INFORMATION MEMO

First Amendment Concepts for Protests in Cities

Learn legal concepts related to First Amendment free speech rights in the U.S. and state of Minnesota Constitutions and how cities balance them with public safety concerns. Read about speech that is not protected, ways to deal with unpopular ideas and how others may react to them. Describes how cities may choose to regulate protests, marches and demonstrations in city parks or streets by ordinance.

RELEVANT LINKS:

What do you do if someone on your city staff or council hears about an unpopular group or person planning to use a city park, march in your city parade, or use city streets to stage a demonstration? At every point, consider that your role as a city official affects your response and is wholly separate from how you personally may feel about the group and their viewpoint.

Why? When you act as part of government, First Amendment rights kick in. The goal of this memo is to help you understand the parameters of those First Amendment rights to speak, and to balance them with the city's interest to protect both the speaker, law enforcement officials and those who do not wish to hear unpopular views expressed in their city.

I. First Amendment

State v. Wicklund, 589 NW 2d 793 (Minn. 1999).

Lovell v. City of Griffin, Ga., 303 U.S. 444, 451 (1938).

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

Texas v. Johnson, 491 U.S. 397 (1989).

In America, a person has a right or freedom to speak. That speech includes "expressive conduct" such as distributing literature, holding up banners, or burning things such as books or flags. Government, referred to as cities in this memo, must not limit that right to speak if the U.S. Constitution protects it, even if the view expressed is unpopular or downright offensive and hateful to others. It is hard to stress just how strenuously courts protect the First Amendment right to free speech from government regulation.

"If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Quoting U.S. Supreme Court Justice William J. Brennan, Jr.

Where exactly does this right to free speech come from? Just six words in the First Amendment of the U.S. Constitution:

- "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."

RELEVANT LINKS:

State v. Wicklund, 589 N.W.2d 793, 801 (Minn. 1999).

According to the Minnesota Supreme Court, the Minnesota Constitution does not offer broader protection of speech than does the U.S. Constitution.

Since the founding of this country, courts have given great weight and protection to allowing people to say, write, or post freely. But the right to speak is not absolute. There are three limited exceptions to a person's right to speak out, where such speech falls outside of First Amendment protection:

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).
United States v. Lee, 6 F.3d 1297 (8th Cir. 1993).

- **Words aimed at inciting violence, or "fighting words**." The U.S. Supreme Court narrowly defines "inciting violence" to mean "actions done with the intent to advocate the use of force or violence and likely to produce such action."

US v. Bellrichard, 994 F. 2d 1318 (Court App. Eighth Circuit 1993).

- **Actual threats of violence**. Minnesota courts find that the First Amendment affords no protection to those who utter direct threats of force and violence toward other people

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).
Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985).

- **Obscenity.** The U.S. Supreme Court defines obscenity as limited to works that appeal to a "prurient interest in sex, which portray sexual conduct in a patently offensive way, and which do not have serious literary, artistic, political, or scientific value."

Let's look at protected speech—that is, speech that may be unpopular but is not speech that is inciting violence, an actual threat of violence, or obscene.

II. Protected speech factors

Johnson v. Minneapolis Park and Recreation Bd., 729 F. 3d 1094 (Court of Appeals 8th Circuit 2013).

When determining if speech is protected and how a city may regulate it, courts consider these overarching points and concepts:

The Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn., 557 F. Supp. 2d 1014(D. Minn. 2008).

- Location: where a protest or demonstration occurs, focusing on public property.
- Content: courts use the term "content" when examining the viewpoints expressed, meaning what is expressed through action or words.
- Content neutrality: courts look at facts indicating or implying whether a city regulation shows disapproval of a specific message or is neutral as to the message.

A. Location

Johnson v. Minneapolis Park and Recreation Bd., 729 F. 3d 1094 (Court of Appeals 8th Circuit 2013). *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). See also, Part III. B below.

People have strong First Amendment rights to hold forth on city streets, sidewalks, and in city parks. As public forums, people may typically speak, hand out literature, or carry signs on streets, sidewalks, and in parks to express their opinions.

RELEVANT LINKS:

LMC information memo, *Parks and Recreation Loss Control Guide*. See also Handbook, *Election Procedures,* Section IV-C, Campaign Signs.

Due to the public nature of parks and streets, rooted in many years of tradition, cities must take great care if limiting speech in these areas to avoid running afoul of the U.S. Constitution.

B. Content neutrality

See Section I - First Amendment.

Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015).

The Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn., 557 F. Supp. 2d 1014(D. Minn. 2008).

Outside of the three exceptions discussed above (fighting words, actual threats of violence, or obscenity), a city has no power to restrict speech because of its subject matter or its content. This idea applies to both speech and conduct. As an example, a city ordinance banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation. Another example: declining an application from an unpopular group, even extremely unpopular, to march in a city parade or hold a rally simply because the group or their message is controversial is likely government restriction based on the content of the group's message. Unpopular or not, a group must be allowed to march, rally, or demonstrate safely. This does not mean a city council personally approves of the group or message. It simply shows that the city council, acting as government, understands it cannot look at the content of speech and base its reaction or regulation on approval or disapproval of the message. Government, acting through elected officials and staff, must be neutral as to content but does have some basis to control protests, marches, or demonstrations.

Ward v. Rock Against Racism, 491 U.S. 781 (1989).

As an example of a lawful content-neutral regulation, the court considered a city guideline controlling noise levels at band shell events; it applies to everyone using that park, which is near a residential area. The court found that the reason for the guideline had nothing to do with the content of the speech and it, thus, satisfied the requirement that the manner of regulation be content-neutral.

III. Content-neutral regulations

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Cities have valid concerns for public safety when people speak out on controversial issues; challenging situations may result. When it comes to public forums, such as sidewalks and streets, cities may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions:

- Do not consider the content of the speech.
- Are crafted narrowly, only to serve an important governmental interest.
- Leave open other ways for someone to communicate the information.

Let's parse these out a bit.

RELEVANT LINKS:

Working Am., Inc. v. City of Bloomington, 142 F. Supp. 3d 823 (D. Minn. 2015).
LMC information memo, *Regulating Peddlers, Solicitors and Transient Merchants*.

The Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn., 557 F. Supp. 2d 1014(D. Minn. 2008).

Welsh v. Johnson, 508 NW 2d 212 (Minn. Ct. App. 1993).

Frisby v. Schultz, 487 US 474 (1988).

State v. Occhino, 572 N.W.2d 316 (Minn. Ct. App. 1997).

Minn. Stat. § 412.221, subd. 3.

Minn. Stat. § 373.052, subd. 1b.

State v. Occhino, 572 N.W.2d 316 (Minn. Ct. App. 1997).

Minn. Stat. § 609.605, subd. 1 (b) (11).

A. Time

As an example, if a city ordinance sets an 8 p.m. deadline for peddlers and solicitors but does not restrict others who may knock on doors, such as a person espousing religious or political beliefs, the time restriction singles out one kind of "speech" and may be a questionable regulation. While this case does not involve protests or demonstrations, the principle of city restrictions based on time also likely applies to the use of city streets and sidewalks.

A city may regulate the times that a protest march on a city street begins and ends. Content-neutral time of day regulations are allowable when based upon articulated and specific public safety concerns. These concerns may include ensuring the safe movement of other pedestrians or traffic on the march route, and ensuring the march does not interfere with emergency police, fire, or ambulance services along the route.

B. Place

Consult the city attorney before implementing any city regulations of speech That said, some of the ways cities may lawfully limit speech revolve around the place of the speech, protest, or demonstration.

(1) Homes

Cities have a strong interest in prohibiting protests, picketing, and demonstrations focused on a person's home. Cities may act to protect the well-being, tranquility and privacy of an individual's home. City ordinances, discussed subsequently, may likely limit picketing or demonstrating in front of a residence.

(2) Public buildings

Not every part of a publicly owned building is a public forum. Police bureaus, tax offices, and other areas where city staff must work are routinely off-limits for citizens without prior arrangements. City councils may likely close public buildings to protect them from damage or destruction. County boards may, by resolution, close a public building in an emergency and retroactively approve the closing at its next meeting.

(3) Access to public officials and public property

The First Amendment does not guarantee personal access to public property and public officials. Private areas of offices of individual city officials, even though publicly owned, are not always open to all comers.

City-owned property, or private property, may be cordoned off and access restricted by law enforcement.

RELEVANT LINKS:

"Cordoned off" in this context means that access is barred by using tape, barriers, or other means conspicuously placed and identifying the area as off-limits by a police officer's actions. A person is guilty of a misdemeanor if the person intentionally enters the restricted area.

(4) In roadways

Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo., 775 F.3d 969 (8th Cir. 2014).

A city ordinance seeking to prevent harm to pedestrians or to people distributing materials to vehicles directly in the roadways may be a valid restriction on First Amendment rights, especially when the ordinance does not limit distribution of materials along the side of the roadways and at other locations in the city. (Note: this may not apply to people standing in medians or other areas near a street where a person may safely stand and hold a sign or hand out a pamphlet). If cities document the risks of people soliciting or distributing materials within a roadway, that may help a city establish this as a valid and content-neutral regulation that applies to all. Risks include people being struck by vehicles, or vehicles getting into accidents trying to avoid hitting a person in the street.

C. Manner

See Section I - First Amendment.

Texas v. Johnson, 491 U.S. 397, 420 (1989).

United States v. Lee, 6 F.3d 1297, 1301 (8th Cir. 1993).

Outside of the three exceptions discussed above (fighting words, actual threats of violence, or obscenity), cities may not regulate the way, or manner, in which a person chooses to express their beliefs, or to "speak." For example, a city may not act to stop someone from burning a flag, a cross, wearing a jacket with an obscenity on it, or displaying signs that criticize the city. Though objectionable and even abhorrent to many, cities may not prohibit or criminally charge a person for such expressions of their opinions; the manner of expression is still "speech" protected by the First Amendment.

D. Time, place, and manner combined

The Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008).

A Minnesota city worked over many months with a group planning to march in protest during a large convention. This case is unique because of the number of people attending the convention and those wishing to protest it. Notable for all cities is the approach the city took, working with the protesters, legal staff, law enforcement, and many others to allow a demonstration but keep the public and convention attendees safe.

The court found that the city successfully limited the time, place, and manner of the protest in the following ways:

- The time of a planned protest, by not allowing it to occur when the United States president was expected to attend, but allowing marches at other times.

RELEVANT LINKS:

- The route, or place, of a protest due to security and safety concerns and the expected attendance of over 40,000 people at the convention.
- The manner of the protest, requiring the group to apply for a permit to march and to stay on the agreed upon route.

Importantly, the court noted that ample opportunity for free speech existed because, "despite massive security and logistical concerns inherent" to the convention, the permit's route brought the marchers within sight and sound of the convention that they found objectionable.

IV. Limits on First Amendment

Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271 (1984).

As an interesting aside, a citizen or even a city employee may not use the First Amendment to force a response from a city. The U.S. Supreme Court finds that nothing in the First Amendment suggests that the right to speak requires government policymakers to listen or respond to employees or members of the public.

Bierman v. Dayton, 227 F. Supp. 3d 1022 (D. Minn. 2017) *dismissed for lack of jurisdiction by Bierman v. Dayton*, 817 F.3d 1070 (8th Cir. 2016).

This idea most often comes up in employment law; individual employees argue that the First Amendment means that government must listen to each person, not a union or collective bargaining unit. Minnesota courts find that employees or members of the public "have no constitutional right to force the government to listen to their views. A person's right to speak is not infringed when government simply ignores that person while listening to others." Best practice suggests checking on this tenet with the city attorney before acting on it.

V. Regulating use of streets by ordinance

Cox v. State of New Hampshire, 312 U.S. 569 (1941).
Lovell v. City of Griffin, Ga., 303 U.S. 444, 451 (1938).

A city ordinance may require all people wishing to participate in a parade or march on city streets to seek a permit first. A city has authority to control the use of its public streets for parades and demonstrations. The ordinance and the permitting process must follow reasonable time, place, and manner regulations.

A. Permits

If a city ordinance requires a permit to use public property to rally, demonstrate, or march in a parade, each step of the process must focus on objective criteria and not the views of the applicants seeking the permit. Both the city's staff and process must be objective in approving and denying permits.

RELEVANT LINKS:

1. Content-neutral review by city staff

Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123 (1992).

For example, the Supreme Court found an ordinance unconstitutional because it allowed a city administrator to set permit fees based on the amount of disruption he thought an unpopular group would cause. In effect, the city ordinance required the administrator to examine the content of the applicant's speech—the very thing to avoid—rendering the ordinance unconstitutional.

Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996).

By contrast, a city ordinance requiring the chief of police to issue or deny a parade permit based on the time, route, and size of the demonstration survived court scrutiny on that point because it did not require consideration of the applicant's views or purpose of their demonstration. (However, the court found the section of the parade permitting ordinance requiring a five-day notice of an event from a group of just10 or more people wishing to demonstrate problematic, discussed below).

2. Objective standards

Advantage Media, L.L.C. v. City of Hopkins, 379 F. Supp. 2d 1030 (D. Minn. 2005) (citing *Thomas v. Chicago Park Dist*., 534 U.S. 316, 322 S. Ct. 775 (2002).

Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996).

Again, content-neutral standards in a city ordinance may include several factors as long as they apply to all seeking a permit to rally, demonstrate, or parade. Some examples include the following factors:

- Permits required only for larger groups, say, 50 or more people.
- Sound regulations, for example, use of amplification in city parks.
- Routes that do not unreasonably interfere with emergency response.
- Reasonable time of event restrictions.

The Coal. to Mar. on the RNC & Stop the War v. The City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008).

- Permits denied based on public safety and order, including the safe and orderly movement of pedestrian and vehicular traffic in the area.

Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996).

- Reasonable permit procedures in an ordinance as to when an application to demonstrate must be filed (except protests involving constitutionally protected speech must generally be allowed to occur with short notice).

3. Fees

Cox v. State of New Hampshire, 312 U.S. 569 (1941).

Permit fees may not be a source of revenue, though they may cover some expenses. It is yet another area to avoid looking at the content of the message and consider setting reasonable fees applicable to all who apply.

RELEVANT LINKS:

Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir.1983).

Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

iMatter Utah v. Njord, 980 F. Supp. 2d 1356 (D. Utah 2013), aff'd, 774 F.3d 1258 (10th Cir. 2014).

Terminiello v. Chicago, 337 U.S. 1 S. Ct. 894 (1949).

4. Insurance and indemnification

Insurance requirements in ordinances may be subject to scrutiny. Courts outside of Minnesota find mandatory insurance provisions unconstitutional because such requirements may discourage a group from demonstrating.

In one case, a court found that requiring a notorious group to obtain insurance to demonstrate or march violates the First Amendment when that group, due to its controversial nature, could not obtain commercial insurance.

Requiring that a protest applicant indemnify, or defend the city against loss due to a demonstration, has been found to conflict with the First Amendment. Such a requirement applied to all applicants, may be too broad, or not narrowly tailored to meet a substantial government interest and thus has been found to discourage people wishing to protest from using public property. Note that cities may prosecute any demonstrator who vandalizes public property or harms a third party.

This is not a settled area of law in Minnesota. However, courts in Minnesota may look at how courts in other states have ruled on this issue. It's important that cities consult with the city attorney as to insurance or indemnification requirements in a permitting ordinance allowing use of public streets or parks by large groups of people.

B. Governmental response to requests for permits

It may seem counterintuitive, but if your city receives a request for a parade or demonstration permit from an unpopular group, consider working with all sides to protect First Amendment rights to speak. At all phases, cities must refrain from actions that disfavor what an unpopular group expresses or favor a popular viewpoint. Working with the entity that wishes to protest, demonstrate, or march in a city parade allows people to speak but also helps identify and account for public safety concerns. What about the people in your city who do not wish to hear what they consider a downright offensive viewpoint, setting off counter protests?

VI. Counter protests and the heckler's veto

An extremely unpopular group protest may trigger even larger counter protests. If those counter protesters become angry, hostile, or violent, city officials and city police departments cannot remove the unpopular group to appease the counter protesters. A person's right to speak cannot be limited because it stirs people to anger, invites public outcry, or causes turmoil. To do so allows those heckling a speaker to quash their speech by getting the city to intervene; this is known as the heckler's veto.

RELEVANT LINKS:

If a city refuses to issue a permit for a demonstration by a notorious group because of concerns about counter protesters, it may be in danger of a constitutional challenge based on allowing a hostile audience to silence a speaker. The city itself might then effectively be seen as silencing the speaker and effectuate a "heckler's veto." The First Amendment does not allow such action by a city.

Minn. Stat. § 609.595.

Remember, cities may prosecute demonstrators who damage public property, public safety vehicles, or harm a third party pursuant to current criminal law. Intentionally and significantly damaging critical public service facilities with an intent to disrupt those services may bring heighted charges in some situations.

Minn. Stat. § 609.594.

VII. Conclusion

Should your city receive a request to demonstrate, rally, or parade, remember your response as someone affiliated with the city is tied to the time-honored traditions of allowing people to speak. A fact-specific inquiry is required in each situation. The city attorney is best suited to provide the complex legal guidance cities face when a protest or demonstration comes to your city. With that guidance, your city council may consider an ordinance to govern the use of city streets and perhaps city parks by large groups of people seeking to protest or demonstrate.