FIRST AMENDMENT: MUNICIPAL REGULATION OF DEMONSTRATIONS

PLANNING FOR CIVIL DISTURBANCES— OBSERVATIONS FROM CHARLOTTESVILLE, VIRGINIA

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I. BACKGROUND

The large scale demonstration that took place in Charlottesville on August 12, 2017 was watched by millions on television and social media. That day was the culmination of political controversy and unrest that had been building up over time. In 2017 the City was faced with applications seeking approval of permits for demonstrations in parks that contain statues of Robert E. Lee or Thomas "Stonewall" Jackson—ostensibly to protest the City Council's announcement of their intention to remove the statues from these parks. One application was from a KKK chapter in North Carolina. The other application was received from an individual City resident, but using the power of social media he connected with thousands of individuals and dozens of groups who sought to participate in a "rally", and soon what began as a demonstration protesting a local political decision became an attraction that was beyond the organizer to control.

Across the nation violent clashes have been occurring between (i) organizations and individuals who espouse white supremacist views and organizations and (ii) individuals who oppose them (*various locales, including: San Francisco (Berkeley), Portland, Boston, and places in Florida, Tennessee and Virginia*). Via social media and the dark web, both groups monitor the activities of the other, and both can quickly mobilize hundreds if not thousands of participants to attend a demonstration or event that is planned—either officially, or unofficially—in cities across the nation. Both sides are willing and able to engage in violence, and often do so; however, in advance of a particular event, each side claims that it will only engage in violence if provoked by the other. Often, the individual or organization seeking to "stage" an event through a local permit process will bring just a few dozen participants, but the "counter protesters" who show up will number in the hundreds or thousands—with or without permits.

For municipal officials faced with advance knowledge that one of these demonstrations is coming to their city: advance planning is difficult, can involve hundreds of thousands of dollars, and can place police at odds with groups who are already distrustful of them. These written materials are organized in a manner that is intended to walk the reader through the decision-making stages that Charlottesville officials experienced during 2017 and 2018.

II. "DON'T GIVE THEM A PERMIT"!!!

A. For both the KKK rally in July 2017, the Unite the Right Rally in August 2017, and the "UTR-2 Rally" planned in 2018, City officials were under strong and persistent pressure to refuse to allow those events to occur. "Deny the permit" became a chant frequently heard at City Council meetings and within hundreds of emails sent to councilors.

B. Sometimes, a demonstration must be allowed, regardless of whether or not a permit is required or approved.

1. A permit should not be required for events [on streets] that do not implicate public safety, traffic safety, or the free use of the public right-of-way. *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010 (9th Cir. 2008).

2. Small groups of people that do not implicate a locality's interest in crowd control, traffic flow, or public safety should not be required to obtain a permit to assemble on city streets or sidewalks. (The lack of an exception within an ordinance or regulations for small groups is likely to render the ordinance/ regulations facially unconstitutional). *Cox v. City of Charleston*, 416 F.3d 281, 284-288 (4th Cir. 2005).

3. Localities must allow for "spontaneous demonstrations" to take place without a permit. Permit schemes fail to provide exemptions for spontaneous demonstrations, or at least an immediate, expedited review will be held unconstitutional. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). *See also Am.-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir. 2007); *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008).

4. A municipal government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Restrictions that target speech because of its content are presumptively unconstitutional. *Kessler v. City of Charlottesville*, 2017 U.S. Dist. LEXIS 128330 (W.D. Va. 8/11/2017). The principal inquiry in determining "content neutrality" is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

   Note: The City of Charlottesville later attempted to relocate the August 2017 Unite the Right rally, but did not seek to relocate events that "counter protesters" had scheduled in nearby parks. To the federal court reviewing Charlottesville's situation, this suggested that the desire to move Kessler's rally was based on the content of his speech. (*Compare Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015)("We simply cannot accept Defendants' position that they were compelled to abridge Constitutional rights for the sake of public safety, when at the same time the lawless adolescents who caused the risk with their assaultive behavior were left unmolested."). The Court also noted that city councilors' social media communications indicated that members of City Council opposed Kessler's political viewpoint. *Kessler*, 2017 U.S. Dist LEXIS 128330 (W.D. Va. 8/11/2017).

5. See also *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (police arrested individuals for demonstrating without a required permit, AFTER having already closed several streets in anticipation of the march and after having directed individuals participating in the march into the closed streets. This was held to be action that could be regarded as amounting to either a de facto issuance of a parade permit, or a waiver of the permit requirement.)

C. Permits cannot be denied, and demonstrations/ parades cannot be banned, if the denial or ban amounts to a "Hecklers' Veto"

1. "Heckler's veto" refers to circumstances in which citizens successfully persuade a locality to prohibit offensive speech, on grounds that the offensive speech will result of disruption of public order. Public officials instinctively want to avoid public disorders, and are often tempted to do so by prohibiting that speech (i.e., denying a permit for a demonstration, parade, rally, etc.). *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Berger v. Battaglia*, 779 F.2d. 992, 1001 (4th Cir. 1985).

2. "Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order. *See Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), 'Government's instinctive and understandable impulse to buy its peace — to avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public — is a recurring theme in first amendment litigation.' *4th Cir. Court of Appeals, ruling in Berger v. Battaglia, 779 F.2d 992 (1985).*

3. *Gregory v. City of Chicago*, 394 U.S. 111 (1969)(85 marchers attracted a crowd of over 1000 spectators, who became riotous despite crowd control efforts of 100 uniformed police officers). Held: when police arrested the peaceful marchers, in an effort to avoid a riot, they acted unconstitutionally.

4. A restriction is content based if it is concerned with the undesirable effects that arise from the direct impact of speech on the speaker's audience (listeners' reactions to speech). *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). If a restriction cannot be justified *without* reference to the content of the regulated speech, it's NOT content neutral.

5. A government may not selectively shield the public from some kinds of speech on the grounds that they are more offensive than others. *McCullen v. Coakley*, 134 s. Ct. 2518, 2529 (2014). Listeners' reactions to speech (emotive impact of speech on its audience) is not a secondary effect that can be used to ban or restrict speech that arouses anger, alarm or resentment on the basis of race, color, creed, religion, or gender. *Boos v. Barry*, 485 U.S. 312 (1988); *RAV v. City of St. Paul*, 505 U.S. 377 (1992).

6. An interest in public safety is a content-neutral basis on which to regulate speech, but safety concerns arising from a prediction of how listeners might react to speech cannot effectively be de-coupled from speech content. Acquiescence to a heckler's veto fails under application of strict judicial scrutiny. *Rock for Life UMBC v. Hrabowski*, 411 F. App'x 541 (4th Cir. 2010).

D. Many people confuse the issues of whether an event could be prohibited altogether within a permit process (usually not) with the issue of what type of reasonable time, place or manner restrictions can be imposed on a planned event to make it safer. It's well established that, when public safety is implicated, a local permitting scheme will be lawful, but the requirement for a permit (i) may not delegate broad licensing discretion to a government official, (ii) may not be based on the content of a message, (iii) must be narrowly tailored to serve a significant governmental interest, and (iv) must leave open ample alternatives for communication. *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

1. The government has a "strong" interest in ensuring public safety and order, and in promoting the free flow of traffic on public streets and sidewalks. *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005); *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008).

2. A government may not charge to a permittee any costs that are related to listeners' reaction to speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135, fn. 12 (1992). This includes trash pick-up; costs of policing; costs of repairing grass in a park; etc. *Nationalist Movement v. City of New York*, 481 F.3d 178 (3rd Cir. 2007).

3. A locality may require permit applications to be filed sufficiently in advance to allow planning for effective policing, traffic management, and public order. The specific length of time that will be considered reasonable by a court will vary, based on a number of factors, including whether or not a permit scheme allows exemptions for Small Groups and Spontaneous Demonstrations. *Santa Monica Food not Bombs v. Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Green v. City of Raleigh*, 523 F.3d 293 (2008). An ordinance or permit scheme may authorize a municipal decision maker to waive advance notice requirements for time-sensitive events. *Coe v. Town of Blooming Grove*, 567 F.Supp. 2d 543 (S.D.N.Y. 2008).

4. A locality should specify within its ordinance/ regulations a specific time period for making a decision on a permit application. *Reyes v. City of Lynchburg*, 300 F. 3d 449 (4th Cir. 2002).

E. *See Yeats v Norwood*, 841 F. Supp. 2d 934, 942 (E.D. Va. 2012) (upholding municipal ordinance that provided specific evaluative criteria to determine if a proposed event could endanger public health, safety, or welfare; allowing permit denial based on one or more of the reasons set forth in the ordinance and holding that "decisions concerning the resources required to maintain order and safety under varying circumstances necessarily call[s] for the exercise of discretion based on law enforcement expertise and familiarity with the potential dangers facing a locality.")

F. *United for Peace and Justice (UPJ) v. City of New York*, 243 F.Supp.2d 19 (S.D.N.Y. 2003), upheld the denial of a permit for a protest based on the lack of information it had about the event, the large and uncertain number of participants, and its inability to appropriately plan for adequate security. In denying an injunction to allow the march, the court found that the City's concerns about security were a legitimate exercise of its interest in maintaining public safety. The court noted that "police concerns about security threats posed for the United Nations are far from theoretical," citing two previous instances of security breaches. See also U*nited for Peace and Justice v. Bloomberg*, et al., 783 N.Y.S.2d 255 (New York County Supreme Court, 2004) (court denied an injunction, finding that the City had met its burden to establish that plaintiff's request for a special events permit for 215,000 person rally, on the Great Lawn, with spillover onto East and North Meadows, on the eve of the Republican National Convention, was properly denied. The court found the City had appropriately applied content-neutral regulations and had offered plaintiff a reasonable alternative site with ample alternative means of communication, to which plaintiff had initially agreed, then plaintiff sought injunctive relief mere days prior to the convention. The court found that, by waiting so late to seek injunctive relief, the plaintiff had "foreclosed an opportunity for the City to formulate an appropriate plan to ensure the safety of the public and to protect the City's park land from what likely would be irreparable damage.")

III. "REVOKE THE PERMIT"!!!

A. For both the July 2017 (KKK Rally) and August 2017 (UTR Rally) demonstrations, once it became known that permits had been granted to the applicants, City officials were pressured to revoke the permits. Particularly in connection with the August 2017 UTR Event, the demands for revocation of permits were either to revoke the permits because the permittees would be engaged in hate speech (which many believe not to be Constitutionally protected), or to revoke the permits for public safety reasons due [in large part] to statements being posted on social media.

B. The Mayor of Portland, Oregon requested the federal government to revoke a permit authorizing a rally planned by an alt-right group on federal property. The Mayor stated "I'm reminded constantly that they have a First Amendment right to speak. My pushback is that hate speech is not protected under the Constitution." The response of the American Civil Liberties Union, Oregon Chapter: "*The government cannot revoke or deny a permit based on the viewpoint of the demonstrators. Period.*" "Content-based restrictions on expressive conduct are presumptively invalid" – *U.S. Supreme Court, ruling in R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).*

C. "Much to their credit, Charlottesville officials acknowledged that the First Amendment required the issuance of the permit for the Klan's demonstration, while expressing the City's unified opposition to racism, violence and intimidation." *--ACLU, Virginia Chapter, Director Claire Guthrie Gastanaga, et al., in a letter dated 7/7/17 addressed to City Council, referring to the City's decision not to revoke the demonstration permit for the Klan rally on July 8, despite significant concerns over the threat of violence presented by the Klan members, who had promised to be armed at the rally.*

> After announcements of the jury verdicts in the Rodney King trial, several demonstrations, both peaceful and disruptive, took place in San Francisco over the course of two days. City's Mayor declared a local emergency and imposed a curfew . . . A large crowd of people assembled at a BART station in violation of the curfew. They refused police orders to disperse; eventually 500 persons were arrested. Arrestees filed a class action lawsuit against the City. "The violence and disorder that occurred in San Francisco [in response to the Rodney King verdicts] falls far short of the type of occurrence that could have led any reasonable official to believe that it would be Constitutional to

impose a city-wide ban on all demonstrations, and the law to that effect was clearly established." *Collins v. Jordan*, 110 F. 3d 1363 1373 (9th Cir. 1997).

D. When Might Revocation be Lawful?

1. *Sec. 3.4 City of Charlottesville's Special Events Regulations:* After a permit has been granted, it may be revoked: (1) by the Events Coordinator, for any reason for which it could have originally been denied, including for violation of any rule, ordinance, law, regulation or condition of the permit; and (2) on the day of a demonstration, a public safety official may revoke the permit, if the demonstration presents a clear danger to public safety/ public order, or if demonstration activities violate applicable laws or regulations.

2. Enjoining or preventing First Amendment activities before demonstrators have *acted* illegally, or before the demonstration poses a *clear and present danger* is presumptively a Constitutional violation. The "generally accepted" way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent it from occurring. *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997).

3. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious. *United Steelworkers of America v. Dalton*, 544 F. Supp. 282 (E.D. Va. 1982).

4. A court prohibited a University from cancelling a speech in advance, based on anticipated [negative] student reaction. *Padgett v. Auburn University*, 207 U.S. Dist. LEXIS 74076 (M.D. Ala. 4/18/2017)

E. "People are threatening terrible things on Social Media—threats to fight, to f*** people up, etc. Why don't those count as "credible threats" justifying revocation of a permit?"

1. General public safety concerns aren't sufficient, *see Newport v. Fact Concerts, 453 U.S. 247 (1981)*. The danger to public safety must be real (credible) and compelling. To revoke a permit in advance, the City would need to establish that the threats of violence being uttered by a permit holder, and/or evidence of the permit holder's violent activities in prior similar situations, clearly establish "a serious and substantive evil that rises far above public inconvenience, annoyance or unrest." –*U.S. Supreme Court, ruling in Terminiello v. Chicago, 337 U.S. 1 (1949)*.

2. Offensive statements made generally to a crowd are protected by the First Amendment. In order to be excluded from protection, offense must be directed specifically at an individual. Speech that is not directed specifically to an individual cannot be construed as "fighting words". *Bible Believers v. Wayne County*, 805 F.3d 228, 246 (6th Cir. 2015).

3. If the City wants to rely on words posted on social media, then those words must go beyond the "bounds of argument or persuasion" for acts of violence, they must undertake incitement to riot.—*U.S. Supreme Court, ruling in Feiner v. New York, 340 U.S. 315 (1951)*. There must be credible evidence that the permit holder actually plans or intends to commit violence or disorder; in other words, there must be a "true threat", which the Supreme Court has defined as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Hyperbole, regardless of how hateful or offensive, is not a true threat. The assessment of a true threat must be specific to a particular situation, and determinations can't be based on presumptions about an individual's intentions – *U.S. Supreme Court, ruling in Virginia v. Black, 538 U.S. 343 (2003)* and *Texas v. Johnson 491 U.S. 397 (1989)*. Advocacy of violence (protected speech) is not the same thing as incitement to imminent lawless action (not protected)—*U.S. Supreme Court, ruling in Brandenburg v. Ohio, 395 U.S. 444 (1969)*.

F. What evidence would be necessary to justify?

1. "We'll be back tomorrow, bigger and stronger" and "All I ask for is a peaceful demonstration": if these two statements are the only evidence of intent, they are insufficient as a matter of law to establish that an individual did unlawfully assemble without authority of law and for the purpose of disturbing the peace. *Corbett v. Commonwealth*, 210 Va. 304 (1969). In *Hess v. Indiana*, the U.S. Supreme Court ruled that a protester who yelled "we'll take the f***ing street again" within an agitated crowd that was resisting police authority could not be punished for his speech. 414 U.S. 105, 107 (1973).

2. Concerns about the number of people likely to attend the demonstration are purely speculative; there is no evidence to support the "notion" that many thousands of individuals are likely to attend the demonstration. *Kessler v. City of Charlottesville*, 2017 U.S. Dist. LEXIS 128330 (W.D. Va. 8/11/2017).

3. Tangible evidence is required to establish that a decision/ regulation that will restrict protected speech is necessary to advance the government's interest in public safety. *Edwards v. City of Coeur d'Alene*, 262 F.3d 856 (9th Cir. 2001).

IV. "MOVE THEM SOMEPLACE ELSE"!!!

A. Even in the face of an undisputed threat to public safety, a restriction on the place where a rally may take place is not permissible if the threat can reasonably be managed within available police resources at the specific location desired by the permit applicant. – *D.C. Cir. Court of Appeals, ruling in Christian Knights of KKK Invisible Empire, Inc. v. District of Columbia, 972 F.2d 365 (1992)*

> Note: the federal court reviewing the City's decision to require the Unite the Right Rally to be moved to a different, larger park, stated that, to the extent that the City's desire to move the demonstration to a different location was based on the number of "counter protesters" expected to attend the demonstration, it is undisputed that merely moving the demonstration to a different park will not avoid a clash of ideologies or prevent confrontation between the two groups. Critics of Kessler and his beliefs would likely follow him to the other park. Given the relation between the demonstration and the desired location [park containing a statue of Robert E. Lee] supporters of Kessler are likely to still appear at the park even if the location of Kessler's demonstration is moved elsewhere. *Kessler v. City of Charlottesville*, 2017 U.S. Dist. LEXIS 128330 (W.D. Va. 8/11/2017)

B. Location is often considered "an essential part of the message sought to be conveyed," as well as "essential to communicating with the intended audience." *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 192 (D. Mass. 1998). The U.S. Supreme Court has also held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163, 84 L. Ed. 155, 60 S. Ct. 146 (1939).

C. *Christian Knights of the Ku Klux Klan Invisible Empire, Inc., et al. v. District of Columbia, et al.*, 972 F.2d 365 (1992).

In 1990 27 members of the Ku Klux Klan paraded from the Washington Monument down Constitution Avenue to Capitol Hill. Prior to the march, a violent counter-demonstration had been threatened, causing the full mobilization of the Metropolitan Police Department and the commitment of more than 3,500 police officers (DC and National Park Police, et al.). Disputes about the permit for the march generated two district court rulings, the second issuing twelve hours before the march. During a previous march, counter-protesters spilled into an intersection and blocked traffic. Instead of clearing the counter protesters, police re-routed the Klan March on that date. In considering the permit application for the second march, and based on their prior experience, DC granted a permit only for a portion of the parade route. A lawsuit followed. Within its opinion, the court stated:

"[One] view is that "the fear of the hostile audience is never to be considered in ruling upon permit applications...." Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L.REV. 1481, 1515 (1970). The Klan echoes this position, arguing that the authorities may impose restrictions only on the scene in response to a clear and present danger of violence. **We cannot agree that a threat of violence "is an impermissible ground even for a time, place and manner limitation. When 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**. *Clark v. Community for Creative Non-Violence*, 468 U.S. at 290, 104 S.Ct. at 1817."

In the above-reference DC case, all parties had stipulated that there was a "real and substantial" threat of violence anticipated to occur. The only question before the Court was whether the threat could be managed within available police resources.

D. Means chosen to protect public safety

1. Means chosen to protect public safety may not be substantially broader than necessary to achieve the government's interest. Measures implemented don't need to be the least restrictive means (locality's decision should not be measured by a judge's reaction to whether the most appropriate measure is being taken, or the degree to which public safety or other interests should be protected). *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *Green v. City of Raleigh*, 523 F.3d 293 (4th Cir. 2008); *McCullen v. Coakley*, 134 S.Ct. 2518 (2014).

2. *Separation of demonstrators and "counter-protesters"--Free Speech Zones.*

Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004). In 2004 the City of Boston, MA hosted the Democratic National Convention. This was the first major political party convention in the U.S. following the attacks of September 11, 2001. City of Boston Police Department participated in developing a public safety plan, but BPD was the primary. 18-months of planning. They reviewed after-action plans of cities that had most recently hosted major political conventions. They learned that in 2000 a federal court in California ruled a public safety plan developed by the City of Los Angeles to be Unconstitutional after challenges brought by protest groups. That decision forced L.A. to revise their plans, just weeks before it was scheduled to begin. Boston did its research and when protest groups brought challenges to their plans, the First Circuit rejected the protests.

Boston included ACLU and National Lawyers' Guild in their planning process, to minimize the chances of litigation on the eve of the convention. Consultation began a year prior to the event. The *Bl(a)ck Tea Soc'y* case established the validity of "free speech zones". ACLU and NLG still sued them (5 days prior to the convention start) but as the City had taken the groups' comments into account in the planning process, the court looked unfavorably on the timing of the lawsuit.

3. *Other cases to review—public safety restrictions and restrictive zones*
   a. ACLU v. Denver, 569 F.Supp. 2d 1142 (D. Colo. 2008)
   b. Citizens for Peace in Space v. City of Colo. Springs, 477 F.3d 1212 (10th Cir. 2007)
   c. Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005)
   d. Coalition to March on the RNC and Stop the War v. City of St. Paul, 557 F.Supp. 2d 1014 (D. Minn. 2008) (this case involves a Parade--zones/ distance restrictions are more difficult to apply to "moving" demonstrations)
   e. Amnesty In'l v. Battle, 559 F.3d 1170 (11th Cir. 2009)

V. "KK KOPS"!!!

A. In Charlottesville, as in other places, police who take actions to facilitate demonstrators' access to streets or parks, or who provide escorts, are often accused of supporting demonstrators whose messages are unpopular. In Charlottesville, some of those who opposed the message of the permittees were individuals or organizations whose agendas/ platforms included anti-police views. Following the July 2017 KKK Rally, they began referring to City police as "KKK Kops".

B. Police facilitate lawful and legitimate actions of individuals and groups who are present at a demonstration. When conflict occurs, the goal is to permit the pursuit of lawful actions and effectively deal with individuals or groups who are acting illegally.

C. Supreme Court jurisprudence (particularly the cases establishing that Hecklers' Vetoes are unconstitutional) indicates that police are expected to afford a measure of protection sufficient to facilitate the exercise of First Amendment rights, but the limits of the duty are still not clear. *See* Hostile Audience Confrontations: Police Conduct and First Amendment Rights, Michigan Law Review, Vol 75, No. 1 (Nov. 1976) pp. 180-209. (See also the *Bible Believers* opinion, cited in VI.C., following below (including a statement that police are not required to "go down" with a speaker)

VI. "ARREST THEM"!!!

A. If police silence a speaker to appease a crowd and stave off a potentially violent altercation, that's a form of heckler's veto. (When Christian evangelists preached to a crowd of Muslims gathered for an Arab International Festival, and the Muslims responded with threats of violence, police removed the evangelists in order to restore the peace; this was held unconstitutional. *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015)).

B. When public peace and order is in jeopardy it is not unreasonable to authorize police to clear the streets. When there is clear and present danger of immediate disturbance police must be able to take swift action. To require individual determinations of who is acting lawfully and who unlawfully would be unduly burdensome and the restoration of order would be unnecessarily slowed. *United Steelworkers of America v. Dalton*, 544 F. Supp. 282 (E.D. Va. 1982).

1. *Vodak v. City of Chicago*, (7th Cir. 2011) (*anti-war protesters marching in city streets without a permit or an established route were initially allowed to continue, but then were surrounded and arrested en masse*) ("no precedent should be necessary to establish that the 4th Amendment does not permit the police to say to a person "go ahead and march" and then five minutes later, having revoked the permission to march without notice to anyone, arrest the person for having marched without police permission."). The 10th and DC Circuits agree with the 7th.

2. *Garcia v. Bloomberg*—(2nd Cir. 2016, No. 15-3113-cv, 10/13/2016), petition for certiorari to U.S. Sup. Ct. denied June 2017. Issue: whether, when police permit individuals to exercise 1st amendment rights, officers must provide fair warning prior to arresting individuals participating in a demonstration. Garcia joined an Occupy Wall Street March on the Brooklyn Bridge. After marching with a police escort along a footpath, Garcia and 700 others veered onto the roadway; halfway across the bridge, police rolled out orange netting and made mass arrests. The 2nd Circuit Court of Appeals ruled in favor of police, in part because New York law clearly prohibits obstruction of traffic and police never did or said anything to suspend the traffic laws. Plaintiff Garcia was charged with disorderly conduct; after 10 court appearances over 2 years, the charge was dropped.
3. See also *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008) (police arrested individuals for demonstrating without a required permit, AFTER having already closed several streets in anticipation of the march and after having directed individuals participating in the march into the closed streets. This was held to be action that could be regarded as amounting to either a de facto issuance of a parade permit, or a waiver of the permit requirement.)

C. *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015)

1. "We do not presume to dictate to law enforcement precisely how it should maintain the public order. But in this case there were a number of easily identifiable measures that could have been taken short of removing the speaker...." [E.g., increased police presence in the vicinity of the speech, as requested by the speaker; arresting individuals breaking the law; erecting a barricade for free speech]

2. "If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech, he or she may do so without fear of retribution from the state, for the speaker is not the one threatening to breach the peace or break the law. However, the Constitution does not require the police to "go down with the speaker." If, in protecting the speaker or attempting to quash the lawless behavior, the officer must retreat due to risk of injury, then retreat would be warranted....the police may go against the hecklers, cordon off the speakers, or attempt to disperse the entire crowd if that becomes necessary."

D. Unlawful Assembly Statute—

1. **Va. Code 18.2-406**: whenever 3 or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace or order, and the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety, peace or order, then such assembly is an **unlawful assembly**. Every person who participates in an unlawful assembly shall be guilty of a Class 1 misdemeanor. If any such person carried, at the time of his participation in an unlawful assembly, any firearm or other deadly or dangerous weapon, he shall be guilty of a Class 5 felony.

2. **Va. Code 18.2-411 (dispersal of unlawful or riotous assemblies; duties of officers)**: When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the police officials of the county, city or town, and any assigned militia, or any of them, shall go among the persons assembled or as near to them as safety will permit and command them in the name of the Commonwealth immediately to disperse. If upon such command the persons unlawfully assembled do not disperse immediately, such sheriff, officer or militia may use such force as is reasonably necessary to disperse them and to arrest those who fail or refuse to disperse. To accomplish this end, the sheriff or other law-enforcement officer may request and use the assistance and services of private citizens. **Every endeavor shall be used, both by such sheriff or other officers and by the officer commanding any other force, which can be made consistently with the preservation of life, to induce or force those unlawfully assembled to disperse before an attack is made upon those unlawfully assembled by which their lives may be endangered**. [Emphasis added]

3. **Immunity**--Virginia law enforcement officers, being statutorily authorized to disperse unlawful assemblies, even by the use of force, are immune from liability in connection with actions taken in dispersing the unlawful assemblies. *Banks v. Town of Culpeper*, 1995 W.L. 48267, 1995 U.S. Dist. LEXIS 1512 (W.D. Va. 1/10/1995).

E. **Law Enforcement Tactics**—there is no easy, or one-size-fits-all approach to managing a riotous crowd of people. In an urban area, police "formations" are one technique by which law enforcement officers may split a crowd into smaller sections for easier management or dispersal. However, techniques designed to move a crowd aren't necessarily effective for managing violence within the crowds being moved. As the size of a crowd grows, and violence increases, it may be necessary for officers to utilize measures such as mass arrests, or controlled use of force (chemical agents), or in some cases, to retreat for their own safety.

1. ***Mass Arrests***--Mass detention of protesters not actively engaged in violence can be legally problematic. Often protest activity, while unlawful, may not be violent. In Washington DC, police were criticized for their handling of mass demonstrations during a 2002 IMF/ World Bank (police

used mass arrest tactics, and those arrested included both non-violent protesters and bystanders). Subsequent litigation is costly. Courts dismiss charges against many, due to: poor quality of evidence against specific individuals. Understaffing the arrest processing function during a major event can lead to inordinately long periods of detention without charges. In New York City in 2004, protests at the Republican National Convention were managed by police using mass arrest decision, and a state-court judge ordered release of 500 protesters and imposed a $1,000 fine against the city for each protester held after a deadline set by the judge.

2. ***Use of Force***—use of force by police against the public is disturbing to watch. Prospect of capturing those confrontations is a goal of the media. Charlottesville is evidence of that. Some protesters have as their goal the provocation of police, so that use of force against them will be broadcast by the media. Adherence to the Use of Force Continuum is important. Also: all police agencies working together at an event should be on the same page, and the options for use of force should be agreed to in advance. (D.C. Metro Police has established a Civil Disturbance Use of Force Reporting and Investigation Protocol: non arrest options are preferred; the Protocol also defines various levels of force, and a use of force continuum, applicable only to crowd control situations).

F. ***Deciding When and How to Intervene—***following the August 2017 UTR Rally, City and Virginia State Police were accused of failing to provide an adequate law enforcement response to the rioting and fighting that occurred. One lawsuit brought against the City in federal court presented civil claims against the City and City officials, alleging "failure to intervene", and "deliberate indifference" to the violence that occurred. Those claims were dismissed by Judge Norman K. Moon, ruling in favor of the City on a 12(b)(6) Motion *(Robert Sanchez Turner v. Al Thomas, et al., U.S. Dist. Ct. (W.D. Va. Case No. 3:17-cv-00064)*. In his written memorandum opinion, Judge Moon stated as follows:

> Citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servc.*, 489 U.S. 189 (1989) and *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995), Judge Moon ruled that "The Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual….Affirmative acts, in the state-created danger context, are quite limited in scope. It cannot be that the state commits an affirmative act or creates a danger every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released….Ultimately, the Fourth Circuit has never issued a published opinion finding a successful state-created danger claim. Turner's argument there was "clear fair warning" that such a "stand down" order violated clearly established law, collapses under the weight of controlling precedent that there is generally no duty to intervene….
>
> "The tourchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." (Citing *Cty. Of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). In a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience….The Fourth Circuit has acknowledged that, outside of situations involving custody, the Supreme Court has never applied a "deliberate indifference" standard merely because the State created a danger that resulted in harm (citing *Slaughter v. Mayor & City Council of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012) (analyzing a deliberate indifference claim supported by a state-created danger theory of liability).

G. Many law enforcement officers regard the 1999 World Trade Organization protests in Seattle as a defining moment. Protesters were organized, knowledgeable about police procedures and tactics, and undertook a program of property destruction and violence against police officers. Police in Seattle were criticized for how they managed the demonstration: they made over 500 arrests, implemented curfews, and used tear gas and pepper spray on crowds that included both protesters and bystanders. Two years later, 2001 Mardi Gras celebrations resulted in additional civil unrest in Seattle.

1. Seattle's WTO After Action report cited "insufficient depth and detailing of contingency plans" as a flaw in their planning process. Unpredictability is inherent in these events. Don't underestimate the level of coordinated effort that some protesters are capable of. Seattle established a Major Event Planning Unit within their Special Operations Bureau, to provide an "ongoing source of institutional memory and organizational expertise."[1]

2. Information is essential—lack of it, or bad information, will negate the value of otherwise well-conceived plans. Seattle: "...the frequency and virulence of rumors and reports of planned and spontaneous disruptive acts increased, principally via the internet and other media. Most of these reports were alarming and many were preposterous. Events like the WTO invariably attract doomsayers and extremist rhetoric. The challenge is to separate disinformation and fallacious reports from potentially authentic data. In hindsight, it is clear that fragments of information gathered during this period were accurate and predictive."[2]

3. Information gathering: legal concern is that police are collecting, maintaining and sharing with other law enforcement agencies intelligence files on protesters. The ACLU has criticized use of undercover police intelligence sources to gather information about a group; ACLU position is that police should have a reasonable suspicion that a group is planning criminal activity, not just civil disobedience. These days, however, much, MUCH, information is readily available via public sources such as the internet and social media.

VII. "BAN THE GUNS"!!!

A. Virginia prohibits localities from regulating firearms. Local governments may not regulate or prohibit firearms in local government buildings, or in public places. State law allows open carry of all firearms, and provides for concealed-carry permits.

B. Virginia Constitution requires the "militia" to be under the control of the state government. Militia consists of three classes of forces: the National Guard, the Virginia Defense Force, and "unorganized" militias. If a group identifies itself as, or operates as, a militia it may be unlawful for the group to do so as part of a public event, unless requested by the Governor to assist. Question being litigated—Charlottesville City Council has joined a lawsuit seeking to permanently ban unofficial militia organizations from coming back to the City.

C. *See* "Prohibiting Private Armies at Public Rallies, a Catalog of Relevant State Constitutional and Statutory Provisions", February 2018, Institute for Constitutional Advocacy and Protection, Georgetown Law. http://www.law.georgetown.edu/academics/centers-institutes/constitutional-advocacy-protection/upload/prohibiting-private-armies-at-public-rallies.pdf

VIII. "WE'LL SEE YOU NEXT YEAR"!!!

A. The same permit applicant who organized the 2017 Unite the Right Rally sought a permit to do the same thing ("UTR2") on the 2018 anniversary of the first event. *Kessler v. City of Charlottesville, et al.,* (U.S. Dist. Ct. W.D. Va. Case No. 3:18-cv-00015-NKM-JCH). In 2018 the City denied a permit, using its 2017 experience with the applicant and the faults with applicant's own application materials, as grounds. No decision was rendered by the Court on the merits, on the day of the preliminary injunction hearing, the applicant withdrew his request for injunctive relief. For a media article that captures the bizarre series of events that the City experienced on its day in court in 2018, see https://www.huffingtonpost.com/entry/jason-kessler-charlottesville-rally-

[1] Police Management of Mass Demonstrations, Identifying Issues and Successful Approaches, *Police Executive Research Forum* (2006), p. 32
[2] Id.

lawsuit_us_5b578171e4b0de86f4915e07 (*"The Spectacular Catastrophe of Charlottesville Rally Organizer's Lawsuit for a Unite the Right Sequel", by Andy Campbell*) :

> *" 'I want to know what's going on. What is the point of this?' These are the exasperated words of U.S. District Judge Norman K. Moon, directed at a crack team of lawyers for white supremacist rally organizer Jason Kessler....Bringing a federal judge to his breaking point today was no easy task; Kessler's team really had to work for it. He and one of his lawyers, Kames Kolenich, were 45 minutes late to their hearing....It all started with white supremacist defense attorney Elmer Woodard—scraggly white mutton chops, bowtie, pinstripe suit and all—who seemed surprised that his co-counsel and Kessler weren't there....At several points, Moon held his forehead in his hand...."*

B. There is no *per se* rule precluding a government from referencing past experience in planning for future events. The question is to what degree inferences drawn from past experience are plausible. Heavier burdens on speech, in general, will be required to be justified by more detailed evidence of "narrow tailoring".

> *See Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 17 (1st Cir. 2004) :* affirmed the denial of a preliminary injunction sought by demonstrators at a political convention, to overturn restrictions based on part on "recent past experience with large demonstrations". Although there was no evidence in the record that the City had information indicating that the demonstrators in fact intended to use prior tactics in the proposed demonstration, the court held that the City of Boston properly took the past experience into account and "most assuredly can" make use of past experience as long as the "inferences drawn from past experience are plausible."

C. The following constitute grounds for denying a permit application: the application is incomplete or contains a material falsehood or misrepresentation; the applicant has damaged public property on a prior occasion and has not paid for the damage; permit has been granted to a different applicant for the same place; the proposed event would present an unreasonable danger to the health or safety of park users or employees; the applicant has violated the terms of a prior permit. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). See also ***Yeats v Norwood***, 841 F. Supp. 2d 934, 942 (E.D. Va. 2012)(upholding denial of a permit, after applicant failed or refused to provide for adequate traffic control/ security during the demonstration, and did not seek a waiver of the requirement/ related fees).