



Recent Protests and First Amendment Rights

Prepared by: Anna Henning, Senior Staff Attorney

Recent protests, including protests against racial injustice and protests of states' responses to the COVID-19 pandemic, have prompted challenges on First Amendment grounds. This issue brief summarizes relevant case law and recent court actions.

FIRST AMENDMENT RIGHTS IN THE CONTEXT OF PROTESTS

The right to engage in political protest is protected by very strong, but not absolute, constitutional guarantees. The U.S. Constitution and the Wisconsin Constitution prohibit governments from abridging the freedom of speech, and the U.S. Constitution also protects the right of the people to peaceably assemble and to petition their government.¹ Those constitutional protections are strongest when applied to political speech, including protests of government action,² in a “traditional public forum,” such as a public park, sidewalk, or street.³

Even in a traditional public forum, government may impose reasonable restrictions on the time, place, and manner of protected speech, but the restrictions must survive “strict scrutiny.” Specifically, the restrictions must: (1) be content-neutral; (2) be narrowly tailored to advance a significant governmental interest; and (3) leave open ample alternative channels of communication. [*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).] Relevant to protests, courts have in some cases upheld requirements such as permits and fees as reasonable time, place, and manner restrictions, if the restrictions are guided by sufficiently narrow and objective criteria.⁴

Unprotected Speech and Actions

Merely causing offense – even “profound offense” – does not remove speech from First Amendment protection. [See *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014).] However, the U.S. Supreme Court has identified narrow categories of speech that are unprotected. One such category – rarely relied upon – is “fighting words,” “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” [*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).] “True threats” are another unprotected category. To be “true,” a threat must be more than hyperbolic.⁵ Similarly, speech that advocates lawlessness is unprotected only if it is “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” [*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).]

If a person attending a protest commits an unlawful action, the person may be held criminally liable for that action, regardless of any associated political speech. That principle generally applies to both violent actions, such as destroying property or assaulting a person, and nonviolent civil disobedience, such as trespassing or blocking traffic.⁶ However, otherwise protected speech does not lose its constitutional protection because it is associated with a protest that involves violence or other unlawful acts.⁷ [*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).]

Interplay with Police Powers During an Emergency

Jacobson v. Massachusetts, an early Twentieth Century decision upholding government restrictions in a smallpox epidemic, has been cited for the principle that governments must sometimes infringe on constitutional liberties “under the pressure of great dangers” to “the safety of the general public.” [197 U.S. 11 (1905).] However, the U.S. Supreme Court has suggested in some past cases that a lesser level of deference to governments might apply to restrictions affecting First Amendment

rights than to rights such as freedom of movement or travel. [See *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).] Thus, the typical time, place, and manner analysis likely applies to restrictions affecting the ability to assemble for political protests, even in the midst of the COVID-19 outbreak. If so, restrictions may be upheld if they are narrowly tailored and applied similarly to all types of protests, regardless of viewpoints expressed.

RECENT FEDERAL COURT ACTIONS

Several recent federal court cases raise First Amendment claims regarding government response to protesters.⁸ Some cases challenge the use of chemicals or projectiles to disperse crowds.⁹ Other filings challenge restrictions relating to COVID-19. Examples of recent actions include:

- A [complaint](#) filed in the U.S. District Court for the District of Columbia on June 4, 2020, which challenges the use of pepper spray, tear gas, rubber bullets, and flash bombs to disperse peaceful protestors in Lafayette Square, near the White House.
- An [order](#) issued on June 5, 2020, by the U.S. District Court for the District of Colorado, which temporarily prohibits the Denver Police Department from using chemical weapons or projectiles “unless an on-scene supervisor at the rank of Captain or above specifically authorizes force in response to specific acts of violence or destruction of property.”
- An [appeal](#), filed before the U.S. Court of Appeals for the Ninth Circuit on June 9, 2020, of an [order](#) denying relief from the State of California’s denial of a permit for a socially distanced protest of the state’s COVID-19 response on the state capitol grounds. The U.S. Department of Justice has filed an [amicus brief](#) in the case, which, in part, draws contrasts with the state’s approach to protests against racial discrimination.
- An [order](#) issued on June 9, 2020, by the U.S. District Court for the District of Oregon, which limits the Portland Police Bureau’s use of tear gas or its equivalent to situations in which the bureau’s own rules are followed and the lives or safety of the public or police are at risk.

¹ See U.S. Const., amend. I (“Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); Wis. Const., art. I, s. 3 (“Every person may freely speak ... on all subjects ... and no laws shall be passed to restrain or abridge the liberty of speech ...”). Courts have treated speech, assembly, and petition rights as “inseparable” and apply a merged First Amendment analysis. [*NAACP*, 458 U.S. at 911.]

² Courts have characterized protests as “classic” political speech and described a “large group protesting a pattern of discrimination targeted at a specific minority” as “epitomiz[ing] political speech.” [*Boos v. Barry*, 485 U.S. 312, 318 (1988); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (2008).]

³ *Hague v. CIO*, 307 U.S. 496, 515 (1939). In contrast, a protest that takes place on private property or inside a government building may be subject to greater degree of regulation. [See *McCullen v. Coakley*, 573 US 464 (2014).]

⁴ See, e.g., *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001) (upholding a parade permit requirement directing city officials to consider, in part, whether there are a “sufficient number of peace officers to police and protect lawful participants and non-participants from traffic-related hazards” with respect to a proposed parade). But see *Sauk County v. Gumz*, 2003 WI App 165 (2003) (holding that certain aspects of a county ordinance, including a lengthy processing time and prohibitions on event advertising, were not narrowly tailored to serve a significant government interest).

⁵ See *Watts v. United States*, 394 U.S. 705, 706 (1969) (holding that the following statement, made at a Vietnam War era rally, is protected speech: “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”).

⁶ See *Adderley v. Florida*, 385 U.S. 39 (1966). However, courts have recognized the expressive value of civil disobedience, and the nonviolent nature of unlawful acts has informed analyses regarding the reasonableness of government restrictions. Laws such as disorderly conduct and trespass laws must also be enforced in a non-arbitrary and non-discriminatory manner.

⁷ However, a [petition](#) requests the U.S. Supreme Court to consider whether movement organizers (specifically Black Lives Matter Network, Inc.) can be held civilly liable for injuries to a police officer caused by a protestor.

⁸ Some challenges have also included claims under the Fourth Amendment to the U.S. Constitution, which prohibits governments from violating the “right of the people to be secure in their persons ... against unreasonable searches and seizures.” The U.S. Supreme Court has held that any use of force must be objectively reasonable. [*Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989).]

⁹ In addition, some municipalities and law enforcement departments have recently considered limiting the use of chemicals and projectiles as a crowd control tactic or have reached settlement agreements to limit the use of such tools. For example, on June 8, 2020, a state circuit court in Minnesota issued a [stipulation order](#) requiring certain “crowd control weapons” to be approved by the Chief of Police or the chief’s designee.