



VI

Protesting During
A Pandemic

VI. PROTESTING DURING A PANDEMIC

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

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

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

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

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

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

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

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

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