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Legal Sidebar

Freedom of Association in the Wake of Coronavirus

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At least 42 U.S. states have issued emergency orders directing residents to "stay at home," with many states prohibiting gatherings of various sizes to control the spread of Coronavirus Disease 2019 (COVID-19). California's March 19th stay-at-home order effectively banned public gatherings outside of "critical" sectors and "essential" services. New York's March 23rd order "canceled or postponed" "non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events)," with a maximum penalty of $1,000 for violations added in a later order. Maryland's March 30th order prohibited "[s]ocial, community, spiritual, religious, recreational, leisure, and sporting gatherings and events . . . of more than 10 people," with willful violators facing up to a year imprisonment and/or a maximum fine of $5,000. Texas's March 31st order directed residents to "minimize social gatherings" except "where necessary to provide or obtain" designated "essential services." In late March, some lawmakers called on the President to issue a temporary, nationwide shelter-in-place order.

Mandatory social distancing measures have prompted constitutional questions, including whether gathering bans, which restrict in-person communication, comport with the First Amendment's protections for freedom of speech and assembly. There have already been a few legal challenges to COVID-19–related orders litigated on these grounds. On March 25th, a New Hampshire court denied an emergency motion to enjoin that state's previous ban on scheduled gatherings of 50 people or more. And on April 13th, the Pennsylvania Supreme Court rejected a state candidate's First Amendment challenge to a March 19th order closing "non-life-sustaining" businesses. This post discusses the legal standards that those courts applied as well as background First Amendment principles that are likely to continue to inform judicial review of free speech–related challenges to gathering bans. Religious exercise principles are discussed separately in this posting.

Legal Background: Freedom of Association and Emergency Measures

The First Amendment prohibits the federal government and, through the Fourteenth Amendment, state and local governments from "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." Early Supreme Court precedent suggested that assembly was protected only if the purpose was to petition the government. Later cases, however, recognized "the close nexus between the freedoms of speech and assembly,"

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describing a right "to gather in public places for social or political purposes." Although the Court now recognizes a broader "right to associate" to engage in any First Amendment activities, including speech, petition, and religious exercise, legal commentators have observed that association claims are often "resolved on free speech grounds," with association having largely "displaced" the right of assembly. Thus, although gathering bans clearly implicate assembly concerns, courts will likely resolve association-based challenges to these measures by relying on the Court's free speech case law.

Government regulations of speech are often subject to heightened levels of scrutiny, meaning that a state must show that its regulation is appropriately tailored to achieve a sufficiently important government interest. At the same time, states have broad "police powers" to adopt measures that are "essential to the public safety [and] health," so long as the state (1) acts in "the interests of the public generally" as opposed to "those of a particular class," and (2) uses "reasonably necessary" means that are "not unduly oppressive upon individuals." The question becomes how to reconcile these two disparate standards during a pandemic.

The Supreme Court has said that "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved," by the Constitution. But "emergency may furnish the occasion for the exercise of power." The Court drew this distinction in the midst of the Great Depression, recognizing the need for "a rational compromise between individual rights and public welfare." And while the Supreme Court has at times ruled that First Amendment freedoms must yield to certain exigencies, it has never squarely decided whether the government can completely ban people from gathering during a state of emergency. Some appellate courts have ruled that "free speech may be temporarily limited or suspended" in "an emergency situation." Reasoning that courts should grant governing officials "the proper deference and wide latitude necessary for dealing with the emergency," these courts have applied flexible standards in reviewing alleged infringements of civil liberties that echo the "reasonably necessary" police powers standard. For example, in upholding a county curfew following Hurricane Andrew, the Eleventh Circuit asked only whether the government (1) took that action in "good faith," (2) with "some factual basis" that the restrictions were "necessary to maintain order."

This two-part "emergency measures" test partly guided a New Hampshire court's review of a state order responding to the novel coronavirus. In *Binford v. Sununu*, the state court denied a group's request to preliminarily enjoin an order banning scheduled gatherings of 50 people or more. After noting the plaintiffs' concession that the governor "acted in good faith," the court concluded that the governor established a "sufficient factual basis" for the gathering ban. The ban, the court wrote, was "consistent with similar actions taken by New Hampshire courts" responding to COVID-19 and "clearly supported by the recommendations put forth by the CDC and the White House." The court also noted the "multiple checks" on the governor's emergency powers, including the order's "limited duration" of 21 days.

It is not clear, however, whether the deferential emergency measures test is the appropriate standard for resolving First Amendment challenges to gathering bans. Modern free speech cases suggest that the First Amendment provides a check on even the strongest government interests by demanding sufficiently tailored laws. For example, the Supreme Court has held that "'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power." Instead, the Court emphasized that "precision of regulation must be the touchstone" when considering restrictions on free association rights. More directly, the Ninth Circuit has suggested that the emergency measures test "does not permit a sufficiently nuanced review of the First Amendment rights at stake" in all situations. Observing that courts have applied that test to "nighttime curfew[s]" imposed during "natural disasters" or "civil unrest confined in a small[] area," the court applied a standard from free speech case law to evaluate "a restricted zone covering a large part of downtown Seattle" that remained in place "day and night" for "several" days.

Statewide coronavirus-related gathering bans cover even larger swaths of potential meeting spaces than the restricted zone in the Ninth Circuit case and could be in place for weeks or months. In March, as governors across the United States began to declare states of emergency in response to the coronavirus,

some commentators suggested that a heightened standard of review should apply to mandatory restrictions. In an open letter to federal officials, "over 450 public health, human rights, and legal experts and organizations," including the American Civil Liberties Union (ACLU), cautioned that "[i]nfringements on liberties" due to mandatory lockdowns must be "proportional to the risk presented by those affected," the "least restrictive means to protect public health," and "regularly revisited to ensure that they are still needed as the epidemic evolves." Given these disagreements over the appropriate standard of review, the next section summarizes the traditional First Amendment tests that could apply in a free speech challenge to a gathering ban.

Free Speech Standards That Could Apply to Gathering Bans

Depending on the scope and wording of the gathering ban at issue, one of several free speech tests could apply in a constitutional challenge.

Conduct Regulation with Incidental Effects on Speech. The First Amendment generally does not prohibit the government from regulating conduct. However, incidental burdens on speech or expressive activity created by a conduct-focused regulation are still subject to First Amendment scrutiny. While gathering bans do regulate conduct in one sense (i.e., the act of meeting in person with a certain number of people), they likely have more than an *incidental* effect on speech because they "directly limit" association. However, even if a court views a gathering ban as a conduct-focused regulation, the judicial test to determine whether the restriction is sufficiently limited is "little, if any, different from the standard applied to time, place, or manner restrictions," discussed below.

Time, Place, or Manner Regulations. The government may impose reasonable restrictions on the time, place, or manner of speech, subject to some conditions. First, those restrictions must be content-neutral, meaning that they generally cannot regulate speech because of its subject matter or viewpoint. Second, the restrictions must be "narrowly tailored to serve a significant governmental interest," meaning that they "must not burden substantially more speech than is necessary to further" that interest. And third, the restrictions must "leave open ample alternative channels for communication." One scholar has noted that the time, place, or manner standard has allowed for "extensive legal regulation" of public gatherings, including through permit requirements. Gathering bans that regulate the *places* where speech occurs or the *manner* in which it is conducted, rather than its content, could be evaluated under the time, place, or manner standard. In the zoning context, some lower courts have held that the temporary nature of certain moratoriums affecting speech, even those lasting longer than a month, made them valid *time*-based regulations, though this analysis may not apply to orders of an indefinite duration.

At least two courts have concluded that coronavirus-related gathering bans satisfied the time, place, or manner test. The *Binford* court, applying this standard in the alternative, held that New Hampshire's ban was "content neutral" because it applied to "any gathering in excess of 50 people," regardless of the purpose or content of the gathering. The court also held that the ban was "narrowly tailored" to protect public health, a significant governmental interest, because it was less restrictive than federal guidance limiting gatherings to 10 people and had a "fixed expiration date." Finally, the court concluded that the ban "clearly" left open "alternative opportunities for expression" because it did not apply to scheduled gatherings of less than 50 people, "impromptu gatherings" of any size, or telephone or online communications. The Pennsylvania Supreme Court similarly cited the option of virtual assembly in rejecting a candidate committee's First Amendment challenge to the governor's March 19th order closing "non-life-sustaining" businesses. While the Pennsylvania high court appeared to read the order to reach only "the physical campaign office," the court stopped short of opining whether the candidate's supporters could gather in person in other locations.

Other states' gathering bans might not fare as well as the challenged New Hampshire or Pennsylvania orders under the time, place, or manner standard. In particular, orders that severely limit the locations or

size of in-person gatherings may not be "narrowly tailored" or leave open "ample alternative channels" of communication. For example, the Supreme Court previously upheld an eight-foot "bubble zone" that prohibited people from approaching nonconsenting individuals entering abortion clinics to engage with or distribute materials to those individuals—two more feet of space than the CDC-recommended six feet of social distancing from others. The Court emphasized that the restriction left "ample room to communicate" through conversational speech and applied "only within 100 feet" of such facilities where it was "most needed." In contrast, in *McCullen v. Coakley*, the Court struck down a 35-foot, fixed "buffer zone" outside abortion facility entrances because it burdened substantially more speech than was necessary to achieve the government's interests. In particular, the zone made it nearly impossible for people to engage in "close, personal conversations." The current COVID-19 gathering bans, which generally regulate in-person meetings based on size rather than adherence to social distancing practices, could suffer from a similar defect because they restrict groups from engaging in a common and low-cost medium of expression—"normal conversation"—for which virtual meetings may provide an inadequate substitute. And they often extend to public streets, sidewalks, and parks—places that "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." However, COVID-19 gathering bans are likely more tailored to achieving the government's interests than the buffer zone at issue in *McCullen*. Restrictions that prevent close, personal contact are the centrally recommended way, not merely an expedient way, to control the spread of the coronavirus. And unlike physical obstruction of facility entrances or harassment, the virus's presence in any given area may be "difficult to detect."

Content-Based Regulations. The time, place, or manner standard may not apply to orders that prohibit gatherings for some lawful purposes but not others, because such orders may draw content-based distinctions (e.g., prohibiting concerts but not religious gatherings). A content-based regulation is "presumptively unconstitutional" and subject to strict scrutiny, meaning that it can only survive judicial review if it is "narrowly tailored" to serve a "compelling" governmental interest. Unlike under time, place, or manner review, "narrow tailoring" in the strict scrutiny context typically requires that the law be the "least restrictive means" of achieving the government's interest "among available, effective alternatives." Courts often examine the evidence to test the government's assertions that a speech regulation is narrowly tailored. However, given the complexity and time-sensitive nature of the public health response to the coronavirus, courts may defer to state or federal executives if they conclude a ban on certain types of gatherings but not others is the least speech-restrictive way to address the problem.

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Judicial resolution of ongoing challenges to gathering bans could help to inform Congress's consideration of whether to take additional actions on a nationwide basis in response to the pandemic. These decisions can also guide the federal government in deciding whether to maintain restrictions in certain national parks and federal buildings. Although the precise test for reviewing emergency gathering bans is somewhat unsettled, the Supreme Court has long held that the Constitution "does not withdraw from the Government the power to safeguard its vital interests." But "when First Amendment rights are at stake," the Court has committed to state and federal lawmakers the "task of writing legislation which will stay within those bounds" to mitigate the "impact on the continued vitality of First Amendment freedoms."

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