# 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 weapons and 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 reasonable limitations on gun ownership and possession, especially when those limitations seek to protect public safety outside the home. For example, courts have upheld laws that limit individuals' ability to carry guns in public and on government property.

- Reasonable restrictions on carrying firearms during public events likely would be found by a court to be consistent with the Second Amendment.

- The U.S. Supreme Court repeatedly has 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 law that prevents 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]

---

[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

---

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]

---

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.

---

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

---

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

---

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.

---

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.

---

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

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

### a. *Adjudicating Permit Applications*

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

[69] 394 U.S. 147, 149–50 (1969).

[70] *Id.* at 153.

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

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

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

---

[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 decision in *Thomas v. Chicago Park District* (2002). *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]

---

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

---

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 reasonable 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 reasonable regulations on gun ownership and possession, especially when those regulations are aimed at protecting public safety outside the home.

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, gun-safety regulations not deemed presumptively lawful are nonetheless permissible when those regulations advance a sufficient governmental interest and do not impose too great a burden on the Second Amendment right. As relevant here, applying these principles, lower courts have upheld many gun-safety regulations, including restrictions on individuals' ability to carry firearms in public, and prohibitions on carrying firearms on government property. These precedents all suggest that reasonable, temporary restrictions on the carrying of weapons during public events would be constitutional.

---

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.

This Section addresses only the extent to which the Second Amendment permits reasonable gun-safety regulations and how federal courts, as a general matter, have approached these issues. Note that the analysis of any given issue may vary slightly depending on the circuit; therefore, local governments should review the case law from their jurisdiction 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.[98] 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. The Supreme Court Has Recognized an Individual Right to Keep and Bear Arms for Self-Defense in the Home

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.[99] Despite longstanding precedent suggesting that the Second Amendment protected the right to keep and bear arms only for certain authorized military purposes,[100] 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."[101] 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.[102] 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."[103]

### 2. The Supreme Court Has Left the Door Open for Reasonable Gun Restrictions Outside the Home

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

---

98 *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").

99 554 U.S. 570 (2008).

100 *See United States v. Miller*, 307 U.S. 174 (1939).

101 *Heller*, 554 U.S. at 630.

102 561 U.S. 742, 750 (2010).

103 *Id.* at 780; *see also id.* at 767 ("individual self-defense is 'the *central component*' of the Second Amendment right" (quoting *Heller*, 554 U.S. at 599)).

any weapon whatsoever in any manner whatsoever and for whatever purpose."[104] Rather, *Heller* expressly left the door open for governments to impose reasonable restrictions on gun possession and ownership,[105] and the Court in *McDonald* "repeat[ed] those assurances."[106]

As an initial matter, the Court in *Heller* made clear that several types of existing gun regulations remain "presumptively lawful."[107] Such regulations include, but are not limited to, "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.[108] In addition, *Heller* reaffirmed that the Second Amendment "does not prevent the prohibition of private paramilitary organizations."[109]

Moreover, the *Heller* Court suggested that, even if a gun regulation is not presumptively lawful, it would be subject to a traditional means-ends scrutiny analysis that balances the government's interest in regulation with the burden on the individual's exercise of the right.[110] But the Court declined to elaborate on the precise level of scrutiny that courts should apply, given 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."[111]

### 3. Lower Courts Have Interpreted *Heller* to Permit Reasonable Firearms Regulations

Lower courts have taken seriously the Supreme Court's statement in *Heller* that the Second Amendment right is not unlimited and that ample room remains for reasonable firearms regulations. As noted above, however, *Heller* left open important questions about how lower courts should apply that decision in cases challenging firearms regulations under the Second Amendment.

Since *Heller*, most (but not all) federal courts have answered those questions by adopting a two-step framework for analyzing such challenges, under which a wide array of restrictions have passed constitutional muster. Under this framework, courts ask: "(1) Is the restricted activity protected by the Second Amendment in the first place? (2) If so, does it pass muster under the appropriate level of scrutiny?"[112]

---

104 *Heller*, 554 U.S. at 626.
105 *Id.* at 626–28.
106 *McDonald*, 561 U.S. at 786.
107 *Heller*, 554 U.S. at 626–27 & n.26.
108 *Id.* at 626–27; *see also id.* at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").
109 *Id.* at 621 (citing *Presser v. Illinois*, 116 U.S. 252 (1886)).
110 *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.").
111 *Id.* at 628–29.
112 *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,

### a. *Step One – Is the Restricted Activity Protected by the Second Amendment?*

Under the first step, courts determine "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood."[113] If the court finds that a firearms regulation does not implicate the Second Amendment, it will uphold the regulation without proceeding to the second step.[114]

As part of this initial inquiry, courts have 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 have examined Founding-era laws to determine whether proscriptions similar to the one at issue existed when the Constitution was ratified.[117] Courts have also looked to evidence of nineteenth-century courts and commentators to determine whether, even if such prohibitions do not date to the Founding era, they are nonetheless sufficiently "longstanding."[118] If the court finds the restriction at issue has a sufficient historical pedigree, it will be considered outside the scope of the Second Amendment's protection.[119]

In addition, some courts have found that the "presumptively lawful" regulations identified in *Heller* necessarily fall 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

---

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). Only the Eighth Circuit appears not to have adopted this approach. *See United States v. Hughley*, 691 F. App'x 278, 279 n.3 (8th Cir. June 14, 2017) ("Other courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here.").

113 *Greeno*, 679 F.3d at 518.

114 *See, e.g.*, *Silvester v. Harris*, 843 F.3d 816, 830 (9th Cir. 2016) ("If a regulation qualifies as longstanding and presumptively lawful at step one, we need go no further.").

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

116 *Silvester*, 843 F.3d at 829 (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 (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 have treated "presumptively lawful" regulations as satisfying step one of the two-step inquiry, however. Other courts have held that "presumptively lawful" regulations trigger 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

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 have 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] 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.

### b. *Step Two – Does the Restriction Pass the Means-Ends Scrutiny Test?*

If a regulation burdens a right historically thought to be within the scope of the Second Amendment, courts will analyze the regulation under traditional means-ends scrutiny. In other words, courts will ask whether the government's interest in the regulation is sufficiently great and whether the regulation burdens an individual's Second Amendment rights no 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 applies, while ruling out "rational basis" review: "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."[123]

Accordingly, courts have been left to choose between strict and intermediate scrutiny. The federal courts of appeals have taken varying approaches to determining which level of scrutiny applies, and their decisions on this question have been highly fact-specific.[124] Courts most often most have reasoned that the level of scrutiny turns on how heavily a law burdens an individual's Second

---

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).

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 § 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.

124 *Compare Ezell*, 651 F.3d at 708–09 (applying a standard that was "more rigorous" than intermediate scrutiny, but "not quite 'strict scrutiny'" to Chicago's ban on firing ranges), *with Jackson*, 746 F.3d at 962–63 (applying intermediate scrutiny to San Francisco's law requiring that individuals keep firearms in a locked container or on their person while at home).

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."[125]

Although federal courts might apply strict scrutiny to a firearms restriction that burdens the core of the Second Amendment, most federal courts of appeals have applied intermediate scrutiny to gun laws that do not encroach on an individual's right to bear arms at home or for self-defense.[126] In practice, "[t]here is . . . near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate."[127] Indeed, since *Heller*, no federal court of appeals has adopted strict scrutiny in a Second Amendment challenge to a gun-safety regulation,[128] although several dissenting opinions have suggested that strict scrutiny should apply to such challenges.[129]

---

125 *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.").

126 *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).

127 *Silvester*, 843 F.3d at 823.

128 Stressing the "fundamental" nature of the Second Amendment right, a panel of the Sixth Circuit in *Tyler v. Hillsdale Cty. Sheriff's Dept.*, 775 F.3d 308, 324 (6th Cir. 2014), applied strict scrutiny in a challenge to a federal law prohibiting mentally ill individuals from owning firearms, even though it acknowledged that "other circuits have adopted [intermediate scrutiny] as their test of choice." However, the en banc Sixth Circuit later vacated that opinion and determined that intermediate scrutiny applied. *Tyler*, 837 F.3d at 692. Similarly, a panel of the Fourth Circuit in *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), held that strict scrutiny applied in a challenge to Maryland's ban on assault weapons and large capacity magazines, but it was later reversed by the en banc court. *See Kolbe*, 849 F.3d at 139 (4th Cir. 2017) (en banc).

129 *See, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting) ("Insofar as Highland Park's ordinance implicates Friedman's right to keep assault rifles and large-capacity magazines in his home for the purposes of self-defense, it implicates a fundamental right and is subject to strict scrutiny."); *Chovan*, 735 F.3d at 1145–46, 1149–52 (Bea, J., concurring); *NRA v. ATF*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., dissenting from the denial of rehearing en banc); *Heller II*, 670 F.3d at 1284 (Kavanaugh, J., dissenting).

Under intermediate scrutiny, "the government must demonstrate . . . that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective."[130] The Second Circuit, for instance, applied this standard to uphold New York's and Connecticut's prohibitions on certain semiautomatic firearms because they were "substantially related to the achievement of an important governmental interest."[131] The court made clear that the states unquestionably "have 'substantial, indeed compelling, governmental interests in public safety and crime prevention.'"[132] And, "afford[ing] substantial deference to the predictive judgments of the legislature," the court concluded that the states had "drawn reasonable inferences based on substantial evidence" and "tailored the legislation at issue to address" the special dangers posed by "these particularly hazardous weapons."[133] Because the challenged laws were "substantially—even if not perfectly—related to the articulated governmental interest," they survived intermediate scrutiny and were upheld.[134]

However, in one case, the Seventh Circuit applied a standard it described as "more rigorous" than intermediate scrutiny but "not quite 'strict scrutiny'" when it struck down a law banning firing ranges in the City of Chicago.[135] In that case, the court explained that the prohibition was "a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," and accordingly came "much closer to implicating the core of the Second Amendment right" than other gun-safety laws that warrant intermediate scrutiny.[136] As the Seventh Circuit explained in a later case:

> [A] law that curtails the fundamental right of law-abiding citizens to carry a weapon for self-defense must pass even more exacting (although not quite strict) scrutiny. Defenders of such a law must show a 'close fit' between the law and a strong public interest. . . . That 'close fit' is functionally equivalent to the 'narrow tailoring' requirement for content-neutral speech restrictions to which strict scrutiny is inapplicable.[137]

No other circuit has adopted this approach.

#### 4. State and Local Governments Generally May Restrict the Carrying of Firearms at Public Events Consistent with the Second Amendment

Under the analytical approach outlined above, restrictions on carrying firearms at public events or demonstrations for public-safety reasons likely will, as a general matter, survive challenges brought under the Second Amendment. Federal courts have upheld firearms regulations in a variety of

---

130 *Chester*, 628 F.3d at 683.
131 *New York State Rifle & Pistol Ass'n*, 804 F.3d at 261–62.
132 *Id.* at 261 (quoting *Kachalsky v. Westchester*, 701 F.3d 81, 97 (2d Cir. 2012)).
133 *Id.* at 261–62.
134 *Id.* at 263.
135 *Ezell*, 651 F.3d at 708.
136 *Id.*
137 *Culp v. Madigan*, 840 F.3d 400, 407 (7th Cir. 2016).

relevant areas that provide guideposts for state and local governments that wish to limit the use of weapons at public events, whether via law, ordinance, or otherwise.

### a. *Bans on Carrying Weapons in Public*

Many federal courts of appeals have recognized that state and local governments have broad discretion to regulate the carrying of firearms outside the home. This case law suggests that temporary restrictions on open and concealed carrying at specific public events would pass constitutional muster, even if imposed on individuals who possess the required permit or live in states that allow the carrying of firearms without a permit. As the Fourth Circuit has explained, "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."[138] Applying similar reasoning, the First, Third, and Fourth Circuits all have upheld schemes requiring permits, issued only upon a showing of good cause, for both open and concealed carrying of firearms in public places.[139] In addition, several circuits have upheld various permitting schemes limiting the ability of individuals to carry concealed firearms in public,[140] and the Seventh Circuit recently upheld an Illinois prohibition on granting concealed-carry licenses to out-of-state residents whose states do not impose licensing requirements that are "substantially similar" to those of Illinois.[141]

### b. *Prohibitions on Firearms on Government Property*

Courts also have upheld prohibitions on carrying firearms on government property, which suggests that state and local governments could lawfully restrict the carrying of firearms during public events on public property such as public parks, streets, or other government-owned land. As noted above, *Heller* itself stated that laws prohibiting the carrying of firearms in "sensitive places" like "schools and government buildings" are "presumptively lawful."[142] Lower courts have followed suit. For instance, the Fourth Circuit in 2011 upheld a ban on handguns in vehicles in national parks.[143] Although it avoided resolving whether national parks qualify as "sensitive places" under *Heller*, the court held that the ban "passes constitutional muster under the intermediate scrutiny standard," noting in particular that the park at issue was a place "where large numbers of people, including children, congregate for recreation. Such circumstances justify reasonable measures to secure public

---

138 *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

139 *Gould*, 907 F.3d 659; *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). Not all circuits have been willing to uphold such sweeping restrictions, however. The Seventh Circuit, for example, struck down an Illinois ban (with certain exceptions) on carrying guns in public "ready to use," but also suggested that a narrower restriction could be valid: "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public." *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

140 *See, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *Kachalsky v. Westchester*, 701 F.3d 81 (2d Cir. 2012). Note, however, the D.C. Circuit struck down a licensing scheme that limited licenses for concealed carry of handguns to those who can establish "good reason." *See Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

141 *Culp v. Raoul*, 921 F.3d 646 (7th Cir. 2019).

142 *Heller*, 554 U.S. at 626–27 & n.26.

143 *Masciandaro*, 638 F.3d 458.

safety."[144] Other courts have found similar public-safety concerns sufficient to uphold a ban on possession of firearms on county property,[145] a prohibition on carrying firearms on U.S. Postal Service property,[146] a federal statute banning the possession of firearms on the U.S. Capitol grounds,[147] and a state regulation restricting the carrying of weapons in places of worship.[148]

### 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."[149] 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. Indeed, many states have longstanding anti-paramilitary laws or laws banning parading or marching with firearms, which remain lawful under *Heller*. Such laws are discussed in further detail below.

144 *Id.* at 473 (citation omitted); *see also Moore*, 702 F.3d at 940 (observing that, although Illinois's blanket ban on public carrying of weapons was unconstitutional, more-limited restrictions on public carry likely would pass muster because "when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need").

145 *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc).

146 *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015) (upholding federal regulation prohibiting the storage and carriage of firearms on U.S. Postal Service property).

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

148 *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

149 116 U.S. 252, 264–65 (1886).

## 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. 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 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

*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

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

It does not violate the Second Amendment for the government to prohibit firearms at public events. The Supreme Court made clear in its 2008 decision in District of Columbia v. Heller that the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Thus, the Supreme Court left the door open for governments to impose reasonable safety regulations on the possession and use of firearms.

Before prohibiting or restricting firearms, officials will need to check other provisions of state law. Just because a state might allow the open carrying of firearms does not necessarily mean that local officials must allow open carrying at all public events, particularly where there may be public safety concerns about potential violence. However, 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 to prohibit even temporary restrictions on carrying weapons at public events. *See* Chapters I.B and II.F

*What types of firearms restrictions might be permissible under the Second Amendment?*

**Bans on carrying weapons in public:** Governments have broad authority to regulate the carrying of weapons outside the home. Temporary restrictions on open and concealed carrying at specific public events would likely be constitutional, even if imposed on individuals who have the required permit or live in states that allow the carrying of firearms without a permit. But local officials should consult state law to determine if the state government has preempted local officials from regulating firearms even for temporary and geographically limited purposes during public events. *See* Chapters I.B.4.a and II.F

**Prohibitions on firearms on government property:** Prohibitions on carrying firearms on government property also have been upheld repeatedly against Second Amendment challenge. This suggests that state and local governments could lawfully restrict the carrying of firearms during public events on public property such as public parks, streets, or other government-owned land or buildings. Again, local jurisdictions should ensure that such restrictions would not run afoul of state firearms regulation preemption laws. *See* Chapters I.B.4.b and II.F

**Prohibitions on private paramilitary organizations and paramilitary activity:** It is well established under U.S. Supreme Court precedent that the Second Amendment does not prevent states from prohibiting paramilitary organizations, and most states do so. Forty-eight states include a provision in their constitutions 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 state 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.4.c and II.B

*How will a court analyze a Second Amendment challenge to a firearms regulation?*

Courts generally apply a two-part test when analyzing such challenges. *See* Chapter I.B.3

**Step One:** First a court will ask whether the regulation restricts activity that is protected by the Second Amendment. A regulation restricts activity that is not protected by the Second Amendment (and restrictions on it thus will pose no Second Amendment problem) if it satisfies one of the following two criteria:

a. It is the type of regulation that the Supreme Court in Heller deemed "presumptively lawful." Such presumptively lawful 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.
   - OR -
b. The conduct that the regulation restricts was not historically understood to be protected by the Second Amendment. To make this determination, courts often will look at 18th and 19th century laws to determine whether prohibitions similar to the one at issue existed when the Constitution was ratified or whether they are sufficiently "longstanding" to fall outside the Second Amendment's protections. *See* Chapter I.B.3.a

**Step Two:** If a regulation burdens conduct that is protected by the Second Amendment, that does not mean that it is automatically unconstitutional. Instead, courts will apply "means-ends scrutiny." Under this analysis, a court asks whether the government's interest in the regulation is sufficiently great and whether the regulation burdens an individual's Second Amendment rights no more than necessary to achieve that governmental interest. If the answer is yes, the regulation will be upheld. *See* Chapter I.B.3.b

*What level of scrutiny applies to gun regulations that burden activity protected by the Second Amendment?*

The Supreme Court in Heller did not answer this question. Instead, it left lower courts to decide whether "intermediate scrutiny" or "strict scrutiny" should apply. The lower courts are nearly unanimous that intermediate scrutiny applies to gun restrictions that apply outside the home. Under intermediate scrutiny, a regulation must be substantially related to furthering an important government interest. Strict scrutiny is more rigorous: Under that test, a regulation must be the most narrowly tailored possible to achieve a compelling government interest. *See* Chapter I.B.3.b

*Has any court ever applied strict scrutiny to a firearms regulation?*

No. In the Supreme Court's landmark Heller decision, the Court expressly declined to specify the level of scrutiny that courts should apply. The Court made clear that the District of Columbia's near-absolute ban on the possession of a handgun impermissibly burdened individuals' core Second Amendment right to possess handguns in the home for self-defense under any level of scrutiny. *See* Chapters I.B.2 and I.B.3.b

In cases involving restrictions on the possession and use of firearms outside the home, federal courts have applied intermediate scrutiny in the vast majority of cases. In one case, Ezell v. City of Chicago, the Seventh Circuit applied a standard it described as "more rigorous" than intermediate scrutiny but "not quite 'strict scrutiny'" when it struck down a law banning firing ranges in the City of Chicago. It explained that the regulation at issue in that case came close to burdening the core Second Amendment right to self- defense. No other court has adopted this approach. *See* Chapter I.B.3.b

*Are there any other considerations besides the Second Amendment that states and localities should take into account when determining what types of event-specific firearms restrictions might be appropriate?*

Yes. States and localities should be aware that even if a regulation passes muster under the Second Amendment to the U.S. Constitution, state constitutional or statutory law might restrict their ability to impose certain firearms regulations. Therefore, local governments should consult their state constitutions and codes to make sure that any firearms restrictions they plan to impose are not prohibited under state law. *See* Chapter I.B

State constitutions may include provisions protecting the right to bear arms that are different from and, in some cases, broader than the Second Amendment. *See* Chapter I.B