



INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER

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I am a senior litigator at the Institute for Constitutional Advocacy and Protection (ICAP) and a visiting professor of law at Georgetown University Law Center. I previously was the Acting Assistant Attorney General for National Security at the U.S. Department of Justice from 2016–2017, the Principal Deputy Assistant Attorney General for National Security from 2014–2017, and an Assistant U.S. Attorney in the U.S. Attorney’s Office for the District of Columbia for nearly two decades. ICAP is a small constitutional impact litigation organization within Georgetown Law, focused on issues of public interest. I recently led successful litigation on behalf of the City of Charlottesville, Virginia, and local small businesses and neighborhood associations to prevent a recurrence of militaristic violence in the public square, as had occurred at the August 2017 Unite the Right rally during which one person was killed and dozens injured.

I make this statement today on behalf of ICAP and with regard to Portland’s proposed ordinance to “Authorize the Commissioner in Charge of the Police Bureau to Order Content-Neutral Time, Place, and Manner Regulations for Demonstrations Held in the City” (“the ordinance”). I appreciate that some observers have expressed concern about the constitutionality of the proposed ordinance. In our view, a facial constitutional challenge to the ordinance under the First Amendment to the U.S. Constitution would stand little chance of succeeding. The ordinance instead serves the laudable goal of ensuring public safety during large demonstrations, thereby creating the conditions for freer and more peaceful expression.

I express no view on the constitutionality of the ordinance under the Oregon Constitution or other Oregon law, nor do I express any view on the constitutionality of any particular applications of the ordinance, which would depend on the particular facts. Further, this statement does not address the constitutionality of any potential penalty for violation of the ordinance.

The Proposed Ordinance Comports with First Amendment Principles

Governmental restrictions of speech on the basis of content or viewpoint pose unique concerns in a free society. The U.S. Supreme Court has therefore long subjected such restrictions to a rigid standard known as strict scrutiny. But this does not mean that people may express themselves “at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1138–39 (9th Cir. 2005) (rejecting the view that “protestors have an absolute right to protest at any time and at any place, or in any manner of their choosing”).

Accordingly, under well-settled First Amendment principles, regulations of the time, place, or manner of public expression are subject to a less demanding form of review. Such regulations are constitutional as long as they (1) “are justified without reference to the content of the regulated speech,” (2) “are narrowly tailored to serve a significant governmental interest,” and

(3) “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The ordinance’s stated purpose is to authorize the issuance of “Content-Neutral Time, Place, and Manner Regulations for Demonstrations Held in the City.” Consistent with this professed constraint, the ordinance does *not* empower the Commissioner in Charge (“the Commissioner”) to control what people may say. It merely enables the Commissioner—when certain conditions are met—to issue written orders concerning when and where people may demonstrate, and what weapons, if any, they are prohibited from carrying when they do so. Such generalized restrictions “have nothing to do with content.” *Boos v. Barry*, 485 U.S. 312, 320 (1988). Nor do the ordinance’s well-documented justifications for imposing them.

Because the ordinance allows the Commissioner to limit only the time, place, and manner of certain demonstrations, the sole remaining question is whether the ordinance satisfies the more lenient three-part test described above. I will first discuss the *Ward* test’s second and third prongs, and then conclude by analyzing whether the ordinance would actually enable content-based speech restrictions, contrary to its stated purpose.

First, the governmental interests served by the ordinance are undoubtedly significant. Among the ordinance’s core objectives are to protect the safety of demonstrators, prevent property damage, minimize congestion on public property, and reduce the mass diversion of police resources. Courts have repeatedly recognized the importance of such interests. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (“The State . . . has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens.”); *Heffron*, 452 U.S. at 651 (characterizing as “substantial” the government’s “interest in the orderly movement of a large crowd and in avoiding congestion”); *Menotti*, 409 F.3d at 1131 (“No one could seriously dispute that the government has a significant interest in maintaining public order; indeed this is a core duty that the government owes its citizens.”).

Second, there is no plausible argument that the ordinance violates the *Ward* test’s tailoring prong. Although a time, place, or manner regulation must be “narrowly tailored” to serve a significant governmental interest, it “need not be the least restrictive or least intrusive means of doing so.” *Ward*, 491 U.S. at 798. *Ward*’s tailoring requirement is satisfied as long as the relevant governmental interest “would be achieved less effectively absent the [challenged] regulation.” *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). A regulation will be invalidated for this reason only if its restrictions are “substantially broader than necessary to achieve the government’s interest.” *Id.* at 800.

The ordinance contains structural safeguards designed to ensure the satisfaction of this standard. For example, the ordinance requires the Commissioner to issue written “findings demonstrating the necessity” for any time, place, or manner restrictions imposed. And it specifies that the Commissioner’s written orders must “establish that other alternative regulations were considered and that no other less restrictive means were practicable under the circumstances.” In this way, the ordinance *over*protects demonstrators’ constitutional rights by erecting more barriers to regulation than the First Amendment requires. If any protestors’ rights are violated by the

application of this ordinance in the future, it will be despite—and not because of—this carefully crafted feature.

Third, the ordinance also hews closely to *Ward*'s requirement that any restriction preserve ample alternative channels for expression. This command rarely will be violated unless the government “foreclose[s] an entire medium of public expression across the landscape of a particular community or setting.” *Menotti*, 409 F.3d at 1138. After all, the First Amendment requires that “individuals retain the ‘ability to communicate effectively,’” *id.* at 1138 n.48 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)), not “the *most* effective means of communication,” *id.* (emphasis added).

Under the conditions specified in the ordinance, if the Commissioner orders the relocation of a public demonstration, “[a]ny such redirection shall be to a location that is reasonably close to, sufficiently approximates, or reaches substantially the same audience as the original location.” This provision faithfully tracks the applicable law. And the ordinance grants no authority to impair demonstrators’ ability to convey their messages effectively in a public setting. Put another way, “the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain.” *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Any violations that might occur in the course of implementing concrete time, place, or manner regulations would be attributable not to the ordinance—which facially comports with First Amendment doctrine—but to separate acts that purport to exercise authority *beyond* what the ordinance provides.

Fourth, the ordinance does not authorize content-based restrictions of speech. A content-based regulation is one that “target[s] speech based on its communicative content”—in other words, “because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015). Laws that draw such distinctions “on [their] face” qualify as content-based. *Id.* at 2227 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011)). So do facially content-*neutral* laws that “cannot be ‘justified without reference to the content of the regulated speech,’” or that were adopted “‘because of disagreement with the message [the speech] conveys.’” *Id.* (quoting *Ward*, 491 U.S. at 791) (alteration in original).

None of the five types of regulations contemplated in subsection (d) of the ordinance references the communicative content of speech. Each is a paradigmatic time, place, or manner regulation, one that would “apply equally to all demonstrators.” *Hill v. Colorado*, 530 U.S. 703, 719 (2000). And subsection (c), which sets out the conditions under which the Commissioner “is authorized to take action by written order,” steers a decidedly content-neutral course. It aims at preventing the outbreak of violence between groups that have clashed before, regardless of those groups’ respective beliefs. The ordinance’s detailed recitation of past “injury and property damage” ascribes no views to these antagonistic groups, identifying them only as “demonstrators” and “counter-demonstrators.” In short, the ordinance draws no content-based distinctions on its face; it is fully justified by content-neutral considerations; and there is no indication that its true purpose is to suppress speech on certain topics or to stifle particular viewpoints. *See Menotti*, 409 F.3d at 1129 (restricted zone established by mayor’s order “applied equally to persons of all viewpoints”).

To be sure, there is a superficial resemblance between the ordinance—specifically, its focus on obviating anticipated violence—and the permitting scheme deemed to be content-based in

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). In *Forsyth County*, an administrator was empowered to increase the fee paid by permit applicants to compensate for the expected cost of maintaining order at permitted events. To assess such a fee, the Supreme Court reasoned, the administrator would have to examine the content of an applicant’s message and predict the likely response of onlookers. The resulting fee would depend on “the amount of hostility likely to be created by the speech based on its content.” *Id.* at 134. The rule of *Forsyth County*—that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation,” *id.*—is often referred to as the “heckler’s veto” principle.

The D.C. Circuit reached the same result for the same reason in *Christian Knights of the KKK v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992). In that case, the government sought to limit a planned Klan march to four blocks rather than the requested eleven—a “place” restriction—for the sake of better “control[ing] the outbreak of violence it anticipated.” *Id.* at 373. Such a restriction, the court held, would necessarily be predicated on “what point [the Klan] would be trying to make, and how much antagonism, discord and strife this would generate.” *Id.* The government’s proposed location restriction was therefore content-based.

By contrast, the ordinance does not oblige the Commissioner to anticipate listeners’ reactions. Although subsection (c)(3) of the proposed ordinance requires a showing of “a substantial likelihood of violence at the planned demonstrations” for the Commissioner’s authority to be activated, because subsection (c)’s three factors are listed in the conjunctive, the Commissioner need not forecast how onlookers are likely to react to the utterance of any particular message. Instead, a “substantial likelihood” showing would presumably be anchored by a documented history of violence between multiple groups planning to demonstrate at the same time. The presence of such a history—that two groups have skirmished in the past and will likely do so again—would provide a standard for the Commissioner to administer irrespective of the content of any group’s or speaker’s message. *Cf. Christian Knights of the KKK*, 972 F.2d at 372 (noting that “the Klan were not expected to engage in violence,” and that any disorder would result from onlookers’ hostile reactions to the Klan’s message).

The Seventh Circuit’s decision in *Potts v. City of Lafayette*, 121 F.3d 1106 (7th Cir. 1996)—decided after *Forsyth County*—illustrates this exact principle at work. In *Potts*, a police order forbade all persons from bringing weapons to an upcoming rally. The order justified this “manner” restriction in light of the expected attendance of “groups . . . who have been violent toward the [demonstrators] in the past, and who have been violent toward one another.” *Id.* at 1111. In the court’s view, the police order targeted “the possibility that attendees who had been violent at previous rallies would injure themselves, others, or property,” and “not . . . the content of the views aired at the rally.” *Id.* The record contained “[n]othing . . . suggest[ing] that the [government] disagreed with the content of the message of the [demonstrators] or other groups expected to attend the rally.” *Id.* The same is true here. As Section 1 of the ordinance painstakingly demonstrates, the City of Portland is endeavoring to counteract “a pattern of escalation, injury and property damage”—regardless of what each set of antagonists says or believes.

Importantly, the ordinance is not directed to a permitting process or the establishment of permitting conditions, and instead applies when multiple groups have announced an intention to demonstrate simultaneously. It does not purport to name such “groups” in advance or even limit

its applicability to “groups” that are formal or informal named organizations. Any time, place, and manner regulations resulting from application of the terms of the ordinance would apply equally to *all* persons attending those events, not just to a single person or group. As the Supreme Court has explained, regulatory evenhandedness “is evidence against there being a discriminatory governmental motive.” *Hill*, 530 U.S. at 731; *see also Heffron*, 452 U.S. at 649 (concluding that a “place” restriction was not content-based because it “applie[d] evenhandedly to all”). The Court has also suggested that generally applicable time, place, and manner regulations categorically fall outside the “heckler’s veto” doctrine. *See Hill*, 530 U.S. at 734 (concluding that such a restriction “does not provide for a ‘heckler’s veto’ but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject to the narrow place requirement).

The Ninth Circuit has explicitly endorsed this view. It is the law of the circuit that speech restrictions are subject to the “heckler’s veto” doctrine only when a speaker or message is singled out for disfavor, as often occurs when conditions are attached to permits. “The prototypical heckler’s veto case is one in which the government silences *particular* speech or a *particular* speaker ‘due to an anticipated disorderly or violent reaction of the audience.’” *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1293 (9th Cir. 2015) (quoting *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007)). To date, “every appellate decision” applying that doctrine has “involved the restriction of *particular* speech due to listeners’ actual or anticipated hostility to *that* speech.” *Id.* (emphases added). But when a “generally applicable regulation” does “not single out [any] speech,” it is “not the stuff of a traditional heckler’s veto,” and must therefore be deemed content-neutral. *Id.* at 1294; *see also id.* (“We would expand the heckler’s veto doctrine significantly . . . if we held here that the doctrine applies to neutral regulations that do not target particular speech . . .”).

As a matter of historical reality, the ordinance was drafted against the backdrop of violence committed by groups of demonstrators and counter-demonstrators with discernible ideological commitments. These recent patterns of conflict in downtown Portland show few signs of abating. As a result, the restrictions contemplated by the ordinance will likely fall most heavily on these groups—at least in the near term. But that fact is irrelevant for First Amendment purposes.

To understand why, consider *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). *McCullen* involved a speech restriction that applied only outside clinics where abortions were performed. Naturally, the act “ha[d] the inevitable effect of restricting abortion-related speech more than speech on other subjects.” *Id.* at 2531. As the Court explained, however, “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.” *Id.*; *see also Menotti*, 409 F.3d at 1129 (“That Order No. 3 predominantly affected protestors with anti-WTO views did not render it content based.”). The relevant inquiry is simply “whether the law is ‘justified without reference to the content of the regulated speech.’” *McCullen*, 134 S. Ct. at 2531 (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). Here, the ordinance rests on a content-neutral foundation, even though it may have “an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791.

Put simply, the ordinance “ha[s] everything to do with the need to restore and maintain civic order, and nothing to do with the content of [anyone’s] message.” *Menotti*, 409 F.3d at 1129.

And it creates a framework under which vital governmental interests will be pursued with precision. For these reasons, the ordinance stands on solid constitutional footing. In the event that in any future application the Commissioner exceeds the authorities conferred by the ordinance, the proper remedy would be “to seek re[lie]f through as-applied challenges.” *Id.* at 1145.

It Is Proper to Consider Past Incidents of Violence

It is our understanding that some critics have argued that it is improper to consider past patterns of lawbreaking in promulgating time, place, and manner restrictions. Bedrock First Amendment principles belie that claim. A robust factual record is precisely what establishes that an asserted governmental interest is worth advancing. Otherwise, expressive activity could be foreclosed based on “mere speculation about danger.” *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990).

Unsurprisingly, then, courts routinely examine relevant prior conduct in assessing the validity of time, place, and manner restrictions. In *Menotti*, for example, the Ninth Circuit acknowledged that “violent protestors had established a pattern.” 409 F.3d at 1132 n.33. When confronted with such a history, the court concluded, a city need not “wait for further violence to occur” before instituting time, place, and manner restrictions. *Id.* at 1136 n.43; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (noting a record of “recurring problems,” including “crowding, obstruction, and even violence”); *Schenk v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997) (stating that “a record of abusive conduct” can “make[] a prohibition on classic speech in limited parts of a public sidewalk permissible”); *Potts*, 121 F.3d at 1111 (considering the history of “groups . . . who ha[d] been violent toward one another” in assessing the validity of a “manner” regulation); *cf. City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at *10 (Va. Cir. July 7, 2018) (refusing to require a city to “react[] after the fact” to anticipated violence—“after someone else is beaten, stabbed, shot, or killed.”).

It is of course true that “a *complete* ban on First Amendment activity cannot be justified simply because past similar activity led to violence.” *United States v. Baugh*, 187 F.3d 1037, 1043–44 (9th Cir. 1999) (citing *Collins v. Jordan*, 110 F.3d 1363, 1371–72 (9th Cir. 1996)). But the ordinance does not authorize anything resembling a complete ban on protected activity. It represents an appropriately limited effort to comply with the Ninth Circuit’s admonition: “[O]nce multiple instances of violence erupt, with a breakdown in social order, a city must act vigorously . . . to restore order for all of its residents and visitors.” *Menotti*, 409 F.3d at 1137.

The Ordinance Does Not Vest a Single Decisionmaker with Unbridled Authority

Finally, we understand that the proposed ordinance has been criticized on the ground that it would authorize a single official to restrict protected speech in his sole (and unappealable) discretion. This criticism does not appear to be well founded based on the language of the ordinance, and is irrelevant to the ordinance’s constitutionality in any event.

First, as long as a time, place, or manner restriction pursues a sufficiently important interest with adequate precision, First Amendment doctrine does not constrain *which* governmental actor may enact the restriction. We are aware of no case, state or federal, in which an otherwise-valid time,

place, or manner restriction has been struck down on the ground that a multimember body did not promulgate it. In fact, multiple decisions with which we are familiar have upheld speech restrictions issued by a single governmental official. *See Menotti*, 409 F.3d at 1124 (mayor’s order); *Potts*, 121 F.3d at 1109 (police captain’s order); *Hobbs v. Cty. of Westchester*, 397 F.3d 133, 143 (2d Cir. 2005) (county executive’s order).

Second, the ordinance would not grant the Commissioner unfettered authority. Under the First Amendment, government officials may not be endowed with “unbridled discretion” in issuing time, place, or manner restrictions. *Forsyth Cty.*, 505 U.S. at 133. An authorizing regulation must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). The ordinance easily satisfies that test. Written orders issued by the Commissioner must include “findings demonstrating the necessity” for each regulation imposed. Those orders must also establish that all other less-restrictive means were deemed impracticable under the circumstances. And within 30 days after a demonstration governed by a written order, the Commissioner must issue a written report assessing the regulations’ efficacy and identifying any “lessons that might be learned for future written orders.” This multi-layered process does not leave the choice of restrictions “to the whim of the administrator.” *Forsyth Cty.*, 505 U.S. at 133.

Third, there is no constitutional right to an administrative appeal of generally applicable speech regulations. Any orders issued under the terms of the ordinance would apply equally to all persons who attend an affected demonstration. The proper way to “appeal” such an order would be to file a suit for injunctive relief in advance of the scheduled event.

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In summary, we at ICAP see no facial constitutional infirmity in the ordinance proposed. Applied consistently with its terms, the ordinance authorizes reasonable time, place, and manner regulations designed to *facilitate*, rather than thwart, opportunities for persons to engage in First Amendment–protected activity, regardless of their views, by mitigating the potential for violence during public demonstrations and protests.

Dated: November 12, 2018