



## What Rules Can A Market Make Regarding Speech?

Many farmers markets have questions about free speech at markets, and in particular, what types of restrictions market rules can place on activities such as leafleting, political campaigning, or protesting. These activities can interfere with the operation of the market. Are farmers markets obligated to allow these types of activities as exercises of free speech under the First Amendment?

## Rules All Markets Can Write Regarding Speech

There are some rules that all markets may write that place limitations on speech. A market may have restrictions that are content-neutral and restrict speech to a reasonable time, place and manner. A market may also prohibit unprotected speech.

It is also important that the market is careful to make rules as clear and narrow as possible so that customers and vendors are notified in advance of what is and what is not acceptable conduct at the market.

### Content-Neutral

Market rules covering speech fall into two categories: content-neutral and content-based. **Content-neutral** means that whether the market rule prohibits a particular expression does not depend on the topic or content of that expression. For example, a rule that says, “no signs permitted” or “signs must be 24 x 36 inches” are content-neutral rules: whether you can display a sign, or the size of the sign, does not depend on the sign’s content. **Content-based** means that the market rule prohibits expression related to some topics while allowing others. For example, a rule that says, “the display of offensive signs is prohibited” is a content-based rule: whether you may display a sign depends on the subject matter it contains.

The distinction between content-based rules and content-neutral rules matters because a court will treat the market rule differently if the rule is content-

based. There are two competing interests that the court must balance: (1) the people have an interest in exercising their First Amendment right of free expression and (2) the state also has an interest in protecting an unwilling listener’s right to be left alone. If a content-based rule is challenged, a public market has a high burden of showing a compelling reason for prohibiting a particular topic of speech from the market. For example, a market operated by a municipality would have to show a reason that would outweigh the fundamental right of free speech. Therefore, it is possible to have a content-based rule if the market can justify it with a compelling reason. This is a very high burden to meet and markets should aim for content-neutral rules controlling conduct that are applicable to all.

### Is It Speech?

The first question to ask is whether it is “speech” that a market wants to restrict. In the context of the First Amendment, “speech” includes actual speech and conduct that the law treats as “speech,” such as soliciting, leafleting, or flag burning. If a market wants to restrict “speech” they may write rules that are content-neutral, or restrict speech to a reasonable time, place, and manner.

## Time, Place, and Manner Restrictions

Most farmers markets take place in areas that the law may categorize as a “**traditional public forum.**” A traditional public forum is an area that has traditionally been used for political speech, such as parks, streets, and sidewalks.

In a traditional public forum, a market may limit speech to a **reasonable time, place, and manner.** When expression interferes with the routine activities of the market it is permissible to impose restrictions on the conduct, not the speech’s content.

### **For example:**

- A **time** restriction might be restricting speech when the market is setting up or closing down.
- A **place** restriction might include limiting speech to a designated area of the market or creating a buffer zone where speakers may not interfere with customers entering and exiting the market.
- A **manner** restriction could be restricting noise by prohibiting the use of megaphones.

The question of whether a market rule like this is **reasonable** depends on (1) whether the rule can be justified without reference to the content of the speech and (2) whether there are alternative ways for the speaker to communicate their message. For example, it is reasonable to prohibit speech in walkways because that would interfere with the overall functioning of the market. Interfering with the operation of the market is not related to the content of the speech and the speaker may go elsewhere to express themselves. A farmers market should consult a lawyer about what would constitute reasonable time, place, and manner restrictions for their market.

## Unprotected Speech

Markets may prohibit speech that falls into certain categories the First Amendment does not protect. Some of these categories are fighting words, true threats, advocacy of unlawful action, and obscenity.

Fighting words are words that by their mere utterance would invoke an immediate breach of the peace. True threats are speech that is intended to intimidate a reasonable person into fear or apprehension of bodily harm or death. Advocacy of unlawful action is the direction to incite imminent lawless action and the likelihood of the listeners to follow the direction of the speaker. Obscenity is speech that has no social, artistic, or political value. What is considered obscene can vary from community to community, but it is something more extreme than merely “offensive” speech.

Speech that is illegal or misrepresentative is also not protected and may be prohibited from the market. Illegal speech includes advertisements of products or services that are not legal, such as illicit drugs. A farmers market manager should consult with a lawyer for further guidance as to whether certain speech may fall into an unprotected category.

While unprotected speech may be prohibited, a market must still have a compelling reason to justify a content-based limitation on speech. Additionally, these categories are very narrow. A market should be careful not to assume the speech they are limiting will be considered unprotected.

### **Key Takeaways for Market Rules Regarding Speech**

#### **Market rules should be:**

- **Specific enough that a customer or vendor would understand what activities are not allowed at the market.**
- **Focused on how, when, and where customers and vendors may participate in speech activities, rather than what they can or cannot say.**
- **Reasonable in restricting how, when, and where speech may take place.**

## Some Markets May Write More Restrictive Rules

The types of rules discussed in the previous section can be implemented by any market. Some markets may also write more restrictive rules regarding speech. That depends in part on whether the market is publicly operated or privately operated. If a government entity runs the market, it is publicly operated. If a private business or organization runs the market, it is privately operated. If it is unclear which category your market falls under, you should follow the stricter set of requirements (those for publicly operated markets) to err on the side of caution. There are two instances when a market may write more restrictive rules. A market that is considered a nonpublic forum under the law may write content-based rules but not viewpoint-based rules. A private market may write any rules restricting speech provided they are not “entangled” with a government entity or serving a “public function.” Notably, state law may impose additional obligations on private markets.

### Public Markets Held in Nonpublic Forums

Some farmers markets may be held at a nonpublic forum. A nonpublic forum is public property that has historically not been designated as a place for political speech. For example, schools, jails, airports, and military bases are nonpublic forums. Some factors to consider when determining whether a space is a nonpublic forum are: whether it is a place for free expression, whether free speech interferes with what the location is used for, and whether free speech is the purpose of the location. Markets in nonpublic forums have broader discretion in their regulation of speech. Unlike traditional forums, nonpublic forums may have content-based rules but not viewpoint-based rules. **Viewpoint-based rules** allow expression about a particular topic, but prohibit expressing a particular view on that topic. For example, a viewpoint-based rule might say it is permissible to speak positively but not negatively about an elected official. These viewpoint distinctions are not permissible in a nonpublic forum.

It is not always easy to determine what type of forum applies to a particular market. For example, many farmers markets are held in parking lots. A parking lot may be considered a traditional public forum because it is open to the public like a street or sidewalk. On the other hand, parking lots may be considered nonpublic forums because parking lots are not historically a place for free speech; allowing free speech could greatly interfere with the parking lot’s functioning, and free speech is not the primary purpose of the parking lot. Unlike most sidewalks or streets, a parking lot may be associated with a stand-alone store or set apart from known public areas with physical barriers or signs. For example, a parking lot could be set apart by landscaping, paving, or signs designating the space as a separate area for specific uses. Those may be reasons to consider it a nonpublic forum.

A farmers market manager should consult a lawyer for further guidance on whether their setting may be a traditional public forum or a nonpublic forum.

### Private Markets

Generally, the First Amendment does not apply to private entities. This means if a market is privately operated the market may write any rules they would like restricting speech. However, there are two exceptions where the Constitution does apply to private entities: when the private entity is “entangled” with a government entity, and when the private entity is performing a “public function.” This means if a private market is “entangled” or serving a “public function” it may be limited to the content-neutral and reasonable time, place, and manner rules that all markets can implement. Additionally, state law may impose some obligations on private markets.



**When is a private market entangled with a government entity?**

A privately-operated market may have to honor the right to free speech if it becomes “entangled” with a government entity. Entanglement may be found when the government affirmatively authorizes, encourages, or facilitates privately operated market activities. For example, some private markets are located on government property, or receive government subsidies, or are licensed by the government. Those may be close enough ties to consider the private market entangled with a government entity. Each of these practices alone is probably not enough to consider a market entangled, but they are factors to consider in determining whether entanglement exists. For example, receiving government grants by itself is not likely enough to show entanglement.

If the government were giving a grant with the intent to control or influence the independent authority of a private market then this might be closer to entanglement. A market may try to avoid entanglement with the following practices:

- Use only market volunteers or staff, not local police, to enforce internal speech restrictions (but having police officers present to enforce municipal laws is okay)
- Take sole responsibility for organizing, planning, and managing the market
- Operate with market funds, not municipal funds
- Reimburse the municipality for services (such as waste management)

Following these practices does not guarantee that a private market would not be considered entangled with a government entity. “Entanglement” is determined on a case-by-case basis. Consult a lawyer for further guidance on whether your private market’s circumstances may lead to entanglement.

**When is a private market serving a public function?**

A privately operated market may have to follow the rules for government-operated markets if it serves a “public function.” Serving a public function means a private entity is performing a task that is traditionally governmental in nature. For example, town squares, business districts, and parks are traditionally seen as governmental in nature because the space is open to the public and is serving the community. While the Supreme Court has said town squares, parks, and business districts serve “public functions,” shopping centers do not. This gives privately owned shopping centers the right to ask speakers to leave.

Whether a privately operated market is more like a town square (serving a public function) or a shopping center (not serving a public function) can be very unclear. One factor to consider is whether the market invites the public generally or invites them specifically to shop. A general invitation may include shopping and speaking or exchanging ideas, and makes it more likely that the market would be serving a public function. If the farmers market is open to the public generally, it is more like a town square. A specific invitation to the public only includes shopping for products being sold. If the market invites the public only to shop, the market is closer to being a shopping mall. It is best to consult with a lawyer as to whether the characteristics of your farmers market would be considered more like a town square or a shopping center.

Under federal law privately owned shopping centers do not have to honor free speech rights. However, some state constitutions recognize a right for the public to use shopping centers for free speech purposes. A privately operated market should consult with a lawyer for further guidance on what legal requirements its state constitution may impose on private markets.

*Find more legal resources for farmers markets at [farmersmarketlegaltoolkit.org](http://farmersmarketlegaltoolkit.org)*



### **Any Market May Restrict the Following Types of Speech**

**Fighting words** are words that by the mere utterance would invoke an immediate breach of the peace.

**True threats** are speech that is intended to intimidate a reasonable person into fear or apprehension of bodily harm or death.

**Advocacy of unlawful action** is the direction to incite imminent lawless action and the likelihood of the listeners to follow the direction of the speaker.

**Obscenity** is speech that has no social, artistic, or political value. What is considered obscene can vary from community to community, but it is something more extreme than merely “offensive” speech.

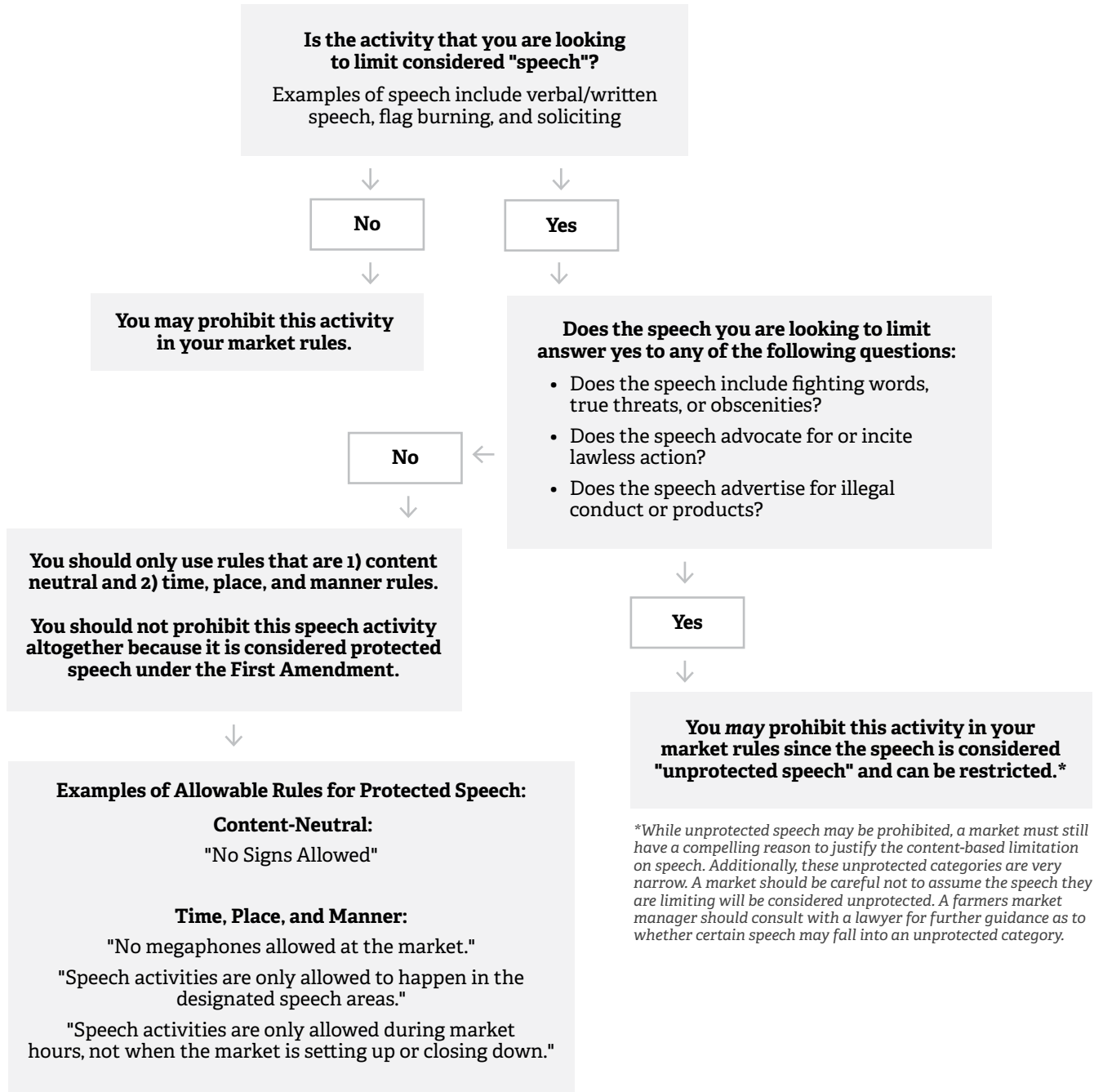
**Speech that is illegal or misrepresentative** is also not protected and may be prohibited by the market.

**Illegal speech** includes advertisements of products or services that are not legal, such as illicit drugs. A farmers market manager should consult with a lawyer for further guidance as to whether certain speech may fall into an unprotected category.

**Decision Tree #1: Free Speech Rules Any Market May Write**

What activities can my market rules prohibit related to free speech?

Farmers markets may want to write rules to limit certain activities at their markets. Sometimes those rules might raise issues related to legal free speech protections. Use this decision tree to see what kinds of speech-related activities market rules can restrict.



## Decision Tree #2: More Restrictive Rules Some Markets May Write

What additional rules can my market make related to free speech?

