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CONFIDENTIAL & PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Via Email
Jeff McCutchan, Esq.
General Counsel
Cook County Health
1950 W. Polk St., Ste. 9813
Chicago, Illinois 60612

Re: Audiovisual Recording on Hospital Premises

Dear Mr. McCutchan,

You have asked the State's Attorney's Office for advice about the current state of First Amendment law as applied to filming and/or recording public employees on hospital premises. You have informed us that you would like to implement a policy prohibiting recording in patient and treatment areas; clinical areas; and non-treatment areas that may be accessed by patients, visitors, and the public. The stated purpose of this policy is to protect and safeguard the privacy and confidentiality of patients, visitors, and workforce members of Cook County Health ("CCH"). The specific question presented, our conclusion and a discussion of the reasons supporting our conclusion follow.

QUESTION PRESENTED

What is the current state of First Amendment law as applied to filming and/or recording public employees on hospital premises?

CONCLUSION

A policy banning audiovisual recording in a public hospital does not violate the First Amendment because hospitals are non-public forums. Even assuming that recording CCH employees is protected First Amendment conduct, a nonpublic forum may enforce a regulation as long as it is both viewpoint neutral

and reasonable in light of the purpose served by the forum. CCH's proposed regulation is both content neutral and reasonable considering its interest in providing medical care and its legal responsibility to protect patient privacy.

DISCUSSION

In evaluating a potential First Amendment violation, courts first examine whether the relevant activities are protected speech. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 797 (1985). If so, the court next identifies whether any challenged restrictions impact a public or nonpublic forum, because that determination dictates the extent to which the government can restrict First Amendment activities. *See id*. Finally, courts look to whether the proffered justifications for prohibiting speech in the forum satisfy the requisite standard of review. *Id*. I address each element in turn.

A. Protected Speech

The First Amendment provides at least some degree of protection for recording news and information about government affairs. In *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), the Seventh Circuit held in the context of a preliminary injunction that an Illinois statute prohibiting individuals from making audio recordings of police officers performing their duties in public triggered heightened First Amendment scrutiny. The court explained that the "act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Id*. at 595. The court further explained that the public has a strong First Amendment interest in "free discussion of government affairs" and "gathering news and information…about the affairs of the government." *Id*. at 597.

Most circuit courts agree that not *all* recordings are protected speech, however. In determining whether recording is protected, courts typically look to the intent and subject of the recording. *See People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fedn., Inc*., 60 F.4th 815 (4th Cir. 2023); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (finding recordings to be protected where information encouraged "discourse on public issues" but declining to address plaintiffs' argument that the "act of recording is inherently expressive conduct").The Ninth Circuit, however, has held that the recording process itself is "inherently expressive" because it necessitates "decisions about content, composition, lighting, volume, and angles." *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). In any event, because restricting the use of all recordings will likely suppress at least *some* protected speech, it is safest to assume that CCH's proposed regulation implicates a First Amendment right.

B. Forum Analysis

Even if the recording of public employees deserves constitutional protection, it may nonetheless be regulated. This is because "[e]ven protected speech…is not equally permissible in all places and at all times." *Corenlius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985). *Alvarez* explicitly noted that its holding did not preclude the possibility of reasonable time, place, and manner restrictions on the

right to record public officials conducting their duties. *Alvarez*, 679 F.3d at 607. And the Supreme Court has made clear that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id*. at 800.

The constitutionality of regulation depends on the forum where the expression occurred. See *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 530 (7th Cir. 2009) (explaining that "the forum category defines the level of scrutiny applicable to the challenged government action"). At one end of the spectrum are public forums—spaces devoted to public expression and the exchange of ideas. *Cornelius*, 473 U.S. at 800, 802. In these spaces, "speakers cannot be excluded without a compelling governmental interest." *Id*. at 800. On the opposite end of the spectrum are nonpublic forums. Greater regulation is permissible in these spaces because they are "not by tradition or designation…forum[s] for public communication." *Christian Legal Soc'y v. Walker*, 453 U.S. at 728–30 (7th Cir. 2006). Exclusion from nonpublic forums is permissible if (1) the government does not engage in viewpoint discrimination against speech otherwise within the forum's limitations; and (2) the restriction is reasonable in light of the purpose served by the forum. *Milwaukee Deputy Sheriffs' Ass'n*, 588 F.3d at 530.

i. CCH is a nonpublic forum.

CCH is likely a nonpublic forum. The most analogous precedential authority is the Seventh Circuit's recent decision in *United States v. Krahenbuhl*, 88 F.4th 678, 683 (7th Cir. 2023). In *Krahenbuhl*, a defendant became agitated and yelled profanities at a respiratory therapist and Veterans Administration ("VA") police officers at a VA medical clinic. These actions occurred at his appointment, while walking to the patient waiting area, and on the sidewalk next to the patient parking lot. *Id*. at 681. The defendant's disorderly conduct convictions were upheld because the convictions did not violate the First Amendment. In reaching this conclusion, the court held that the clinic is a nonpublic forum because its "'primary aim' is to provide veterans with medical care, not a space to exchange ideas." *United States v. Krahenbuhl*, 88 F.4th 678, 683 (7th Cir. 2023) (quoting *Preminger v. Principi*, 422 F.3d 815, 824 (9th Cir. 2005)). The court reasoned that "[t]he focus of the forum analysis is on the government's intent, not how the forum is used by speakers." *Id*. Like the VA clinic at issue in *Krahenbuhl*, the primary purpose of CCH hospitals and clinics is to provide patients with medical care and not to facilitate public communication. *Krahenbuhl* did not differentiate between treatment and non-treatment areas, thus supporting a holding that the entire premises of a hospital or clinic qualify as a nonpublic forum. *See also United States v. Kokinda*, 497 U.S. 720, 728 (1990) (holding that sidewalk next to post office was nonpublic forum).

The Supreme Court has not squarely addressed where public hospitals fit in public forum law. The Court has, however, made clear that the public forum analysis turns on "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Under this logic, the Court has consistently upheld regulation of First Amendment activities in public spaces unsuited for unfettered expression: military bases, *Greer v. Spock*, 424 U.S. 828 (1976); jails and prisons, *Adderley v. Florida*, 385 U.S. 39 (1966); and advertising space in city train cars, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). If these are nonpublic forums, "it would be illogical to conclude that [a] [h]ospital's busy, sometimes crowded waiting areas, in

close proximity to treatment and in frequent use for doctor-patient or doctor-family consultation, are an appropriate site for political activity." *See Low Income People Together*, 615 F. Supp. at 516. The mere fact that a hospital may be used indirectly for the communication of ideas does not transform it into a public forum. *See Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (emphasis added) ("Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.").

ii. Adverse Authority

In other contexts, however, the Supreme Court has differentiated between treatment and non-treatment areas in hospitals. Specifically, *NLRB v. Baptist Hospital, Inc*., 442 U.S. 773 (1979), upheld the right of hospital employees to solicit and distribute literature to each other in non-working areas of hospitals. The Supreme Court held that prohibition of solicitation in corridors and sitting rooms on floors of the hospital having either patients' rooms or operating and therapy rooms was permissible because the record reflected this had the potential to interfere with patient care. But the Court held that the respondent failed to justify the prohibition of union solicitation in the cafeteria, gift shop, and lobbies on the first floor of the hospital. This case is distinguishable from the matter at hand because it involves workers' rights under the National Labor Relations Act, 29 U.S.C. 151-68, rather than any First Amendment analysis. Nonetheless, we include this analysis because it highlights the possibility of treating expression differently in different areas of a hospital, depending on the potential for interference with patient care. If the proposed regulation extends to areas like cafeterias, CCH should be prepared to establish the risk that recording poses to patient privacy and wellbeing.

There is also non-precedential authority holding that hospitals are public forums. In *Dallas Asso. of Community Organizations for Reform Now v. Dallas County Hospital Dist*., the Fifth Circuit held that "a hospital owned by the state is a public forum but one whose use may be limited by the state by reasonable restrictions." 670 F.2d 629, 630–31 (1982). In reaching this conclusion, the Fifth Circuit explained that although there was a need for "preventing disruptive activity in the crowded front lobby of [the hospital], the waiting room, the outpatient clinic, and the emergency treatment area, as well as any other area for patient treatment," the hospital also included "over 1,000 feet of sidewalks and several large parking lots." Accordingly, the court concluded that it should "find the middle way between absolute prohibition of free speech activities in a limited public forum, and disruptive expressions that interfere with the purpose, function and administration of a hospital." *Id*. at 631.

However, as stated above, this case is not binding in Illinois and we note that Justice Rehnquist filed a dissent from the denial of the hospital's petition for a writ of certiorari, criticizing the Fifth Circuit's view that a hospital was a public forum. *Dallas County Hospital Dist. v. Dallas Asso. Of Community Organization for Reform Now*, 459 U.S. 1052 (1982) (Rehnquist, J., dissenting). Justice Rehnquist explained that the Fifth Circuit "misunderstood the distinction in our cases between public property, such as city streets and parks, which has been historically treated as a 'public forum,' and public property, such as jails, military bases, and postal delivery boxes, which has been held not to be a public forum.'" *Id*. (internal citations omitted). At least one district court addressing this issue has also disagreed with the Fifth

Circuit's analysis. *See Low Income People Together, Inc. v. Manning*, 615 F. Supp. 501, 513 ("[T]his court concludes that the Hospital lobby and outpatient waiting areas are neither a public forum nor a limited public forum"). And the Seventh Circuit's analysis in *Krahenbuhl* did not differentiate its First Amendment analysis depending on whether the defendant was in a treatment or non-treatment part of the VA clinic. 88 F.4th at 681.

C. Regulation

Having determined that CCH is a nonpublic forum, the next step in the analysis is determining whether any regulation on speech is viewpoint neutral and "reasonable in light of the purpose served by the forum." *Milwaukee Deputy Sheriffs' Ass'n*, 588 F.3d at 530.

A policy preventing recording at public hospitals is viewpoint neutral. A viewpoint neutral regulation is one that is not "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 812–13. Because the proposed regulation prohibits all recording, it does not favor one viewpoint over another.

The regulation is also reasonable in light of the purpose served by the forum. To the extent that recording interferes with CCH employees' ability to protect patient care, the Seventh Circuit has concluded that "conduct that disrupts Clinic employees from their work is properly prohibited." *Krahenbuhl*, 88 F.4th at 683. Protecting patient privacy has also been held to be a valid justification in response to First Amendment challenges. *See Hill v. Colo*., 530 U.S. 703, 719 (2000) (upholding abortion-clinic bubble zone because law was intended to ensure clinic access and protect patient privacy); *Price v. City of Chicago*, 915 F.3d 1107,113 (7th Cir. 2019) (same).

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Please feel free to contact our office should you have any additional questions about this letter or the opinion sought. We condition this opinion upon the facts presented and may wish to revisit this matter should new information be made available.

Very truly yours,

KIMBERLY M. FOXX
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By: /s/ *Jessica Wasserman*
Jessica Wasserman
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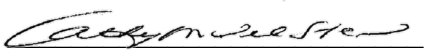
Advice, Transactions, and Complex Litigation

APPROVED BY:



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