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# An Open and Shut Case: Why (and How) the Eleventh Circuit Should Restrain the Government's Forum Closure Power

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AN OPEN AND SHUT CASE: WHY (AND HOW) THE ELEVENTH  
CIRCUIT SHOULD RESTRAIN THE GOVERNMENT’S FORUM  
CLOSURE POWER

*Jordan E. Pratt\**

Abstract

The Supreme Court has made it clear that when the government opens a nontraditional public forum, it retains the power to shut down the forum subsequently. But the Court has not specifically addressed whether this forum closure power knows any constitutional limitations. Several circuits, including the U.S. Court of Appeals for the Eleventh Circuit, have suggested in dicta that this power is unlimited—that the government may shut down nontraditional public forums at any time and for any reason. While the government certainly enjoys broad discretion as a property owner, it cannot wield its ownership powers in a manner that will infringe basic constitutional guarantees. This Note argues that, at a minimum, the First Amendment’s guarantees against retaliation and viewpoint discrimination should rein in the outer bounds of the government’s forum closure power, and that the Eleventh Circuit should qualify its expansive dicta by recognizing a cause of action under 42 U.S.C. § 1983 for plaintiffs who allege that a forum was shut down in retaliation against their viewpoint. Such a rule would protect the fundamental guarantees of the First Amendment, harmonize with existing First Amendment retaliation doctrine, vindicate the purposes of § 1983, and strike the correct balance between protecting constitutional rights on one hand and government discretion on the other.

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INTRODUCTION

Donald and Meagan Burrows received a flyer from their children’s elementary school advertising a “Tile Wall program” in which the school invited “kids, parents, grandparents, families, classroom groups, Girl Scout/Boy Scout troops—everyone” to purchase tiles for display on a wall on school property.<sup>1</sup> The Pacific Elementary Parent Teacher Association organized the program to raise funds for itself, as well as to “beautify the [elementary school’s] campus.”<sup>2</sup> The flyer stated that recipients could purchase tiles for fifty dollars apiece<sup>3</sup> and that they

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1. Verified Complaint for Declaratory and Injunctive Relief and Nominal Damages at paras. 11, 13, *Burrows v. Manhattan Beach Unified Sch. Dist.*, No. CV-05-1631-NM (SHx) (C.D. Cal. Mar. 4, 2005) [hereinafter *Burrows’ Complaint*] (internal quotation marks omitted); *accord* Defendants’ Answer to Complaint; Demand for Jury Trial at para. 1, *Burrows v. Manhattan Beach Unified Sch. Dist.*, No. CV-05-1631-NM (SHx) (C.D. Cal. Apr. 4, 2005) [hereinafter *School District’s Answer*].

2. *Burrows’ Complaint* at para. 11; *accord* School District’s Answer at para. 1.

3. *Burrows’ Complaint* at para. 17; *accord* School District’s Answer at para. 1.

would have the opportunity to design and paint their own ceramic tiles.<sup>4</sup> The school, school district, and parent teacher association had no written policy establishing criteria for accepting or rejecting messages displayed on tiles,<sup>5</sup> and the flyer expressly encouraged “[f]amily tile groupings.”<sup>6</sup> The advertisement included sample pictures called “A Few Ideas for Inspiration,” several of which depicted sets of tiles that formed a larger picture when arranged in a particular order.<sup>7</sup>

The Burrows participated in the program, and their tiles, when arranged in the manner they requested, formed the image of a cross.<sup>8</sup> After receiving a complaint from another parent about the Burrows’ cross,<sup>9</sup> the principal met with the Burrows on multiple occasions and informed them that their tiles would have to be rearranged or removed because the cross was a “permanent” religious display on school grounds.<sup>10</sup> The tiles were eventually rearranged without the consent of the Burrows, who requested, but never received, a letter from the school district’s attorney stating the legal justification for the tiles’ rearrangement.<sup>11</sup> The Burrows, through counsel, then notified the principal and superintendent that they believed the school’s action violated their civil rights.<sup>12</sup> Soon thereafter, the school board decided to terminate the Tile Wall program altogether and remove the tiles rather than allow the Burrows’ cross to remain on display.<sup>13</sup>

Donald and Meagan Burrows, after asserting their First Amendment rights to express their message in a limited public forum<sup>14</sup> and to petition the government for redress of grievances,<sup>15</sup> were met with retaliatory forum closure. Given the religious content of the Burrows’ tiles, the improbability of an Establishment Clause violation, and the possibility of avoiding litigation by simply leaving the tiles alone, it seems likely that the school decided to end the Tile Wall program in an

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4. Burrows’ Complaint at para. 14; *accord* School District’s Answer at para. 1.

5. Burrows’ Complaint at para. 16; *accord* School District’s Answer at para. 1.

6. Burrows’ Complaint at para. 18 (internal quotation marks omitted); *accord* School District’s Answer at para. 1.

7. Burrows’ Complaint at para. 19 (internal quotation marks omitted); *accord* School District’s Answer at para. 1.

8. Burrows’ Complaint at paras. 37, 39; *accord* School District’s Answer at paras. 1, 7.

9. Burrows’ Complaint at para. 42; *accord* School District’s Answer at para. 1.

10. Burrows’ Complaint at paras. 48, 56 (internal quotation marks omitted); *accord* School District’s Answer at para. 1.

11. Burrows’ Complaint at paras. 50, 58, 60, 66, 67; *accord* School District’s Answer at paras. 1, 13.

12. Burrows’ Complaint at para. 68; *accord* School District’s Answer at para. 14.

13. Burrows’ Complaint at para. 70; *accord* School District’s Answer at para. 1.

14. A “limited public forum” is a place the government has opened for expressive activity to certain speakers or the discussion of certain topics. *See* discussion *infra* Section I.C.

15. The Supreme Court has explained that the right of access to the courts is one facet of the First Amendment right to petition the government for a redress of grievances. *See* *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

effort to suppress the Burrows' viewpoint.<sup>16</sup> Unfortunately for the Burrows, in the majority of jurisdictions—including perhaps the Eleventh Circuit—their complaint alleging viewpoint discrimination and retaliatory forum closure likely would be subject to dismissal for failure to state a claim upon which relief can be granted.<sup>17</sup>

Although the Supreme Court has observed that, at its core, the First Amendment protects citizens from government-initiated viewpoint discrimination<sup>18</sup> and retaliation,<sup>19</sup> several circuits have suggested they will not vindicate these bedrock constitutional rights in the forum closure context.<sup>20</sup> When religious and other ideological individuals or groups challenge their exclusion or expulsion from a designated or limited public forum, the government will often respond by simply closing the forum altogether,<sup>21</sup> just as it did in the Burrows' case. Under

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16. Although the school board might have cited Establishment Clause concerns as the reason for shutting down the Tile Wall program, any such purported concerns were unwarranted. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 769–70 (1995) (holding that a private religious display permitted in a public forum constituted private expression and did not violate the Establishment Clause); see also Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3 (2005) (“As history demonstrates, the Establishment Clause aims to keep the government from singling out certain religious sects for preferential treatment, but it does not prevent the government from showing favoritism to religion in general.” (footnote omitted)). The Burrows' expression of their religious faith on a small portion of the wall would have been perceived in the context of a great variety of personalized expressions by other families and would not have risked the appearance of governmental advancement of religion.

17. The majority of circuits that have addressed the issue interpret the government's forum closure power quite broadly and do not appear to recognize a cause of action in retaliatory forum closure cases. See discussion *infra* Parts II, III. Even though the Burrows' case never reached adjudication on the merits, it bears mentioning that one federal district court, on facts remarkably similar to those of the Burrows' case, stated that forum closure cannot provide a cause of action. See *Demmon v. Loudoun Cnty. Pub. Sch.*, 342 F. Supp. 2d 474, 476–79 (E.D. Va. 2004).

18. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court stated:

Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

*Id.* at 828–29 (citations omitted).

19. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.”).

20. See discussion *infra* Parts II, III.

21. See *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1114 n.10 (S.D. Ind. 2005)

such circumstances, feelings of animus toward speakers' viewpoints may play a central role in the government actor's decision to close the forum. This type of forum closure contravenes the foundational guarantees of the First Amendment. Nevertheless, courts generally have not yet recognized a cause of action and remedy under 42 U.S.C. § 1983<sup>22</sup> for retaliatory forum closure.<sup>23</sup> In fact, several circuits, including the Eleventh Circuit,<sup>24</sup> have suggested that the government's forum closure power knows no limits.<sup>25</sup>

Courts have addressed retaliatory governmental actions in other contexts, however, and have held that to state a § 1983 claim for First Amendment retaliation, a plaintiff must plead that (1) he engaged in an activity protected by the First Amendment; (2) the government took significant adverse action against him; and (3) the plaintiff's constitutionally protected conduct was a substantial factor in the government's decision to take adverse action against the plaintiff.<sup>26</sup> This Note argues that courts, and in particular the Eleventh Circuit, should temper broad constructions of the government's forum closure power by invoking First Amendment retaliation doctrine to recognize a § 1983 cause of action for retaliatory forum closure.<sup>27</sup> Such a logical extension of this doctrine will provide sensible limits on the government's power to shut down public forums and will ensure that the First Amendment's basic protections against retaliation and viewpoint discrimination do not ring hollow for the victims of retaliatory forum closure. In addition, this Note proposes a form of injunctive relief that will adequately protect a plaintiff's constitutional rights without unduly burdening the government's

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("Government bodies that find they have created a public forum often respond to controversies over access by closing the forum entirely.").

22. 42 U.S.C. § 1983 (2006). Section 1983 states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

23. See discussion *infra* Part II.

24. See discussion *infra* Part III.

25. See discussion *infra* Parts II, III.

26. See cases cited *infra* note 121 and accompanying text.

27. At least one commentator has observed that, although the government has an inherent right to control its property, "a more difficult question is whether general First Amendment principles prohibiting viewpoint discrimination are sufficiently hale to prohibit a governmental entity from closing down a public forum in direct retaliation against a particular group's expressive message." 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 8:51 (3d ed. 1996). This Note answers that question in the affirmative and argues that the issue is not a difficult one to resolve. See discussion *infra* Part V.

legitimate exercise of control over public property.

Part I will briefly survey the Supreme Court's First Amendment forum doctrine, and Part II will explore the state of the law on the scope of the government's forum closure power. Part III will analyze a decision by the Eleventh Circuit that suggests, as other circuits have also implied, that the government's forum closure power is unlimited. Part IV will summarize the Supreme Court's and the circuits' First Amendment retaliation jurisprudence and discuss the elements of a First Amendment retaliation claim. Finally, Part V will argue that the Eleventh Circuit in particular should clarify its position on the power of the government to close public forums by extending First Amendment retaliation doctrine to provide a cause of action in retaliatory forum closure cases. It will explore why retaliatory forum closure transgresses fundamental constitutional guarantees, how the Eleventh Circuit can use existing case law on First Amendment retaliation claims to recognize a cause of action in retaliatory forum closure cases, and what the appropriate remedy should be.

#### I. A BRIEF GLANCE AT FIRST AMENDMENT FORUM DOCTRINE

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,<sup>28</sup> the Supreme Court differentiated between three categories of government property<sup>29</sup> and introduced the modern framework used to analyze the First Amendment claims of speakers that have been denied access to such property.<sup>30</sup> In *Perry*, a public school district denied a teachers' union access to its mail system and teacher mailboxes but granted a right of access to a rival union. The excluded union brought suit to challenge the denial of access.<sup>31</sup> At issue in the case was whether the district's preferential grant of access to one union and denial of access to the other ran afoul of the First and Fourteenth Amendments.<sup>32</sup>

Beginning with the observation that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the

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28. 460 U.S. 37 (1983).

29. See Marc Rohr, *The Ongoing Mystery of the Public Forum*, 33 NOVA L. REV. 299, 303 (2009) ("Not until 1983, in the *Perry* decision, did the Court attempt to impose structure and clarity upon [the part of First Amendment doctrine] involving access by speakers to non-traditional governmentally controlled fora." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983))).

30. See *United States v. Kokinda*, 497 U.S. 720, 726 (1990) ("In [*Perry*], the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property." (citation omitted)); see also Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63, 91 n.209 (2008) ("*Perry* and *Cornelius [v. NAACP Legal Defense & Educational Fund, Inc.]*, 473 U.S. 788 (1985) are seminal decisions that outlined the general legal framework for First Amendment cases involving a nonpublic forum.>").

31. *Perry*, 460 U.S. at 39–41.

32. *Id.* at 44.

property at issue,”<sup>33</sup> the Court concluded that the internal mail system and teacher mailboxes constituted a “nonpublic forum.”<sup>34</sup> Due to the mail system’s status as a nonpublic forum, the Court held that the school district had “the right to make distinctions in access on the basis of subject matter and speaker identity” so long as “they are reasonable in light of the purpose which the forum . . . serves.”<sup>35</sup> In its decision, the Court explicitly referred to three categories of forums<sup>36</sup> and implicitly recognized one subcategory<sup>37</sup> that it developed more fully in subsequent decisions.<sup>38</sup>

### A. *The Traditional Public Forum*

The “traditional” or “quintessential” public forum<sup>39</sup> consists of government property which “by long tradition or by government fiat [has] been devoted to assembly and debate.”<sup>40</sup> The government may create a traditional public forum without any intention of opening an area for public expression, as the traditional public forum is defined not by the label the government gives it, but by its physical characteristics and objective and historical use.<sup>41</sup> The Supreme Court has recognized

33. *Id.*

34. *Id.* at 46, 49; *see also id.* at 46 (describing the nonpublic forum as “[p]ublic property which is not by tradition or designation a forum for public communication”).

35. *Id.* at 49.

36. These are the “quintessential” or “traditional” public forums, the “designated public forum,” and the “nonpublic forum.” *See id.* at 45 (describing the “quintessential public forum[.]”); *id.* at 46 (referencing the “traditional public forum,” a term presumably synonymous with “quintessential public forum”); *id.* at 46 (referencing “[p]ublic property” that is designated as “a forum for public communication”); *id.* at 49 (referencing the “nonpublic forum”).

37. This is the “limited public forum,” which consists of a designated public forum held open only to certain speakers or to the discussion of certain topics. *See id.* at 46 n.7 (“A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.” (citations omitted)); *see also* Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (bifurcating *Perry*’s designated public forum into those of “limited” and “unlimited” character). Much confusion has arisen regarding the limited public forum. *See generally* Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2142 (2009) (describing the lack of clarity in the Court’s designated public forum and limited public forum jurisprudence). However, this Note does not attempt to address the ambiguities of modern forum doctrine and seeks merely to describe the four types of forums that the Supreme Court has recognized in its decisions.

38. The Supreme Court has continued to analyze claims under the forum analysis it developed in *Perry*, using the labels “traditional public forum,” “designated public forum,” “limited public forum,” and “nonpublic forum.” *See, e.g.,* Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971, 2984 n.11 (2010) (describing “traditional public forums,” “designated public forums,” and “limited public forums”); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007) (referencing the “nonpublic forum”).

39. The *Perry* Court uses these terms interchangeably. *See* 460 U.S. at 45–46.

40. *Id.* at 45.

41. *See* Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 678 (1998) (“[T]raditional public fora are open for expressive activity regardless of the government’s intent. The objective characteristics of these properties require the government to accommodate private



public parks, streets, and sidewalks as falling within this category.<sup>42</sup> These public lands bear the status of traditional public forums because they “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>43</sup>

Due to the traditional public forum’s historically pivotal role in accommodating public assembly, speech, and debate, governmental restrictions on speech in traditional public forums receive high levels of judicial scrutiny.<sup>44</sup> In a traditional public forum, a government actor may not exclude speakers based on the content of their speech unless such content-based exclusion “is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end.”<sup>45</sup> The government may, however, enforce content-neutral time, place, and manner restrictions on speech in traditional public forums as long as those restrictions meet an intermediate level of judicial scrutiny.<sup>46</sup>

### B. *The Designated Public Forum*

The *Perry* Court also set forth a second type of forum, which “consists of public property which the State has opened for use by the public as a place for expressive activity.”<sup>47</sup> This forum differs from the traditional public forum in that its status arises not from tradition or governmental fiat, but from designation.<sup>48</sup> After *Perry*, this forum has been referred to as the “designated public forum.”<sup>49</sup> The creation of a designated public forum requires a deliberate act on behalf of the government to open public property for expressive activity.<sup>50</sup>

speakers.”); *Sumnum v. Pleasant Grove City*, 483 F.3d 1044, 1051 (10th Cir. 2007) (“[A] traditional public forum is defined by its objective characteristics, not by governmental intent or action.”), *rev’d on other grounds*, 129 S. Ct. 1125 (2010).

42. *See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 777 (1988) (White, J., dissenting).

43. *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)) (internal quotation marks omitted).

44. *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (stating that “regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny”).

45. *Perry*, 460 U.S. at 45.

46. In other words, restrictions are permissible as long as they are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Id.*

47. *Id.*

48. *Id.* at 46 (describing the nonpublic forum as “[p]ublic property which is not by tradition or designation a forum for public communication” (emphasis added)).

49. *See, e.g., Int’l Soc’y for Krishna Consciousness*, 505 U.S. at 678 (“The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public.”).

50. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)

The Constitution does not require the government to provide designated public forums, but when the government does provide them, it must operate them according to the same constitutional standards that govern traditional public forums.<sup>51</sup> In designated public forums, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>52</sup> When acting to exclude a person or group from a designated public forum, government actors cannot discriminate on the basis of viewpoint without running afoul of the First Amendment.<sup>53</sup>

Instances of the designated public forum abound. Courts have found that state university meeting facilities made available for student use, school board meetings open to the public, advertising space in state-owned subway stations, city-owned-and-operated senior centers, and public libraries all constitute designated public forums.<sup>54</sup>

### C. *The Limited Public Forum*

In *Perry*'s discussion of the designated public forum, it differentiated between those nontraditional public forums held open to the public generally and those held open only to certain speakers or the discussion of certain topics.<sup>55</sup> Decisions after *Perry* have labeled this latter subcategory the “limited public forum.”<sup>56</sup>

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(“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.” (citation omitted)).

51. *Perry*, 460 U.S. at 46; see also *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010) (stating that “governmental entities create designated public forums when ‘government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose’; speech restrictions in such a forum ‘are subject to the same strict scrutiny as restrictions in a traditional public forum’” (quoting *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1127 (2009))).

52. *Perry*, 460 U.S. at 46.

53. See *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1311 (Fed. Cir. 2008) (“A designated public forum, on the other hand, is an area dedicated by the government for a certain class of speakers. Exclusion of a speaker who is within the certain class must pass strict scrutiny; exclusion of a speaker outside the class must be reasonable and viewpoint neutral.” (citation omitted)).

54. See *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999) (citing several examples of designated public forums). For a discussion on a recently emerging designated public forum question, see Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 25 (2007) (discussing whether wireless networks in public locations constitute designated public forums).

55. *Perry*, 460 U.S. at 46 n.7 (“A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects.” (citation omitted)).

56. See, e.g., *Christian Legal Soc’y*, 130 S. Ct. at 2984 n.11 (“[G]overnmental entities establish limited public forums by opening property ‘limited to use by certain groups or dedicated solely to the discussion of certain subjects.’” (quoting *Pleasant Grove City*, 129 S. Ct.

In determining those topics and groups to which a limited public forum is held open, the government may employ content-based restrictions so long as they are reasonable and viewpoint-neutral.<sup>57</sup> Thus, in defining the parameters of a limited public forum, the government may discriminate among certain topics but may not discriminate on the basis of viewpoint.<sup>58</sup> Furthermore, if a speaker falls within the parameters that define a limited public forum, commentators have said that he enjoys a “right of access” to the forum such that his exclusion will trigger heightened scrutiny.<sup>59</sup> Indeed, the Supreme Court has held that although the government has broad leeway in setting up the parameters that define a limited public forum, it does not enjoy such discretion in *applying* those parameters to exclude speakers who fall within the class of individuals to whom the forum has been held open.<sup>60</sup>

Examples of limited public forums include a municipal auditorium dedicated to certain types of expressive activities<sup>61</sup> and school facilities

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at 1127)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (referencing the “limited public forum”).

57. *Christian Legal Soc’y*, 130 S. Ct. at 2984 (“[T]he Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral[.]”); *Good News Club*, 533 U.S. at 106–07 (“The State’s power to restrict speech [in a limited public forum], however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be ‘reasonable in light of the purpose served by the forum.’” (citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985))).

58. See Waldman, *supra* note 30, at 98 n.251 (observing that in *Good News Club*, “[t]he Court . . . held that viewpoint discrimination was impermissible in a limited public forum” (citing *Good News Club*, 533 U.S. at 111–12)).

59. See, e.g., Rohr, *supra* note 29, at 307–09 (2009). Professor Marc Rohr derived the following from *Perry’s* dicta concerning limited public forums and citation of *Widmar v. Vincent*:

In a limited public forum, we must first identify the speakers to whom the forum has been opened—the favored class of speakers, if you will—and then ask whether the speaker who seeks access to the forum—the challenger—is an “entit[y] of similar character” to those to whom the forum has been opened. In other words, we must ask whether the challenger falls within the favored class of speakers. If the answer is “yes,” then that challenger enjoys a “right of access” to the forum. To put it another way, a limited public forum would be “open” to speakers who fall into the same class as those to whom the forum has already been opened.

*Id.* at 307 (footnote omitted) (quoting *Perry*, 460 U.S. at 48).

60. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.”); see also *Ark. Educ. Television Co. v. Forbes*, 523 U.S. 666, 677 (1998) (“If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”).

61. *United States v. Belsky*, 799 F.2d 1485, 1488 n.5 (11th Cir. 1986) (citing *Cornelius*, 473 U.S. at 802–05).

opened for the use of student groups.<sup>62</sup>

#### D. *The Nonpublic Forum*

Having identified two categories and one subcategory of forums, the *Perry* Court went on to identify the “nonpublic forum” as “[p]ublic property which is not by tradition or designation a forum for public communication.”<sup>63</sup> Invoking the principle that “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,”<sup>64</sup> *Perry* made clear that the government enjoys great latitude as a property owner when restricting speech in the nonpublic forum.<sup>65</sup> Time, place, and manner restrictions, as well as the exclusion of individual speakers, will be upheld so long as they are reasonable and do not operate on the basis of viewpoint discrimination.<sup>66</sup> Examples of nonpublic forums include “airport terminals, military bases, prisons, and similar properties,”<sup>67</sup> as well as public schools’ internal mail systems.<sup>68</sup>

### II. THE STATE OF THE LAW ON THE GOVERNMENT’S FORUM CLOSURE POWER

The *Perry* Court provided some guidance regarding the limitations that the First Amendment places on forum closure. The government may not close a traditional public forum from all expressive activity.<sup>69</sup> Presumably this owes to the fact that traditional public forums have always been used by the public for assembly, communication, and

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62. *Christian Legal Soc’y*, 130 S. Ct. at 2984 n.12 (citing *Rosenberger*, 515 U.S. at 829) (explaining that university facilities opened up to student groups constituted limited public forums).

63. *Perry*, 460 U.S. at 46.

64. *Id.* (internal quotation marks omitted) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981)).

65. *Id.* (“In addition to time, place, and manner regulations, the State may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”). It has been argued that the Court has used the nonpublic forum to define public locations where First Amendment claims are “radically devalued and immune from independent judicial scrutiny.” ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 234 (1995).

66. *Perry*, 460 U.S. at 46; *see also id.* at 46–54 (finding a public school internal mailing system to be a nonpublic forum and upholding restrictions on speech and selective exclusion of plaintiffs via a deferential reasonableness inquiry); *Cornelius*, 473 U.S. at 806 (noting that “[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral”).

67. *See Byrne v. Rutledge*, 623 F.3d 46, 53 (2d Cir. 2010) (citing *Perez v. Hoblock*, 368 F.3d 166, 172–73 (2d Cir. 2004)).

68. *Perry*, 460 U.S. at 46.

69. *Id.* at 45 (“In these quintessential public forums, the government may not prohibit all communicative activity.”).

discussion.<sup>70</sup> The only way the government may in some sense “close” a traditional public forum is if the forum loses the characteristics that make it a “place[] which by long tradition or by government fiat [has] been devoted to assembly and debate,”<sup>71</sup> such as when the government sells the land to a private buyer or changes the physical character of the land.<sup>72</sup> The government may, however, completely shut down designated and limited public forums.<sup>73</sup> This power derives from the principle that the government is a property owner like any other and may control its property in a lawful manner.<sup>74</sup>

Decisions after *Perry* struggled to define the precise limitations of the government’s ability to close traditional public forums from limited types of expressive activity. In *Capitol Square Review & Advisory Board v. Pinette*,<sup>75</sup> the Supreme Court considered a challenge by the Klu Klux Klan, which had been denied permission to erect a Latin cross in a statehouse plaza.<sup>76</sup> Ohio law had declared the plaza “available ‘for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose,’” and citizens had used the area in such a manner for over a century.<sup>77</sup> Authority to regulate public access to the plaza lay with the Capitol Square Review and Advisory Board, and the process of gaining access entailed filling out a simple application and meeting several content-neutral criteria.<sup>78</sup> The board had maintained a policy of granting such applications to groups wishing to leave unattended displays in the square, but when the Klan applied for permission to leave an unattended Latin cross in the square, the board denied its application on Establishment Clause grounds.<sup>79</sup>

The Klan brought suit to challenge its exclusion from the plaza, and the district court held that the unattended cross would not violate the Establishment Clause.<sup>80</sup> The court ordered the board to grant the Klan

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70. *Id.* Some have described the public’s right to use traditional public forums as a prescriptive easement. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1163 (2005) (calling the Court’s rationale for affording protection to speech in traditional public forums the “prescriptive easement justification”).

71. *Perry*, 460 U.S. at 45.

72. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring) (“In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.”).

73. *Perry*, 460 U.S. at 46 (establishing that “a State is not required to indefinitely retain the open character of the [designated public forum]”).

74. *Id.* (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981)) (internal quotation marks omitted).

75. 515 U.S. 753 (1995).

76. *Id.* at 758.

77. *Id.* at 757 (quoting OHIO ADMIN. CODE ANN. § 128-4-02(A) (1994)).

78. *Id.* at 757–58.

79. *Id.* at 758.

80. *Id.* at 758–59.

access, which it did.<sup>81</sup> The board appealed, the Sixth Circuit affirmed the ruling of the district court, and the board sought and obtained certiorari.<sup>82</sup> Identifying the square as a traditional public forum,<sup>83</sup> the Supreme Court held that the Klan's private, unattended cross did not violate the Establishment Clause when placed in the square.<sup>84</sup>

Eight out of nine Justices in *Pinette* expressed the opinion that the board, although required to permit the Klan's unattended cross pursuant to its existing policy, retained the authority to close the traditional public forum altogether with respect to unattended displays.<sup>85</sup> Thus, although the government may not close a traditional public forum entirely, it may foreclose certain types of expressive activity that it has historically permitted in the forum.<sup>86</sup>

The government's authority to close a designated or limited public forum is much more far-reaching and encompasses the ability to shut off a forum entirely from expressive activity. Recall that in *Perry*, the Supreme Court noted that "a State is not required to indefinitely retain the open character of [a designated public forum]."<sup>87</sup> *Perry* did not, however, articulate the scope of this forum closure power. The Ninth Circuit has interpreted this language in *Perry* as standing for the proposition that the government may close designated or limited public forums "whenever it wants."<sup>88</sup> The Third Circuit, in dicta, has construed

81. *Id.* at 759.

82. *Id.*

83. *Id.* at 757.

84. *Id.* at 770 (plurality opinion).

85. *See id.* at 761; *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996) (stating that in *Pinette*, "[e]ight members of the Court joined behind the proposition that the State of Ohio 'could ban all unattended private displays in [the forum] if it so desired'" (quoting *Pinette*, 515 U.S. at 783 (Souter, J., concurring in part and concurring in the judgment))); *see also* SMOLLA, *supra* note 27, at § 8:51.

86. *See Grossbaum*, 100 F.3d at 1298. The eight Justices' dicta in *Pinette* should not be interpreted too broadly and should be read in conjunction with the Court's consistently firm opposition to viewpoint discrimination in public forums. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). *Pinette* does not stand for the proposition that the government may foreclose activity in a traditional public forum in retaliation against a speaker's viewpoint, but it does allow foreclosing limited types of activity for legitimate purposes.

87. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

88. *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1031–32 (9th Cir. 2006) (citing *Currier's* expansive interpretation of *Perry's* forum closure power with approval as support for the proposition that total forum closure mooted plaintiffs' First Amendment claim). The Ninth Circuit, before *Currier* and *Santa Monica*, once described the government's forum closure power much more narrowly. *See United States v. Griefen*, 200 F.3d 1256, 1262 (9th Cir. 2000) (stating that "[i]f a closure of a public forum is for a *valid rather than a disguised impermissible purpose*, the potential for self-imposed or government censorship . . . does not exist" (emphasis added)); *see also id.* at 1265 ("Our holding [that temporary closure of a portion of a national

*Perry* to mean that “officials may choose to close . . . a designated public forum at any time.”<sup>89</sup> The Eighth Circuit has likewise suggested a broad forum closure power,<sup>90</sup> and the Seventh Circuit, after considering the issue directly, expressly refused to limit the government’s forum closure power by refusing to extend a cause of action in retaliatory forum closure cases.<sup>91</sup> In contrast, the First Circuit has recognized that the government’s forum closure power is not unlimited and is circumscribed by the First Amendment’s prohibition against viewpoint discrimination.<sup>92</sup> Some federal district courts have advanced the First Circuit’s position,<sup>93</sup> but given the lack of clear guidance from the circuits, trial courts reaching the issue have gone in different directions.<sup>94</sup>

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forest to allow road construction did not violate the First Amendment] does not imply that an order that closes a public forum is sacrosanct. Should it appear that the true purpose of such an order was to silence disfavored speech or speakers . . . the federal courts are capable of taking prompt and measurably appropriate action.”). Given *Santa Monica*’s refusal to recognize a First Amendment claim after forum closure and citation of *Currier*’s expansive dicta as support for its refusal, it appears that the Ninth Circuit no longer recognizes a cause of action for retaliatory forum closure.

89. *United States v. Bjerke*, 796 F.2d 643, 647 (3d Cir. 1986) (citing *Perry*, 460 U.S. at 46).

90. *See Straights & Gays for Equal v. Osseo Area Sch.—Dist. No. 279*, 471 F.3d 908, 913 (8th Cir. 2006) (noting that a school that likely denied equal access to an ideological student group in violation of the Equal Access Act was still “free to wipe out all of its noncurriculum related student groups and totally close its forum” (quoting *Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993)) (internal quotation marks omitted)).

91. *See Grossbaum*, 100 F.3d at 1292–96 (finding retaliatory motive and discriminatory intent irrelevant and refusing to extend First Amendment retaliation doctrine where a local building authority entirely shut down a nonpublic forum in response to controversy over religious holiday displays).

92. *See Student Gov’t Ass’n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) (“Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it.”).

93. *See, e.g., Initiative & Referendum Inst. v. U.S. Postal Serv.*, 116 F. Supp. 2d 65, 73 (D.D.C. 2000) (“The government may close a public forum that it has created by designation . . . so long as the reasons for closure are not content-based.”).

94. *Compare, e.g., ACT-UP v. Walp*, 755 F. Supp. 1281, 1292 (M.D. Pa. 1991) (recognizing a cause of action for forum closure), *Mo. Knights of the Klu Klux Klan v. Kansas City*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989) (holding that a complaint alleging that the city shut down a local public access channel to prevent the Klu Klux Klan from gaining access to it stated a § 1983 claim, and noting that “[a] state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment”), *and Thomason v. Jernigan*, 770 F. Supp. 1195, 1201–03 (E.D. Mich. 1991) (declaring unconstitutional a city’s closure of a public sidewalk outside an abortion clinic in retaliation against abortion protestors’ viewpoint), *with Demmon v. Loudoun Cnty. Pub. Sch.*, 342 F. Supp. 2d 474, 479 (E.D. Va. 2004) (stating that forum closure cannot provide a cause of action).

### III. THE ELEVENTH CIRCUIT'S IMPLICITLY BROAD INTERPRETATION OF THE GOVERNMENT'S FORUM CLOSURE POWER

The Eleventh Circuit has yet to reach directly the issue of what limits, if any, constrain the government's forum closure power, a power recognized but left undefined in *Perry*. In line with the Third, Seventh, Eighth, and Ninth Circuits, however, the court in *Chabad-Lubavitch of Georgia v. Miller*<sup>95</sup> suggested in an en banc opinion that it might endorse a broad construction of this power. In later decisions, the Eleventh Circuit should clarify and limit *Miller*'s broad language by recognizing that the government's forum closure power is constrained by, if nothing else, the principle that the government may not close a forum in retaliation against a speaker's viewpoint. Such a rule would place the Eleventh Circuit in line with the First Circuit on the retaliatory forum closure issue.<sup>96</sup>

In *Miller*, Chabad-Lubavitch, a nonprofit Jewish organization,<sup>97</sup> received permission in 1989 to erect a large menorah display during Chanukah in a plaza outside the Georgia state capitol building.<sup>98</sup> The privately owned menorah, accompanied by a sign reading, "HAPPY CHANUKAH from CHABAD OF GEORGIA," remained on display in front of the state capitol for the duration of the entire eight-day holiday during 1989.<sup>99</sup> Each day at sundown, Chabad-Lubavitch lit a candle of the menorah during a forty-five minute ceremony.<sup>100</sup> When the organization applied to have its menorah similarly displayed during Chanukah in 1990, however, the Georgia Attorney General issued an opinion letter concluding that the requested display would violate the Establishment Clause.<sup>101</sup> The state thus denied Chabad-Lubavitch's request, and Chabad-Lubavitch brought suit, claiming violations of its right to free speech.<sup>102</sup> This suit ultimately failed, but the organization did not lose heart. Chabad-Lubavitch submitted an application the following year asking to display the menorah during Chanukah, either on the plaza or inside the capitol building rotunda.<sup>103</sup> During the preceding decade, the state had opened the rotunda for various types of expressive activity, both secular and religious, "pursuant to a 'content-

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95. 5 F.3d 1383 (11th Cir. 1993) (en banc).

96. See discussion *supra* Part II.

97. According to its website, "Chabad-Lubavitch is a philosophy, a movement, and organization" stemming from Hasidic Judaism, whose "system of Jewish religious philosophy, the deepest dimension of G-d's Torah, teaches understanding and recognition of the Creator, the role and purpose of creation, and the importance and unique mission of each creature." *About Chabad-Lubavitch*, CHABAD.ORG, [http://www.chabad.org/global/about/article\\_cdo/aid/36226/jewish/About-Chabad-Lubavitch.htm](http://www.chabad.org/global/about/article_cdo/aid/36226/jewish/About-Chabad-Lubavitch.htm) (last visited Sept. 4, 2011).

98. *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1385 (11th Cir. 1993).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1386.

103. *Id.*



neutral, equal access policy . . . .”<sup>104</sup> Even private, unattended displays had been permitted in the rotunda.<sup>105</sup>

When it did not receive a response to its 1991 request, Chabad-Lubavitch amended the complaint it had filed in 1990, seeking injunctive relief with respect to both the plaza and the rotunda.<sup>106</sup> The district court granted the state’s motions for summary judgment as to both claims, a decision which the Eleventh Circuit affirmed.<sup>107</sup> On en banc rehearing, however, the Eleventh Circuit reversed, holding that the state’s content-based exclusion of the group’s menorah could not withstand strict scrutiny.<sup>108</sup> The court reasoned that the state could have granted Chabad-Lubavitch’s request to display the menorah in the rotunda, pursuant to its neutral open-access policy, without risking an Establishment Clause violation.<sup>109</sup> Displays erected in the rotunda, a limited public forum,<sup>110</sup> could only be perceived by a reasonable observer as private free speech, not governmental endorsement of religion.<sup>111</sup> Accordingly, the Eleventh Circuit granted Chabad-Lubavitch’s request for injunctive relief.<sup>112</sup> In expansive dicta, however, the court opined:

If Georgia fears that it would violate the Establishment Clause by allowing the display, it can avoid the perception that it is endorsing a religion by (1) *closing the forum altogether*, (2) posting signs to explain the nature of the public forum, or (3) enacting time, place, and manner restrictions governing the form of presentations in the Rotunda.<sup>113</sup>

It is difficult to see how Georgia could legitimately fear that it would violate the Establishment Clause if the Eleventh Circuit’s en banc decision had already definitively resolved the question. Any forum closure ordered at that point, after the resolution of the case, would more likely have been the result of animus toward Chabad-Lubavitch’s religious viewpoint. Although it did not consider the issue directly, this language in *Miller* suggests that the Eleventh Circuit favors a broad construction of the government’s power to close a designated or limited

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104. *Id.* at 1386–87 (quoting Chabad-Lubavitch of Ga. v. Miller, 976 F.2d 1386 app. at 1390 (11th Cir. 1992)) (internal quotation marks omitted).

105. *Id.* at 1386. Displays permitted in the past included “an eighteen-foot tall Indian Wattle and Daub Hut during the annual Indian Heritage Week, . . . a forty-one poster exhibit sponsored by the Atlanta Jewish Foundation, . . . and a thirty-five flag exhibit during ‘International Week.’” *Id.*

106. *Id.* at 1387.

107. *Id.*

108. *Id.*

109. *Id.* at 1389.

110. *Id.* at 1391.

111. *Id.* at 1392.

112. *Id.* at 1395–96.

113. *Id.* at 1394 (emphasis added).

public forum, even encompassing the ability to shut down a forum in retaliation against a speaker's viewpoint.<sup>114</sup> Indeed, the Ninth Circuit, in rejecting a retaliatory forum closure claim, cited *Miller* for the sweeping proposition that “[c]losing 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.”<sup>115</sup>

As one commentator has observed, “[T]he Supreme Court has never specifically addressed the question of when a designated public forum can be closed.”<sup>116</sup> However, an expansive interpretation of the forum closure power recognized in *Perry* is improvident insofar as it might permit the government to close a forum in retaliation against a speaker's viewpoint. If a retaliatory forum closure case comes before the Eleventh Circuit, it should qualify the expansive view it suggested in *Miller* by holding that the government's forum closure power knows at least two constitutional constraints: a forum may not be closed in retaliation against a speaker's viewpoint or against a speaker's initiation of suit to challenge his viewpoint-based exclusion or expulsion from a forum. *Miller*'s suggested construction of *Perry*'s forum closure power, if left untempered, will transgress basic constitutional guarantees against retaliation and viewpoint discrimination, and the Eleventh Circuit should extend First Amendment retaliation doctrine to prohibit such abuse. To set the framework for this argument, Part IV provides an overview of First Amendment retaliation jurisprudence.

#### IV. AN OVERVIEW OF A FIRST AMENDMENT RETALIATION CLAIM

The First Amendment requires the government to refrain from retaliating against speakers because of their protected speech.<sup>117</sup> “The

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114. See SMOLLA, *supra* note 27, at § 8:51.

115. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999).

116. Derigan A. Silver, Note, *Policy, Practice, and Intent: Forum Analysis and the Uncertain Status of the Student Press at Public Colleges and Universities*, 12 COMM. L. & POL'Y 201, 227 (2007).

117. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (stating that “as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out”); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (noting that “the First Amendment bars retaliation for protected speech”); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (“An 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.” (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984)) (internal quotation marks omitted)); see also John Koerner, Note, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 758 (2009) (“The First Amendment prohibits government officials from retaliating against individuals on the basis of their protected speech.”); Colin P. Watson, Note, *Limiting a Constitutional Tort Without Probable Cause: First Amendment Retaliatory Arrest After Hartman*, 107 MICH. L. REV. 111, 111 (2008) (“Federal law provides a cause of action for individuals who are the target of adverse state action taken in retaliation for their exercise of First Amendment rights.”).

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.”<sup>118</sup> “The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.”<sup>119</sup> One who suffers governmental retaliatory action in response to his exercise of protected speech may bring suit under § 1983 of the Civil Rights Act.<sup>120</sup>

### A. Elements of a First Amendment Retaliation Claim

To set out a § 1983 First Amendment retaliation claim, a plaintiff must plead that (1) he engaged in an activity protected by the First Amendment; (2) the government took significant adverse action against him (that is, the government inflicted an injury that would chill a person of ordinary firmness from continuing to engage in the protected activity); and (3) the plaintiff’s constitutionally protected conduct was a substantial factor—that is, a motivating factor—in the government’s decision to take adverse action against the plaintiff.<sup>121</sup>

## 1. Exercise of a Constitutionally Protected Right

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118. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000).

119. *Crawford-El*, 523 U.S. at 588 n.10; *see also* *Perez v. Ellington*, 421 F.3d 1128, 1131 (10th Cir. 2005) (“Although retaliation is not expressly discussed in the First Amendment, it may be actionable inasmuch as governmental retaliation tends to chill citizens’ exercise of their constitutional rights.”). *See also* *Perry v. Sindermann*, 408 U.S. 593 (1972), in which the Court stated:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.” Such interference with constitutional rights is impermissible.

*Id.* at 597 (citation omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

120. *See supra* note 22.

121. *See* *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also* *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007) (“Under *Mount Healthy* and its progeny, a plaintiff must show that (1) he was participating in a constitutionally protected activity; (2) defendant’s action injured plaintiff in a way ‘likely [to] chill a person of ordinary firmness from’ further participation in that activity; and (3) in part, plaintiff’s constitutionally protected activity motivated defendant’s adverse action.” (alteration in original) (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998))). The Sixth Circuit’s test for the second element of a First Amendment retaliation claim outlined in *Center for Bio-Ethical Reform* represents the generally accepted standard. *See infra* note 128.

Courts have found that the First Amendment's implicit protection against governmental retaliation applies in a wide variety of contexts. For example, courts have held an individual's or group's First Amendment right of association to be protected from retaliation by government actors, whether exercised in the form of contracting for business<sup>122</sup> or deciding to hire an attorney.<sup>123</sup> The Supreme Court has held that a public school teacher's private speech regarding the school system for which he works, if confined to matters of "public concern," is protected from retaliation by his employer.<sup>124</sup> Likewise protected from governmental retaliation are insults directed at law enforcement officers, provided they do not rise to the level of "fighting words."<sup>125</sup> The First Amendment's prohibition against retaliation also protects expressive activity such as driving a billboard truck that displays pro-life messages and graphic abortion-related images.<sup>126</sup> In addition, the Supreme Court has held that the First Amendment prohibits the government from retaliating against citizens because of their free exercise of religion.<sup>127</sup>

## 2. Significant Adverse Governmental Action

The second element of a First Amendment retaliation claim requires a plaintiff to prove that the government took significant adverse action against him. To establish this element, a plaintiff must show that the government inflicted an injury that would chill a person of ordinary firmness from further participation in the protected activity.<sup>128</sup>

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122. See, e.g., *Perez*, 421 F.3d at 1132 (protecting from retaliation a Native American tribe's decision to contract with a gasoline company).

123. See, e.g., *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (protecting from retaliation a murder suspect's decision to hire a private attorney).

124. See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 574–75 (1968) (protecting from retaliation a teacher's letter to a local newspaper that was critical of the way the board of education and superintendent had handled proposals to raise revenue).

125. See, e.g., *Greene v. Barber*, 310 F.3d 889, 895–97 (6th Cir. 2002) (calling a police officer an "asshole" and "stupid" protected from retaliation); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (noting that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers").

126. See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821–22 (6th Cir. 2007) (affording protection from retaliation to the driver of a vehicle that displayed graphic abortion-related images).

127. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (protecting from retaliation a Seventh-Day Adventist's refusal to work on Saturday for religious reasons).

128. *Ctr. for Bio-Ethical Reform*, 477 F.3d at 821. The Ninth, Tenth, Eleventh, and D.C. Circuits share the Sixth Circuit's formulation of this element. See *Mendocino Env'tl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[W]e conclude that the proper inquiry asks 'whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'" (quoting *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996))); *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("The focus, of course, is upon whether a *person of ordinary firmness* would be chilled, rather than whether the particular plaintiff is chilled."); *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) (surveying the

Many government actions will satisfy this second element. For example, the Supreme Court has held that a public university's refusal to renew an untenured professor's employment contract in retaliation against his protected speech would give rise to a First Amendment retaliation claim.<sup>129</sup> In a similar vein, a public school's dismissal of a teacher satisfies the significant adverse action requirement.<sup>130</sup> Furthermore, courts have held that the issuance of a jeopardy tax assessment,<sup>131</sup> the denial of public benefits,<sup>132</sup> and the denial of promotions and transfers to public employees<sup>133</sup> meet this element. To further illustrate the breadth of the adverse action element, commentators have argued, and at least one circuit has found, that arrests<sup>134</sup> and detentions accompanied by a search without probable cause<sup>135</sup> would "chill or silence a person of ordinary firmness from future First Amendment activities."<sup>136</sup>

### 3. Causation: The Substantial Factor Formulation

The third and final element a plaintiff must plead to state a § 1983 claim for First Amendment retaliation is causation. The causation element requires plaintiffs to show that their exercise of a constitutionally protected right was a "substantial factor"—that is, a

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case law among the federal circuits and adopting the "objective test"); *Crawford-El*, 93 F.3d 813, 826 (D.C. Cir. 1996) ("The district court commendably latched onto our approval of *Bart* and applied a sensible standard—whether an official's acts 'would chill or silence a 'person of ordinary firmness' from future First Amendment activities.'" (quoting *Crawford-El v. Britton*, 844 F. Supp. 795, 801 (D.D.C. 1994))).

The Fourth Circuit, however, has formulated a different, *subjective* test for this second element. See *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) ("Second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech.").

129. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

130. See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968).

131. See, e.g., *Perez v. Ellington*, 421 F.3d 1128, 1132 (10th Cir. 2005).

132. See, e.g., *Suarez Corp. Indus.*, 202 F.3d at 686–87 ("For example, a public official who restricts the award of or terminates public benefits based on the citizen's exercise of his First Amendment rights adversely affects that citizen's First Amendment rights.").

133. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) ("Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.").

134. See *Koerner*, *supra* note 117, at 761 ("An arrest is certainly an injury that would chill a person of ordinary firmness from continuing to engage in protected speech.").

135. See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (holding that "[a] two and one-half hour detention absent probable cause, accompanied by a search . . . would undoubtedly deter an average law-abiding citizen" from future free speech activities).

136. *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) (citing *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996)) (adopting the D.C. Circuit's objective formulation of the adverse action requirement).

“motivating factor”<sup>137</sup>—in the government’s decision to take the adverse action of which the plaintiff complained. As several circuits have stressed, a plaintiff need not show that his exercise of constitutionally protected conduct was *the* motivating factor in the government’s decision to take retaliatory action; he must only show that it was *a* motivating factor.<sup>138</sup>

### B. *The Government’s Affirmative Defense*

Once the plaintiff has established his claim by a preponderance of the evidence, the burden shifts to the government to prove, also by a preponderance of the evidence, that it would have taken the adverse action even in the absence of the plaintiff’s protected speech. In *Mount Healthy City School District Board of Education v. Doyle*,<sup>139</sup> the Supreme Court first articulated this affirmative defense.<sup>140</sup> The *Mount Healthy* Court considered a lawsuit brought by an untenured teacher who claimed that the board of education refused to renew his employment contract in retaliation against his protected speech.<sup>141</sup> Before the occurrence giving rise to his claim, the plaintiff had engaged in several altercations with his fellow teachers. In one such incident, he had an argument with another teacher that ended when that teacher slapped him.<sup>142</sup> In yet another incident, the plaintiff had caused an altercation with school cafeteria staff when he disapproved of the amount of spaghetti they had served him.<sup>143</sup> The plaintiff also had failed to maintain a professional attitude toward his students, using foul and offensive language when referring to students involved in a disciplinary complaint and making an obscene gesture to two female students when they failed to obey him.<sup>144</sup> The last straw, however, occurred when the plaintiff made a phone call to a local radio station in criticism of the board’s adoption of a teacher dress code policy.<sup>145</sup> When the plaintiff’s employment contract expired that year, the board refused to renew it, referencing “the radio station incident and . . . the obscene-gesture

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137. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (internal quotation marks omitted).

138. *See, e.g., Miller v. City of Canton*, 319 F. App’x 411, 419 (6th Cir. 2009) (observing that “a plaintiff satisfies [the causation element of a First Amendment retaliation claim] by showing that the adverse action ‘was motivated at least in part’ by the protected speech” (quoting *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006))); *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008) (requiring plaintiff to show that his exercise of a constitutionally protected right was merely *a* motivating factor, not *the* motivating factor, in defendant’s decision to retaliate).

139. 429 U.S. 274 (1977).

140. *See Koerner, supra* note 117, at 764 (noting that the Court established its burden-shifting framework in *Mount Healthy*).

141. *Mount Healthy*, 429 U.S. at 282.

142. *Id.* at 281.

143. *Id.*

144. *Id.*

145. *Id.*

incident.”<sup>146</sup>

The Court began its brief analysis with the observation that:

A rule of causation which focuses solely on whether protected conduct played a part, “substantial” or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.<sup>147</sup>

Finding that the plaintiff’s call to the radio station was a constitutionally protected activity,<sup>148</sup> and noting the district court’s finding that the decision not to rehire him satisfied the significant adverse action and causation requirements for First Amendment retaliation claims,<sup>149</sup> the Court nonetheless held that the plaintiff could not prevail on his claim against the board of education if the board could show “by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff’s] reemployment even in the absence of the protected conduct.”<sup>150</sup> The Court then remanded the case for a determination as to whether the board would have decided not to rehire the plaintiff even in the absence of his phone call to the radio station.<sup>151</sup>

Thus, *Mount Healthy* made clear that government actors may assert, as an affirmative defense to a prima facie First Amendment retaliation claim, that they would have taken the adverse action complained of even in the absence of the plaintiff’s exercise of First Amendment rights.<sup>152</sup>

#### V. THE ELEVENTH CIRCUIT SHOULD RECOGNIZE A § 1983 CAUSE OF ACTION IN RETALIATORY FORUM CLOSURE CASES

The argument that the government’s forum closure power is not unlimited and that the Eleventh Circuit should recognize a § 1983 cause of action for the victims of retaliatory forum closure is a relatively straightforward one. First, the victims of retaliatory forum closure can set forth a claim that includes all the elements of a traditional First Amendment retaliation claim. Second, retaliatory forum closure contravenes foundational constitutional guarantees. Third, granting a cause of action and remedy in retaliatory forum closure cases would vindicate a right Congress sought to protect in enacting 42 U.S.C. § 1983, and limiting the government’s forum closure power would comport with the statute’s broad scope. Finally, in typical retaliatory forum closure cases, an injunctive remedy of limited duration can be

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146. *Id.* at 281–83.

147. *Id.* at 285.

148. *Id.* at 284.

149. *Id.* at 283, 287.

150. *Id.* at 287.

151. *Id.*

152. See Koerner, *supra* note 117, at 764.

easily granted and will cure the injury without unduly interfering with the government's legitimate exercise of control over its property.

*A. Retaliatory Forum Closure Cases Satisfy All the Elements of a First Amendment Retaliation Claim*

Recall that to set forth a First Amendment retaliation claim, a plaintiff must plead (1) he engaged in an activity protected by the First Amendment; (2) the government took significant adverse action against him; and (3) the plaintiff's constitutionally protected conduct was a substantial factor in the government's decision to take adverse action against the plaintiff.<sup>153</sup> Instances of retaliatory forum closure meet all these criteria.

Plaintiffs can easily establish the first required element. In the typical retaliatory forum closure case, a government actor chooses to completely shut down a designated or limited public forum as a response to both a speaker's viewpoint and retention of counsel (or pursuit of legal remedy) to enforce his constitutional right to speak in the forum.<sup>154</sup> A speaker's retention of counsel is protected under the Freedom of Association Clause of the First Amendment.<sup>155</sup> More significantly, if the speech or expressive activity a speaker wishes to conduct in a forum is protected under the Free Speech Clause of the First Amendment, a speaker will automatically establish this first element. In a limited public forum, of course, the speaker first will have to show that he enjoys a so-called "right of access" to the forum.<sup>156</sup> Finally, a speaker's access to the courts is also secured by the First Amendment.<sup>157</sup> Thus, in typical retaliatory forum closure cases, plaintiffs can successfully plead the first element of a First Amendment retaliation claim, establishing that they engaged in an activity protected by the First Amendment.

As to the second element of a retaliation claim, forum closure certainly constitutes "significant adverse action" that would chill a person of ordinary firmness from continuing to engage in the constitutionally protected activity.<sup>158</sup> By definition, forum closure chills even a person of extraordinary firmness from continuing to speak or conduct expressive activity in the forum, as it renders *any* speech or

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153. *See supra* Section IV.A.

154. In the Burrows' controversy, discussed in the Introduction, it appears that the plaintiffs' initial exclusion from the forum was motivated by viewpoint discrimination, while the decision to close the forum entirely was made in retaliation against both the plaintiffs' religious viewpoint and the plaintiffs' assertion of their rights through counsel.

155. *See DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech.").

156. *See Rohr, supra* note 29, at 307-09 (internal quotation marks omitted).

157. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

158. Recall that this objective test is the generally accepted formulation of the adverse action requirement. *See supra* note 128.



expressive activity in the forum impossible.

Retaliatory forum closure cases also satisfy the third element of a First Amendment retaliation claim. As in the Burrows' forum closure incident, it is a speaker's expression of his viewpoint or retention of counsel to enforce his right to express his viewpoint that draws fire from the operator of the forum. It does not matter that other considerations might also influence the forum closure decision; for a First Amendment retaliation claim to arise, a speaker's exercise of constitutionally protected conduct need only be *a* motivating factor, not the *sole* motivating factor, in the government's decision to take adverse action.<sup>159</sup>

### B. Retaliatory Forum Closure Transgresses Basic First Amendment Guarantees

Aside from the particular elements of a retaliation claim, on a more basic level, retaliatory forum closure simply does not accord with the foundational guarantees of the First Amendment. Two of the First Amendment's most basic guarantees are the rights to be free from government-initiated viewpoint discrimination and retaliation for "speaking out."<sup>160</sup> These protections would be of little value to speakers if the government, although required to afford the protections while a forum is held open, always retained a trump card to disregard them by shutting down the forum entirely. If government has the power to shut down a designated or limited public forum at any time in retaliation against a speaker's viewpoint, then the First Amendment's "marketplace of ideas,"<sup>161</sup> though protected from selective suppression, would remain vulnerable to total censorship in the event that the operator's animus toward a viewpoint expressed in the forum outweighed the operator's desire to hold the forum open to competing viewpoints.

The Seventh Circuit has observed that total forum closure is a facially content-neutral regulation on speech,<sup>162</sup> but the drastic, all-

159. See discussion *supra* Subsection IV.A.3.

160. See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (stating that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

161. See *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[.] . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."); see also Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 971 (2010) (noting that Holmes' "marketplace of ideas" has been seen to rank among "the most forceful metaphors in American jurisprudence" (internal quotation marks omitted)).

162. See *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1291 (7th

encompassing nature of total forum closure emphasizes rather than diminishes the point. If a speaker's viewpoint offends the government so much that it would prefer to close down a forum entirely rather than operate it according to the viewpoint-neutral manner the First Amendment commands, the specter of retaliation and viewpoint discrimination looms ominously. And in the event that specter is merely phantasmal, recognizing a § 1983 cause of action for the victims of retaliatory forum closure would not sound the death knell for an innocuous forum closure. If the government can demonstrate, by a preponderance of the evidence, that it would have shut down the forum even in the absence of a speaker's expression of his viewpoint (or retention of legal counsel or pursuit of legal remedy to enforce his right to express his viewpoint), the speaker will not be entitled to relief.<sup>163</sup> Furthermore, even if the government cannot invoke *Mount Healthy's* affirmative defense, the plaintiff will still have to prove each element of his claim on the merits.

C. *Granting a Cause of Action for Retaliatory Forum Closure Is Consistent with the Purpose of § 1983*

Extending First Amendment retaliation jurisprudence to provide a § 1983 cause of action for the victims of retaliatory forum closure would at the same time serve the purposes of § 1983 itself. As the Supreme Court has stressed:

A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of “any rights, privileges, or immunities secured by the Constitution and laws.” Accordingly, we have “repeatedly held that the coverage of [§ 1983] must be broadly construed.” The legislative history of the section also stresses that as a remedial statute, it should be “liberally and beneficently construed.”<sup>164</sup>

The Court has consistently rejected attempts to limit the types of constitutional rights whose violation will give rise to a § 1983 private right of action.<sup>165</sup> The circuits have hammered this point home even further, observing that § 1983 was “designed to provide a *comprehensive*

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Cir. 1996) (calling total forum closure “content-neutral”).

163. See *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (affording an affirmative defense to First Amendment retaliation claims when defendants can show they would have reached the same decision even in the absence of protected conduct).

164. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (alteration in original) (citations and footnote omitted) (quoting 42 U.S.C. § 1983 (1988), *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989), and *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 684 (1978), respectively).

165. *Id.* at 445 (stating that “we have rejected attempts to limit the types of constitutional rights that are encompassed within the phrase ‘rights, privileges, or immunities’”).

remedy for the deprivation of constitutional rights,”<sup>166</sup> and that “[t]he contours of § 1983 must necessarily remain flexible to accommodate changing circumstances and the exigencies of a given era. . . . [Section] 1983 is appropriately suited to redress any ‘new method of interference’ with the rights which its words protect.”<sup>167</sup> Given § 1983’s intentionally broad scope, it is likely that Congress did indeed seek to create a private right of action for individuals to whom retaliatory forum closure has denied the very core of the First Amendment’s protections.<sup>168</sup>

*D. Damages Sustained by Retaliatory Forum Closure Can Be Cured by Injunctive Relief of a Limited Duration*

Plaintiffs who bring suit under 42 U.S.C. § 1983 may seek a variety of remedies. Claims brought under § 1983 sound in tort, and just as tort law provides remedies for invasions of personal or property interests, the statute “provides relief for invasions of rights protected under federal law.”<sup>169</sup> Given the compensatory nature of the statute, plaintiffs whose constitutional rights have been violated may bring an action for monetary, declaratory, or injunctive relief.<sup>170</sup>

In the majority of retaliatory forum closure cases, an injunction ordering the government to hold the forum open (or to re-open the forum if already closed) for a limited duration will suffice to cure the injury, while at the same time honoring the government’s right to control its property.<sup>171</sup> The Eleventh Circuit, and other courts willing to

166. *Smith v. Hampton Training Sch. for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966) (emphasis added); *see also Basista v. Weir*, 340 F.2d 74, 81 (3d Cir. 1965) (declaring that “[t]he Civil Rights Act is not to be interpreted narrowly”).

167. *Green v. Dumke*, 480 F.2d 624, 628 n.7 (9th Cir. 1973) (quoting *United States v. Classic*, 313 U.S. 299, 324 (1941)).

168. Section 1983 was directed in large part at preventing government actors from exercising their discretionary powers to infringe constitutional liberties. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (observing that “the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983”).

169. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999). Section 1983 is to be interpreted “in light of the ‘background of tort liability.’” *Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

170. *See Monell v. Dep’t. of Soc. Servs. of New York*, 436 U.S. 658, 690 (1978) (stating that “[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief”).

171. Recall that the Supreme Court in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, alluding to general property law concepts, noted that “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated,” and that “a [s]tate is not required to indefinitely retain the open character of [a designated public forum].” 460 U.S. 37, 46 (1983) (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981)) (internal quotation marks omitted). As a property owner, surely the government may control the disposition of its property. Unlike private property owners, however, the government may not wield its ownership powers in a manner that will infringe a basic constitutional right. *See City of Newport*, 453 U.S. at 268

recognize a cause of action for retaliatory forum closure, should craft a set of factors for determining the appropriate duration of such an injunction. The injunction should last only as long as necessary for the plaintiff to speak or conduct expressive activity in the manner he would have done absent the forum closure and should end automatically whenever the government would have elected to close down the forum had the plaintiff not chosen to exercise his First Amendment rights. This fact-sensitive inquiry will naturally involve some measure of estimation, but if done carefully, it will cure the chilling effect of forum closure on speech without forcing the government to hold open a forum it would have eventually closed. Additionally, this approach logically follows from the affirmative defense afforded by *Mount Healthy*.<sup>172</sup>

In the event that an injunction of the type just described would place an unreasonable burden upon the government or would prove impractical, a court could always award damages in a manner similar to that of other § 1983 claims.

#### CONCLUSION

Given the broad interpretation of the government's forum closure power suggested in *Chabad-Lubavitch v. Miller*, the Eleventh Circuit stands at a crossroads. It may either limit *Miller's* expansive view as dicta or affirm it as a controlling rule of law. Should the Eleventh Circuit choose to do the former and recognize that the First Amendment does not allow closure in retaliation against a speaker's viewpoint, it will stand with the First Circuit in providing full constitutional protections to the victims of retaliatory forum closure. Should the Eleventh Circuit instead choose to affirm *Miller's* expansive view as a positive rule of law, it will join the Seventh Circuit, and perhaps the Third, Eighth, and Ninth Circuits, in denying two of the First Amendment's most core protections to a wide range of citizens.

Considering the split that unquestionably exists between the Seventh and First Circuits, this issue might not reach full resolution at the circuit level. However, if the Eleventh Circuit were to spark a trend toward qualifying expansive dicta on the forum closure power issue, perhaps the Third, Eighth, and Ninth Circuits would follow, producing a strong majority rule that would reduce the likelihood of decision at the Supreme Court. Without such a qualification, those courts will remain vulnerable to reversal by the Supreme Court when it finally has occasion to decide the scope of the government's forum closure power.

Which direction the Eleventh Circuit will take remains unclear. But as for Donald and Meagan Burrows, whose open forum was shut down in retaliation against their viewpoint, the violation of their First Amendment rights is an open and shut case.

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(observing that "the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983").

172. See discussion *supra* Section IV.B.