



AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

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To Whom It May Concern,

The recent deaths of George Floyd and Breonna Taylor, among others, at the hands of law enforcement have spurred a dramatic rise across the country in community action through protests, marches, and other events. As more and more individuals and groups embrace their rights to participate in protected public expression, it follows that some municipalities and other local government entities may be dealing for the first time with requests from community members seeking to organize protests and marches.

The ACLU of West Virginia has in recent weeks received inquiries from a number of West Virginians across the state who are concerned that their local governments may be seeking to unduly restrict or prevent them from exercising their constitutional rights to protest or otherwise assemble peacefully. In our organization's role as a defender of civil liberties, we regularly advise individuals and groups on their rights to protest and participate in protected public expression. Just as it is necessary for West Virginians to understand the breadth of the rights to which they are entitled, it is incumbent on state and local government officials to fully understand when restrictions on those rights are impermissible.

With that interest in mind, we respectfully ask that you distribute this letter to your organization's membership. It is our hope that the following information on the constitutionality of permitting requirements and of restricting an individual's right to record government actors will provide helpful information for those involved in making and enforcing laws regarding protected public expression.

### **The Right to Peacefully Assemble is Enshrined in Both the U.S. Constitution and West Virginia Constitution**

Under the First Amendment to the United States Constitution, individuals have a right to be assemble peacefully.

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

U.S. Const. amend. I.

The West Virginia Constitution provides a provision that mirrors the federal constitution:

*The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.*

W.V. Const. art. III, sec. 16. *See also Woodruff v. Board of Trustees*, 319 S.E.2d 372 (W. Va. 1984) (“[T]he protections inherent and explicit in this state constitutional provision parallel associational, assemblage, and petition protections found under the first amendment.”).

### **Applying the Law to Permitting Requirements**

Individuals and groups do not need a permit in order to assemble in such a way that does not impede access to government buildings, pedestrian traffic, or vehicle traffic.

Government bodies *may* require a permit if the regulation is content neutral and narrowly tailored to serve a legitimate public interest. Some regulations could be permissible for a march through public streets, an event wherein equipment like loudspeakers would be used, or an event in which many people are expected to attend. *See e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

However, spontaneous events of public interest are an exception to the requirement for permit approval because they restrict spontaneous free expression permissible under the First Amendment. *See e.g., Sullivan v. City of Augusta*, 511 F.3d 16, 39 (1st Cir. 2007). Although a municipality may require a short period of advance notice in these situations, it can “be no longer than necessary to meet the City’s urgent and essential needs of this type.” *Id.* (citing *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005)). In these circumstances, courts have considered that five days may be too long in certain circumstances. *See id.* (citing *Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996) (noting that the “city’s asserted goals of protecting pedestrian and vehicular traffic and minimizing inconvenience to the public does not justify five-day advance filing requirement.”)).

Importantly, a government body may not apply certain restrictions to one individual or group but not to others on the basis of the content of the speech involved. *See e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”) *See also e.g., Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”).

For example, if a municipality charges permitting fees, these fees cannot change depending on the nature of the event regardless of the subject matter of the event. Emergency orders can be implemented by the city, including things like curfews, restrictions on places of protest, and other similar limitations, but only when they are content-neutral and narrowly tailored to serve the significant governmental interest in maintaining public order. Additionally, excessive amounts charged for permits have been deemed unconstitutional and waivers must be considered when alternatives for communication of the message are lacking. *See Sullivan*, 511 F.3d at 37.

### **Filming Activity of Government Actors**

Individuals have a constitutionally protected right to film law enforcement and other government actors when they are engaged in their duties in public. Those that elect to film law enforcement are contributing to the public's ability to hold government accountable and to ensure that there are no abuses of power. This right has been protected many times in the courts of the United States and remains one of the strongest forces available to citizens in the fight for police accountability. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First

Amendment right to film matters of public interest”); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding it “highly probable” that filming of a public official on street outside his home by contributors to public access cable show was protected by the First Amendment, and noting that, “[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest”); Notably, no Circuit Court, the highest courts of appeal below the United States Supreme Court, has held that the First Amendment *does not* extend to the recording of police. *See Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017).

We hope this information is beneficial to your membership moving forward. Please contact me at [lstark@acluwv.org](mailto:lstark@acluwv.org) with any questions.

Regards,

A handwritten signature in blue ink that reads "Loree Stark". The signature is written in a cursive, flowing style.

Loree Stark  
Legal Director, ACLU-WV