



# III

Local Authorities

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

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

- When local officials have reason to believe that violence may erupt at a public event, they may wish to include either as a permit condition or as a generally applicable condition of attendance a list of prohibited items that may not be brought to the event.
- Jurisdictions may, in the right circumstances, require permit applicants to offset the costs of providing government services, to insure against personal injury and property damage, and to sign indemnification agreements. In imposing these financial requirements, authorities may not charge more than necessary to serve a valid state interest, or tie the cost of the permit to the content of the speech.

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

- Although local authorities may prohibit participants from bringing items that can be used as weapons to public events, their ability to conduct searches of attendees depends on both the search protocols used and the security threats justifying the searches.
- Jurisdictions generally may set up buffer zones and barricades in order to physically separate opposing groups and prevent violence.
- It is generally unconstitutional for a jurisdiction to cancel an already-scheduled event in advance, even if it has reason to believe the event is likely to become violent. Nor are officials generally allowed to remove controversial speakers due to safety concerns.

- Where an individual's behavior—even that person's own speech—interferes with a permit-holder's ability to speak, officials may remove the disruptive individual.
- When an event has been closed off to the general public, officials may exclude members of the public to allow the permit-holder to retain control over the sharing of its message.

### III. LOCAL AUTHORITIES

#### A. Permitting System

By claiming authority to punish speech that occurs without prior government approval, permitting systems represent a drastic departure from ordinary First Amendment principles. Yet there is widespread agreement that permitting regimes can be necessary to create the conditions for robust and orderly public expression.<sup>259</sup> Permits enable governments to “coordinate multiple uses of limited space,”<sup>260</sup> allocate police protection and emergency services,<sup>261</sup> and preserve “public access to thoroughfares and public facilities.”<sup>262</sup> For these reasons, the Supreme Court has clarified that content-neutral permitting requirements are to be analyzed as time, place, and manner regulations rather than as presumptively unconstitutional prior restraints.<sup>263</sup>

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

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

##### a. *When Can Permits Be Required?*

Not all expressive activities implicate the types of governmental interests that justify permitting regimes. For example, the Ninth Circuit has held that municipalities may not require a permit merely because an event would “require the provision of city public services,” given that some services—such as litter abatement—are “trivial” in relation to the corresponding burdens on expression.<sup>264</sup> Nor have courts accepted arguments by governments that they must be forewarned when very small groups intend to demonstrate in public. Instead, numerous courts have struck down permitting requirements that failed to include an exception for small gatherings.<sup>265</sup>

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<sup>259</sup> See *Thomas v. Chicago Park Dist.*, 227 F.3d 921, 924 (7th Cir. 2000) (“A park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park’s utility as a forum for speech.”).

<sup>260</sup> *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002).

<sup>261</sup> *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1318 (11th Cir. 2000); *Douglas v. Brownell*, 88 F.3d 1511, 1522 (8th Cir. 1996).

<sup>262</sup> *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004).

<sup>263</sup> *Thomas*, 534 U.S. at 322–23.

<sup>264</sup> *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1035 (9th Cir. 2009).

<sup>265</sup> See *Berger v. City of Seattle*, 569 F.3d 1029, 1047 (9th Cir. 2009) (applied to individual performances, regardless of crowd size); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1040 (9th Cir. 2006) (requirement “lack[ed] any specification as to the size of the group covered”); *Knowles v. City of Waco*, 462 F.3d 430, 435 (5th Cir. 2006) (requirement “may encompass just two individuals”); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (applied to “two or more persons”); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) (applied to “groups as small as two or three”); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 (11th Cir. 2004) (applied to “as few as five” persons); *Grossman*

Courts have taken care, however, not to decree a strict “numerical floor [i.e., of persons engaged in expression] below which a permit requirement cannot apply.”<sup>266</sup> That is because the government’s interests may vary according to the nature of the relevant property; streets and sidewalks, for instance, are more vulnerable to congestion than are open spaces such as parks.<sup>267</sup> In lieu of specifying a numerical threshold for particular properties, governments may require a permit “when [c]ity services are required” due to “interfere[nce] with normal vehicular or pedestrian traffic.”<sup>268</sup> Linking the permit requirement to its practical justification in this way avoids any tailoring problem, though at the expense of providing precise notice to regulated persons.

When permitting requirements are drafted so loosely that they contain *no* ascertainable standard, they may be challenged as unconstitutionally vague. Vagueness doctrine requires that a legal provision “provide a person of ordinary intelligence fair notice of what is prohibited” and not be “so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>269</sup> Several permitting ordinances have run afoul of this principle for using broad, undefined, and otherwise subjective phraseology.<sup>270</sup>

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

<sup>266</sup> *Cox*, 416 F.3d at 286.

<sup>267</sup> See *Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) (“Only after viewing the Policy in light of the concerns that are unique to the venue in question do we believe a court can appropriately assess the constitutionality of the regulation.”); *Long Beach Area Peace Network*, 574 F.3d at 1034 (“[P]ermitting requirements applicable to smaller groups would likely be unconstitutional, unless . . . the public space in question was so small that even a relatively small number of people could pose a problem of regulating competing uses.”); *Green v. City of Raleigh*, 523 F.3d 293, 304 (4th Cir. 2008) (“[A] small-group exception must anticipate such overlapping uses of public space in a relatively confined area, thereby supporting a more modest numerical exception than might otherwise be the case.”).

<sup>268</sup> *Cox*, 416 F.3d at 287 (quoting *Grossman*, 33 F.3d at 1207) (first alteration in original); see also *Food Not Bombs*, 450 F.3d at 1041 (“[I]t would have been simple enough to tailor the permitting requirement to marches, processions and assemblies that the organizer expects or intends *actually* to impede traffic flow.”).

<sup>269</sup> *United States v. Williams*, 553 U.S. 285, 304 (2008).

<sup>270</sup> See *SEIU, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (“public gathering”); *Trenbella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1076 (E.D. Wis. 2003) (“parade” and “assembly”); *SEIU, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 974 (C.D. Cal. 2000) (activity that “has the effect[,] purpose[,] or propensity to draw a crowd of onlookers”); *Invisible Empire Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1433 (D. Conn. 1985) (permit required when “the Chief of Police reasonably believes [the

### **b. *What Information Can Be Required?***

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

Courts have upheld informational requirements that served a valid governmental interest, such as maintaining a point of contact for logistical and cost-shifting purposes.<sup>271</sup> This means that permit applicants who wish to hold public demonstrations are not entitled to conceal their identities from the government. But the permitting process cannot be used to extract unnecessary information about persons who wish to exercise their First Amendment rights. For example, there would be no basis for requiring applicants to disclose their incomes, political affiliations, or Social Security numbers, or to identify each person intending to participate in the proposed event. Moreover, one court has held that applicants cannot be required to meet in person with governmental officials if other methods of consultation would be just as effective.<sup>272</sup>

### **c. *When Can Permits Be Denied?***

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

There is little doubt that permit requests may be denied for reasons that track the underlying justifications for permitting systems—for example, when a permit has already been granted for the same time and place, or if the applicant’s proposed activities (as distinguished from protesters’ responses) would be unlawful,<sup>273</sup> endanger the health and safety of surrounding persons,<sup>274</sup>

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

<sup>271</sup> *See Green*, 523 F.3d at 302 (picketers required to “identify the sponsoring group (if any), the person giving notice to the City, and the name of the person carrying the receipt of notice”); *New England Reg’l Council of Carpenters v. Kinton*, 284 F.3d 9, 28 (1st Cir. 2002) (contact information required from either the attorney for, or another representative of, the sponsoring organization); *Marcavage v. City of New York*, 918 F. Supp. 2d 266, 273 (S.D.N.Y. 2013) (certain permit applicants required to provide their “name, address, and phone number”); *Sauk Cty. v. Gumz*, 669 N.W.2d 509, 529 (Wis. App. 2003) (applicant’s signature required).

<sup>272</sup> *See Sullivan v. City of Augusta*, 511 F.3d 16, 41 (1st Cir. 2007).

<sup>273</sup> *See Douglas*, 88 F.3d at 1523 (upholding provision that authorized denial “only when, on its face, the proposed parade will violate a law or an ordinance”).

<sup>274</sup> *See Church of the Am. Knights of the KKK v. City of Gary*, 334 F.3d 676, 683 (7th Cir. 2003) (“Of course a permit need not be granted for a demonstration if the authorities reasonably believe that the demonstrators

significantly inhibit pedestrian and vehicular traffic,<sup>275</sup> or deprive the municipality of critical services (such as police protection) that could not be supplied through other means.<sup>276</sup> Of course, denials on these grounds could be challenged on an as-applied basis if the government's stated justifications were unsupported. And it is uncontroversial that permits may be denied or revoked if the permitting system has been abused, as by providing materially false information in an application.<sup>277</sup>

On the other hand, courts have held that permit requests cannot be denied merely because an applicant has committed a crime<sup>278</sup> or violated permitting regulations<sup>279</sup> in the past. The Fifth Circuit has emphatically rejected this “once a sinner, always a sinner” approach, deeming it grossly mistailored to any valid governmental interest.<sup>280</sup> Localities should also keep in mind that certain justifications for denying permit requests—such as interference with vehicular or foot traffic—would be implicated by a substantial portion of events subject to permitting regulations. It would be unconstitutional to invoke those facially neutral rationales selectively to deny some permit applications, but not others.<sup>281</sup>

#### **d. Advance-Notice Requirements and Decision Deadlines**

The same interests that justify the creation of a permitting system also require that the government have some amount of lead time to process applications and plan for large events. As the Ninth Circuit has explained, it “take[s] . . . time to coordinate the various demands on the streets, sidewalks, and parks; assess what services (such as additional police) are needed; contact those services; ensure their availability; and allow those services to prepare for the events.”<sup>282</sup> Yet requiring would-be demonstrators to disclose their intentions “ha[s] the tendency to stifle” core First

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

<sup>275</sup> See *Kinton*, 284 F.3d at 26 (deeming “[p]ublic . . . convenience” a “paradigmatically permissible consideration[] in the issuance of permits”); *Progressive Labor Party v. Lloyd*, 487 F. Supp. 1054, 1059 (D. Mass. 1980) (upholding a provision that authorized denial if “the proposed march would disrupt a street or public place which is ‘ordinarily subject to great congestion . . . and is chiefly of a business or mercantile character’”).

<sup>276</sup> See *Brandt v. Vill. of Winnetka*, No. 06-cv-588, 2007 WL 844676, at \*21 (N.D. Ill. Mar. 15, 2007) (upholding a provision that authorized denial “if there are not significant Village resources available at the time of the proposed event to mitigate the disruption”); *Progressive Labor Party*, 487 F. Supp. at 1059 (upholding a provision that authorized denial if “the necessary diversion of police protection ‘would deny reasonable police protection to the City’”).

<sup>277</sup> See *Fernandes v. Limmer*, 663 F.2d 619, 629 (5th Cir. 1981) (upholding a provision that authorized denial if “one or more of the statements in the Application is not true”).

<sup>278</sup> See *id.* at 629–30.

<sup>279</sup> See *Beckerman v. City of Tupelo*, 664 F.2d 502, 512 (5th Cir. 1981); *Int’l Soc’y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 832–33 (5th Cir. 1979); cf. *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1167 (9th Cir. 2007) (“[N]o provision of the City’s permitting scheme called for a mechanical rejection of appellants’ permit application because of past violation of the noise ordinance.”).

<sup>280</sup> *Fernandes*, 663 F.2d at 632 (quoting *Eaves*, 601 F.2d at 833).

<sup>281</sup> See *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 191 (D. Mass. 1998).

<sup>282</sup> *Food Not Bombs*, 450 F.3d at 1045.



Amendment activity<sup>283</sup>—especially for speech that responds to late-breaking events. Courts have thus taken “special care” in assessing governments’ stated reasons for requiring advance-notice periods of a particular length.<sup>284</sup>

This unusually searching form of review has led to the facial invalidation of provisions requiring permit applications to be submitted 60 days,<sup>285</sup> 45 days,<sup>286</sup> 40 days,<sup>287</sup> 30 business days,<sup>288</sup> one month,<sup>289</sup> 30 days,<sup>290</sup> 20 days,<sup>291</sup> 10 business days,<sup>292</sup> seven days,<sup>293</sup> and even five days<sup>294</sup> in advance of proposed events. These decisions have emphasized the government’s failure to justify the precise length of the challenged notice period,<sup>295</sup> the absence of outlets for spontaneous speech,<sup>296</sup> and the less-restrictive practices of comparable jurisdictions.<sup>297</sup> And at least one court has held that the availability of a “good cause” exception will not save an excessive advance-notice requirement, inasmuch as applicants cannot be required to “shoulder the burden” of seeking waivers from unconstitutional requirements.<sup>298</sup> By contrast, courts have upheld advance-notice periods of nine days,<sup>299</sup> two days,<sup>300</sup> and less than one day.<sup>301</sup>

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

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<sup>283</sup> *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 605.

<sup>284</sup> *Id.*

<sup>285</sup> See *Gumz*, 669 N.W.2d at 531.

<sup>286</sup> See *City of Gary*, 334 F.3d at 682.

<sup>287</sup> See *SEIU, Local 660*, 114 F. Supp. 2d at 973.

<sup>288</sup> See *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 871 (Cal. App. 1993).

<sup>289</sup> See *World Wide Street Preachers*, 2007 WL 1462130, at \*6.

<sup>290</sup> See *Sullivan*, 511 F.3d at 39; *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606; *York v. City of Danville*, 152 S.E.2d 259, 264 (Va. 1967).

<sup>291</sup> See *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

<sup>292</sup> See *Hotel Emps.*, 1995 WL 870959, at \*3.

<sup>293</sup> See *Grossman*, 33 F.3d at 1204, 1206.

<sup>294</sup> See *Douglas*, 88 F.3d at 1524.

<sup>295</sup> See *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606; *City of Gary*, 334 F.3d at 683; *Douglas*, 88 F.3d at 1524; *NAACP*, 743 F.2d at 1356–57; *World Wide Street Preachers*, 2007 WL 1462130, at \*6; See *Hotel Emps.*, 1995 WL 870959, at \*3; *Gumz*, 669 N.W.2d at 531; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 871; *York*, 152 S.E.2d at 264.

<sup>296</sup> See *Food Not Bombs*, 450 F.3d at 1047; *City of Gary*, 334 F.3d at 682; *Grossman*, 33 F.3d at 1206; *NAACP*, 743 F.2d at 1356.

<sup>297</sup> See *Sullivan*, 511 F.3d at 39; *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 606 n.2; *City of Gary*, 334 F.3d at 683; *Douglas*, 88 F.3d at 1524; *NAACP*, 743 F.2d at 1356–57.

<sup>298</sup> *Sullivan*, 511 F.3d at 40.

<sup>299</sup> See *Handley v. City of Montgomery*, 401 So.2d 171, 184 (Ala. Crim. App. 1981).

<sup>300</sup> See *Food Not Bombs*, 450 F.3d at 1045; *Quaker Action Grp.*, 516 F.2d at 735; *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968).

<sup>301</sup> See *Jackson v. Dobbs*, 329 F. Supp. 287, 292 (N.D. Ga. 1970).

that must be processed<sup>302</sup> and the amount of time needed to coordinate municipal services for particular types of events.<sup>303</sup> In addition, exempting spontaneous expression from general permitting rules would eliminate one harmful effect of advance-notice requirements that courts have found objectionable. But the category of spontaneous speech cannot be defined so narrowly as to leave speakers with constitutionally inadequate methods of responding to fast-breaking events.<sup>304</sup>

Judicial skepticism of lengthy advance-notice periods would seem to overlook a crucially important variable: what happens *after* an initial decision is rendered. If a permit is granted, the permittee will almost certainly need some amount of time to complete required event preparations (including consulting with local authorities). If an application is instead denied, the applicant must have time to seek effective judicial review of that determination, lest governments be allowed to suppress disfavored viewpoints by running out the clock on permit applications.<sup>305</sup> And it would be anomalous for First Amendment doctrine to police the precise length of advance-notice requirements—to ensure that application periods are not unnecessarily prolonged—while simultaneously allowing governments to leave applications pending longer than necessary.<sup>306</sup>

Unsurprisingly, then, several courts have either held or presupposed that the First Amendment requires *some* deadline for acting on permit requests.<sup>307</sup> Yet other decisions have reached the

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<sup>302</sup> See *Thomas*, 227 F.3d at 925–26 (upholding advance-notice requirements of 30 and 60 days in light of fact that “thousands of permit applications” were filed every year); see also *United States v. Kistner*, 68 F.3d 218, 222 (8th Cir. 1995).

<sup>303</sup> See *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1318; *Rosen*, 641 F.2d at 1247; *Gumz*, 669 N.W.2d at 531; *York*, 152 S.E.2d at 264.

<sup>304</sup> See *Long Beach Area Peace Network*, 574 F.3d at 1038 (holding that an exception for spontaneous events “fail[ed] to provide ample alternative means of communication” in light of its unduly restrictive reach).

<sup>305</sup> See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 161 (1969) (Harlan, J., concurring) (“Given the absence of speedy procedures, [the challengers] were faced with a serious dilemma when they received their notice from Mr. Connor. If they attempted to exhaust the administrative and judicial remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday.”); *Pinette v. Capitol Sq. Review & Advisory Bd.*, 874 F. Supp. 791, 794 (S.D. Ohio 1994) (“By delaying action on plaintiffs’ permit . . . , defendants have foreclosed any possibility of a timely administrative appeal from the denial of the permit.”).

<sup>306</sup> See *Gumz*, 669 N.W.2d at 531 (concluding that neither a 60-day advance-notice requirement nor a 45-day review period was narrowly tailored).

<sup>307</sup> See *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1261 (10th Cir. 2004) (acting on a permit request over two months before the scheduled event was “more than adequate . . . to satisfy the demands of the First Amendment”); *Quaker Action Grp.*, 516 F.2d at 735 (“We believe such a deadline is an essential feature of a permit system.”); *Houston Peace Coal. v. Houston City Council*, 310 F. Supp. 457, 460 (S.D. Tex. 1970) (applicants must “have time . . . to resort to judicial processes before the issue they hope to publicize is rendered ineffective or moot by reason[] of the lapse of too much time”); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 872 (“[A]voidance of limbo requires a deadline for action following application.”); see also *Poulos v. New Hampshire*, 345 U.S. 395, 408 (1953) (“We must and do assume that . . . the Portsmouth Council will promptly and fairly administer their responsibility in issuing permits on request.”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (“[S]uch applications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of . . . slow-moving procedures.”); *Grossman*, 33 F.3d at 1206 (“[T]he temporal hurdle of waiting for the permit to be granted may discourage potential speakers.”).

opposite conclusion.<sup>308</sup> As a result, it remains unclear whether permitting regulations must contain built-in deadlines for acting on applications. To avoid potential First Amendment pitfalls, jurisdictions would be well advised to specify that permit applications will be deemed granted if not acted on within a specified time period.<sup>309</sup>

And more broadly, governments should not hesitate to prescribe advance-notice periods that build in sufficient time for effective judicial review<sup>310</sup> and the completion of back-end logistics. Because not all events require the same amount of preparation, one-size-fits-all approaches may be especially vulnerable on First Amendment grounds.<sup>311</sup> The surer course would be to create multiple advance-notice requirements that are tailored to the logistical challenges presented by various types of gatherings. These factors could include the size and location of the proposed event and whether additional governmental services would be required.

#### **e. *Prioritization of Competing Applications***

When multiple applicants request to use the same property for the same time, governments must decide how to prioritize these overlapping applications. Four general approaches are possible. First, priority could be given to those who apply the soonest. Such a first-come, first-served regime would be easily administrable and would avoid any prospect of content-based discrimination.<sup>312</sup> But it would also invite manipulation by savvy actors whose foresight could deprive others of expressive opportunities.<sup>313</sup> A second possibility would be to prioritize certain types of events—perhaps annually recurring or government-sponsored events—and adopt a first-come, first-served approach for all others.<sup>314</sup> In this scenario, the categories of preferred events should be carefully selected to avoid content-based distinctions.

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

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<sup>308</sup> See *S. Ore. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1138 (9th Cir. 2004); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993); *Progressive Labor Party*, 487 F. Supp. at 1059.

<sup>309</sup> See *Quaker Action Grp.*, 516 F.2d at 735.

<sup>310</sup> See *Gumz*, 669 N.W.2d at 531 (“[W]e also appreciate the fact that . . . an unsuccessful applicant [has at least] fifteen days to seek court review of the decision.”).

<sup>311</sup> See *Grossman*, 33 F.3d at 1206 (noting that “the burden placed on park facilities and the possibility of interference with other park users is more substantial” with respect to “large groups”); *World Wide Street Preachers*, 2007 WL 1462130, at \*6 (invalidating an advance-notice period that applied “even [to] small events”); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 871 (invalidating a “blanket” advance-notice period that was unjustified as least as to “diminutive” events).

<sup>312</sup> See *Kissick*, 956 F. Supp. 2d at 993 (“[T]he police have *no* discretion to favor one of the two competing permits—the first-filed automatically takes precedence.”); *Donling v. Twp. of Woodbridge*, No. 05-cv-313, 2005 WL 419734, at \*7 (D.N.J. Mar. 2, 2005) (“[T]he Ordinance’s provision that the first application for a use of a particular space will take priority over any subsequent application for the same space makes sense.”).

<sup>313</sup> Although such a result would not appear to violate the First Amendment, it may be inconsistent with the type of free-speech culture a locality seeks to foster.

<sup>314</sup> See *Utah Animal Rights Coal.*, 371 F.3d at 1251–52 (providing an example of this approach).

method would pose no First Amendment problems.<sup>315</sup> And fourth, permitting regulations could remain silent on how to choose among overlapping applications. This method, however, would seem to confer unbridled discretion on permitting authorities to elevate their preferred viewpoints and suppress disfavored ones, inviting First Amendment challenges.

## **2. Imposing Conditions on Permits**

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

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

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

### **a. Change of Location**

The First Amendment limits the government's ability to issue permits that are contingent on an applicant's willingness to change the location of its proposed event. If the reasons for imposing such a condition are content-neutral, the restriction must be "narrowly tailored to serve a significant governmental interest" and also "leave open ample alternative channels for communication of the information."<sup>316</sup>

Each of these requirements has been treated as having real teeth in this context. As some courts have concluded, entirely forbidding demonstrations in specified areas may be substantially more burdensome than necessary to serve the government's goals.<sup>317</sup> Courts have also found certain alternative locations to be unsatisfactory, either because a particular site was integral to a group's

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<sup>315</sup> See *Black Heritage Soc'y v. City of Houston*, No. H-07-0052, 2007 WL 9770639, at \*9 (S.D. Tex. Dec. 4, 2007) (noting that "the outcome of the coin toss . . . is clearly not content-based").

<sup>316</sup> *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)).

<sup>317</sup> See *Lederman v. United States*, 291 F.3d 36, 45–46 (D.C. Cir. 2002); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227–28 (9th Cir. 1990); *Stauber v. City of New York*, No. 03-cv-9162, 2004 WL 1593870, at \*28–29 (S.D.N.Y. July 16, 2004); *SEIU, Local 660*, 114 F. Supp. 2d at 971.

message<sup>318</sup> or because its intended audience could not be reached elsewhere.<sup>319</sup> Far more often, however, alternative areas have been deemed constitutionally adequate despite being practically inferior in some respect.<sup>320</sup>

One justification for altering the site of a planned demonstration might be that the applicant's preferred venue could not accommodate the expected number of attendees. The D.C. Circuit has suggested that "[limiting] the number of individuals who may demonstrate simultaneously" would be "substantially less restrictive" than forbidding demonstrations altogether in particular areas.<sup>321</sup> But this alternative fails to account for the perspectives of persons who are excluded from assembling in the original location due to crowd-size restrictions. If the number of expected attendees is so large as to threaten substantial harm, governments should consider giving applicants the *option* of either holding their events elsewhere or capping the number of attendees.

Suppose instead that the government required a change of location for content-based reasons—for example, by altering a proposed parade route due to credible threats of violence from surrounding protesters. Such a restriction would violate the First Amendment unless it were the least restrictive means of furthering a compelling governmental interest.<sup>322</sup> Despite the obvious drawbacks of effectuating this form of a "heckler's veto," the overwhelming interest in public safety may sometimes justify otherwise-forbidden measures. As the D.C. Circuit has put it, "[w]hen the choice is between an abbreviated march or a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers, and others in the vicinity."<sup>323</sup> But such a dire choice must actually exist if content-based "adjustments" are to be tolerated.<sup>324</sup>

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<sup>318</sup> See *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1054–55 (2d Cir. 1983); see also *Housing Works v. Safir*, No. 98 Civ. 1994, 1998 WL 823614, at \*9 (S.D.N.Y. Nov. 25, 1998) (finding it "difficult to envision how a march on the sidewalks of Broadway . . . could maintain any coherent form").

<sup>319</sup> See *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999); *Bay Area Peace Navy*, 914 F.2d at 1229; *SEIU, Local 660*, 114 F. Supp. 2d at 972.

<sup>320</sup> See *iMatter Utah v. Njord*, 774 F.3d 1258, 1265 (10th Cir. 2014); *Ross v. Early*, 746 F.3d 546, 559 (4th Cir. 2014); *Marcavage v. City of New York*, 689 F.3d 98, 108 (2d Cir. 2012); *Marcavage*, 659 F.3d at 631; *Startzell v. City of Philadelphia*, 533 F.3d 183, 202–03 (3d Cir. 2008); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1225–26 (10th Cir. 2007); *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005); *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004); *Frye v. Kansas City Police Dep't*, 375 F.3d 785, 790 (8th Cir. 2004); *United for Peace & Justice v. City of New York*, 323 F.3d 175, 177 (2d Cir. 2003); *Hotel Emps. & Restaurant Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 556 (2d Cir. 2002); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 481–82 (2d Cir. 2002); *United States v. Griefen*, 200 F.3d 1256, 1261 (9th Cir. 2000); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1134 (6th Cir. 1991); *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 476 (2d Cir. 1980); *Kissick*, 956 F. Supp. 2d at 1006; *Black Heritage Soc'y*, 2007 WL 9770639, at \*9; *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 395 (D. Mass. 2004).

<sup>321</sup> *Lederman*, 291 F.3d at 45–46.

<sup>322</sup> *Kessler v. City of Charlottesville*, No. 3:17-cv-00056, 2017 WL 3474071, at \*2–3 (W.D. Va. Aug. 11, 2017).

<sup>323</sup> *Christian Knights of the KKK v. Dist. of Columbia*, 972 F.2d 365, 374 (D.C. Cir. 1992).

<sup>324</sup> See *id.* at 376 (accepting the district court's finding that "the threat of violence was not beyond reasonable control"); *Nationalist Movement*, 12 F. Supp. 2d at 192 ("[O]nly the most imminent likelihood of serious danger—a likelihood that is clear and present—will justify governmental action to . . . alter the expression.").

### **b. *Change of Time***

Permit conditions may also be used to alter the starting or ending time of a proposed event. If these conditions are imposed to conform with generally applicable regulations—for example, a ban on demonstrations before 8 AM and after 9 PM—the underlying regulations will be subjected to the First Amendment test reserved for “time, place, and manner” restrictions. Courts have upheld at least three “time” limitations of this sort,<sup>325</sup> but other decisions demonstrate that the test’s tailoring requirement has real practical bite.<sup>326</sup> These cases tend to be highly fact-specific and focus on whether the government’s interests are actually (and narrowly) served by adjusting the timing of planned expression.

Another reason to alter the timing of a proposed event would be to “limit [its] duration,”<sup>327</sup> whether to conserve needed public resources or to ensure the forum’s availability for other permit applicants. Any such restriction, of course, must be tailored to the stated justifications for imposing it<sup>328</sup> and afford the permittee a constitutionally “ample” amount of speaking time.

### **c. *Prohibited Items***

If local officials have reason to believe that violence could erupt at a permitted event, they may wish to append a list of prohibited items as a condition to the permit. Doing so could require analysis under both the Second Amendment and state-level firearms-regulation preemption statutes, as outlined above.<sup>329</sup> Prohibiting specific objects could also burden First Amendment rights in two ways: by conditioning those rights on attendees’ willingness not to bring certain desired objects, and by prohibiting the carrying of items that would be wielded for expressive purposes. If this type of event-specific permit condition is used, officials should issue an order that applies the same restrictions to all persons attending the event. Otherwise, the condition would function as an impermissible speaker-based distinction.<sup>330</sup>

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

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<sup>325</sup> See *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding a prohibition on parading on Saturday morning); *Quaker Action Grp.*, 516 F.2d at 733 (upholding a prohibition on public gatherings during morning and evening rush hours on weekdays); *Abernathy v. Conroy*, 429 F.2d 1170, 1173 (4th Cir. 1970) (upholding a prohibition on parading after 8 PM).

<sup>326</sup> See *SEIU, Local 5*, 595 F.3d at 604 (invalidating a regulation that restricted weekday parading in downtown areas to two one-hour windows); *Cox*, 416 F.3d at 287 (invalidating a prohibition on permitted activities between 8 AM and 1 PM on Sundays); *Beckerman*, 664 F.2d at 512 (invalidating a year-round prohibition on parading after 6 PM); *United Food & Commercial Workers Union, Local 442 v. City of Valdosta*, 861 F. Supp. 1570, 1583 (M.D. Ga. 1994) (invalidating a prohibition on parading after 4 PM on Sundays).

<sup>327</sup> See *Lederman*, 291 F.3d at 46 (assuming the validity of this type of regulation as an alternative to other, more restrictive measures).

<sup>328</sup> See *Quaker Action Grp.*, 516 F.2d at 734 (invalidating a maximum-duration provision that limited the length of permitted events even when no competing application had been filed).

<sup>329</sup> See *supra* Sections [LB](#) and [II.F](#). Such an approach could well be justified under both, depending on the underlying circumstances, the items prohibited, and the precise wording of a state’s preemption law.

<sup>330</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not by others.”).

particular items in public must sometimes yield to the demands of public safety.<sup>331</sup> As always, whether a restriction passes constitutional muster will depend on whether the government has regulated unduly broadly or narrowly in relation to its stated goals. Relevant to this analysis will be the forbidden objects' propensity to be used as weapons, their use as weapons in the past,<sup>332</sup> their centrality to demonstrators' expressive objectives,<sup>333</sup> and the presence or absence of a prohibition on objects with a similar functionality.<sup>334</sup>

In addition, there is no clear answer in the case law to whether security restrictions motivated by a desire to prevent violence should be categorized as content-based or content-neutral. The Seventh Circuit has deemed a weapons restriction to be content-neutral, finding that it targeted only “the possibility that attendees . . . would injure themselves, others, or property,” rather than “the content of the views aired at the rally.”<sup>335</sup> But two other circuits have categorized security measures as content-based, given that they were ultimately traceable to the dangers emanating from participants' hostile reactions.<sup>336</sup> Regardless of which framework applies, it is unlikely that a court would upend local officials' good-faith efforts to protect life and limb absent a significant failure of tailoring.<sup>337</sup>

### 3. Imposing Financial Conditions Through the Permitting Process

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

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<sup>331</sup> See *Potts v. City of Lafayette*, 121 F.3d 1106, 1109, 1112 (7th Cir. 1997) (upholding a restriction on “personal items that can be used as weapons” in light of “the City’s goals of preventing violence and injury at the rally”); *Wilkinson v. Forst*, 832 F.2d 1330, 1338 (2d Cir. 1987) (“[I]n light of the Klan’s stated intentions to bring firearms to their public rallies and use them in self defense if necessary, such inhibition is a legitimate and important objective.”); *United Food & Commercial Workers*, 861 F. Supp. at 1584 (upholding a restriction on carrying “any object or instrumentality with an apparent potential to cause physical injury to persons or damage to property”); see also *Grider v. Abramson*, 180 F.3d 739, 744 (6th Cir. 1999) (“In this anxious and potentially explosive environment, the Louisville police and civil authorities resolved to initiate prophylactic steps to forestall the disorder, hostilities, and consequent personal injuries and property damage patently threatened . . .”).

<sup>332</sup> See *Edwards v. Coeur d’Alene*, 262 F.3d 856, 864–65 (9th Cir. 2001) (“The City does not cite any parade or public assembly . . . in which Coeur d’Alene citizens used sign handles as instruments of violence.”).

<sup>333</sup> See *id.* at 865 (“[T]he ordinance’s total ban on sign supports has an undeniable impact on the manner in which a signholder communicates with the public.”).

<sup>334</sup> See *id.* at 864 n.16 (“If the object being swung was a flagpole, it is not regulated by the ordinance, which regulates fixtures attached to signs and placards, not fixtures attached to flags.”).

<sup>335</sup> *Potts*, 121 F.3d at 1111.

<sup>336</sup> See *Bourgeois v. Peters*, 387 F.3d 1303, 1320 (11th Cir. 2004) (magnetometer searches); *Grider*, 180 F.3d at 749–50 (magnetometer searches); *id.* at 750 (law-enforcement buffer zone). Notably, the *Bourgeois* court suggested that “a mere ban on the use of weapons or incendiary devices at the protest”—even one motivated by ideologically driven violence—should be analyzed as a “manner restriction.” 387 F.3d at 1323.

<sup>337</sup> See *Citizens for Peace in Space*, 477 F.3d at 1221 (“[T]he significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.”).

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

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

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

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

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

**i. *Costs of Providing Governmental Services***

In *Cox v. New Hampshire* (1941), the Supreme Court confirmed that localities may charge variable fees corresponding to the actual costs of “maint[aining] . . . public order” at permitted events.<sup>338</sup> This statement cannot be interpreted literally in light of later decisions forbidding content-based recoupment.<sup>339</sup> But as long as the content of a permittee's message has no bearing on the amount charged, governments enjoy considerable “flexibility of adjustment of fees” to offset the burdens of providing extraordinary public services.<sup>340</sup> Under modern parlance, there is undoubtedly a significant governmental interest in recouping the costs of providing special equipment and facilities, as well as ensuring adequate policing, traffic control, sanitation, and post-event restoration.

Many cases have upheld this type of cost-shifting pursuant to permit conditions.<sup>341</sup> And even decisions invalidating permit fees as content-based have explicitly reaffirmed the validity of content-

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<sup>338</sup> 312 U.S. 569, 577 (1941).

<sup>339</sup> See *infra* Section [III.A.3.b](#).

<sup>340</sup> *Id.*

<sup>341</sup> See *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 368 (5th Cir. 2010); *Sullivan*, 511 F.3d at 36; *Food Not Bombs*, 450 F.3d at 1049; *S. Ore. Barter Fair*, 372 F.3d at 1139; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1320–22; *Stonewall Union*, 931 F.2d at 1134; *Brandt*, 2007 WL 844676, at \*16–17; *United States v. McFadden*, 71 F. Supp. 2d 962, 967 (W.D. Mo. 1999); *United Food & Commercial Workers*, 861 F. Supp. at 1584; *Long Beach Lesbian & Gay Pride, Inc.*, 17 Cal. Rptr. 2d at 874–75; *Morascini v. Comm'r of Pub. Safety*, 675 A.2d 1340, 1353 (Conn. 1996).



neutral cost recoupment.<sup>342</sup> As a result, there is no dispute that permit fees may be imposed to defray these substantial expenses.

Such fees, however, must align with the permitting jurisdiction's actual costs; otherwise, the fees would not be narrowly tailored to serve the government's interests. For example, it would be unconstitutional to charge a fixed fee unrelated to the government's true expenses<sup>343</sup>—even for the purpose of deterring frivolous requests.<sup>344</sup> Nor may a permittee be charged by one jurisdiction for services that *another* jurisdiction has committed to providing by way of assistance.<sup>345</sup> Similarly, if the estimated costs of furnishing additional services exceed the permitting jurisdiction's actual costs, any excess prepaid amounts must be reimbursed to the permittee.<sup>346</sup>

ii. *Costs of Administering Permit Systems*

As the Supreme Court also has made clear, permit applicants may be charged a fixed fee that covers the administrative costs of processing their applications.<sup>347</sup> These can include the logistical expenses of “planning a route that is safe and secure” and “that has adequate personnel to provide traffic control and police protection.”<sup>348</sup> A corollary of this principle is that an application fee will be invalidated if the government cannot demonstrate that the fee corresponds to its actual costs in processing permit applications.<sup>349</sup>

iii. *Insurance Requirements*

The Supreme Court has suggested that permitting systems may be used to “assure financial accountability for damage caused by [an] event.”<sup>350</sup> Perhaps the most effective method of securing financial accountability is to require permittees to purchase event-specific liability insurance. The Court itself has never addressed when such a requirement might violate the First Amendment.

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<sup>342</sup> See *Surita v. Hyde*, 665 F.3d 860, 876 (7th Cir. 2011); *Nationalist Movement v. City of York*, 481 F.3d 178, 184 (3d Cir. 2007); *City of Gary*, 334 F.3d at 682; *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985).

<sup>343</sup> *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943).

<sup>344</sup> *Bullock v. Carter*, 405 U.S. 134, 145–46 (1972); *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983).

<sup>345</sup> *Invisible Empire of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988).

<sup>346</sup> *Sullivan*, 511 F.3d at 37–38.

<sup>347</sup> See *Cox*, 312 U.S. at 577 (explaining that permitting authorities may charge fees to “meet the expense incident to the administration of the Act”); see also *City of York*, 481 F.3d at 183 (upholding a permit-application fee); *Stonewall Union*, 931 F.2d at 1133 (same); *Black Heritage Soc’y*, 2007 WL 9770639, at \*10 (same).

<sup>348</sup> *Black Heritage Soc’y*, 2007 WL 9770639, at \*10.

<sup>349</sup> See *Citizens Action Grp.*, 723 F.2d at 1056 (invalidating an administrative fee for this reason); *Ky. Restaurant Concepts v. City of Louisville*, 209 F. Supp. 2d 672, 692–93 (W.D. Ky. 2002) (same); *Moffett v. Killian*, 360 F. Supp. 228, 232 (D. Conn. 1973) (same); *Gumz*, 669 N.W.2d at 535 (same); see also *729, Inc. v. Kenton Cty. Fiscal Court*, 515 F.3d 485, 504 (6th Cir. 2008) (remanding for consideration of whether an unusually expensive database, “customized for the licensing regime,” was a narrowly tailored method of defraying necessary administrative costs).

<sup>350</sup> *Thomas v. Chicago Park Dist.*, 534 U.S. at 322.

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

Decisions upholding insurance requirements have generally done so in narrow, case-specific ways. For example, the Seventh Circuit rejected a facial challenge to a permitting regulation that required applicants to obtain liability insurance in an amount determined by “the size of the event and the nature of the facilities involved.”<sup>351</sup> The court’s decision did not rule out the possibility of as-applied challenges to insurance requirements that are excessive in relation to the risk posed by a particular event. And the Ninth Circuit has, on two separate occasions, upheld provisions that gave permittees the *option* of purchasing insurance, signing an indemnification agreement, or redesigning their proposed events to minimize specific hazards highlighted by the City Manager.<sup>352</sup> Neither opinion indicated whether an insurance requirement as such would pass constitutional muster.

Far more often, courts have struck down insurance-related conditions—usually due to a failure of tailoring.<sup>353</sup> These decisions have rejected unduly large coverage amounts, demanding a connection between the government’s liability risks for a particular event and the size of resulting insurance requirements.<sup>354</sup> Conversely, one such requirement has been struck down as underinclusive (i.e., for exempting certain events that equally implicated the interests purportedly justifying additional charges).<sup>355</sup>

Moreover, courts have invalidated insurance requirements upon perceiving that the circumstances rendered *any* amount of insurance unnecessary. In these cases, a permitted event did not implicate the government’s asserted interests,<sup>356</sup> a permittee had taken precautions to reduce the potential hazards posed by its events,<sup>357</sup> and insurance requirements proved duplicative of state sovereign

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<sup>351</sup> *Thomas v. Chicago Park Dist.*, 227 F.3d at 925.

<sup>352</sup> See *Long Beach Area Peace Network*, 574 F.3d at 1031; *Food Not Bombs*, 450 F.3d at 1057. Notably, the requirement in *Food Not Bombs* did not even apply to expressive demonstrations unless their organizers had been successfully sued for causing harm at a previous event. See 450 F.3d at 1057; see also *Black Heritage Soc’y*, 2007 WL 9770639, at \*14 (upholding an insurance requirement that applied only to parades that included animals, floats, or motorized vehicles).

<sup>353</sup> See *Van Arnam v. Gen. Servs. Admin.*, 332 F. Supp. 2d 376, 393 (D. Mass. 2004) (“The lower courts have generally found mandatory insurance provisions to be unconstitutional . . .”); *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 878 (“[C]ourts that have reviewed parade insurance requirements have uniformly found them to overreach . . .”).

<sup>354</sup> See *iMatter Utah*, 774 F.3d at 1269 (“Utah must offer *some* evidence that this amount, and not some lesser amount, is necessary.”); *Citizens Action Grp.*, 723 F.2d at 1057 (“[N]o basis has been offered for the amount of coverage required.”); *Green Party of N.J. v. Hartz Mtn. Indus.*, 752 A.2d 315, 332 (N.J. 2000) (“[T]his record fall[s] far short of demonstrating that the insurance requirements posed . . . are required to achieve legitimate . . . objectives”).

<sup>355</sup> See *Wilson ex rel. U.S. Nationalist Party v. Castle*, No. 93-3002, 1993 WL 276959, at \*4 (E.D. Pa. July 15, 1993).

<sup>356</sup> See *iMatter Utah*, 774 F.3d at 1269–70; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 878.

<sup>357</sup> See *Citizens Action Grp.*, 723 F.2d at 1056.

immunity,<sup>358</sup> Tort Claims Act legislation,<sup>359</sup> and the government’s existing insurance arrangements.<sup>360</sup> Even more drastically, some courts have struck down insurance requirements after concluding that the government’s interests could be served less restrictively by applying existing civil and criminal sanctions to wrongdoers.<sup>361</sup> This rationale—if accepted—would virtually eliminate the availability of insurance as a constitutionally permissible permitting condition.

In any event, permittees cannot be required to purchase insurance to guard against harms for which they are not legally responsible, such as “the reactions of third-party bystanders” or a government’s own negligence.<sup>362</sup> As the Supreme Court has explained, a person or entity engaged in First Amendment expression may not be held liable for a third party’s unlawful conduct absent “a finding that [it] authorized . . . or ratified” that conduct.<sup>363</sup>

#### iv. *Indemnification Agreements*

Many permitting regulations also require the permittee to indemnify, defend, and hold harmless the issuing jurisdiction and all of its officers, employees, and agents from any legal claims arising from the permitted activity. Because these liability-shifting devices “can have an inhibiting effect on speech,”<sup>364</sup> they are subject to all of the First Amendment constraints applicable to insurance requirements. Most notably, indemnification agreements cannot require permittees to assume legal responsibility for the unlawful acts of third parties<sup>365</sup> or governmental officials.<sup>366</sup> Indemnification provisions that do not clearly exclude these outcomes are thus particularly susceptible to constitutional challenge.

#### b. *Content-Based Financial Obligations Forbidden*

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

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

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<sup>358</sup> See *iMatter Utah*, 774 F.3d at 1269.

<sup>359</sup> See *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 877.

<sup>360</sup> See *Mayor of Thurmont*, 700 F. Supp. at 285.

<sup>361</sup> See *Citizens Action Grp.*, 723 F.2d at 1057; *Collin v. Smith*, 578 F.2d 1197, 1209 (7th Cir. 1978); *Wilson*, 1993 WL 276959, at \*4; *Mayor of Thurmont*, 700 F. Supp. at 285; see also *iMatter Utah*, 774 F.3d at 1271 (striking down an indemnification provision after observing that “Utah has offered no evidence that its existing tort and criminal law is insufficient to regulate the behavior of the permittees”).

<sup>362</sup> *iMatter Utah*, 774 F.3d at 1270.

<sup>363</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982).

<sup>364</sup> *City of York*, 481 F.3d at 186 n.9.

<sup>365</sup> *Long Beach Area Peace Network*, 574 F.3d at 1040–41; *Stand Up America Now v. City of Dearborn*, 969 F. Supp. 2d 843, 849 (E.D. Mich. 2013).

<sup>366</sup> *Long Beach Area Peace Network*, 574 F.3d at 1040; *Stand Up America Now*, 969 F. Supp. 2d at 849.

determining whether financial requirements are content-based. *Forsyth County* struck down a system of adjusting permit fees to defray “the cost of necessary and reasonable protection of persons participating in or observing” permitted events.<sup>367</sup> To determine the appropriate number of police—and thus the cost of maintaining public order—the administrator was required to “examine the content of the message that is conveyed” and “estimate the response of others to that content.”<sup>368</sup> The Court held that “[s]peech cannot be financially burdened” on content-based grounds—that is, depending on how listeners might respond to it.<sup>369</sup>

Both before and since *Forsyth County*, courts have struck down a number of financial obligations as impermissibly content-based.<sup>370</sup> Some courts have even regarded insurance requirements as necessarily content-based, given that controversial speakers tend to be charged higher premiums<sup>371</sup> (and may find themselves shut out of the insurance market altogether<sup>372</sup>). As the First Circuit has explained, insurance requirements “implicate[] issues of viewpoint discrimination” because “an insurance company may charge more depending on the group being covered.”<sup>373</sup>

In addition, the law is unsettled on whether sweeping indemnification requirements are inherently content-based. Courts disagree over whether permittees may be required to defend the government against *all* suits relating to the permittees’ conduct—even baseless ones—or only suits that are not frivolous in nature. The Ninth Circuit has upheld the former type of requirement, reasoning that the groundlessness of a legal claim “cannot be established until the defense has already been provided.”<sup>374</sup> The Tenth Circuit, by contrast, has reasoned that a duty to defend against even frivolous suits “raises the possibility of a ‘heckler’s veto,’ by which third parties who disagree with

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<sup>367</sup> 505 U.S. 123, 134 (1992).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> See *Surita*, 665 F.3d at 876–77; *Long Beach Area Peace Network*, 574 F.3d at 1040; *City of York*, 481 F.3d at 185–86; *City of Gary*, 334 F.3d at 680–82; *Nuclear Freeze Campaign*, 774 F.2d at 1524–25; *New Century Found. v. Robertson*, 400 F. Supp. 3d 684, 701–02 (M.D. Tenn. 2019); *Coll. Republicans*, 2018 WL 804497, at \*2–3; *SEIU v. City of Houston*, 542 F. Supp. 2d 617, 640 (S.D. Tex. 2008); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1030–31 (C.D. Cal. 2002); *First Puerto Rican Festival v. City of Vineland*, 108 F. Supp. 2d 392, 395 (D.N.J. 1998); *Indo-Am. Cultural Soc’y v. Twp. of Edison*, 930 F. Supp. 1062, 1068 (D.N.J. 1996); *Pinette*, 874 F. Supp. at 795; *Gay & Lesbian Servs. Network, Inc. v. Bishop*, 832 F. Supp. 270, 275 (W.D. Mo. 1993); *Mayor of Thurmont*, 700 F. Supp. at 285–86; *Invisible Empire of the Knights of the KKK v. City of West Haven*, 600 F. Supp. 1427, 1434–35 (D. Conn. 1985).

<sup>371</sup> See *Collin*, 578 F.2d at 1208–09; *Mayor of Thurmont*, 700 F. Supp. at 285; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 877; see also *Van Arnam*, 332 F. Supp. 2d at 398 (“[L]iability premiums are higher for more controversial speakers.”).

<sup>372</sup> See *Van Arnam*, 332 F. Supp. 2d at 405 (“Where a belligerent counterdemonstration is expected, the insurance industry is likely to refuse to issue insurance at all . . . .”); *Pritchard v. Mackie*, 811 F. Supp. 665, 668 (S.D. Fla. 1993) (“[T]he most heinous political groups in American society may find it difficult, if not impossible, to actually purchase insurance.”); see also *Citizens Action Grp.*, 723 F.2d at 1056 n.2 (third parties’ decisions to reject insurance applications “may raise . . . constitutional issues”).

<sup>373</sup> *Sullivan*, 511 F.3d at 43 n.15.

<sup>374</sup> *Food Not Bombs*, 450 F.3d at 1057; see also *id.* (“[Indemnification] must protect against both well-founded and unfounded claims to be useful.”).

the content of an organization’s speech could . . . punish an organization after the event”<sup>375</sup> through vexatious lawsuits.

Because most cost-shifting and liability-shifting clauses can be construed to require *some* consideration of content, jurisdictions would be well served to insert a “no-content” proviso in each of these types of provisions. These disclaimers—which clarify that neither a speaker’s message nor the reactions of others may be considered<sup>376</sup>—insulate permit fees and indemnification provisions from facial unconstitutionality (though not as-applied challenges) under *Forsyth County*.<sup>377</sup>

Courts have also held—at least in the context of parades and festivals—that administrators can guard against content-based invalidity by relying purely on information provided by applicants (e.g., the estimated number of attendees) in calculating the cost of necessary services or the amount of financial risk.<sup>378</sup> One court has even applied this logic to public demonstrations, reasoning that when an *applicant* accounts for the possibility of a hostile audience, “it is not the [government] that is predicting the listener reaction to the content of the speech but the requesting party.”<sup>379</sup> Notwithstanding this decision, it is questionable whether permitting authorities should be able to evade *Forsyth County* simply by requiring applicants to provide information about the very factors that officials are forbidden from considering.

Finally, courts have held that governments may selectively subsidize permitted events by waiving generally applicable permit fees for those events.<sup>380</sup> This is but another application of the general First Amendment principle that governments “may freely subsidize private speech of [their] choice, while not subsidizing other private speech.”<sup>381</sup> As long as these waivers amount to “singling out . . . favored messages for special treatment” rather than “singling out disfavored viewpoints for

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<sup>375</sup> *iMatter Utah*, 774 F.3d at 1271 n.8 (quotation marks omitted); *Food Not Bombs*, 450 F.3d at 1051 n.26 (Berzon, J., dissenting) (objecting to such a requirement as enabling “an after-the-fact heckler’s veto in the form of a costly, non-meritorious lawsuit”).

<sup>376</sup> See *Sullivan*, 511 F.3d at 22 (“The permit fee will not include the cost of police protection for public safety.”); *Food Not Bombs*, 450 F.3d at 1049 (“[A] permittee shall not be required to provide for or pay for the cost of public safety personnel who are present to protect event attendees from hostile members of the public or counter-demonstrators or for general law enforcement in the vicinity of the event.”); *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1322 (“[N]o consideration may be given to the message of the festival, nor to the content of speech, . . . nor to any assumptions or predictions as to the amount of hostility which may be aroused in the public by the content of speech or message conveyed by the festival.”).

<sup>377</sup> See *Sullivan*, 511 F.3d at 36; *Food Not Bombs*, 450 F.3d at 1049; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1322. The same cannot be said of insurance requirements, since the insurance market necessarily operates through the content-sensitive judgments of private actors.

<sup>378</sup> See *Sullivan*, 511 F.3d at 36; *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1321; *Stonewall Union*, 931 F.2d at 1135.

<sup>379</sup> *Brandt*, 2007 WL 844676, at \*18; see also *id.* (“[W]ho determines the need for security resources is highly relevant to whether or not the government . . . is making a content-based determination.”) (emphasis added).

<sup>380</sup> See *Int’l Women’s Day*, 619 F.3d at 361; *Stonewall Union*, 931 F.2d at 1137–38; *Long Beach Lesbian & Gay Pride*, 17 Cal. Rptr. 2d at 879.

<sup>381</sup> *Int’l Women’s Day*, 619 F.3d at 361 (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983)).

sanction,”<sup>382</sup> such unequal sponsorship poses no First Amendment problem.

### **c. Unfettered Discretion Forbidden**

As explained above in Section [I.A.2.c](#), any financial conditions imposed through the permitting process must not result from government officials’ standardless discretion. The Supreme Court has justified this rule—one that applies to all types of speech restrictions—as a safeguard against efforts to “suppress[] a particular point of view.”<sup>383</sup>

### **d. Is an Indigency Exception Constitutionally Required?**

Although some permitting systems expressly waive financial requirements for persons who are unable to afford them,<sup>384</sup> not all jurisdictions have created an indigency exception. Without such an exemption, certain forms of expression—those for which a permit is required—will be accessible only to persons wealthy enough to afford them.

The Supreme Court has never considered whether an indigency exception is constitutionally required in this context. Four federal circuit courts have held that indigent applicants may be deprived of the ability to obtain a permit as long as ample alternative channels remain for their expression.<sup>385</sup> A few other federal courts, however, have either held or strongly implied that indigent applicants cannot be treated less favorably due to their inability to pay requisite fees and costs.<sup>386</sup>

### **e. Content-Neutrality At Any Cost?**

Because speakers with inflammatory messages cannot be charged larger permit fees on account of those messages, governments are “compelled to spend significant sums of money to preserve order and prevent violence at these rallies.”<sup>387</sup> First Amendment doctrine contemplates that permitting jurisdictions will bear these expenses—“however great”<sup>388</sup>—notwithstanding professed “budgetary

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<sup>382</sup> *Id.*; see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (“If the NEA were to leverage its power to award subsidies . . . into a penalty on disfavored viewpoints, then we would confront a different case.”); *Regan*, 461 U.S. at 548 (“The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.” (quotation marks and alteration omitted)).

<sup>383</sup> 505 U.S. at 130 (quotation marks omitted).

<sup>384</sup> Indigency provisions are subject to all of the usual First Amendment principles, including the requirement of narrow tailoring to achieve the government’s stated goals. See *Black Heritage Soc’y*, 2007 WL 9770639, at \*12 (“Whether or not the First Amendment requires the City to waive the permit fee for those who cannot afford to pay, once the City establishes such a waiver, it must respect constitutional limits.”).

<sup>385</sup> See *iMatter Utah*, 774 F.3d at 1264; *Sullivan*, 511 F.3d at 41–42; *Stonewall Union*, 931 F.2d at 1137; *Nuclear Freeze Campaign*, 774 F.2d at 1523–24; *Brandt*, 2007 WL 844676, at \*24; *Gumz*, 669 N.W.2d at 537, 539.

<sup>386</sup> See *City of Gary*, 334 F.3d at 681; *Wilson*, 1993 WL 276959, at \*4; *City of West Haven*, 600 F. Supp. at 1435; see also *729, Inc.*, 515 F.3d at 503 (stating that permit fees “must not be so high as to deter constitutionally protected speech”); *City of West Haven*, 600 F. Supp. at 1435 (“[T]he exercise of fundamental constitutional rights cannot be conditioned upon an individual’s wealth.”).

<sup>387</sup> *Wilkinson*, 832 F.2d at 1337.

<sup>388</sup> *City of West Haven*, 600 F. Supp. at 1434.

constraints.”<sup>389</sup> At some point, however, “a city, county, or state will simply not have the available personnel and not have the available funds.”<sup>390</sup> This is especially true when controversial groups repeatedly return to the same city or town to stage expensive rallies. Bearing these costs in full may deprive local governments of critical resources that most communities would value more highly than the ability to engage in duplicative public demonstrations.<sup>391</sup>

Does the Constitution require local governments to facilitate permitted speech at any cost, even if it drives them into bankruptcy? Under a strict reading of *Forsyth County*—one that does not account for extraordinary background conditions—the answer appears to be yes. But it is far from certain that courts would dutifully follow *Forsyth County* if doing so could threaten that “public order without which liberty itself would be lost.”<sup>392</sup> As localities find themselves absorbing increasingly exorbitant costs, time will tell if the rule of *Forsyth County* is actually as unyielding as it appears.

## **B. Other Event-Specific Tools for Protecting Public Safety**

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

### **1. Preparatory Measures**

#### **a. Searches for Prohibited Items**

As explained above,<sup>393</sup> the Constitution leaves ample room for local authorities to prohibit persons who attend public events from bringing items that could be used as weapons. It stands to reason that if these restrictions are constitutional, officials may also implement generally applicable, minimally intrusive searches to screen attendees for forbidden items. Yet mass searches of this sort—ones conducted without warrants or individualized suspicion—represent a departure from ordinary Fourth Amendment principles. And the First Amendment further limits officials’ ability to implement search methods likely to deter expression. The constitutionality of such measures will depend on the specific facts justifying a particular search protocol, as well as its manner of implementation.

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<sup>389</sup> *Gay & Lesbian Servs. Network*, 832 F. Supp. at 275; see also *Pinette*, 874 F. Supp. at 794 (refusing to allow concerns about “the city’s already limited budget” to override *Forsyth County*’s prohibition on content-based fees).

<sup>390</sup> Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1689 (2019).

<sup>391</sup> As one court has noted, “the costs of special services . . . affect[] [governments’] ability to preserve and allocate resources in the interest of the health, safety, and welfare of the [public] as a whole.” *Brandt*, 2007 WL 844676, at \*22.

<sup>392</sup> *Cox*, 312 U.S. at 574; see also Schauer, *supra* note 390, at 1689 (“[P]rotecting speakers exercising their First Amendment rights will come at some cost to . . . protecting or enforcing other constitutional rights.”).

<sup>393</sup> See *supra* Section [III.A.2.c](#).

i. *First Amendment*

Searching attendees for prohibited items can be a powerful tool for preserving an atmosphere conducive to “free speech and assembly rights.”<sup>394</sup> But the fact that a prohibited-items list satisfies the First Amendment does not mean that a resulting search protocol necessarily does. Such measures will fail the relevant tailoring requirement if they are exceedingly intrusive, or if they are poorly adapted to detecting the types of items that have been forbidden. Thus, although the Sixth Circuit once found a magnetometer search to be “narrowly fashioned to further a compelling governmental interest in public safety and order,”<sup>395</sup> the Eleventh Circuit later deemed that same technique to be “substantially underinclusive” with respect to the government’s professed interests.<sup>396</sup> A policy of searching attendees’ bags and other personal items could be an appropriate way to strike this balance<sup>397</sup>—especially if attendees are given prior notice that their effects will be subject to inspection.

The Eleventh Circuit has also held that mass searches at public demonstrations—as a type of speech restriction—must not result from the “unbridled discretion” of law enforcement.<sup>398</sup> Under this view, the police may implement mass suspicionless searches only pursuant to advance legislative authorization (via ordinance or otherwise). In the same decision, the Eleventh Circuit further held that a magnetometer search functioned as both an impermissible prior restraint and an unconstitutional condition on the exercise of First Amendment rights.<sup>399</sup> But it is difficult to view these conclusions as anything other than add-ons to the court’s tailoring analysis, which performed all the relevant work. And that analysis was itself driven by the government’s failure to identify any genuine security threat.<sup>400</sup> If such a showing has been made, it is unlikely that a court would venture to micromanage the precise policing tools selected to keep demonstrators safe.<sup>401</sup>

ii. *Fourth Amendment*

Although searches conducted without a warrant are presumptively unreasonable, warrants and individualized suspicion are not required (1) “where special needs . . . make the warrant and probable-cause requirement impracticable,”<sup>402</sup> and (2) “where the primary purpose of the searches is

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<sup>394</sup> *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999).

<sup>395</sup> *Id.*; see also *Pinette*, 874 F. Supp. at 793 (“Walk-through and hand-held magnetometers . . . were successful in preventing injury and property damage”).

<sup>396</sup> *Bourgeois*, 387 F.3d at 1322.

<sup>397</sup> See *Lederman v. United States*, 291 F.3d 36, 46 (D.C. Cir. 2002) (suggesting that officials could have “require[d] that demonstrators present bags and other personal possessions to police officers for screening”).

<sup>398</sup> *Bourgeois*, 387 F.3d at 1317; see also *Stauber*, 2004 WL 1593870, at \*31 (noting, in the course of resolving a Fourth Amendment challenge, that “there is no written policy for deciding when bag searches will be conducted”).

<sup>399</sup> See *Bourgeois*, 387 F.3d at 1319–20, 1324–25.

<sup>400</sup> See *id.* at 1311–12, 1318.

<sup>401</sup> See *Grider*, 180 F.3d at 749 (stating, as part of a strict-scrutiny analysis, that magnetometer searches were “among the least restrictive available means of preserving social order and safeguarding the physical security of all persons” (emphasis added)).

<sup>402</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Skinner v. Rwy. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989)) (alteration in original).



distinguishable from the general interest in crime control.”<sup>403</sup> Each of these conditions applies to mass searches at public gatherings conducted for the purpose of protecting demonstrators against credible (if diffuse) security threats.<sup>404</sup>

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

- pat-down searches for all attendees at a public rally—even one that authorities feared could “erupt into violence”;<sup>405</sup>
- a bag-search policy that exempted a significant portion of attendees, and where the security concerns were based on “speculative” and “third-hand” information;<sup>406</sup>
- a bag-search policy that had not been communicated in advance and that was supported by “overly vague” security threats;<sup>407</sup> and
- magnetometer searches for all attendees in the absence of any credible threat to public safety.<sup>408</sup>

By contrast, the Second Circuit has approved the use of magnetometer searches (followed by individualized frisks) at a public rally with a demonstrated “potential for violent confrontations.”<sup>409</sup> The Sixth Circuit has reached the same conclusion, albeit in dicta.<sup>410</sup> In sum, under current Fourth Amendment doctrine, facially valid prohibited-items orders may be implemented through mass-search protocols that are not unnecessarily intrusive in relation to an articulable underlying threat.

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<sup>403</sup> *Id.* (quotation marks omitted) (alteration omitted).

<sup>404</sup> The Eleventh Circuit has held to the contrary, reasoning that “public safety c[annot] be seen as a governmental interest independent of law enforcement” when a search detects unlawfulness (e.g., a violation of a prohibited-items order). *Bourgeois*, 387 F.3d at 1312–13. This analysis—which flouts both common practice and common sense—overlooks that governments typically do not search attendees at public demonstrations for the purpose of “conducting criminal investigations.” *Patel*, 135 S. Ct. at 2452.

<sup>405</sup> *Wilkinson*, 832 F.2d at 1337, 1340. The court noted, however, that “more intrusive measures might be justified by future events.” *Id.* at 1341.

<sup>406</sup> *Norwood v. Bain*, 143 F.3d 843, 853–54 (4th Cir. 1998), *aff’d by an equally divided court*, 166 F.3d 243, 245 (4th Cir. 1999) (en banc).

<sup>407</sup> *Staubert*, 2004 WL 1593870, at \*31. The court emphasized that “the ban on [bag] searches at demonstrations is not categorical, and may be justified under different circumstances.” *Id.* at \*32.

<sup>408</sup> *Bourgeois*, 387 F.3d at 1311–13, 1316.

<sup>409</sup> *Wilkinson*, 832 F.2d at 1341; *see also id.* at 1335 (“[T]he Klan . . . made known its intention to arm its members for purposes of self-defense.”); *id.* at 1341 (noting that “a multitude of rifles and shotguns were brought by Klan members” to an earlier rally).

<sup>410</sup> *See Grider*, 180 F.3d at 750 n.14 (characterizing an unpreserved Fourth Amendment challenge to a magnetometer search as “misconceived”); *see also Norwood v. Bain*, 166 F.3d 243, 245 (4th Cir. 1999) (en banc) (Wilkins, J., writing separately) (urging that officers must be able to “avert a concrete threat of great public harm with a relatively unobtrusive and appropriately effective warrantless search not supported by individualized suspicion”).

### **b. *Physical Separation of Hostile Groups***

Another common policing technique at volatile public demonstrations is to facilitate the physical separation of opposing camps. Techniques like buffer zones and barricades can help to prevent violent confrontations, thereby “protect[ing] those actively exercising their rights” from forcible silencing.<sup>411</sup> In fact, courts appear to have evinced no skepticism of these crowd-control measures on First Amendment grounds (at least when implementation relies on participants’ self-sorting).<sup>412</sup> Whether or not such practices are best classified as content-based under the circumstances,<sup>413</sup> they should have little difficulty satisfying whichever standard of scrutiny applies—as long as they represent good-faith efforts to protect public safety.

The Sixth Circuit case of *Grider v. Abramson* is illustrative. *Grider* involved a “high-security barricade” erected to separate the Klan’s staging area from the general public, with further insulation provided by a police-only buffer zone.<sup>414</sup> Despite this technique’s classification as content-based<sup>415</sup>—and although it inhibited attendees from simultaneously interacting with attendees of both gatherings<sup>416</sup>—the court readily held that the separation of antagonistic groups survived strict scrutiny. *Grider* deemed this technique to be “a necessary and narrowly tailored means of promoting the compelling public interest in preserving community peace and safety, especially in the face of threatened violence which might impede free expression by the rally participants.”<sup>417</sup>

### **c. *Canceling Events Altogether?***

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

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<sup>411</sup> *Olivieri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986).

<sup>412</sup> See *id.*; *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 254 (6th Cir. 2015) (identifying “erecting a barricade for free speech” as an “easily identifiable measure[] that could have been taken”); *City of Gary*, 334 F.3d at 680 (“The City’s brief states that ‘standard requirements for a Ku Klux Klan rally include fencing and barricades that enforce separation of the Klan from other attendees, who, themselves, must be separated into separate enclosures for pro and con demonstrators . . . .’”); *Wilkinson*, 832 F.2d at 1335 (“Plaintiffs do not challenge . . . the police policy of separating contending forces at the rallies.”); *id.* at 1341 (opining that the “separation of hostile forces” is a permissible technique for “deal[ing] with . . . challenges to safety and order”); *Coal. to Protest Dem. Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 75 (D. Mass 2004) (“Many of these security measures were designed to minimize the necessity and likelihood of physical confrontation—in essence, hand-to-hand combat . . . .”); *Pinette*, 874 F. Supp. at 793 (“A ten foot high chain link fence was erected in order to separate the Klan from the protestors.”).

<sup>413</sup> Compare *Olivieri*, 801 F.2d at 607 (classifying a barricaded enclosure as content-neutral “since it is applicable to both groups”), with *Grider*, 180 F.3d at 751 (“[T]he police buffer zone was created to prevent potential violence instigated by speech content, and thus comprised a content-based stricture.”).

<sup>414</sup> 180 F.3d at 744.

<sup>415</sup> See *id.* at 751.

<sup>416</sup> See *id.* at 750.

<sup>417</sup> *Id.* at 751; see also *id.* at 750 (identifying a “compelling state interest in separating two mutually antagonist[ic] and potentially hostile congregations”); *id.* (“[T]he sequestering of the counter-demonstrators encouraged, rather than impeded, free speech and assembly rights, in that it safeguarded rally participants from expression-stifling intimidation and threatened injuries.”).

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

In general, government may not “suppress legitimate First Amendment conduct as a prophylactic measure” to prevent anticipated violence.<sup>418</sup> Persons “who actually engage in [violent] conduct” should be dealt with on an individualized basis;<sup>419</sup> if the situation warrants, law enforcement may also be able to disperse an unruly gathering by declaring an unlawful assembly.<sup>420</sup> But it is far from certain that the same effect may be achieved *anticipatorily* by calling off a scheduled gathering before it begins. Such a drastic measure—if it could ever be constitutional—must surely be grounded in “specific, reliable information that organized violence of a serious nature is about to occur.”<sup>421</sup> And the outright cancellation of an event would fail strict scrutiny if the risk of impending harm could be mitigated through other, less restrictive means (such as the techniques discussed above).

## 2. Reactive Measures

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

Perhaps the most settled feature of First Amendment doctrine is that speakers cannot be preemptively silenced simply because their messages might prove controversial. As numerous courts have concluded, this “heckler’s veto” prohibition precludes governments from denying permits to applicants whose demonstrations could cause others to react in anger.<sup>422</sup> And the rule is often stated so sweepingly as to forbid *any* form of response-based silencing, even if violence is presently unfolding.<sup>423</sup> Yet a different array of governmental interests will be implicated when a threat to public safety has actually materialized. Under these conditions, strict application of the heckler’s-veto rule could deprive police of an essential tool for averting tragedy.

The Sixth Circuit has confronted this tension most directly. In *Bible Believers v. Wayne County*, the court did not categorically foreclose the removal of controversial speakers if necessary to stave off immediate harm. It instead held that, “before removing [a] speaker due to safety concerns, . . . the police must first make bona fide efforts to protect the speaker from the crowd’s hostility by other, less restrictive means.”<sup>424</sup> The court made clear that silencing a speaker in this way “will seldom, if ever, constitute the least restrictive means available” for serving a compelling governmental

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<sup>418</sup> *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996); see also *Wilkinson*, 832 F.2d at 1337 (“[A] public authority is usually not in a position to ban a Klan rally on the theory that it will arouse community opposition.”).

<sup>419</sup> *Collins*, 110 F.3d at 1372.

<sup>420</sup> See *infra* Section [II.C](#); see also *Menotti*, 409 F.3d at 1137 (“[O]nce multiple instances of violence erupt, with a breakdown in social order, a city must act vigorously . . . to restore order for all of its residents and visitors.”).

<sup>421</sup> *Collins*, 110 F.3d at 1373.

<sup>422</sup> See *supra* Section [I.A.1.a](#).

<sup>423</sup> See, e.g., *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292–93 (9th Cir. 2015) (“If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech.”); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (“A police officer has the duty not to ratify and effectuate a heckler’s veto . . .”).

<sup>424</sup> 805 F.3d at 255.

interest.<sup>425</sup> In particular, “containing or snuffing out the lawless behavior of the rioting individuals” must *always* be attempted before effectuating a heckler’s veto.<sup>426</sup> Other courts have similarly characterized the latter option as a last resort.<sup>427</sup>

## **b. Dealing with Unwanted Protesters**

### *i. Disruption of Permittees’ Speech*

Even though audience hostility generally cannot justify silencing a permittee’s speech, may the police remove surrounding persons whose behavior interferes with a permittee’s ability to convey its message? Ordinarily, the “preferred First Amendment remedy” for undesirable speech is “more speech, not enforced silence.”<sup>428</sup> Yet a key purpose of permitting systems is to allocate scarce and valuable expressive opportunities among competing claimants. Obstructing a permit-holder’s efforts to engage in speech could negate the outcome of this carefully managed process. Some courts have even insisted that the police *must* restrain private actors from drowning out or otherwise thwarting a permittee’s speech—even if that interference takes the form of counter-speech.<sup>429</sup>

Although any such duty likely would not be legally enforceable,<sup>430</sup> there is little doubt that police are *authorized* to preserve the conditions for effective communication by permittees. The Third Circuit, for example, has held that officers had “ample justification” to remove protesters who were using bullhorns and microphones to render scheduled speech inaudible.<sup>431</sup> As the court remarked, “[t]he right of free speech does not encompass the right to cause disruption . . . of an event covered by a

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<sup>425</sup> *Id.* at 248.

<sup>426</sup> *Id.* at 252. Other “easily identifiable measures” available in *Bible Believers* included “increasing police presence in the immediate vicinity” and “erecting a barricade for free speech.” *Id.* at 254.

<sup>427</sup> See *Deferio v. City of Syracuse*, 306 F. Supp. 3d 492, 512 (N.D.N.Y. 2018) (“[P]olice officers may not—as a first reaction in the name of safety—punish a person’s protected speech in the face of limited hostilities . . . .”); *Padgett v. Auburn Univ.*, No. 3:17-cv-231, 2017 WL 10241386, at \*2 (M.D. Ala. Apr. 18, 2017) (“Security personnel may not cut off the free speech of Mr. Spencer or other persons except as a last resort to ensure security or to prevent violence or property damage . . . .”).

<sup>428</sup> *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

<sup>429</sup> See *MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir. 2001) (police were “obliged to . . . prevent disruptive or even violent confrontations” at permitted events (emphasis added)); *Grider*, 180 F.3d at 751 (“[T]he formally slated speakers possessed a protected interest in addressing their audience under orderly and audible conditions.”); *id.* at 751–52 (“[T]he police are obligated to prevent suppression of public speech . . . by spectators.”); *Glason*, 518 F.2d at 906 (“A police officer . . . must take reasonable action to protect from violence persons exercising their constitutional rights.”).

<sup>430</sup> See *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (denying that an officer’s “*failure to prevent* [one person] from violating [another’s] [F]irst [A]mendment rights transgressed any clearly established legal norm”); *Kessler v. City of Charlottesville*, No. 3:19-cv-00044, 2020 WL 871484, at \*7 (W.D. Va. Feb. 21, 2020) (“[T]he First Amendment merely guarantees that the state will not suppress one’s speech. It does not guarantee that the state will protect individuals when private parties seek to suppress it.”).

<sup>431</sup> *Startzell*, 533 F.3d at 199. As the court noted, this action was “based [not] on the content of Appellants’ message but on their conduct.” *Id.*

permit.”<sup>432</sup> A permittee’s interest in “us[ing] the permit for the purpose for which it was obtained” necessarily empowered the police to “prevent counter-protestors from disrupting or interfering with the message of the permit-holder.”<sup>433</sup>

ii. *Preserving the Autonomy of Permittees’ Speech*

Police may silence or exclude members of the public for still another reason: to enable a permit-holder to retain “autonomy [over] the content of [its] own message.”<sup>434</sup> The First Amendment does not require permittees to tolerate counter-speech conveyed through the very mechanisms that have been reserved for the permittees’ exclusive use.<sup>435</sup> Nor must permit-holders abide dissenting perspectives at events designed to espouse particular viewpoints,<sup>436</sup> or ones that have been deliberately closed off to the general public.<sup>437</sup> But the police may *not* effectuate viewpoint-based exclusions at events that are held in public forums and open to all members of the public.<sup>438</sup> This is true even if the underlying permit purports to grant “exclusive” access during the period when the permit is in effect.<sup>439</sup>

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<sup>432</sup> *Id.* at 198.

<sup>433</sup> *Id.* at 198–99; *see also Grider*, 180 F.3d at 751–52 (stating, in dicta, that no First Amendment violation would have resulted from silencing “outside elements intent upon disruption” of permit-holders’ speech); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 417 (E.D. Pa. 1987) (explaining that members of the public may not “engage in conduct which genuinely interferes with” permitted expression).

<sup>434</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

<sup>435</sup> *See Grider*, 180 F.3d at 751 (“[T]he rally organizers were entitled to select and schedule public speakers, which entailed the power to exclude from their rostrum any unapproved would-be speaker.”).

<sup>436</sup> *See Sistrunk v. City of Strongsville*, 99 F.3d 194, 198 (6th Cir. 1996) (“[T]he city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey.”); *Kroll v. U.S. Capitol Police*, 847 F.2d 899, 903 (D.C. Cir. 1988) (police “could lawfully direct an anti-abortion picketer away from the area set aside under a permit to those communicating a pro-choice viewpoint (or *vice versa*)”).

<sup>437</sup> *See Sistrunk*, 99 F.3d at 196 (allowing exclusion where event was ticketed and “limited to the members of the organization and their invitees”); *Sanders v. United States*, 518 F. Supp. 728, 729 (D.D.C. 1981) (outsiders have no right to “intrud[e] within an area reserved for another event still in progress”); *Jankowski v. City of Duluth*, No. 11-cv-3392, 2011 WL 7656906, at \*7 (D. Minn. Dec. 20, 2011) (“[T]here must be temporary exceptions when private actors lease all or part of a public park for their private use.”).

<sup>438</sup> *See Teesdale v. City of Chicago*, 690 F.3d 829, 834 (7th Cir. 2012) (event was “a public festival, held on public city streets, free and open to all members of the general public”); *Startzell*, 533 F.3d at 194 (event was “free and open to the general public”); *Gathright v. City of Portland*, 439 F.3d 573, 577–78 (9th Cir. 2006) (“[m]erely being present at a public event” posed “no risk that [the plaintiff’s] provocations could be mistaken by anybody as part of the message of the events he protests”); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005) (plaintiff was wrongly excluded from “an arts festival open to all that was held on the streets of downtown Columbus”); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (attendees sought only to “stand on the sidewalk and peacefully note their dissent as the parade goes by”); *Pledge of Resistance*, 665 F. Supp. at 417 (event was open to “any . . . member of the public”).

<sup>439</sup> *See McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1097 (N.D. Fla. 2016). The same principle would apply if a locality reserved public space using short-term leasing arrangements rather than a permitting system.

*c. Enforcing Existing Laws*

As discussed in Section [II](#) above, existing federal, state, and local criminal laws can be used to restrain conduct that threatens immediate harm to public safety at expressive gatherings.<sup>440</sup> Several prominent examples include laws concerning domestic terrorism, hate crimes, paramilitary activity, the existence of unauthorized militias, the false assumption of law-enforcement functions, the unauthorized wearing of military or law-enforcement uniforms, and the wearing of masks for specified purposes. Depending on the circumstances, officials may also be authorized to declare an unlawful assembly and disperse all attendees who have gathered. Because these tools do not depend on the existence of a permit or an event-specific code of conduct, they may be used at both permitted events and spontaneous gatherings.

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<sup>440</sup> Of course, arrests can be made under these laws after an event has concluded, as well as in direct response to ongoing criminality.

## FREQUENTLY ASKED QUESTIONS

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

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

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

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

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

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

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

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

*When can an event permit be denied?*

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

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

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



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

Denial of a permit based on the anticipated reaction of counter-protesters is an impermissible “heckler’s veto” that courts generally treat as invalid. *See* Chapter [I.A.1.b.iii](#)

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

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

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

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

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

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

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

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

*Can a permit be conditioned on moving the location requested?*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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