

Institute for Constitutional Advocacy and Protection

GEORGETOWN LAW

PROTESTS AND PUBLIC SAFETY: A GUIDE FOR CITIES AND CITIZENS

FREQUENTLY ASKED QUESTIONS

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First Amendment

What is a content-based restriction on speech?

A content-based restriction is based on the topic discussed or the idea or message expressed. It would, for example, be a content-based restriction on speech to deny a permit for a demonstration to a white-nationalist group because of the subject matter of the planned demonstration or because of concerns about how listeners will react to the particular anticipated message. [See Part I.A.1.a]

Is it OK to have one set of rules for political protests and a different set of rules for sports tournaments?

Yes. Localities may impose different conditions based on the intended use of the property. Thus, localities may impose different conditions on the use of a park for a sports tournament or other non-expressive activity than they would impose for expressive activity like a political protest. Conditions or restrictions that apply to the use of public property for expressive activity will be evaluated depending on whether they are content-neutral or content-based. Localities should not impose content-based restrictions on speech unless they are the “least restrictive means” of achieving a compelling governmental interest. Outright denial of a permit to a disfavored group is unlikely to satisfy that test. On the other hand, content-neutral time, place, and manner restrictions on expressive activity need not be the least restrictive means of satisfying a governmental interest;

instead, they must be “narrowly tailored” to serve a significant governmental interest. And they must leave open ample alternative channels for communication. [See Part I.A.1]

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

Denial of a permit based on the anticipated reaction of counter-protesters is an impermissible “heckler’s veto” that courts generally treat as invalid. [See Part I.A.1.a.ii]

Can a permit be conditioned on moving the location requested?

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

Can governments allow only protesters and not counter-protesters onto public property during an event?

The government generally may not treat groups differently based on the message they seek to express, because that would be a content-based restriction that is unlikely to be the least-restrictive way to satisfy the government’s interest in public safety, even if that interest is compelling. [See Part I.A.1]

If the government gives exclusive use of public property to a private entity for a private event—through a lease, permit, or other arrangement—the private entity would be able to exclude people whom the private entity has not invited. Common examples include the lease of a park for a wedding or family reunion. Local jurisdictions should exercise caution, however, not to attempt to exploit exclusive-use arrangements as a means to avoid what would otherwise be potential First Amendment constraints. If the jurisdiction ordinarily issues permits for protests and demonstrations, but changes its practice to a leasing arrangement for a specific protest event at which the protesters seek to exclude counter-protesters, that change of practice could be vulnerable to legal challenge. [See Parts III.B.2.b.ii; V.A]

Would it be content-neutral or content-based if the government were to ban weapons out of concerns about violence?

Although there is no clear law on this, a weapons-ban or other policing measure based on anticipated violence between ideologically opposed camps that have clashed in the past arguably should be treated as content-neutral. That is because such measures would not be based on the messages the groups intend to express on the day in question, but would be based on the demonstrated history of violence between them—regardless of their message. Even if considered content-based, where there is a history of violence between hostile factions, the government’s interest in public safety may be compelling enough to satisfy strict scrutiny. Before imposing a weapons ban, jurisdictions should determine whether the ban could be prohibited by a state firearms-regulation-preemption statute. [See Parts I.A.1.a.ii; II.F; III.A.2.c]

What governmental interests can justify restrictions on speech or assembly?

For content-neutral time, place, and manner restrictions, many governmental interests are considered “substantial,” including maintaining public property in clean and usable condition, ensuring sidewalks and streets remain safe and accessible, ensuring that multiple users can use limited space, and protecting public health, safety, and property. There is less legal guidance about which governmental interests are compelling enough to justify content-based restrictions, but a significant and documented threat to public safety based on past violence or credible information likely would be significant to any court’s analysis of whether a reasonable response to the threat is narrow enough to satisfy strict scrutiny. [See Part I.A.1.b]

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

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 Part I.A.2]

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 Part III.A.3.b]

What about searches – can we leave it to the discretion of the police to determine whom they want to search before entering the venue?

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

Second Amendment

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

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

Before prohibiting or restricting firearms, officials will need to check other provisions of state law. Just because a state might allow the open carrying of firearms does not necessarily mean that local officials must allow open carrying at all public events, particularly where there may be public safety concerns about potential violence. However, many states prohibit local authorities from taking any action that regulates the carrying or possession of firearms. Depending on their wording, these state laws may be interpreted broadly to prohibit even temporary restrictions on carrying weapons at public events. [See Parts I.B; II.F]

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

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

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

Prohibitions on private paramilitary organizations and paramilitary activity: It is well established under U.S. Supreme Court precedent that the Second Amendment does not prevent states from prohibiting paramilitary organizations, and most states do so. Forty-eight states include a provision in their constitutions that requires all military units to be strictly subordinate to and

governed by the civil power, which generally refers to the governor or his or her designee. Many states also have state laws prohibiting people from associating together as a military unit and from parading or drilling with firearms in public. And many states have state laws banning teaching or assembling to train or practice in using firearms or other techniques capable of causing injury or death, for use in a civil disorder. [See Part I.B.4.c; II.B]

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

Courts generally apply a two-part test when analyzing such challenges. [See Part I.B.3]

- ***Step One:*** First a court will ask whether the regulation restricts activity that is protected by the Second Amendment. A regulation restricts activity that is *not* protected by the Second Amendment (and restrictions on it thus will pose no Second Amendment problem) if it satisfies one of the following two criteria:
 - (a) It is the type of regulation that the Supreme Court in *Heller* deemed “presumptively lawful.” Such presumptively lawful regulations include, among other things, prohibitions on the possession of firearms in “sensitive places” such as schools and government property and laws prohibiting private paramilitary organizations.
 - OR -
 - (b) The conduct that the regulation restricts was not historically understood to be protected by the Second Amendment. To make this determination, courts often will look at 18th and 19th century laws to determine whether prohibitions similar to the one at issue existed when the Constitution was ratified or whether they are sufficiently “longstanding” to fall outside the Second Amendment’s protections. [See Part I.B.3.a]
- ***Step Two:*** If a regulation burdens conduct that is protected by the Second Amendment, that does not mean that it is automatically unconstitutional. Instead, courts will apply “means-ends scrutiny.” Under this analysis, a court asks whether the government’s interest in the regulation is sufficiently great and whether the regulation burdens an individual’s Second Amendment rights no more than necessary to achieve that governmental interest. If the answer is yes, the regulation will be upheld. [See Part I.B.3.b]

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

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

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

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

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

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

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

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

In addition, even if a local regulation is permitted under the Second Amendment, it may be preempted under state law. Many states have firearms-regulation preemption statutes that bar local jurisdictions from regulating firearms in a manner that differs from state law. These statutes often allow for the shifting of attorneys’ fees or imposition of damages if a local restriction is successfully challenged in litigation. [See Part II.E]

State and Federal Laws

Can a local jurisdiction stop private individuals from purporting to protect public safety or property during a demonstration?

During recent demonstrations, private militias and paramilitary organizations have shown up, often in military gear and heavily armed, engaging in unauthorized paramilitary and law enforcement functions, intimidating protesters, and escalating tensions that sometimes leads to violence. Laws in every state bar private individuals from engaging in military or law enforcement activity outside of governmental authority. Many states have criminal laws that prohibit this activity, and local authorities may arrest and prosecute individuals who violate them. Where there is reason to believe that paramilitary groups may attend a protest, jurisdictions may want to consider including prohibitions on paramilitary activity in their permits and in event restrictions applicable to anyone who attends the event. Jurisdictions also may want to consider involving state authorities, who may be able to make clear ahead of time that such actions are not allowed under state law. And where certain militias or paramilitary organizations have engaged in unlawful activity at demonstrations in the past, and present a threat of engaging in unlawful and unauthorized activity at future demonstrations, local authorities could consider seeking court-ordered injunctive relief under public nuisance laws. [See Part II.B]

My town has had protests turn violent in the past. Now the protesters want to come back again. What can I do to stop them from becoming violent again?

In general, governments may not prohibit First Amendment-protected activity altogether in order to prevent anticipated violence. The threat of violence 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 an event altogether is likely to fail strict scrutiny if the risk of impending harm could be mitigated through less drastic measure. [See Part III.B.1.c.]

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 Part II.E.]

If a group of demonstrators has in the past followed a pattern in which their demonstrating has led to violent, illegal activity, that pattern may be relevant to whether and at what point officials may declare a gathering an unlawful assembly. Where a pattern repeats itself, officials may be able to intervene sooner to avoid a repeat of violence [See Part II.C.]

When do actions at a demonstration become a public nuisance?

Officials in every state have the ability to abate public nuisances that interfere with the public health, safety, peace, and convenience. Generally, to be considered a nuisance, the conduct must create a significant interference with those rights, be prohibited by law, or be continuing or long-lasting and significantly affect those rights. For the most part, even somewhat disruptive demonstrations may

not be prohibited as a public nuisance. But where, without permission from the local jurisdiction, groups engaged in demonstrations block public streets and sidewalks to a significant degree, prevent access to public facilities, or violate the law—presenting a significant hazard to public health and safety—localities may seek an order from a court that the demonstrators may not engage in the problematic conduct in the future. Governments should not use public nuisance law to attempt to silence unwanted speech, however, and even with a court order prohibiting unprotected conduct, demonstrators are entitled to engage in protected speech and assembly. [See Part II.E]

When is it OK to order an unruly demonstration to disperse?

Unlawful assembly laws in every state allow authorities to disperse protests and other assemblies where the group has become violent or poses a clear danger of imminent violence, or if the group is violating other laws in the process. Loud, boisterous protest activity is not enough to make a demonstration an unlawful assembly, nor is supporting an unpopular cause that is likely to cause a hostile reaction from onlookers. When the group assembled grows hostile and violent and threatens the safety of other people or their property, an official may declare an unlawful assembly and order the demonstrators to disperse. [See Part II.C]

If some demonstrators commit crimes, can a jurisdiction declare an unlawful assembly?

Generally, an unlawful assembly should not be declared if the only basis is that individual demonstrators commit crimes. In order for the *assembly* to be unlawful, the participants must share the intent to engage in unlawful or violent activity. The more appropriate way to address individual criminal activity is to arrest those who are committing crimes, while allowing the peaceful demonstrators to continue their event. [See Part II.C; Policing Best Practices 4.]

What should officials do in declaring an unlawful assembly?

If there is probable cause to believe that a demonstration has become unlawful, officials may declare an unlawful assembly and order the participants to disperse. Failing to disperse after being ordered to do so is a separate misdemeanor in many states. An officer dispersing an unlawful assembly should ensure that the order to disperse is loud enough to reach all of the crowd, and law enforcement should give participants a reasonable amount of time to comply with the order before arresting those who remain. In ordering participants to disperse, jurisdictions should think carefully about where the participants will go when they disperse in order to avoid merely moving conflicts elsewhere in the locality. Jurisdictions also should look to best practices about how to enforce a dispersal order, including what types of force are appropriate under the circumstances. [See Part II.C; Policing Best Practices 4.]

What are anti-mask laws?

Anti-mask laws prohibit people from wearing masks in order to conceal their identity. Some of these laws allow exceptions for wearing masks on Halloween, for theatrical productions, and the like; other laws ban wearing a mask only if it is done with intent to, for example, intimidate or threaten another person or while engaged in the commission of a crime. Anti-mask laws generally have been enacted in response to outbreaks of violence by masked groups, such as the Ku Klux

Klan. Anti-mask laws generally serve the government’s interest in protecting public safety by preventing the anonymous commission of crimes and allowing the identification and apprehension of wrongdoers, but in times of public health emergencies such as the COVID-19 pandemic, anti-mask laws should be suspended in the interest of public safety. [See Part II.D]

Should anti-mask laws be enforced during a pandemic?

During the COVID-19 pandemic, public health officials have recommended—and many states require—that people wear masks in public places and where they cannot maintain adequate distancing from others, as is often true of public demonstrations. Many states therefore have suspended enforcement of their anti-mask laws, and it is unlikely that anyone wearing a mask for health reasons would be prosecuted under anti-mask laws still in effect. [See *Protesting During a Pandemic*]

Are anti-mask laws constitutional?

People seeking to protest anonymously have raised First Amendment challenges to anti-mask laws. Most appellate courts have upheld the constitutionality of these laws, so there is a strong argument that these laws are constitutional. A few courts have found anti-mask laws unconstitutional as applied to certain factual scenarios. These cases turn on circumstance-specific issues, including the reasons the demonstrators seek to wear masks and the basis for the jurisdiction’s concerns that the demonstrators will engage in violence. [See Part II.D]

Issuing Permits and Imposing Conditions

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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Part 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 Parts I.A.1.c; 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 Part 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 Part 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 2A FAQs] [See Part III.A.2.c]

Financial Conditions

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 Part 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 Part 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 Part III.A.3.b]

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 Part 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 Part III.A.3.a.iv]

Event-Specific Tools for Protecting Public Safety

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. [See Part III.B.1.a.i.] 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 Part III.B.1.a.i & 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 Part I.A.2.d.; Part 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 Part 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 Part I.A.1.a.ii.; Part 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 Part III.B.1.c.]

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 Part 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 Part 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 Part 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 Part 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 Part 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.