



# MEMORANDUM

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## **Sharing Your Faith/Witnessing on Public Property**

Public streets, sidewalks, and parks in the United States are open fora for evangelism. Government-owned property may be divided into three categories: public forums, limited public forums, and nonpublic forums.<sup>1</sup> In general, the more public the forum, the more likely the First Amendment to the United States Constitution (“First Amendment”) controls.<sup>2</sup> Several Supreme Court of the United States (“U.S. Supreme Court”) cases provide answers to those who challenge your First Amendment right to, for example, give away religious tracts, pamphlets, and other printed material, and to speak to people on a public sidewalk about your faith.

### **What laws protect my right to witness and share my faith in public?**

When you share the Gospel or give away religious tracts in public places—streets, sidewalks, and parks—you are engaged in a form of speech protected by the First Amendment. State constitutions in the United States include free speech protections as well.<sup>3</sup>

The First Amendment free speech clause reads, “Congress shall make no law . . . abridging the freedom of speech,”<sup>4</sup> and the Fourteenth Amendment states, in part, “[N]or shall any State deprive

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<sup>1</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1323-25 (7<sup>th</sup> ed. 2004). A public forum is government property that has traditionally been held open to public discourse, such as public streets and public parks, wherein the government generally imposes content-neutral time, place, and manner restrictions (to be discussed herein). *Id.* A limited public forum refers to public property that is not traditionally open to public discourse but, nonetheless, the government has chosen to open it up to public discourse for a time. *Id.* One example of a limited public forum is a public school classroom when school is in session. *Id.* A nonpublic forum is public property that has not traditionally been held open to public discourse and the government has not chosen to open it to such discourse. *Id.* An example of a nonpublic forum is a polling place on Election Day. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1879 (2018).

<sup>2</sup> Nowak & Rotunda, *supra* note 1 at 1326.

<sup>3</sup> *E.g.*, Tex. Const. art. 1, § 8 (“Every person shall be at liberty to speak, write or publish his opinions on any subject . . . and no law shall ever be passed curtailing the liberty of speech or of the press.”); Cal. Const. art. 1 § 2 (“Every person may freely speak, write and publish his or her sentiments on all subjects . . . . A law may not restrain or abridge liberty of speech or press.”); Fla. Const. art. 1 § 4 (“Every person may speak, write and publish sentiments on all subjects . . . . No law shall be passed to restrain or abridge the liberty of speech or of the press.”); N.J. Const. art. 1 § 6 (“Every person may freely speak, write and publish his sentiments on all subjects . . . . No law shall be passed to restrain or abridge the liberty of speech or of the press.”).

<sup>4</sup> U.S. Const. amend. I.

any person of life, liberty, or property, without due process of law . . . .”<sup>5</sup> The U.S. Supreme Court has ruled that these two Constitutional provisions severely limit the power of federal, state, and local governments to interfere with speech activities on sidewalks, streets, and in parks.<sup>6</sup> The U.S. Supreme Court has also noted that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.”<sup>7</sup>

It is a constitutional axiom that the distribution of free religious literature is a form of expression protected by the First Amendment.<sup>8</sup> As the U.S. Supreme Court explained:

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years . . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.<sup>9</sup>

The government, moreover, cannot regulate private speech based on its substantive content or the message it conveys.<sup>10</sup> “Constitutional rights, however, are not absolutes.”<sup>11</sup>

### **What laws protect my right to exercise my religion?**

The First Amendment free exercise clause reads, “Congress shall make no law . . . prohibiting the free exercise” of religion.<sup>12</sup> This clause “withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.”<sup>13</sup> The free exercise clause, in other words, prohibits “governmental regulation of religious beliefs.”<sup>14</sup>

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<sup>5</sup> U.S. Const. amend. XIV.

<sup>6</sup> *E.g.*, *McCullen v. Coakley*, 573 U.S. 464 (2014); *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009); *United States v. Grace*, 461 U.S. 171 (1983).

<sup>7</sup> *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

<sup>8</sup> *See, e.g.*, *Heffron v. Int’l Soc’y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981); *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>9</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 108-109 (1943).

<sup>10</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

<sup>11</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2445 (2022) (noting that “[r]ights often conflict and balancing of interests is often required to protect the separate rights at issue.”).

<sup>12</sup> U.S. Const. amend. I.

<sup>13</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-223 (1963).

<sup>14</sup> *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963) (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs . . . . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.”) (internal citation omitted).

## **Am I soliciting when I hand out religious literature and share my faith?**

No! Giving away free Gospel tracts and talking to people about salvation are not the same thing as soliciting. The U.S. Supreme Court has held that there is a difference between soliciting and leafletting.

In *United States v. Kokinda*, for example, the U.S. Supreme Court determined that “a United States Postal Service regulation that prohibits ‘soliciting alms and contributions’ on postal premises” did not violate the First Amendment.<sup>15</sup> Nevertheless, the U.S. Supreme Court suggested that it would reject a rule that banned free distribution of literature on such properties, stating:

As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation.<sup>16</sup>

In *Int'l Soc'y for Krishna Consciousness v. Lee*, the U.S. Supreme Court considered two questions, one of which was “whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment.”<sup>17</sup> Here, the U.S. Supreme Court determined “that the *solicitation ban* [was] reasonable.”<sup>18</sup> However, in *Lee v. Int'l Soc'y for Krishna Consciousness*, the U.S. Supreme Court determined that the *ban* “*on distribution of literature* in the Port Authority airport terminal [was] invalid under the First Amendment.”<sup>19</sup>

## **Where can I go to hand out Gospel tracts to the public?**

You may go to any publicly-owned street, sidewalk, or park. In legal terms, streets, sidewalks, and parks, are called traditional public forums. A public forum is government property that is traditionally opened to public speech activities, including, for example, leafletting, picketing, marching, newspaper distribution, and political rallies.<sup>20</sup>

In addition to streets, sidewalks, and parks, courts have found many other places to be appropriate. Subject to local laws and ordinances, airport terminals, subway systems, and public sidewalks surrounding the U.S. Supreme Court building, for example, may be appropriate locations for leafletting and other First Amendment free speech activities.<sup>21</sup>

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<sup>15</sup> 497 U.S. 720, 722-723 (1990).

<sup>16</sup> *Id.* at 734.

<sup>17</sup> 505 U.S. 672, 674 (1992).

<sup>18</sup> *Id.* at 685 (emphasis added).

<sup>19</sup> 505 U.S. 830, 831 (1992) (emphasis added).

<sup>20</sup> See *United States v. Grace*, 461 U.S. 171, 176-177 (1983); *Hague v. Comm. for Indus. Org.*, 307 U.S. 469, 515; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758 (1995).

<sup>21</sup> See, e.g., *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.* 482 U.S. 569, 577 (1987) (resolution banning all First Amendment activities at Los Angeles International Airport was “substantially overbroad”); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1321 (1991) (“guidelines” banning all noncommercial expressive activity in designated areas on Massachusetts Bay Transit Authority’s property held to be invalid); *United*

Unfortunately, sometimes city officials misunderstand the way in which First Amendment protections apply to traditional public forums. In *Frisby v. Schultz*, for example, the appellants (i.e., the Chief of Police, Town Board, and Town Attorney), argued that the *public streets* in their town “should be considered a nonpublic forum.”<sup>22</sup> The U.S. Supreme Court rejected this argument and explained that “a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood . . . . [A]ll public streets are held in the public trust and are properly considered traditional public fora.”<sup>23</sup> The *Frisby* Court, however, also noted that a state may enforce “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>24</sup>

In *Ward v. Rock Against Racism*, for example, the U.S. Supreme Court examined a city guideline applicable to protected speech.<sup>25</sup> The issue arose “from the city's attempt to regulate the volume of amplified music at the bandshell [i.e., amphitheater] so the performances [were] satisfactory to the audience without intruding upon those who” lived near the amphitheater.<sup>26</sup> The U.S. Supreme Court determined that the “city's sound-amplification guideline [was] narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline [left] open ample channels of communication.”<sup>27</sup> As such, the city guideline was “valid under the First Amendment as a reasonable regulation . . . .”<sup>28</sup>

Because of potential time, place, and manner regulations, you should look up local laws and ordinances ahead of time. You may also want to contact local police if you have additional questions.

### **If I am witnessing on a public sidewalk in front of a business, am I loitering, and will I be required to move away from the business?**

No! Loitering has been defined as the “criminal offense of remaining in a certain place (such as a public street) for no apparent reason.”<sup>29</sup> In *City of Chi. v. Morales*, the U.S. Supreme Court explained that an ordinance “with no apparent purpose . . . is inapplicable to assemblies that are designed to demonstrate a group’s support of, or opposition to, a particular point of view.”<sup>30</sup> In other words, evangelizing is a legitimate purpose for standing on a public sidewalk.

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*States v. Grace*, 461 U.S. 171, 183 (1983) (statute section that prohibited “carrying signs, banners, or devices on the public sidewalks surrounding the [U.S. Supreme Court] building” held to be unconstitutional).

<sup>22</sup> 487 U.S. 474, 480 (1988).

<sup>23</sup> *Id.* at 480-481.

<sup>24</sup> *Id.* at 474.

<sup>25</sup> 491 U.S. 781, 789 (1989).

<sup>26</sup> *Id.* at 784.

<sup>27</sup> *Id.* at 803.

<sup>28</sup> *Id.*

<sup>29</sup> *Loitering*, BLACK’S LAW DICTIONARY (11th ed. 2019). It is important to note that loitering ordinances may be constitutionally problematic as well. See, e.g., *City of Chi. v. Morales*, 527 U.S. 41, 51 (1999) (City of Chicago loitering ordinance held to be unconstitutionally vague).

<sup>30</sup> 527 U.S. 41, 53 (1999).

Common sense must also be used. One cannot stand in the middle of a street and obstruct the flow of traffic while evangelizing, for example (as vehicle and pedestrian safety are government concerns).<sup>31</sup> Your right to use the streets, sidewalks, and parks, is also not a license to make such places unusable for others.<sup>32</sup>

### **Do I have the same rights to witness on a public sidewalk of a town in which I do not live?**

Yes, you are free to share your faith on public streets and sidewalks and in parks of towns in which you do not live. The free speech constitutional protection provided in the First Amendment applies to all citizens and aliens and extends throughout the United States. The U.S. Supreme Court has frequently emphasized that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>33</sup> The ACLJ has won many First Amendment free speech cases involving visitors from other towns or states.

### **What should I do to get started witnessing and sharing my faith in public?**

First, devote time to prayerful preparation. Second, select a location and pray for the surrounding area. You may choose a place in a high-trafficked area, outside a sports stadium, or near an historic monument, for example. You may also have a target group in mind. Third, check the local government website for the rules applicable to your First Amendment activities. Print the rules and keep them on hand. When in doubt, confer with local police.

If you are stopped from distributing free literature on public property, you may contact the ACLJ so that we can review the incident. Local rules are not always consistent with the First Amendment and applicable case law. Several federal cases have addressed such inconsistencies.<sup>34</sup>

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<sup>31</sup> In *Sun-Sentinel Co. v. City of Hollywood*, for example, two newspaper companies (unsuccessfully) sought a preliminary injunction against the City of Hollywood, Florida, after “City police officers cited three Sentinel vendors under Section 316.130(5) of the Florida Statutes . . . [which] reads: ‘no person shall stand in the portion of a roadway paved for vehicular traffic for the purpose of soliciting a ride, employment, or business from the occupant of any vehicle.’” 274 F. Supp. 2d 1323, 1327 (S.D. Fla. 2003). The United States District Court for the Southern District of Florida denied the motion for a preliminary injunction, in part, because Florida has “significant interests in vehicle and pedestrian safety and the free flow of traffic.” *Id.* at 1331.

<sup>32</sup> In *Cox v. Louisiana*, the U.S. Supreme Court made this clear:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection . . . . A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.

379 U.S. 536, 554-555 (1965).

<sup>33</sup> *Connick v. Myers*, 461 U.S. 138, 145 (internal citation omitted) (internal quotations omitted).

<sup>34</sup> See, e.g., *Houston v. Hill*, 482 U.S. 451, 453 (1987); *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015); *R.A.V. v. St. Paul*, 505 U.S. 377, 379 (1992).

## First Amendment Protections on Privately-owned Property

Though this memo focuses primarily on First Amendment protections applicable on public property, such as streets, sidewalks, and parks, this section briefly discusses the way in which First Amendment and state constitutional protections may (or may not) be applicable on privately-owned property. Of note, despite the following case outcomes, it must be emphasized that *an owner of a privately-owned property may, for example, choose to allow First Amendment free speech activities on the property.*

### Privately-owned Shopping Centers and the U.S. Supreme Court

The U.S. Supreme Court has addressed the way in which privately-owned shopping centers have handled First Amendment-related issues. In *Lloyd Corp. v. Tanner*, for example, the U.S. Supreme Court stated that property does not “lose its private character merely because the public is generally invited to use it for designated purposes.”<sup>35</sup>

However, in *Pruneyard Shopping Ctr. v. Robins*, the U.S. Supreme Court explained that “Art. 1, §§ 2 and 3, of the California Constitution gave appellees the right to solicit signatures on appellants' [privately-owned shopping center] property in exercising their state rights of free expression and petition.”<sup>36</sup> In reaching this result, the U.S. Supreme Court explained that its reasoning in *Lloyd Corp. v. Tanner* did not, of its own force “limit the authority of the State to exercise . . . its sovereign right to adopt in its own Constitution individual liberties *more expansive* than those conferred by the Federal Constitution.”<sup>37</sup> In other words, a state constitution may provide more expansive individual liberty protections than the federal constitution.

### Privately-owned Shopping Centers and State Courts

State courts have also addressed the way in which privately-owned shopping centers have handled these issues. In *Publix Super Mkts., Inc. v. Tallahasseeans for Prac. Law Enf't*, for example, a Florida Circuit Court explained that “there is no right under the First Amendment to the United States Constitution [or the Florida Constitution<sup>38</sup>] for a person to engage in free speech . . . on private property *without the property owner's permission.*”<sup>39</sup> As such, the court ruled that Publix

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<sup>35</sup> 407 U.S. 551, 569 (1972). Similarly, in *UFCW, Loc. 919 v. Crystal Mall Ass'n, L.P.*, the Connecticut Supreme Court explained that “there is no right under the first amendment to the United States constitution for a person to use a privately owned shopping center as a forum to communicate *without the permission of the property owner.*” 270 Conn. 261, 273 (Conn. 2004) (emphasis added).

<sup>36</sup> 447 U.S. 74, 79. “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.” Cal Const. Art. I § 2. “The people have the right to . . . assemble freely to consult for the common good.” Cal Const. Art. I § 3. “A statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.” *Id.*

<sup>37</sup> 447 U.S. at 81 (emphasis added). In *UFCW, Loc. 919 v. Crystal Mall Ass'n, L.P.*, the Connecticut Supreme Court also noted that a state “may adopt greater protection for free expression on private property, so long as such protection does not conflict with any federally protected property right of the owners of private shopping centers.” 270 Conn. at 273-74.

<sup>38</sup> 2005 Fla. Cir. LEXIS 1006, \*9 (noting that “the scope of the Florida Constitution's protection of freedom of speech is the same as that required under the First Amendment”).

<sup>39</sup> *Id.* at \*7 (emphasis added).

was “entitled to exclude Defendants from coming onto Publix's privately owned or leased properties where such persons seek to use the premises for any purpose other than shopping.”<sup>40</sup>

Similarly, in *Collins v. Shoppers’ World, L.C.*, a Virginia Circuit Court noted that “the First Amendment of the United States Constitution does not require the owner of a privately-owned shopping center to allow individuals to distribute political materials.”<sup>41</sup> The court also explained that the authority cited by the plaintiff was inconsistent with the “Virginia Supreme Court’s findings in *Elliott v. Commonwealth . . .*”<sup>42</sup> In *Elliott*, the Virginia Supreme Court emphasized that “Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment.”<sup>43</sup> In *Collins*, the court, therefore, ruled that, “[u]nder the Virginia Constitution, there is no general right to engage in political speech in privately-owned shopping centers . . . .”<sup>44</sup>

## Conclusion

The First Amendment to the U.S. Constitution provides protection for those who desire to share the Gospel on public property (such as public streets, sidewalks, and parks). First Amendment protections, however, generally do not apply to those on private property. But some state constitutions may provide more expansive constitutional protections than the First Amendment. An owner of private property may also *choose* to allow First Amendment free speech activity on the property.

We hope that this information is of assistance to you. Should you have any questions, feel free to contact the ACLJ again.

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<sup>40</sup> *Id.* at \*13.

<sup>41</sup> 71 Va. Cir. 133, 136 (2006).

<sup>42</sup> *Id.* (citing 267 Va. 464, 473-74 (2004)).

<sup>43</sup> 267 Va. at 473-74.

<sup>44</sup> 71 Va. Cir. at 137.