

# RETALIATORY FORUM CLOSURE

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*The recent Occupy Wall Street and Tea Party movements highlight the importance of preventing unconstitutional government interference with disfavored speakers. Perversely, officials seeking to prevent such protests while evading viewpoint-discrimination lawsuits can elect to simply close forums in which speech would otherwise be expressed. Holding that all speakers are equally affected, courts have generally allowed such actions. In other contexts, however, courts have rejected this rationale under the First Amendment retaliation doctrine. Despite a facade of facial neutrality, retaliatory forum closures specifically harm targeted speakers by making them the object of community scorn and by disproportionately obstructing their viewpoints. Also, retaliatory forum closures usually stem from governmental errors in the design or maintenance of a forum. To address these issues, this Note extends First Amendment retaliation jurisprudence to the forum-closure context by creating an action for retaliatory forum closure and then examines how this action corrects the problematic results of previous retaliatory forum closures. Consistent with First Amendment policy, this would protect disfavored speakers and give the public a greater opportunity to interact with a wide spectrum of viewpoints.*

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## INTRODUCTION

*Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . .*

—Justice Oliver Wendell Holmes, Jr.<sup>1</sup>

*The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.*

—Justice Samuel A. Alito, Jr.<sup>2</sup>

Protest movements have positively shaped the American historical narrative: Federalist pamphleteers in the 1780s, suffragettes in the 1910s, and civil rights marchers in the 1960s all played leading roles. To many, Occupy Wall Street or Tea Party protesters are the contemporary protagonists in this great American story—chapter after chapter of bloodless revolutions to alter the status quo. Regrettably, there is a substantial risk that, as in previous eras,<sup>3</sup> some government officials will attempt to suppress these protesters. Although longstanding prohibitions on viewpoint discrimination prevent targeted exclusion of disfavored speakers from public forums,<sup>4</sup> one way to achieve a similar result is to prevent everyone from speaking by closing public forums altogether. This risk is especially acute when a protest is closely connected to a specific location—such as many of the Occupy Wall Street assemblies. This Note proposes to resolve court disagreement<sup>5</sup> over the questionable constitutionality of such closures by

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1. *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918) (citation omitted), *quoted with approval in* *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960). More specifically, “[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.” *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984)).

2. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3017 (2010) (Alito, J., dissenting).

3. *See, e.g., infra* note 238 and accompanying text.

4. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995). Viewpoint discrimination occurs when the government regulates speech “based on the ideology of the message.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1218 (3d ed. 2009).

5. *Compare* *Gay Guardian Newspaper v. Ohoopce Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1373–78 (S.D. Ga. 2002) (allowing retaliatory forum closure), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision), *with* *Mo. Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1353 (W.D. Mo. 1989) (disallowing retaliatory forum closure). *See also* 1 RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 8:51 (3d ed. 1996 & Supp. 2010) (recognizing that whether governments can close forums for discriminatory or retaliatory reasons is a difficult and unresolved question). The ambiguity surrounding retaliatory forum closure is partly due to the dearth of published cases addressing the issue.

extending current speech-retaliation doctrine into the public-forum context to create a cause of action for retaliatory forum closure.<sup>6</sup>

Examples of retaliatory forum closure abound.<sup>7</sup> As the Occupy Wall Street protests spread in 2011, officials in California,<sup>8</sup> Colorado,<sup>9</sup> Georgia,<sup>10</sup> Idaho,<sup>11</sup> South Carolina,<sup>12</sup> and Tennessee<sup>13</sup> responded by indefinitely closing

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6. This Note expands upon two prior articles that have addressed limited facets of this issue and reached the same basic conclusion. See Kerry L. Monroe, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 985–87 (2011) (arguing that retaliatory forum closure constitutes viewpoint discrimination); Jordan E. Pratt, Note, *An Open and Shut Case: Why (and How) the Eleventh Circuit Should Restrain the Government's Forum Closure Power*, 63 FLA. L. REV. 1487, 1488–91 (2011) (arguing that recognizing a cause of action for retaliatory forum closure is consistent with the purposes of 42 U.S.C. § 1983 (2006)).

7. See, e.g., *Henke v. Dep't of the Interior*, No. 11-2155 (JEB), 2012 WL 310852, at \*1 (D.D.C. Feb. 2, 2012) (discussing National Park Service's decision to close part of a Washington, D.C. park in response to Occupy D.C. protests); Stipulated Voluntary Dismissal with Prejudice at 1, *Hart v. Tomack*, No. CV11-00611 (C.D. Cal. June 9, 2011), available at <http://oldsite.alliancedefensefund.org/userdocs/HartStipulatedVoluntaryDismissal.pdf> (describing public high school's decision to rescind brick-paver fundraiser rather than allow religious quotes to be inscribed on brick pavers); Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 603–04 (2011) (discussing various forum closures intended to prevent disfavored expression); Monroe, *supra* note 6, at 985–86 (discussing temporary forum closure of University of California's student media to prevent racially inflammatory content); Mark Walsh, *Gay Students' Request Spurs Board to Cut Clubs*, EDUC. WK., Feb. 28, 1996, at 6 (discussing Salt Lake City School Board's decision to eliminate all extracurricular clubs rather than allow a club for gay students); Ingrid M. Johansen, *Court Affirms Lower Court Rulings in Free Speech and Free Exercise Case*, CLEARINGHOUSE N.C. SCH. L. (Summer 2004), <http://csl.sog.unc.edu/node/222> (discussing unreported case concerning Catawba County Board of Education's decision to discontinue an advertising program rather than display an advertisement with a religious message). For additional discussion, see *infra* Part IV.B–D.

8. See Press Release, City of Oakland, Cal., “Occupy Oakland” Wednesday Evening Update (Oct. 26, 2011), available at <http://www2.oaklandnet.com/oakca/groups/ceda/documents/pressrelease/oak031926.pdf> (closing grassy area of park by erecting a chain-link fence around it the morning after removing protesters who had violated curfew rules).

9. See Sara Burnett et al., *At Occupy Denver Protest, Crowds and Officers Thin as Morning Turns to Afternoon*, DENVER POST (Oct. 14, 2011, 11:33 PM), [http://www.denverpost.com/breakingnews/ci\\_19112322](http://www.denverpost.com/breakingnews/ci_19112322) (closing park indefinitely and arresting protesters during normal park hours).

10. See Errin Haines & Kate Brumback, *Atlanta Closes Park After Protesters Arrested*, TIMES-HERALD (Oct. 26, 2011), <http://www.times-herald.com/Local/Atlanta-closes-city-park-after-protesters-arrested> (describing indefinite closure of park the day after removing protesters who had violated the law).

11. See *Watters v. Otter*, No. 1:12-CV-76-BLW, 2012 WL 640941, at \*2–4 (D. Idaho Feb. 26, 2012) (discussing Idaho's passage of law prohibiting camping and Governor Otter's edict that all tents must be removed, both in response to Occupy Boise).

12. See *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990, at \*1–2 (D.S.C. Dec. 22, 2011) (discussing enactment of Emergency Regulation

public parks or tightening usage rules. A Mississippi public high school cancelled its 2010 prom rather than allow a lesbian student to attend with her girlfriend.<sup>14</sup> In Indiana, a public-building authority banned all private displays rather than continue to allow a menorah display during Hanukkah.<sup>15</sup> Pennsylvania closed the observation galleries in its Commonwealth House Chambers during a State of the Commonwealth speech to prevent a group of protestors from silently wearing shirts with messages condemning the Governor.<sup>16</sup> A California public school tore down a wall of tiles, sold as part of a fundraiser, rather than display tiles with a religious message.<sup>17</sup> And in Georgia, a public library removed all private literature from its “free literature” table to prevent controversy surrounding a gay-rights newspaper.<sup>18</sup> Although such forum closures ostensibly affect all speakers equally, the mask of neutrality merely conceals underlying viewpoint discrimination.<sup>19</sup> Equally problematic, targeted speakers are subject to the anger of others who are no longer able to participate in now-closed forums.<sup>20</sup>

In the government-employment context, the Supreme Court has long held that analogous retaliatory conduct violates the First Amendment.<sup>21</sup> Specifically, disciplinary action against employees in response to their private speech triggers an action for speech retaliation.<sup>22</sup> Federal circuit courts have applied this theory in numerous other contexts,<sup>23</sup> and this anti-retaliation rationale logically extends to retaliatory forum closures. Because the normative goal of a retaliatory-forum-closure cause of action is to protect disfavored speech, this theory should be applied as long as it upholds this principle.

Part I of this Note examines current speech-retaliation precedent in employment and other contexts. This case law provides the structure for a retaliatory-forum-closure action. Part II briefly looks at how the Supreme Court

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19,480, which responded to Occupy Columbia protests by banning all camping and sleeping on State House grounds).

13. See Hedy Weinberg, *A Win for Freedom of Speech and Occupy Nashville*, AM. CIVIL LIBERTIES UNION (Nov. 1, 2011, 5:33 PM), <http://www.aclu.org/blog/free-speech/win-freedom-speech-and-occupy-nashville> (“[T]he state adopted new rules significantly restricting use of the plaza, requiring a permit and liability insurance, and imposing a curfew . . .”).

14. See *infra* notes 239–45 and accompanying text.

15. *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290–91 (7th Cir. 1996).

16. *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289–90 (M.D. Pa. 1991).

17. See Reply to Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction: Memorandum of Points and Authorities at 11–12, *Burrows v. Manhattan Beach Unified Sch. Dist.*, No. CV-05-1631 (C.D. Cal. Apr. 11, 2005); cf. Pratt, *supra* note 6, at 1488–90 (discussing the case).

18. *Gay Guardian Newspaper v. Ohoopsee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1363–64 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision).

19. See *infra* text accompanying notes 263–67.

20. See *infra* text accompanying notes 234–45.

21. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

22. See *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499–500 (4th Cir. 2005).

23. See *infra* text accompanying notes 43–62.

has addressed the problem of deducing retaliatory intent in the equal protection context. This exposes policy concerns inevitably triggered by extending speech-retaliation actions and offers guidance on how to address these concerns. A general overview of forum analysis in Part III provides the background necessary to understand the retaliatory-forum-closure action. Then, Part IV examines the disagreement between lower courts over whether a retaliatory-forum-closure action should exist. Part V explains the mechanics of a proposed test for retaliatory forum closure and applies it to previous cases, and Part VI explains how retaliatory forum closures necessarily harm plaintiffs. Finally, Part VII examines the policy reasons for extending speech-retaliation law into the public-forum context and answers objections to this extension.

### I. A FOUNDATIONAL PRINCIPLE: THE ILLEGALITY OF SPEECH RETALIATION

*[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.*

—Justice David H. Souter<sup>24</sup>

Government may not retaliate against citizens for exercising their First Amendment rights.<sup>25</sup> First Amendment protections include the right to free speech as well as the right not to be subject to adverse acts by public officials for exercising that right.<sup>26</sup> As such, a cause of action for speech retaliation is available to persons deprived of a benefit (even if the persons had no inherent right to that benefit)<sup>27</sup> or punished by the government on account of their protected expression.<sup>28</sup> The policy behind this protection is that retaliatory conduct unconstitutionally “place[s] informal restraints on speech” by producing results the

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24. Hartman v. Moore, 547 U.S. 250, 256 (2006).

25. *Id.* This is a direct extension of the First Amendment’s command that “Congress shall make no law . . . abridging the freedom of speech,” U.S. CONST. amend. I, and is enforceable against specific government officials and agencies under 42 U.S.C. § 1983 (2012).

26. *See Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (“The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. Retaliation is thus akin to an ‘unconstitutional condition’ demanded for the receipt of a government-provided benefit.” (citation omitted)); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000) (“The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right.”).

27. *See, e.g., Hill v. Lappin*, 630 F.3d 468, 473 (6th Cir. 2010) (“Even though a prisoner has no inherent constitutional right to avoid segregated housing or prison transfers, the [Bureau of Prisons] may not place the prisoner in segregated housing or transfer him to another prison as a means of retaliating against him for exercising his First Amendment rights.”).

28. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

government could not directly command.<sup>29</sup> In other words, speech retaliation is prohibited because it chills speech.<sup>30</sup>

Courts have recognized actions for speech retaliation in numerous situations.<sup>31</sup> The Supreme Court has extensively developed a five-part cause of action for speech retaliation in the public-employment context.<sup>32</sup> To begin, plaintiff employees must prove that: (1) they spoke on a matter of public concern,<sup>33</sup> (2) they suffered an adverse employment action,<sup>34</sup> and (3) their speech was a substantial or motivating factor behind the government's decision to take adverse action.<sup>35</sup> Next, the burden shifts to the government to show that either: (4) as an employer, it had a valid justification for the adverse action,<sup>36</sup> or (5) it would

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29. *Suarez Corp. Indus.*, 202 F.3d at 685 (citing *Sindermann*, 408 U.S. at 597).

30. *See* *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499–500 (4th Cir. 2005) (recognizing that cause of action for speech retaliation targets conduct that tends to chill First Amendment activity); *see also* *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) (collecting cases).

31. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (prohibiting retaliatory criminal prosecutions); *Sindermann*, 408 U.S. at 597 (explaining that retaliation principles have been applied to “denials of tax exemptions, . . . unemployment benefits, . . . welfare payments, . . . [and] denials of public employment” (citations omitted)).

32. *See* *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (describing employment-speech-retaliation test). The Supreme Court began developing speech retaliation in the public-employment context in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and has modified the retaliation doctrine numerous times since. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 144–48 (1983); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

33. What constitutes a “matter of public concern” is determined by the “content, form, and context” of the speech. *Connick*, 461 U.S. at 147. The primary consideration is whether the speech addresses “public” or “private” interests. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 708–09 (9th Cir. 2009). As such, statements to members of the public at large generally qualify as matters of public concern. *See Connick*, 461 U.S. at 146 (defining matters of public concern as speech that can be “fairly considered as relating to any matter of political, social, or other concern to the community”).

34. Courts have reached different conclusions on what constitutes an “adverse employment action.” John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539, 565–66 (2007). Employment termination, however, certainly qualifies. *See Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003); *see also* *Suppan v. Dadonna*, 203 F.3d 228, 234–35 (3d Cir. 2000) (recognizing sufficiency of retaliation in “a campaign of retaliatory harassment culminating in the retaliatory rankings” that allegedly “resulted in ‘mental anxiety, . . . stress, humiliation, loss of reputation, and sleeplessness’ as well as loss of promotion” (alteration in original)).

35. Plaintiffs can show that their speech was a substantial or motivating factor in three ways: “(1) introduce evidence that the speech and adverse action were proximate in time . . . ; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual.” *Anthoine v. N. Cent. Cnty. Consortium*, 605 F.3d 740, 750 (9th Cir. 2010) (citing *Coszalter*, 320 F.3d at 977).

36. This element implicates the *Pickering* balancing test. *See* 391 U.S. at 568. In *Pickering*, the Supreme Court held that it was necessary to consider a teacher as a member of the general public where he wrote a letter to the editor criticizing the activities of a school

have taken the adverse action even absent the protected speech.<sup>37</sup> Beyond protecting traditional government employees, retaliation actions protect government contractors,<sup>38</sup> volunteers,<sup>39</sup> and some government employees in political-patronage situations.<sup>40</sup> Although employment cases do not often examine retaliatory actions that are facially neutral, the Third Circuit Court of Appeals has recognized the validity of an action for speech retaliation by two employees who, along with seven others, were laid off when a \$1.4 million budget cut required the elimination of nine positions.<sup>41</sup> Similarly, the Second Circuit affirmed the denial of a town's summary-judgment motion when an employee of the town sued for

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board from his perspective as a teacher, because his activities were “only tangentially and insubstantially involved” with his employment. *Id.* at 574. Likewise, the Supreme Court has held that a law prohibiting federal employees from receiving honorarium for speaking or writing was unconstitutionally broad because most such activities were on topics unrelated to government employment. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 (1995).

37. The third and fifth elements together require a showing of but-for causation. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979). Thus, the question when mixed motives exist is whether the government “would have taken the adverse action if the proper reason alone had existed.” *Eng*, 552 F.3d at 1072 (quoting *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996)). This test is similar to the test for Title VII employment discrimination under 42 U.S.C. § 2000e-3 (2012), which is analyzed using the *McDonnell Douglas* tripartite burden-shifting scheme. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973). First, the plaintiff must make a prima facie case by showing “(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision.” *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065–66 (9th Cir. 2003) (citation omitted). Second, the burden shifts to the defendant “to articulate a legitimate, non-discriminatory reason for the adverse employment action.” *Id.* at 1066 (citation omitted) (internal quotation mark omitted). Third, the burden shifts back to the plaintiff to “demonstrat[e] that the reason was merely a pretext for a discriminatory motive.” *Id.* (citation omitted) (internal quotation mark omitted).

38. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *see also Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 383 (5th Cir. 2006) (denial of construction company's bid for public-works project); *Kinney v. Weaver*, 367 F.3d 337, 367 (5th Cir. 2004) (en banc) (boycott by police departments of all classes at police-officer-training academy taught by plaintiffs).

39. *See Mosely v. Bd. of Educ. of Chi.*, 434 F.3d 527, 534 (7th Cir. 2006) (student's parent prevented from serving as volunteer chairperson of school-oversight committee); *Hyland v. Wonder*, 117 F.3d 405, 407, 412 (9th Cir. 1997) (loss of volunteer juvenile-probation-worker position); *Andersen v. McCotter*, 100 F.3d 723, 727 (10th Cir. 1996) (removal from volunteer internship position).

40. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73–74 (1990); *Branti v. Finkel*, 445 U.S. 507, 519–20 (1980).

41. *Langford v. City of Atlantic City*, 235 F.3d 845, 846, 850–51 (3d Cir. 2000). *But see Lewis v. City of Boston*, 321 F.3d 207, 218–20 (1st Cir. 2003) (finding insufficient evidence of retaliatory motive for firing employee as part of a reduction in force that resulted in 31 similar employees also being fired).



speech retaliation after his position, along with four others, was eliminated from the budget.<sup>42</sup>

Courts recognize similar speech-retaliation actions in numerous other contexts.<sup>43</sup> For example, the Supreme Court has recognized an action for speech retaliation in malicious-prosecution contexts.<sup>44</sup> Likewise, circuit courts have recognized speech-retaliation actions in diverse contexts: embarrassing search and detention by police,<sup>45</sup> release of embarrassing confidential information,<sup>46</sup> surveillance by police,<sup>47</sup> harassment by police,<sup>48</sup> parking tickets,<sup>49</sup> unjustified arrest,<sup>50</sup> prisoner searches,<sup>51</sup> legal investigation,<sup>52</sup> intentional defamation,<sup>53</sup>

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42. *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 71–75 (2d Cir. 1992).

43. *See generally* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.11 (4th ed. 2003 & Supp. 2011).

44. *Hartman v. Moore*, 547 U.S. 250, 256–58 (2006). *But see* *Williams v. City of Carl Junction*, 480 F.3d 871, 877–78 (8th Cir. 2007) (declining to extend retaliatory-prosecution action to issuance of traffic citation).

45. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (“A two and one-half hour detention absent probable cause, accompanied by a search of both their vehicles and personal belongings, conducted in view of an ever-growing crowd of on-lookers, would undoubtedly deter an average law-abiding citizen . . . .”); *see also* *Swiecicki v. Delgado*, 463 F.3d 489, 500–03 (6th Cir. 2006) (arrest by police), *abrogated on other grounds by* *Wallace v. Kato*, 549 U.S. 384 (2007).

46. *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998).

47. *Anderson v. Davila*, 125 F.3d 148, 163 (3d Cir. 1997). *But cf.* *Laird v. Tatum*, 408 U.S. 1, 10 (1972) (finding no standing when complaint alleged “that the exercise of [the plaintiff’s] First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity [not specifically targeting the plaintiffs] that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose”).

48. *Bennett v. Hendrix*, 423 F.3d 1247, 1254–55 (11th Cir. 2005) (“The alleged retaliatory acts complained of here include a prolonged and organized campaign of harassment by local police officers . . . [including] instances where the defendants followed, pulled over, cited, intimidated, or otherwise harassed the plaintiffs[, and] accessed confidential government databases containing information on the plaintiffs, attempted to obtain arrest warrants against the plaintiffs without probable cause, and produced and mailed . . . flyers depicting the plaintiffs as criminals terrorizing the county.”).

49. *Garcia v. City of Trenton*, 348 F.3d 726, 728–29 (8th Cir. 2003) (issuance of four parking tickets totaling \$35 in two-month period).

50. *See, e.g., Morfin v. City of East Chicago*, 349 F.3d 989, 1005–06 (7th Cir. 2003) (unjustified arrest); *Greene v. Barber*, 310 F.3d 889, 895, 897–98 (6th Cir. 2002) (same); *DeLoach v. Bevers*, 922 F.2d 618, 620–21 (10th Cir. 1990) (arrested and bound over for trial).

51. *Reynolds-Bey v. Harris*, 428 F. App’x 493, 503 (6th Cir. 2011) (quick search of prisoner accompanied by “a racial slur and a thinly-veiled threat”).

52. *White v. Lee*, 227 F.3d 1214, 1228–29 (9th Cir. 2000) (eight-month investigation by the U.S. Department of Housing and Urban Development involving multiple interrogations, legal threats, document requests, and bad publicity).

53. *David v. Baker*, 129 F. App’x 358, 361 (9th Cir. 2005) (plaintiffs’ allegations of “intentional defamation by law enforcement officials”); *Barrett v. Harrington*, 130 F.3d 246, 264 (6th Cir. 1997) (judge’s accusations to reporters that lawyer was stalking her); *see also* *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002) (“In some cases,

withdrawal of government advertising in a newspaper,<sup>54</sup> administrative licensing,<sup>55</sup> issuing permits,<sup>56</sup> tax assessments,<sup>57</sup> educational accommodation,<sup>58</sup> land use regulation,<sup>59</sup> property condemnation,<sup>60</sup> and suits or counterclaims by government entities.<sup>61</sup> The Supreme Court has also recognized, albeit with some reticence, limited speech-retaliation actions for conduct adversely affecting prisoners.<sup>62</sup> And, under the separate but analogous doctrine of “unconstitutional conditions,” the Supreme Court has both recognized and rejected protective actions in situations involving federal funding.<sup>63</sup>

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embarrassment, humiliation and emotional distress may be sufficient to support a [First Amendment] claim.”).

54. *El Dia, Inc. v. Rossello*, 165 F.3d 106, 110 (1st Cir. 1999); *N. Miss. Commc’ns, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).

55. *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877–78 (9th Cir. 2008).

56. *Holzemer v. City of Memphis*, 621 F.3d 512, 524 (6th Cir. 2010) (delayed issuing of business permit); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91–92 (2d Cir. 2002) (denied building permit); *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989) (suspension of petroleum permits).

57. *Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007); *cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) (“To deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”).

58. *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 588–89 (6th Cir. 2008); *see also Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 882–83 (9th Cir. 2003) (termination of medical residency).

59. *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 194–95 (2d Cir. 1994) (selective non-enforcement of zoning regulations for properties adjoining plaintiffs’ land); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40–41 (1st Cir. 1992) (denial of land-use permit).

60. *Rolf v. City of San Antonio*, 77 F.3d 823, 827–28 (5th Cir. 1996) (targeting of plaintiffs’ property for condemnation).

61. *Beedle v. Wilson*, 422 F.3d 1059, 1068–71 (10th Cir. 2005) (filing of libel suit by government entity against plaintiff); *Harrison v. Springdale Water & Sewer Comm’n*, 780 F.2d 1422, 1428 (8th Cir. 1986) (filing of frivolous counterclaim); *cf. Greenwich Citizens Comm., Inc. v. Cnty. of Warren & Wash. Indus. Dev. Agency*, 77 F.3d 26, 30 (2d Cir. 1996) (implying that filing of any counterclaims would constitute adverse action).

62. *See Crawford-El v. Britton*, 523 U.S. 574, 577–80 (1998); *see also Newsom v. Norris*, 888 F.2d 371, 372–79 (6th Cir. 1989) (loss of inmates’ positions as “inmate advisors”); *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979) (prisoner transfer).

63. *Compare Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (upholding law requiring federal-funding recipients to refrain from abortion-related activities), *and Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545–46 (1983) (upholding law requiring organizations to refrain from lobbying or partisan-election activities to retain tax-exempt status), *with Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001) (striking down law that legal-service providers could not challenge constitutionality of welfare laws). *See also Elizabeth Dale, Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 185–87 (2008). Under the unconstitutional-conditions doctrine, “the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.” 16A AM. JUR. 2D *Constitutional Law* § 411 (2012).

Circuit courts in non-employment contexts have generally applied a four-part test for speech retaliation.<sup>64</sup> To establish a *prima facie* case, plaintiffs must plead and prove that: (1) they engaged in a protected First Amendment activity;<sup>65</sup> (2) the government took an action that adversely affected their First Amendment activity;<sup>66</sup> and (3) their First Amendment activity was a substantial or motivating factor for the government's action.<sup>67</sup> The burden then shifts to the government to prove that (4) it would have taken the adverse action even absent the protected speech.<sup>68</sup> This test is essentially the same as the Supreme Court's test for employment-speech retaliation.<sup>69</sup>

Courts have consistently recognized the core requirements of speech-retaliation actions since *Pickering* set out the test for employment retaliation in 1968. And, the application of speech-retaliation actions expanded slowly in the 1970s and 1980s, and more rapidly thereafter.<sup>70</sup> A unifying thread through these cases is the recognition that even seemingly trivial retaliatory actions can violate the First Amendment.<sup>71</sup> Recognizing an action for retaliatory forum closure is consistent with, and a logical continuation of, this trend of expanding application.

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64. See *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 585–86 (6th Cir. 2008); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007); see also, e.g., *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008); *Van Deelen v. Johnson*, 497 F.3d 1151, 1155–56 (10th Cir. 2007); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). Although some circuits explain this action as a three-element test, see, e.g., *Van Deelen*, 497 F.3d at 1155, this framework only includes the plaintiff's half of the *Mt. Healthy* burden-shifting test. A complete analysis also includes the defendant's half of the *Mt. Healthy* burden-shifting test, which is the fourth part of an action for speech retaliation. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

65. See *Constantine*, 411 F.3d at 499. First Amendment activities include conduct (1) intended “to convey a particularized message” and (2) whose message would in great likelihood “be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation omitted) (internal quotation marks omitted).

66. See *Constantine*, 411 F.3d at 499. Circuit courts overwhelmingly recognize that the proper standard for an “adverse affect” is whether retaliatory conduct would deter or chill a person of ordinary firmness from exercising First Amendment rights. *Bennett v. Hendrix*, 423 F.3d 1247, 1250–51 (11th Cir. 2005) (collecting cases).

67. See *Constantine*, 411 F.3d at 499. This element encompasses the first part of the *Mt. Healthy* burden-shifting scheme used in employment-speech-retaliation cases. See *CarePartners*, 545 F.3d at 877.

68. See *Jenkins*, 513 F.3d at 586. This element encompasses the second part of the *Mt. Healthy* burden-shifting scheme used in employment-speech-retaliation cases. See *CarePartners*, 545 F.3d at 877.

69. The major difference between the two tests is that this second test does not include the *Pickering* balancing considerations, which are unique to the employer–employee context. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Additionally, the second test's first prong may be slightly broader than the Supreme Court's first prong.

70. See *supra* notes 38–62.

71. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting in dicta that “the First Amendment . . . protects state employees not only from patronage dismissals but also from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech

## II. EQUAL PROTECTION CASES: A GUIDE TO PROHIBITING DISCRIMINATORY INTENT

*[A] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose.*

—Justice Lewis F. Powell<sup>72</sup>

Because speech-retaliation actions require proof of discriminatory intent, the Supreme Court's treatment of motive under the Equal Protection Clause is instructive. Equal protection actions require proof of both discriminatory effect and discriminatory purpose.<sup>73</sup> Although the Supreme Court has not directly answered the question of whether a facially neutral law can violate equal protection rights on the basis of discriminatory purpose alone, it has suggested that some discriminatory effect is required.<sup>74</sup> In *Palmer v. Thompson*, which built upon the reasoning of *United States v. O'Brien*,<sup>75</sup> the Supreme Court noted hazards associated with relying solely on the motivations of legislative sponsors.<sup>76</sup> First, discovering the single or collective motivation lying behind legislative enactments is "extremely difficult."<sup>77</sup> Second, invalidating a law that the legislature could simply pass again for a valid "different reason" approaches futility.<sup>78</sup> Third, inefficiency could result by requiring courts to scrutinize the motives behind every

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rights" (second alteration in original) (citation omitted)); *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) (explaining that First Amendment rights are violated "both where the government fines a person a penny . . . and where it withholds the grant of a penny" to punish or suppress protected speech); *see also O'Connor v. City of Newark*, 440 F.3d 125, 127–28 (3d Cir. 2006) ("First Amendment retaliation claims are always individually actionable, even when relatively minor. . . . [The] threshold is very low . . . [and] a cause of action is supplied by all but truly de minimis violations." (citation omitted)); *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994) (noting in dicta that "the degree of retaliation is immaterial. . . . [E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures."); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (Posner, J.) (noting that "a campaign of petty harassments," such as ridiculing the plaintiff for bringing a birthday cake to the office on the occasion of another employee's birthday, "though trivial in detail may [be] substantial in gross").

72. *Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982).

73. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239–41 (1976) (upholding employment test with discriminatory effect because no discriminatory purpose was present).

74. *CHEMERINSKY*, *supra* note 4, at 793. *But see Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) ("Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." (citations omitted)).

75. 391 U.S. 367 (1968).

76. *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971); *see also O'Brien*, 391 U.S. at 383–84 (stating that the "Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," because Congress could simply reenact the same law "in its exact form if the same or another legislator made a 'wiser' speech about it").

77. *Palmer*, 403 U.S. at 224; *see also O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

78. *Palmer*, 403 U.S. at 225.

legislative decision.<sup>79</sup> Fourth, government agencies might be “locked in” to providing services.<sup>80</sup>

Subsequently, the Court has largely ignored these warnings, even going so far as to note that “[t]o the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary.”<sup>81</sup> Several other decisions might also suggest that a discriminatory purpose can violate the Constitution even if a disproportionate effect is not shown,<sup>82</sup> and four members of the Court cited this language in the First Amendment context for the analogous proposition that “[t]he adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.”<sup>83</sup>

Binding or not, *Palmer* raises important considerations for actions that require proof of retaliatory intent. These concerns merit a point-by-point response.<sup>84</sup> First, the difficulty of proving discriminatory intent is no reason to restrict relief in situations where legislative intent is clear.<sup>85</sup> Whether legislative intent can be determined should be a case-by-case inquiry, not an inflexible rule. Second, retaliatory-forum-closure actions are not futile because monetary damages may be awarded to compensate a speaker for injury even if the forum remains closed.<sup>86</sup> Further, retaliatory-forum-closure actions serve a prophylactic function, motivating legislators to act correctly in the future. Third, inefficiency does not

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79. *Id.* at 228 (Burger, C.J., concurring).

80. *Id.* at 230 (Blackmun, J., concurring).

81. *Washington v. Davis*, 426 U.S. 229, 244 n.11 (1976); *see also* *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1528–29 (11th Cir. 1993) (examining cases departing from *Palmer*); *cf. Goldberg v. Whitman*, 743 F. Supp. 943, 948–53 (D. Conn. 1990) (collecting and comparing cases disagreeing on the relevance of legislative intent), *aff’d sub nom. Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2d Cir. 1992).

82. *See Crawford v. Bd. of Educ.*, 458 U.S. 527, 544 (1982) (“Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides an important starting point.” (citation omitted) (internal quotation marks omitted)); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982) (“[P]urposeful discrimination is the condition that offends the Constitution. . . . Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations.” (citations omitted) (internal quotation marks omitted)).

83. *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3017 (2010) (Alito, J., dissenting).

84. For a more theoretical analysis of investigating discriminatory motives, see generally *Monroe*, *supra* note 6, at 1010–15.

85. *See, e.g., Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 225, 230–31 (1964) (holding that a county school system’s decision to avoid a desegregation order by closing all public schools and then funding segregated private schools was unconstitutional).

86. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . .” (footnote omitted)).

justify restricting speech.<sup>87</sup> Even in *Palmer*, the Court admitted that citizens need not “forgo their constitutional rights because officials fear public hostility or desire to save money.”<sup>88</sup> Fourth, as discussed in detail below,<sup>89</sup> an action for retaliatory forum closure need not lock officials into maintaining a forum indefinitely. Emergencies may still justify forum closure, and officials can likely avoid legal problems by waiting until a controversy has died down before closing a forum.<sup>90</sup>

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court reaffirmed that violating the Equal Protection Clause requires discriminatory intent<sup>91</sup> and explained how to prove discriminatory motive without triggering the concerns expressed in *Palmer*.<sup>92</sup> Evidence tending to show discriminatory intent includes: (1) the broader historical context, (2) the specific sequence of events leading up to the challenged decision, and (3) departures from the normal procedural sequence.<sup>93</sup> The Court has also recognized that intent is often made clear by “the give and take of the situation,”<sup>94</sup> and it has applied the *Mt. Healthy* burden-shifting analysis in such circumstances.<sup>95</sup> These methods of

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87. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701–02 (1992) (Kennedy, J., concurring). The Court has generally disregarded concerns of inefficiency to protect fundamental constitutional rights. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (requiring police to inform arrested persons of their constitutional rights before interrogation). *But see Korematsu v. United States*, 323 U.S. 214, 217–19 (1944) (deferring to claims of military necessity in upholding the racially discriminatory internment of Japanese Americans during World War II).

88. *Palmer v. Thompson*, 403 U.S. 217, 226 (1971).

89. See *infra* text accompanying notes 195–201 (discussing leeway in extraordinary circumstances); *infra* text accompanying notes 213–16 (discussing an example of acceptable forum closure).

90. Even a multi-year wait would not be unreasonable because government officials are able to avoid problematic situations before they ever occur by simply designing forum regulations more carefully. See *infra* text accompanying notes 294–98. Ironically, closing a forum immediately after an offensive speaker has spoken—in order to prevent further offensive speech—deprives other speakers of any chance to respond and ensures that “the disfavored speaker ha[s] the last word in the debate.” *Monroe*, *supra* note 6, at 1016.

91. 429 U.S. 252, 265, 270–71 (1977) (upholding village’s special use permit denial, which had a discriminatory effect, absent proof of a discriminatory purpose). This emphasis on the importance of discriminatory motive was actually a reaffirmation of a long-recognized principle in equal protection cases. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.”).

92. *Vill. of Arlington Heights*, 429 U.S. at 267.

93. *Id.*; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (applying similar evidence of motive under the Free Exercise Clause, including “contemporaneous statements made by members of the decisionmaking body”).

94. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 n.24 (1979) (quoting *Cramer v. United States*, 325 U.S. 1, 33 (1945)).

95. See *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (“Once racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have

demonstrating discriminatory intent are also useful in an action for retaliatory forum closure.<sup>96</sup>

### III. FORUM-ANALYSIS OVERVIEW: PROTECTING SPEECH ON GOVERNMENT PROPERTY

*[U]se of the streets and public places [for speech] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.*

—Justice Owen Josephus Roberts<sup>97</sup>

The Court has long applied public-forum analysis to protect speech on government property.<sup>98</sup> Although disagreement remains, courts have utilized five general categories relating to First Amendment forum analysis: traditional public forums, designated public forums, limited public forums, nonpublic forums, and areas that are not forums at all (i.e., where the government alone is the speaker).<sup>99</sup>

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been enacted without this factor.” (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); see also *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993) (distinguishing *Palmer* by noting that Supreme Court cases “suggest that action by any branch of government may be invalid if the challenger shows the action was partly motivated by purposes offensive to the Free Speech Clause and the defender cannot prove that illicit motivation was not in fact the cause of the action”).

96. See *infra* text accompanying notes 177–93.

97. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

98. See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992). This protection is vitally important because “[t]here is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (footnote omitted) (internal quotation marks omitted). Further, protecting the right to speak in specific locations is essential. Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587, 2588 (2007) (“[W]here we speak is often just as important as what we say . . . . To convey a message of dissent is to convey no message at all if it is spoken where no other persons—much less the targeted government officials—can hear or see the message.”).

99. The Supreme Court referenced all of these categories except the nonpublic forum in its most recent significant analysis of this issue. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–70 (2009). However, the Court mentioned nonpublic forums in a decision only two years earlier. See *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007). Post-*Summum*, the categorical scheme remains unclear, see *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011), and circuit courts have taken different approaches. For example, the Sixth Circuit Court of Appeals has discussed all five categories. See *Miller v. City of Cincinnati*, 622 F.3d 524, 534–37 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2875 (2011). The Second, Seventh, Ninth, and Tenth Circuits separate traditional public forums, designated public forums, limited public forums, and nonpublic forums. See *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012); *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1134 (9th Cir. 2011); *Zalaski v. City of Bridgeport Police Dep’t*, 613 F.3d 336, 341–42 (2d Cir. 2010); *Ill. Dunesland Pres. Soc’y v. Ill. Dep’t of Natural Res.*, 584 F.3d 719, 722–23 (7th Cir. 2009). The D.C. Circuit equates limited public forums and designated public forums. See *Oberwetter v. Hilliard*, 639 F.3d 545, 551–52 (D.C. Cir. 2011). And, the Eighth Circuit categorizes limited public forums as a type of

Traditional public forums include “places which by long tradition or by government fiat have been devoted to assembly and debate,” such as streets or parks.<sup>100</sup> In these forums, content-based speech restrictions are allowed only if they are narrowly tailored and advance a compelling state interest.<sup>101</sup> Designated or limited public forums include “public property which the state has opened for use by the public as a place for expressive activity,”<sup>102</sup> such as university meeting facilities,<sup>103</sup> municipal theaters,<sup>104</sup> and school-board meetings.<sup>105</sup> Speech-restriction analysis in a designated forum is the same as the traditional public forum, while content in limited forums can be limited to the forum’s purpose as long as such restrictions are viewpoint neutral and reasonable.<sup>106</sup> Nonpublic forums include public property “which is not by tradition or designation a forum for public communication,”<sup>107</sup> such as an airport terminal.<sup>108</sup> In nonpublic forums, content-based speech restrictions must be reasonable and viewpoint neutral.<sup>109</sup> Finally, areas that are “not fora at all”<sup>110</sup> are present “[w]hen the purpose of a particular piece of government property is for the government to speak on it . . . either itself or through its agents.”<sup>111</sup> For example, public-television-broadcasting stations are not forums.<sup>112</sup> Limits on speech restrictions in such areas are similar to or less than nonpublic forums.<sup>113</sup>

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nonpublic forum. See *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 334–35 (8th Cir. 2011), *cert denied*, 132 S. Ct. 592.

100. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

101. See, e.g., *Sumnum*, 555 U.S. at 469.

102. *Perry Educ. Ass’n*, 460 U.S. at 45.

103. *Widmar v. Vincent*, 454 U.S. 263, 264–67 (1981).

104. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

105. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Pub. Emp’t Relations Comm’n*, 429 U.S. 167, 174–76 (1976).

106. See EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 420 (2001). Although this is an oversimplification, for the purposes of this Note, there is no need to analyze conflicting circuit approaches, which alternatively conflate or distinguish designated and limited forums. See *supra* note 99.

107. *Perry Educ. Ass’n*, 460 U.S. at 46.

108. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679–80 (1992).

109. See *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007).

110. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

111. VOLOKH, *supra* note 106, at 421. The “nonforum” category is not a traditional part of forum analysis, but it received a passing mention from the Supreme Court in *Forbes* as well as support from some lower courts and academics. See, e.g., Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 786–806 (2009); Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 655–56 (2010).

112. See *Forbes*, 523 U.S. at 675.

113. Supreme Court precedent is not entirely clear in this area. See, e.g., *id.* at 677–78 (“Other government properties are either nonpublic fora or not fora at all. The government can restrict access to a nonpublic forum as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s view.” (citations omitted)); see also VOLOKH, *supra* note 106, at 421



Time, place, or manner speech restrictions are valid regardless of forum type, provided they are at least “reasonable” and “justified without reference to the content of the regulated speech.”<sup>114</sup> In public forums, such content-neutral restrictions must be narrowly tailored, advance a significant government interest, and leave open “ample alternative channels for communication of the information.”<sup>115</sup> Importantly, the Supreme Court has expressed “particular concern” with content-neutral speech restrictions that “foreclose an entire medium of expression.”<sup>116</sup>

#### IV. FRACTURED CASE LAW: THE DISAGREEMENT OVER RETALIATORY FORUM CLOSURE

*Once the state has created a forum, it may not . . . close the forum solely because it disagrees with the messages being communicated in it.*

—Judge Juan R. Torruella<sup>117</sup>

*[A] governmental body [may have public-policy reasons] to close a hybrid forum . . . in a speech-suppressive manner to avoid reasonably anticipatable disruption and attendant litigation.*

—Judge B. Avant Edenfield<sup>118</sup>

##### A. Forum Closure Generally

Although courts disagree on whether forums can be closed for retaliatory reasons,<sup>119</sup> the government is not required to open a forum<sup>120</sup> or “indefinitely retain” an existing forum.<sup>121</sup> Forums may be closed by “selling the property,

(noting that the government may discriminate based on viewpoint when acting as a speaker in nonforums).

114. *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *VOLOKH*, *supra* note 106, at 354–57, 419–21.

115. *Ward*, 491 U.S. at 791.

116. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (rejecting an ordinance that banned all residential signs that did not fall into one of ten codified exemptions).

117. *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989).

118. *Gay Guardian Newspaper v. Ohoopsee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1375 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision).

119. *See supra* text accompanying notes 117–18; *see also supra* note 5.

120. *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 50 (D. Me. 2002) (“[T]he First Amendment does not prevent a city from deciding not to open a public access channel in the first place or to close it later.”).

121. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983); *see also Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004) (“The government may limit the [designated or limited] forum to certain groups or subjects . . . and may close the fora whenever it wants.”); *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993) (“[W]e do not hold that a school district can never close a limited open forum once such a forum has been created . . . East Brunswick remains free to wipe out all of its noncurriculum related student groups and totally close its forum.”).

changing its physical character, or changing its principal use.”<sup>122</sup> Otherwise, the government could be locked into maintaining a forum indefinitely.<sup>123</sup> To close a forum, the government must change the “objective physical character” of the forum’s use and bear any resulting costs.<sup>124</sup> Likewise, a forum may be converted into a different, more restrictive type of forum.<sup>125</sup>

Although not entirely clear, the divided Court in *Capitol Square Review & Advisory Board v. Pinette* apparently collected eight votes implicitly supporting the proposition that a ban on certain types of displays within a forum—a partial forum closure—may be considered a content-neutral restriction even if the government’s motives are possibly non-neutral.<sup>126</sup> Although at least two lower courts have reached similar conclusions,<sup>127</sup> *Capitol Square* addressed the issue only in dicta.<sup>128</sup> And, despite relying on this dicta, the Seventh Circuit noted that its reading was only “suggested” in *Capitol Square*.<sup>129</sup> Thus, notwithstanding *Capitol Square*, there remains a difficult question as to “whether general First Amendment principles . . . prohibit a governmental entity from closing down a

122. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring); *accord Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1227–28 (D. Utah 2004) (holding that government may sell property that is a traditional public forum to a private entity, thereby eliminating the forum), *aff’d*, 425 F.3d 1249 (10th Cir. 2005).

123. *Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 699–700 (Kennedy, J., concurring).

124. *Id.* at 700.

125. For example, the Tenth Circuit Court of Appeals upheld a city’s decision to convert a traditional public forum to a nonpublic forum. *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1287–88 (10th Cir. 1999).

126. *See* 515 U.S. 753, 761 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) (noting that, in a public forum, the state “may impose reasonable, content-neutral time, place, and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such)”; *id.* at 783–84 (Souter, J., joined by O’Connor and Breyer, JJ., concurring in part and concurring in the judgment) (“[T]he State of Ohio could ban all unattended private displays in Capitol Square if it so desired. The fact that the capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government’s own unattended displays, such as statues, does not disable the State from closing the square to all privately owned, unattended structures.” (citation omitted)); *id.* at 802–03 (Stevens, J., dissenting) (“[T]he Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum[.]”).

127. *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996) (“[T]he Supreme Court suggested in *Capitol Square* that content-neutral regulations are free from motive inquires even in public forum cases.”); *Storti v. Se. Transp. Auth.*, No. Civ.A. 99-2159, 1999 WL 729266, at \*7–10 (E.D. Pa. Sept. 10, 1999) (upholding prohibition on leafleting in public-transit area as a valid nonpublic-forum restriction or alternatively as a valid time-place-manner restriction despite apparent targeting of specific speakers), *aff’d*, 265 F.3d 1056 (3d Cir. 2001) (unpublished table decision).

128. *Capitol Square*’s dicta “should not be interpreted too broadly and should be read in conjunction with the Court’s consistently firm opposition to viewpoint discrimination.” Pratt, *supra* note 6, at 1499 n.86.

129. *Grossbaum*, 100 F.3d at 1298.

public forum in direct retaliation against a particular group's expressive message."<sup>130</sup>

Several principles limit the government's ability to close forums. Consistency demands that the government close forums only in a manner that "conform[s] to the general requirements of the first amendment."<sup>131</sup> In *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, the Supreme Court held that even in nonpublic forums, which afford speakers only minimal protection, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."<sup>132</sup> Furthermore, even if reasonable grounds exist for limiting access to a forum, such grounds "will not save a regulation that is in reality a facade for viewpoint-based discrimination."<sup>133</sup> Finally, although later cases are inconsistent on this point,<sup>134</sup> the Court in *Cornelius* noted that avoiding controversy is an invalid reason for restricting speech in public forums.<sup>135</sup> These significant restrictions on forum closure provide a supportive foundation for an action for retaliatory forum closure.

### ***B. Cases Allowing Retaliatory Forum Closure***

Only one court—the U.S. District Court for the Southern District of Georgia—has extensively analyzed the issue of retaliatory closures of public

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130. 1 SMOLLA, *supra* note 5, § 8:51; *see also* Monroe, *supra* note 6, at 997 n.78 (arguing that *Grossbaum*'s reliance on *Capitol Square* was misguided); Pratt, *supra* note 6, at 1499 n.86 (contending that *Capitol Square* "does not stand for the proposition that the government may foreclose activity in a traditional public forum in retaliation against a speaker's viewpoint").

131. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1804 (1987); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.").

132. 473 U.S. 788, 806 (1985).

133. *Id.* at 811. This is similar to the Court's reasoning under the Free Exercise Clause. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.").

134. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 681 (1998) (recognizing and implicitly approving the conclusion of some government actors that "the safe course is to avoid controversy" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994))); Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 99 (2004) (noting that forum closure may be used as a last resort to prevent controversial speech).

135. *Cornelius*, 473 U.S. at 811. Specifically, the Court referred to the invalidity of avoiding controversies, such as disrupting fundraising and the workplace as well as hindering the effectiveness of the forum. *Id.* Because of their different purposes, this applies to public forums but not to nonpublic forums. *Id.*

forums and still allowed them.<sup>136</sup> In *Gay Guardian Newspaper v. Ohoopee Regional Library System*, a public library created a limited public forum by setting up a table in its lobby, which the library expressly designated for use by community members who could disseminate free literature by leaving it on the table.<sup>137</sup> The library received several complaints after a patron left several copies of the *Gay Guardian*, “a homosexual-rights advocating publication”<sup>138</sup> that was neither obscene nor “explicitly erotic.”<sup>139</sup> Seeking to avoid further controversy surrounding the publication, the library partly closed the already-limited forum by changing its policy to only allow dissemination of government-produced literature via the lobby table.<sup>140</sup> The court assumed, for the sake of argument, that a retaliatory motive was present, but determined that no action for retaliatory forum closure existed.<sup>141</sup>

The court in *Gay Guardian Newspaper* partly based its decision on policy considerations. First, the court highlighted the probable dilemma that governments could be “paralyzed” by potential retaliation claims when making new policies.<sup>142</sup> Second, the court argued that it was reasonable for government officials to opt for forum closure to avoid costs associated with conflicts and lawsuits.<sup>143</sup> Third, the court argued that libraries require different speech treatment.<sup>144</sup> Ultimately, the court ruled against the newspaper because it believed that the forum closure affected all groups equally.<sup>145</sup>

In the nonpublic-forum context, the Seventh Circuit Court of Appeals in *Grossbaum v. Indianapolis-Marion County Building Authority* similarly upheld a state’s decision to close a forum to prevent a Jewish group from placing a menorah in a government building during the celebration of Hanukkah.<sup>146</sup> The court held that a “prospective, generally applicable rule” is not subject to a retaliation challenge, even if the rule resulted in the closure of a nonpublic forum.<sup>147</sup> The

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136. See *Gay Guardian Newspaper v. Ohoopee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1373–79 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision).

137. 235 F. Supp. 2d at 1363–64.

138. *Id.* at 1363.

139. *Id.* at 1366.

140. *Id.* at 1363–64. Notably, the library maintained a willingness to help patrons in finding the *Gay Guardian* online. *Id.* at 1364.

141. *Id.* at 1375.

142. *Id.* at 1375–76 (citing *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1295 (7th Cir. 1996)).

143. *Id.* at 1376.

144. *Id.* at 1378. The unique status of public libraries in free speech analysis goes beyond the scope of this Note. See generally *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1250–65 (3d Cir. 1992) (discussing libraries’ First Amendment status).

145. *Gay Guardian Newspaper*, 235 F. Supp. 2d at 1377.

146. 100 F.3d at 1299 (holding that “content-neutral speech regulations in nonpublic fora pass constitutional muster regardless of motive”); cf. *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1114 n.10 (S.D. Ind. 2005) (citing *Grossbaum* approvingly in dicta), *rev’d on other grounds sub nom.* *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584 (7th Cir. 2007).

147. *Grossbaum*, 100 F.3d at 1295.

court, however, limited its holding by explicitly declining to consider the relevance of improper motive in the “harder” situations of traditional or designated public-forum closures.<sup>148</sup>

At least seven cases have implied similar results without extensive analysis.<sup>149</sup> First, in a fact situation similar to *Grossbaum*, the Eleventh Circuit noted in dicta that fear that a religious display may violate the Establishment Clause can justify closing a public forum.<sup>150</sup> The Third<sup>151</sup> and Eighth<sup>152</sup> Circuits have implicitly agreed with this conclusion in dicta. Likewise, the Ninth Circuit upheld a school’s decision to close a nonpublic forum—an advertisement space on a baseball-field fence—to prevent the display of an advertisement containing the Ten Commandments,<sup>153</sup> and dismissed as moot a challenge by Santa Monica Food Not Bombs against a discriminatory city street-banner ordinance after the city closed the forum by prohibiting all private street banners.<sup>154</sup> The U.S. District Court for the District of Columbia allowed a transit authority to remove an entire class of advertisements to prevent advertisements stating: “Marijuana Laws Waste

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148. *Id.* at 1299 n.11.

149. One commentator has suggested that dicta in two other cases that recognized that the government can close a forum whenever it wants implied a similar conclusion. *See Pratt, supra* note 6, at 1499–500 (citing *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004); *United States v. Bjerke*, 796 F.2d 643, 647 (3d Cir. 1986)). This implication appears to be incorrect because, on their face, such statements speak only to the *timing* of a closure, not the motive. Even if the government can close a forum whenever it wants, “it does not necessarily follow that the government may do so whatever its motivation.” *Monroe, supra* note 6, at 992.

150. *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (en banc) (noting in passing that “[i]f Georgia fears that it would violate the Establishment Clause by allowing the display [of a menorah in the state capitol rotunda], it can avoid the perception that it is endorsing a religion by . . . closing the forum altogether”).

151. *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993) (recognizing in dicta that a school “remain[ed] free to wipe out all of its noncurriculum related student groups and totally close its forum. . . . [This option] is the burden that Congress imposed on school districts that do not wish to allow religious and other student groups equal access to their facilities.”).

152. *Straights & Gays for Equal v. Osseo Area Sch.–Dist. No. 279*, 471 F.3d 908, 913 (8th Cir. 2006) (noting that, despite its holding, the school remained “free to wipe out all of its noncurriculum related student groups and totally close its forum” (quoting *Pope*, 12 F.3d at 1254)).

153. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999) (“Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion. . . . [It] does not constitute viewpoint discrimination.”).

154. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031–32 (9th Cir. 2006) (“As Food Not Bombs recognizes, the February 24, 2004 amendments to the street banner ordinance render the original challenge to that ordinance . . . no longer viable. By precluding all private parties from putting up street banners and limiting such ‘bannering’ to the City itself, the Council has now closed the designated public forum in which appellants sought to exercise their rights.”).

Billions of Taxpayer Dollars to Lock Up Non-Violent Americans.”<sup>155</sup> The U.S. District Court for the District of New Hampshire upheld a school’s adoption of a new “no props” yearbook-picture policy to prevent publication of a senior picture featuring trapshooting gear and a shotgun,<sup>156</sup> and the U.S. District Court for the Eastern District of Virginia, although finding viewpoint discrimination in a school’s decision to remove religiously themed bricks from a brick-paver fundraiser, echoed in dicta the sentiments of the Eleventh and Ninth Circuits as to forum closure.<sup>157</sup>

### *C. Cases Prohibiting Retaliatory Forum Closure*

In contrast, at least eight cases have held or implied that retaliatory forum closures are forbidden. The U.S. District Court for the Western District of Missouri decided the strongest case supporting a cause of action for retaliatory forum closure.<sup>158</sup> In *Missouri Knights of the Ku Klux Klan v. Kansas City, Missouri*, a local Klan chapter applied to run a weekly show on the community public access channel that espoused a “racialist” belief that “ethnological races should not mix.”<sup>159</sup> In a less-than-subtle attempt to skirt public-forum protections, the city council and the cable company worked out a plan whereby the city council amended the cable-franchise contract to allow the cable company to delete the public access channel.<sup>160</sup> Following the scheme, the cable company then opened a new channel that would accommodate former public access users while utilizing the company’s editorial control to prevent “extremist” programming.<sup>161</sup> Unimpressed by this creative ploy, the court held that “[w]hether the exclusion is accomplished by individual censorship or elimination of the forum is

155. *ACLU v. Mineta*, 319 F. Supp. 2d 69, 75, 83 n.4 (D.D.C. 2004) (“The question at issue here, however, is . . . whether [the transit authority] can close itself as a designated public forum and thus constitutionally refuse to accept the advertisements in question by eliminating entire categories of advertisements. The answer is that it can.”).

156. *Douglass ex rel. Douglass v. Londonderry Sch. Bd.*, 372 F. Supp. 2d 203, 204–12 (D.N.H. 2005); *see also* *Douglass v. Londonderry Sch. Bd.*, 413 F. Supp. 2d 1 (D.N.H. 2005) (reaffirming earlier decision).

157. *Demmon v. Loudoun Cnty. Pub. Sch.*, 342 F. Supp. 2d 474, 479 (E.D. Va. 2004) (“Closing a forum is a permissible solution to problems reconciling the Establishment and Free Speech clauses of the First Amendment. The government has an inherent right to control its property, which includes the right to close a previously open forum.” (citation omitted) (quoting *DiLoreto*, 196 F.3d at 970) (internal quotation marks omitted)).

158. *See* *Mo. Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1352–53 (W.D. Mo. 1989).

159. *Id.* at 1348. As Justice Frankfurter wisely observed, “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). No matter how great the temptation, society must not create an exception to free speech protection for objectionable beliefs. Rather, as Milton urged, “Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?” JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND* 41 (NuVision Publ’n’s 2010) (1644); *see also* *infra* note 253 and accompanying text.

160. *Mo. Knights*, 723 F. Supp. at 1349–50.

161. *Id.* at 1350.

inconsequential; the result is the same. A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment.”<sup>162</sup>

In 2002, the U.S. District Court for the District of Maine implicitly affirmed this reasoning in a similar case involving the temporary closure of a cable public access channel.<sup>163</sup> The First Circuit has maintained that although government entities are free to close public forums if acting in good faith, closures are invalid if they are conducted “merely as a ruse for impermissible viewpoint discrimination.”<sup>164</sup> The Fourth Circuit reached a similar conclusion in a case where a state college ended funding of a student newspaper because it disapproved of the newspaper’s editorial content.<sup>165</sup> Also, the Ninth Circuit held that closing a small part of a public forum—a national forest—was justified, despite the admitted result of blocking environmentalist protestors, because it was motivated by safety concerns, which constituted “a valid rather than a disguised impermissible purpose.”<sup>166</sup> Similarly, the U.S. District Court for the Middle District of Pennsylvania held that closing the Commonwealth House gallery to all visitors to

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162. *Id.* at 1352.

163. *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 51 (D. Me. 2002) (noting in dicta that “[c]ertainly if [the government] were to shut down the public access channel temporarily so as to stifle discussion of a particular current controversy, with plans to reopen the channel later after the controversy had subsided, or so as to stifle the particular speech of this plaintiff, that shutdown would be speaker and viewpoint censorship and would violate the First Amendment”); *see also* Carl E. Brody, Jr., *Regulating Public Access Programming Without Violating First Amendment Rights*, FLA. B.J., Dec. 2003, at 55, 57 (“Overall, the complete elimination of a channel based on discontent with the nature of programming is inconsistent with our current constitutional standards.”).

164. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (“[E]ven if MBTA’s previous intent was to maintain a designated public forum, it would be free to decide *in good faith* to close the forum at any time. . . . [I]f the MBTA revised a guideline merely as a ruse for impermissible viewpoint discrimination, that would be found unconstitutional regardless of the type of forum created.”); *accord* *Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) (noting in dicta that “[o]nce the state has created a forum, it may not . . . close the forum solely because it disagrees with the messages being communicated in it”); *see also* Steven G. Gey, *Contracting Away Rights: A Comment On Daniel Farber’s “Another View of the Quagmire,”* 33 FLA. ST. U. L. REV. 953, 959 (2006) (“[T]he government . . . may not close [a] forum in response to speech that the government does not favor.” (citing *Student Gov’t Ass’n*, 868 F.2d at 480)).

165. *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (“[A] college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.”).

166. *United States v. Griefen*, 200 F.3d 1256, 1262 (9th Cir. 2000); *accord* *Menotti v. City of Seattle*, 409 F.3d 1113, 1128–30 (9th Cir. 2005). In *Griefen*, the government was addressing the very real safety threat posed by protestor attempts to halt road construction by (1) digging ditches and holes (one of which was filled with human waste) to damage a forest-service access road; and (2) illegally erecting barricades and structures in the path of the planned construction. 200 F.3d at 1258–59.

prevent a particular group of protestors was unconstitutional;<sup>167</sup> the U.S. District Court for the Eastern District of Michigan held that a city ordinance restricting pedestrian and parking access in a cul-de-sac, which was passed to prevent anti-abortion protesters from disrupting the operations of an abortion clinic, was invalid because it was not content-neutral;<sup>168</sup> and the U.S. District Court for the District of Columbia noted that the “government may close a public forum that it has created by designation . . . so long as the reasons for closure are not content-based.”<sup>169</sup> These cases provide a foundation for building an action for retaliatory forum closure.

#### *D. Analogous Cases*

Several courts have evaluated allegations of retaliatory forum partial-closures as time-place-manner restrictions.<sup>170</sup> For example, the U.S. District Court for the District of Minnesota held that a temporary sidewalk closure in response to a major abortion-protest event was a content-neutral time-place-manner restriction validated by considerable safety concerns.<sup>171</sup> Also, in a case from the U.S. District Court for the Western District of Pennsylvania, a request to run a show dealing with minority-rights issues on a public access channel was denied when the forum was shut down and reopened in a different fashion.<sup>172</sup> There, the court analyzed only whether the forum closure was a content-neutral speech restriction.<sup>173</sup> Although not directly on point, these analogous cases help guide the formation of a cause of action for retaliatory forum closure and demonstrate ways that courts have avoided the issue of retaliatory forum closure.

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167. *ACT-UP v. Walp*, 755 F. Supp. 1281, 1290 (M.D. Pa. 1991) (“The closing of the gallery of the house chamber, which has consistently been open to all who would care to sit and listen, in order to deny access to a particular group is not only in all probability unconstitutional, but also cuts against the grain of the notions of a free and open society embodied in the first amendment.”).

168. *Thomason v. Jernigan*, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991). “Note that, since viewpoint discrimination is a form of content discrimination, a finding that content-discriminatory closure of a designated public forum is unconstitutional necessarily indicates that viewpoint-discriminatory closure is also unconstitutional.” *Monroe*, *supra* note 6, at 992.

169. *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 73 (D.D.C. 2000).

170. *See, e.g., Storti v. Se. Transp. Auth.*, No. Civ.A. 99-2159, 1999 WL 729266, at \*7–10 (E.D. Pa. Sept. 10, 1999) (upholding prohibition on leafleting in public-transit area as a valid nonpublic-forum restriction or alternatively as a valid time-place-manner restriction despite apparent targeting of specific speakers), *aff’d*, 265 F.3d 1056 (3d Cir. 2001) (unpublished table decision).

171. *Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1325–29 (D. Minn. 1995).

172. *Britton v. City of Erie*, 933 F. Supp. 1261, 1264–66 (W.D. Pa. 1995), *aff’d*, 100 F.3d 946 (3d Cir. 1996) (unpublished table decision).

173. *Id.* at 1268–69.



## V. RETALIATORY FORUM CLOSURE: THE CAUSE OF ACTION

*[First Amendment] doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.*

—Justice Elena Kagan<sup>174</sup>

### A. Proposed Test

Consistent with foundational First Amendment principles,<sup>175</sup> the speech-retaliation and public-forum doctrines lay the substantive foundation for a cause of action for retaliatory forum closure. Although masquerading as neutral, retaliatory forum closures are merely a creative way to conceal viewpoint discrimination, which is prohibited in all types of forums.<sup>176</sup> And, the *Mt. Healthy* burden-shifting scheme,<sup>177</sup> as applied in the extensive body of case law dealing with speech retaliation in non-employment contexts,<sup>178</sup> provides the structure for a four-part test for exposing retaliatory forum closures.<sup>179</sup> First, the plaintiff must establish a prima facie case by proving three elements: (1) the plaintiff exercised or intended to exercise First Amendment speech rights in a forum; (2) the government adversely affected the plaintiff's speech by closing the forum; and (3) the plaintiff's speech or viewpoint was a substantial or motivating factor for the government's decision to close the forum. Next, the burden shifts to the government to prove that (4) it would have closed the forum even absent the protected speech.

This test warrants further deliberation.<sup>180</sup> The first prong—"plaintiff exercised or intended to exercise First Amendment speech rights in a forum"—encompasses two sub-elements: (1)(A) the plaintiff must have participated, or intended to participate,<sup>181</sup> in protected First Amendment speech, which can include

174. Elena Kagan, *Private Speech, Public Purpose: The Rule of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). Although this quote predates Kagan's appointment to the Supreme Court, it remains true today.

175. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); see also Kagan, *supra* note 174, at 414 (arguing that First Amendment doctrine focuses on eliminating illicit motives).

176. See *supra* text accompanying notes 98–113; see also *Monroe*, *supra* note 6, at 999 (arguing that "closing a public forum for viewpoint-discriminatory reasons should always be impermissible").

177. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

178. See *supra* text accompanying notes 43–62.

179. See *supra* text accompanying notes 64–68.

180. For a helpful overview of the mechanics of an action for retaliatory forum closure from a slightly different perspective, see Pratt, *supra* note 6, at 1503–10.

181. Because improper motives are equally problematic whether they are anticipatory or responsive, this test encompasses persons who have both (1) previously spoken in the forum and (2) intended to speak in the forum but were prevented when the government closed the forum first.

expressive activities,<sup>182</sup> and (1)(B) the speech must occur, or have been intended to occur, in a forum, whether traditional, designated, limited, or nonpublic.<sup>183</sup> Notably, although public-forum analysis provides lower standards of protection for nonpublic forums than for traditional and designated public forums, distinguishing between these categories in an action for retaliatory forum closure is unnecessary because any retaliatory government action that adversely affects speech is, in and of itself, a violation of the First Amendment as both unlawful retaliation<sup>184</sup> and viewpoint discrimination.<sup>185</sup>

The next prong—“the government adversely affected the plaintiff’s speech by closing the forum”—also includes two sub-elements: (2)(A) the government must have fully or partly<sup>186</sup> closed a forum,<sup>187</sup> and (2)(B) the government’s action must have adversely affected the plaintiff’s speech.<sup>188</sup> Thus, as a partial forum closure under (2)(A), even time-place-manner restrictions are actionable if the plaintiff can prove that they were enacted for retaliatory

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182. See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (discussing categories of unprotected expression); *Texas v. Johnson*, 491 U.S. 397, 404–05 (1989) (evaluating protected speech expression based on whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it” (alterations in original) (citation omitted)). Due to the unique considerations present in the context of government employment, public employees speaking in their *public* capacity as government officials would still be analyzed under the *Pickering* balancing test regardless of their presence in a public forum. See *supra* notes 32–37 and accompanying text. Additionally, unattended displays might not be protected after the Supreme Court’s decision in *Capitol Square Review & Advisory Board v. Pinette*. See *supra* note 126 and accompanying text.

183. Thus, although nonpublic forums are included, nonforums—areas where government is the only speaker—are not. See *generally supra* notes 107–13.

184. See *supra* notes 25–31 and accompanying text.

185. See *infra* Part VII.B.

186. Partial forum closure is sufficient to prove retaliatory forum closure. Compare *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 801 (1996) (Kennedy, J., concurring in part and dissenting in part) (“If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every exclusion could be recast as a limitation.”), with *id.* at 742 (plurality opinion) (declining to decide “whether the Government’s viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum”). See also *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45, 51 (D. Me. 2002) (noting in dicta that a temporary closure for retaliatory reasons would be unconstitutional); cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (“Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”).

187. Although there is a strong argument that government inaction in the face of hostility from private parties (constituting a sort of *de facto* forum closure) should be included, this question is beyond the scope of this Note.

188. Circuit courts overwhelmingly recognize that the proper standard for an “adverse affect” is whether retaliatory conduct would deter or chill a person of ordinary firmness from exercising First Amendment rights. *Bennett v. Hendrix*, 423 F.3d 1247, 1250–51 (11th Cir. 2005) (collecting cases).

reasons.<sup>189</sup> The problematic nature of even partial forum closures is aptly illustrated by Tennessee's 2011 enactment of curfew hours for Nashville's Legislative Plaza to block Occupy Nashville protesters from protesting overnight.<sup>190</sup> In fact, because preventing overnight protesting, although facially neutral, had a de facto effect *only* on Occupy Nashville, this example shows that partial forum closures can be *more* problematic than complete forum closures because they are more likely to disproportionately affect targeted speakers. Under (2)(B), all forum closures are sufficiently adverse to deter or chill a person of ordinary firmness from speaking because, among other reasons, forcing plaintiffs to discontinue their speech by closing a forum will completely eliminate the possibility that plaintiffs may ever speak in the forum again.<sup>191</sup>

The third prong—"the plaintiff's speech or viewpoint was a substantial or motivating factor for the government's decision to close the forum"—also includes two sub-elements: (3)(A) the government must have had some retaliatory intent, and (3)(B) the government's retaliatory intent must have been a substantial or at least a motivating factor in its decision to close the forum.<sup>192</sup>

Finally, when the burden of proof shifts to the government, the fourth prong—the government "would have closed the forum even absent the protected speech"—includes only one consideration: whether the plaintiff's speech was the but-for cause of the government's decision to close the forum. In practice, the third and fourth prongs are merely two sides of the same motive coin. Although deducing the motivations behind government actions is certainly not easy, courts have significant experience dealing with such issues.<sup>193</sup> As with other retaliation actions,<sup>194</sup> proof of intent will almost certainly become a battleground in legal fights over retaliatory forum closure.

This two-pronged motive analysis initially appears to create a problem. In situations where the government has a strong, pressing interest in closing a forum, could the interest be so closely related to a particular speaker's expression that, were the government to close the forum on this basis, the government would fail the fourth prong of the retaliatory-forum-closure test? Because the government cannot anticipate every possible problem that could require forum restrictions before it happens, the government must have some avenue for closing or limiting forums based on unexpected events. The fourth prong addresses this issue, however, by providing what is essentially an extraordinary-circumstances escape hatch in the rare situations that the government may have a pressing need to, for

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189. See *Thomason v. Jernigan*, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991).

190. See *supra* note 13.

191. For a more thorough discussion of this issue, see *infra* Part VI.

192. This merely incorporates the *Mt. Healthy* balancing test. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

193. See *infra* text accompanying notes 282–88.

194. See, e.g., *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1294 (7th Cir. 1996) ("Claims of retaliation admittedly almost always turn on the issue of motive."); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 457 (2008) ("[T]he fundamental question for most discrimination claims is that of intent.").

example, protect citizen safety.<sup>195</sup> Non-pressing interests, however, such as small cost increases, do not qualify.<sup>196</sup> The government will usually have apparently valid reasons to close or limit a forum—reasons that could easily disguise retaliatory intentions. As such, the challenge is to ensure that this narrow, carefully limited allowance does not become an exception that grows to define the rule and renders an action for retaliatory forum closure impotent.

The essence of this prong is a test for pretext, which is fact intensive.<sup>197</sup> The government may take action to limit or close a forum in response to (i.e., retaliating against) a speaker if the government can show that it would have taken the same action in response to another speaker, similarly situated but with a different viewpoint, who had brought the same problem to its attention. In other words, the government must show that even though the speaker's expression motivated the forum closure, the speaker's viewpoint itself was irrelevant to the decision.<sup>198</sup> Thus, in the forum-closure context, the fourth prong is also similar to transferring the *Pickering* balancing test from the government-as-employer context to the government-as-landlord context.<sup>199</sup> The contexts, however, are not directly analogous because the *Pickering* test,<sup>200</sup> if directly applied in the forum context, would be too large of an exception. The determinative question is whether a government action is part of a neutral scheme that inadvertently affects the plaintiff or whether the government action is part of a scheme targeted at the plaintiff that merely appears facially neutral.<sup>201</sup>

### ***B. Application to Previous Cases***

Perhaps the best way to illustrate how this retaliatory-forum-closure test would work is by applying it to past controversies. Unsurprisingly, evaluating the facts of *Gay Guardian Newspaper*<sup>202</sup> under the retaliatory-forum-closure test changes the result of the case. There, the plaintiff met the first prong because distributing newspapers is a protected form of speech, and the library's lobby table was clearly designated as a limited public forum.<sup>203</sup> The second prong is also met because the library's exclusion of all private speakers was a forum closure, and the

195. See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.”).

196. See, e.g., *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) (“[P]ublic fora cannot be put off limits to first amendment activity solely to spare public expense.” (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939))).

197. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

198. This principle is loosely derived from the *Mt. Healthy* “but-for” test. See *supra* note 37.

199. See *supra* note 36.

200. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

201. See *supra* note 37.

202. See *Gay Guardian Newspaper v. Ohoospee Reg'l Library Sys.*, 235 F. Supp. 2d 1362, 1363–64 (S.D. Ga. 2002), *aff'd*, 90 F. App'x 386 (11th Cir. 2003) (unpublished table decision).

203. *Id.* at 1368, 1370.

plaintiff was no longer able to distribute newspapers there.<sup>204</sup> The third prong is met as the library only acted upon complaints about the plaintiff's speech.<sup>205</sup> Finally, because the library admitted that it closed the forum to prevent the potential controversy surrounding plaintiff's speech, and because the library did not proffer another motivation separate and distinct from excluding plaintiff's speech,<sup>206</sup> the government cannot rebut the plaintiff's prima facie case. Importantly, the library could have still closed the forum on the basis of non-speech motivations like safety—if the library lobby was often dangerously overcrowded—or repair—if the library lobby required temporary renovation. Still, controversy alone, even if combined with increased costs, does not justify a forum closure.<sup>207</sup> In essence, in situations similar to *Gay Guardian Newspaper*, where the government faces potential controversy for speech in a forum, the retaliatory-forum-closure action requires the government to bear the burden of protecting controversial speech, not private speakers.

The more difficult fact patterns in *Chabad-Lubavitch of Georgia*<sup>208</sup> and *Grossbaum*,<sup>209</sup> although similar, part ways when examined under the retaliatory-forum-closure test. Only *Grossbaum*'s result changes under this framework. In these cases, the government believed it risked an Establishment Clause violation due to the religious content of the speech involved.<sup>210</sup> Although the first and second prongs of the retaliatory-forum-closure test are clearly met, proving causation under the third and fourth prongs requires some consideration. As such, the question becomes whether the risk of an Establishment Clause violation is a reason independent of the plaintiff's speech—in which case the government might carry its burden on the fourth prong<sup>211</sup>—or whether the risk is too intertwined with the plaintiff's speech to be considered a separate motivation—in which case the plaintiff would win. Because the government presented a facially valid justification for its actions in each case,<sup>212</sup> these are precisely the types of situations where courts must scrutinize the government's actions for pretext.

In *Chabad-Lubavitch*, the plaintiff had previously displayed an unattended Hanukkah exhibit in the state capitol building, but its second request, a

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204. *Id.* at 1363–64.

205. *Id.*

206. *See id.*

207. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985).

208. *See Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1385–86 (11th Cir. 1993) (en banc).

209. *See Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290–91 (7th Cir. 1996).

210. *See id.*; *Chabad-Lubavitch of Ga.*, 5 F.3d at 1385–86.

211. *Compare Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 832, 834–35 (1995), with *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 40 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816.

212. *See Grossbaum*, 100 F.3d at 1290–91; *Chabad-Lubavitch of Ga.*, 5 F.3d at 1385–86.

year later, was denied by the state.<sup>213</sup> The only evidence presented in the court's explanation of the facts was that the government denied the menorah display solely on the basis of a new Attorney General's opinion concluding that the display violated the Establishment Clause.<sup>214</sup> Without any evidence that this opinion was requested to provide a pretext for excluding religious displays or that the government only referenced the opinion to hide retaliatory motivations,<sup>215</sup> the plaintiff would fail to meet the third prong of the retaliatory-forum-closure test. If Georgia had closed the forum *at this point*, this would be an example of a legitimate forum closure in response to new, unanticipated information.

In contrast, if Georgia had closed the forum *after* the Eleventh Circuit's en banc decision in *Chabad-Lubavitch* that there was no Establishment Clause problem, the case would likely reach the opposite conclusion.<sup>216</sup> Similarly, the facts presented by the court in *Grossbaum*, although limited, may be sufficient to show retaliatory forum closure.<sup>217</sup> There, the forum closure occurred less than two months after the conclusion of the plaintiff's first litigation against the same government board for banning private *religious* displays in the lobby of a joint city-county building.<sup>218</sup> Although the government claimed that the new rule banning *all* private displays was passed to protect the flow of pedestrian traffic, past displays had not interfered with traffic flow.<sup>219</sup> Additionally, limited deposition testimony indicated a retaliatory motive.<sup>220</sup> These facts, although not enough to guarantee a plaintiff victory, are sufficient to meet the third prong—because preventing Grossbaum's speech was a motivating factor in the government's decision to close the forum—and take the case to the jury on the fourth prong—to decide whether the plaintiff's speech was the but-for cause of the government's decision to close the forum.

A clearer satisfaction of the fourth prong's requirements can be seen in the facts of *ACT-UP*.<sup>221</sup> There, the court reached the same result that is produced by the retaliatory-forum-closure test after the government admitted that it closed the visitors' gallery of the State House of Representatives during the Governor's State of the Commonwealth speech to exclude ACT-UP demonstrators from promoting their campaign for AIDS awareness during the speech.<sup>222</sup> Thus, the

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213. *Chabad-Lubavitch of Ga.*, 5 F.3d at 1385–86.

214. *Id.* at 1385–87.

215. *See id.*

216. Similarly, if a forum is closed for a single nonretaliatory reason (e.g., Georgia's fear of an Establishment Clause violation in *Chabad-Lubavitch*) and a court later rejects that reason, the forum must be reopened. Absent a different and legitimate reason for closing the forum, failure to reopen the forum would be analytically indistinguishable from closing a forum based on retaliatory motives.

217. *See Grossbaum*, 100 F.3d at 1290–91.

218. *Id.* at 1290.

219. *Id.* at 1290–91. In fact, the government made no claim that the plaintiff's menorah display had interfered with traffic flow during the eight years it was displayed before the forum closure. *See id.*

220. *Id.* at 1291.

221. *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991).

222. *Id.*

Commonwealth acted out of fear that the speech may have been disrupted.<sup>223</sup> This forum closure satisfies all four prongs of the test because the government response was targeted specifically at a particular group. These examples illustrate the value of drawing a line so as to expand free speech protections without unduly burdening the government.

**VI. COMMUNITY SCORN AND OTHER PROBLEMS:  
THE SPEECH-CHILLING CONSEQUENCES  
OF RETALIATORY FORUM CLOSURE**

*[C]onditions on public benefits, . . . which dampen the exercise generally of First Amendment rights, [are prohibited,] however slight the inducement to the individual to forsake those rights.*

—Justice William J. Brennan, Jr.<sup>224</sup>

Often the best predictor of “the unconstitutional effects of a regulation is the purpose behind its enactment.”<sup>225</sup> Nevertheless, a major issue raised when extending speech-retaliation analysis to a new area is whether a plaintiff can meet the “adverse effect” requirement of the second prong of the retaliation test.<sup>226</sup> In the forum-closure context, an important question is whether closing a forum actually deprives plaintiffs of a benefit sufficient to be actionable. This concern has two parts. First, although courts have applied speech-retaliation actions to the denial of many types of benefits,<sup>227</sup> rarely have these benefit denials been in facially neutral situations.<sup>228</sup> Second, these benefit denials have only rarely dealt with denials of intangible<sup>229</sup> or minimal benefits,<sup>230</sup> rather than more substantial, tangible benefits like employment or finances.<sup>231</sup>

Beginning with the first facet of facially neutral benefit denial, arguably a forum closure that equally denies access to all citizens cannot be considered denial of a constitutionally protected benefit.<sup>232</sup> Otherwise, any government action might trigger a retaliation claim. Still, the government’s decision to deny a benefit to

223. See *id.* at 1290.

224. *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality opinion).

225. *Monroe*, *supra* note 6, at 1008.

226. See *supra* text accompanying notes 38–62.

227. See *supra* text accompanying notes 38–62.

228. For two exceptions to this trend, see *supra* text accompanying notes 41–42.

229. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting in dicta that First Amendment protections extend to “even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights” (alteration in original) (citation omitted)).

230. See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (embarrassing detention and search by police); *Swiecicki v. Delgado*, 463 F.3d 489, 500–03 (6th Cir. 2006) (arrest by police), *abrogated on other grounds by Wallace v. Kato*, 549 U.S. 384 (2007).

231. See *supra* text accompanying notes 38–62.

232. See *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1295 (7th Cir. 1996); *Gay Guardian Newspaper v. Ohoopsee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1377 (S.D. Ga. 2002), *aff’d*, 90 F. App’x 386 (11th Cir. 2003) (unpublished table decision).

several people besides the plaintiff does not diminish the fact that the plaintiff was denied a benefit.<sup>233</sup> Benefits denied to many or even all citizens and benefits denied to only several people are conceptually indistinguishable. Moreover, although ostensibly neutral in effect, retaliatory forum closure actually results in an unequal burden because those who had been expressing themselves in the forum before its closure are no longer able to do so, while others who are “equally” prohibited from expression within the former forum are only deprived of the possibility of not utilizing the forum in the future. There is a difference in degree between the concrete harm to the former “actual” speaker and the theoretical harm to the latter “potential” speaker.

Regardless, plaintiffs in retaliatory-forum-closure situations are uniquely subject to significant reputational harm; the Third and Sixth Circuits recognize a cause of action for such damages.<sup>234</sup> By closing a forum to prevent disfavored speech, the government communicates that the disfavored speaker’s actions caused the forum closure.<sup>235</sup> The government also signals official condemnation of the targeted speech,<sup>236</sup> which disproportionately harms disfavored speakers by forcing them to face the scorn of the other speakers now excluded from the forum. For example, this consequence was articulated in 1969 by Fifth Circuit Judge John Minor Wisdom,<sup>237</sup> and subsequently quoted by Justice Douglas in his *Palmer v. Thompson* dissent:

The closing of the City’s pools has . . . taught Jackson’s Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time *engendering further animosity from a white*

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233. The Second and Third Circuits have both recognized actions for retaliation despite facially neutral layoffs of multiple people besides the plaintiff. *See Langford v. City of Atlantic City*, 235 F.3d 845, 846, 850–51 (3d Cir. 2000); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 71–75 (2d Cir. 1992).

234. *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998) (release of embarrassing confidential information); *Anderson v. Davila*, 125 F.3d 148, 153 (3d Cir. 1997) (surveillance by police); *see also Ctr. for Bio-Ethical Reform*, 477 F.3d at 822 (embarrassing detention and seizure).

235. *See Reply to Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction: Memorandum of Points and Authorities at 11–12*, *Burrows v. Manhattan Beach Unified Sch. Dist.*, No. CV-05-1631 (C.D. Cal. Apr. 11, 2005).

236. *Cf. Palmer v. Thompson*, 403 U.S. 217, 266 (1971) (White, J., dissenting) (“[B]y closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility . . .”).

237. *Palmer v. Thompson*, 419 F.2d 1222, 1236 (5th Cir. 1969) (en banc) (Wisdom, J., dissenting), *aff’d*, 403 U.S. 217.



*community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.*<sup>238</sup>

Similar reasoning is equally persuasive in the forum-closure context.

This “community scorn” phenomenon is also vividly illustrated by the experience of Constance McMillen, a lesbian high school student who was threatened with exclusion from her prom because she wanted to attend with her girlfriend and wear a tuxedo.<sup>239</sup> After a federal district court ruled that the First Amendment would protect Constance’s expression,<sup>240</sup> the school district cancelled the prom rather than allow her to attend.<sup>241</sup> Two private proms were eventually held, but Constance was relegated to a decoy prom attended by only seven people.<sup>242</sup> Constance’s peers blamed her for the controversy and disparaged her with comments such as: “Heard you got the other prom canceled. Good job.”; “You don’t even deserve to go to our school.”; “Are you going to ruin graduation too?”; and “I don’t know why you come to this school because no one likes your gay ass anyways.”<sup>243</sup> She asked to transfer out of the school due to the hostile environment,<sup>244</sup> and the school paid damages and attorneys’ fees pursuant to a negotiated binding judgment.<sup>245</sup> The ever-present possibility of similarly spiteful

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238. *Palmer*, 403 U.S. at 235 (Douglas, J., dissenting) (emphasis added) (citation omitted) (internal quotation mark omitted). Justice Brennan articulated a similar rationale in a dissent one year earlier:

[U]nder the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility. [We have previously] said, ‘Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.’ In this context what is true of public schools is true of public parks. When it is as starkly clear as it is in this case that a public facility would remain open but for the constitutional command that it be operated on a non-segregated basis, the closing of that facility conveys an unambiguous message of community involvement in racial discrimination. Its closing for the sole and unmistakable purpose of avoiding desegregation, like its operation as a segregated park, ‘generates (in Negroes) a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’

*Evans v. Abney*, 396 U.S. 435, 453–54 (1970) (Brennan, J., dissenting) (citations omitted).

239. See Press Release, Am. Civil Liberties Union, ACLU Sues Mississippi School That Canceled Prom Rather Than Let Lesbian Couple Attend (Mar. 11, 2010), available at <http://www.aclu.org/lgbt-rights/aclu-sues-mississippi-school-canceled-prom-rather-let-lesbian-couple-attend>.

240. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010).

241. First Amended Complaint at 11, *McMillen*, 702 F. Supp. 2d 699 (No. 1:10CV61-D-D).

242. *Id.* at 12–13.

243. *Id.* at 11.

244. *Id.* at 13.

245. See Press Release, Am. Civil Liberties Union, Mississippi School Agrees to Revise Policy and Pay Damages to Lesbian Teenager Denied Chance to Attend Prom (July

community reactions would be enough to dissuade even persons of extraordinary firmness from speaking.<sup>246</sup>

Turning to the second facet of minimal or intangible benefit denial, arguably denying the opportunity to speak in a public forum is merely a de minimis denial. As such, although the right to speak is itself protected, it may not be violated in retaliatory-forum-closure situations. For example, if the closed forum is a sidewalk where the plaintiff had previously protested, must the plaintiff prove that she was planning to use the forum in the future to have been denied a benefit? Is denying the plaintiff the opportunity to use the forum in the future sufficient even if she had no plans to use it? Stretching the situation even further, is the mere fact that the government acted based on illicit motives sufficient on its own, even if the plaintiff was planning not to use the forum again?

Forum closures are much more than a de minimis benefit denial because forcing plaintiffs to discontinue their speech by closing a forum will completely eliminate the possibility that plaintiffs may ever speak in the forum again. The right to free speech is at least as significant as temporary detention and search by police, which several circuit courts have held to be more than de minimis.<sup>247</sup> Because the Supreme Court has also held that even loss of a minor benefit for a short period is actionable,<sup>248</sup> an indefinite denial of the fundamental right to speak in a forum results in a sufficiently appreciable benefit loss to plaintiffs. Likewise, retaliatory forum closure will probably discourage plaintiffs from speaking in similar venues in the future.<sup>249</sup> Of course, as just discussed,<sup>250</sup> plaintiffs in retaliatory-forum-closure situations also suffer significant reputational harm far exceeding a de minimis threshold, and this is similar in many respects to the Sixth Circuit's holdings that actionable injuries include release of embarrassing confidential information,<sup>251</sup> as well as temporary detention and search leading to

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20, 2010), available at <http://www.aclu.org/lgbt-rights/mississippi-school-agrees-reverse-policy-and-pay-damages-lesbian-teenager-denied-chance-a>.

246. Speakers also face the injury of self-censorship because, upon suspicion that a forum will be closed to prevent their speech, the most certain path to avoid the indignity of community scorn is to not speak at all. Without an action for retaliatory forum closure, speakers are left in the unenviable position of choosing to either refrain from speaking altogether—thus suffering the injury of self-censorship but avoiding potential community scorn—or speaking out despite potential retaliatory forum closure—thus risking community scorn but avoiding the injury of self-censorship.

247. See *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (embarrassing detention and search by police); *Swiecicki v. Delgado*, 463 F.3d 489, 500–03 (6th Cir. 2006) (arrest by police), *abrogated on other grounds by* *Wallace v. Kato*, 549 U.S. 384 (2007).

248. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *id.* at 359 n.13 (explaining that First Amendment rights are violated “both where the government fines a person a penny . . . and where it withholds the grant of a penny” to punish or suppress protected speech).

249. *Cf. Lamont v. Postmaster Gen.*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (“[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.”).

250. See *supra* text accompanying notes 234–45.

251. *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998).

embarrassment.<sup>252</sup> These concerns, however, are not the only reasons for prohibiting retaliatory forum closures.

## VII. POLICY IMPLICATIONS: FURTHER RATIONALE FOR PROHIBITING RETALIATORY FORUM CLOSURE

*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.*

—Justice Byron Raymond White<sup>253</sup>

Policy considerations favor an action for retaliatory forum closure.<sup>254</sup>

### A. First Amendment Policy Generally

One of the primary purposes of First Amendment law is to discover and prevent improperly motivated governmental actions.<sup>255</sup> The First Amendment's speech protections were intended to protect all manner of free thinking—not just ideas most would agree with (which are already protected by virtue of their

252. See *Ctr. for Bio-Ethical Reform*, 477 F.3d at 822 (“A two and one-half hour detention absent probable cause, accompanied by a search of both their vehicles and personal belongings, conducted in view of an ever-growing crowd of on-lookers, would undoubtedly deter an average law-abiding citizen . . .”).

253. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); accord *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

254. Considering the current case law on retaliation generally, see *supra* Part I, and on forum closure specifically, see *supra* Part IV, the First and Sixth Circuits appear to be the most receptive to recognizing an action for retaliatory forum closure. Three decisions in the First Circuit have already implicitly accepted retaliatory forum closure, see *supra* notes 163–64, and retaliation actions have been accepted in analogous contexts, see *supra* notes 41, 54, 59, 62. But see *supra* note 156 (district court implicitly rejecting action for retaliatory forum closure). The Sixth Circuit has also accepted retaliation actions in analogous contexts, see *supra* notes 45–46, 56, 58, 62, as has one helpful federal district court case, see *supra* note 168. The Seventh, Ninth, and Eleventh Circuits appear to be less receptive because each has decisions at least implicitly rejecting an action for retaliatory forum closure. See *supra* note 146 (Seventh Circuit); *supra* notes 136, 150 (Eleventh Circuit); *supra* notes 153–54 (Ninth Circuit). But see *supra* note 166 (Ninth Circuit implicitly recognizing that retaliatory forum closure is unlawful). Regardless, the fact that, to date, this Note marks the third note that has reached the same basic conclusion on this issue—with none opposed—lends support to advocates of such an action in every circuit. See *Monroe*, *supra* note 6; *Pratt*, *supra* note 6.

255. See *Kagan*, *supra* note 174, at 414 (“[First Amendment] doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. . . . [It is] a kind of motive-hunting.”); Jed Rubinfeld, *The First Amendment's Purpose*, 53 *STAN. L. REV.* 767, 775–78 (2001); cf. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

majority status), but freedom for ideas that most find contemptible.<sup>256</sup> Unfortunately, First Amendment protections have “little value to speakers if the government, although required to afford the protections while a forum is held open, always retain[s] a trump card to disregard them by shutting down the forum entirely.”<sup>257</sup>

The Founders “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; [and] that public discussion is a political duty.”<sup>258</sup> Today, freedom of speech is almost universally recognized as a fundamental human right.<sup>259</sup> Although free speech is often inconvenient for non-speakers and the government, inconvenience alone does not free the government from its obligation to protect speech.<sup>260</sup> Rather, censorship can be justified “only when the censors are better shielded against error than the censored,”<sup>261</sup> which is rarely the case. An action for retaliatory forum closure is consistent with this strong preference for open and rigorous debate.

### ***B. Additional Policy Support***

Four major policy implications support an action for retaliatory forum closure.<sup>262</sup> First and most importantly, an action for retaliatory forum closure ensures viewpoint neutrality and equality of treatment between speakers over time. Viewpoint discrimination, which takes place when the government favors one speaker over another, egregiously violates the First Amendment.<sup>263</sup> In situations of

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256. *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946).

257. Pratt, *supra* note 6, at 1510.

258. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

259. See, e.g., International Covenant on Civil and Political Rights (“ICCPR”) art. 19(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Of the 193 United Nations member states, 167 are parties to the ICCPR, the most notable exception being China. See *International Covenant on Civil and Political Rights*, UNITED NATIONS, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last modified Aug. 10, 2011). Although not parties to the ICCPR, several Arab states recognize the right to freedom of speech as parties to the Arab Charter on Human Rights. See League of Arab States, Revised Arab Charter on Human Rights art. 32, May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005).

260. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701–02 (1992) (Kennedy, J., concurring).

261. *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 443 (1950) (Jackson, J., concurring in part and dissenting in part); see also *City of Paducah v. Inv. Entm’t, Inc.*, 791 F.2d 463, 466 (6th Cir. 1986) (“[Censorship] subject[s] all freedom of sentiment to the prejudices of one man, and make[s] him the arbitrary and infallible judge of all controverted points of learning, religion, and government.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*151–52)).

262. For further analysis of the theoretical basis for prohibiting retaliatory forum closure, see generally Monroe, *supra* note 6, at 999–1010.

263. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

retaliatory forum closure, the government is doing just that. Without a remedy for retaliatory forum closure, the government can open a forum and keep it open as long as no disfavored speakers make use of the forum. Then, when a disfavored speaker begins to use the forum, the government can close the forum. Although, if considered in isolation, the specific act of closing a forum might not be problematic in this regard, considering the entire life of the forum shows a disproportionate availability based on the viewpoint of the speaker.<sup>264</sup> In effect, this constitutes viewpoint discrimination when measured over time—discrimination chronologically rather than concurrently.<sup>265</sup> Similar to how government actors might try to disguise illicit legislative motives by framing speech-regulation statutes in broad terms,<sup>266</sup> this type of de facto discrimination should be discouraged.<sup>267</sup>

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264. See Monroe, *supra* note 6, at 1002–03 (“[T]he impact, over time and across forums, will be substantially greater on those expressing the disfavored viewpoints that motivated the forum closure. Forums in which only favored viewpoints are expressed will tend to remain open, while forums in which disfavored viewpoints surface or predominate will be closed at a disproportionate rate.”). This argument is analogous to the Supreme Court decision striking down Vermont’s campaign-contribution limits as too low because, despite equally restraining both incumbents and challengers, the low limits favored incumbents who had the added advantage of previous spending. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 248–49 (2006) (plurality opinion) (“[C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders . . . .”); *id.* at 286–87 (Souter, J., dissenting) (“The plurality thinks that . . . the low contribution limits threaten the ability of challengers to run effective races against incumbents. . . . The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break.”).

265. See Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENT. 287, 302 (1994) (“Laws are unconstitutional because of their predicted effects over an indefinite period of time, not because of their effects during any given time slice.”). This is analogous to courts’ characterization of ripeness and mootness as viewing standing on a timeline. See *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (“[B]ecause the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.”); see also *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (recognizing that mootness is “the doctrine of standing set in a time frame” (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)) (internal quotation mark omitted)).

266. See Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 34 (2003) (“[L]awmakers may draft laws in broad terms precisely to *obscure* an illicit discriminatory legislative purpose.”).

267. “[I]t is difficult to see how closing a forum altogether is constitutionally preferable to restricting viewpoints within it.” Monroe, *supra* note 6, at 1003. Unfortunately, “[p]rohibiting viewpoint discrimination within a forum, while permitting viewpoint-discriminatory closure of a forum” sets up “a rule of law that would encourage government actors to silence everyone in order to silence a few.” *Id.* at 1016–17.

A second interest is the preference for case law to develop consistently and for various lines of cases to complement one another.<sup>268</sup> This interest is rooted in the principle of stare decisis<sup>269</sup> and is necessary to preserve predictability for current and potential litigants alike.<sup>270</sup> Beyond creating confusion, logical inconsistencies between diverging or conflicting lines of cases erode respect for the law in all sectors of society.<sup>271</sup> Here, an action for retaliatory forum closure would resolve the logical divergence between the public-forum and retaliation branches of First Amendment jurisprudence in a manner consistent with the policy behind the First Amendment<sup>272</sup> and 42 U.S.C. § 1983.<sup>273</sup>

The third interest is that an action for retaliatory forum closure will help prevent the chilling of free speech,<sup>274</sup> which will, in turn, give the public greater opportunity to interact with and learn from both minority and majority viewpoints. The importance of preserving vigorous debate within the marketplace of ideas cannot be overstated.<sup>275</sup> Similarly, promoting informed political dialogue is essential,<sup>276</sup> and “the right to receive information and ideas” is an inherent corollary to free speech.<sup>277</sup> Simply put, more speech is better and less speech is worse.<sup>278</sup> An action for retaliatory forum closure is beneficial because it will result in more speech.

268. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 391 (1983) (“[T]he same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time.”); *see also* *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” (emphasis omitted)); *Conway v. Town of Wilton*, 680 A.2d 242, 246 (Conn. 1996) (“[D]ecisionmaking consistency itself has normative value.”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) (discussing the value of predictability).

269. *Ark. Elec.*, 461 U.S. at 391.

270. *See Payne*, 501 U.S. at 827.

271. *See Ark. Elec.*, 461 U.S. at 391.

272. *See Mo. Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989); *see also supra* notes 25–31.

273. *See Pratt, supra* note 6, at 1511–12.

274. *See supra* Part VI.

275. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

276. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).

277. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) (internal quotation mark omitted); *see also Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (collecting cases); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“[The First Amendment] embraces the right to distribute literature and necessarily protects the right to receive it.” (citation omitted)).

278. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 911 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”).

The fourth interest is that an action for retaliatory forum closure places the burden for protecting speech on the party most likely to provide adequate protection. Notably, advocates of unpopular minority positions are in the worst position to protect their own speech.<sup>279</sup> Yet, the First Amendment protects speech that is heretical to societal norms precisely because it is unpopular.<sup>280</sup> Consistent with this policy, retaliatory forum closure shifts the burden for protecting speech onto the party best positioned to provide protection—the government. Combined, these four policy interests tilt the scales strongly in favor of an action for retaliatory forum closure.

### C. Answering the Objections

The two major policy objections to an action for retaliatory forum closure do not outweigh the interests in maintaining such an action. First, as *Palmer v. Thompson* cautions, retaliatory motivations are often difficult to prove.<sup>281</sup> This difficulty might increase the burden on overloaded court systems and force government entities to face frequent and lengthy litigation, plus attendant costs. If plaintiffs cannot prove illicit motivations, a cause of action for retaliatory forum closure would be all but pointless. This objection, however, is far from fatal. Although undeniable challenges are associated with determining motivations, courts regularly face these challenges in cases dealing with various types of illicit motivations: speech retaliation,<sup>282</sup> Title VII discrimination,<sup>283</sup> Title VII retaliation,<sup>284</sup> Equal Protection,<sup>285</sup> the Establishment Clause,<sup>286</sup> the Free Exercise

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279. See *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982) (“Where the majority rules, there is usually no need for constitutional protection of the right to express views that are considered proper and reasonable by the majority. The real purpose of the First Amendment is to protect also the expression of sentiments that the majority finds unacceptable or even unthinkable.”).

280. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The ACLU eloquently explains its defense of unpopular speakers like the KKK as follows:

[I]f only popular ideas were protected, we wouldn't need a First Amendment. History teaches that the first target of government repression is never the last. If we do not come to the defense of the free speech rights of the most unpopular among us, even if their views are antithetical to the very freedom the First Amendment stands for, then no one's liberty will be secure. In that sense, all First Amendment rights are “indivisible.”

*Freedom of Expression*, AM. CIVIL LIBERTIES UNION (Oct. 31, 2005), <http://www.aclu.org/free-speech/freedom-expression>.

281. See 403 U.S. 217, 224–26 (1971); *id.* at 228 (Burger, C.J., concurring); *id.* at 230 (Black, J., concurring); *supra* text accompanying notes 76–80.

282. See *supra* Part I. See generally SCHWARTZ, *supra* note 43, § 3.11.

283. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993).

284. See, e.g., *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1239–42 (10th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 357–60 (7th Cir. 2002).

285. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977); see also *supra* text accompanying notes 81–95.

286. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Clause,<sup>287</sup> and the dormant Commerce Clause.<sup>288</sup> This extensive experience should suffice to substantially mitigate this concern. Also, the benefits of successfully rooting out improper motive outweigh the challenges of doing so.

The second policy objection is that a cause of action for retaliatory forum closure eliminates an easy avenue—sometimes perhaps the *only* avenue—for good-faith government officials to avoid difficult situations. Assuming that a hypothetical governmental official has no improper motivations, the threat of an action for retaliatory forum closure may, for example, place the official in the unenviable position of choosing between a suit for retaliatory forum closure if the forum is closed and a suit for violating the Establishment Clause if the forum is maintained.<sup>289</sup> Although such dilemmas might hinder government efficiency somewhat and marginally increase litigation, the fundamental rights at stake justify bearing these burdens.

First of all, the test's allowance for relief to the government in extraordinary circumstances, as discussed above,<sup>290</sup> would eliminate many problems. However, this allowance does not eliminate this concern entirely. Unavoidably, courts must sometimes choose between either protecting speech while burdening government or protecting government while burdening speech. Supreme Court precedent favors the former option.<sup>291</sup> Even putting aside constitutional requirements, preferring speech protection above cost increases is beneficial over the long run for several policy reasons. First, encouraging free speech may result in long-term cost savings to the government by making government agencies and officers more accountable to the people.<sup>292</sup> Second, basic freedoms like free speech are more important than relatively minor financial considerations because the entire purpose of government collection and use of funds is to safeguard and promote such rights.<sup>293</sup>

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287. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

288. See, e.g., *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 675–79 (1981).

289. See *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290–91 (7th Cir. 1996); cf. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681 (1998) (“Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all.”).

290. See *supra* text accompanying notes 195–201.

291. See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring) (arguing that although free speech is often inconvenient, “[i]nconvenience does not absolve the government of its obligation to tolerate speech”); *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) (“[P]ublic fora cannot be put off limits to first amendment activity solely to spare public expense.” (citing *Schneider v. New Jersey*, 308 U.S. 147 (1939))).

292. Cf. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).

293. See U.S. CONST. art. I, § 8, cl. 1 (“Congress shall have Power To lay and collect Taxes . . . [to] provide for the . . . general Welfare.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[All people are] endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted . . . .”); *Fed. Election Comm’n v. Mass.*



Any remaining concerns about burdens on the government are mitigated by the government's own fault in risking retaliatory-forum-closure actions in the first place. When government officials are acting in good faith, retaliatory forum closures only appear necessary because the government made a mistake in designing or maintaining the forum's regulations.<sup>294</sup> Although expecting the government to anticipate all future problems is unrealistic, holding the government accountable for failure to take adequate precautions is not. More importantly, speakers should not be punished for mistakes made by the government.

A brief analogy helps demonstrate this argument. In contract interpretation, the rule of *contra proferentem* cautions that "a contract should be construed most strongly against the drafter."<sup>295</sup> This rule's policy rationale is fairly straightforward:

Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.<sup>296</sup>

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Citizens for Life, Inc., 479 U.S. 238, 264 (1986) ("[F]reedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937))); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (recognizing the First Amendment's "preferred position" in the constitutional scheme); JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 131, at 84 (J.W. Gough ed., Basil Blackwell Press 1946) (1690) (arguing that the purpose of government is to preserve liberty and property); MILTON, *supra* note 159, at 40 ("Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."). The near-universal recognition of free speech as a fundamental human right is further proof of this hierarchy. *See supra* note 259.

294. For example, even assuming for the sake of argument that Tennessee acted without retaliatory motive when enacting new curfew and permit rules that partially closed Nashville's Legislative Plaza in response to Occupy Wall Street protesters in October 2011, the State's actions could only have appeared necessary to officials because they had not adequately thought through the ramifications of its forum-use rules previously. *See Verified Complaint at 7-9, Occupy Nashville v. Haslam*, No. 3:11-cv-01037 (M.D. Tenn. Oct. 31, 2011), available at <http://www.aclu-tn.org/pdfs/OccupyNashvilleComplaint.pdf>.

295. *United States v. Seckinger*, 397 U.S. 203, 210 (1970); *see also* BLACK'S LAW DICTIONARY 377 (9th ed. 2009).

296. RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981). Other areas of law embrace similar reasoning. *See, e.g., Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011) (Fourth Amendment's exigent-circumstances doctrine); *Alice L. ex rel. R.L. v. Dusek*, 492 F.3d 563, 564 (5th Cir. 2007) (decisions to stay court proceedings); *In re Afolabi*, 343 B.R. 195, 197 (Bankr. S.D. Ind. 2006) (bankruptcy); *Equicredit Corp. v. Simms (In re Simms)*, 300 B.R. 877, 879 (Bankr. S.D. W. Va. 2003) (equitable subrogation); *Mitchell v. Johnson*, 641 So. 2d 238, 239 (Ala. 1994) (tort law's negligence doctrine); *Vasconez v. Mills*, 651 N.W.2d 48, 54 (Iowa 2002) (tort law's sudden-emergency doctrine); *Zueck v. Oppenheimer Gateway Props., Inc.*, 809 S.W.2d 384, 388 (Mo. 1991) (tort law generally); U.C.C. § 3-404 cmt. 3 (1990) (issuance of negotiable instruments to imposters or fictitious payees).

In like manner, a public forum is essentially a contract the government makes with the public to regulate free speech rights in a particular locale. Dismissing an action for retaliatory forum closure due to fear of burdening the government, in effect, turns the *contra proferentem* rule on its head and facilitates inept forum regulation by removing an incentive for the government to “get it right the first time.”<sup>297</sup> Because the government is the only party able to set the rules for a forum’s operation, if these rules later prove untenable, the government should be held responsible for its own error.<sup>298</sup> In this manner, actions for retaliatory forum closure serve both the immediate interests of vindicating wronged speakers and prophylactic interests of ensuring future care in setting forum regulations. Thus, the policy objections to an action for retaliatory forum closure are outweighed by the significant policy support for protecting free speech.

### CONCLUSION

*[R]easonable grounds for limiting access to a [forum] will not save a regulation that is in reality a facade for viewpoint-based discrimination.*

—Justice Sandra Day O’Connor<sup>299</sup>

An action for retaliatory forum closure furthers the policy goals of the First Amendment and is the most consistent application of current speech-retaliation and public-forum doctrines. This Note proposes applying a four-part test based on the tests the Supreme Court uses to address speech retaliation in the employment and prosecution contexts as well the tests circuit courts use to address speech retaliation in numerous other contexts. First, plaintiffs must speak in a forum. Second, the government must adversely affect plaintiffs’ speech through forum closure. Third, plaintiffs’ speech must be a substantial or motivating factor for the government’s actions. And fourth, the government must be unable to show that it would have closed the forum even absent the protected speech. Proving

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297. Concerns that avoiding future retaliatory-forum-closure suits will motivate government officials not to create forums in the first place are ultimately unpersuasive because government officials already face significant litigation risks by opening a forum and the additional risk is marginal at best. *Cf. Sefick v. United States*, No. 98-C5301, 1999 WL 778588, at \*15 (N.D. Ill. May 6, 1999) (“[T]his lawsuit illustrates the risks of opening up a limited or nonpublic forum for use by any persons or entities outside the government.”).

298. See *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (en banc) (“The state cannot constitutionally penalize private speakers by restricting either their right to speak or the content of their speech simply because the state exhibited dubious wisdom in creating, or has been slovenly in its maintenance of, its public fora.”); *cf. Planned Parenthood Ass’n/Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (holding that the government’s fault in maintaining “no system of control” over a forum required it to accept pro-abortion advertisements); David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Disclosure on Government Websites*, 2010 B.Y.U. L. REV. 1981, 2002 (“[I]f the government is not vigilant in maintaining the forum’s focus or otherwise opens the forum for general discussion, it cannot exclude speakers based on subject matter without satisfying strict scrutiny.”).

299. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985).

causation in the third and fourth prongs will be the focus of most retaliatory-forum-closure cases because the harms associated with retaliatory forum closure are sufficient to constitute an adverse action.

Merging speech-retaliation and public-forum doctrines into an action for retaliatory forum closure will end chronological viewpoint discrimination, promote consistency within the legal system, and increase opportunities for free speech. Although protecting speech is not always convenient, in the long term, cultivating novel opinions and preserving diverse perspectives in cultural and political life will prove the best safeguard of liberty. Subjecting a disfavored speaker to community scorn by closing a forum for all to prevent the speech of one destroys the First Amendment's promise of an uninhibited marketplace of ideas in which truth will ultimately prevail.