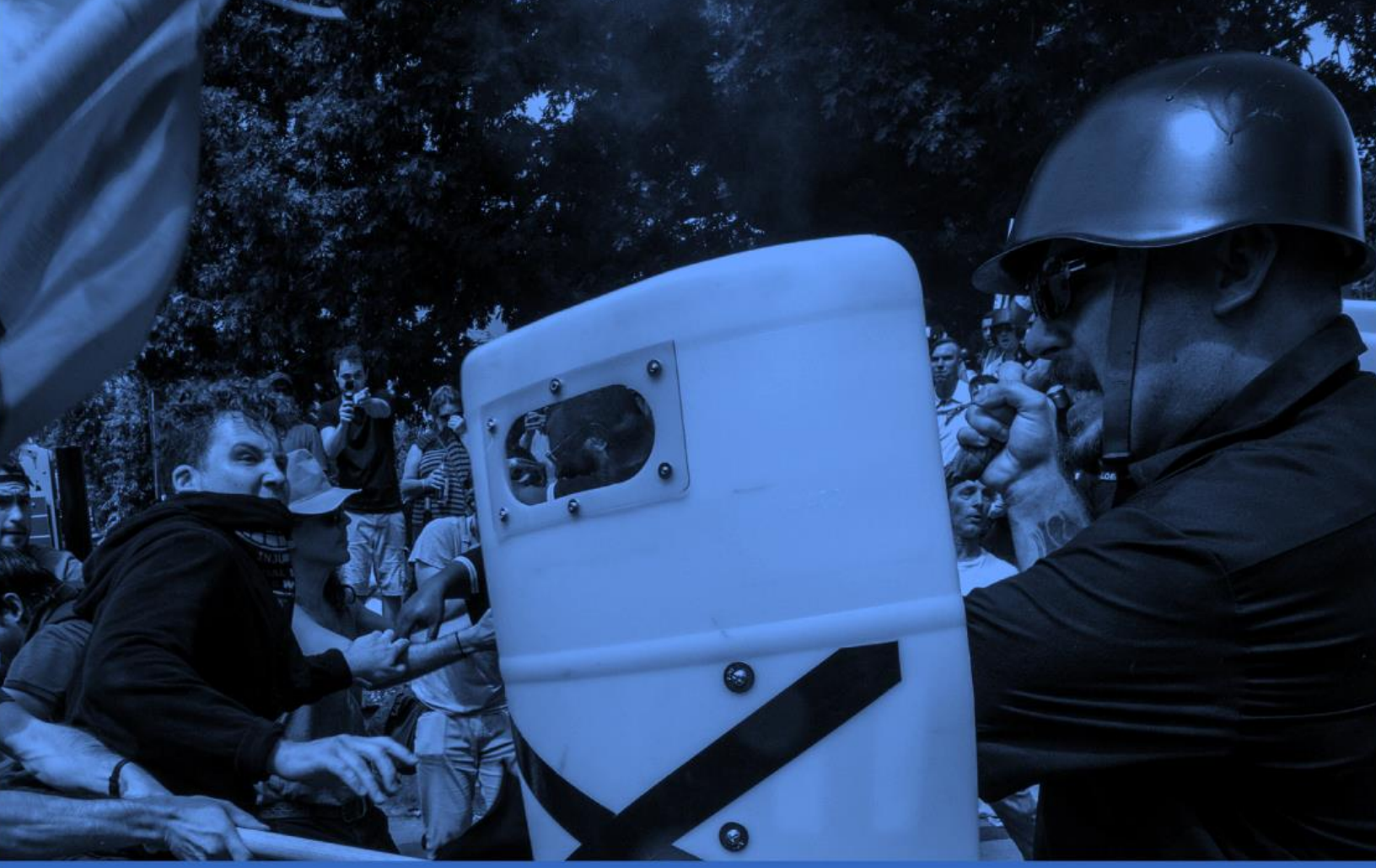

Protests & Public Safety: A Guide for Cities & Citizens

Institute for Constitutional Advocacy and Protection

GEORGETOWN LAW

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INTRODUCTION

The past few years have witnessed a rise in violence at far-right protests and rallies nationwide. In places as diverse as Berkeley, California, and Murfreesboro, Tennessee, white supremacist and white nationalist groups have organized rallies with the self-avowed goal of provoking a response from counter-protesters, including anti-fascists. These events have yielded violence, as evidenced most prominently by the street battles and the death of Heather Heyer at the "Unite the Right" rally in Charlottesville, Virginia, in August 2017. These kinds of confrontations began well before Unite the Right, however, and have continued since, with contentious protests and rallies occurring in major cities like Portland, Oregon, and Dayton, Ohio, and smaller cities in Georgia, Tennessee, and elsewhere. More recently, in the wake of the police killing of George Floyd, heavily armed far-right militias have shown up at protests for racial justice, sometimes purporting to "protect" property and statues and sometimes openly seeking to stoke riots. The result is too often the same: physical violence among warring groups of protesters, property damage to local businesses, sky-high costs for localities seeking to protect public safety, and loss of public trust in government's ability to keep residents secure.

After the Unite the Right rally, the Institute for Constitutional Advocacy and Protection (ICAP) used litigation as a tool to prevent similar violence at future demonstrations and rallies. Representing the City of Charlottesville, local businesses, and residents' associations, ICAP sued nearly two dozen white nationalist and militia groups and their leaders under Virginia state law, and obtained permanent injunctions preventing these groups from returning to Charlottesville acting as armed private militaries. The lawsuit, based on the state constitution's prohibition on private militias and state laws barring private paramilitary and unauthorized law enforcement activity, aimed at preventing violence and incitement to violence while protecting constitutional rights.

Following that successful litigation effort, ICAP has been contacted regularly by localities facing upcoming protest events they fear could turn violent. ICAP has worked with them to develop legal tools to allow local governments to impose reasonable content-neutral conditions on events in public spaces; draft permit restrictions for upcoming rallies, consistent with the First Amendment, Second Amendment, and relevant state laws; design security protocols to ensure public safety while protecting constitutional values; and use alternative mechanisms, including litigation, to preempt unlawful, violent activity.

The need for these tools often begins when local officials learn that a white nationalist group intends to hold a rally or demonstration in their jurisdiction. They usually have some information—even if only from social media or the local activist community—about whether the group intends to be armed and whether it is expected to draw armed counter-protesters. They often are trying to navigate between the requests of their elected officials about how to respond, the needs of public safety, financial costs and other resource considerations, and concerns about litigation risk if the measures they take run afoul of constitutional rights. ICAP assists by helping to develop a constitutionally sound and legally defensible plan, often on short notice, to help ensure public safety, defray costs where possible, and minimize litigation risk.

But local officials aren't the only people who seek legal guidance on these issues. As protests against police brutality and racial injustice have spread across the country more recently, concerned residents and activists increasingly have reported that their peaceful marches and vigils have been met with intimidating militia members bearing assault rifles, dressed in military gear, and often shouting down their messages. In some cases, local officials have failed to take action, mistakenly believing the paramilitary activity is lawful. ICAP has responded with letters to those officials, setting out the relevant law and debunking the widely held myth that the Second Amendment protects the right to assemble as a private militia outside any governmental authority. These letters have led to a decrease in militia activity in some jurisdictions, press coverage that enhances public understanding in others, and productive conversations aimed at reducing the threat.

In the present moment, it is more important than ever that local jurisdictions understand their role in fostering First Amendment activity while protecting the safety of protesters and the public. Having developed a body of knowledge and proven results, ICAP seeks to scale what it has learned by providing this toolkit of legal options. In it you will find legal principles, best practices, and creative solutions upon which local jurisdictions may draw to protect public safety while respecting constitutional rights during rallies, protests, and other public events. The toolkit offers detailed legal analysis suitable for municipal and state attorneys, as well as more general legal guardrails, best practices, and frequently asked questions intended to be more easily accessible to non-lawyer elected and appointed officials, concerned residents, and activists.

I

Relevant Constitutional Principles

This chapter discusses First and Second Amendment principles as applied to limitations on speech and assembly, including restrictions on gun possession and paramilitary activity, in the interest of public safety:

- Violence and incitement to imminent unlawful or violent activity are not protected by the First Amendment.
- Public safety is a legitimate and compelling governmental interest that can justify carefully crafted limitations on First Amendment-protected speech and assembly in certain circumstances.
- Limitations based on the content of speech are disfavored and will be upheld in court only when the government's interest is very compelling and no other means are adequate to protect that interest.
- Restrictions based on the anticipated hostile reaction of some members of the audience are considered to be content-based, making them much more difficult to defend. It is generally impermissible, for example, to deny a permit based on fears about how counter-protesters will react.
- Content-neutral limitations on speech, known as "time, place, and manner" restrictions, will be upheld in court when they are narrowly tailored to advance a significant government interest. Unlike content-based restrictions, they do not need to be the only means adequate to protect the government's interest.
- Time, place, and manner restrictions, such as banning paramilitary activity by all participants in a public event, may be justified for public-safety reasons.
- Giving unfettered discretion to local officials, whether as part of an advance permitting process or during the event itself, is unlikely to withstand First Amendment scrutiny.

- The Second Amendment protects an individual right to possess guns for purposes of self-defense, but it is not a right to carry any weapon in any manner and for whatever purpose.

- The Second Amendment allows jurisdictions to impose limitations on gun ownership and possession if those limitations are consistent with the Nation's historical tradition of firearm regulation.

- Restrictions on carrying firearms in "sensitive places"—including government buildings and surrounding areas—likely would be found by a court to be consistent with the Second Amendment. It remains an open question following the U.S. Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen* whether states can ban guns at public protests.

- Although states cannot adopt "may-issue" regimes for issuing public-carry licenses, the Supreme Court has endorsed "shall-issue" schemes, which allow states to condition the issuance of public-carry licenses on a range of objective criteria.

- The Supreme Court has repeatedly held that states may prohibit private paramilitary organizations consistent with the Second Amendment.

- Even if a regulation is consistent with the Second Amendment, it may nonetheless be preempted by state constitutional provisions or state laws that prevent local jurisdictions from regulating firearms. Local jurisdictions seeking to impose limitations on gun possession at public events should consult state law before doing so.

I. RELEVANT CONSTITUTIONAL PRINCIPLES

This chapter explores the general frameworks and specific features of First and Second Amendment doctrine that are most relevant to the context of public demonstrations. Those Amendments—like many constitutional provisions—regulate only governmental actors, not private individuals. Thus, when protests occur on private property, the property owners are free to restrict unwanted speech, ban weapons, require event organizers to pay the full costs of providing security, and otherwise limit potentially harmful conduct.[1] In addition, the First Amendment discussion below focuses exclusively on so-called public forums[2]—where most expressive gatherings occur—rather than on nonpublic forums, where speech rights are highly constrained.[3]

A. Generally Applicable First Amendment Principles

In 1977, the neo-Nazi National Socialist Party of America announced its intention to march in Skokie, Illinois, a community with the largest population of Holocaust survivors in the country. They intended to wear uniforms embellished with the Nazi swastika and carry a banner bearing the swastika and statements such as "Free Speech for the White Man." As abhorrent as their message was to the majority of the population, years of court battles had made it clear that the First Amendment protects the right to engage in hateful, racist, offensive speech and to associate with others who share those views.[4] But the First Amendment does not protect violent or unlawful *conduct*, even if the person engaging in it intends to express an idea.[5] Nor does the First Amendment protect speech that incites imminent violence.[6]

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[1] That is not to say that governments automatically can evade the force of constitutional requirements simply by transferring title to public property to a private entity. *See Evans v. Newton*, 382 U.S. 296, 301–02 (1966); *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 454–55 (6th Cir. 2004); *Lee v. Katz*, 276 F.3d 550, 554–57 (9th Cir. 2002); *Venetian Casino Resort, LLC v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 942–44 (9th Cir. 2001); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 68–74 (D. Mass. 1990); *City of Jamestown v. Beneda*, 477 N.W.2d 830, 835–36 (N.D. 1991).

[2] First Amendment doctrine distinguishes between "traditional public forum[s]—parks, streets, sidewalks, and the like"—and "designated public forums—spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose." *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (quotation marks omitted). Notwithstanding these taxonomic distinctions, "[t]he same standards apply" in each type of public forum. *Id.*

[3] A nonpublic forum is "a space that is not by tradition or designation a forum for public communication," and in which "the government has much more flexibility to craft rules limiting speech." *Id.* (quotation marks omitted).

[4] *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977) (staying injunction prohibiting marchers from displaying the swastika and promoting hatred against Jews); *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978) (citing U.S. Supreme Court cases).

[5] *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[6] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

1. Governments May Impose Time, Place, and Manner Restrictions on Speech and Assembly in Public Forums

Although the First Amendment limits the government's ability to regulate speech in public forums, it does not guarantee a right to express oneself "at all times and places or in any manner that may be desired."[7] Long-established First Amendment principles permit the government to act in ways that burden expressive freedoms if it can demonstrate an adequate justification for doing so. Public safety is a legitimate and compelling governmental interest that can justify certain restrictions on speech and assembly.

Speech restrictions in public forums are generally adjudicated under one of two overarching First Amendment frameworks. First, restrictions that single out speech on the basis of its content are subject to strict scrutiny, meaning that they "must be the least restrictive means of achieving a compelling state interest."[8] Second, if a restriction is content-neutral—such that it regulates only the time, place, or manner in which speech can occur, but not the substance of the speech itself—then it need only (1) be "narrowly tailored to serve a significant governmental interest" and (2) "leave open ample alternative channels for communication of the information."[9]

This Section provides an overview of three key issues local governments must grapple with when considering whether to impose restrictions on public demonstrations, rallies, protests, and marches: (1) how to determine whether a speech restriction is content-based or content-neutral, (2) how that determination affects courts' tailoring analyses, and (3) which alternative methods of communication qualify as "ample."

a. ***Which Speech Restrictions Are Content-Based?***

According to the Supreme Court, a content-based restriction is one that "target[s] speech based on its communicative content"—in other words, "because of the topic discussed or the idea or message expressed."[10] In the context of public demonstrations, this distinction arises most often in the following three settings.

i. The Text of Permitting Regulations

When textual provisions "on [their] face" distinguish between types of communicative content, those regulations are content-based.[11] As a result, permitting requirements, ordinances, or other

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7 *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).
8 *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).
9 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
10 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015).
11 *Id.* at 2227 (quotation marks omitted).

written requirements that apply only to[12] (or carve out exemptions for[13]) certain groups, topics, or functions are almost certain to be classified as content-based. This is not to say that such restrictions would never *survive* strict scrutiny—only that they are *subject to* strict scrutiny. In contrast, multiple courts have held that generally distinguishing between expressive and nonexpressive activity does *not* qualify as content-based, inasmuch as all speech is treated the same.[14]

ii. Accounting for Listeners' Reactions

Even without a textual provision that singles out particular actors or messages for favorable or unfavorable treatment based on their content, speech restrictions will be deemed content-based if they account for—or were prompted by—the prospect of an adverse audience response. As the Supreme Court has made clear, "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[15]

This principle is a crucial First Amendment limitation in the context of public demonstrations. Courts have found speech restrictions to be content-based when the possibility (or actuality) of a hostile audience caused governmental officials to deny permit requests,[16] cancel scheduled events,[17] change the location of proposed events,[18] search all attendees,[19] employ crowd-control measures,[20]

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[12] *See Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1251, 1254–55 (11th Cir. 2004) (ordinance applied only to certain events expressing "support for, or protest of, any person, issue, political or other cause or action").
[13] *See Beckerman v. City of Tupelo*, 664 F.2d 502, 514 (5th Cir. 1981) (exemption for government agencies and students participating in educational activities); *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 999 (W.D. Wis. 2013) (exemption for speech aimed at "promoting a cause"); *Miami for Peace, Inc. v. Miami-Dade Cty.*, No. 07-21088-cv, 2008 WL 3163383, at *10 (S.D. Fla. June 4, 2008) (exemption for "the forces of the United States Armed Services, the military forces of the state, and the forces of the police and fire departments, and funeral processions"); *Dowling v. Twp. of Woodbridge*, No. 05-cv-313, 2005 WL 419734, at *5 (D.N.J. Mar. 2, 2005) (exemption for funeral processions, veterans' organizations, religious observances, government agencies, and certain student activities); *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1069 (E.D. Wis. 2003) (exemption for labor-union picketers, school groups, veterans' organizations, and government agencies); *Hotel Emps. & Rest. Emps. Union, Local 2850 v. City of Lafayette*, No. C-95-3519, 1995 WL 870959, at *2 (N.D. Cal. Nov. 2, 1995) (exemption for "vehicular wedding or funeral procession[s]").
[14] *See SEIU, Local 5 v. City of Houston*, 595 F.3d 588, 602 (5th Cir. 2010); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1027–28 (9th Cir. 2009); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1037 (9th Cir. 2006).
[15] *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).
[16] *See Beckerman*, 664 F.2d at 509–10; *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 190–92 (D. Mass. 1998); *see also Williamson v. City of Foley*, 146 F. Supp. 3d 1247, 1251–52 (S.D. Ala. 2015) (invalidating a permitting regime that enabled the "denial of a permit due to its potential for causing third parties to become unruly").
[17] *See Padgett v. Auburn Univ.*, No. 3:17-cv-231, 2017 WL 10241386, at *1 (M.D. Ala. Apr. 18, 2017).
[18] *See Christian Knights of the KKK v. Dist. of Columbia*, 972 F.2d 365, 372–74 (D.C. Cir. 1992); *Kessler v. City of Charlottesville*, No. 3:17-cv-00056, 2017 WL 3474071, at *2 (W.D. Va. Aug. 11, 2017); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674 (N.D. Ill. 1976).
[19] *See Bourgeois v. Peters*, 387 F.3d 1303, 1320 (11th Cir. 2004); *Grider v. Abramson*, 180 F.3d 738, 749 (6th Cir. 1999).
[20] *See Grider*, 180 F.3d at 750–51.

and silence individual speakers engaged in expression.[21] In addition, facially neutral permitting regulations will be deemed content-based when they invite officials to consider how others might react to a particular speaker's message. This is true, for example, of permitting fees designed to offset the costs of police protection.[22] (The constitutionality of such fees will be further explored in Section III.A.3.)

Although the case law provides no clear guidance, courts arguably should treat as content-neutral any policing measures implemented in light of anticipated violence between ideologically opposed camps. If antagonistic groups expect and intend to clash with one another—*regardless* of what messages will be expressed on the day of an event—then any preventative speech restrictions would not stem from "[l]isteners' *reaction* to speech."[23] They would instead be justified by the existence of ongoing and foreseeable hostility between warring factions—and thus the dangerous possibility of violence arising from the gathering as a whole. The U.S. Court of Appeals for the Seventh Circuit has seemingly endorsed this position, regarding as content-neutral a speech restriction issued against the backdrop of "groups . . . who have been violent toward the [demonstrators] in the past, and who have been violent toward one another."[24] The court viewed the challenged restriction as targeting "the possibility that attendees who had been violent at previous rallies would injure themselves, others, or property"—"*not* . . . the content of the views aired at the rally."[25]

iii. Individualized Restrictions

Finally, the Supreme Court categorizes speech restrictions as content-based if they "cannot be justified without reference to the content of the regulated speech" or if they were adopted "because of disagreement with the message [the speech] conveys."[26] Reasoning in this fashion, courts have deemed individualized restrictions—such as permit denials to particular applicants—to be content-based when comparably situated groups have received preferable treatment in the past.[27] Such disparities create an inference that officials have simply muzzled speech with which they disagreed, rather than acted to advance some valid governmental objective.

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21 *See Bible Believers v. Wayne Cty.*, 805 F.3d 228, 247 (6th Cir. 2015); *Glasson v. City of Louisville*, 518 F.3d 899, 905–06 (6th Cir. 1975); *Deferio v. City of Syracuse*, 306 F. Supp. 3d 492, 510–11 (N.D.N.Y. 2018).

22 *See Forsyth Cty.*, 505 U.S. at 134.

23 *Id.* at 134.

24 *Potts v. City of Lafayette*, 121 F.3d 1106, 1111 (7th Cir. 1997).

25 *Id.*

26 *Reed*, 135 S. Ct. at 2227 (alteration in original) (quotation marks omitted).

27 *See Kessler*, 2017 WL 3474071, at *2 (city "solely revoked [one speaker's] permit, but left in place the permits issued to counter-protestors" for the same day); *Housing Works, Inc. v. Safir*, No. 98 Civ. 1994, 1998 WL 823614, at *8 (S.D.N.Y. Nov. 25, 1998) (rationale for denying permit was inconsistent with "several [decisions] in the recent past"); *Houston Peace Coalition v. Houston City Council*, 310 F. Supp. 457, 460 (S.D. Tex. 1970) (permit denial was "arbitrary" and "discriminatory" in light of other permitted events that the city had allowed to occur).

b. *Tailoring*

Regardless of whether a speech restriction is content-based or content-neutral, the government must have sufficiently good reasons for regulating expression, and it must do so in a way that does not unnecessarily restrict speech. Content-based regulations must be "the least restrictive means of achieving a compelling state interest,"[28] and content-neutral time, place, and manner regulations are held to a more lenient standard—that they be "narrowly tailored to serve a significant government interest."[29] As the case law amply demonstrates, First Amendment tailoring analysis resists bright-line rules. Even judicial precedents presenting seemingly identical legal questions are not treated as dispositive; they are merely instructive, and can be overcome by any number of distinguishing factors relevant to the tailoring inquiry.[30]

i. Which Governmental Interests Count?

The types of interests that justify the creation of permitting systems for public events qualify as "substantial" or "significant" under First Amendment doctrine. These include the government's interests in maintaining public property in a clean and usable condition,[31] coordinating multiple uses of limited space,[32] and ensuring that streets and sidewalks remain safe and accessible.[33] Courts also agree that governments have a substantial interest in regulating the potential harmful effects of public assemblies—including threats to human safety,[34] public health,[35] and nearby property,[36] as well as instances of excess noise.[37]

It is less clear which interests qualify as "compelling"—a higher bar to meet than "substantial." There is a dearth of case law on this question; because the vast majority of permitting regulations (and the restrictions they engender) are content-neutral, it is usually enough to establish that a

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28 *McCullen*, 573 U.S. at 478.
29 *Ward*, 491 U.S. at 791.
30 *See Sauk Cty. v. Gumz*, 669 N.W.2d 509, 530 (Wis. App. 2003) (explaining that newly challenged provisions "must be analyzed in the context of the particular permit or licensing scheme," and that prior holdings "are not necessarily applicable in this case").
31 *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002); *Clark*, 468 U.S. at 296.
32 *See, e.g.*, *Thomas*, 534 U.S. at 322; *Forsyth Cty.*, 505 U.S. at 130.
33 *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994); *Heffron*, 452 U.S. at 651; *Marcavage v. City of New York*, 689 F.3d 98, 104 (2d Cir. 2012).
34 *See, e.g.*, *Madsen*, 512 U.S. at 768; *iMatter Utah v. Njord*, 774 F.3d 1258, 1266 (10th Cir. 2014); *Ross v. Early*, 746 F.3d 546, 555 (4th Cir. 2014); *Long Beach Area Peace Network*, 574 F.3d at 1036.
35 *See, e.g.*, *SEIU*, 595 F.3d at 596; *S. Ore. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1139 (9th Cir. 2004).
36 *See, e.g.*, *Madsen*, 512 U.S. at 768; *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005); *Potts*, 121 F.3d at 1111.
37 *See, e.g.*, *United States v. Marcavage*, 609 F.3d 264, 287 (3d Cir. 2010); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 481 (2d Cir. 2002).

proffered interest is substantial.[38] That said, courts have explicitly[39] and implicitly[40] recognized that governments have a compelling interest in ensuring public safety and order at public events.

In the context of public demonstrations, courts virtually never question the validity of asserted governmental interests *in the abstract*. Problems do arise, however, when governments cannot demonstrate that their asserted interests are seriously implicated under the particular factual circumstances at issue.[41] In these situations, it will be difficult to establish that speech has not been excessively restricted in relation to valid governmental goals.

Conversely, an unusually strong showing of governmental need may yield a correspondingly lenient tailoring analysis.[42] For instance, a demonstrated history of past violence—or reliable evidence of anticipated violence—will weigh heavily in favor of the constitutionality of speech restrictions designed to ensure public safety.[43]

ii. Content-Neutral Time, Place, and Manner Regulations

Although a content-neutral regulation must be "narrowly tailored to serve a significant governmental interest," it "need not be the least restrictive or least intrusive means of doing so."[44] A regulation will be invalidated for this reason only if its strictures are "substantially broader than necessary to achieve the government's interest."[45] In other words, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its

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38 *See Marcavage*, 609 F.3d at 287 ("[T]he Supreme Court was applying intermediate, not strict, scrutiny, so it concluded that those interests were merely 'significant' or 'substantial' as opposed to 'compelling.' ").

39 *See Grider*, 180 F.3d at 749.

40 *See Menotti v. City of Seattle*, 409 F.3d 1113, 1131 (9th Cir. 2005) ("[M]aintaining public order . . . is a core duty that the government owes its citizens."); *Christian Knights of the KKK*, 972 F.2d at 374 (insisting that government "must have some leeway" to act "for the protection of participants . . . and others in the vicinity").

41 *See, e.g.*, *Bourgeois*, 387 F.3d at 1322 (expressing "doubts . . . about whether the policy is narrowly tailored to *any* kind of governmental interest, whether compelling or even simply 'significant' "); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("In prior years, the Coast Guard has demonstrated ample ability to operate safely without a 75 yard security zone."); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1057 (2d Cir. 1983) (noting the "uneventful history of the previous Railathon").

42 *See Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007) ("[T]he significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.").

43 *See Citizens for Peace in Space*, 477 F.3d at 1224; *Menotti*, 409 F.3d at 1132–37; *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 13–14 (1st Cir. 2004); *Grider*, 180 F.3d at 749–51; *Potts*, 121 F.3d at 1111–12; *Wilkinson v. Forst*, 832 F.2d 1330, 1337–39, 1341 (2d Cir. 1987); *Coal. to Protest the DNC v. City of Boston*, 327 F. Supp. 2d 61, 77 (D. Mass. 2004); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 475 (2d Cir. 1980); *SEIU, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000); *Pinette v. Capitol Square Review & Advisory Bd.*, 874 F. Supp. 791, 796 (S.D. Ohio 1994); *Morascini v. Comm'r of Pub. Safety*, 675 A.2d 1340, 1350–52 (Conn. Super. Ct. 1996); *Handley v. City of Montgomery*, 401 So.2d 171, 183–84 (Ala. Crim. App. 1981).

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

45 *Id.* at 800.

goals."[46] This test is hardly a rubber-stamp; as discussed throughout this Toolkit, courts routinely invalidate regulations that sweep unnecessarily broadly in relation to the government's goals. Content-neutral speech restrictions are likely to be struck down if the government has overlooked "obvious" alternatives that would have achieved the same ends "with less restriction of speech."[47]

iii. Content-Based Regulations

Content-based speech restrictions are "presumptively unconstitutional."[48] To survive so-called strict scrutiny, such restrictions must serve a "compelling governmental interest" and be "narrowly tailored to that end."[49] Critically, the phrase "narrowly tailored" bears a more stringent meaning in the context of content-based regulations—it requires that those regulations be "the *least* restrictive means" of achieving a compelling state interest.[50]

Although content-based restrictions are generally subjected to strict scrutiny, the Supreme Court has stated categorically that "[s]peech cannot be . . . punished or banned . . . simply because it might offend a hostile mob."[51] This so-called "heckler's veto" principle accounts for three contexts in which content-based restrictions are treated as per se invalid, rather than subject to strict scrutiny. First, governments may not financially burden expression in ways that are influenced by how other persons might react, or have reacted, to that speech.[52] Second, with two narrow exceptions,[53] speakers may not be criminally punished merely because their speech foments violent reactions.[54] And third, governments have no authority to deny or revoke requested permits[55] or "enjoin otherwise legal expression"[56] simply because speech might elicit a hostile response.

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46 *McCullen*, 573 U.S. at 486.
47 *Long Beach Area Peace Network*, 574 F.3d at 1025.
48 *Reed*, 135 S. Ct. at 2226.
49 *Id.* at 2231.
50 *McCullen*, 573 U.S. at 478 (emphasis added).
51 *Forsyth Cty.*, 505 U.S. at 134–35.
52 *Id.*; *see also infra* Section III.A.3.b.
53 *See Cohen v. California*, 403 U.S. 15, 20 (1971) (recognizing that governments may criminalize "so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)); *Brandenburg*, 395 U.S. at 447 (same, for words "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").
54 *Cox v. Louisiana*, 379 U.S. 536, 550–51 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).
55 *Beckerman*, 664 F.2d at 510; *Williamson*, 146 F. Supp. 3d at 1251–52; *Nationalist Movement*, 12 F. Supp. 2d at 192; *Dr. Martin Luther King, Jr. Movement*, 419 F. Supp. at 675.
56 *Christian Knights of the KKK, Inc. v. Stuart*, 934 F.2d 318, at *2 (4th Cir. 1991).

c. *Ample Alternative Channels*

Time, place, and manner regulations must "leave open ample alternative channels for communication of the information."[57] Although the Supreme Court has never precisely defined this requirement, its essence is that speakers must be able to reach approximately the same audience without undue cost or effort.[58] Regulations that "foreclose an entire medium of expression" are viewed with particular disfavor.[59] Alternative channels are not "ample," moreover, if a speaker "is not permitted to reach the intended audience."[60] This can occur when "the location of the expressive activity is part of the expressive message."[61]

On the other hand, alternative channels will be considered adequate if a restriction merely renders the speech somewhat less effective[62] or somewhat more costly;[63] a speaker is not entitled to insist on her "first or best choice."[64] It is also the speaker's burden to demonstrate that a challenged restriction threatens her "ability to communicate effectively."[65]

2. The First Amendment Forbids Giving Government Officials Unfettered Discretion to Regulate Expression

The First Amendment prohibits government officials from regulating expression absent "objective factors" and "articulated standards" to guide their decisions.[66] Put another way, administrators may not exercise "unfettered discretion"[67] to permit or restrict speech. This rule aims to ensure that governments will not covertly amplify their preferred viewpoints, while silencing opinions that meet with official disapproval. With unduly broad discretion comes a heightened risk that the authorized decisionmaker will favor or disfavor speech based on its content. It is not enough to rely on government officials' good faith in administering such elastic language. If a provision allows for the unfettered regulation of First Amendment rights, then it is subject to facial invalidation unless the government can identify a "binding judicial or administrative construction" or "well-established practice"[68] confining officials' discretion.

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57 *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).
58 *See Linmark Assocs. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977); *see also Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 867 (9th Cir. 2001) ("[T]here is no other effective and economical way for an individual to communicate his or her message to a broad audience during a parade or public assembly . . . .").
59 *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *cf. Clark*, 468 U.S. at 295 ("[T]he Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks.").
60 *Bay Area Peace Navy*, 914 F.2d at 1229; *see also United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999).
61 *Long Beach Area Peace Network*, 574 F.3d at 1025.
62 *See, e.g.*, *Ward*, 491 U.S. at 802; *iMatter Utah*, 774 F.3d at 1265; *Marcavage*, 689 F.3d at 108; *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 372 (5th Cir. 2010); *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008); *Menotti*, 409 F.3d at 1138; *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.
63 *See, e.g.*, *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1298 (9th Cir. 2015).
64 *Ross*, 746 F.3d at 559 (quotation marks omitted).
65 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).
66 *Forsyth Cty.*, 505 U.S. at 133.
67 *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988).
68 *Id.* at 770.

This prohibition on unfettered discretion applies in a variety of contexts implicated by the First Amendment. The existing case law thus counsels strongly in favor of establishing a permitting system under which public expression may be regulated only according to objective, standardized processes.

a. *Adjudicating Permit Applications*

The rule against excessive discretion applies most quintessentially to governments' treatment of permit applications. In *Shuttlesworth v. City of Birmingham* (1969), for example, the Supreme Court invalidated an ordinance requiring that permits for public demonstrations be granted "unless in [the city commission's] judgment the public welfare, peace, safety, health, decency, good order, or convenience require that it be refused."[69] Such language enabled local officials "to roam essentially at will," authorizing or forbidding speech according to their personal conceptions of "decency," "morality," and "public welfare."[70] Courts routinely strike down similar language when it fails to constrain official decisions to (1) grant or deny permits,[71] (2) impose certain conditions on

[69] 394 U.S. 147, 149–50 (1969).

[70] *Id.* at 153.

[71] *See City of Lakewood*, 486 U.S. at 769 (ordinance contained "no explicit limits on the mayor's discretion"); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001) (permitting requirement "provide[d] no concrete standards or guideposts"); *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (statutory language conferred "nearly unfettered discretion"); *Beckerman*, 664 F.2d at 511 (permit issuance depended on "the virtually unguided opinion of an official regarding the potential effects o[f] the proposed parade"); *Fernandes v. Limmer*, 663 F.2d 619, 631 (5th Cir. 1981) (permitting requirement entailed "a subjective judgment call in the total discretion of the Director"); *Nichols v. Vill. of Pelham Manor*, 974 F. Supp. 243, 251 (S.D.N.Y. 2007) ("[T]he Chief's subjective determination . . . serves as the only limit on his power."); *Camp Legal Defense Fund, Inc. v. City of Atlanta*, No. 1:03-cv-387, 2004 WL 5545426, at *5 (N.D. Ga. Sept. 16, 2004) ("There are no objective criteria regarding when 'good cause' exists . . . ."); *Nationalist Movement*, 12 F. Supp. 2d at 193 ("[T]he decision whether to grant a permit is entirely *ad hoc*."); *Ohio Citizen Action v. City of Avon Lake*, 986 F. Supp. 454, 461 (N.D. Ohio 1997) (ordinance "provide[d] no standards at all . . . in deciding whether or not to request an applicant's fingerprints"); *Indo-Am. Cultural Soc'y, Inc. v. Twp. of Edison*, 930 F. Supp. 1062, 1066 (D.N.J. 1996) ("[T]he Ordinance vests unbridled discretion . . . to prevent speech altogether by denying a permit."); *Hotel Emps.*, 1995 WL 870959, at *3 (ordinance's permitting requirements functioned as necessary but not sufficient conditions); *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 284 (D. Md. 1988) ("There are absolutely no written guidelines on the criteria for granting permission to parade."); *Invisible Empire of the Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1432 (D. Conn. 1985) (ordinance provided "absolutely no standards" for deciding whether to issue a permit); *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 868 (Cal. App. 1993) (ordinance conferred "open-ended discretion whether or not to issue permits"); *Dillon v. Municipal Court*, 484 P.2d 945, 951 (Cal. 1971) (ordinance contained "no standards whatsoever" for granting or withholding permits).

permits,[72] and (3) revoke or modify previously granted permits.[73]

At the same time, there is wide agreement that governments must be afforded *some* latitude in adjudicating permit applications. Challenged provisions are usually upheld as long as the administrator's discretion can be fairly characterized as less than absolute.[74] This is especially true when the relevant factors implicate the decisionmaker's professional expertise (e.g., matters of public safety and available municipal resources)[75] or appear to have been phrased as precisely as possible under the circumstances.[76] And courts generally have held that qualifiers like "unreasonably," "substantially," and "unnecessarily" operate to reduce official discretion rather than to expand it.[77] Despite some notable exceptions,[78] facial invalidation is disfavored as long as *some* objective touchstones exist. It is a common refrain in this area that "a pattern of unlawful favoritism" can be dealt with "if and when [it] appears."[79]

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[72] *See City of Lakewood*, 486 U.S. at 769 (ordinance authorized imposition of "such other terms and conditions deemed necessary and reasonable by the Mayor"); *United States v. Linick*, 195 F.3d 538, 541–42 (9th Cir. 1999) (permits could contain any terms and conditions "deem[ed] necessary to . . . protect the public interest"); *Indo-Am. Cultural Soc'y*, 930 F. Supp. at 1066 (permits were granted "upon such terms and conditions as [the Township Council] deem[ed] necessary and proper to ensure the public health"); *Invisible Empire*, 700 F. Supp. at 284 ("[T]he Town regards its power to impose conditions as limitless.").

[73] *See Kaahumanu v. Hawaii*, 682 F.3d 789, 805–06 (9th Cir. 2012) (permits were "terminable at anytime for any reason in the sole and absolute discretion of the Chairperson," and additional conditions could be imposed "as . . . deem[ed] necessary or appropriate").

[74] *See, e.g.*, *Thomas*, 534 U.S. at 324; *Long Beach Area Peace Network*, 574 F.3d at 1028–29; *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1160 (9th Cir. 2007); *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 178–81 (2d Cir. 2006); *New England Reg'l Council v. Kinton*, 284 F.3d 9, 18 (1st Cir. 2002); *MacDonald v. City of Chicago*, 243 F.3d 1021, 1027 (7th Cir. 2001); *Douglas v. Brownell*, 88 F.3d 1511, 1522 (8th Cir. 1996); *United States v. Kistner*, 68 F.3d 218, 221 (8th Cir. 1995); *Graff v. City of Chicago*, 9 F.3d 1309, 1318 (7th Cir. 1993) (en banc); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993); *Yates v. Norwood*, 841 F. Supp. 2d 934, 942 (E.D. Va. 2012); *Black Heritage Soc'y v. City of Houston*, No. H-07-0052, 2007 WL 9770639, at *16 (S.D. Tex. Dec. 4, 2007); *Brandt v. Vill. of Winnetka*, No. 06-cv-588, 2007 WL 844676, at *27 (N.D. Ill. Mar. 15, 2007); *Trewhella*, 249 F. Supp. 2d at 1076; *SEIU, Local 660*, 114 F. Supp. 2d at 974; *United States v. McFadden*, 71 F. Supp. 2d 962, 965 (W.D. Mo. 1999); *Gumz*, 669 N.W.2d at 525.

[75] *See Kinton*, 284 F.3d at 26 ("judgments about public safety" are "inherently within the competence of the [Director of Public Safety]"); *MacDonald*, 243 F.3d at 1027 (challenged provisions "specif[ied] legitimate safety concerns"); *Yates*, 841 F. Supp. 2d at 942 (challenged provisions "call[ed] for the exercise of discretion based on law enforcement expertise and familiarity with the potential dangers facing a locality").

[76] *See MacDonald*, 243 F.3d at 1027 (relevant factors were enumerated in "as precise a manner as . . . c[ould] reasonably be articulated").

[77] *See Long Beach Area Peace Network*, 574 F.3d at 1028; *MacDonald*, 243 F.3d at 1027; *Brandt*, 2007 WL 844676, at *27; *Trewhella*, 249 F. Supp. 2d at 1076.

[78] *See Nationalist Movement*, 12 F. Supp. 2d at 193 ("The regulation itself has no definitions or standards to guide the judgment . . . about how much 'disruption' [of streets] is too much."); *Hotel Emps.*, 1995 WL 870959, at *4 (holding that various considerations—including whether the number of required police personnel would "unduly interfere with normal police protection in other areas of the city"—were "far from narrow, objective, and definite").

[79] *Thomas*, 534 U.S. at 325; *see also Long Beach Area Peace Network*, 574 F.3d at 1029; *Kinton*, 284 F.3d at 27; *Beckerman*, 664 F.2d at 515; *Kissick*, 956 F. Supp. 2d at 995.

b. *Waivers from Generally Applicable Permitting Requirements*

Because they "raise[] the spectre of selective enforcement on the basis of the content of speech,"[80] waiver provisions are especially likely to be facially invalidated as conferring unbridled discretion. Accordingly, courts have invalidated a host of waiver provisions authorizing administrators to dispense with standard permitting requirements, both of a procedural[81] and substantive nature.[82] Isolated departures from general protocols—which function as ad hoc waivers—are nearly certain to be struck down, as well.[83]

There appears to be only one decision upholding a waiver provision in a permitting regulation: the Supreme Court's 2002 decision in *Thomas v. Chicago Park District*. *Thomas* unanimously upheld a permitting regulation specifying that the administrator "may" (rather than "must") deny permit applications for any one or more of several listed reasons.[84] The Court thus refused to "insist[] upon a rigid, no-waiver application of the ordinance requirements."[85] But *Thomas* also declined to authorize fully discretionary waivers of permitting requirements. Instead, the Court noted that Chicago's Park District had interpreted the challenged provision as allowing it to "overlook[] *only* those inadequacies that, under the circumstances, do no harm to the policies furthered by the application requirements."[86] This gloss functioned as a "binding . . . administrative construction"[87] forbidding the use of waivers except as to trivial harms. So narrowed, the provision posed little risk of favoring or disfavoring speech based on its content. The Court concluded by assuring that any abuses could be dealt with through future as-applied challenges.[88]

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80 *See NAACP v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984).

81 *NAACP*, 743 F.2d at 1357 (City Council authorized to waive application deadline "at its 'discretion' . . . 'if it finds unusual circumstances' "); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1033–34 & n.16 (C.D. Cal. 2002) (late-filed applications could be considered "if good cause is shown"); *SEIU, Local 660*, 114 F. Supp. 2d at 973–74 (there were "no rules governing the exercise of the Board's discretion" in waiving application deadline); *Long Beach Lesbian & Gay Pride, Inc.*, 17 Cal. Rptr. 2d at 871 (city manager authorized to consider late-filed applications "in his discretion"); *York v. City of Danville*, 152 S.E.2d 259, 264 (Va. 1967) (late-filed applications could be considered "where good cause is shown").

82 *See A Quaker Action Grp. v. Morton*, 516 F.2d 717, 728 (D.C. Cir. 1975) (court was "troubled by the lack of any expressed standards for selection of 'NPS events' "); *Brandt*, 2007 WL 844676, at *26–27 (administrator authorized to waive requirements if the event "will encourage the economic development of the Village . . . or otherwise benefit the health, safety, or welfare of the Village and its citizens"); *Nationalist Movement*, 12 F. Supp. 2d at 193 (exception for occasions of "extraordinary public interest"); *Safir*, 1998 WL 823614, at *7 (same).

83 *Safir*, 1998 WL 823614, at *6.

84 534 U.S. at 324. The Court recited several of these examples: "when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit." *Id.*

85 *Id.* at 325.

86 *Id.* (emphasis added).

87 *City of Lakewood*, 486 U.S. at 770.

88 *Thomas*, 534 U.S. at 325.

c. *Financial Obligations Imposed on Permittees*

Permitting regulations often require applicants to assume certain financial obligations as a condition of obtaining a permit. Examples include fees tied to the estimated costs of furnishing necessary governmental services, insurance and surety-bond requirements, and indemnification and hold-harmless agreements. As explained below,[89] it is unconstitutional to consider the content of an applicant's speech in imposing these requirements. In addition to that frequently litigated constraint, the First Amendment forbids administrators from exercising unfettered discretion in deciding (1) whether to impose financial obligations as a condition of receiving a permit, and (2) if so, in what amounts.

Unsurprisingly, the case law on excessive discretion in this context largely mirrors the general principles discussed above. The most pertinent Supreme Court decision is *Forsyth County v. Nationalist Movement* , in which the Court struck down an ordinance that left the decisions of "how much to charge"—"or even whether to charge at all"—to the "whim of the administrator."[90] A variety of financial requirements have likewise been invalidated on the ground that they stemmed from an exercise of untrammeled discretion.[91] Others, however, have been upheld as the product of sufficiently cabined judgments grounded in one or more articulable state interests.[92] Lastly, as with

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89 *See infra* Section III.A.3.b.

90 505 U.S. 123, 133 (1992).

91 *See Burk*, 365 F.3d at 1255–56 (applicant to provide "an indemnification and hold harmless agreement . . . in a form satisfactory to the [city] attorney"); *Transp. Alternatives v. City of New York*, 340 F.3d 72, 78 (2d Cir. 2003) (fee determination based on eleven unweighted factors, including "such other information as the Commissioner shall deem relevant"); *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1526 (11th Cir. 1985) (cost-shifting based on the "nature of the assembly"); *Coll. Republicans of Univ. of Wash. v. Cauce*, No. C18-189, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018) (applicants required to pay "reasonable event security," as determined by a non-exhaustive list of "all event factors"); *Stand Up America Now v. City of Dearborn*, 969 F. Supp. 2d 843, 847, 849 (E.D. Mich. 2013) (applicants required to sign indemnification agreement "with terms established by the legal department"); *SEIU v. City of Houston*, 542 F. Supp. 2d 617, 640 (S.D. Tex. 2008) ("[T]here are absolutely no guidelines to determine how much applicants must pay to obtain security."); *Sullivan v. City of Augusta*, 310 F. Supp. 2d 348, 355 (D. Me. 2004) (police chief free to decide "whether the applicant must post a surety bond at all and, if so, what the amount of the bond must be"); *Mardi Gras*, 189 F. Supp. 2d at 1034 ("No standard or guidance is provided to determine . . . wh[en] a charge is appropriate []or what the appropriate fee should be."); *SEIU, Local 660*, 114 F. Supp. 2d at 974 (municipal code "d[id] not specify how or when . . . fees are to be assessed"); *Pritchard v. Mackie*, 811 F. Supp. 665, 668–69 (S.D. Fla. 1993) (whether to waive an insurance requirement was "committed to the unfettered discretion of the Town Council"); *Houston Peace Coal.*, 310 F. Supp. at 462 (amount of required insurance was "left up to the discretion of the city attorney"); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 876 (ordinance was "devoid of standards to restrain the discretion of the city manager in fixing the insurance requirement").

92 *See Int'l Women's Day*, 619 F.3d at 368; *Sullivan v. City of Augusta*, 511 F.3d 16, 35–36 (1st Cir. 2007); *S. Ore. Barter Fair*, 372 F.3d at 1140; *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1135 (6th Cir. 1991); *Yates*, 841 F. Supp. 2d at 942; *Brandt*, 2007 WL 844676, at *26.

waivers of permitting requirements more generally, waivers of financial obligations may be granted only pursuant to provisions that meaningfully curtail official discretion.[93]

d. *Searches of Attendees*

Because the prohibition on unfettered discretion applies to "a wide[] range of burdens on expression,"[94] the U.S. Court of Appeals for the Eleventh Circuit has held that decisions to search some or all persons who attend a public demonstration cannot be the product of officials' unguided judgment. In that court's view, such mass searches—even if otherwise justified by a risk of impending violence—may be undertaken only pursuant to "objective, established standards" that predated the decision to implement safety protocols for a particular gathering.[95] Jurisdictions thus would be well advised to include in their permitting regulations generally applicable standards for conducting searches at public demonstrations. (The constitutionality of such searches is discussed further below in Section III.B.1.)

B. Generally Applicable Second Amendment Principles

Case law from the Supreme Court and lower courts suggests that certain restrictions on gun possession during public events are consistent with the Second Amendment to the U.S. Constitution. Although the Supreme Court has recognized an individual right to keep and bear arms under the Second Amendment, that right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[96] Rather, the Court has made clear that governments may constitutionally impose limitations on gun ownership and possession if those limitations are consistent with the Nation's historical tradition of firearm regulation.

In particular, as discussed in greater detail below, the Supreme Court considers certain gun-safety regulations to be presumptively lawful. Such regulations include, among other things, prohibitions on the possession of firearms in "sensitive places," such as schools and government property, and laws prohibiting private paramilitary organizations.[97] In addition, governments may condition the issuance of licenses to publicly carry firearms on a variety of objective criteria, as long as the government does not "deny ordinary citizens their right to public carry."[98]

The Supreme Court recently adopted a new standard for evaluating Second Amendment challenges in its decision in *New York State Rifle & Pistol Ass'n v. Bruen*. As of this writing, lower courts have not had much time to apply this standard and address the many questions that *Bruen* left unresolved. Each circuit will inevitably answer certain questions differently, and local governments should

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93 *Compare Long Beach Area Peace Network*, 574 F.3d at 1032 (upholding a waiver provision that relied on "objective factors"), *with id.* at 1043 (invalidating a waiver provision that contained "no provision . . . guid[ing] the City Council's decision whether to . . . waive fees and charges").

94 *Bourgeois*, 387 F.3d at 1317.

95 *Id.* at 1318; *see also id.* (clarifying that "ordinances permitting mass searches 'when public safety so requires' or 'when the Chief shall deem it advisable' " did not meaningfully constrain police discretion).

96 *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

97 *See id.* at 626–27 & n.26.

98 *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 n.9 (2022).

review the case law from their jurisdiction, as it develops, for the judicial precedent relevant to their issue. Moreover, state constitutions may include provisions protecting the right to bear arms that are different from and, in some cases, broader than the Second Amendment.[99] And, as discussed in Section II.F below, even if a local regulation is permitted under the Second Amendment, it may be preempted under state law. Accordingly, local governments should also consult their state constitutions and codes to ensure that any firearms restrictions they plan to impose are not prohibited by state law.

1. In *District of Columbia v. Heller*, the Supreme Court Recognized an Individual Right to Keep and Bear Arms for Self-Defense

In 2008, the Supreme Court in *District of Columbia v. Heller* recognized for the first time an individual right under the Second Amendment to keep and bear arms for the purpose of self-defense.[100] Despite longstanding precedent suggesting that the Second Amendment protected the right to keep and bear arms only for certain authorized military purposes,[101] the Court struck down the District of Columbia's ban on handgun possession in the home, which it said impermissibly infringed on individuals' ability to use handguns "for the core lawful purpose of self-defense."[102] The Court later held in *McDonald v. City of Chicago* that "the Second Amendment right is fully applicable to the States," explaining that states, like the federal government, may not impermissibly burden the right to keep and bear arms.[103] In doing so, the Court reaffirmed its "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[104]

2. The Supreme Court Left the Door Open for Certain Gun Restrictions

Despite its recognition of an individual right under the Second Amendment, the Supreme Court in *Heller* took pains to make clear that the right "is not unlimited": It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[105] Rather*, Heller*

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[99] *See, e.g.*, Ala. Const. Art. I, § 26(a) (expressly requiring courts to apply strict scrutiny to "any restriction" on the right to bear arms); Del. Const. Art. I, § 20 ("A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."); *Bridgeville Rifle & Pistol Club v. Small*, 176 A.3d 632, 636 (Del. 2017) (Delaware constitutional provision protecting right to bear arms "is intentionally broader than the Second Amendment" and protects the right to carry arms in public for self-defense purposes); Mo. Const. Art. I, § 23 (providing that the right to keep and bears arms to defend "home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned" and any restriction on those rights "shall be subject to strict scrutiny").

[100] 554 U.S. 570.

[101] *See United States v. Miller*, 307 U.S. 174 (1939).

[102] *Heller*, 554 U.S. at 630.

[103] 561 U.S. 742, 750 (2010).

[104] *Id.* at 780 (plurality opinion); *see also id.* at 767 (majority opinion) ("[I]ndividual self-defense is 'the *central component*' of the Second Amendment right." (quoting *Heller*, 554 U.S. at 599)).

[105] *Heller*, 554 U.S. at 626; *see id.* at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.").

expressly left the door open for governments to impose certain restrictions on gun possession and ownership,[106] and the Court in *McDonald* "repeat[ed] those assurances."[107]

In particular, the Court in *Heller* emphasized that several types of existing gun regulations remain "presumptively lawful."[108] Such regulations include "longstanding" restrictions on the possession of firearms by felons and the mentally ill, laws prohibiting the possession of firearms in "sensitive places" like "schools and government buildings," and bans on especially dangerous weapons, including military-style firearms.[109] In addition, *Heller* reaffirmed that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."[110]

The *Heller* Court further clarified that these presumptively lawful regulations were mentioned "only as examples," and that the "list does not purport to be exhaustive."[111] The Court did not provide guidance, however, as to the appropriate methodology for identifying other presumptively lawful regulations. And it declined to elaborate on the precise level of scrutiny that courts should apply when evaluating firearms restrictions in subsequent cases, holding only that the District of Columbia's law would have failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[112]

3. Following *Heller*, Lower Courts Developed a Two-Step Framework for Evaluating Second Amendment Challenges

Following *Heller*, most federal courts adopted a two-step approach for analyzing Second Amendment challenges to firearms regulations. Under this framework, courts asked: "(1) Is the restricted activity protected by the Second Amendment in the first place? (2) If so, does [the regulation] pass muster under the appropriate level of scrutiny?"[113] As discussed below, the Supreme Court recently rejected this two-step framework in *New York State Rifle & Pistol Ass'n v. Bruen*,[114] but it is nevertheless helpful to review how courts applied the framework, as aspects of their reasoning are still relevant to post-*Bruen* challenges.

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106 *Id.* at 626–28.
107 *McDonald*, 561 U.S. at 786.
108 *Heller*, 554 U.S. at 626–27 & n.26.
109 *Id.* at 626–27.
110 *Id.* at 621 (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).
111 *Id.* at 627 n.26.
112 *Id.* at 628–29.
113 *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1324 (11th Cir. 2015); *see also, e.g.*, *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives* (*NRA v. ATF*), 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).
114 142 S. Ct. 2111.

Beginning with the first step of the approach, courts evaluating firearms regulations after *Heller* looked to history to determine "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee,"[115] including "whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment."[116] Among other things, courts examined Founding-era laws to determine whether proscriptions similar to the one at issue existed when the Constitution was ratified.[117] Courts also looked to evidence of nineteenth-century courts and commentators to determine whether, even if such prohibitions did not date to the Founding era, they were nonetheless sufficiently "longstanding."[118] If a court found the restriction at issue had a sufficient historical pedigree, it would conclude that the prohibitions imposed by that restriction fell outside the scope of the Second Amendment's protection.[119]

In addition, some courts found that the "presumptively lawful" regulations identified in *Heller* necessarily fell outside the Second Amendment's protections, with no need to conduct a further historical analysis.[120] The Fourth Circuit, for instance, applied a more "streamlined" analysis when it rejected a challenge to the federal statute prohibiting felons from possessing firearms, reasoning that, "[a]mong the firearms regulations specifically enumerated as presumptively lawful in *Heller* are 'longstanding prohibitions on the possession of firearms by felons.' "[121]

Because the list of presumptively lawful regulations in *Heller* was—explicitly—not exhaustive, some courts upheld regulations similar, but not identical, to the ones the Supreme Court expressly mentioned. For example, in 2010, the Eleventh Circuit rejected a challenge to the federal law banning possession of firearms by persons convicted of domestic violence, 18 U.S.C. § 922(g)(9).[122]

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115 *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018).

116 *Silvester v. Harris*, 843 F.3d 816, 829 (9th Cir. 2016) (Thomas, C.J., concurring) (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014)).

117 *See, e.g.*, *Jackson*, 746 F.3d at 962–63.

118 *NRA v. ATF*, 700 F.3d at 202–03.

119 *Id.*

120 *See, e.g.*, *Silvester*, 843 F.3d at 829 (Thomas, C.J., concurring) (considering at step one "whether the regulation is one of the presumptively lawful regulatory measures identified in *Heller or* whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment" (emphasis added)). Not all courts treated "presumptively lawful" regulations as satisfying step one of the two-step inquiry, however. Other courts held that "presumptively lawful" regulations triggered intermediate scrutiny under step two of the two-part test (explained further below). *See, e.g.*, *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) ("In mapping *Heller*'s 'presumptively lawful' language onto the two-step inquiry, it is difficult to discern whether [the] prohibitions [the Court listed] are presumptively lawful because they do not burden persons within the ambit of the Second Amendment as historically understood, or whether the regulations presumptively satisfy some form of heightened means-end scrutiny. Ultimately, the latter understanding is the better option.").

121 *United States v. Pruess*, 703 F.3d 242, 245–46 (4th Cir. 2012) (quoting *Heller*, 554 U.S. at 626).

122 *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010); *see In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (unpublished order) ("Notably, felons and the mentally ill[, categories expressly mentioned in *Heller*,] are the first and fourth entries on the list of persons excluded from firearm possession by

Although the court acknowledged that *Heller*'s list of "presumptively lawful" regulations did not include that specific prohibition, it reasoned that § 922(g)(9)'s ban served the same purpose as felon-in-possession statutes: keeping firearms out of the hands of dangerous individuals.

Moving to the second step of the two-step framework, if a regulation burdened a right historically thought to be within the scope of the Second Amendment, a court would analyze the regulation under traditional means-ends scrutiny. In other words, the court would ask whether the government's interest in the regulation was sufficiently great and whether the regulation burdened an individual's Second Amendment rights more than necessary to achieve that governmental interest. As noted above, the Supreme Court in *Heller* expressly declined to specify the precise level of scrutiny that applied, while ruling out "rational basis" review.[123] Accordingly, courts were left to choose between strict and intermediate scrutiny.

Courts took varying approaches to determining which level of scrutiny applied, but most reasoned that the level of scrutiny turned on how heavily a law burdened an individual's Second Amendment rights. As the Fifth Circuit put it, "[a] law that burdens the core of the Second Amendment guarantee—for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'—would trigger strict scrutiny, while a less severe law would be proportionately easier to justify."[124] Indeed, where a law did not encroach on an individual's right to bear arms at home or for self-defense, most federal courts of appeals applied intermediate scrutiny.[125] And under

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§ 922(g) . . . . Nothing suggests that the *Heller* dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence."); *see also Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc) (upholding the constitutionality of Maryland's ban on assault rifles and large-capacity firearms because those weapons are "like" M-16 rifles, which the Supreme Court said the Second Amendment does not protect).

[123] *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

[124] *NRA v. ATF*, 700 F.3d at 205; *see also, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) ("A law or policy that burdens conduct falling within the core of the Second Amendment requires a correspondingly strict level of scrutiny, whereas a law or policy that burdens conduct falling outside the core of the Second Amendment logically requires a less demanding level of scrutiny.").

[125] *See, e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny to federal law prohibiting individuals convicted of misdemeanor crime of domestic violence from possessing a firearm); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (same); *NRA v. ATF*, 700 F.3d at 205–06 (applying intermediate scrutiny to federal law prohibiting firearms dealers from selling firearms to individuals under the age of 21); *Heller II*, 670 F.3d at 1257 (applying intermediate scrutiny to District of Columbia's assault-weapon registration requirement); *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to federal law banning possession of handgun with obliterated serial number). *But see Ezell*, 651 F.3d at 708–09 (applying a standard that was "more rigorous" than intermediate scrutiny, but "not quite 'strict scrutiny' " to City of Chicago's ban on firing ranges, explaining, "the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*, and their claim comes much closer to implicating the core of the Second Amendment right," which includes self-defense).

that standard, the government was required to show only "a 'reasonable fit' between the challenged regulation and a 'substantial' government objective."[126]

4. In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court Rejected the Two-Step Framework but Reaffirmed *Heller*'s Approval of Certain Restrictions

In June 2022, the Supreme Court issued its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, in which it held that New York's public-carry licensing regime violated the Second Amendment by requiring applicants to demonstrate a special need for self-defense.[127] Rather than applying the two-step framework developed by the lower courts following *Heller*, the Supreme Court articulated a new legal standard to govern Second Amendment challenges to firearms regulations. Under this test, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[128] The burden then falls on the government to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[129] To make that showing, the government will often need to "identify a well-established and representative historical analogue" to the regulation being challenged.[130]

Applying this standard to New York's licensing regime, the Court wrote that it had "little difficulty concluding" that the text of the Second Amendment protected not only the right to keep firearms in the home, but also the right to "carry[] handguns publicly for self-defense."[131] The burden thus fell on New York to show that its licensing scheme was "consistent with this Nation's historical tradition of firearm regulation."[132] And because, in the Court's view, New York had failed to "demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense"—or "any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense"[133]—the state's public-carry licensing requirement violated the Second Amendment.

Bruen represents an expansion of gun rights and a corresponding diminution of government power to regulate firearms. By limiting permissible regulations to those with well-established historical analogues, and by expressly eschewing the kind of means-end scrutiny that lower courts had applied following *Heller*, the Supreme Court cast doubt on a broad swath of reasonable gun laws that promote public safety.[134] Although the full ramifications of the decision will not be known for years,

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126 *Chester*, 628 F.3d at 683.
127 142 S. Ct. at 2122.
128 *Id.* at 2126.
129 *Id.*
130 *Id.* at 2133 (emphasis omitted).
131 *Id.* at 2134.
132 *Id.* at 2135.
133 *Id.* at 2138.
134 *See* Michael Waldman, *The Most Dangerous Gun Ruling in History, at the Worst Possible Time*, Wash. Post (June 23, 2022), https://www.washingtonpost.com/opinions/2022/06/23/bruen-supreme-court-gun-rights-dangerous/ ("[T]he implications of the decision are far broader than the New York law. They stretch across the whole country. The bigger impact will probably be felt in hundreds of other gun laws in all 50 states.").

it is clear now that states and local governments should prepare for a new wave of Second Amendment challenges to regulations previously thought to be valid.

That said, *Bruen* was careful to emphasize that the Second Amendment is not a "regulatory straightjacket," and that governments defending against challenges to gun laws are required only to "identify a well-established and representative historical *analogue*, not a historical *twin*."[135] The Court further explained that, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster," and it cited as an example "*Heller*'s discussion of 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.' "[136] "Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited," the majority explained, "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[137] In a concurrence joined by Chief Justice Roberts, Justice Kavanaugh also emphasized that "the Second Amendment allows a 'variety' of gun regulations," and he quoted extensively from *Heller*'s discussion of "presumptively lawful regulatory measures."[138]

5. State and Local Governments May Restrict the Carrying of Firearms at Certain Public Events Consistent with the Second Amendment

Case law interpreting *Bruen* is still in its infancy. We can nevertheless draw some conclusions about the ability of state and local governments to limit the use of weapons at public events. Although such limitations are at greater risk of being struck down following *Bruen*, the analytical approach outlined by the Court suggests that some restrictions on carrying firearms at public events or demonstrations will survive challenges brought under the Second Amendment.

a. *Prohibitions on Firearms in "Sensitive Places"*

As noted above, *Heller* said that laws prohibiting the carrying of firearms in "sensitive places" like "schools and government buildings" are "presumptively lawful."[139] And *Bruen* reaffirmed that in historically sensitive places, "arms carrying could be prohibited consistent with the Second Amendment."[140] *Bruen* listed as additional sensitive places "legislative assemblies, polling places, and courthouses."[141] And, as just discussed, *Bruen* contemplated that lower courts would analogize to these historically sensitive locations when deciding whether new places qualify as sensitive.

In the years between *Heller* and *Bruen*, lower courts rarely elaborated on what it meant for a place to be "sensitive," often choosing instead to resolve Second Amendment challenges on other

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135 *Bruen*, 142 S. Ct. at 2133.
136 *Id.* (quoting *Heller*, 554 U.S. at 626).
137 *Id.*
138 *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626–27 & n.26, 636).
139 *Heller*, 554 U.S. at 626–27 & n.26; *see McDonald*, 561 U.S. at 786 (plurality opinion).
140 *Bruen*, 142 S. Ct. at 2133.
141 *Id.*

grounds.[142] In 2011, for example, the Fourth Circuit upheld a ban on handguns in vehicles in national parks, but it declined to resolve whether national parks were sensitive, holding instead that the ban satisfied the then-applicable intermediate scrutiny standard.[143] The following year, the Eleventh Circuit upheld a state regulation restricting the carrying of weapons in places of worship, again without deciding whether places of worship were sensitive, because it concluded that the conduct burdened by the law fell outside the scope of the Second Amendment's protection.[144]

Some pre-*Bruen* decisions did add color, however, as to what it means for a place to be sensitive.[145] In 2015, for example, the Tenth Circuit held that not only was a federal post office sensitive as a government building, but so too was the adjacent parking lot.[146] Although the court's reasoning was brief, it noted that the parking lot was attached to and "exclusively serve[d]" the post office, and that "postal transactions take place in the parking lot as well as in the building."[147] Likewise, the D.C. Circuit held in 2019 that a parking lot near the U.S. Capitol was sensitive because it "has been set aside for the use of government employees, is in close proximity to the Capitol building, and is on land owned by the government."[148] The court rejected the argument that outdoor government property is sensitive only if it is "off-limits to the public (like the White House lawn) or protected by metal detectors and security guards (like the Capitol building)," noting that "[m]any 'schools' and 'government buildings'—the paradigmatic 'sensitive places' identified in *Heller I*—are open to the public, without any form of special security or screening."[149]

These cases suggest that state and local governments can, consistent with the Second Amendment, restrict firearms not only in the sensitive places enumerated by *Heller* and *Bruen*—that is, schools, government buildings, legislative assemblies, polling places, and courthouses—but also in adjacent areas. The ability to impose such restrictions is a valuable tool in policymakers' toolkits. With respect to legislative assemblies, for example, "more than one-third of all the armed protests that occurred in 2021 were around statehouses."[150] And the power to ban guns at and around polling places is also important because "[t]he presence of armed protesters at these locations can suppress

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142 *See* Adam B. Sopko, *Second Amendment Background Principles and* Heller*'s Sensitive Places*, 29 Wm. & Mary Bill Rts. J. 161, 164 (2020).

143 *See United States v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011).

144 *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012).

145 *See, e.g.*, *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1328 (11th Cir. 2015) (opining that the question whether a dam and surrounding recreational area qualified as a sensitive place would turn on such factors as the size of the dam and recreational area, "how far the recreational area extends beyond the dam, whether the recreational area is separated from the dam itself by a fence or perimeter, or to what extent the dam is policed").

146 *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1122–23 (10th Cir. 2015).

147 *Id.* at 1125.

148 *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019).

149 *Id.* at 465 (quoting *Heller*, 554 U.S. at 626).

150 Elly Page and Nick Robinson, *Protecting the Freedom of Peaceful Assembly After* Bruen*: A Roadmap for State Lawmakers*, Just Security (June 30, 2022), https://www.justsecurity.org/82168/protecting-the-freedom-of-peaceful-assembly-after-bruen-a-roadmap-for-state-lawmakers/ (citing *Updated Armed Demonstration Data Released a Year After the 6 January Insurrection Show New Trends*, https://acleddata.com/acleddatanew/wp-content/uploads/2022/01/ACLED_ET_Armed-Demonstration-Factsheet_1.2022.pdf (last visited Aug. 18, 2022)).

turnout and intimidate both voters and poll workers."[151] This became clear in Arizona in the days following the 2020 presidential election, when Trump supporters protested outside vote-counting sites with military-style assault rifles.[152]

Beyond those places the Supreme Court has specifically deemed historically sensitive, state and local governments must decide how ambitious they want to be in prohibiting firearms in "*new* and analogous sensitive places."[153] One lower court decision before *Bruen* suggested that locations could be deemed sensitive if they were "gathering places where high numbers of people might congregate."[154] New York advanced a similar position in its briefing in *Bruen*, arguing that sensitive places were "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available."[155] The Supreme Court rejected this view, reasoning that while "people sometimes congregate in 'sensitive places,' " and while "law enforcement professionals are usually presumptively available in those locations," New York's position "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense."[156] "Put simply," the Court wrote, "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[157]

While *Bruen* expressed doubts regarding an expansive reading of "sensitive places," it remains to be seen how the Supreme Court (and lower courts) will evaluate laws that prohibit firearms at or near

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151 *Id.*

152 *Id.*

153 *Bruen*, 142 S. Ct. at 2133.

154 *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009); *see id.* (concluding that "open space venues, such as County-owned parks, recreational areas, historic sites, . . . and the County fairgrounds" all "fit comfortably within the same category as schools and government buildings"). The panel decision in *Nordyke* was subsequently vacated and remanded for further consideration in light of the Supreme Court's decision in *McDonald*, *see* 611 F.3d 1015 (9th Cir. 2010) (en banc), and the en banc Ninth Circuit ultimately rejected the plaintiffs' Second Amendment claim, *see* 681 F.3d 1041 (9th Cir. 2012) (en banc).

155 Brief for Respondents at 34, *Bruen*, 142 S. Ct. 2111 (No. 20-843).

156 *Bruen*, 142 S. Ct. at 2133–34.

157 *Id.* at 2134. New York has since passed a law that criminalizes the possession of firearms in the following locations deemed to be "sensitive": "government buildings, healthcare facilities, places of worship, libraries, playgrounds, public parks, zoos, childcare facilities, the buildings or grounds of educational institutions (from pre-schools to universities), summer camps, developmental disability treatment locations, addiction and mental health facilities, facilities for disability assistance, homeless and domestic violence shelters, mass transit, any location with a liquor license or license for on-premises cannabis consumption, performing arts venues, stadiums and racetracks, museums, amusement parks, banquet halls, polling places, public sidewalks or areas restricted from general use for a permitted event, any protest or gathering, and Times Square." Andrew Willinger, *New York's Response to* Bruen*: The Outer Limits of the "Sensitive Places" Doctrine*, Duke Ctr. for Firearms L. (July 13, 2022), https://firearmslaw.duke.edu/2022/07/new-yorks-response-to-bruen-the-outer-limits-of-the-sensitive-places-doctrine/; *see* 2022 N.Y. Sess. Laws Ch. 371 (McKinney). Whether (and how much of) the law survives constitutional challenge is an open question.

public protests.[158] Several states currently have such laws on the books,[159] and questioning at oral argument in *Bruen* suggested that some Justices in the majority might endorse restrictions on guns in particularly crowded places.[160] That said, certain scholars and gun rights activities—including some cited by the Court in *Bruen*[161]—have argued that it is not enough for a location to be crowded, and that sensitive places are instead limited to those in which the government "can provide physical defense comparable to the individual right to bear arms."[162] *Bruen* did not fully embrace this view, noting only that "law enforcement professionals are *usually presumptively available* in" sensitive places,[163] and other scholars have rejected it as ahistorical.[164] Indeed, skepticism toward this position seems warranted: as the D.C. Circuit noted in the decision discussed above, "[m]any 'schools' and 'government buildings'—the paradigmatic 'sensitive places' identified in *Heller I*—are open to the public, without any form of special security or screening."[165] It nevertheless is likely that litigants

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158 *See* Timothy Zick and Diana Palmer, *The Next Fight Over Guns in America*, Atlantic (June 23, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-bruen-concealed-carry-gun-law-new-york/661364/ ("Courts and legislatures will have to decide whether people can carry guns at protests and political demonstrations, in voting booths, on the subway and bus, and in pretty much every other public space in American life."). For a helpful discussion of the ways in which the "sensitive places" doctrine might and might not permit states to ban guns at public protests, see Timothy Zick, *Arming Public Protests*, 104 Iowa L. Rev. 223, 260–63 (2018).

159 *See* Page & Robinson, *supra* note 150; *Keeping Guns Away from Protests*, ICNL, https://www.icnl.org/wp-content/uploads/Guns-at-Protests-Briefer-vf-02.2022.pdf (last visited Aug. 18, 2022); Ala. Code § 13A-11-59; D.C. Code § 7-2509.07(a)(14); Md. Code., Crim. Law § 4-208; N.C. Gen. Stat. § 14-277.2.

160 *See, e.g.*, Transcript of Oral Argument at 30–31, *Bruen*, 142 S. Ct. 2111 (No. 20-843) (question from Justice Barrett—following up on a question from Justice Kagan about the validity of a law banning guns at any "protest or event that has more than 10,000 people"—asking: "[C]an't we just say Times Square on New Year's Eve is a sensitive place? Because now we've seen, you know, people are on top of each other, we've—we've had experience with violence, so we're making a judgment, it's a sensitive place."); *id.* at 64 (Chief Justice Roberts: "I can understand, for example, a regulation that says you can't carry a gun into, you know, Giants Stadium, just because a lot of things are going on there and it may not be safe to have—for people to have guns.").

161 S*ee Bruen*, 142 S. Ct at 2133 (citing Brief of *Amicus Curiae* Independent Institute in Support of Petitioners at 11–17; David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 205, 229–36, 244–47 (2018)).

162 Brief of *Amicus Curiae* Independent Institute in Support of Petitioners at 20; *id.* at 12–13 (arguing that, in the colonial era, restrictions on the right to carry were limited to "areas near certain core government operations in which security was assured by the government"); *see* David Kopel, *The Sensitive Places Issue in New York Rifle*, Volokh Conspiracy (Nov. 8, 2021), https://reason.com/volokh/2021/11/08/the-sensitive-places-issue-in-new-york-rifle/ (relaying views of Second Amendment advocate and scholar Stephen Halbrook that "the types of laws in place at the Founding tell us that sensitive places are limited, and they are areas where the government has taken on a particular responsibility for providing for the care and safety of individuals in the location").

163 *Bruen*, 142 S. Ct at 2134 (emphasis added).

164 *See, e.g.*, Carina Bentata Gryting & Mark Anthony Frassetto, NYSRPA v. Bruen *and the Future of the Sensitive Places Doctrine: Rejecting the Ahistorical Government Security Approach*, 63 B.C.L. Rev. E-Supplement I.-60, I.–62 (2022) ("[T]he 'metal detector and security guard' principle for identifying sensitive places is inconsistent with the original public understanding of the Second Amendment, both at its ratification and at its incorporation via the Fourteenth Amendment.").

165 *Class*, 930 F.3d at 465 (quoting *Heller*, 554 U.S. at 626).

will advance the government-protection theory in future challenges to gun restrictions at both public protests and other putatively sensitive places.

b. *Public-Carry Licensing Schemes*

Before *Bruen*, many federal courts of appeals held that state and local governments had broad discretion to regulate the carrying of firearms outside the home. *Bruen* cast doubt on many of these decisions, and it expressly abrogated those that upheld "may-issue" public-carry licensing regimes like the New York scheme the Court struck down.[166] However, the *Bruen* majority did endorse "shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course."[167] And Justice Kavanaugh's concurrence noted that "shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, *among other possible requirements*."[168] States and local governments therefore retain significant authority to impose public-carry licensing requirements, as long as those requirements are based on objective criteria and administered in a way that does not "deny ordinary citizens their right to public carry."[169]

c. *Anti-Paramilitary Laws*

Courts have long recognized that state laws prohibiting marching or drilling with firearms, as well as laws banning paramilitary organizations, are consistent with the Second Amendment. This precedent supports the inclusion of such restrictions in public-event permits. In 1886, the Supreme Court in *Presser v. Illinois* held that the Second Amendment did not prohibit a state law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law."[170] As noted above, *Heller* made clear that the recognition of an individual right to bear arms in certain circumstances did not undermine *Presser*'s holding.[171] Nor did *Bruen* cast doubt on *Presser*. Indeed, many states have longstanding anti-paramilitary laws or laws banning parading or marching with firearms, which remain lawful under *Heller* and *Bruen*. Such laws are discussed in further detail below.

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166 *See Bruen*, 142 S. Ct at 2123–24 (contrasting " 'may issue' licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license," with " 'shall issue' jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability"); *id.* at 2124 (citing five federal court of appeals decisions that had upheld licensing schemes similar to New York's).

167 *See id.* at 2138 n.9. The Court did add a caveat: "[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry." *Id.*

168 *Id.* at 2162 (Kavanaugh, J., concurring) (emphasis added).

169 *Id.* at 2138 n.9 (majority opinion).

170 116 U.S. 252, 264–65 (1886).

171 *See Heller*, 554 U.S. at 621.

FREQUENTLY ASKED QUESTIONS

What is a content-based restriction on speech?

A content-based restriction is based on the topic discussed or the idea or message expressed. It would, for example, be a content-based restriction on speech to deny a permit for a demonstration to a white-nationalist group because of the subject matter of the planned demonstration or because of concerns about how listeners will react to the particular anticipated message. *See* Chapter I.A.1.a

Is it OK to have one set of rules for political protests and a different set of rules for sports tournaments?

Yes. Localities may impose different conditions based on the intended use of the property. Thus, localities may impose different conditions on the use of a park for a sports tournament or other non-expressive activity than they would impose for expressive activity like a political protest. Conditions or restrictions that apply to the use of public property for expressive activity will be evaluated depending on whether they are content-neutral or content-based. Localities should not impose content-based restrictions on speech unless they are the "least restrictive means" of achieving a compelling governmental interest. Outright denial of a permit to a disfavored group is unlikely to satisfy that test. On the other hand, content-neutral time, place, and manner restrictions on expressive activity need not be the least restrictive means of satisfying a governmental interest; instead, they must be "narrowly tailored" to serve a significant governmental interest. And they must leave open ample alternative channels for communication. *See* Chapter I.A.1

Can an event permit be denied out of concerns that counter-protesters might initiate violence?

Denial of a permit based on the anticipated reaction of counter-protesters is an impermissible "heckler's veto" that courts generally treat as invalid. *See* Chapter I.A.1.a.ii

Can a permit be conditioned on moving the location requested?

Yes, but speakers must be able to reach the intended audience without undue cost and effort. If, for example, a permit is requested for a demonstration outside city hall against an action the city council has taken, local authorities should not condition the permit on the demonstration taking place at a location far from city hall, as a court is likely to view that relocation as thwarting the intended speech from reaching its intended audience. On the other hand, permit applicants are not necessarily entitled to their first choice of locations if the government has a significant content-neutral interest in having the event take place elsewhere. One such governmental interest might be the capacity of the requested location to accommodate safely the number of people likely to attend. *See* Chapters I.A.1.c and III.A.2.a

Jurisdictions should be cautious when requiring a location change for content-based reasons such as concerns about violence from counter-protesters. This type of condition would be subject to strict scrutiny and could be justified only if it were the only way adequately to protect public safety. Jurisdictions should also be cautious about treating protesters and counter-protesters differently, as this likely would be considered content-based. *See* Chapter III.A.2

Can governments allow only protesters and not counter-protesters onto public property during an event?

The government generally may not treat groups differently based on the message they seek to express, because that would be a content-based restriction that is unlikely to be the least-restrictive way to satisfy the government's interest in public safety, even if that interest is compelling. *See* Chapter I.A.1

If the government gives exclusive use of public property to a private entity for a private event—through a lease, permit, or other arrangement—the private entity would be able to exclude people whom the private entity has not invited. Common examples include the lease of a park for a wedding or family reunion. Local jurisdictions should exercise caution, however, not to attempt to exploit exclusive-use arrangements as a means to avoid what would otherwise be potential First Amendment constraints. If the jurisdiction ordinarily issues permits for protests and demonstrations, but changes its practice to a leasing arrangement for a specific protest event at which the protesters seek to exclude counter-protesters, that change of practice could be vulnerable to legal challenge. *See* Chapters III.B.2.b.ii and V.A

Would it be content-neutral or content-based if the government were to ban weapons out of concerns about violence?

Although there is no clear law on this, a weapons-ban or other policing measure based on anticipated violence between ideologically opposed camps that have clashed in the past arguably should be treated as content-neutral. That is because such measures would not be based on the messages the groups intend to express on the day in question, but would be based on the demonstrated history of violence between them—regardless of their message. Even if considered content-based, where there is a history of violence between hostile factions, the government's interest in public safety may be compelling enough to satisfy strict scrutiny. As discussed elsewhere, such a ban may still be vulnerable to a Second Amendment challenge. And before imposing a weapons ban, jurisdictions should determine whether the ban could be prohibited by a state firearms-regulation preemption statute. *See* Chapters I.A.1.a.ii, I.B, and II.F; III.A.2.c

What governmental interests can justify restrictions on speech or assembly?

For content-neutral time, place, and manner restrictions, many governmental interests are considered "substantial," including maintaining public property in clean and usable condition, ensuring sidewalks and streets remain safe and accessible, ensuring that multiple users can use limited space, and protecting public health, safety, and property. There is less legal guidance about which governmental interests are compelling enough to justify content-based restrictions, but a significant and documented threat to public safety based on past violence or credible information likely would be significant to any court's analysis of whether a reasonable response to the threat is narrow enough to satisfy strict scrutiny. *See* Chapter I.A.1.b

Can local governments establish a permitting system that leaves it to a city employee's discretion whether to grant or deny a permit or whether to impose conditions on the permit?

It would be an unconstitutional content-based restriction to charge a group whose message is disfavored a higher permitting fee on that basis alone than the fee it charges other permit applicants. *See* Chapter III.A.3.b

What about searches – can we leave it to the discretion of the police to determine whom they want to search before entering the venue?

The decision to search or not to search—whether through bag checks, magnetometers, pat-downs, or some other method—should not be left to the unfettered discretion of the police or other government officials. Even when searches may be justified as content-neutral time, place, and manner restrictions justified by a substantial public safety interest, they must be done pursuant to objective, established standards. *See* Chapters I.A.2.d and III.B.1.a

If a local jurisdiction wants to discourage a group from holding a rally in the town, can it charge a higher permitting fee?

It would be an unconstitutional content-based restriction to charge a group whose message is disfavored a higher permitting fee on that basis alone than the fee it charges other permit applicants. *See* Chapter III.A.3.b

Following the Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen*, what is the legal standard that governs Second Amendment challenges to gun laws?*

Before *Bruen*, most federal courts of appeals had adopted a two-step framework for analyzing Second Amendment challenges. *Bruen* rejected this framework and articulated a new test instead. Under this test, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." The burden then falls on the government to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." To make this showing, the government will often need to "identify a well-established and representative historical analogue" to the regulation being challenged. And if the government fails to make the showing, then the challenged regulation is unconstitutional.

What types of firearms restrictions might be permissible under this new test?

Case law interpreting *Bruen* is still in its infancy, and lower courts have not yet had time to apply the new standard or address the many questions that *Bruen* left resolved. It seems likely, however, that the following categories of restrictions would survive Second Amendment challenges:

Prohibitions on firearms in "sensitive places": In *District of Columbia v. Heller*, the Supreme Court described as "presumptively lawful" prohibitions on the possession of firearms in "sensitive places," such as "schools and government buildings." States can likely ban firearms both in and around these places. *Bruen* added to the list "legislative assemblies, polling places, and courthouses," and it noted that governments could also prohibit guns in "*new* and analogous sensitive places" not expressly enumerated in the Court's decision. The Court offered little guidance as to the range of places that might be considered sufficiently analogous to justify firearms prohibitions. It indicated, however, that a government must do more than just show that a location is crowded and presumptively protected by law enforcement. *See* Chapter I.B.5.a

Public-carry licensing schemes: Although *Bruen* struck down New York's "may-issue" public-carry licensing regime, the Court endorsed "shall-issue" regimes, which condition the issuance of public-carry licenses on a variety of objective criteria. *Bruen* emphasized that these licensing schemes are permissible so long as governments do not use them to "deny ordinary citizens their right to public carry." *See* Chapter I.B.5.b

Prohibitions on private paramilitary organizations and paramilitary activity: *Bruen* did not disturb well-established Supreme Court precedent holding that the Second Amendment does not prevent states from prohibiting paramilitary organizations. And most states impose such prohibitions. Forty-eight states include a provision in their constitution that requires all military units to be strictly subordinate to and governed by the civil power, which generally refers to the governor or his or her designee. Many states also have state laws prohibiting people from associating together as a military unit and from parading or drilling with firearms in public. And many states have laws banning teaching or assembling to train or practice in using firearms or other techniques capable of causing injury or death, for use in a civil disorder. *See* Chapters I.B.5.c and II.B

Note: Before prohibiting or restricting firearms, officials will need to check other provisions of state law. Many states prohibit local authorities from taking any action that regulates the carrying or possession of firearms. Depending on their wording, these state laws may be interpreted broadly. *See* Chapters I.B and II.F

Can governments prohibit or restrict the carrying of firearms at public events?

As just noted, governments can prohibit paramilitary activity, and they can condition public-carry licenses on a number of objective factors. Both of these measures can help reduce the presence of firearms at public events. In addition, governments can likely ban guns in or near "sensitive places," including government buildings, where a substantial percentage of armed protests take place. Furthermore, *Bruen* made clear that governments can restrict public carry at modern-day locations that are analogous to the historically sensitive places enumerated in the Court's opinion. The Court provided little guidance, however, as to the appropriate methodology for identifying such analogues, and the opinion suggested that the category should not be construed expansively. Whether public demonstrations qualify as sensitive places (including when they do not take place at an independently sensitive place, like a legislative assembly or polling location) will likely be the subject of litigation over the coming years.

II

Relevant Federal & State Laws

Federal and state laws both limit how jurisdictions may respond to the potential for violence at public events and provide tools to prevent violence from occurring. This chapter details various categories of laws that may be particularly relevant in shaping jurisdictions' responses to public events:

- Hate Crimes and Domestic Terrorism: Federal and state laws often impose stricter penalties for hate crimes and acts of terrorism than for other violent crimes because these crimes seek to affect more people than the immediate target. Protecting against and prosecuting hate crimes and domestic terrorism sends the message that the community will not tolerate these kinds of crimes.

- Laws Barring Private Paramilitary Activity: Laws in every state bar private individuals from engaging in military or law-enforcement activity outside of governmental authority. Depending on the circumstances, jurisdictions concerned about the presence of private militias may be able to seek an injunction prohibiting groups from acting as paramilitary organizations or assuming law enforcement functions; to include prohibitions on such activity in their event restrictions; to seek help from state authorities; or, when appropriate, to prosecute those who violate these laws.

- Unlawful Assembly Laws: Participating in an unlawful assembly is a crime in every state. A peaceful public event can become an unlawful assembly—and participants ordered to disperse—if the participants develop the shared intent to commit an illegal act or do an act "in a violent, unlawful, and tumultuous manner" that causes others to fear violence against persons or property. However, individual unlawful activity is not enough to transform an otherwise peaceful demonstration into an unlawful assembly.

- Anti-Mask Laws: Anti-mask laws prohibit people from wearing masks in order to conceal their identity. Some laws ban wearing a mask only if it is done with the further intent to intimidate or threaten another person or while engaged in the commission of a crime. In times of public-health emergencies such as the COVID-19 pandemic, anti-mask laws generally have been suspended.

- Public Nuisance Laws: Officials in every state have the power to abate public nuisances that interfere with the public health, safety, peace, and convenience. For the most part, even somewhat disruptive demonstrations may not be prohibited as a public nuisance. However, where groups participating in public demonstrations have engaged in conduct presenting a significant hazard to public health and safety or to access to public facilities, jurisdictions may seek an injunction against such conduct as a public nuisance, but demonstrators must remain able to engage in protected speech and assembly.

- Firearms-Regulation Preemption Laws: Most states have laws that bar local jurisdictions from regulating firearms in a way that exceeds, or differs from, state law. Some of these laws could prevent or limit a locality's ability to restrict the carrying of firearms as a condition of a public-event permit.

II. RELEVANT FEDERAL AND STATE LAWS

In addition to understanding constitutional constraints, localities preparing for public demonstrations also should be aware of state and federal laws that both constrain how they may respond to the potential for violence and provide tools that may be utilized to create the conditions that allow for First Amendment expression while minimizing the risk of harm. This Section details categories of both statutory and common law concepts that may be particularly relevant as localities consider what kinds of conditions to include in permits, what the thresholds are between protected activity and unlawful conduct, and how to avoid repeated violence where individuals have engaged in unlawful conduct in the past. At the same time, as recent events have demonstrated, these laws can be abused to undermine free-speech rights, and localities should exercise care in how they employ the legal tools at their disposal.

A. Criminal Prohibitions on Certain Types of Violence

All 50 states and the District of Columbia criminalize violent conduct that results in injury to persons and property. Federal and state laws also provide separate and often more stringent penalties for hate crimes and acts of terrorism because these types of crimes seek to intimidate and coerce whole communities, thereby affecting a broader array of people than the immediate target. Protecting against and prosecuting hate crimes and domestic terrorism sends a critical message that the community will not tolerate these kinds of crimes.

1. Hate-Crimes Statutes

Hate crimes are violent crimes in which the perpetrator targets an individual, group, or institution because of the actual or perceived characteristics of the victim. Hate crimes can include assault, murder, arson, vandalism, and threats and conspiracies to commit such crimes.

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act makes it a federal crime to willfully cause bodily injury, or attempt to do so using a dangerous weapon, because of the victim's actual or perceived race, religion, ethnicity, national origin, gender, sexual orientation, gender identity, or disability.[172] Forty-five states and the District of Columbia also have their own hate-crime laws.[173] While some states' hate-crime statutes cover a more limited set of characteristics—e.g., only race, ethnicity, and religion—others extend to the same array of protected characteristics as the Shepard Byrd Act. In *Wisconsin v. Mitchell*, the U.S. Supreme Court upheld the constitutionality of Wisconsin's hate-crimes law as consistent with the First Amendment.[174]

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[172] 18 U.S.C. § 249. The Shepard Byrd Act covers hate crimes committed on the basis of certain characteristics (including gender identity, sexual orientation, and disability) only if the crime affected interstate or foreign commerce or occurred within federal jurisdiction. *See id.* § 249(a)(2), (3). Where there is not a sufficient federal nexus, such hate crimes would have to be prosecuted under state law.

[173] For a comprehensive list of state hate-crime statutes, see Anti-Defamation League, *State Hate Crime Statutory Provisions*, https://www.adl.org/sites/default/files/pdfs/2022-05/Hate%20Crime%20Statutes%20-%20updated%202022.pdf.

[174] 508 U.S. 476 (1993).

Federal law also includes other hate-crimes provisions that may be relevant when individuals seek to engage in violence at public demonstrations. For example, it is unlawful for two or more people to "conspire to injure, oppress, threaten, or intimidate" others "in the free exercise or enjoyment" of any constitutional right or federal statutory right.[175] Federal law also prohibits the intentional defacement, damage, or destruction of religious real property "because of the religious character of that property" or because of "the race, color, or ethnic characteristics" of the people associated with that property.[176] This statute also criminalizes intentionally obstructing, by force or threat of force, any person from enjoying "that person's free exercise of religious beliefs."[177]

Many state-law provisions allow victims of hate crimes to seek civil remedies.[178] Where bias-motivated conduct is recurring, some states also allow that state's attorney general to seek an injunction to prevent such harm from happening in the future.[179]

2. Domestic-Terrorism Statutes

Domestic terrorism is defined by federal law as conduct that occurs primarily in the United States, that is a crime under federal or state law, that "involve[s] acts dangerous to human life," and that "appear[s] to be intended" to (a) "intimidate or coerce a civilian population," (b) "influence the policy of a government by intimidation or coercion," or (c) "affect the conduct of a government by mass destruction, assassination, or kidnapping."[180] Bias-motivated violence may qualify as both a hate crime and domestic terrorism, depending on the perpetrator's intent. For example, an individual who commits criminal acts of violence against black people in order to "spark a race war" may be engaging in both domestic terrorism and a hate crime. At the same time, some acts of domestic terrorism may be motivated by ideologies unrelated to bias. For example, the 1995 Oklahoma City bombing, one of the deadliest domestic terrorism attacks in U.S. history, was motivated primarily by animus against the federal government.

Although federal law defines domestic terrorism, there is no generic federal crime of "domestic terrorism."[181] Instead, federal law creates dozens of "terrorism" crimes applicable to specific circumstances—such as using a bomb, biological agent, or radiological dispersal device[182]—but does not penalize as "terrorism" violent acts committed domestically using firearms or vehicles when not

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[175] 18 U.S.C. § 241; *see also id.* § 245 (criminalizing interference with federally protected activities). Federal law also provides a civil cause of action for victims of conspiracies to interfere with civil rights against those involved in the conspiracy, *see* 42 U.S.C. § 1985, and those who neglect or refuse to prevent the conspiracy's aim from being accomplished, *see id.* § 1986.
[176] 18 U.S.C. § 247 (a), (c).
[177] *Id.* § 247(a).
[178] *See* Anti-Defamation League, *supra* note 173 (listing state civil-remedy provisions).
[179] *See, e.g.*, Me. Rev. Stat. tit. 5, § 4681; W. Va. Code § 5-11-20.
[180] 18 U.S.C. § 2331(5).
[181] *See* Mary B. McCord, *Filling the Gap in Our Terrorism Statutes*, Program on Extremism, George Washington Univ. (Aug. 2019), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Filling%20The%20Gap%20in%20Our%20Terrorism%20Statutes.pdf; *cf.* 18 U.S.C. § 2332b (criminalizing "acts of terrorism transcending national boundaries").
[182] *See, e.g.*, 18 U.S.C. § 2332a (use of weapons of mass destruction); *id.* § 2332h (radiological dispersal devices).

committed on behalf of a foreign terrorist organization like al Qaeda or the Islamic State and not targeted at U.S. officials or U.S. property.[183] While federal officials sometimes describe such acts as domestic terrorism, those who commit mass shootings or vehicle attacks for what are thought of as "domestic" extremist causes like white supremacy cannot be charged with a federal crime of terrorism.[184]

At least 25 states and the District of Columbia have statutes that criminalize domestic terrorism or impose a sentencing enhancement for acts of terrorism.[185] These statutes generally employ a similar definition for the requisite intent as that used in the federal definition. States vary, however, in the types of criminal conduct they deem to be "acts of terrorism" when committed with the requisite intent. At a minimum, state terrorism offenses cover conduct that causes or creates a risk of death or serious physical injury, and many also include serious property damage. Some state statutes make clear that peaceful protests are not acts of terrorism, although there should be no doubt about this proposition.[186]

B. State Anti-Paramilitary Laws

In August 2017, the Unite the Right rally turned violent as ideologically opposed groups clashed in the streets of Charlottesville, Virginia. Several white-nationalist groups, utilizing centralized command structures, arrived outfitted in helmets and matching uniforms and deployed shields, batons, clubs, and flagpoles as weapons in skirmishes with counter-protesters. Meanwhile, private militia groups—many dressed in camouflage fatigues, tactical vests, helmets, and combat boots, and most bearing assault rifles—stood guard as self-designated protectors of the protesters and counter-

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[183] A mass shooting or vehicle attack in support of a foreign terrorist organization would qualify as an act of *international terrorism*, even if it occurred in the United States, and it would be prosecuted as a terrorism crime under federal law. *See* 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); *id.* § 2339B (providing material support or resources to a foreign terrorist organization).

[184] *See* Dep't of Justice, Press Release: Ohio Man Pleads Guilty to 29 Federal Hate Crimes for August 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019), https://www.justice.gov/opa/pr/ohio-man-pleads-guilty-29-federal-hate-crimes-august-2017-car-attack-rally-charlottesville (describing James Alex Fields' crimes, prosecuted as hate crimes, as "acts of domestic terrorism").

[185] *See* Ala. Code §§ 13A-10-151, -152; Ariz. Rev. Stat. §§ 13-2301, -2308.01; Ark. Code §§ 5-54-201, -205; Conn. Gen. Stat. § 53a-300; D.C. Code § 22-3153; Fla. Stat. § 775.30; Ga. Code §§ 16-11-220, -221; Idaho Code §§ 18-8102, -8103; 720 Ill. Comp. Stat. 5/29D-14.9; Iowa Code §§ 708A.1, 708A.2; Kan. Stat. § 21-5421; Ky. Rev. Stat. § 525.045; La. Stat. § 14:128.1; Mich. Comp. Laws §§ 750.543b, .543f; Minn. Stat. § 609.714; Nev. Rev. Stat. §§ 202.4415, .445; N.J. Stat. § 2C:38-2; N.Y. Penal Law §§ 490.05, .25; N.C. Gen. Stat. § 14-10.1; Ohio Rev. Code §§ 2909.21, .24; Okla. Stat. tit. 21, §§ 1268.1, .2; 18 Pa. Cons. Stat. § 2717; S.D. Codified Laws § 22-8-12; Tenn. Code §§ 39-13-803, -805; Vt. Stat. tit. 13, § 1703; Va. Code §§ 18.2-46.4, .5.

[186] *See, e.g.*, Nev. Rev. Stat. § 202.4415; Okla. Stat. tit. 21, § 1268.1; *cf. People v. Morales*, 982 N.E.2d 580, 586 (N.Y. 2012) ("[T]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act.").

protesters.[187] The heavily armed presence and coordinated paramilitary activities of these groups not only increased the prevalence of violence at the rally but also made it more dangerous for state and local law enforcement to maintain public safety. Moreover, the attire and behavior of some of the self-professed militia led to confusion as to who was lawfully authorized to keep the peace and give commands to the civilian population.

Constitutional and statutory provisions exist in every state to prohibit these kinds of private armies and paramilitary activity.[188] These laws fall into four categories.

1. State Constitutional Provisions

Forty-eight states have constitutional provisions requiring the subordination of the military to civil authorities. Virginia's constitutional provision is representative: "in all cases the military should be under strict subordination to, and governed by, the civil power."[189] When private armies organize into military-style units that are neither responsible to, nor under the command of, the civil power of the state authorities, they violate this constitutional command to the detriment of civil order.[190]

2. Unauthorized-Private-Militia Statutes

Twenty-nine states have statutes that prohibit groups of people from organizing as private military units without the authorization of the state government. These statutes usually also prohibit such groups from "parading" or "drilling" in public with firearms. New York's statute is representative: "No body of men other than the organized militia and the armed forces of the United States except such . . . organizations as may be formed under the provisions of this chapter, shall associate themselves together as a military company or other unit or parade in public with firearms in any city or town of this state."[191] When self-designated private militia organizations attend public rallies purportedly to keep the peace or protect the rights of protesters or counter- protesters, they likely violate this prohibition, particularly when bearing arms and wearing military-style uniforms.

3. Anti-Paramilitary-Activity Statutes

Twenty-five states have statutes that criminalize paramilitary activity. These laws make it illegal for individuals to teach others how to use firearms, explosives, or techniques capable of causing injury or death, or to assemble to train or practice with such firearms, explosives, or techniques, knowing

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187 *See* First Am. Compl., *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560 (Va. Cir. Ct. filed Jan. 4, 2018), *available at* https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/02/charlottesville-complaint.pdf (describing events at Unite the Right rally).

188 For a catalog of each state's unauthorized private militia and anti-paramilitary-activity laws, see ICAP's *Prohibiting Private Armies at Public Rallies* (3d ed. 2020), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf.

189 Va. Const. art. I, § 13.

190 *See City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at *4 (Va. Cir. Ct. July 7, 2018) ("[U]nder this constitutional provision, no private army or militia would have any justified existence or authority apart from the federal, state, or local authorities.").

191 N.Y. Mil. Law § 240.

or intending that these techniques will be used to further a civil disorder.[192] "Civil disorder" generally is defined as a public disturbance involving acts of violence by two or more persons that causes an immediate danger of, or results in, damage or injury to persons or property.[193] This prohibition covers conduct similar to that witnessed at the Unite the Right rally, where organized groups used firearms and dangerous techniques (including using shields and sharpened flagpoles to form phalanxes) in the civil disorder that resulted in the event being declared an unlawful assembly.[194]

4. False-Assumption Statutes

A number of states prohibit the false assumption of the uniform or duties of a peace officer or member of the military, including at least 14 states with statutes that may apply in the context of unauthorized private militia activity at public demonstrations.[195] For example, Arizona bars any person except service members and veterans from wearing "any part of the uniform of the national guard or the army, navy or air force of the United States, or a uniform so similar as to be easily mistaken therefor,"[196] and Virginia prohibits the false assumption of the "functions, powers, duties, and privileges" of a law enforcement or peace officer.[197] Private militias that wear uniforms highly similar to military uniforms and those who seek to "keep the peace" to the exclusion of authorized law enforcement may violate these prohibitions.[198]

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These prohibitions reinforce the fundamental tenet of civil society that the government must maintain a monopoly on the legitimate use of force for the protection of public safety.[199] The laws are consistent with the First Amendment, as they regulate conduct harmful to public safety—not

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192 *See, e.g.*, Colo. Rev. Stat. § 18-9-120(2).

193 *See id.* § 18-9-120(1)(a).

194 *See City of Charlottesville*, 2018 WL 4698657, at *6 (concluding that plaintiffs had adequately pleaded a violation of Virginia's anti-paramilitary-activity statute where the complaint alleged that the organizer of the Unite the Right rally "was engaged and involved in the solicitation, training, and command of . . . paramilitary units" knowing that they would be used in a civil disorder); *see also id.* at *7 (finding, with respect to a left-wing militia, that "forming a security perimeter while carrying tactical rifles makes out a sufficient claim of paramilitary activity under this provision").

195 Many other states ban the false assumption of the duties of law enforcement and the impersonation of law enforcement or members of the military. However, certain elements of those offenses (e.g., intent requirements) may not be as readily applicable to conduct likely to occur at public demonstrations.

196 Ariz. Rev. Stat. § 26-170.

197 Va. Code § 18.2-174.

198 *See City of Charlottesville*, 2018 WL 4698657, at *8 ("There are sufficient facts pleaded to support a finding that Redneck Revolt was involved in assuming the functions and duties of law enforcement, and that they were appearing to 'keep the peace' and did not want the police to be anywhere around.").

199 *See Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982) ("[P]rotecting citizens from the threat of violence posed by private military organizations . . . is a vital governmental interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos.").

speech or assembly for peaceable purposes—and with the Second Amendment right to bear arms, which does not protect private paramilitary activity.[200]

Anti-paramilitary laws may be enforced in a number of ways. Where private militias and groups engaging in paramilitary activity at public demonstrations violate a state's relevant statutes, law-enforcement officials may pursue criminal charges.[201] State-level officials may also seek to enforce their constitutional prerogative to ensure that all military activity remains under civil control. Localities and affected communities have utilized anti-paramilitary laws to obtain injunctive relief against imminent or repeated dangerous paramilitary activity.[202] Finally, such laws may be used proactively as a basis for lawful time, place, and manner restrictions designed to minimize violence at future rallies.[203]

C. Unlawful-Assembly Laws

Both at common law and under various state statutes, participating in an unlawful assembly is a criminal offense punishable as a misdemeanor. Although there is some variation among the statutes of different states, an unlawful assembly ordinarily involves an assembly of three or more persons[204]

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200 *See Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) ("The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law."); *City of Charlottesville*, 2018 WL 4698657, at *11 (rejecting First and Second Amendment challenges to the enforcement of anti-paramilitary-activity laws because, even though paramilitary conduct was enjoined, the defendants "will still be able to come exercise their free speech rights, and assemble with each other, as well as carry a firearm, so long as such is openly carried (unless the person has a concealed weapon permit), and not concealed or brandished or used in a threatening way"); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 216 (concluding that Texas's anti-paramilitary-activity law was consistent with both the First Amendment, as a conduct regulation, and the Second Amendment); *see also District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886), for the principle that the Second Amendment "does not prevent the prohibition of private paramilitary organizations"). For further discussion of the Second Amendment, see *supra* Section I.B. For further information on the First Amendment test for laws that regulate conduct but have an incidental restriction on speech, see *infra* Section II.D.1.

201 *See Presser*, 116 U.S. at 254 (upholding conviction for violation of unauthorized-private-militia statute where an unauthorized military company paraded through the streets of Chicago).

202 *See City of Charlottesville*, 2018 WL 4698657 (suit on behalf of City of Charlottesville, local businesses, and local residents' associations, which obtained injunctions against private paramilitary activity by participants in the 2017 Unite the Right rally and counter-protest); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. 198 (S.D. Tex. 1982) (enjoining military activity by militia wing of the Ku Klux Klan, who sought to intimidate local minority fishermen); *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (upholding a Carolina Ku Klux Klan member's contempt conviction for violating a court-ordered consent decree prohibiting him from operating a paramilitary organization); Complaint, *City of Dayton v. Honorable Sacred Knights* (Ohio Common Pleas Ct.), *available at* https://perma.cc/YC93-JF7R.

203 *See* Section V.C for additional suggestions on how to utilize anti-paramilitary-activity prohibitions to protect public safety.

204 Some statutes set the minimum number of participants at two, while others require a larger gathering. *See, e.g.*, Cal. Penal Code § 407 ("two or more persons"); Va. Code. § 18.2-406 ("three or more persons"); N.Y. Penal Code § 240.10 ("with four or more other persons"); Mo. Stat. § 574.040 ("with six or more other persons").

who share a common intent "to do an unlawful act" or to do an "act in a violent, unlawful, and tumultuous manner to the terror and disturbance of others."[205] That is, a gathering may be deemed an unlawful assembly regardless of whether its object is unlawful if those participating in the assembly intend to achieve their ends in such a way "as to give firm and courageous persons in the neighborhood of such assembly ground to apprehend a breach of the peace in consequence of it."[206]

Unlawful-assembly offenses are closely related to the common law and statutory crimes of riot and disturbing the peace: when participants in an unlawful assembly "take steps towards the performance of their purpose, it becomes a rout; and, if they put their design into actual execution, it is a riot."[207] Prohibitions on unlawful assemblies therefore seek to "stop trouble before it occurs"[208] and to prevent riots—"to discourage assemblies which get 'out of hand,' which interfere with the public, and thus disturb the public peace and provoke the commission of other and more serious crimes."[209]

Lawful demonstrations can become unlawful assemblies if the participants develop the intent to do an unlawful act or any act in a violent and unlawful manner during the course of the assembly.[210] This intent must be shared among the participants; individual wrongdoing is not enough to transform a lawful assembly into an unlawful assembly.[211] Even unlawful activity by some participants in a demonstration does not necessarily transform a "peaceful demonstration into a potentially disruptive one."[212] However, although the participants in an unlawful assembly must share a common intent, not every individual needs to have committed a violent or unlawful act to render the assembly as a whole unlawful. Rather, "a person can become a member of an unlawful

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205 *Lair v. State*, 316 P.2d 225, 234 (Okla. Crim. Ct. App. 1957) (interpreting Okla. Stat. tit. 21, § 1314); *see also, e.g.*, *Heard v. Rizzo*, 281 F. Supp. 720, 740 (E.D. Pa. 1968) (three-judge court), *aff'd per curiam*, 392 U.S. 646 (1968) (construing Pennsylvania's unlawful-assembly statute); *Black's Law Dictionary* (11th ed. 2019) (defining "unlawful assembly" as "a meeting of three or more persons who intend either to commit a violent crime or to carry out some act, lawful or unlawful, that will constitute a breach of the peace").

206 *Lair*, 316 P.2d at 234; *State v. Simpson*, 347 So. 2d 414, 415 (Fla. 1977).

207 *Heard*, 281 F. Supp. at 740 (quoting *Black's Law Dictionary*). A riot is "[a]n unlawful disturbance of the peace by an assemblage of usu[ally] three or more persons acting with a common purpose in a violent or tumultuous manner that threatens or terrorizes the public or an institution." *Black's Law Dictionary* (11th ed. 2019).

208 *People v. Uptgraft*, 8 Cal. App. 3d Supp. 1, 8 (App. Dep't Super Ct. 1970).

209 *State v. Hipp*, 213 N.W.2d 610, 615 (Minn. 1973); *see also State v. Mast*, 713 S.W.2d 601, 603–04 (Mo. Ct. App. 1986) ("The purpose of unlawful assembly statutes is to discourage assemblies which interfere with the rights of others and endanger the public peace and excite fear and alarm among the people."); *Lair*, 316 P.2d at 233 ("[T]he public peace and welfare require that unlawful assemblies be 'nipped in the bud' before they get out of hand and become riots.").

210 *Lair*, 316 P.2d at 234; *Mast*, 713 S.W.2d at 603–04.

211 *See Lair*, 316 P.2d at 236 (union members involved in strike did not concur in another member's unlawful threat, so there was no unlawful assembly).

212 *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982)).

assembly by not disassociating himself from the group assembled and by knowingly joining or remaining with the group assembled after it has become unlawful."[213]

Prohibitions on unlawful assemblies generally have been upheld as consistent with the First Amendment. The Supreme Court has repeatedly affirmed that the First Amendment does not bar government officials from restricting public demonstrations where "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears."[214] At the same time, however, "a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[215]

Courts have concluded that the common-law history of unlawful-assembly offenses and the First Amendment's rights of freedom of speech and assembly constrain the otherwise broad range of conduct that arguably could fall within the definition of unlawful assembly, such that the statutes are neither vague nor overbroad.[216] In doing so, courts generally have read into the statutes a limitation that "protests or assemblies cannot be dispersed on the ground that they are unlawful unless they are violent or . . . pose a clear and present danger of imminent violence, or they are violating some other law in the process."[217]

Thus, in the context of public demonstrations, government officials must draw a distinction between loud but orderly protest activity and conduct that threatens public safety due to imminent violence, destruction or property, or other unlawful acts. Neither loud but generally peaceful protest activities, such as chanting, singing, or praying on a public sidewalk, nor demonstrations in support of unpopular causes likely to offend onlookers can support a conclusion that an assembly is

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213 *Mast*, 713 S.W.2d at 604; *State v. Dixon*, 479 P.2d 931, 939 (1971); *In re Wagner*, 119 Cal. App. 3d 90, 103 (Cal. Ct. App. 1981) ("If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group." (citations omitted)).

214 *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *see also Feiner v. New York*, 340 U.S. 315, 320 (1951) (explaining that threats to "public peace, order and authority" fall within "the bounds of proper state police action"); *Cox v. Louisiana*, 379 U.S. 559, 574 (1965) ("We . . . reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law . . . ."); *see also United States v. Griefen*, 200 F.3d 1256, 1263 (9th Cir. 2000) ("[A] government entity may close . . . a street engulfed in a riot or an unlawful assembly . . . ."); *State v. Elliston*, 159 N.W.2d 503, 508 (Iowa 1968).

215 *Cantwell*, 310 U.S. at 308.

216 *See In re Brown*, 510 P.2d 1017 (Cal. 1973); *Simpson*, 347 So. 2d at 415–16; *Hipp*, 213 N.W.2d at 615; *Dixon*, 479 P.2d at 935–38; *Heard*, 281 F. Supp. at 739–40. *But see Owens v. Commonwealth*, 179 S.E.2d 477, 479–80 (1971) (striking down portion of unlawful-assembly statute as overbroad because it "makes unlawful a peaceable assembly that poses no clear and present danger"). By contrast, when interpreted broadly, statutes criminalizing disorderly conduct and breach of the peace have been found unconstitutionally vague and overbroad. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

217 *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (quotation marks and citations omitted); *see also Jones*, 465 F.3d at 57–58 ("[T]he police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety.").

unlawful.[218] By contrast, where a once-peaceful gathering grows hostile and violent and threatens the safety of others or their property, an official would be justified in concluding that the assembly has become an unlawful one.[219] The key question is whether those assembled have shown a "common intent to resort to force or violence," as demonstrated "by an actual resort to violence or by acts giving probable cause to believe that such violence is imminent."[220]

When statutes grant government officials the authority to order an unlawful assembly to disperse, a failure to disperse following such an order is generally a separate misdemeanor offense.[221] Officials may declare an unlawful assembly only if they have probable cause to believe that the current gathering has become unlawful. It is not enough that there was violence on another day, in similar circumstances, or by others responding to the same issue,[222] although a pattern of escalating violence by the same group may be a relevant consideration.[223] Moreover, a decision to declare an unlawful assembly should not be based on the content of the assembly's message.[224]

An officer dispersing an unlawful assembly should ensure that the order to disperse is loud enough to be "reasonably likely to have reached all of the crowd" and should, absent a threat of imminent harm, provide time to comply with the order before arresting those who remain.[225] The language an official uses to order dispersal need only reasonably convey to an observer that she is being commanded to depart; it need not specify the extent of the area that must be vacated nor the time by which it must be cleared.[226] In enforcing a lawful dispersal order, officials need not allow non-

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218 *See Edwards v. South Carolina*, 372 U.S. 229, 235–36 (1963) (overturning conviction for breach of the peace where protesters peaceably assembled and sang songs without any threat of violence; the only danger was that their opinions "were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection"); *Cox v. Louisiana*, 379 U.S. at 546 (similar); *In re Brown*, 510 P.2d at 1024 ("Although the public may fear a large, noisy assembly, particularly an assembly that espouses an unpopular idea, such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence."); *Jones v. State*, 355 S.W.2d 727, 727 (Tex. Crim. App. 1962) (orderly sit-in was not an unlawful assembly).

219 *Feiner*, 340 U.S. at 317–21; *Hipp*, 213 N.W.2d at 616 (finding declaration of unlawful assembly warranted where demonstrators disrupted a restaurant's business, blocked access to and damaged its property, impeded vehicular and pedestrian traffic, engaged in shouting and profanity, and disregarded officials' requests that they conduct an orderly demonstration).

220 *Commonwealth v. Abramms*, 849 N.E.2d 867, 875 (Mass. App. Ct. 2006).

221 *See, e.g.*, Cal. Penal Code § 409; Mo. Stat. § 574.060; Va. Code § 18.2-407.

222 *Collins*, 110 F.3d at 1372.

223 *Uptgraft*, 8 Cal. App. 3d Supp. at 8–9 (unlawful assembly justified based on pattern of escalating violence in recent protests by the same group even though the group's activities on that day would not alone qualify as an unlawful assembly).

224 *Kessler v. City of Charlottesville*, No. 3:19-cv-00044, 2020 WL 871484, at *10 (W.D. Va. Feb. 21, 2020).

225 *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Jones*, 465 F.3d at 60. The appropriate methods for dispersing those who remain, including what level of force is warranted, are beyond the scope of this discussion.

226 *See Mast*, 713 S.W.2d at 605–06; *State v. Johnson*, 500 P.2d 788, 795 (Wash. App. 1972), *opinion adopted*, 508 P.2d 1028 (Wash. 1973).

violent demonstrators to remain; even those who merely choose not to disperse and dissociate themselves from the unlawful assembly may be subject to arrest.[227]

D. Anti-Mask Laws and Ordinances

Some states and localities have enacted statutes and ordinances that forbid the wearing of masks and other disguises intended to conceal one's identity while on public property. In the extenuating circumstances related to COVID-19, mask-wearing is recommended as a public health measure and required in many states, and some states and localities have expressly suspended enforcement of their existing anti-mask laws.[228] This Section addresses anti-mask laws in ordinary times; it does not in any way cast doubt on recommended or required mask-wearing in the context of a grave public health emergency.

Many anti-mask laws were passed in response to outbreaks of violence by masked individuals, such as attacks perpetrated by the Ku Klux Klan against members of minority communities into the mid-20th century.[229] Given this history of intimidation and harassment, masks often are perceived as threatening, especially in combination with the presence of weapons, and they can strike fear in members of the public.[230] More generally, anti-mask laws recognize that mask-wearing allows individuals to commit criminal acts anonymously, thereby threatening public safety and the public peace and hindering the identification and apprehension of perpetrators of crime and violence.[231] After the pandemic has subsided, jurisdictions may want to consider enacting and enforcing generally applicable anti-mask statutes, even as they remain aware that such statutes are likely to face opposition from groups seeking to protest anonymously.

Anti-mask statutes generally can be grouped into two categories. Statutes in the first category, "general anti-mask statutes," criminalize wearing a mask in public to conceal one's identity. Many such laws also include exceptions for wearing masks in contexts where a threat to public safety is considered less likely. For example, Georgia bans wearing "a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer" while "upon any public way or public property or upon the private property of another without" permission.[232] The statute exempts from its prohibition wearing "holiday costume[s]"; donning a mask for physical safety while on the job or for a sporting activity; using a mask "in a theatrical

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227 *See White v. Jackson*, 865 F.3d 1064, 1075–76 (8th Cir. 2017); *Kessler*, 2020 WL 871484, at *11; *Mast*, 713 S.W.2d at 605.

228 For additional discussion of mask-wearing ordinances during the COVID-19 pandemic, see *infra* Protesting During a Pandemic.

229 *See State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990) (explaining the origins of Georgia's 1951 Anti-Mask Act); *see also Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203–05 (2d Cir. 2004) (tracing origins of New York's anti-mask law to armed insurrections of tenant farmers in the mid-1800s).

230 *See Miller*, 398 S.E.2d at 549–51 (describing interests served by anti-mask statute); *see also id.* at 550 (noting that victims feared reporting incidents of Klan violence "in case law enforcement officers might have been involved").

231 *See Kerik*, 356 F.3d at 205; *Hernandez v. Commonwealth*, 406 S.E.2d 398, 401 (Va. Ct. App. 1991).

232 Ga. Code § 16-11-38(a).

production," Mardi gras celebration, or masquerade ball; and wearing a gas mask in an emergency or emergency drill.[233]

Statutes in the second category, "criminal anti-mask statutes," ban wearing a mask only when it is worn either with a specified intent or while engaged in the commission of a crime. For example, Washington, D.C., criminalizes "wearing any mask, hood, or device . . . to conceal the identity of the wearer" when done with certain specified intents, including an "intent to deprive any person . . . of equal protection of the law," "intent to intimidate, threaten, abuse, or harass any other person," or "intent to cause another person to fear for his or her personal safety"; or "[w]hile engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification."[234]

Individuals prosecuted under anti-mask statutes and groups seeking to wear masks at public demonstrations—including members of Ku Klux Klan affiliates and students protesting against the government of Iran in the 1970s—have raised First Amendment challenges to the enforcement of anti-mask statutes and ordinances. Although some courts have struck down anti-mask statutes as unconstitutional, the Second Circuit, Seventh Circuit, the Georgia and West Virginia supreme courts, and a Virginia court of appeals have upheld their constitutionality. Challengers primarily have raised four arguments.

1. Symbolic Speech

Protesters have argued that mask-wearing is a type of conduct that qualifies as symbolic speech, requiring the application of heightened scrutiny under the First Amendment. Courts generally have rejected this argument in the context of Ku Klux Klan–affiliated groups, concluding that mask-wearing is not protected speech because the incremental speech value of wearing the mask beyond that of wearing the Klan's traditional robe and hood without the mask is negligible.[235] However, a court held that mask-wearing by protesters of the Iranian government was expressive conduct where the masks had become symbols "of opposition to a regime which is of such a character that its detractors believe they must disguise their identity to protect themselves."[236] To the extent mask-wearing qualifies as symbolic speech, the government must satisfy the test set forth in *United States v. O'Brien*: it must establish that the prohibition furthers an important governmental interest unrelated

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233 *Id.* § 16-11-38(b); *see also* N.Y. Penal Law § 240.35(4) (similar).

234 D.C. Code § 22-3312.03; *see also* 18 U.S.C. § 241 (prohibiting "two or more persons" from going "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege"); 42 U.S.C. § 1985(3) (allowing a civil suit when the same conduct constitutes a conspiracy to interfere with civil rights).

235 *See Kerik*, 356 F.3d at 206–08 (finding the "expressive force" of the mask to be "redundant"); *Miller*, 398 S.E.2d at 551 (concluding that "the statute's incidental restriction on expression is *de minimis*," as "the law restricts only unprotected expression—the communication of a threat[—]and regulates only the noncommunicative function of the mask"); *Hernandez*, 406 S.E.2d at 400 ("The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the [KKK] robe and the hood."). *But see Church of Am. Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 587 & n.3 (W.D. Pa. 2000) (concluding that mask-wearing qualified as symbolic speech where the mask was not detachable from the Klan hood).

236 *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978).

to the suppression of speech; that there is a sufficient nexus between the prohibition and the governmental interest it supports; and that the incidental restriction on speech is no greater than necessary to the furtherance of that interest.[237] Courts have reached different conclusions as to how this test applies depending on the context of the challengers' conduct.[238]

2. Anonymous Speech

Protesters have argued that they have a First Amendment right to protest anonymously because of the risk that they or their families will be retaliated against for their views. The First Amendment protects individuals' right to engage in anonymous speech where the government's interests in requiring disclosure of one's identity do not justify the chilling effect disclosure would impose on the rights of speech and association.[239] However, the extent to which the right to anonymity extends to public demonstrations is unsettled, and courts disagree as to whether prohibiting masked protests implicates the right to anonymity at all.[240] Where courts have found that prohibitions on wearing masks implicate a protected First Amendment right, thereby requiring heightened scrutiny, they generally also have concluded that the government failed to demonstrate that the law was appropriately tailored to meet its interests.[241]

3. Overbreadth

Defendants charged with violating anti-mask statutes have argued that the statutes are overbroad—i.e., that they prohibit a substantial amount of constitutionally protected activity. General anti-mask statutes are more susceptible to overbreadth challenges because the only intent required ordinarily is

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[237] 391 U.S. 367, 376–77 (1968).

[238] *Compare Miller*, 398 S.E.2d at 551 (finding law to be amply supported by legitimate state interests), and *State v. Berrill*, 474 S.E.2d 508, 514–16 (W. Va. 1996) (similar), *with Aryan*, 462 F. Supp. at 93–94 (finding that a public university's concern about violence at a masked protest was speculative, so there was an insufficient nexus to the government's interests to prohibit mask-wearing).

[239] *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) (concluding that Alabama could not compel the NAACP to produce its membership lists because it would chill the members' free-association rights); *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) (striking down prohibition on distribution of anonymous campaign literature).

[240] *Compare Kerik*, 356 F.3d at 209 (refusing to extend the rule of *NAACP v. Alabama* to "the concealment of one's face while demonstrating"), *and Miller*, 398 S.E.2d at 553 (finding that the prohibition's "effect on the Klan's ability to advocate or proselytize anonymously is negligible" where other methods of anonymous communication remain available), *with Am. Knights of Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 836, 840–41 (N.D. Ind. 1999) (concluding that the anti-mask law burdened Klan members' free speech and association rights because past retaliation made "it likely that disclosing the members would impact the group's ability to pursue its collective efforts at advocacy"), *and Ghafari v. Mun. Court*, 87 Cal. App. 3d 255, 261 (Ct. App. 1978) (finding anti-mask statute to impinge on the right to anonymous speech because "the state either inhibits the exercise of free speech or exposes the speaker who dares, to retaliation by a foreign government").

[241] *See City of Goshen*, 50 F. Supp. 2d at 836 (finding the government's evidence connecting masked protesting with an increased risk of violence and criminal activity to be insufficient); *see Ghafari*, 87 Cal. App. 3d at 261 (finding that other existing statutes sufficiently, and more narrowly, prohibited "illegitimate and improper use of concealment of identity").

the intent to conceal one's identity, thereby allowing application in a broader array of circumstances.[242] In order to avoid such an overbreadth problem, in *State v. Miller*, the Georgia Supreme Court construed Georgia's general anti-mask statute to apply only "when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence."[243] Criminal anti-mask statutes, by contrast, are less susceptible to an overbreadth challenge because they are more focused on the connection between mask-wearing and constitutionally unprotected conduct.[244]

4. Content-Based Restriction

Where a general anti-mask statute exempts from its prohibition masks worn for specific purposes—such as Halloween costumes or masquerade balls—challengers have argued that the statute operates as a content-based restriction on speech (or as a violation of the Equal Protection Clause under a content-based theory) and therefore should be subject to strict scrutiny. This type of challenge has only rarely been successful.[245] Where courts conclude that an anti-mask statute only minimally affects speech rights, they generally defer to legislative judgments in determining what categories to exempt from prohibition.[246] It remains to be seen, however, whether exemptions from mask-wearing prohibitions will be treated as content-based following the Supreme Court's decision in *Reed*

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[242] *See Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980); *Ghafari v. Mun. Court*, 87 Cal. App. 3d at 262. *But see Hernandez*, 406 S.E.2d at 400 (rejecting an overbreadth challenge to a law requiring that the mask-wearer "*intend* to conceal his identity," which the court found did not reach a substantial amount of constitutionally protected mask-wearing for other reasons).

[243] 398 S.E.2d at 551–52.

[244] The language used to specify the required intent for a criminal anti-mask statute will be scrutinized in the context of an overbreadth challenge. For example, *City of Erie* drew a distinction among the enumerated types of intents in Erie's anti-mask ordinance. It struck down as overbroad and vague a provision barring mask-wearing with "intent to intimidate, threaten, abuse or harass any other person," but upheld provisions barring mask-wearing "when the person has the intent to deprive other persons of the equal protection of the laws," "the intent, by force or threat of force, to injur[e], intimidate, or interfere with any person because of his exercise of" his legal rights, or "the intent to cause another person to fear for his or her personal safety." 99 F. Supp. 2d at 589–91; *see also Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990) (finding an ordinance prohibiting paraders from wearing masks or disguises "to the disturbance of the peace or to the alarming of the citizens" to be overbroad because it could "be used to stifle" protected symbolic speech); *Cf. Virginia v. Black*, 538 U.S. 343, 347, 360 (2003) (concluding that Virginia's statute criminalizing cross-burning with "an intent to intimidate a person or group of persons" did not violate the First Amendment because "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat").

[245] *See Ghafari*, 87 Cal. App. 3d at 265–66. In *Ghafari*, the California Court of Appeals also held that the exception for mask-wearing for "purposes of amusement [and] entertainment" was unconstitutionally vague. *Id.* at 264.

[246] *See Kerik*, 356 F.3d at 209–10 (concluding that the anti-mask statute regulates non-expressive conduct, and deferring to the legislature's decision to exempt certain uses of masks); *see also Miller*, 398 S.E.2d at 553 (rejecting an Equal Protection Clause challenge on similar grounds because "the statute distinguishes appropriately between mask-wearing that is intimidating, threatening or violent and mask-wearing for benign purposes"); *City of Erie*, 99 F. Supp. 2d at 588 (finding mask-wearing to be symbolic speech as applied, but rejecting the notion that the prohibition operates on its face as a content-based restriction).

v. Town of Gilbert,[247] which articulated a seemingly rigid framework for determining whether speech restrictions are content-neutral or content-based.

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Even if a court concludes that mask-wearing implicates demonstrators' First Amendment rights, that is not the end of the inquiry.[248] The government may still prevail if it establishes that its substantial interests furthered by the statute justify the impingement on individuals' First Amendment rights. Courts generally have found the interests furthered by anti-mask statutes—protecting public safety, identifying criminals, and guarding against violence and intimidation—to be substantial and even compelling interests.[249] Where governments defending their anti-mask ordinances have lost challenges to their statutes, it has often been because of a lack of evidence demonstrating the nexus between public-safety goals and the protest activity at issue.[250] Jurisdictions are on safer ground where they can demonstrate specific, non-speculative public-safety justifications for their anti-mask regulations.[251] Finally, even when enactment of an anti-mask prohibition was motivated by the behavior of a single group, like the Ku Klux Klan, courts have not found that fact relevant to their First Amendment analysis.[252] Still, it is essential that anti-mask laws—like any other type of speech restriction—serve broader governmental ends, rather than simply targeting individual groups based on their messages.

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247 576 U.S. 155 (2015).

248 An overbreadth challenge is the exception to this rule, as a successful challenge indicates that the statute sweeps too broadly for the interests it protects.

249 *See Miller*, 398 S.E.2d at 551 ("Safeguarding the right of the people to exercise their civil rights and to be free from violence and intimidation is not only a compelling interest, it is the General Assembly's affirmative constitutional duty."); *Berrill*, 474 S.E.2d at 514 ("The obvious governmental interest here is the protection of citizens from violence and from the fear and intimidation of being confronted by someone whom they cannot identify.").

250 *See City of Goshen*, 50 F. Supp. 2d at 842 (recognizing that "preventing violence and identifying and apprehending criminals are compelling governmental interests," while concluding that the statute was insufficiently tailored to those ends); *Aryan*, 462 F. Supp. at 93–94 (finding an insufficient nexus between the government's interests and the prohibition on mask-wearing where evidence of potential violence was speculative).

251 *See Ryan v. Cty. of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995) (finding a rule banning masks in a courthouse to be "reasonable" because courts generally "have acute security problems" and the specific courthouse at issued had "been the scene of a crime committed by a masked man").

252 *See Hernandez*, 406 S.E.2d at 401 (acknowledging a focus on the Klan, but commenting that "whatever motivation might have prompted the anti-mask statute's enactment, the purpose of the statute is no more than what appears in the plain language of the statute"); *City of Erie*, 99 F. Supp. 2d at 588 n.4 (finding the legislative focus on the Klan neither "dispositive" for a facial challenge nor "relevant" to whether it would be "applied in a discriminatory fashion"). *But see Miller*, 398 S.E.2d at 554 (Smith, J., dissenting) (emphasizing legislative purpose to "unmask the Ku Klux Klan" to argue for heightened scrutiny).

E. Public-Nuisance Laws

Public nuisance is a common law tort and a crime in every state. "The concept of common law public nuisance . . . elude[s] precise definition."[253] At the general level, a public nuisance is an "unreasonable interference with a right common to the general public."[254] Rights "common to the general public" are those related to the public health, safety, peace, comfort, convenience, and morals, rather than individual rights.[255] Moreover, the "unreasonable interference" involved in a public nuisance—i.e., the conduct or condition that is deemed to be a nuisance—generally must affect "the interests of the public generally, as distinguished from those of a particular class," even if that class involves a large number of people.[256] Finally, the effect on the public right—i.e., the "annoyance, discomfort, inconvenience, or injury to the public"—must be "substantial."[257] For example, an unreasonable obstruction that blocks access to a public street for a considerable period of time is considered a public nuisance.[258]

Generally, in determining whether conduct or a condition so unreasonably interferes with a public right to be considered a public nuisance, courts assess three factors: (a) "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," (b) "whether the conduct is proscribed by a statute, ordinance or administrative regulation," or (c) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[259] The unreasonableness of the interference may be shown if any one of the three factors is met, though these factors are not exclusive.[260]

States have broad authority to prohibit conduct or the creation of a harmful condition as a public nuisance.[261] Many states have a general public-nuisance misdemeanor offense.[262] These statutes generally have been interpreted to include interferences with public rights that were considered

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[253] *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (1982).
[254] *Restatement (Second) of Torts* § 821B.
[255] *Lawton v. Steele*, 152 U.S. 133, 136 (1894); *see also Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (plurality op.) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113–14 (2004).
[256] *Lawton*, 152 U.S. at 137. In a few states, it is sufficient that a nuisance affects a large number of people, even if it does not affect a public right. *See, e.g.*, Cal. Civ. Code § 3480; Okla. Stat. tit. 50, § 2. Even in those states, the conduct regulated must affect a large number of people simultaneously; it is not enough to affect many people one by one. *See, e.g.*, *City of McAlester v. Grand Union Tea Co.*, 98 P.2d 924, 926 (Okla. 1940) (striking down a public-nuisance ordinance regulating door-to-door salespeople because the conduct would affect only one residence at a time).
[257] 58 *Am. Jur. 2d Nuisances* § 31; *see also Breeding ex rel. Breeding v. Hensley*, 258 Va. 207, 213 (1999) ("More than sporadic or isolated conditions must be shown; the interference must be 'substantial.' ").
[258] *See, e.g.*, *Breeding*, 258 Va. at 213.
[259] *Restatement (Second) of Torts* § 821B.
[260] *Id.* cmt. e.
[261] *Lawton*, 152 U.S. at 140.
[262] *See, e.g.*, Minn. Stat. § 609.74; N.M. Stat. § 30-8-1.

public nuisances at the common law.[263] States also have specifically criminalized certain activities as public nuisances per se because they interfere with public rights.[264] Moreover, many states have delegated to municipalities and administrative agencies the ability to define public nuisances by ordinance or regulation.[265] The enumeration of specific public-nuisance offenses does not preclude common-law remedies for other, non-enumerated conduct that unreasonably interferes with a right common to the public.

Public nuisances may be regulated in three main ways: (1) criminal prosecution; (2) civil suits for abatement, such as through injunctive relief; and (3) civil suits for damages.[266] States generally have authority to sue for abatement of public nuisances,[267] and many states also have shared that authority with municipalities by statute.[268] Private individuals also may be able to sue for abatement or damages, but only to the extent that they have suffered damages different in kind from those suffered by the public at large.[269] Where injunctive relief is sought, the ordinary standards for an injunction apply.[270] Finally, where a continuing nuisance exists, a plaintiff may seek both damages and an injunction.[271]

Municipalities may seek to enjoin actually harmful conduct as a public nuisance even if that conduct occurs in the course of a public demonstration. For example, in *Thomas v. City of Danville*, the Virginia Supreme Court upheld an injunction where ongoing protests had, over a period of multiple months, repeatedly turned violent and blocked public streets and buildings.[272] In *New York State National Organization for Women v. Terry*, the U.S. Court of Appeals for the Second Circuit upheld an injunction obtained by New York City under a public-nuisance theory where anti-abortion

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263 *See Restatement (Second) of Torts* § 821B cmt. c.
264 *Id.*
265 *Id.*; *see, e.g.*, Cal. Gov. Code § 13771.
266 *See, e.g.*, Cal. Civ. Code § 3491.
267 *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982) (citing cases in which states had standing to sue to enjoin public nuisances); *United Steelworkers of Am. v. United States*, 361 U.S. 392 (1959) (Frankfurter, J., concurring) ("The judicial power to enjoin public nuisance at the instance of the Government has been a commonplace of jurisdiction in American judicial history.").
268 *See, e.g.*, Minn. Stat. §§ 412.221 subd. 23, 368.01 subd. 15; Va. Code § 15.2-900; *see also N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989); *Cox v. New Castle Cty.*, 265 A.2d 26, 27 (Del. 1970); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1238 (Ind. 2003); *City of Charlottesville*, 2018 WL 4698657, at *9 (Va. Cir. Ct. July 7, 2018).
269 *See Restatement (Second) of Torts* § 821C; *see also, e.g.*, Okla. Stat. tit. 50, §§ 10, 12; Cal. Civ. Code § 3493.
270 *Festival Theatre Corp.*, 438 N.E.2d at 167 (injunction improvidently granted "because it was not shown that criminal prosecution fails to afford an adequate remedy for the harm caused"); *Wade v. Campbell*, 200 Cal. App. 2d 54, 62 (Ct. App. 1962) (scope of injunction should be no broader than necessary to remedy harm).
271 58 *Am. Jur. 2d Nuisances* § 180; *Columbia Cty. v. Doolittle*, 512 S.E.2d 236, 238 (1999).
272 152 S.E.2d 265, 269 (1967) ("Clearly the lower court had the right . . . to enjoin the defendants and their associates from obstructing or attempting to obstruct the free use of the streets and the free ingress and egress to the public buildings and other acts which were patently disorderly and riotous."); *see also City of Charlottesville*, 2018 WL 4698657, at *10 (concluding that municipality could bring public-nuisance action against armed militia groups patrolling public demonstrations because their presence unreasonably interfered with the public's right "to be free to visit and use the downtown area without fear or intimidation from organized, armed, uniformed, but unofficial military-like groups").

protesters engaged in "en masse demonstrations" in order to block access to health clinics, thereby impeding both the public's right to obtain medical services and the health and safety of those who wanted to use the public streets.[273] And municipalities may, within reasonable limits, enact public-nuisance ordinances to control the volume of amplified sound.[274]

However, like any other government action, public nuisance prohibitions and injunctions must comport with constitutional limits, including First Amendment and due process protections. For example, in *Near v. Minnesota ex rel. Olson*, the Supreme Court held that the First Amendment precluded Minnesota from imposing a prior restraint on what a newspaper could publish in the name of abating a public nuisance.[275] And in *Thomas v. City of Danville*, while upholding some of the provisions of an injunction against riotous conduct, the Virginia Supreme Court nonetheless struck down other terms of the injunction because the conduct prohibited by those terms was protected by the First Amendment.[276]

F. State Firearms-Regulation Preemption Laws

In many states, firearms-regulation preemption statutes bar local jurisdictions from regulating firearms in a manner that differs from state law, even if the regulation fully complies with the Second Amendment. The specifics of such laws vary, but they often prohibit localities from regulating most aspects of firearms manufacturing, ownership, possession, and sale, and could pose an obstacle (in addition to the constitutional obstacles discussed in Section I.B) to including restrictions on carrying firearms as a condition of public-event permits.[277] Some such laws, however,

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[273] 886 F.2d 1339, 1362 (2d Cir. 1989)

[274] See *Kovacs*, 336 U.S. at 88–89 (1949) (plurality op.) (finding public-nuisance ordinance barring broadcasting from sound trucks "in a loud and raucous manner on the streets" to be consistent with the First Amendment).

[275] 283 U.S. 697, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."); *see also Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam) (public-nuisance statutes restraining the playing of obscene films failed to provide sufficient due process safeguards); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (public-nuisance rationale did not justify content-based restriction on protected speech); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) (regulations of public nuisances subject to vagueness challenges where they restrict First Amendment-protected activity); *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 207–08 (2d Cir. 2001) (finding a no-protest zone that extended from a health clinic to the sidewalk in front of neighboring businesses too broad because the "use of nuisance law for such a broad prohibition of protest activities raises profound constitutional issues"); *cf. Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571 (9th Cir. 1984) (concluding that a contract provision was overbroad where it permitted a city to disapprove concerts in a public venue if the concerts had "the potential of creating a public nuisance"); *Leonardson v. City of E. Lansing*, 896 F.2d 190, 198–99 (6th Cir. 1990) (although a city had a compelling interest "in abating the public nuisance created by" a recurring "drunk, raucous" event, the city's ordinance preventing the event was vague and overbroad where it "also permit[ted] the city to prevent the occurrence of events which enjoy constitutional protection").

[276] 152 S.E.2d at 269–70.

[277] *See, e.g.*, Ariz. Rev. Stat. § 13-3118(A) ("Except for the legislature, this state and any agency or political subdivision of this state shall not enact or implement any law, rule or ordinance relating to the possession,

contain exceptions allowing localities to regulate certain aspects of gun safety, such as the recent amendment to Virginia's preemption law, which preserves the ability of localities to restrict possession of firearms in government buildings and public spaces owned by the locality, such as parks.[278] Other states, including Connecticut, Hawaii, Massachusetts, New Jersey, and New York, have no express firearms-regulation preemption law. Even those states, however, may follow general preemption principles that recognize the supremacy of state over local law, which could affect how localities can regulate firearms.

Localities may want to include firearms restrictions in public-events permits, but, because the specifics of each state law vary, localities should check the law in their state before doing so.[279] Note also that some state firearms-regulation preemption laws impose fines, criminal penalties, or removal from office for local officials who violate them.[280] Depending on the wording of the specific preemption statute in any given state, there may be an argument available that the statute does not apply to reasonable time, place, and manner restrictions on gun possession during public events where there are well-founded concerns about protecting public safety.

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transfer or storage of firearms other than as provided in statute."); Fla. Stat. § 790.33(1) ("Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void."); Idaho Code § 18-3302J ("Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition."); Ind. Code § 35-47-11.1-2 ("a political subdivision may not regulate . . . the ownership, possession, carrying, transportation, registration, transfer, and storage of firearms, ammunition, and firearm accessories"); 25 Me. Rev. Stat. § 2011 ("no political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies").

[278] *See* Va. S. 35 (Apr. 22, 2020) (amending and reenacting §§ 15.2-915 and 15.2-915.5 of the Code of Virginia and repealing § 15.2-915.1 of the Code of Virginia), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SB35ER2+pdf; *see also* Md. Crim. Law Code § 4-209(b) (allowing localities to regulate firearms possession in or within 100 yards of "a park, church, school, public building, and other place of public assembly").

[279] Giffords Law Center to Prevent Gun Violence contains a helpful catalog of state firearms laws, including firearms-regulation preemption statutes. *See* https://lawcenter.giffords.org/.

[280] *See, e.g.*, Fla. Stat. § 790.33(3); Ky. Rev. Stat. § 65.870(4)-(6); Ariz. Rev. Stat. § 13-3108(I)-(K).

FREQUENTLY ASKED QUESTIONS

Can a local jurisdiction stop private individuals from purporting to protect public safety or property during a demonstration?

During recent demonstrations, private militias and paramilitary organizations have shown up, often in military gear and heavily armed, engaging in unauthorized paramilitary and law enforcement functions, intimidating protesters, and escalating tensions that sometimes leads to violence. Laws in every state bar private individuals from engaging in military or law enforcement activity outside of governmental authority. Many states have criminal laws that prohibit this activity, and local authorities may arrest and prosecute individuals who violate them. Where there is reason to believe that paramilitary groups may attend a protest, jurisdictions may want to consider including prohibitions on paramilitary activity in their permits and in event restrictions applicable to anyone who attends the event. Jurisdictions also may want to consider involving state authorities, who may be able to make clear ahead of time that such actions are not allowed under state law. And where certain militias or paramilitary organizations have engaged in unlawful activity at demonstrations in the past, and present a threat of engaging in unlawful and unauthorized activity at future demonstrations, local authorities could consider seeking court-ordered injunctive relief under public nuisance laws. *See* Chapter II.B

My town has had protests turn violent in the past. Now the protesters want to come back again. What can I do to stop them from becoming violent again?

In general, governments may not prohibit First Amendment-protected activity altogether in order to prevent anticipated violence. The threat of violence may support time, place, and manner restrictions, including weapons bans (where allowed by state law), separation of protesters and counter-protesters, prohibitions on coordinated paramilitary activity, and other measures, but individuals who engage in unlawful conduct generally should be dealt with on an individual basis. Cancelling an event altogether is likely to fail strict scrutiny if the risk of impending harm could be mitigated through less drastic measure. *See* Chapter III.B.1.c

If a group of demonstrators has previously engaged in violence or broken laws and a locality has a basis to believe they will do so again, a municipality may be able to seek an injunction preventing that conduct as a public nuisance—though it could not stop the demonstrators from assembling and engaging in protected speech. *See* Chapter II.E

If a group of demonstrators has in the past followed a pattern in which their demonstrating has led to violent, illegal activity, that pattern may be relevant to whether and at what point officials may declare a gathering an unlawful assembly. Where a pattern repeats itself, officials may be able to intervene sooner to avoid a repeat of violence *See* Chapter II.C

When do actions at a demonstration become a public nuisance?

Officials in every state have the ability to abate public nuisances that interfere with the public health, safety, peace, and convenience. Generally, to be considered a nuisance, the conduct must create a significant interference with those rights, be prohibited by law, or be continuing or long-lasting and significantly affect those rights. For the most part, even somewhat disruptive demonstrations may not be prohibited as a public nuisance. But where, without permission from the local jurisdiction, groups engaged in demonstrations block public streets and sidewalks to a significant degree, prevent access to public facilities, or violate the law—presenting a significant hazard to public health and safety—localities may seek an order from a court that the demonstrators may not engage in the problematic conduct in the future. Governments should not use public nuisance law to attempt to silence unwanted speech, however, and even with a court order prohibiting unprotected conduct, demonstrators are entitled to engage in protected speech and assembly. *See* Chapter II.E

When is it OK to order an unruly demonstration to disperse?

Unlawful assembly laws in every state allow authorities to disperse protests and other assemblies where the group has become violent or poses a clear danger of imminent violence, or if the group is violating other laws in the process. Loud, boisterous protest activity is not enough to make a demonstration an unlawful assembly, nor is supporting an unpopular cause that is likely to cause a hostile reaction from onlookers. When the group assembled grows hostile and violent and threatens the safety of other people or their property, an official may declare an unlawful assembly and order the demonstrators to disperse. *See* Chapter II.C

If some demonstrators commit crimes, can a jurisdiction declare an unlawful assembly?

Generally, an unlawful assembly should not be declared if the only basis is that individual demonstrators commit crimes. In order for the assembly to be unlawful, the participants must share the intent to engage in unlawful or violent activity. The more appropriate way to address individual criminal activity is to arrest those who are committing crimes, while allowing the peaceful demonstrators to continue their event. *See* Chapters II.C and VII.4.

What should officials do in declaring an unlawful assembly?

If there is probable cause to believe that a demonstration has become unlawful, officials may declare an unlawful assembly and order the participants to disperse. Failing to disperse after being ordered to do so is a separate misdemeanor in many states. An officer dispersing an unlawful assembly should ensure that the order to disperse is loud enough to reach all of the crowd, and law enforcement should give participants a reasonable amount of time to comply with the order before arresting those who remain. In ordering participants to disperse, jurisdictions should think carefully about where the participants will go when they disperse in order to avoid merely moving conflicts elsewhere in the locality. Jurisdictions also should look to best practices about how to enforce a dispersal order, including what types of force are appropriate under the circumstances. *See* Chapters II.C and VII.4.

What are anti-mask laws?

Anti-mask laws prohibit people from wearing masks in order to conceal their identity. Some of these laws allow exceptions for wearing masks on Halloween, for theatrical productions, and the like; other laws ban wearing a mask only if it is done with intent to, for example, intimidate or threaten another person or while engaged in the commission of a crime. Anti-mask laws generally have been enacted in response to outbreaks of violence by masked groups, such as the Ku Klux Klan. Anti-mask laws generally serve the government's interest in protecting public safety by preventing the anonymous commission of crimes and allowing the identification and apprehension of wrongdoers, but in times of public health emergencies such as the COVID-19 pandemic, anti-mask laws should be suspended in the interest of public safety. *See* Chapter II.D

Should anti-mask laws be enforced during a pandemic?

During the COVID-19 pandemic, public health officials have recommended—and many states require—that people wear masks in public places and where they cannot maintain adequate distancing from others, as is often true of public demonstrations. Many states therefore have suspended enforcement of their anti-mask laws, and it is unlikely that anyone wearing a mask for health reasons would be prosecuted under anti-mask laws still in effect. *See* Chapter VI

Are anti-mask laws constitutional?

People seeking to protest anonymously have raised First Amendment challenges to anti-mask laws. Most appellate courts have upheld the constitutionality of these laws, so there is a strong argument that these laws are constitutional. A few courts have found anti-mask laws unconstitutional as applied to certain factual scenarios. These cases turn on circumstance-specific issues, including the reasons the demonstrators seek to wear masks and the basis for the jurisdiction's concerns that the demonstrators will engage in violence. *See* Chapter II.D

III

Local Authorities

This chapter addresses constitutional issues that arise when local jurisdictions create permitting systems to require prior approval for, and impose conditions on, public events in public spaces:

- Content-neutral permitting requirements are analyzed as time, place, and manner restrictions. They are thus generally constitutional so long as the requirements are reasonably well matched to the governmental interests that justify them.
- Permitting requirements generally should not be applied to small or spontaneous gatherings.
- Jurisdictions may require that applicants provide relevant information, such as contact information, on their permit applications.
- Permitting regulations should specify the circumstance under which a permit must be denied or revoked and should not leave undue discretion in officials to deny permits.
- A jurisdiction may require a permit applicant to change the location of its preferred event if the reason for the change is content-neutral (e.g., the location's capacity), the location change is narrowly tailored to serve a significant government interest (e.g., public safety), and the change leaves open ample alternative channels for communication.
- Permit conditions limiting the start or end time or overall length of an event may be allowed where they are imposed to meet generally applicable regulations or to ensure the venue's availability for other permit applicants.
- Permit conditions apply only to the person or group to whom the permit is issued. If officials want to regulate the behavior of everyone who may attend a public event, they should issue orders that apply to all attendees.

- When local officials have reason to believe that violence may erupt at a public event, they may wish to include either as a permit condition or as a generally applicable condition of attendance a list of prohibited items that may not be brought to the event.

- Jurisdictions may, in the right circumstances, require permit applicants to offset the costs of providing government services, to insure against personal injury and property damage, and to sign indemnification agreements. In imposing these financial requirements, authorities may not charge more than necessary to serve a valid state interest, or tie the cost of the permit to the content of the speech.

This chapter also outlines additional measures, outside of permit conditions, jurisdictions may wish to utilize to protect public safety:

- Although local authorities may be able to prohibit participants from bringing items that can be used as weapons to public events, their ability to conduct searches of attendees depends on both the search protocols used and the security threats justifying the searches.

- Jurisdictions generally may set up buffer zones and barricades in order to physically separate opposing groups and prevent violence.

- It is generally unconstitutional for a jurisdiction to cancel an already-scheduled event in advance, even if it has reason to believe the event is likely to become violent. Nor are officials generally allowed to remove controversial speakers due to safety concerns.

- Where an individual's behavior—even that person's own speech—interferes with a permit-holder's ability to speak, officials may remove the disruptive individual.

- When an event has been closed off to the general public, officials may exclude members of the public to allow the permit-holder to retain control over the sharing of its message.

III. LOCAL AUTHORITIES

A. Permitting System

By claiming authority to punish speech that occurs without prior government approval, permitting systems represent a drastic departure from ordinary First Amendment principles. Yet there is widespread agreement that permitting regimes can be necessary to create the conditions for robust and orderly public expression.[281] Permits enable governments to "coordinate multiple uses of limited space,"[282] allocate police protection and emergency services,[283] and preserve "public access to thoroughfares and public facilities."[284] For these reasons, the Supreme Court has clarified that content-neutral permitting requirements are to be analyzed as time, place, and manner regulations rather than as presumptively unconstitutional prior restraints.[285]

This Section examines the most frequently litigated constitutional issues that arise throughout the permitting process. One key lesson emerges: Regardless of the type of provision challenged—whether a generally applicable regulation or a permit condition—speech restrictions must be commensurate with the governmental interests cited to justify them.

1. The Law of Permit Issuance: Substantive and Procedural Constraints

a. *When Can Permits Be Required?*

Not all expressive activities implicate the types of governmental interests that justify permitting regimes. For example, the Ninth Circuit has held that municipalities may not require a permit merely because an event would "require the provision of city public services," given that some services—such as litter abatement—are "trivial" in relation to the corresponding burdens on expression.[286] Nor have courts accepted arguments by governments that they must be forewarned when very small groups intend to demonstrate in public. Instead, numerous courts have struck down permitting requirements that failed to include an exception for small gatherings.[287]

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281 *See Thomas v. Chicago Park Dist.*, 227 F.3d 921, 924 (7th Cir. 2000) ("A park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.").

282 *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002).

283 *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1318 (11th Cir. 2000); *Douglas v. Brownell*, 88 F.3d 1511, 1522 (8th Cir. 1996).

284 *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004).

285 *Thomas*, 534 U.S. at 322–23.

286 *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1035 (9th Cir. 2009).

287 *See Berger v. City of Seattle*, 569 F.3d 1029, 1047 (9th Cir. 2009) (applied to individual performances, regardless of crowd size); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1040 (9th Cir. 2006) (requirement "lack[ed] any specification as to the size of the group covered") *Knowles v. City of Waco*, 462 F.3d 430, 435 (5th Cir. 2006) (requirement "may encompass just two individuals"); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (applied to "two or more persons"); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (applied to "groups as small as two or three"); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 (11th Cir. 2004) (applied to "as few as five" persons); *Grossman*

Courts have taken care, however, not to decree a strict "numerical floor [i.e., of persons engaged in expression] below which a permit requirement cannot apply."[288] That is because the government's interests may vary according to the nature of the relevant property; streets and sidewalks, for instance, are more vulnerable to congestion than are open spaces such as parks.[289] In lieu of specifying a numerical threshold for particular properties, governments may require a permit "when [c]ity services are required" due to "interfere[nce] with normal vehicular or pedestrian traffic."[290] Linking the permit requirement to its practical justification in this way avoids any tailoring problem, though at the expense of providing precise notice to regulated persons.

When permitting requirements are drafted so loosely that they contain *no* ascertainable standard, they may be challenged as unconstitutionally vague. Vagueness doctrine requires that a legal provision "provide a person of ordinary intelligence fair notice of what is prohibited" and not be "so standardless that it authorizes or encourages seriously discriminatory enforcement."[291] Several permitting ordinances have run afoul of this principle for using broad, undefined, and otherwise subjective phraseology.[292]

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v. City of Portland, 33 F.3d 1200, 1206 (9th Cir. 1994) (applied to any "organized" demonstration or gathering); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (applied to "organized" speech, which could include as few as two persons); *Rosen v. Port of Portland*, 641 F.2d 1243, 1248 (9th Cir. 1981) (applied to "individuals [and] small groups"); *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 728 (D.C. Cir. 1975) (applied to "even a single individual"); *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 1003 (W.D. Wis. 2013) (applied to " 'groups' as few as one person"); *Coe v. Town of Blooming Grove*, 567 F. Supp. 2d 543, 568 (S.D.N.Y. 2008) (applied to "any person or group"); *World Wide Street Preachers' Fellowship v. City of Grand Rapids*, No. 1:07-cv-57, 2007 WL 1462130, at *6 (W.D. Mich. May 16, 2007) (applied to "groups of any size"); *Hotel Emps. & Restaurant Emps. Union Local 2850 v. City of Lafayette*, No. C-95-3519, 1995 WL 870959, at *3 (N.D. Cal. Nov. 2, 1995) (applied to "a quiet demonstration by two people"); *see also Douglas*, 88 F.3d at 1524 ("We entertain doubt whether applying the permit requirement to such a small group [i.e., ten or more persons] is sufficiently tied to the City's interest . . . .").

288 *Cox*, 416 F.3d at 286.

289 *See Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) ("Only after viewing the Policy in light of the concerns that are unique to the venue in question do we believe a court can appropriately assess the constitutionality of the regulation."); *Long Beach Area Peace Network*, 574 F.3d at 1034 ("[P]ermitting requirements applicable to smaller groups would likely be unconstitutional, unless . . . the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses."); *Green v. City of Raleigh*, 523 F.3d 293, 304 (4th Cir. 2008) ("[A] small-group exception must anticipate such overlapping uses of public space in a relatively confined area, thereby supporting a more modest numerical exception than might otherwise be the case.").

290 *Cox*, 416 F.3d at 287 (quoting *Grossman*, 33 F.3d at 1207) (first alteration in original); *see also Food Not Bombs*, 450 F.3d at 1041 ("[I]t would have been simple enough to tailor the permitting requirement to marches, processions and assemblies that the organizer expects or intends *actually* to impede traffic flow.").

291 *United States v. Williams*, 553 U.S. 285, 304 (2008).

292 *See SEIU, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) ("public gathering"); *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1076 (E.D. Wis. 2003) ("parade" and "assembly"); *SEIU, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 974 (C.D. Cal. 2000) (activity that "has the effect[,] purpose[,] or propensity to draw a crowd of onlookers"); *Invisible Empire Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1433 (D. Conn. 1985) (permit required when "the Chief of Police reasonably believes [the

b. *What Information Can Be Required?*

For the permitting process to function effectively, governments must be able to insist that applicants provide relevant information concerning their proposed events. These requirements are usually uncontroversial and rarely generate litigation. But the First Amendment limits the types of information that applicants can be forced to disclose in order to receive a permit.

Courts have upheld informational requirements that served a valid governmental interest, such as maintaining a point of contact for logistical and cost-shifting purposes.[293] This means that permit applicants who wish to hold public demonstrations are not entitled to conceal their identities from the government. But the permitting process cannot be used to extract unnecessary information about persons who wish to exercise their First Amendment rights. For example, there would be no basis for requiring applicants to disclose their incomes, political affiliations, or Social Security numbers, or to identify each person intending to participate in the proposed event. Moreover, one court has held that applicants cannot be required to meet in person with governmental officials if other methods of consultation would be just as effective.[294]

c. *When Can Permits Be Denied?*

Most permitting regulations specify a set of circumstances under which permits must be denied (or must be revoked once granted). The Supreme Court has never articulated a framework for deciding which substantive grounds for permit denials violate the First Amendment. These restrictions arguably function as "manner" regulations, in the sense that speakers remain free to engage in expression that does not require a permit. Yet the authority to veto the manner of proposed expression before it occurs is an extraordinary power that could readily be misused.

There is little doubt that permit requests may be denied for reasons that track the underlying justifications for permitting systems—for example, when a permit has already been granted for the same time and place, or if the applicant's proposed activities (as distinguished from protesters' responses) would be unlawful,[295] endanger the health and safety of surrounding persons,[296]

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intended use] will attract more than twenty five (25) people" (alteration in original)); *see also Kissick*, 956 F. Supp. 2d at 997 (court "would tend to agree" that "the concept of 'promoting a cause' and the concept of a 'gathering' are both vague").

293 *See Green*, 523 F.3d at 302 (picketers required to "identify the sponsoring group (if any), the person giving notice to the City, and the name of the person carrying the receipt of notice"); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 28 (1st Cir. 2002) (contact information required from either the attorney for, or another representative of, the sponsoring organization); *Marcavage v. City of New York*, 918 F. Supp. 2d 266, 273 (S.D.N.Y. 2013) (certain permit applicants required to provide their "name, address, and phone number"); *Sauk Cty. v. Gumz*, 669 N.W.2d 509, 529 (Wis. App. 2003) (applicant's signature required).

294 *See Sullivan v. City of Augusta*, 511 F.3d 16, 41 (1st Cir. 2007).

295 *See Douglas*, 88 F.3d at 1523 (upholding provision that authorized denial "only when, on its face, the proposed parade will violate a law or an ordinance").

296 *See Church of the Am. Knights of the KKK v. City of Gary*, 334 F.3d 676, 683 (7th Cir. 2003) ("Of course a permit need not be granted for a demonstration if the authorities reasonably believe that the demonstrators

significantly inhibit pedestrian and vehicular traffic,[297] or deprive the municipality of critical services (such as police protection) that could not be supplied through other means.[298] Of course, denials on these grounds could be challenged on an as-applied basis if the government's stated justifications were unsupportable. And it is uncontroversial that permits may be denied or revoked if the permitting system has been abused, as by providing materially false information in an application.[299]

On the other hand, courts have held that permit requests cannot be denied merely because an applicant has committed a crime[300] or violated permitting regulations[301] in the past. The Fifth Circuit has emphatically rejected this "once a sinner, always a sinner" approach, deeming it grossly mistailored to any valid governmental interest.[302] Localities should also keep in mind that certain justifications for denying permit requests—such as interference with vehicular or foot traffic—would be implicated by a substantial portion of events subject to permitting regulations. It would be unconstitutional to invoke those facially neutral rationales selectively to deny some permit applications, but not others.[303]

d. *Advance-Notice Requirements and Decision Deadlines*

The same interests that justify the creation of a permitting system also require that the government have some amount of lead time to process applications and plan for large events. As the Ninth Circuit has explained, it "take[s] . . . time to coordinate the various demands on the streets, sidewalks, and parks; assess what services (such as additional police) are needed; contact those services; ensure their availability; and allow those services to prepare for the events."[304] Yet requiring would-be demonstrators to disclose their intentions "ha[s] the tendency to stifle" core First

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(as distinct from counterdemonstrators) will be violent."); *Quaker Action Grp.*, 516 F.2d at 729 (upholding provision that authorized denial if it "reasonably appears that the proposed public gathering will present a clear and present danger to the public safety, good order, or health").

297 *See Kinton*, 284 F.3d at 26 (deeming "[p]ublic . . . convenience" a "paradigmatically permissible consideration[] in the issuance of permits"); *Progressive Labor Party v. Lloyd*, 487 F. Supp. 1054, 1059 (D. Mass. 1980) (upholding a provision that authorized denial if "the proposed march would disrupt a street or public place which is 'ordinarily subject to great congestion . . . and is chiefly of a business or mercantile character' ").

298 *See Brandt v. Vill. of Winnetka*, No. 06-cv-588, 2007 WL 844676, at *21 (N.D. Ill. Mar. 15, 2007) (upholding a provision that authorized denial "if there are not significant Village resources available at the time of the proposed event to mitigate the disruption"); *Progressive Labor Party*, 487 F. Supp. at 1059 (upholding a provision that authorized denial if "the necessary diversion of police protection 'would deny reasonable police protection to the City' ").

299 *See Fernandes v. Limmer*, 663 F.2d 619, 629 (5th Cir. 1981) (upholding a provision that authorized denial if "one or more of the statements in the Application is not true").

300 *See id.* at 629–30.

301 *See Beckerman v. City of Tupelo*, 664 F.2d 502, 512 (5th Cir. 1981); *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 832–33 (5th Cir. 1979); *cf. Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1167 (9th Cir. 2007) ("[N]o provision of the City's permitting scheme called for a mechanical rejection of appellants' permit application because of past violation of the noise ordinance.").

302 *Fernandes*, 663 F.2d at 632 (quoting *Eaves*, 601 F.2d at 833).

303 *See Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 191 (D. Mass. 1998).

304 *Food Not Bombs*, 450 F.3d at 1045.

Amendment activity[305]—especially for speech that responds to late-breaking events. Courts have thus taken "special care" in assessing governments' stated reasons for requiring advance-notice periods of a particular length.[306]

This unusually searching form of review has led to the facial invalidation of provisions requiring permit applications to be submitted 60 days,[307] 45 days,[308] 40 days,[309] 30 business days,[310] one month,[311] 30 days,[312] 20 days,[313] 10 business days,[314] seven days,[315] and even five days[316] in advance of proposed events. These decisions have emphasized the government's failure to justify the precise length of the challenged notice period,[317] the absence of outlets for spontaneous speech,[318] and the less-restrictive practices of comparable jurisdictions.[319] And at least one court has held that the availability of a "good cause" exception will not save an excessive advance-notice requirement, inasmuch as applicants cannot be required to "shoulder the burden" of seeking waivers from unconstitutional requirements.[320] By contrast, courts have upheld advance-notice periods of nine days,[321] two days,[322] and less than one day.[323]

Despite these particular outcomes, existing precedents should not be understood to foreclose the use of deadlines longer than just a few days. Instead, notice periods are likely to be upheld if they can be shown to be reasonably necessary to enable adequate review and event preparation. This determination can be affected by a number of factors, including the overall number of applications

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305 *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 605.
306 *Id.*
307 *See Gumz*, 669 N.W.2d at 531.
308 *See City of Gary*, 334 F.3d at 682.
309 *See SEIU, Local 660*, 114 F. Supp. 2d at 973.
310 *See Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 871 (Cal. App. 1993).
311 *See World Wide Street Preachers*, 2007 WL 1462130, at *6.
312 *See Sullivan*, 511 F.3d at 39; *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606; *York v. City of Danville*, 152 S.E.2d 259, 264 (Va. 1967).
313 *See NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).
314 *See Hotel Emps.*, 1995 WL 870959, at *3.
315 *See Grossman*, 33 F.3d at 1204, 1206.
316 *See Douglas*, 88 F.3d at 1524.
317 *See Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606; *City of Gary*, 334 F.3d at 683; *Douglas*, 88 F.3d at 1524; *NAACP*, 743 F.2d at 1356–57; *World Wide Street Preachers*, 2007 WL 1462130, at *6; *See Hotel Emps.*, 1995 WL 870959, at *3; *Gumz*, 669 N.W.2d at 531; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 871; *York*, 152 S.E.2d at 264.
318 *See Food Not Bombs*, 450 F.3d at 1047; *City of Gary*, 334 F.3d at 682; *Grossman*, 33 F.3d at 1206; *NAACP*, 743 F.2d at 1356.
319 *See Sullivan*, 511 F.3d at 39; *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606 n.2; *City of Gary*, 334 F.3d at 683; *Douglas*, 88 F.3d at 1524; *NAACP*, 743 F.2d at 1356–57.
320 *Sullivan*, 511 F.3d at 40.
321 *See Handley v. City of Montgomery*, 401 So.2d 171, 184 (Ala. Crim. App. 1981).
322 *See Food Not Bombs*, 450 F.3d at 1045; *Quaker Action Grp.*, 516 F.2d at 735; *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968).
323 *See Jackson v. Dobbs*, 329 F. Supp. 287, 292 (N.D. Ga. 1970).

that must be processed[324] and the amount of time needed to coordinate municipal services for particular types of events.[325] In addition, exempting spontaneous expression from general permitting rules would eliminate one harmful effect of advance-notice requirements that courts have found objectionable. But the category of spontaneous speech cannot be defined so narrowly as to leave speakers with constitutionally inadequate methods of responding to fast-breaking events.[326]

Judicial skepticism of lengthy advance-notice periods would seem to overlook a crucially important variable: what happens *after* an initial decision is rendered. If a permit is granted, the permittee will almost certainly need some amount of time to complete required event preparations (including consulting with local authorities). If an application is instead denied, the applicant must have time to seek effective judicial review of that determination, lest governments be allowed to suppress disfavored viewpoints by running out the clock on permit applications.[327] And it would be anomalous for First Amendment doctrine to police the precise length of advance-notice requirements—to ensure that application periods are not unnecessarily prolonged—while simultaneously allowing governments to leave applications pending longer than necessary.[328]

Unsurprisingly, then, several courts have either held or presupposed that the First Amendment requires *some* deadline for acting on permit requests.[329] Yet other decisions have reached the

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[324] *See Thomas*, 227 F.3d at 925–26 (upholding advance-notice requirements of 30 and 60 days in light of fact that "thousands of permit applications" were filed every year); *see also United States v. Kistner*, 68 F.3d 218, 222 (8th Cir. 1995).

[325] *See Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1318; *Rosen*, 641 F.2d at 1247; *Gumz*, 669 N.W.2d at 531; *York*, 152 S.E.2d at 264.

[326] *See Long Beach Area Peace Network*, 574 F.3d at 1038 (holding that an exception for spontaneous events "fail[ed] to provide ample alternative means of communication" in light of its unduly restrictive reach).

[327] *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 161 (1969) (Harlan, J., concurring) ("Given the absence of speedy procedures, [the challengers] were faced with a serious dilemma when they received their notice from Mr. Connor. If they attempted to exhaust the administrative and judicial remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday."); *Pinette v. Capitol Sq. Review & Advisory Bd.*, 874 F. Supp. 791, 794 (S.D. Ohio 1994) ("By delaying action on plaintiffs' permit . . . , defendants have foreclosed any possibility of a timely administrative appeal from the denial of the permit.").

[328] *See Gumz*, 669 N.W.2d at 531 (concluding that neither a 60-day advance-notice requirement nor a 45-day review period was narrowly tailored).

[329] *See Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1261 (10th Cir. 2004) (acting on a permit request over two months before the scheduled event was "more than adequate . . . to satisfy the demands of the First Amendment"); *Quaker Action Grp.*, 516 F.2d at 735 ("We believe such a deadline is an essential feature of a permit system."); *Houston Peace Coal. v. Houston City Council*, 310 F. Supp. 457, 460 (S.D. Tex. 1970) (applicants must "have time . . . to resort to judicial processes before the issue they hope to publicize is rendered ineffective or moot by reason[] of the lapse of too much time"); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 872 ("[A]voidance of limbo requires a deadline for action following application."); see *also Poulos v. New Hampshire*, 345 U.S. 395, 408 (1953) ("We must and do assume that . . . the Portsmouth Council will promptly and fairly administer their responsibility in issuing permits on request."); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[S]uch applications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of . . . slow-moving procedures."); *Grossman*, 33 F.3d at 1206 ("[T]he temporal hurdle of waiting for the permit to be granted may discourage potential speakers.").

opposite conclusion.[330] As a result, it remains unclear whether permitting regulations must contain built-in deadlines for acting on applications. To avoid potential First Amendment pitfalls, jurisdictions would be well advised to specify that permit applications will be deemed granted if not acted on within a specified time period.[331]

And more broadly, governments should not hesitate to prescribe advance-notice periods that build in sufficient time for effective judicial review[332] and the completion of back-end logistics. Because not all events require the same amount of preparation, one-size-fits-all approaches may be especially vulnerable on First Amendment grounds.[333] The surer course would be to create multiple advance-notice requirements that are tailored to the logistical challenges presented by various types of gatherings. These factors could include the size and location of the proposed event and whether additional governmental services would be required.

e. *Prioritization of Competing Applications*

When multiple applicants request to use the same property for the same time, governments must decide how to prioritize these overlapping applications. Four general approaches are possible. First, priority could be given to those who apply the soonest. Such a first-come, first-served regime would be easily administrable and would avoid any prospect of content-based discrimination.[334] But it would also invite manipulation by savvy actors whose foresight could deprive others of expressive opportunities.[335] A second possibility would be to prioritize certain types of events—perhaps annually recurring or government-sponsored events—and adopt a first-come, first-served approach for all others.[336] In this scenario, the categories of preferred events should be carefully selected to avoid content-based distinctions.

Third, governments could accept applications on a rolling basis and then, at some pre-announced point in time, select a permit recipient at random from those who have applied for the same date (e.g., by lottery or a coin toss). Like a first-come, first-served approach, this plainly content-neutral

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330 *See S. Ore. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1138 (9th Cir. 2004); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993); *Progressive Labor Party*, 487 F. Supp. at 1059.

331 *See Quaker Action Grp.*, 516 F.2d at 735.

332 *See Gumz*, 669 N.W.2d at 531 ("[W]e also appreciate the fact that . . . an unsuccessful applicant [has at least] fifteen days to seek court review of the decision.").

333 *See Grossman*, 33 F.3d at 1206 (noting that "the burden placed on park facilities and the possibility of interference with other park users is more substantial" with respect to "large groups"); *World Wide Street Preachers*, 2007 WL 1462130, at *6 (invalidating an advance-notice period that applied "even [to] small events"); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 871 (invalidating a "blanket" advance-notice period that was unjustified as least as to "diminutive" events).

334 *See Kissick*, 956 F. Supp. 2d at 993 ("[T]he police have *no* discretion to favor one of the two competing permits—the first-filed automatically takes precedence."); *Dowling v. Twp. of Woodbridge*, No. 05-cv-313, 2005 WL 419734, at *7 (D.N.J. Mar. 2, 2005) ("[T]he Ordinance's provision that the first application for a use of a particular space will take priority over any subsequent application for the same space makes sense.").

335 Although such a result would not appear to violate the First Amendment, it may be inconsistent with the type of free-speech culture a locality seeks to foster.

336 *See Utah Animal Rights Coal.*, 371 F.3d at 1251–52 (providing an example of this approach).

method would pose no First Amendment problems.[337] And fourth, permitting regulations could remain silent on how to choose among overlapping applications. This method, however, would seem to confer unbridled discretion on permitting authorities to elevate their preferred viewpoints and suppress disfavored ones, inviting First Amendment challenges.

2. Imposing Conditions on Permits

Permitting regimes may include conditions applicable to all permits issued thereunder, such as a list of prohibited items. They also may authorize local officials to impose additional conditions on particular permits in the interest of public safety. In either circumstance, the conditions would presumably take the form of time, place, and manner restrictions, the violation of which would justify revoking the permit and canceling the event.

A distinguishing feature of permit conditions is that they apply only to the person or group to whom the permit is issued. If officials wish to regulate the behavior of other demonstrators, they must do so through generally applicable local laws or event-specific orders. In fact, to the extent that permit conditions burden a permit-holder's constitutional rights, it would almost certainly be unconstitutional *not* to apply those same restrictions to all attendees.

Three common types of permit conditions are analyzed below: ones that (1) require the proposed event to be relocated, (2) alter the event's timing, or (3) prohibit certain items from being brought to the event. As always, the constitutionality of each type of restriction will depend on whether it is suitably tailored to advancing the government's stated interest.

a. *Change of Location*

The First Amendment limits the government's ability to issue permits that are contingent on an applicant's willingness to change the location of its proposed event. If the reasons for imposing such a condition are content-neutral, the restriction must be "narrowly tailored to serve a significant governmental interest" and also "leave open ample alternative channels for communication of the information."[338]

Each of these requirements has been treated as having real teeth in this context. As some courts have concluded, entirely forbidding demonstrations in specified areas may be substantially more burdensome than necessary to serve the government's goals.[339] Courts have also found certain alternative locations to be unsatisfactory, either because a particular site was integral to a group's

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337 *See Black Heritage Soc'y v. City of Houston*, No. H-07-0052, 2007 WL 9770639, at *9 (S.D. Tex. Dec. 4, 2007) (noting that "the outcome of the coin toss . . . is clearly not content-based").

338 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

339 *See Lederman v. United States*, 291 F.3d 36, 45–46 (D.C. Cir. 2002); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227–28 (9th Cir. 1990); *Stauber v. City of New York*, No. 03-cv-9162, 2004 WL 1593870, at *28–29 (S.D.N.Y. July 16, 2004); *SEIU, Local 660*, 114 F. Supp. 2d at 971.

message[340] or because its intended audience could not be reached elsewhere.[341] Far more often, however, alternative areas have been deemed constitutionally adequate despite being practically inferior in some respect.[342]

One justification for altering the site of a planned demonstration might be that the applicant's preferred venue could not accommodate the expected number of attendees. The D.C. Circuit has suggested that "[limiting] the number of individuals who may demonstrate simultaneously" would be "substantially less restrictive" than forbidding demonstrations altogether in particular areas.[343] But this alternative fails to account for the perspectives of persons who are excluded from assembling in the original location due to crowd-size restrictions. If the number of expected attendees is so large as to threaten substantial harm, governments should consider giving applicants the *option* of either holding their events elsewhere or capping the number of attendees.

Suppose instead that the government required a change of location for content-based reasons—for example, by altering a proposed parade route due to credible threats of violence from surrounding protesters. Such a restriction would violate the First Amendment unless it were the least restrictive means of furthering a compelling governmental interest.[344] Despite the obvious drawbacks of effectuating this form of a "heckler's veto," the overwhelming interest in public safety may sometimes justify otherwise-forbidden measures. As the D.C. Circuit has put it, "[w]hen the choice is between an abbreviated march or a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers, and others in the vicinity."[345] But such a dire choice must actually exist if content-based "adjustments" are to be tolerated.[346]

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340 *See E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1054–55 (2d Cir. 1983); *see also Housing Works v. Safir*, No. 98 Civ. 1994, 1998 WL 823614, at *9 (S.D.N.Y. Nov. 25, 1998) (finding it "difficult to envision how a march on the sidewalks of Broadway . . . could maintain any coherent form").

341 *See United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999); *Bay Area Peace Navy*, 914 F.2d at 1229; *SEIU, Local 660*, 114 F. Supp. 2d at 972.

342 *See iMatter Utah v. Njord*, 774 F.3d 1258, 1265 (10th Cir. 2014); *Ross v. Early*, 746 F.3d 546, 559 (4th Cir. 2014); *Marcavage v. City of New York*, 689 F.3d 98, 108 (2d Cir. 2012); *Marcavage*, 659 F.3d at 631; *Startzell v. City of Philadelphia*, 533 F.3d 183, 202–03 (3d Cir. 2008); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1225–26 (10th Cir. 2007); *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004); *Frye v. Kansas City Police Dep't*, 375 F.3d 785, 790 (8th Cir. 2004); *United for Peace & Justice v. City of New York*, 323 F.3d 175, 177 (2d Cir. 2003); *Hotel Emps. & Restaurant Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 556 (2d Cir. 2002); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 481–82 (2d Cir. 2002); *United States v. Griefen*, 200 F.3d 1256, 1261 (9th Cir. 2000); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1134 (6th Cir. 1991); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 476 (2d Cir. 1980); *Kissick*, 956 F. Supp. 2d at 1006; *Black Heritage Soc'y*, 2007 WL 9770639, at *9; *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 395 (D. Mass. 2004).

343 *Lederman*, 291 F.3d at 45–46.

344 *Kessler v. City of Charlottesville,* No. 3:17-cv-00056, 2017 WL 3474071, at *2–3 (W.D. Va. Aug. 11, 2017).

345 *Christian Knights of the KKK v. Dist. of Columbia*, 972 F.2d 365, 374 (D.C. Cir. 1992).

346 *See id.* at 376 (accepting the district court's finding that "the threat of violence was not beyond reasonable control"); *Nationalist Movement*, 12 F. Supp. 2d at 192 ("[O]nly the most imminent likelihood of serious danger—a likelihood that is clear and present—will justify governmental action to . . . alter the expression.").

b. *Change of Time*

Permit conditions may also be used to alter the starting or ending time of a proposed event. If these conditions are imposed to conform with generally applicable regulations—for example, a ban on demonstrations before 8 AM and after 9 PM—the underlying regulations will be subjected to the First Amendment test reserved for "time, place, and manner" restrictions. Courts have upheld at least three "time" limitations of this sort,[347] but other decisions demonstrate that the test's tailoring requirement has real practical bite.[348] These cases tend to be highly fact-specific and focus on whether the government's interests are actually (and narrowly) served by adjusting the timing of planned expression.

Another reason to alter the timing of a proposed event would be to "limit [its] duration,"[349] whether to conserve needed public resources or to ensure the forum's availability for other permit applicants. Any such restriction, of course, must be tailored to the stated justifications for imposing it[350] and afford the permittee a constitutionally "ample" amount of speaking time.

c. *Prohibited Items*

If local officials have reason to believe that violence could erupt at a permitted event, they may wish to append a list of prohibited items as a condition to the permit. Doing so could require analysis under both the Second Amendment and state-level firearms-regulation preemption statutes, as outlined above.[351] Prohibiting specific objects could also burden First Amendment rights in two ways: by conditioning those rights on attendees' willingness not to bring certain desired objects, and by prohibiting the carrying of items that would be wielded for expressive purposes. If this type of event-specific permit condition is used, officials should issue an order that applies the same restrictions to all persons attending the event. Otherwise, the condition would function as an impermissible speaker-based distinction.[352]

There is no doubt that the First Amendment right to engage in protected expression by carrying

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347 *See Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding a prohibition on parading on Saturday morning); *Quaker Action Grp.*, 516 F.2d at 733 (upholding a prohibition on public gatherings during morning and evening rush hours on weekdays); *Abernathy v. Conroy*, 429 F.2d 1170, 1173 (4th Cir. 1970) (upholding a prohibition on parading after 8 PM).

348 *See SEIU, Local 5*, 595 F.3d at 604 (invalidating a regulation that restricted weekday parading in downtown areas to two one-hour windows); *Cox*, 416 F.3d at 287 (invalidating a prohibition on permitted activities between 8 AM and 1 PM on Sundays); *Beckerman*, 664 F.2d at 512 (invalidating a year-round prohibition on parading after 6 PM); *United Food & Commercial Workers Union, Local 442 v. City of Valdosta*, 861 F. Supp. 1570, 1583 (M.D. Ga. 1994) (invalidating a prohibition on parading after 4 PM on Sundays).

349 *See Lederman*, 291 F.3d at 46 (assuming the validity of this type of regulation as an alternative to other, more restrictive measures).

350 *See Quaker Action Grp.*, 516 F.2d at 734 (invalidating a maximum-duration provision that limited the length of permitted events even when no competing application had been filed).

351 *See supra* Sections I.B and II.F.

352 *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not by others.").

particular items in public must sometimes yield to the demands of public safety.[353] As always, whether a restriction passes constitutional muster will depend on whether the government has regulated unduly broadly or narrowly in relation to its stated goals. Relevant to this analysis will be the forbidden objects' propensity to be used as weapons, their use as weapons in the past,[354] their centrality to demonstrators' expressive objectives,[355] and the presence or absence of a prohibition on objects with a similar functionality.[356]

In addition, there is no clear answer in the case law to whether security restrictions motivated by a desire to prevent violence should be categorized as content-based or content-neutral. The Seventh Circuit has deemed a weapons restriction to be content-neutral, finding that it targeted only "the possibility that attendees . . . would injure themselves, others, or property," rather than "the content of the views aired at the rally."[357] But two other circuits have categorized security measures as content-based, given that they were ultimately traceable to the dangers emanating from participants' hostile reactions.[358] Regardless of which framework applies, it is unlikely that a court would upend local officials' good-faith efforts to protect life and limb absent a significant failure of tailoring.[359]

3. Imposing Financial Conditions Through the Permitting Process

Although public demonstrations are a vital part of our democratic culture, these gatherings can prove immensely costly. They often require the provision of extra governmental services to maintain public order—especially when scheduled events attract large crowds of protesters. The resulting expenditures can prove crushing to local jurisdictions obliged to preserve both public safety and fiscal stability. To reduce these burdens, many governments condition the issuance of permits

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353 *See Potts v. City of Lafayette*, 121 F.3d 1106, 1109, 1112 (7th Cir. 1997) (upholding a restriction on "personal items that can be used as weapons" in light of "the City's goals of preventing violence and injury at the rally"); *Wilkinson v. Forst*, 832 F.2d 1330, 1338 (2d Cir. 1987) ("[I]n light of the Klan's stated intentions to bring firearms to their public rallies and use them in self defense if necessary, such inhibition is a legitimate and important objective."); *United Food & Commercial Workers*, 861 F. Supp. at 1584 (upholding a restriction on carrying "any object or instrumentality with an apparent potential to cause physical injury to persons or damage to property"); *see also Grider v. Abramson*, 180 F.3d 739, 744 (6th Cir. 1999) ("In this anxious and potentially explosive environment, the Louisville police and civil authorities resolved to initiate prophylactic steps to forestall the disorder, hostilities, and consequent personal injuries and property damage patently threatened . . . .").

354 *See Edwards v. Coeur d'Alene*, 262 F.3d 856, 864–65 (9th Cir. 2001) ("The City does not cite any parade or public assembly . . . in which Coeur d'Alene citizens used sign handles as instruments of violence.").

355 *See id.* at 865 ("[T]he ordinance's total ban on sign supports has an undeniable impact on the manner in which a signholder communicates with the public.").

356 *See id.* at 864 n.16 ("If the object being swung was a flagpole, it is not regulated by the ordinance, which regulates fixtures attached to signs and placards, not fixtures attached to flags.").

357 *Potts*, 121 F.3d at 1111.

358 *See Bourgeois v. Peters*, 387 F.3d 1303, 1320 (11th Cir. 2004) (magnetometer searches); *Grider*, 180 F.3d at 749–50 (magnetometer searches); *id.* at 750 (law-enforcement buffer zone). Notably, the *Bourgeois* court suggested that "a mere ban on the use of weapons or incendiary devices at the protest"—even one motivated by ideologically driven violence—should be analyzed as a "manner restriction." 387 F.3d at 1323.

359 *See Citizens for Peace in Space*, 477 F.3d at 1221 ("[T]he significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.").

on various forms of financial accountability. Applicants are often required to offset the costs of providing various services, to insure against personal injury and property damage, and to sign indemnification agreements.

Each of these requirements can be constitutional under certain circumstances, but the First Amendment imposes four significant limits on governments' ability to implement them. Permitting authorities may not:

(1) charge more than necessary to serve a valid state interest;
(2) tie the cost of obtaining a permit to the content of an applicant's speech;
(3) exercise unfettered discretion in deciding how much to charge; or
(4) charge an amount so large as to prevent the applicant from speaking in an effective manner.

The second of these rules is by far the most consequential, as it can create enormous disparities between a government's actual costs and the costs it may constitutionally recoup. This Section explains how governments can avoid running afoul of First Amendment doctrine when imposing financial conditions—however modest they may be—through the permitting process.

a. ***Cost-Shifting and Liability-Shifting—When Permissible***

i. Costs of Providing Governmental Services

In *Cox v. New Hampshire* (1941), the Supreme Court confirmed that localities may charge variable fees corresponding to the actual costs of "maint[aining] . . . public order" at permitted events.[360] This statement cannot be interpreted literally in light of later decisions forbidding content-based recoupment.[361] But as long as the content of a permittee's message has no bearing on the amount charged, governments enjoy considerable "flexibility of adjustment of fees" to offset the burdens of providing extraordinary public services.[362] Under modern parlance, there is undoubtedly a significant governmental interest in recouping the costs of providing special equipment and facilities, as well as ensuring adequate policing, traffic control, sanitation, and post-event restoration.

Many cases have upheld this type of cost-shifting pursuant to permit conditions.[363] And even decisions invalidating permit fees as content-based have explicitly reaffirmed the validity of content-

360 312 U.S. 569, 577 (1941).
361 *See infra* Section III.A.3.b.
362 *Id.*
363 *See Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 368 (5th Cir. 2010); *Sullivan*, 511 F.3d at 36; *Food Not Bombs*, 450 F.3d at 1049; *S. Ore. Barter Fair*, 372 F.3d at 1139; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1320–22; *Stonewall Union*, 931 F.2d at 1134; *Brandt,* 2007 WL 844676, at *16–17; *United States v. McFadden*, 71 F. Supp. 2d 962, 967 (W.D. Mo. 1999); *United Food & Commercial Workers*, 861 F. Supp. at 1584; *Long Beach Lesbian & Gay Pride, Inc.*, 17 Cal. Rptr. 2d at 874–75; *Morascini v. Comm'r of Pub. Safety*, 675 A.2d 1340, 1353 (Conn. 1996).

neutral cost recoupment.[364] As a result, there is no dispute that permit fees may be imposed to defray these substantial expenses.

Such fees, however, must align with the permitting jurisdiction's actual costs; otherwise, the fees would not be narrowly tailored to serve the government's interests. For example, it would be unconstitutional to charge a fixed fee unrelated to the government's true expenses[365]—even for the purpose of deterring frivolous requests.[366] Nor may a permittee be charged by one jurisdiction for services that *another* jurisdiction has committed to providing by way of assistance.[367] Similarly, if the estimated costs of furnishing additional services exceed the permitting jurisdiction's actual costs, any excess prepaid amounts must be reimbursed to the permittee.[368]

ii. Costs of Administering Permit Systems

As the Supreme Court also has made clear, permit applicants may be charged a fixed fee that covers the administrative costs of processing their applications.[369] These can include the logistical expenses of "planning a route that is safe and secure" and "that has adequate personnel to provide traffic control and police protection."[370] A corollary of this principle is that an application fee will be invalidated if the government cannot demonstrate that the fee corresponds to its actual costs in processing permit applications.[371]

iii. Insurance Requirements

The Supreme Court has suggested that permitting systems may be used to "assure financial accountability for damage caused by [an] event."[372] Perhaps the most effective method of securing financial accountability is to require permittees to purchase event-specific liability insurance. The Court itself has never addressed when such a requirement might violate the First Amendment.

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364 *See Surita v. Hyde*, 665 F.3d 860, 876 (7th Cir. 2011); *Nationalist Movement v. City of York*, 481 F.3d 178, 184 (3d Cir. 2007); *City of Gary*, 334 F.3d at 682; *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985).

365 *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943).

366 *Bullock v. Carter*, 405 U.S. 134, 145–46 (1972); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983).

367 *Invisible Empire of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988).

368 *Sullivan*, 511 F.3d at 37–38.

369 *See Cox*, 312 U.S. at 577 (explaining that permitting authorities may charge fees to "meet the expense incident to the administration of the Act"); *see also City of York*, 481 F.3d at 183 (upholding a permit-application fee); *Stonewall Union*, 931 F.2d at 1133 (same); *Black Heritage Soc'y*, 2007 WL 9770639, at *10 (same).

370 *Black Heritage Soc'y*, 2007 WL 9770639, at *10.

371 *See Citizens Action Grp.*, 723 F.2d at 1056 (invalidating an administrative fee for this reason); *Ky. Restaurant Concepts v. City of Louisville*, 209 F. Supp. 2d 672, 692–93 (W.D. Ky. 2002) (same); *Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973) (same); *Gumz*, 669 N.W.2d at 535 (same); *see also 729, Inc. v. Kenton Cty. Fiscal Court*, 515 F.3d 485, 504 (6th Cir. 2008) (remanding for consideration of whether an unusually expensive database, "customized for the licensing regime," was a narrowly tailored method of defraying necessary administrative costs).

372 *Thomas v. Chicago Park Dist.*, 534 U.S. at 322.

Lower courts, however, have not hesitated to invalidate insurance-related conditions on First Amendment grounds. These decisions should instill caution in governments considering whether and how to implement this strategy.

Decisions upholding insurance requirements have generally done so in narrow, case-specific ways. For example, the Seventh Circuit rejected a facial challenge to a permitting regulation that required applicants to obtain liability insurance in an amount determined by "the size of the event and the nature of the facilities involved."[373] The court's decision did not rule out the possibility of as-applied challenges to insurance requirements that are excessive in relation to the risk posed by a particular event. And the Ninth Circuit has, on two separate occasions, upheld provisions that gave permittees the *option* of purchasing insurance, signing an indemnification agreement, or redesigning their proposed events to minimize specific hazards highlighted by the City Manager.[374] Neither opinion indicated whether an insurance requirement as such would pass constitutional muster.

Far more often, courts have struck down insurance-related conditions—usually due to a failure of tailoring.[375] These decisions have rejected unduly large coverage amounts, demanding a connection between the government's liability risks for a particular event and the size of resulting insurance requirements.[376] Conversely, one such requirement has been struck down as underinclusive (i.e., for exempting certain events that equally implicated the interests purportedly justifying additional charges).[377]

Moreover, courts have invalidated insurance requirements upon perceiving that the circumstances rendered *any* amount of insurance unnecessary. In these cases, a permitted event did not implicate the government's asserted interests;[378] a permittee had taken precautions to reduce the potential hazards posed by its events;[379] and insurance requirements proved duplicative of state sovereign

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373 *Thomas v. Chicago Park Dist.*, 227 F.3d at 925.

374 *See Long Beach Area Peace Network*, 574 F.3d at 1031; *Food Not Bombs*, 450 F.3d at 1057. Notably, the requirement in *Food Not Bombs* did not even apply to expressive demonstrations unless their organizers had been successfully sued for causing harm at a previous event. *See* 450 F.3d at 1057; *see also Black Heritage Soc'y*, 2007 WL 9770639, at *14 (upholding an insurance requirement that applied only to parades that included animals, floats, or motorized vehicles).

375 *See Van Arnam v. Gen. Servs. Admin.*, 332 F. Supp. 2d 376, 393 (D. Mass. 2004) ("The lower courts have generally found mandatory insurance provisions to be unconstitutional . . . ."); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 878 ("[C]ourts that have reviewed parade insurance requirements have uniformly found them to overreach . . . .").

376 *See iMatter Utah*, 774 F.3d at 1269 ("Utah must offer *some* evidence that this amount, and not some lesser amount, is necessary."); *Citizens Action Grp.*, 723 F.2d at 1057 ("[N]o basis has been offered for the amount of coverage required."); *Green Party of N.J. v. Hartz Mtn. Indus.*, 752 A.2d 315, 332 (N.J. 2000) ("[T]his record fall[s] far short of demonstrating that the insurance requirements posed . . . are required to achieve legitimate . . . objectives").

377 *See Wilson ex rel. U.S. Nationalist Party v. Castle*, No. 93-3002, 1993 WL 276959, at *4 (E.D. Pa. July 15, 1993).

378 *See iMatter Utah*, 774 F.3d at 1269–70; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 878.

379 *See Citizens Action Grp.*, 723 F.2d at 1056.

immunity,[380] Tort Claims Act legislation,[381] and the government's existing insurance arrangements.[382] Even more drastically, some courts have struck down insurance requirements after concluding that the government's interests could be served less restrictively by applying existing civil and criminal sanctions to wrongdoers.[383] This rationale—if accepted—would virtually eliminate the availability of insurance as a constitutionally permissible permitting condition.

In any event, permittees cannot be required to purchase insurance to guard against harms for which they are not legally responsible, such as "the reactions of third-party bystanders" or a government's own negligence.[384] As the Supreme Court has explained, a person or entity engaged in First Amendment expression may not be held liable for a third party's unlawful conduct absent "a finding that [it] authorized . . . or ratified" that conduct.[385]

iv. Indemnification Agreements

Many permitting regulations also require the permittee to indemnify, defend, and hold harmless the issuing jurisdiction and all of its officers, employees, and agents from any legal claims arising from the permitted activity. Because these liability-shifting devices "can have an inhibiting effect on speech,"[386] they are subject to all of the First Amendment constraints applicable to insurance requirements. Most notably, indemnification agreements cannot require permittees to assume legal responsibility for the unlawful acts of third parties[387] or governmental officials.[388] Indemnification provisions that do not clearly exclude these outcomes are thus particularly susceptible to constitutional challenge.

b. *Content-Based Financial Obligations Forbidden*

Even if it would otherwise be constitutional to impose financial requirements as part of the permitting process, the cost of obtaining a permit cannot be contingent on the content of a permittee's speech or how other persons might react to it. Importantly, content-based financial obligations are *per se invalid* under current First Amendment doctrine, rather than subject to strict scrutiny.

The Supreme Court's decision in *Forsyth County v. Nationalist Movement* is the leading authority for

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380 *See iMatter Utah*, 774 F.3d at 1269.
381 *See Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 877.
382 *See Mayor of Thurmont*, 700 F. Supp. at 285.
383 *See Citizens Action Grp.*, 723 F.2d at 1057; *Collin v. Smith*, 578 F.2d 1197, 1209 (7th Cir. 1978); *Wilson*, 1993 WL 276959, at *4; *Mayor of Thurmont*, 700 F. Supp. at 285; *see also iMatter Utah*, 774 F.3d at 1271 (striking down an indemnification provision after observing that "Utah has offered no evidence that its existing tort and criminal law is insufficient to regulate the behavior of the permittees").
384 *iMatter Utah*, 774 F.3d at 1270.
385 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982).
386 *City of York*, 481 F.3d at 186 n.9.
387 *Long Beach Area Peace Network*, 574 F.3d at 1040–41; *Stand Up America Now v. City of Dearborn*, 969 F. Supp. 2d 843, 849 (E.D. Mich. 2013).
388 *Long Beach Area Peace Network*, 574 F.3d at 1040; *Stand Up America Now*, 969 F. Supp. 2d at 849.

determining whether financial requirements are content-based. *Forsyth County* struck down a system of adjusting permit fees to defray "the cost of necessary and reasonable protection of persons participating in or observing" permitted events.[389] To determine the appropriate number of police—and thus the cost of maintaining public order—the administrator was required to "examine the content of the message that is conveyed" and "estimate the response of others to that content."[390] The Court held that "[s]peech cannot be financially burdened" on content-based grounds—that is, depending on how listeners might respond to it.[391]

Both before and since *Forsyth County*, courts have struck down a number of financial obligations as impermissibly content-based.[392] Some courts have even regarded insurance requirements as necessarily content-based, given that controversial speakers tend to be charged higher premiums[393] (and may find themselves shut out of the insurance market altogether[394]). As the First Circuit has explained, insurance requirements "implicate[] issues of viewpoint discrimination" because "an insurance company may charge more depending on the group being covered."[395]

In addition, the law is unsettled on whether sweeping indemnification requirements are inherently content-based. Courts disagree over whether permittees may be required to defend the government against *all* suits relating to the permittees' conduct—even baseless ones—or only suits that are not frivolous in nature. The Ninth Circuit has upheld the former type of requirement, reasoning that the groundlessness of a legal claim "cannot be established until the defense has already been provided."[396] The Tenth Circuit, by contrast, has reasoned that a duty to defend against even frivolous suits "raises the possibility of a 'heckler's veto,' by which third parties who disagree with

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389 505 U.S. 123, 134 (1992).

390 *Id.*

391 *Id.*

392 *See Surita*, 665 F.3d at 876–77; *Long Beach Area Peace Network*, 574 F.3d at 1040; *City of York*, 481 F.3d at 185–86; *City of Gary*, 334 F.3d at 680–82; *Nuclear Freeze Campaign*, 774 F.2d at 1524–25; *New Century Found. v. Robertson*, 400 F. Supp. 3d 684, 701–02 (M.D. Tenn. 2019); *Coll. Republicans*, 2018 WL 804497, at *2–3; *SEIU v. City of Houston*, 542 F. Supp. 2d 617, 640 (S.D. Tex. 2008); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1030–31 (C.D. Cal. 2002); *First Puerto Rican Festival v. City of Vineland*, 108 F. Supp. 2d 392, 395 (D.N.J. 1998); *Indo-Am. Cultural Soc'y v. Twp. of Edison*, 930 F. Supp. 1062, 1068 (D.N.J. 1996); *Pinette*, 874 F. Supp. at 795; *Gay & Lesbian Servs. Network, Inc. v. Bishop*, 832 F. Supp. 270, 275 (W.D. Mo. 1993); *Mayor of Thurmont*, 700 F. Supp. at 285–86; *Invisible Empire of the Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1434–35 (D. Conn. 1985).

393 *See Collin*, 578 F.2d at 1208–09; *Mayor of Thurmont*, 700 F. Supp. at 285; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 877; *see also Van Arnam*, 332 F. Supp. 2d at 398 ("[L]iability premiums are higher for more controversial speakers.").

394 *See Van Arnam*, 332 F. Supp. 2d at 405 ("Where a belligerent counterdemonstration is expected, the insurance industry is likely to refuse to issue insurance at all . . . ."); *Pritchard v. Mackie*, 811 F. Supp. 665, 668 (S.D. Fla. 1993) ("[T]he most heinous political groups in American society may find it difficult, if not impossible, to actually purchase insurance."); *see also Citizens Action Grp.*, 723 F.2d at 1056 n.2 (third parties' decisions to reject insurance applications "may raise . . . constitutional issues").

395 *Sullivan*, 511 F.3d at 43 n.15.

396 *Food Not Bombs*, 450 F.3d at 1057; *see also id.* ("[Indemnification] must protect against both well-founded and unfounded claims to be useful.").

the content of an organization's speech could . . . punish an organization after the event"[397] through vexatious lawsuits.

Because most cost-shifting and liability-shifting clauses can be construed to require *some* consideration of content, jurisdictions would be well served to insert a "no-content" proviso in each of these types of provisions. These disclaimers—which clarify that neither a speaker's message nor the reactions of others may be considered[398]— insulate permit fees and indemnification provisions from facial unconstitutionality (though not as-applied challenges) under *Forsyth County*.[399]

Courts have also held—at least in the context of parades and festivals—that administrators can guard against content-based invalidity by relying purely on information provided by applicants (e.g., the estimated number of attendees) in calculating the cost of necessary services or the amount of financial risk.[400] One court has even applied this logic to public demonstrations, reasoning that when an *applicant* accounts for the possibility of a hostile audience, "it is not the [government] that is predicting the listener reaction to the content of the speech but the requesting party."[401] Notwithstanding this decision, it is questionable whether permitting authorities should be able to evade *Forsyth County* simply by requiring applicants to provide information about the very factors that officials are forbidden from considering.

Finally, courts have held that governments may selectively subsidize permitted events by waiving generally applicable permit fees for those events.[402] This is but another application of the general First Amendment principle that governments "may freely subsidize private speech of [their] choice, while not subsidizing other private speech."[403] As long as these waivers amount to "singling out . . . favored messages for special treatment" rather than "singling out disfavored viewpoints for

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397 *iMatter Utah*, 774 F.3d at 1271 n.8 (quotation marks omitted); *Food Not Bombs*, 450 F.3d at 1051 n.26 (Berzon, J., dissenting) (objecting to such a requirement as enabling "an after-the-fact heckler's veto in the form of a costly, non-meritorious lawsuit").

398 *See Sullivan*, 511 F.3d at 22 ("The permit fee will not include the cost of police protection for public safety."); *Food Not Bombs*, 450 F.3d at 1049 ("[A] permittee shall not be required to provide for or pay for the cost of public safety personnel who are present to protect event attendees from hostile members of the public or counter-demonstrators or for general law enforcement in the vicinity of the event."); *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1322 ("[N]o consideration may be given to the message of the festival, nor to the content of speech, . . . nor to any assumptions or predictions as to the amount of hostility which may be aroused in the public by the content of speech or message conveyed by the festival.").

399 *See Sullivan*, 511 F.3d at 36; *Food Not Bombs*, 450 F.3d at 1049; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1322. The same cannot be said of insurance requirements, since the insurance market necessarily operates through the content-sensitive judgments of private actors.

400 *See Sullivan*, 511 F.3d at 36; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1321; *Stonewall Union*, 931 F.2d at 1135.

401 *Brandt*, 2007 WL 844676, at *18; *see also id.* ("[W]ho determines the need for security resources is highly relevant to whether or not the *government* . . . is making a content-based determination.") (emphasis added).

402 *See Int'l Women's Day*, 619 F.3d at 361; *Stonewall Union*, 931 F.2d at 1137–38; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 879.

403 *Int'l Women's Day*, 619 F.3d at 361 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983)).

sanction,"[404] such unequal sponsorship poses no First Amendment problem.

c. *Unfettered Discretion Forbidden*

As explained above in Section I.A.2.c, any financial conditions imposed through the permitting process must not result from government officials' standardless discretion. The Supreme Court has justified this rule—one that applies to all types of speech restrictions—as a safeguard against efforts to "suppress[] a particular point of view."[405]

d. *Is an Indigency Exception Constitutionally Required?*

Although some permitting systems expressly waive financial requirements for persons who are unable to afford them,[406] not all jurisdictions have created an indigency exception. Without such an exemption, certain forms of expression—those for which a permit is required—will be accessible only to persons wealthy enough to afford them.

The Supreme Court has never considered whether an indigency exception is constitutionally required in this context. Four federal circuit courts have held that indigent applicants may be deprived of the ability to obtain a permit as long as ample alternative channels remain for their expression.[407] A few other federal courts, however, have either held or strongly implied that indigent applicants cannot be treated less favorably due to their inability to pay requisite fees and costs.[408]

e. *Content-Neutrality at Any Cost?*

Because speakers with inflammatory messages cannot be charged larger permit fees on account of those messages, governments are "compelled to spend significant sums of money to preserve order and prevent violence at these rallies."[409] First Amendment doctrine contemplates that permitting jurisdictions will bear these expenses—"however great"[410]—notwithstanding professed "budgetary

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404 *Id.*; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies . . . into a penalty on disfavored viewpoints, then we would confront a different case."); *Regan*, 461 U.S. at 548 ("The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." (quotation marks and alteration omitted)).

405 505 U.S. at 130 (quotation marks omitted).

406 Indigency provisions are subject to all of the usual First Amendment principles, including the requirement of narrow tailoring to achieve the government's stated goals. *See Black Heritage Soc'y*, 2007 WL 9770639, at *12 ("Whether or not the First Amendment requires the City to waive the permit fee for those who cannot afford to pay, once the City establishes such a waiver, it must respect constitutional limits.").

407 *See iMatter Utah*, 774 F.3d at 1264; *Sullivan*, 511 F.3d at 41–42; *Stonewall Union*, 931 F.2d at 1137; *Nuclear Freeze Campaign*, 774 F.2d at 1523–24; *Brandt*, 2007 WL 844676, at *24; *Gumz*, 669 N.W.2d at 537, 539.

408 *See City of Gary*, 334 F.3d at 681; *Wilson*, 1993 WL 276959, at *4; *City of West Haven*, 600 F. Supp. at 1435; *see also 729, Inc.*, 515 F.3d at 503 (stating that permit fees "must not be so high as to deter constitutionally protected speech"); *City of West Haven*, 600 F. Supp. at 1435 ("[T]he exercise of fundamental constitutional rights cannot be conditioned upon an individual's wealth.").

409 *Wilkinson*, 832 F.2d at 1337.

410 *City of West Haven*, 600 F. Supp. at 1434.

constraints."[411] At some point, however, "a city, county, or state will simply not have the available personnel and not have the available funds."[412] This is especially true when controversial groups repeatedly return to the same city or town to stage expensive rallies. Bearing these costs in full may deprive local governments of critical resources that most communities would value more highly than the ability to engage in duplicative public demonstrations.[413]

Does the Constitution require local governments to facilitate permitted speech at any cost, even if it drives them into bankruptcy? Under a strict reading of *Forsyth County*—one that does not account for extraordinary background conditions—the answer appears to be yes. But it is far from certain that courts would dutifully follow *Forsyth County* if doing so could threaten that "public order without which liberty itself would be lost."[414] As localities find themselves absorbing increasingly exorbitant costs, time will tell if the rule of *Forsyth County* is actually as unyielding as it appears.

B. Other Event-Specific Tools for Protecting Public Safety

Aside from using permit conditions, local officials may wish to take other measures—whether prophylactic or reactive in nature—to ensure the safety of those who attend public demonstrations. This Section analyzes the constitutionality of several common law-enforcement tools at permitted events.

1. Preparatory Measures

a. *Searches for Prohibited Items*

As explained above,[415] the Constitution may leave room for local authorities to prohibit persons who attend public events from bringing items that could be used as weapons. It stands to reason that if these restrictions are constitutional, officials may also implement generally applicable, minimally intrusive searches to screen attendees for forbidden items. Yet mass searches of this sort—ones conducted without warrants or individualized suspicion—represent a departure from ordinary Fourth Amendment principles. And the First Amendment further limits officials' ability to implement search methods likely to deter expression. The constitutionality of such measures will depend on the specific facts justifying a particular search protocol, as well as its manner of implementation.

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411 *Gay & Lesbian Servs. Network*, 832 F. Supp. at 275; *see also Pinette*, 874 F. Supp. at 794 (refusing to allow concerns about "the city's already limited budget" to override *Forsyth County*'s prohibition on content-based fees).

412 Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1689 (2019).

413 As one court has noted, "the costs of special services . . . affect[] [governments'] ability to preserve and allocate resources in the interest of the health, safety, and welfare of the [public] as a whole." *Brandt*, 2007 WL 844676, at *22.

414 *Cox*, 312 U.S. at 574; *see also* Schauer, *supra* note 412, at 1689 ("[P]rotecting speakers exercising their First Amendment rights will come at some cost to . . . protecting or enforcing other constitutional rights.").

415 *See supra* Section III.A.2.c.

i. First Amendment

Searching attendees for prohibited items can be a powerful tool for preserving an atmosphere conducive to "free speech and assembly rights."[416] But the fact that a prohibited-items list satisfies the First Amendment does not mean that a resulting search protocol necessarily does. Such measures will fail the relevant tailoring requirement if they are exceedingly intrusive, or if they are poorly adapted to detecting the types of items that have been forbidden. Thus, although the Sixth Circuit once found a magnetometer search to be "narrowly fashioned to further a compelling governmental interest in public safety and order,"[417] the Eleventh Circuit later deemed that same technique to be "substantially underinclusive" with respect to the government's professed interests.[418] A policy of searching attendees' bags and other personal items could be an appropriate way to strike this balance[419]—especially if attendees are given prior notice that their effects will be subject to inspection.

The Eleventh Circuit has also held that mass searches at public demonstrations—as a type of speech restriction—must not result from the "unbridled discretion" of law enforcement.[420] Under this view, the police may implement mass suspicionless searches only pursuant to advance legislative authorization (via ordinance or otherwise). In the same decision, the Eleventh Circuit further held that a magnetometer search functioned as both an impermissible prior restraint and an unconstitutional condition on the exercise of First Amendment rights.[421] But it is difficult to view these conclusions as anything other than add-ons to the court's tailoring analysis, which performed all the relevant work. And that analysis was itself driven by the government's failure to identify any genuine security threat.[422] If such a showing has been made, it is unlikely that a court would venture to micromanage the precise policing tools selected to keep demonstrators safe.[423]

ii. Fourth Amendment

Although searches conducted without a warrant are presumptively unreasonable, warrants and individualized suspicion are not required (1) "where special needs . . . make the warrant and probable-cause requirement impracticable,"[424] and (2) "where the primary purpose of the searches is

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416 *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999).

417 *Id.*; *see also Pinette*, 874 F. Supp. at 793 ("Walk-through and hand-held magnetometers . . . were successful in preventing injury and property damage").

418 *Bourgeois*, 387 F.3d at 1322.

419 *See Lederman v. United States*, 291 F.3d 36, 46 (D.C. Cir. 2002) (suggesting that officials could have "require[d] that demonstrators present bags and other personal possessions to police officers for screening").

420 *Bourgeois*, 387 F.3d at 1317; *see also Stauber*, 2004 WL 1593870, at *31 (noting, in the course of resolving a Fourth Amendment challenge, that "there is no written policy for deciding when bag searches will be conducted").

421 *See Bourgeois*, 387 F.3d at 1319–20, 1324–25.

422 *See id.* at 1311–12, 1318.

423 *See Grider*, 180 F.3d at 749 (stating, as part of a strict-scrutiny analysis, that magnetometer searches were "*among* the least restrictive available means of preserving social order and safeguarding the physical security of all persons" (emphasis added)).

424 *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Skinner v. Rwy. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)) (alteration in original).

distinguishable from the general interest in crime control."[425] Each of these conditions applies to mass searches at public gatherings conducted for the purpose of protecting demonstrators against credible (if diffuse) security threats.[426]

That mass suspicionless searches at public events *can* satisfy the Fourth Amendment does not mean that they invariably do. That determination will be heavily influenced by such factors as the gravity of the underlying security threat, the intrusiveness of a particular search method, whether attendees were given advance notice of the search protocol, and whether all or only a subset of attendees will be searched. Courts have found each of the following arrangements unconstitutional:

- pat-down searches for all attendees at a public rally—even one that authorities feared could "erupt into violence";[427]
- a bag-search policy that exempted a significant portion of attendees, and where the security concerns were based on "speculative" and "third-hand" information;[428]
- a bag-search policy that had not been communicated in advance and that was supported by "overly vague" security threats;[429] and
- magnetometer searches for all attendees in the absence of any credible threat to public safety.[430]

By contrast, the Second Circuit has approved the use of magnetometer searches (followed by individualized frisks) at a public rally with a demonstrated "potential for violent confrontations."[431] The Sixth Circuit has reached the same conclusion, albeit in dicta.[432] In sum, under current Fourth Amendment doctrine, facially valid prohibited-items orders may be implemented through mass-search protocols that are not unnecessarily intrusive in relation to an articulable underlying threat.

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425 *Id.* (quotation marks omitted) (alteration omitted).

426 The Eleventh Circuit has held to the contrary, reasoning that "public safety c[annot] be seen as a governmental interest independent of law enforcement" when a search detects unlawfulness (e.g., a violation of a prohibited-items order). *Bourgeois*, 387 F.3d at 1312–13. This analysis—which flouts both common practice and common sense—overlooks that governments typically do not search attendees at public demonstrations for the purpose of "conducting criminal investigations." *Patel*, 135 S. Ct. at 2452.

427 *Wilkinson*, 832 F.2d at 1337, 1340. The court noted, however, that "more intrusive measures might be justified by future events." *Id.* at 1341.

428 *Norwood v. Bain*, 143 F.3d 843, 853–54 (4th Cir. 1998), *aff'd by an equally divided court*, 166 F.3d 243, 245 (4th Cir. 1999) (en banc).

429 *Stauber*, 2004 WL 1593870, at *31. The court emphasized that "the ban on [bag] searches at demonstrations is not categorical, and may be justified under different circumstances." *Id.* at *32.

430 *Bourgeois*, 387 F.3d at 1311–13, 1316.

431 *Wilkinson*, 832 F.2d at 1341; *see also id.* at 1335 ("[T]he Klan . . . made known its intention to arm its members for purposes of self-defense."); *id.* at 1341 (noting that "a multitude of rifles and shotguns were brought by Klan members" to an earlier rally).

432 *See Grider*, 180 F.3d at 750 n.14 (characterizing an unpreserved Fourth Amendment challenge to a magnetometer search as "misconceived"); *see also Norwood v. Bain*, 166 F.3d 243, 245 (4th Cir. 1999) (en banc) (Wilkins, J., writing separately) (urging that officers must be able to "avert a concrete threat of great public harm with a relatively unobtrusive and appropriately effective warrantless search not supported by individualized suspicion").

b. *Physical Separation of Hostile Groups*

Another common policing technique at volatile public demonstrations is to facilitate the physical separation of opposing camps. Techniques like buffer zones and barricades can help to prevent violent confrontations, thereby "protect[ing] those actively exercising their rights" from forcible silencing.[433] In fact, courts appear to have evinced no skepticism of these crowd-control measures on First Amendment grounds (at least when implementation relies on participants' self-sorting).[434] Whether or not such practices are best classified as content-based under the circumstances,[435] they should have little difficulty satisfying whichever standard of scrutiny applies—as long as they represent good-faith efforts to protect public safety.

The Sixth Circuit case of *Grider v. Abramson* is illustrative. *Grider* involved a "high-security barricade" erected to separate the Klan's staging area from the general public, with further insulation provided by a police-only buffer zone.[436] Despite this technique's classification as content-based[437]—and although it inhibited attendees from simultaneously interacting with attendees of both gatherings[438]—the court readily held that the separation of antagonistic groups survived strict scrutiny. *Grider* deemed this technique to be "a necessary and narrowly tailored means of promoting the compelling public interest in preserving community peace and safety, especially in the face of threatened violence which might impede free expression by the rally participants."[439]

c. *Canceling Events Altogether?*

Suppose that local authorities, equipped with credible intelligence, fear that a scheduled event is likely to erupt in violence. May they simply cancel the event as a means of staving off significant

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433 *Olivieri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986).

434 *See id.; Bible Believers v. Wayne Cty.*, 805 F.3d 228, 254 (6th Cir. 2015) (identifying "erecting a barricade for free speech" as an "easily identifiable measure[] that could have been taken"); *City of Gary*, 334 F.3d at 680 ("The City's brief states that 'standard requirements for a Ku Klux Klan rally include fencing and barricades that enforce separation of the Klan from other attendees, who, themselves, must be separated into separate enclosures for pro and con demonstrators . . . .' "); *Wilkinson*, 832 F.2d at 1335 ("Plaintiffs do not challenge . . . the police policy of separating contending forces at the rallies."); *id.* at 1341 (opining that the "separation of hostile forces" is a permissible technique for "deal[ing] with . . . challenges to safety and order"); *Coal. to Protest Dem. Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 75 (D. Mass 2004) ("Many of these security measures were designed to minimize the necessity and likelihood of physical confrontation—in essence, hand-to-hand combat . . . ."); *Pinette*, 874 F. Supp. at 793 ("A ten foot high chain link fence was erected in order to separate the Klan from the protestors.").

435 *Compare Olivieri*, 801 F.2d at 607 (classifying a barricaded enclosure as content-neutral "since it is applicable to both groups"), *with Grider*, 180 F.3d at 751 ("[T]he police buffer zone was created to prevent potential violence instigated by speech *content*, and thus comprised a content-based stricture.").

436 180 F.3d at 744.

437 *See id.* at 751.

438 *See id.* at 750.

439 *Id.* at 751; *see also id.* at 750 (identifying a "compelling state interest in separating two mutually antagonist[ic] and potentially hostile congregations"); *id.* ("[T]he sequestering of the counter-demonstrators encouraged, rather than impeded, free speech and assembly rights, in that it safeguarded rally participants from expression-stifling intimidation and threatened injuries.").

threats to human safety? Or must they allow the event to go forward and respond as best they can to any lawbreaking as it occurs?

In general, government may not "suppress legitimate First Amendment conduct as a prophylactic measure" to prevent anticipated violence.[440] Persons "who actually engage in [violent] conduct" should be dealt with on an individualized basis;[441] if the situation warrants, law enforcement may also be able to disperse an unruly gathering by declaring an unlawful assembly.[442] But it is far from certain that the same effect may be achieved *anticipatorily* by calling off a scheduled gathering before it begins. Such a drastic measure—if it could ever be constitutional—must surely be grounded in "specific, reliable information that organized violence of a serious nature is about to occur."[443] And the outright cancellation of an event would fail strict scrutiny if the risk of impending harm could be mitigated through other, less restrictive means (such as the techniques discussed above).

2. Reactive Measures

a. *Removal of Controversial Speakers to Avoid Imminent Harm*

Perhaps the most settled feature of First Amendment doctrine is that speakers cannot be preemptively silenced simply because their messages might prove controversial. As numerous courts have concluded, this "heckler's veto" prohibition precludes governments from denying permits to applicants whose demonstrations could cause others to react in anger.[444] And the rule is often stated so sweepingly as to forbid *any* form of response-based silencing, even if violence is presently unfolding.[445] Yet a different array of governmental interests will be implicated when a threat to public safety has actually materialized. Under these conditions, strict application of the heckler's-veto rule could deprive police of an essential tool for averting tragedy.

The Sixth Circuit has confronted this tension most directly. In *Bible Believers v. Wayne County*, the court did not categorically foreclose the removal of controversial speakers if necessary to stave off immediate harm. It instead held that, "before removing [a] speaker due to safety concerns, . . . the police must first make bona fide efforts to protect the speaker from the crowd's hostility by other, less restrictive means."[446] The court made clear that silencing a speaker in this way "will seldom, if ever, constitute the least restrictive means available" for serving a compelling governmental

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440 *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996); *see also Wilkinson*, 832 F.2d at 1337 ("[A] public authority is usually not in a position to ban a Klan rally on the theory that it will arouse community opposition.").

441 *Collins*, 110 F.3d at 1372.

442 *See infra* Section II.C; *see also Menotti*, 409 F.3d at 1137 ("[O]nce multiple instances of violence erupt, with a breakdown in social order, a city must act vigorously . . . to restore order for all of its residents and visitors.").

443 *Collins*, 110 F.3d at 1373.

444 *See supra* Section I.A.1.a.

445 *See, e.g.*, *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015) ("If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) ("A police officer has the duty not to ratify and effectuate a heckler's veto . . . .").

446 805 F.3d at 255.

interest.[447] In particular, "containing or snuffing out the lawless behavior of the rioting individuals" must *always* be attempted before effectuating a heckler's veto.[448] Other courts have similarly characterized the latter option as a last resort.[449]

b. *Dealing with Unwanted Protesters*

i. Disruption of Permittees' Speech

Even though audience hostility generally cannot justify silencing a permittee's speech, may the police remove surrounding persons whose behavior interferes with a permittee's ability to convey its message? Ordinarily, the "preferred First Amendment remedy" for undesirable speech is "more speech, not enforced silence."[450] Yet a key purpose of permitting systems is to allocate scarce and valuable expressive opportunities among competing claimants. Obstructing a permit-holder's efforts to engage in speech could negate the outcome of this carefully managed process. Some courts have even insisted that the police *must* restrain private actors from drowning out or otherwise thwarting a permittee's speech—even if that interference takes the form of counter-speech.[451]

Although any such duty likely would not be legally enforceable,[452] there is little doubt that police are *authorized* to preserve the conditions for effective communication by permittees. The Third Circuit, for example, has held that officers had "ample justification" to remove protesters who were using bullhorns and microphones to render scheduled speech inaudible.[453] As the court remarked, "[t]he right of free speech does not encompass the right to cause disruption . . . of an event covered by a

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447 *Id.* at 248.

448 *Id.* at 252. Other "easily identifiable measures" available in *Bible Believers* included "increasing police presence in the immediate vicinity" and "erecting a barricade for free speech." *Id.* at 254.

449 *See Deferio v. City of Syracuse*, 306 F. Supp. 3d 492, 512 (N.D.N.Y. 2018) ("[P]olice officers may not—as a first reaction in the name of safety—punish a person's protected speech in the face of limited hostilities . . . ."); *Padgett v. Auburn Univ.*, No. 3:17-cv-231, 2017 WL 10241386, at *2 (M.D. Ala. Apr. 18, 2017) ("Security personnel may not cut off the free speech of Mr. Spencer or other persons except as a last resort to ensure security or to prevent violence or property damage . . . .").

450 *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

451 *See MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir. 2001) (police were "obliged to . . . prevent disruptive or even violent confrontations" at permitted events (emphasis added)); *Grider*, 180 F.3d at 751 ("[T]he formally slated speakers possessed a protected interest in addressing their audience under orderly and audible conditions."); *id.* at 751–52 ("[T]he police are obligated to prevent suppression of public speech . . . by spectators."); *Glasson*, 518 F.2d at 906 ("A police officer . . . must take reasonable action to protect from violence persons exercising their constitutional rights.").

452 *See Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (denying that an officer's "*failure to prevent* [one person] from violating [another's] [F]irst [A]mendment rights transgressed any clearly established legal norm"); *Kessler v. City of Charlottesville*, No. 3:19-cv-00044, 2020 WL 871484, at *7 (W.D. Va. Feb. 21, 2020) ("[T]he First Amendment merely guarantees that the state will not suppress one's speech. It does not guarantee that the state will protect individuals when private parties seek to suppress it.").

453 *Startzell*, 533 F.3d at 199. As the court noted, this action was "based [not] on the content of Appellants' message but on their conduct." *Id.*

permit."[454] A permittee's interest in "us[ing] the permit for the purpose for which it was obtained" necessarily empowered the police to "prevent counter-protestors from disrupting or interfering with the message of the permit-holder."[455]

ii. Preserving the Autonomy of Permittees' Speech

Police may silence or exclude members of the public for still another reason: to enable a permit-holder to retain "autonomy [over] the content of [its] own message."[456] The First Amendment does not require permittees to tolerate counter-speech conveyed through the very mechanisms that have been reserved for the permittees' exclusive use.[457] Nor must permit-holders abide dissenting perspectives at events designed to espouse particular viewpoints,[458] or ones that have been deliberately closed off to the general public.[459] But the police may *not* effectuate viewpoint-based exclusions at events that are held in public forums and open to all members of the public.[460] This is true even if the underlying permit purports to grant "exclusive" access during the period when the permit is in effect.[461]

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454 *Id.* at 198.

455 *Id.* at 198–99; *see also Grider*, 180 F.3d at 751–52 (stating, in dicta, that no First Amendment violation would have resulted from silencing "outside elements intent upon disruption" of permit-holders' speech); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 417 (E.D. Pa. 1987) (explaining that members of the public may not "engage in conduct which genuinely interferes with" permitted expression).

456 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

457 *See Grider*, 180 F.3d at 751 ("[T]he rally organizers were entitled to select and schedule public speakers, which entailed the power to exclude from their rostrum any unapproved would-be speaker.").

458 *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 198 (6th Cir. 1996) ("[T]he city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey."); *Kroll v. U.S. Capitol Police*, 847 F.2d 899, 903 (D.C. Cir. 1988) (police "could lawfully direct an anti-abortion picketer away from the area set aside under a permit to those communicating a pro-choice viewpoint (or *vice versa*)").

459 *See Sistrunk*, 99 F.3d at 196 (allowing exclusion where event was ticketed and "limited to the members of the organization and their invitees"); *Sanders v. United States*, 518 F. Supp. 728, 729 (D.D.C. 1981) (outsiders have no right to "intrud[e] within an area reserved for another event still in progress"); *Jankowski v. City of Duluth*, No. 11-cv-3392, 2011 WL 7656906, at *7 (D. Minn. Dec. 20, 2011) ("[T]here must be temporary exceptions when private actors lease all or part of a public park for their private use.").

460 *See Teesdale v. City of Chicago*, 690 F.3d 829, 834 (7th Cir. 2012) (event was "a public festival, held on public city streets, free and open to all members of the general public"); *Startzell*, 533 F.3d at 194 (event was "free and open to the general public"); *Gathright v. City of Portland*, 439 F.3d 573, 577–78 (9th Cir. 2006) ("[m]erely being present at a public event" posed "no risk that [the plaintiff's] provocations could be mistaken by anybody as part of the message of the events he protests"); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005) (plaintiff was wrongly excluded from "an arts festival open to all that was held on the streets of downtown Columbus"); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (attendees sought only to "stand on the sidewalk and peacefully note their dissent as the parade goes by"); *Pledge of Resistance*, 665 F. Supp. at 417 (event was open to "any . . . member of the public").

461 *See McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1097 (N.D. Fla. 2016). The same principle would apply if a locality reserved public space using short-term leasing arrangements rather than a permitting system.

c. *Enforcing Existing Laws*

As discussed in Section II above, existing federal, state, and local criminal laws can be used to restrain conduct that threatens immediate harm to public safety at expressive gatherings.[462] Several prominent examples include laws concerning domestic terrorism, hate crimes, paramilitary activity, the existence of unauthorized militias, the false assumption of law-enforcement functions, the unauthorized wearing of military or law-enforcement uniforms, and the wearing of masks for specified purposes. Depending on the circumstances, officials may also be authorized to declare an unlawful assembly and disperse all attendees who have gathered. Because these tools do not depend on the existence of a permit or an event-specific code of conduct, they may be used at both permitted events and spontaneous gatherings.

[462] Of course, arrests can be made under these laws after an event has concluded, as well as in direct response to ongoing criminality.

FREQUENTLY ASKED QUESTIONS

Can a local jurisdiction require advance permits for public events on public property?

As a general matter, local jurisdictions may require those who seek to use public property for public events to obtain a permit in advance, as long as the criteria for granting the permit and any conditions attached are content neutral—in other words, as long as they are applied uniformly and without regard to the content of the applicant's speech. The permitting scheme and the specific conditions placed on permits must be justified by a sufficiently important government interest (like coordinating multiple uses of shared public space or allocating police protection and emergency services). *See* Chapter III.A

Can a permit be required for any event, regardless of size?

Although a permitting scheme for public events is generally allowed, many courts have found that jurisdictions may not require advance permits for very small groups who intend to demonstrate in public. Therefore, it is wise for any permitting requirement to include an exception for small gatherings. There is no hard-and-fast rule about how small a gathering must be to be exempt from permitting requirements, so rather than setting a numerical limit, a local jurisdiction may wish to link a requirement to obtain a permit to an event's likely need for municipal services or the likelihood that an event will block access to public property or streets. *See* Chapter III.A.1.a

What sorts of information can permit applicants be required to provide?

Requiring a permit applicant to provide relevant information about the planned event is generally uncontroversial, but the information must serve a valid governmental interest. For instance, a jurisdiction validly may require a permit applicant to provide his or her name and other information to serve as a point of contact. But a jurisdiction may not require permit applicants to provide irrelevant or unnecessary information, such as incomes, Social Security numbers, political affiliations, or the identity of every person who intends to participate in the event. *See* Chapter III.A.1.b

Can local governments establish a permitting system that leaves it to a city employee's discretion whether to grant or deny a permit or whether to impose conditions on the permit?

Although officials will have to exercise some discretion in making permitting decisions, the First Amendment prohibits government officials from exercising unfettered discretion that is not cabined by objective factors or articulated standards. An ordinance that says permits will be granted unless the permitting official determines in his or her judgment that it will endanger health, welfare, and good order likely would be invalid. However, when some discretion is afforded to city officials with particular expertise—such as to the police chief on the issue of traffic control—courts generally will allow more latitude. The limitations on discretion apply whether the decision is about granting or denying a permit, imposing conditions (including fees) on the permit-holder, or revoking or modifying a permit. *See* Chapter I.A.2.a

When can an event permit be denied?

Most permitting regulations set out criteria under which permits must be denied (or revoked once granted). Valid reasons for denying a permit include if another permit has already been granted for the same time and place, or if the applicant's proposed activities would be unlawful, would endanger others, would significantly inhibit traffic, or would deprive the municipality of critical services, such as police protection. Abuse of the permitting process, such as providing false information on an application, is another valid ground for denial of a permit. Note, however, that these criteria for denying permits must be uniformly applied to all applications. It would be impermissible to invoke these rationales to deny some permits but not others, particularly if the denial were based on the content of the applicant's anticipated speech. *See* Chapter III.A.1.c

Can an event permit be denied on the ground that the applicant has a criminal record?

Probably not. Courts have rejected a "once a sinner, always a sinner" approach and have struck down permit denials based on an applicant's criminal record. In addition, some courts have held that a past violation of permitting requirements is an insufficient ground on which to deny a permit, although other courts have left some discretion to government officials to deny permits based on a past pattern of noncompliance. *See* Chapter III.A.1.c

Can an event permit be denied out of concerns that counter-protesters might initiate violence?

Denial of a permit based on the anticipated reaction of counter-protesters is an impermissible "heckler's veto" that courts generally treat as invalid. *See* Chapter I.A.1.b.iii

How far in advance can a local jurisdiction require the filing of a permit application?

Jurisdictions may require some amount of lead time to allow municipal officials to process a permit application and prepare for the event. That said, the very requirement of a permit has the tendency to stifle speech, so courts have been particularly rigorous in scrutinizing government's stated reasons for requiring rigid advance filing deadlines, especially where there is no exception for speech that responds to late-breaking events.

Local jurisdictions would be well advised to choose notice periods that can be shown to be reasonably necessary to allow officials to process the application and prepare for the event. These notice periods might vary depending on the characteristics of the proposed event and could be tailored to its size and location and the amount of governmental services that might reasonably be needed. Likewise, local jurisdictions should build in reasonable time between when a permit application is acted upon and the date of the proposed event to enable an applicant whose application is denied to obtain judicial review. *See* Chapter III.A.1.d

At the same time, to alleviate concerns about stifling speech, jurisdictions may want to create an exemption from their permitting requirements for spontaneous speech to allow speakers to gather without a permit in response to fast-breaking events. *See* Chapter III.A.1.d

How can a local jurisdiction prioritize permit applications when multiple applications are filed to use the same property at the same time?

There is not a lot of established law on this question, but localities should avoid any approach that could be vulnerable to challenge for giving too much discretion to decisionmakers, thus allowing for the possibility of content-based decisions. A local jurisdiction could consider a few possible approaches. First, it could adopt a first-come, first-served approach, giving priority to the applicant who filed first. This approach would pose no First Amendment problems because it is content-neutral, but it could be subject to manipulation by savvy actors with foresight. Second, a jurisdiction could prioritize certain types of events (like annual or government-sponsored events) and apply a first-come, first-served approach to the others. If a government were to adopt this approach, it would need to ensure it did not prioritize events based on the content of their message. Third, it could accept applications on a rolling basis and use a random drawing to award the permit. This method is also content-neutral and poses no problems under the First Amendment. *See* Chapter III.A.1.e

Generally, what types of conditions may be placed on event permits?

As a general matter, permits may contain reasonable restrictions on the time, place, and manner of an event. These could take the form of conditions that apply to all permits issued under a particular permitting regime, and additional conditions also could be tailored specifically to the circumstances of a particular event. Note that any conditions attached to a permit apply only to the person or group to whom the permit is issued, and not to bystanders or counter-protesters. For that reason, especially as to conditions related to public safety, local officials may want to announce publicly, in advance, that certain restrictions will apply to all attendees, not just the permit-holding group. *See* Chapter III.A.2

Can a permit be conditioned on moving the location requested?

Yes, but speakers must be able to reach the intended audience without undue cost and effort. If, for example, a permit is requested for a demonstration outside city hall against an action the city council has taken, local authorities should not condition the permit on the demonstration taking place at a location far from city hall, as a court is likely to view that relocation as thwarting the intended speech from reaching its intended audience. On the other hand, permit applicants are not necessarily entitled to their first choice of locations if the government has a significant content-neutral interest in having the event take place elsewhere. One such governmental interest might be the capacity of the requested location to accommodate safely the number of people likely to attend. *See* Chapters I.A.1.c and III.A.2.a

Jurisdictions should be cautious when requiring a location change for content-based reasons such as concerns about violence from counter-protesters. This type of condition would be subject to strict scrutiny and could be justified only if it were the only way adequately to protect public safety. Jurisdictions should also be cautious about treating protesters and counter-protesters differently, as this likely would be considered content-based. *See* Chapter III.A.2.a

Can a local jurisdiction issue a permit contingent on an applicant's agreement to change the time of the event?

Yes, especially if the condition is imposed to comply with a generally applicable regulation that allows events to occur only between certain hours. A jurisdiction also could limit the duration of an event to conserve public resources or ensure the location of the event is available to other permit applicants. However, any condition limiting the duration of the event must be tailored to the government's actual justification for imposing it and must provide the permit holders ample time to engage in expressive activity. *See* Chapter III.A.2.b

Can a local jurisdiction prohibit dangerous items as a condition of an event permit?

Yes, local jurisdictions may prohibit dangerous items as a condition of the event permit if they are based on the government's interest in public safety and are tailored to that interest. But note that such prohibitions could trigger First Amendment concerns, so any such condition should be justified by a legitimate public safety rationale and should apply to all individuals attending the event. Such prohibitions could also trigger Second Amendment concerns. In addition, local jurisdictions should check their state laws to determine whether such a restriction is preempted. *See* Second Amendment FAQs, Chapter III.A.2.c

Can a local jurisdiction impose a fee for the cost of administering a permitting system?

Yes, a local jurisdiction can charge permit applicants a fee that covers the administrative costs of processing their applications. It should be a fixed fee, meaning it should be the same for every permit applicant (and charged to every permit applicant). *See* Chapter III.A.3.a.ii

Can a local jurisdiction impose financial costs as part of the conditions for granting a permit for an event?

Yes, a jurisdiction can impose certain costs, but it must proceed carefully in calculating those costs and be prepared to justify them. In particular, the costs must actually reflect what the jurisdiction will incur in, for example, providing special equipment and facilities as well as ensuring adequate policing, traffic control, sanitation, and post-event restoration. That means such costs cannot be charged as a fixed fee for each and every event, regardless of what it costs the jurisdiction: instead, the charges to a permit applicant must reflect the actual costs to the jurisdiction associated with that applicant's event. Moreover, charges absolutely cannot be driven by the content of a particular applicant's intended message at an event, such as imposing particularly high charges in an effort to discourage a permit applicant from holding an event or for any other content-based reason. *See* Chapter III.A.3

If a local jurisdiction wants to discourage a group from holding a rally in the town, can it charge a higher permitting fee?

It would be an unconstitutional content-based restriction to charge a group whose message is disfavored a higher permitting fee on that basis alone than the fee it charges other permit applicants. *See* Chapter III.A.3.b

Can a local jurisdiction impose a fee for the cost of administering a permitting system?

Yes, a local jurisdiction can charge permit applicants a fee that covers the administrative costs of processing their applications. It should be a fixed fee, meaning it should be the same for every permit applicant (and charged to every permit applicant). *See* Chapter III.A.3.a.ii

Can a local jurisdiction require those being granted a permit for an event to purchase insurance?

Yes, a local jurisdiction can require those receiving a permit for an event to purchase insurance, but the jurisdiction must do so carefully, tying closely the costs of the insurance to the details of the particular event, including its size and the facilities used for it. For a jurisdiction to demand an unduly large coverage amount disconnected from the specific risks associated with the planned event likely would be invalidated by a court if challenged. Additionally, a jurisdiction cannot require a permittee to buy insurance to cover harms for which the permittee is not legally responsible, such as the reactions of counter-protestors or bystanders, or the government's own negligence. *See* Chapter III.A.3.a.iii

Can a local jurisdiction require an indemnification agreement from those being granted a permit for an event?

Yes, a local jurisdiction can require a permittee to indemnify, defend, and hold harmless that jurisdiction and all of its officers, employees, and agents from any legal claims arising from the activity for which it is issuing a permit. But an indemnification agreement cannot require permittees to assume legal responsibility for the unlawful acts of third parties or government officials; and it is prudent explicitly to exclude such acts from the scope of indemnification to ensure that the agreement would survive a legal challenge. *See* Chapter III.A.3.a.iv

The local government issued a prohibited items list for the upcoming rally. Does that mean the government can search everyone to see if they are bringing any prohibited items?

Even if local authorities can prohibit dangerous item as a reasonable time place and manner restriction consistent with the First Amendment, it does not automatically mean that any search protocol will also meet constitutional scrutiny. Search protocols must be tailored to the government's substantial interests and may not be exceedingly intrusive or broader than necessary to detect the types of items prohibited. Some jurisdictions have upheld the use of magnetometers, for example, while others have not. With prior notice, and when based on credible threats to public safety, searching attendees' bags or personal items is likely to strike the right balance. For both First and Fourth Amendment purposes, local officials should ensure that search protocols are supported by the gravity of the underlying security threat, not overly intrusive, announced in advance, and applied to all attendees. *See* Chapter III.B.1.a.i and ii

Can governments leave it to the discretion of the police to determine whom they want to search before entering the venue?

The decision to search or not to search—whether through bag checks, magnetometers, pat-downs, or some other method—should not be left to the unfettered discretion of the police or other government officials. Even when searches may be justified as content-neutral time, place, and manner restrictions justified by a substantial public safety interest, they must be done pursuant to objective, established standards. *See* Chapters I.A.2.d and III.B.1.a.i

Can local governments separate protesters from counter-protesters with a buffer zone?

Courts have looked favorably on crowd-control public safety measures that separate groups with opposing views by creating a buffer zone in between them. Where there is a good-faith, factually supported expectation that protesters and counter-protesters may clash violently, keeping them separated—while arguably a content-based restriction—is likely to meet the scrutiny applied. Officials should make clear in advance that there will be separate zones for protesters and counter-protesters, but should allow participants to self-select which zone they enter. And although a neutral buffer zone in between the opposing camps is often recommended to prevent violent confrontations, the buffer zone should not be so large that it prevents the groups from reaching the audience for their intended messages. *See* Chapter III.B.1.b

To ensure safety to and from a protest venue, law enforcement may want to work with protesters and counter-protesters in advance to designate separate parking areas and separate routes to get from the parking area to the venue. Where warranted, law enforcement escorts along the route may also be used. Law enforcement to afford similar treatment to protesters and counter-protesters whenever possible.

If the threat of violence is significant enough, can local officials just cancel the event?

As noted elsewhere, *See* Chapter I.A.1.a.ii. and I.A.1.b.iii.., officials may not deny a permit based on the anticipated reaction of counter-protesters. But what about when local officials see credible indications of a substantial threat of violence, perhaps in social media postings of hostile groups calling for and encouraging violence? In general, governments may not prohibit First Amendment-protected activity altogether as a prophylactic measure to prevent anticipated violence. The threat information may support time, place, and manner restrictions, including weapons bans (where allowed by state law), separation of protesters and counter-protesters, prohibitions on coordinated paramilitary activity, and other measures, but individuals who engage in unlawful conduct generally should be dealt with on an individual basis. Cancelling the event altogether is likely to fail strict scrutiny if the risk of impending harm could be mitigated through less drastic measure. *See* Chapter III.B.1.c

If the threat of violence is significant enough, can local officials just cancel the event (CONTINUED)?

If the situation during an event poses an imminent danger to public safety because attendees exhibit a common intent to resort to force or violence, officials may be able to enforce unlawful assembly laws and order the crowd to disperse. [See Chapter II.C.] And if a group of demonstrators has previously engaged in violence or broken laws and a locality has a basis to believe they will do so again, a municipality may be able to seek an injunction preventing that conduct as a public nuisance—though it could not stop the demonstrators from assembling and engaging in protected speech. *See* Chapter II.E

Can officials remove controversial speakers if their speech is provoking or inciting violence?

Governments generally cannot preemptively silence a speaker simply because his or her message is expected to be controversial. Courts have held that, where protected speech provokes wrongful acts by hecklers, the government must deal with those wrongdoers separately rather than suppress the speech. Where those efforts fail and the situation escalates toward lawless behavior and violence, removal of the speaker might be justified as a last resort. *See* Chapter III.B.2.a. And when a speaker calls for or incites imminent violence at the event, that speech is not protected by the First Amendment and law enforcement likely would be justified in removing the speaker. *See* Chapter I.A

If government officials generally can't suppress a controversial speaker's protected speech, can they remove others who seek to disrupt or drown out that speech?

The preferred First Amendment remedy for undesirable speech generally is more speech, but where a permit has been obtained for a particular event and individuals attempt to thwart or drown out the speech of speakers associated with the permit-holder, law enforcement is authorized to take action to preserve the ability of the speakers to communicate. Courts have upheld police efforts to prevent counter-protesters from disrupting the speech of permit-holders, including the removal of the disruptive individuals. *See* Chapter III.B.2.b. It is unlikely that the authority to take such action translates into an obligation of law enforcement to take such action.

IV

Best Practices

IV. BEST PRACTICES

Chapter I, II, and III have focused on the constitutional and other legal guardrails that state and local authorities must consider when planning for public demonstrations, rallies, protests, and marches that could result in violence. With these in mind, as well as the experiences of jurisdictions across the country—large and small, urban and rural—a number of best practices have been established.

A. Lay the Groundwork *Now* to Have the Tools in Place

There are many steps that local leaders can and should take well before learning of any plans for a protest in their community. These efforts not only will provide the authorities necessary for protecting public safety, but also are more likely to build the kind of trust and respect within communities critical to ensuring a safe event where constitutional rights are protected. And planning in advance, in accordance with applicable law discussed in the prior Sections, often can increase the likelihood that the measures taken will withstand legal challenges.

1. Build Relationships

Ensuring public safety while protecting civil rights and civil liberties means knowing your community and developing relationships, coalitions, and a community identity *before* any plans for a protest or rally. Local officials and law enforcement officers should engage with members of all constituencies—civic, business, educational, religious, and political leaders and organizations; activist, civil rights, and civil liberties groups; residential associations; racial and ethnic minorities and the LGBTQ community; students—to discuss how the community should respond to specific scenarios:

- How do these constituents want their government and their community to respond if a white supremacist group announces a rally in their town?
- How can the local officials and these various constituencies work together to convey the message they want to send as a community without running afoul of the First Amendment rights of those whose views they vehemently oppose?
- How do community members want their law enforcement to ensure that protesters and counter-protesters will be able to express their views safely?
- How have particular constituencies like minorities and vulnerable populations been treated at past events—in your communities or elsewhere—and what special considerations must be given to ensuring that everyone in the community can feel confident that law enforcement is committed to protecting their rights?
- How has structural racism affected your community, and how do city officials and law enforcement officers intend to account for it in the context of planning for public protests and rallies?

Many of these questions are difficult ones about which community members will have different views and therefore consensus will be unlikely. But the process of understanding diverse

perspectives and developing a community response is important to developing trusting relationships, even if the decisions that local leaders make might not please everyone.

2. Establish Permitting Systems or Other Processes for Imposing Time, Place, and Manner Restrictions on Events on Public Property

If your locality does not have an ordinance or other authority that establishes procedures governing when public property may be used for public events such as rallies, protests, demonstrations, and marches, consider enacting one—now. Do not wait to learn of a planned event and then enact emergency authorities, which could be more vulnerable to legal challenge if hastily put into place in advance of a particular event.

Permitting systems have the advantage of being an easy way for jurisdictions to impose time, place, and manner conditions on permit-holders, a violation of which can be enforced through withdrawal of the permit and cancellation of the event. Some small jurisdictions with modest resources may not wish to establish a permitting system, but could by ordinance provide a city official (mayor, city manager, or city attorney, for example) with authority to establish time, place, and manner restrictions for public events as they arise. Local officials should consult the previous discussions of time, place, and manner restrictions in this toolkit, along with their own applicable local law, when establishing a permitting system or other similar process.

Local officials should also:

- Consider including time, place, and manner conditions that will apply to all public events, such as:
    - Prohibiting weapons and other items that can be used as weapons;
    - Prohibiting behaviors that are unlawful under state anti-paramilitary-activity statutes, laws prohibiting the false assumption of law enforcement duties, and anti-mask laws; and
    - Setting consistent capacity and hours limitations specific to the venue.

- Ensure that time, place, and manner conditions apply to *all* attendees, not just the permit-holder or organizer's invited attendees. This means that, in addition to including the time, place, and manner conditions in any permit issued, the same time, place, and manner conditions should be included in announcements about the event to the general public in advance of the event and through signage at the event, so everyone considering attending will be aware of them, ideally in advance.

B. Engage in Event-Specific Planning with All Constituencies

1. Prepare Law Enforcement in Advance

Conduct training sessions for all law enforcement that will assist in protecting public safety at the event. This should include not only local law enforcement, but also all other law enforcement officers who will be participating through mutual assistance agreements and other arrangements, such as law enforcement from neighboring jurisdictions, state law enforcement, and college or university law enforcement. Training should include:

- Applicable constitutional principles, including First, Second, and Fourth Amendment principles of the U.S. Constitution and anti-militia provisions found in most state constitutions;
- Applicable criminal laws, especially those that may be less frequently used, such as laws prohibiting private paramilitary activity and unauthorized law enforcement functions, hate crimes, and domestic terrorism laws; and
- Best practices for policing events where there is a likelihood of violence.[463]

2. Ensure Adequate Information-Sharing Mechanisms

When preparing for a public event where violence may be anticipated, establishing mechanisms for sharing threat-related information between state, local, and federal law enforcement agencies is critical. Equally critical is ensuring that community members, including activist groups, have a reliable mechanism for communicating threat information they are hearing through their networks. Their calls and emails should be returned promptly, and law enforcement should meet personally with any groups intending to organize counter-protests or counter-programming, as well as with community members who are most vulnerable.

3. Communicate, Communicate, Communicate

Communicate with event organizers and expected counter-protesters and advocacy groups in advance of the event. Communicate with the public at large. Communicate with the media.

a. Do:

- Broadly share known facts about the nature of the event and anticipated attendees.
- Seek input from a wide range of community stakeholders about their concerns.
- Acknowledge underlying issues that may be implicated by the protest event, including structural racism, police-community relations, politics, urban-rural polarization, and other issues.

[463] *See infra* Policing at Protests: Best Practices.

- Be credible by working with diverse messengers whom different groups in your community will believe and trust.
- Establish a banner that brings stakeholders from different communities together for action, emphasizing the local identity of your community and the need to protect the rights of every person in it.
- Tell people "who we are" rather than "who we aren't" by using strong, positive, unifying norms that seek dignity and respect for all, reject violence, and say how "we" will respond and what "we" will do.
- Share plans for protecting public safety while preserving civil rights and civil liberties *early and often*; and respond punctually and transparently to community concerns.
- Make sure your commitment to action is believable by demonstrating it through, for example, committing resources to ensure the safety of vulnerable communities and counter-protesters.
- Assure the community that law enforcement is there to protect *everyone*'s rights, not just those of the permit-holder.

b. Don't:

- Don't be vague; instead be concrete, clear, and truthful, and when you don't know the answer, say so.
- Don't signal negative norms that can feed narratives of collective blame; instead, if violence or destruction of property occurs, continually reinforce the message that those committing violence are a small minority.
- Don't use blanket messages that appear to characterize all protesters or counter-protesters with having engaged in violence if it is committed by only a few.

4. Misinformation and Disinformation

Whether planned in advance or spontaneous, expect a lot of social media chatter about the event and recognize that some of it will be misinformation and disinformation.

a. Correct Misinformation as Quickly as Possible.

The more people hear it, the more likely they will believe it.

b. Be Clear When Something is False.

When you must restate the misinformation to correct it, start by warning that the information is false. People tend to believe information they hear multiple times, so making clear the information is false is essential before restating it.

c. Makes Sure the Correction Comes From a Credible Source.

Whether it comes from an individual, institution, news outlet, organization, or a combination of sources, make sure a correction comes from a source that people believe represents their values and interests—or, better still, from multiple sources who are trusted by various parts of the community.

d. If Applicable, Draw Attention to the Questionable Credibility or Motives of the Source of the Misinformation.

Misinformation and disinformation often start on extremist platforms known for conspiracy theories but quickly spreads to more widely used social media platforms. Misinformation and disinformation also often start with foreign actors eager to sow discord and division in the United States. If intelligence officials or researchers have determined that the source of particular content circulating online is a foreign actor with a malicious motive or is otherwise of questionable veracity, say so, openly and often.

e. Keep in Mind Cognitive Biases.

Our brains are subject to cognitive biases, and we tend to believe what we want to believe and dismiss that which we do not want to believe. Try to reduce the level of perceived threat to the audience's views and values when correcting misinformation and disinformation by keeping the message limited to correcting that particular content, rather than attempting to dislodge all at once a broader worldview.

5. Publicize Time, Place, and Manner Restrictions Through Multiple Means.

Restrictions should be publicized at least a few days in advance of the event, where possible, so that people can be prepared. Attendees should not get to the event location only to find that they won't be able to bring certain items into the area. Local authorities should publicize all time, place, and manner restrictions through multiple means:

- On the permit, if applicable;
- In a press release sent to local media;
- On the website and social media accounts of the local jurisdiction, police department, and/or sheriff's office;
- In direct communications to groups expected to attend and/or counter-protest; and
- On signage clearly visible at the event.

In all such communications, announce that the restrictions are designed to ensure public safety while protecting the rights of all attendees, and that criminal laws, including hate crimes laws, will be enforced.

6. Consider Using a "Stadium-Style" Security Plan with Limited Entry Points, Security Screening, and Buffer Zones Between Protesters and Counter-Protesters.

Where groups with strongly held views are expected to clash, consider setting up a "stadium-style" security plan by which protesters and counter-protesters enter at separate points and remain separated from each other during the event by a buffer zone. Security screening may take place at the entry points, consistent with local law.[464] Attendees should self- select which entrance to use, but officials should communicate clearly the plan and the location of specific entrances in advance.

7. Ensure Police Protection of Both Protesters and Counter-Protesters

Whether coming as protesters or counter-protesters, attendees should feel that law enforcement is there to protect their safety and their rights. If law enforcement is providing a designated parking area and police escort for protesters, law enforcement should do the same for counter-protesters. If law enforcement forms a barrier between protesters and counter-protesters, they should alternate the direction in which they face so that they do not appear to be protecting one group *from* the other group, but instead protecting both. Ensure that law enforcement is clearly identified by their insignia and their names. Communicate clearly that law enforcement is committed to protecting all attendees, regardless of their viewpoints.

[464] *See supra* Sections I.A.2.d, III.B.1.

V

Additional Creative Solutions

V. ADDITIONAL CREATIVE SOLUTIONS

In addition to the best practices outlined above, depending on the circumstances localities may wish to consider using other, less conventional tools to reduce the risk of violence at public gatherings. Several potential creative solutions are identified below.

A. Arranging for Exclusive Uses of Public Property

The use of exclusive permitting or leasing arrangements could help prevent violence at public demonstrations. As numerous courts have concluded, the First Amendment does not prohibit governments from granting private parties the exclusive use of public property for a limited period of time.[465] These arrangements make it possible for restricted events—including weddings, birthday parties, family reunions, softball games, and political rallies—to be held in traditional public forums. Entities that are temporarily granted the exclusive use of public property need not comply with First Amendment principles applicable to public forums, meaning that they may exclude whomever they wish.

Accommodating a group's request for exclusive use of a public forum could be an effective way to minimize violence, inasmuch as the forum's boundaries would serve as a natural buffer between opposing camps. Persons wishing to protest the organizing group would still be able to make their voices heard—just not within physical striking distance of their ideological adversaries. Localities should consider suggesting this possibility to any permit applicant whose presence could be expected to trigger large and hostile crowds. To reduce the risk of violence even further, the same offer could be extended to any organizations intending to protest the original group of demonstrators. The use of exclusivity arrangements to create structured separation would thus broaden private speakers' options for engaging in First Amendment expression, as well as the government's tools for preserving public order. To avoid any suggestion of viewpoint discrimination, localities inclined to implement this solution could create a two-track system for reserving public forums whereby applicants choose whether they seek exclusive use of the space or intend for the event to be open to the general public.

B. Requesting Advisory Opinions from State Attorneys General

Localities may wish to seek an advisory opinion from their state's attorney general to obtain clarification as to how relevant provisions of state law would apply to public-safety measures the locality is interested in taking. These requests could yield two especially useful types of guidance in advance of a public demonstration.

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[465] *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 198 (6th Cir. 1996); *Reinhart v. City of Brookings*, 84 F.3d 1071, 1073 (8th Cir. 1996); *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 910–11 (4th Cir. 1995); *Kroll v. U.S. Capitol Police*, 847 F.2d 899, 903 (D.C. Cir. 1988); *Jankowski v. City of Duluth*, No. 11-cv-3392, 2011 WL 7656906, at *7 (D. Minn. Dec. 20, 2011); *Sanders v. United States*, 518 F. Supp. 728, 729 (D.D.C. 1981).

First, advisory opinions on the legality of protesters' anticipated conduct could dispel uncertainty about the reach of certain prohibitions, enabling local officials to craft well-supported permit conditions that are enforceable on the day of an event. This option may be particularly attractive if the relevant laws—such as anti-paramilitary statutes—have never been enforced against public demonstrators. On August 16, 2019, for example, the Attorney General of Virginia issued an advisory opinion on the scope of section 18.2-174 of the Virginia Code, which prohibits "falsely assum[ing] or exercis[ing] the functions" of law-enforcement officers.[466] The opinion concluded that, "[b]y engaging in crowd control or purporting to secure a public area, private militia members usurp a role specifically reserved to law enforcement."[467] This determination placed the Attorney General's imprimatur on the use of Virginia's false-assumption statute for anti-paramilitary purposes, thereby laying the groundwork for (among other things) future arrests and prosecutions.

Second, an advisory opinion could clarify whether a locality's proposed method for ensuring public safety would violate state law. State firearms-regulation preemption statutes loom especially large in this respect, as many of them could be expansively interpreted to forbid even temporally and geographically limited weapons restrictions that apply only to specified public events. It is generally untested whether such a capacious interpretation would be upheld in the courts, especially where there is a compelling public-safety need justifying a time-bounded prohibition on weapons within the confines of the public spaces being used for the event. A favorable Attorney General advisory opinion could help insulate the locality from civil liability for good-faith efforts to protect public safety.

C. Seeking Declaratory and Injunctive Relief in Advance of Scheduled Events

If one or more groups planning to attend a rally has a history of violence, localities should consider seeking declaratory and injunctive relief to forestall further unlawful activity. This technique could prove desirable for several reasons. First, the fact of a lawsuit would place a defendant firmly on notice that particular prohibitions exist—and that the government is committed to using those tools to prevent violence. Second, suits for injunctive relief could enlarge localities' enforcement capabilities. Absent the ability to seek contempt for violations of court orders, a city may have no authority to enforce a state criminal statute or constitutional provision.[468] Third, providing forward-looking, group-wide relief would be far more efficient—and effective—than pursuing after-the-fact individualized prosecutions for harm that has already occurred. And fourth, public safety might well counsel against arresting entire groups of people carrying dangerous weapons during a volatile public demonstration.

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466 *See* Mark R. Herring, Att'y Gen., Op. No. 19-039, Aug. 16, 2019, Commonwealth of Virginia, Office of the Attorney General, *available at* https://www.oag.state.va.us/files/Opinions/2019/19-039-C-Herring-issued.pdf.

467 *Id.* at 3.

468 To be sure, a city's ability to seek equitable relief under a state criminal statute or self-executing constitutional provision will depend on state-specific remedial principles.

The best example of this strategy is the City of Charlottesville's suit for declaratory and injunctive relief in anticipation of a second Unite the Right rally.[469] The litigation was brought on behalf of the City, small businesses, and residential associations against white-supremacist and militia organizations and their leaders alleging causes of action under Virginia's Strict Subordination Clause, its anti-paramilitary-activity and false-assumption statutes, and the tort of public nuisance.[470] The case led to a court decision affirming the use of those state legal authorities to prevent private groups from engaging in the collective use of force.[471] As the court concluded, given the absence of "[any] authority for such illegitimate militia groups—unregulated by any civil authority—the City must be able to act to keep them out of its boundaries . . . for the safety and peace of mind of its citizens."[472] As a result of the litigation, all 23 defendants were permanently enjoined from returning to Charlottesville "as part of a unit of two or more persons acting in concert while armed with a firearm, weapon, shield, or any item whose purpose is to inflict bodily harm, at any demonstration, rally, protest, or march."[473] These defendants—including successors to the organizations bound by the court orders—are now susceptible to civil and criminal contempt charges for any violations of the court orders.

More recently, the City of Dayton—using anti-paramilitary theories developed in the *City of Charlottesville* litigation—successfully obtained consent decrees against a Klan group after seeking injunctive relief in state court.[474] And in July 2020, the District Attorney for Bernalillo County, New Mexico, brought suit against a private militia group, the New Mexico Civil Guard, seeking declaratory and injunctive relief to bar the group from continuing to engage in the unlawful exercise of law enforcement and military functions, as it had done at a protest against the statue of a Spanish conquistador that ended in violence.

D. Pursuing Legislative Change

If the existing array of legal tools proves inadequate to the task of protecting public safety, localities should consider pushing for statutory reform at the state level. These changes could take at least three forms. First, in so-called "Dillon's Rule" jurisdictions in which localities may not enact

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469 The Plaintiffs' key legal filings are available at https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-paramilitaries/city-of-charlottesville-v-pennsylvania-light-foot-militia/. For a narrative overview of the litigation's objectives and accomplishments, see Mary B. McCord, *New Approach After Charlottesville Violence Protects Public Safety While Preserving Rights*, Just Security, Jan. 2, 2019, https://www.justsecurity.org/62056/approach-charlottesville-violence-protects-public-safety-preserving-rights/.

470 For more information on these laws, see *infra* Sections II.B and II.E.

471 *See City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018).

472 *Id.* at *5.

473 Twenty-one of these defendants entered into voluntary consent decrees, which the court then entered as enforceable orders, and two others became subject to default-judgment orders that contained the same restrictions. These court orders are available at https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf.

474 *See Ohio City, Ku Klux Klan Group Agree on Rules for May Rally*, Associated Press, May 14, 2019, https://apnews.com/bb8d055060f941f8ba03357898a0723a.

regulations without affirmative authorization from the state, new laws could expressly empower local governments to take needed protective measures. Second, state-level preemption laws could be amended to clarify that localities are not disabled from governing on particular subject matters. For example, recent amendments to Virginia's firearms-regulation preemption statute confirmed the authority of local governments to restrict the carrying of firearms at most public gatherings.[475] And third, states that lack effective anti-paramilitary prohibitions could fill these legislative gaps in the interest of fostering safe and uncoerced public expression.

[475] Specifically, the amendment provides that "a locality may adopt an ordinance that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof . . . (ii) in any public park owned or operated by the locality, . . . or (iv) in any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." Va. Code § 15.2-915(E).

VI

Protesting During A Pandemic

VI. PROTESTING DURING A PANDEMIC

As we write these words, the world is suffering from the deadliest pandemic in a century. The COVID-19 outbreak has triggered startling invocations of state and local police powers that—until recently—would have seemed inconceivable to most Americans. Few would question that governments must be able to slow the pathogen's spread, including by imposing limits on public gatherings that ordinarily would fail constitutional scrutiny. Yet it is equally clear that public-health crises must not be exploited to choke off peaceful protests—especially ones that can be conducted with minimal risk to surrounding communities. This Section outlines several ways in which COVID-19 could affect the application of various First Amendment principles and doctrines discussed above.

Most notably, many jurisdictions have prohibited gatherings larger than a specified number of people. Even though these regulations do not target expression directly, they function as "manner" restrictions on speech. As such, they must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels for communication."[476] Of these prongs, the tailoring requirement represents the biggest hurdle for COVID-related speech restrictions.[477] As prohibitions on particular types of gatherings are gradually lifted, these evolving exercises in line-drawing may prevent the government from characterizing its interests as expansively or forcefully as originally conceived. And any disparate treatment of comparable activities may render incidental speech restrictions substantially overinclusive or underinclusive—or even content-based.

Localities' twin commitments to public health and free expression were put to the test in the aftermath of George Floyd's killing by a police officer in May 2020. All around the country, large crowds gathered to demand an end to racial injustice, notwithstanding state and local orders that seemingly prohibited those sorts of mass gatherings. In general, a locality's decision not to break up a spontaneous protest by declaring an unlawful assembly probably does not disable the locality from denying future permit requests on public-health grounds.

Assuming that jurisdictions' legal responses to COVID-19 survive constitutional scrutiny, those measures—including prohibitions on certain kinds of public gatherings—may be accounted for at various stages of the permitting process. Most sweepingly, if a permit applicant proposed to hold an event that would be unlawful under a jurisdiction's emergency order, the application could be denied for that reason. Governments could also impose conditions on permits in order to comply with generally applicable public-health restrictions. Such conditions might include capping the number of

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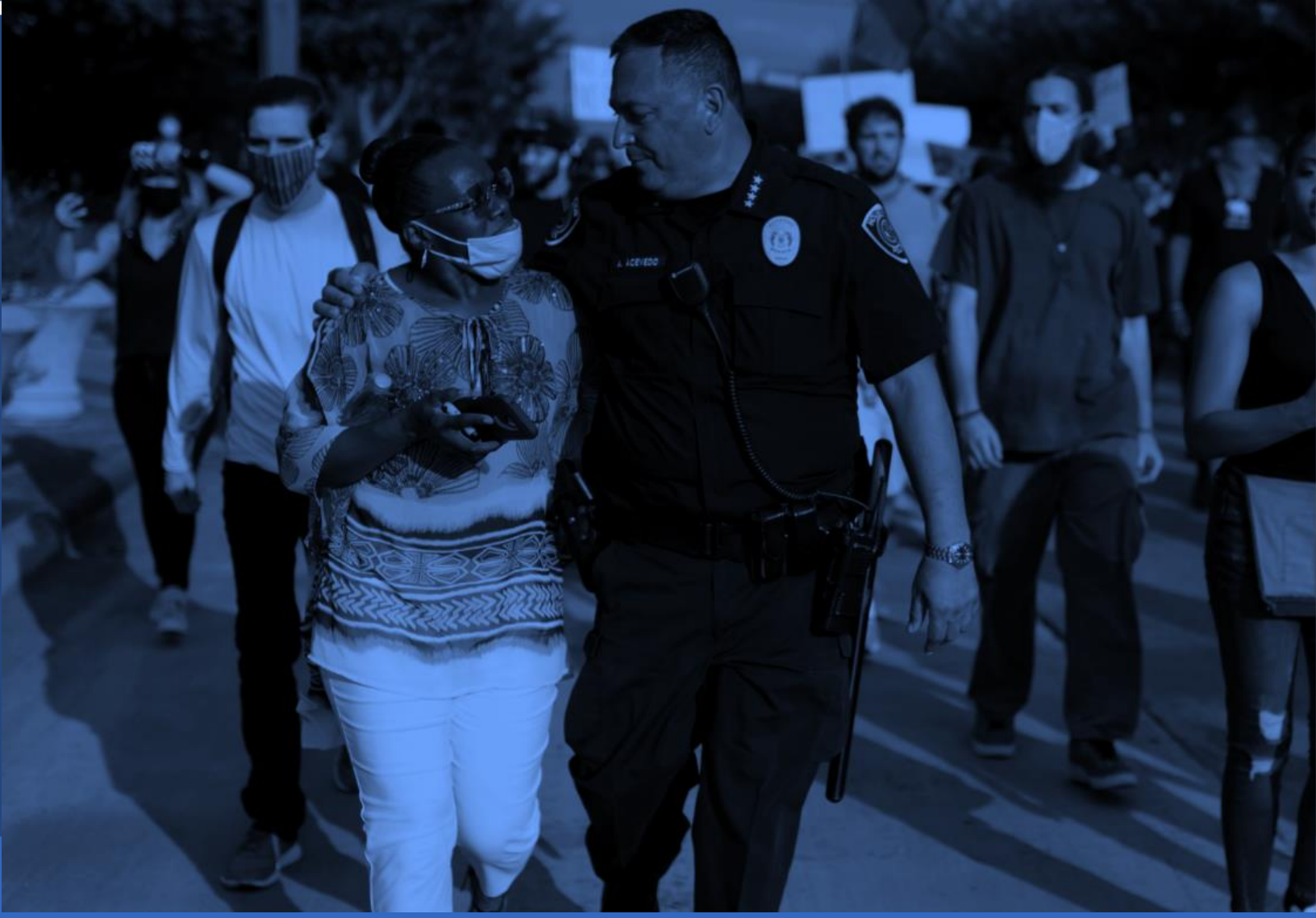
[476] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[477] There can be little doubt that stifling the spread of a pandemic is a significant governmental interest, and the "alternative channels" prong surely must account for the gravity of the interest at stake. *See Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1226 (10th Cir. 2007) ("To treat the ample alternative channels analysis as wholly independent disconnects it from reality and diminishes the emphasis courts have traditionally placed on the importance of the government interest."). Alternatives that ordinarily would fail to qualify as "ample"—such as various forms of digital expression—may be deemed satisfactory if in-person gatherings pose an intolerable risk to public health.

attendees, requiring attendees to wear masks and keep their distance from one another, and relocating the event to an area less susceptible to congestion.

The circumstances of COVID-19 could also alter the authorities of law enforcement on the day of an event. Most notably, anti-mask statutes are a poor fit for pandemic conditions, and many jurisdictions have suspended their anti-mask laws for this reason. But even if anti-mask laws are not suspended, virtually all such statutes require proof that an individual chose to wear a facial covering for the purpose of concealing her identity. Given the widespread (and often obligatory) use of masks as a means of personal and collective protection, proving this basic element of the offense would be challenging, at best. And, from a First Amendment perspective, it is doubtful that the government's interest in minimizing demonstrators' anonymity would outweigh the importance of reducing the transmission of COVID-19.

On the other hand, the existence of COVID-specific prohibitions could, in circumstances that truly posed a danger to public health, potentially afford additional grounds for dispersing public demonstrations Equally important, however, is that the circumstances of a public health emergency not be *exploited* by governments to silence speech, either by using them as an excuse for censoring unwanted messages or by failing to provide reasonable and adequate alternatives for engaging in protected speech.



VII

Policing At Protests: Best Practices

VII. POLICING AT PROTESTS: BEST PRACTICES

The form of protests, demonstrations, rallies, and other types of mass gatherings has evolved over recent years. With the rise of social media, gatherings may increasingly be decentralized and spontaneous, making traditional methods employed by law enforcement agencies impracticable. As a result, best practices for law enforcement response to these gatherings are changing rapidly. Additionally, the capacities of law enforcement agencies may differ greatly depending on the size of the agency and the equipment and training provided to its officers. There are many reports, recommendations, model policies, and training materials available that provide guidance for police departments and officers responding to mass demonstrations and protests. The best practices listed here do not purport to provide comprehensive guidance for law enforcement response. Rather, these best practices will identify some important factors that responding agencies should consider when planning for, and responding to, mass gatherings and public demonstrations, as well as provide links to additional guidance materials.

A. General Considerations

Individuals have a right to peaceably protest, and departments and officers should start with the understanding that their principal role is to facilitate individuals' First Amendment right to express themselves while protecting protesters and public safety.[478] Clear guidance regarding protection of constitutional rights during demonstrations benefits both members of the public and law enforcement. To the extent possible, "police officers should engage in cooperative and strategic advance planning with community members to ensure public safety before, during, and after demonstrations."[479]

- It is important that any law enforcement response to a mass gathering is measured and proportionate, and takes steps to avoid—even inadvertently—heightening tensions and making the situation worse.[480] This is particularly true when the protests are about the actions of police.[481]
- The agency should use the principle of proportionality to tailor a response to the actions and mood of the crowd, and should avoid increasing tensions by using more gear and equipment than necessary.[482]

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[478] *See* Police Exec. Research Forum, *The Police Response to Mass Demonstrations: Promising Practices and Lessons Learned* 69 (2018), https://www.policeforum.org/assets/PoliceResponseMassDemonstrations.pdf [hereinafter "PERF, *Police Response*"]; Amnesty Int'l USA, *Good Practice for Law Enforcement Officials Policing Demonstrations* 1, https://www.amnestyusa.org/pdfs/GoodPracticesForLawEnforcementForPolicingDemonstrations.pdf [hereinafter "Amnesty Guide"].

[479] The Leadership Conference on Civil and Human Rights, New Era of Public Safety: An Advocacy Toolkit for Fair, Safe, and Effective Community Policing 59 (2019), https://civilrights.org/wp-content/uploads/Toolkit.pdf [hereinafter "LCCHR Toolkit"].

[480] *See* PERF, *Police Response, supra* note 478, at 3.

[481] *Id.* at iii, 29.

[482] *Id.* at 71.

- The actions and demeanor of law enforcement agencies and individual officers affects how they are perceived by the people who are demonstrating; institutional legitimacy depends on officers being perceived as fair, respectful, and restrained in their interactions and responses to crowd activity.[483] People are more likely to cooperate when they view law enforcement as legitimate.

Training officers to prepare them to respond to mass demonstrations is critical, including on laws, regulations, and policies pertaining to free expression and demonstrations; specific skills, like de-escalation and peer intervention; and considerations related to the use of certain equipment.[484]

- Where possible, train in conjunction with other agencies that have mutual aid agreements for responding to demonstrations.[485]
- Consider inviting stakeholders and community groups to participate in training to foster mutual understanding between the agency and the community. [486]

B. Prior Planning

It is important to strategically plan in advance of an expected protest or demonstration. This may include establishing a clear command structure, for example, implementing the Incident Command System created by FEMA's National Incident Management System.[487] Among other things, the plan may also include:

- Expectations for officers, including that they are expected to respect the sanctity of life and protesters' First Amendment rights, tactical considerations for the use of weaponry and less-lethal munitions, and under what circumstances they should make arrests;[488]
- Measures to avoid officer fatigue and stress, including providing for officers' basic needs like food, water, protection from weather, and breaks;[489]
- Availability of specialized equipment, resources, or units; [490]

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[483] Edward R. Maguire & Megan Oakley, Harry Frank Guggenheim Found., *Policing Protests: Lessons from the Occupy Movement, Ferguson & Beyond: A Guide for Police* 9–10 (2020), https://www.hfg.org/wp-content/uploads/2021/06/PolicingProtests.pdf [hereinafter "HFG Report"].
[484] *See* PERF, *Police Response*, *supra* note 478, at 29–30.
[485] *Id.* at 29, 34.
[486] *See* Hunton & Williams LLP, *Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia* 168 (2017), https://www.huntonak.com/en/news/final-report-independent-review-of-the-2017-protest-events-in-charlottesville-virginia.html; LCCHR Toolkit, *supra* note 479, at 74.
[487] *See* Fed. Emergency Mgmt. Agency, *Incident Command System Resources* https://training.fema.gov/emiweb/is/icsresource/.
[488] PERF, *Police Response*, *supra* note 478, at 21–25.
[489] *See* Int'l Ass'n of Chiefs of Police, *Crowd Management* 3 (2019), https://www.theiacp.org/sites/default/files/2019-04/Crowd%20Management%20Paper%20-%202019_1.pdf.
[490] *See id.* at 4.

- Coordination with other agencies, like EMS, the fire department, and emergency dispatch, as well as any other law enforcement agencies that may provide aid (see below);[491] and/or
- Plans to divert traffic if it is expected that streets may be blocked. [492]

Strategic planning may include information gathering, including learning about expected participants and potential adversary groups, speaking with advocates, and communicating with trusted departments that have previously dealt with similar gatherings. [493]

- Limitations on surveillance as an information-gathering technique should be developed in collaboration with community members.[494]

C. Coordinating with Other Agencies

Many departments have mutual-aid agreements or memoranda of understanding with other agencies. If an agency believes it may be necessary to rely on the assistance of other agencies and first responders, it is important to have a written agreement that sets forth critical issues with specificity, including mission, supervision, communications, and policies on use of force and arrests.[495]

- Poor coordination with other agencies can create confusion among officers and demonstrators, and may undermine the strategic goals of the lead agency. It should be clear which agency is in charge and that all responding agencies operate under the same policies and protocols for important functions, including the use of force.[496]
- Consider including mutual aid partners in pre- and post-deployment briefings.[497]
- Critical decisions, like when to use force, hard gear, disperse a gathering, or conduct mass arrests should generally be made by the lead agency.[498]

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491 *See id.*; PERF, *Police Response*, *supra* note 478, at 38.
492 *See* Fed. Emergency Mgmt. Agency, Ctr. for Domestic Preparedness, *Field Force Operations Student Guide* 10, *available at* https://www.unicornriot.ninja/wp-content/uploads/2016/11/9-14-16-email-attachment-Crowd-Control.pdf (last visited July 1, 2020) [hereinafter "FEMA Guide"].
493 *See* Tony Narr, et al., Police Exec. Research Forum, *Police Management of Mass Demonstrations: Identifying Issues and Successful Approaches* 8 (2006); Bureau of Justice Assistance, U.S. Dep't of Justice, *Managing Large-Scale Security Events: A Planning Primer for Local Law Enforcement Agencies* 41 (May 2013), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/LSSE-planning-Primer.pdf [hereinafter "DOJ Report"]; HFG Report, *supra* note 483, at 67.
494 LCCHR Toolkit, *supra* note 479, at 59.
495 For these and additional elements such agreements should include, see PERF, *Police Response*, *supra* note 478, at 39–40.
496 *Id.* at 43, 46–48.
497 *Id.* at 47–48.
498 *Id.* at 48.

D. Operational Considerations

During a demonstration, police action should generally focus on crowd management or facilitation rather than crowd control.[499] Generally, arrests, detentions, and force should not be used in response to peaceful participation in a public demonstration.[500]

- Demonstrations are rarely all the same, and crowds are often a combination of individuals engaging in lawful and unlawful activities. Police officers should avoid taking enforcement actions against large groups, and instead restrict any enforcement activities to individuals or subgroups engaged in unlawful behavior.[501] Minor violations of the law should not be used as a basis to disperse an entire assembly.[502]
- Police agencies should clearly communicate the thresholds for arrest and give warnings to demonstrators when they are in violation of the law and subject to arrest.[503] Arrests may only be made where there is probable cause that a crime has been committed.
- Mass arrests and force should be avoided if at all possible, as well as the use of overly restrictive barriers or crowd control methods (like "kettling") that restrict movement.[504]
- However, agencies may consider physically separating opposing groups, potentially using barriers or designated zones, provided there is an accessible exit.[505]

The agency should use the principle of proportionality to tailor a response to the actions and mood of the crowd, and avoid increasing tensions by using more gear and equipment than necessary.[506]

- If specialized equipment, such as protective gear, may be necessary, it is often preferable to keep it in reserve and out of sight of the crowd to avoid escalation.[507]
- Many agencies have had positive experiences with officers on bicycles during demonstrations due to, among other benefits, their mobility and non-threatening appearance.[508]
- Where officers must form a barrier line or perimeter, consider alternating the directions that the officers face so they are not perceived as protecting one "side" and not the other.

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[499] Berkeley Police Dep't, *Response to Civil Unrest: A Review of the Berkeley Police Department's Actions and Events of December 6 and 7, 2014* at 49 (2015), *available at* https://perma.cc/S4KN-439R [hereinafter "Berkeley Report"].
[500] Amnesty Guide, *supra* note 478, at 1.
[501] FEMA Guide, *supra* note 492, at 8; HFG Report, *supra* note 483, at 13.
[502] Amnesty Guide, *supra* note 478, at 1.
[503] PERF, *Police Response*, *supra* note 478, at 16.
[504] HFG Report, *supra* note 483, at 76; PERF, *Police Response*, *supra* note 478, at 16–19.
[505] FEMA Guide, *supra* note 492, at 10; HFG Report, *supra* note 483, at 77; PERF, *Police Response*, *supra* note 478, at 27.
[506] PERF, *Police Response*, *supra* note 478, at 71.
[507] HFG Report, *supra* note 483, at 78-79; DOJ Report, *supra* note 493, at 42; PERF, *Police Response*, *supra* note 473, at 71.
[508] Berkeley Report, *supra* note 499, at 49; PERF, *Police Response*, *supra* note 478, at 26, 71; *Crowd Management*, *supra* note 489, at 7.

Ensure that all law enforcement officers are clearly identified by displaying the insignia of their units and their names.[509]

- Individual officers who are stressed or hostile should be removed from the line. Implementing this may require command or supervisor presence or peer intervention.[510]

E. Communications

To the greatest extent possible, clear communication should take place before, during, and after a mass demonstration with members of law enforcement, mutual aid partners, community groups, protest leaders, and event organizers.[511] Establishing positive relationships with community leaders, event organizers, and protest groups through ongoing outreach can help to prevent escalation during a demonstration.[512]

- Because demonstrations may be spontaneous and groups may not have identified leaders, social media may be beneficial too for outreach and communication.[513]

[509] *See, e.g.*, Amnesty Guide, *supra* note 478, at 2.
[510] PERF, *Police Response*, *supra* note 478, at 26.
[511] Amnesty Guide, *supra* note 478, at 1.
[512] HFG Report, *supra* note 483, at 68–70.
[513] Berkeley Report, *supra* note 490, at 46; PERF, *Police Response*, *supra* note 478, at 62; HFG Report, *supra* note 483, at 73–74.

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