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<p><i>Subject:</i></p> <p><b>Legal Rights of the Public During Protests, Demonstrations, and Gatherings</b></p>	<p><i>No.</i></p> <p>2023-DLE-09</p>	<p><i>Contact for information:</i></p> <p>Client Services Program dojcsp@doj.ca.gov</p>
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**TO: ALL CHIEFS OF POLICE, SHERIFFS, and EXECUTIVES OF CALIFORNIA LAW ENFORCEMENT AGENCIES**

This bulletin provides guidance to California state and local law enforcement agencies regarding the legal rights of the public at protests, marches, demonstrations, rallies, and similar gatherings under the United States and California Constitutions, and state and federal statutory law. We urge all law enforcement agencies to adopt policies and practices consistent with these laws, and to train their personnel accordingly.

**I. Protections for Freedom of Speech**

**A. General Protections**

**1. The Right to Gather**

Individuals have a fundamental, Constitutionally-guaranteed right to gather, demonstrate, and protest.<sup>1</sup> Under the First Amendment, anyone in the United States must be afforded the ability to access any places that have been historically open to the public and where “public access plays a significant positive role,” unless it is found that closure of the area is necessary to serve an overriding interest, and the action is narrowly tailored to serve that interest. Common examples of such public spaces include, but are not limited to, public streets, parks, and sidewalks.<sup>2</sup>

Permits can only be required for marches and demonstrations “that realistically present serious traffic, safety, and competing use concerns, *significantly beyond* those presented on a daily basis by ordinary use of the streets and sidewalks.”<sup>3</sup> Processes for approving permits— like other time, place, and manner restrictions— must be content and viewpoint neutral, may not delegate overly broad discretion to government officials, including law enforcement, must be narrowly tailored, and must leave open ample alternatives for speech.<sup>4</sup> Although a short amount of advance notice may be required generally, permit processes must make allowances for speech that responds to breaking news.<sup>5</sup>

1. *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371 (“Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment.”).

2. *Index Newspapers LLC v. United States Marshals Service*, *supra*, 977 F.3d at pp. 829-831 (citing *Press-Ent. Co. v. Superior Court of Cal.* (1986) 478 U.S. 1).

3. *Santa Monica Food Not Bombs v. City of Santa Monica* (9th Cir. 2006) 450 F.3d 1022, 1039 (emphasis added).

4. *Id.* at p. 1037; *Shuttlesworth v. City of Birmingham, Ala.* (1969) 394 U.S. 147, 151 (permitting schemes must contain “narrow, objective, and definite standards....”).

5. “A delay ‘of even a day or two’ may be intolerable when applied to ‘political’ speech in which the element of timeliness may be

Moreover, protests and gatherings must generally be allowed to reach their target audience.<sup>6</sup> Whenever possible, law enforcement should work with organizers to ensure they are able to effectively gather and protest, while minimizing impacts on traffic and safety.

**2. The Right to Record:** All members of the public have a First Amendment right to record matters of public interest, including both protests and public law enforcement activities, generally.<sup>7</sup> Merely taking a photograph or audio or video recording of law enforcement in a public place, or from any place where the person has the right to be, on its own, *cannot* violate Penal Code section 148, subdivision (a) (resisting arrest), or constitute reasonable suspicion to detain, or probable cause to arrest, the person for obstructing an officer's ability to conduct his/her official duties.<sup>8</sup>

**3. The Right to Criticize:** The First Amendment protects all but a few narrowly defined categories of speech.<sup>9</sup> All members of the public have the right under the First Amendment to criticize law enforcement actions.<sup>10</sup> Protected speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>11</sup>

## **B. Prohibition on Viewpoint and Content Discrimination**

The First and Fourteenth Amendments to the United States Constitution prohibit discrimination against any speakers or group on the basis of both content and viewpoint. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional."<sup>12</sup> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>13</sup>

Protected speech under the First Amendment is not limited to verbal speech but extends to other forms of expression. The First Amendment protects symbolic speech (such as displaying a political symbol) or expressive conduct (like waving or burning a flag). And it protects speech plus conduct (like peaceably assembling to engage in protests).

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important." *N.A.A.C.P., Western Region v. City of Richmond* (9th Cir. 1984) 743 F.2d 1346, 1356 (quoting *Carroll v. Commissioners of Princess Anne* (1968) 393 U.S. 175, 182).

6. *Bay Area Peace Navy v. U.S.* (9th Cir. 1990) 914 F.2d 1224, 1229 ("An alternative is not ample if the speaker is not permitted to reach the 'intended audience.'").

7. *Fordyce v. City of Seattle* (9th Cir. 1995) 55 F.3d 436, 442.

8. Pen. Code, § 148, subd. (g).

9. For example, true threats, obscenity, and incitement of imminent lawless action are not constitutionally protected. *In re George T.* (2004) 33 Cal.4th 620, 634. However, even speech that advocates violence, breaking of the law, or overthrow of the government is constitutionally protected "except where such advocacy is directed to inciting or producing *imminent* lawless action *and* is likely to incite or produce such action." *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 (emphasis added).

10. *Houston v. Hill* (1987) 482 U.S. 451, 461.

11. *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.

12. *Rosenberger v. Rector and Visitors of University of Virginia* (1995) 515 U.S. 819, 828.

13. *Police Dept. of City of Chicago v. Mosley* (1972) 408 U.S. 92, 95. Restrictions on speech because of listeners' reactions to it, including fees charged for policing based on the reactions of listeners, are impermissibly content based. *Forsyth County, Ga. v. Nationalist Movement* (1992) 505 U.S. 123, 134-135 ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

### C. Prohibition on Retaliation

The First Amendment prohibits retaliation for engaging in protected speech which would “chill a person of ordinary firmness” from exercising their rights.<sup>14</sup> Prohibited retaliation includes the use of force, unlawful searches and seizures, and arrests without probable cause.<sup>15</sup>

The persons’ speech does not need to be the sole reason for the retaliation; the First Amendment prohibits any retaliatory acts where the persons’ speech was a “substantial or motivating factor” for the action.<sup>16</sup>

### D. Responses to Violence

First Amendment activities may not be enjoined or prevented unless those involved have acted illegally or pose a clear and present danger of violence. Actions by law enforcement to stop or prevent speech activity before illegal activity has occurred or a clear and present danger of violence is presented are presumed to violate the First Amendment.<sup>17</sup> In other words, “the government may not prohibit angry or inflammatory speech in a public forum unless it is (1) ‘directed to inciting or producing imminent lawless action’ and (2) ‘likely to incite or produce such action.’”<sup>18</sup>

Declaring an unlawful assembly and dispersing protesters should only be done as a last resort and only when other alternatives, including de-escalation and arresting those responsible for the disorder, are ineffective or impracticable. Prior to dispersing a crowd, law enforcement must provide sufficient notice, including clear, audible announcements that an unlawful assembly is being declared, and the opportunity for those gathered to comply.<sup>19</sup>

## II. Searches and Seizures

The Fourth Amendment to the United States Constitution’s protections against unreasonable searches and seizures (including arrests) and use of excessive force apply to those participating in a protest or gathering.

### A. Seizures

The same rules apply at protests, demonstrations, and public gatherings as apply to all other seizures. Arrests must be based on probable cause that a person has violated the law. “Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the suspect had committed a crime.”<sup>20</sup> A pat down of an

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14. *Index Newspapers LLC v. United States Marshals Service*, *supra*, 977 F.3d at p. 827.

15. *Id.* at p. 827, n. 4.

16. *Id.* at p. 827.

17. *Collins v. Jordan*, *supra*, 110 F.3d at pp. 1371-1372 (“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 the First Amendment activity from occurring in order to obviate the possible unlawful conduct.”).

18. *Id.* at p. 1371 (quoting *Brandenburg v. Ohio*, *supra*, 395 U.S. at p. 447) (emphasis in original).

19. *Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 882-883.

20. *Dubner v. City & Cnty. of San Francisco* (9th Cir. 2001) 266 F.3d 959, 966.

individual may be performed when an officer reasonably suspected that the person is “armed and dangerous.”<sup>21</sup>

Law enforcement may perform a brief “investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”<sup>22</sup> Reasonable suspicion must be based on “specific and articulable facts . . . taken together with rational inferences from those facts.”<sup>23</sup> It may not be based on “inchoate and unparticularized suspicion or ‘hunch . . . .’”<sup>24</sup>

“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.”<sup>25</sup>

Law enforcement may not detain individuals for lawfully recording their activity. Such individuals must be permitted to record police activity unless they are actually interfering with law enforcement’s duties.<sup>26</sup>

## **B. Searches**

The same rules apply at protests, demonstrations, and public gatherings as apply to all other searches. Under the Fourth Amendment, searches must be conducted pursuant to a valid warrant (supported by probable cause), unless an exception to the warrant requirement exists, such as searches incident to a lawful arrest, due to exigent circumstances, or a pat down.<sup>27</sup> Searches of cellular phones and similar digital devices may not be conducted incident to a lawful arrest and require a warrant, except where exigent circumstances exist.<sup>28</sup>

The California Electronic Communications Privacy Act, which applies to all members of the public, also prohibits law enforcement from searching any electronic device without a warrant, wiretap order, or consent, unless they have a good faith belief “that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information.”<sup>29</sup> When law enforcement searches a device based on an emergency involving death or serious physical injury, they must apply for a warrant within three court days after the search.<sup>30</sup>

## **C. Use of Non-Deadly Force**

The same rules apply at protests, demonstrations, and public gatherings as apply to the use of force in other situations. An “officer who has reasonable cause to believe that the person to be arrested has committed a

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21. *Terry v. Ohio* (1968) 392 U.S. 1, 27.

22. *Illinois v. Wardlow* (2000) 528 U.S. 119, 123.

23. *Terry v. Ohio*, *supra*, 392 U.S. at p. 21.

24. *Ibid.*

25. *Florida v. Royer* (1983) 460 U.S. 491, 500.

26. See, e.g. *Crago v. Leonard*, K No. 0877 (E.D. Cal., Aug. 5, 2014) 2014 WL 3849954, at \*5 (quoting *Glik v. Cunniffe* (1st Cir. 2011) 655 F.3d 78, 84) (“Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.”).

27. *Riley v. California* (2014) 573 U.S. 373, 384-385; *Kentucky v. King* (2011) 563 U.S. 452, 460.

28. *Riley v. California*, *supra*, 573 U.S. at pp. 401-402. Cell site location information enjoys similar protections. (*Carpenter v. U.S.* (2018) 138 S.Ct. 2206, 2221.)

29. Pen. Code, § 1546.1, subd. (a).

30. Pen. Code, § 1546.1, subd. (h).

public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.”<sup>31</sup> “[A]n officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance.”<sup>32</sup> An officer must also consider whether the person to be arrested has any disabilities in determining the appropriate use of force.<sup>33</sup> Additionally, officers must “utilize deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible.”<sup>34</sup>

Whether law enforcement considers a protest to be an unlawful assembly or a riot makes no difference to the analysis. Indeed, “[t]he use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable.”<sup>35</sup>

“General disorder” or “tumultuous circumstances” cannot justify the use of force against non-violent, non-threatening, and non-resistive individuals.<sup>36</sup> This applies equally to all persons, even if those around them are engaged in violent acts. Similarly, “the desire to [quickly disperse individuals], in the absence of any actual exigency, cannot legitimize the application of force when it is not otherwise justified.”<sup>37</sup>

#### **D. Use of Deadly Force**

Deadly force may only be used if the officer reasonably believes, based upon the totality of the circumstances, that deadly force is necessary “to defend against an imminent threat of death or serious bodily injury to the officer or to another person” or to “apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury . . . unless immediately apprehended.”<sup>38</sup> “A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.”<sup>39</sup> An officer must “consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.”<sup>40</sup> Before resorting to deadly force against a fleeing person who has committed a felony, whenever feasible, an officer shall “make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.”<sup>41</sup>

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For questions about this Information Bulletin, please contact the Client Services Program at [dojcsp@doj.ca.gov](mailto:dojcsp@doj.ca.gov).

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31. Pen. Code, § 835a, subd. (b).

32. Gov. Code, § 7286, subd. (b)(2).

33. *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1033-1034, cert. denied sub nom. *City of Newport Beach, Cal. v. Vos* (2019) 139 S. Ct. 2613.

34. Gov. Code, § 7286, subd. (b)(1).

35. *Ciminillo v. Streicher* (6th Cir. 2006) 434 F.3d 461, 468.

36. *Id.* at p. 881.

37. *Id.* at p. 880.

38. Pen. Code, § 835a, subd. (c)(1).

39. Pen. Code, § 835a, subd. (c)(2).

40. Gov. Code, § 7286, subd. (b)(6).

41. Pen. Code, § 835a, subd. (c)(1)(B).