28, 2003 “Dear Colleague” letter, the U.S. Department of Education’s Office for Civil Rights stated that “[h]arassment...must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive,” and must be “sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.”

Respectful, inclusive, and tolerant communication among members of our University community is critical to maintaining a flourishing learning environment. In exercising these important responsibilities, however, the University must use constitutionally permissible means to carry out its mission and obligations. Importantly, the First Amendment restricts the University from placing selective limitations on speech or expression because it is insensitive, boorish or expresses viewpoints on disfavored subjects. Similarly, the First Amendment forbids the University from regulating or punishing speech or the expression of ideas or messages merely because they are offensive or controversial.

## II. Classification of Public Property

The classification of public property is central to determining the scope and extent of free speech. Under traditional First Amendment forum analysis, there are three types of public property: (1) the traditional “open” public forum; (2) the “closed” or non-public forum; (3) the “designated” public forum; and (4) the “limited” public forum (a sub-category of the designated public forum).

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**1. Open Public Forum:** Defined simply as government property that has traditionally been open to the public for speech, assembly and debate. Public forum property traditionally includes public streets, sidewalks, parks and city squares. See *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939).

**2. Non-Public Forum:** This forum includes state buildings and property that are not by tradition or designation open for public communication, but are used for business, education or other dedicated purposes. The state may reserve non-public property for its intended purpose, provided that the regulation of speech is reasonable and not an effort to suppress a particular viewpoint. Examples of non-public forums include courthouses, jails, government offices, city halls and public schools. While such state property is required to be open for its devoted purposes, it is not required to be open to the public for other expressive activities. See *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46, 103 S.Ct. 948 (1983).

There is no First Amendment requirement that the University's facilities be opened for uses other than those dedicated to education, research, administration and University sponsored activities. Some confusion may occur when non-public forum property abuts an open public forum sidewalk and is not so delineated as to put a speaker on notice that he or she has entered some special enclave where free speech is not protected (e.g., walkway from public street or sidewalk leading up to University building).

**3. Designated Public Forum:** The designated public forum is created when the government intentionally dedicates a non-public forum for expressive conduct by a class of speakers. See *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007).

Although there is no legal requirement to open university facilities for uses other than for normal educational and administrative functions, as a practical matter almost all universities designate some non-public property for free speech and expressive activities. Examples of such designations include university facilities held open for meetings of student groups or other organizations, and the designation of a university mall as "free speech" or "reserved" free speech areas. Once the government opens non-public property to the public for expressive activity, then such property becomes a designated public forum, open for that particular designated use.

**4. Limited Public Forum:** A limited public forum is "a sub-category of a designated public forum that refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *Flint v. Dennison*, 488 F.3d at 831 citing *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir.2001). In a limited public forum, the government may make distinctions in access and speech on the basis of: (i) subject matter; and (ii) speaker identity. See *Perry*, 460 U.S. at 49, 103 S.Ct. at 957.

### **III. Limits on the Exercise of Free Speech and Assembly Based Upon Forum Type**

**1. Open Public Forum:** Expressive activity in an open public forum may not be suppressed, controlled or excluded based upon the "content" of the speech, unless it is necessary to achieve a compelling government interest and is narrowly drawn to achieve that end. A compelling government interest means an interest of the greatest importance, such as protecting the health, safety and welfare of the community. However, reasonable "time, place and manner restrictions" may be used if applied neutrally to all similarly situated parties. See

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*Perry*, 460 U.S. at 45, 103 S.Ct. at 948. But restrictions based upon the particular viewpoint of a speaker are prohibited. *Carey v. Brown*, 447 U.S. 455, 463, 100 S.Ct. 2286 (1980).

**2. Non-Public Forum:** The government may impose reasonable content-based restrictions on expressive activity in non-public forums, in light of the function and purpose of the property. Some government buildings may have portions designated as limited public forums, such as meeting rooms, while other portions remain non-public forums, such as areas that are used for internal business or are not generally open to the public. A non-public forum may be reserved for its intended purpose, as long as the regulation on speech is reasonable in light of the function of the property and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811, 105 S.Ct. 3439 (1985).

**3. Designated Public Forum:** A University setting most often fits into this category, because it contains public buildings and property whose primary purpose is to provide education, but is often designated to allow access to the public at times when the property is not being used for its devoted purpose. The uses of the property may be limited to those designated by policy, and reasonable time, place and manner restrictions may be imposed, but each must be exercised neutrally among similarly situated persons. Similar to a public forum, a content-based restriction on speech in a designated public forum would require the University to show a compelling interest in the restriction that is narrowly drawn to meet that interest. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 103 S.Ct. 948 (1983).

**4. Limited Public Forum:** In creating a limited public forum, the University may define the scope of the subject matter of that forum. However, once the government has created a limited public forum, it must respect the lawful boundaries it has itself set, and not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum." See *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 830, 115 S.Ct. 2510 (1995).

In creating a limited public forum, "[t]he government has substantial leeway in determining the boundaries of limited public fora it creates." *Cogswell v. City of Seattle*, 347 F.3d 809, 817 (2003). Moreover, "[i]n order to preserve the limits of a limited public forum...the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum." *Id.* at 815. "The necessities of confining a [limited public] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510. However "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, then the government has engaged in impermissible viewpoint discrimination" *Cogswell*, 347 F.3d at 813.

To determine whether a restriction on speech is viewpoint discriminatory, the courts apply the guidelines established in the *Lamb's Chapel* line of cases. See *Good News Club*, 533 U.S. 98, 109, 121 S.Ct. 2093 (2001); *Rosenberger*, 515 U.S. at 829-30, 115 S.Ct. 2510; *Lamb's Chapel*, 508 U.S. 384, 394, 113 S.Ct. 2141 (1993). Specifically, "if the speech at issue does not

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fall within an acceptable subject matter otherwise included in the forum, the State may legitimately exclude it from the forum it has created. However, if the speech does fall within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker.” *Cogswell*, 347 F.3d at 815.

### **IV. Time, Place and Manner Restrictions**

Time, place and manner restrictions may be placed, neutrally, on expressive activities that occur in or on open and designated public forums. See *Perry*, 460 U.S. at 45, 103 S.Ct. at 948. Simply, this means that the “when, where and how” of expressive activity may be reasonably regulated to serve a significant government interest if such regulation is (i) without reference to the content of the speech and (ii) leaves ample opportunity for speech in alternative areas or forums. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 106 S.Ct. 925 (1986). A “significant government interest” includes: (1) the protection and maintenance of University resources, facilities and property; and (2) the promotion of public health, safety and welfare.

In conclusion, the U.S. Supreme Court has recognized that “the crucial question [for application of time, place and manner restrictions] is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Grayned v. Rockford*, 408 U.S. 104, 116-18, 92 S.Ct. 2294 (1972). To that end, time, place and manner restrictions may be placed on expressive activities that “materially and substantially” disrupt the operation or function of a university or interfere with the rights of its students to obtain an education. *Id.*

Examples of proper time place and manner restrictions include those required to prevent disruptive activity, obstruction of vehicular or pedestrian traffic, excessive noise levels or noise that interferes with classroom, business or other University activities, interference with the normal functions and processes of the University or the rights of others to effectively use University facilities and property, blocking of doorways, or an imminent threat of physical violence or destruction of property. The responsibility for making time, place and manner determinations and decisions rests with the Dean of Students or the dean’s designated representative.

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