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

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[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

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.