



Additional Creative Solutions

V. ADDITIONAL CREATIVE SOLUTIONS

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

A. Arranging for Exclusive Uses of Public Property

The use of exclusive permitting or leasing arrangements could help prevent violence at public demonstrations. As numerous courts have concluded, the First Amendment does not prohibit governments from granting private parties the exclusive use of public property for a limited period of time.⁴⁴³ These arrangements make it possible for restricted events—including weddings, birthday parties, family reunions, softball games, and political rallies—to be held in traditional public forums. Entities that are temporarily granted the exclusive use of public property need not comply with First Amendment principles applicable to public forums, meaning that they may exclude whomever they wish.

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

B. Requesting Advisory Opinions from State Attorneys General

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

⁴⁴³ See *Sistrunk v. City of Strongsville*, 99 F.3d 194, 198 (6th Cir. 1996); *Reinbart v. City of Brookings*, 84 F.3d 1071, 1073 (8th Cir. 1996); *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 910–11 (4th Cir. 1995); *Kroll v. U.S. Capitol Police*, 847 F.2d 899, 903 (D.C. Cir. 1988); *Jankowski v. City of Duluth*, No. 11-cv-3392, 2011 WL 7656906, at *7 (D. Minn. Dec. 20, 2011); *Sanders v. United States*, 518 F. Supp. 728, 729 (D.D.C. 1981).

First, advisory opinions on the legality of protesters' anticipated conduct could dispel uncertainty about the reach of certain prohibitions, enabling local officials to craft well-supported permit conditions that are enforceable on the day of an event. This option may be particularly attractive if the relevant laws—such as anti-paramilitary statutes—have never been enforced against public demonstrators. On August 16, 2019, for example, the Attorney General of Virginia issued an advisory opinion on the scope of section 18.2-174 of the Virginia Code, which prohibits “falsely assum[ing] or exercis[ing] the functions” of law-enforcement officers.⁴⁴⁴ The opinion concluded that, “[b]y engaging in crowd control or purporting to secure a public area, private militia members usurp a role specifically reserved to law enforcement.”⁴⁴⁵ This determination placed the Attorney General's imprimatur on the use of Virginia's false-assumption statute for anti-paramilitary purposes, thereby laying the groundwork for (among other things) future arrests and prosecutions.

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

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

If one or more groups planning to attend a rally has a history of violence, localities should consider seeking declaratory and injunctive relief to forestall further unlawful activity. This technique could prove desirable for several reasons. First, the fact of a lawsuit would place a defendant firmly on notice that particular prohibitions exist—and that the government is committed to using those tools to prevent violence. Second, suits for injunctive relief could enlarge localities' enforcement capabilities. Absent the ability to seek contempt for violations of court orders, a city may have no authority to enforce a state criminal statute or constitutional provision.⁴⁴⁶ Third, providing forward-looking, group-wide relief would be far more efficient—and effective—than pursuing after-the-fact individualized prosecutions for harm that has already occurred. And fourth, public safety might well counsel against arresting entire groups of people carrying dangerous weapons during a volatile public demonstration.

⁴⁴⁴ See Mark R. Herring, Att'y Gen., Op. No. 19-039, Aug. 16, 2019, Commonwealth of Virginia, Office of the Attorney General, available at <https://www.oag.state.va.us/files/Opinions/2019/19-039-C-Herring-issued.pdf>.

⁴⁴⁵ *Id.* at 3.

⁴⁴⁶ To be sure, a city's ability to seek equitable relief under a state criminal statute or self-executing constitutional provision will depend on state-specific remedial principles.

The best example of this strategy is the City of Charlottesville’s [suit](#) for declaratory and injunctive relief in anticipation of a second Unite the Right rally.⁴⁴⁷ The litigation was brought on behalf of the City, small businesses, and residential associations against white-supremacist and militia organizations and their leaders alleging causes of action under Virginia’s Strict Subordination Clause, its anti-paramilitary-activity and false-assumption statutes, and the tort of public nuisance.⁴⁴⁸ The case led to a court decision affirming the use of those state legal authorities to prevent private groups from engaging in the collective use of force.⁴⁴⁹ As the court concluded, given the absence of “[any] authority for such illegitimate militia groups—unregulated by any civil authority—the City must be able to act to keep them out of its boundaries . . . for the safety and peace of mind of its citizens.”⁴⁵⁰ As a result of the litigation, all 23 defendants were permanently enjoined from returning to Charlottesville “as part of a unit of two or more persons acting in concert while armed with a firearm, weapon, shield, or any item whose purpose is to inflict bodily harm, at any demonstration, rally, protest, or march.”⁴⁵¹ These defendants—including successors to the organizations bound by the court orders—are now susceptible to civil and criminal contempt charges for any violations of the court orders.

More recently, the City of Dayton—using anti-paramilitary theories developed in the *City of Charlottesville* litigation—successfully obtained consent decrees against a Klan group after seeking injunctive relief in state court.⁴⁵² And in July 2020, the District Attorney for Bernalillo County, New Mexico, brought [suit](#) against a private militia group, the New Mexico Civil Guard, seeking declaratory and injunctive relief to bar the group from continuing to engage in the unlawful exercise of law enforcement and military functions, as it had done at a protest against the statue of a Spanish conquistador that ended in violence.

D. Pursuing Legislative Change

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

⁴⁴⁷ The Plaintiffs’ key legal filings are available at <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-paramilitaries/city-of-charlottesville-v-pennsylvania-light-foot-militia/>. For a narrative overview of the litigation’s objectives and accomplishments, see Mary B. McCord, *New Approach After Charlottesville Violence Protects Public Safety While Preserving Rights*, Just Security, Jan. 2, 2019, <https://www.justsecurity.org/62056/approach-charlottesville-violence-protects-public-safety-preserving-rights/>.

⁴⁴⁸ For more information on these laws, see *infra* Sections II.B and II.E.

⁴⁴⁹ See *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657 (Va. Cir. Ct. July 7, 2018).

⁴⁵⁰ *Id.* at *5.

⁴⁵¹ Twenty-one of these defendants entered into voluntary consent decrees, which the court then entered as enforceable orders, and two others became subject to default-judgment orders that contained the same restrictions. These court orders are available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/08/All-Consent-Decrees-and-Default-Judgments-without-photos.pdf>.

⁴⁵² See *Ohio City, Ku Klux Klan Group Agree on Rules for May Rally*, Associated Press, May 14, 2019, <https://apnews.com/bb8d055060f941f8ba03357898a0723a>.

regulations without affirmative authorization from the state, new laws could expressly empower local governments to take needed protective measures. Second, state-level preemption laws could be amended to clarify that localities are not disabled from governing on particular subject matters. For example, recent amendments to Virginia’s firearms-regulation preemption statute confirmed the authority of local governments to restrict the carrying of firearms at most public gatherings.⁴⁵³ And third, states that lack effective anti-paramilitary prohibitions could fill these legislative gaps in the interest of fostering safe and uncoerced public expression.

⁴⁵³ Specifically, the amendment provides that “a locality may adopt an ordinance that prohibits the possession, carrying, or transportation of any firearms, ammunition, or components or combination thereof . . . (ii) in any public park owned or operated by the locality, . . . or (iv) in any public street, road, alley, or sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit.” Va. Code § 15.2-915(E).