

MISSISSIPPI PROTESTERS' GUIDE



RIGHTS AND RISKS TO CONSIDER WHEN PROTESTING IN MISSISSIPPI

First Amendment Clinic at the University of Georgia
School of Law

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Introduction

The goal of the *Mississippi Protesters' Guide* is to provide individuals and groups who are considering organizing or engaging in protest activity with a reader-friendly, plain-language roadmap outlining some of their legal rights and risks.

This guide is organized by topic area based on different contexts and scenarios in which protest activity may occur. A checklist appears at the end of each topic area to help readers identify the key takeaways.

This guide is not intended to be, and does not constitute, legal advice. Laws and how courts interpret them can change rapidly and vary by jurisdiction. Please consult with a lawyer regarding your individual situation.

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Protesting on Government Property

One's right to protest on government property will depend on the type of government property in question and any applicable laws governing the time, place, and manner of public demonstrations on that property.

A. Different Types of Government Forums

The U.S. Supreme Court has divided government property into four types of forums – traditional public forums, designated public forums, limited public forums, and nonpublic forums.¹ The extent of a citizen's right to speak or protest on government property will depend on which category of forum the property falls into.

Traditional public forums are public properties – such as streets, sidewalks, or parks – which “have immemorially been . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”² Members of the public enjoy the broadest speech rights in traditional public forums, and the government's ability to regulate or restrict speech is weakest in traditional public forums. In traditional public forums, the government generally may not discriminate against protesters based on the content or subject matter of their protest.³ The government is absolutely prohibited from restricting protests in traditional public forums (or any other type of government forum) based on the viewpoint of the protesters (i.e., the particular perspective or position being advocated about the particular subject matter).⁴ An

¹ 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:1 (2024).

² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Haque v. CIO*, 307 U.S. 496, 515 (1939)).

³ *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

⁴ *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (citing *Pleasant City Grove v. Summum*, 555 U.S. 460, 469 (2009)).

example of content-based discrimination would be a ban on any abortion-related protests, while an example of viewpoint-discrimination would be a ban only on anti-choice abortion-related protests.

Despite the broad First Amendment rights for speakers in traditional public forums, speech and protest in such forums can lawfully be subject to reasonable regulations of time, place, and manner (see more on this below) so long as the regulations do not target speech based on its content or viewpoint.

Designated public forums are government spaces (either physical or digital) that have not traditionally served as places for public speech and expression but which have been designated or used by the government for the purpose of allowing public speech.⁵ Designated public forums allow for the same broad speech rights as traditional public forums and the government's ability to regulate speech in designated public forums is the same as in traditional public forums – i.e., reasonable time, place, and manner restrictions are allowed so long as they are not content or viewpoint based.⁶

Limited public forums are government spaces (either physical or digital) that the government has opened up for speech only by particular groups or on particular topics.⁷ On-campus meeting rooms at a public university where student groups may gather and hold discussions are an example of a limited public forum. There is no obligation for the public university to allow non-students to use the same property for meeting and discussing. Another example of a limited public forum would be the public comment period during a county board of

⁵ *Summum*, 555 U.S. at 469.

⁶ *Id.* at 470.

⁷ *Id.* (citation omitted).

education meeting or a city council meeting. In those forums, the topics of speech are limited to subjects relating to the public schools, or to city affairs, respectively. While the government may lawfully impose content-based restrictions on speech in limited public forums to ensure that the forum is used only for its intended purpose, any restriction must be reasonable in light of the forum's purpose, and cannot be based on the speaker's viewpoint.⁸ Reasonable time, place, and manner restrictions (see below) are also allowed in limited public forums.

Nonpublic forums are government spaces that are not intended to be used by the public for speech and where speech may be restricted so long as it is not done in a viewpoint-based manner. Examples of nonpublic forums include: inside public-school buildings, airports, jails, military bases, government healthcare facilities, and many other government-controlled spaces.⁹

Given these different types of forums, protesters will want to be mindful of *where* they are planning on protesting: will they be protesting in a public street (a traditional public forum allowing for broad protest rights) or are they seeking to protest at a government office (a limited or nonpublic forum) where the government has much more leeway in curtailing speech and punishing speakers who do not comply? Protest speech receives the broadest First Amendment protections in areas like public parks or town squares.

B. Time, Place, and Manner Restrictions

Even in traditional and designated public forums where speech rights are the most protected, protesters may still face some lawful restrictions on their ability to speak and protest. While the government cannot ban protests based on the protesters' viewpoint or the underlying

⁸ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-107 (2001) (citations omitted).

⁹ *Mansky*, 585 U.S. at 12.

subject matter of their messages, the government can lawfully regulate the manner in which a protest can occur. Such regulations are known as Time, Place, and Manner Restrictions and can include, for example:

- Limits on use of amplified sound (e.g., microphones, use of stereo speakers);
- Requiring a permit for protests expected to involve more than a threshold number of participants;
- Prohibiting blocking of vehicular or pedestrian traffic;
- Prohibiting blocking ingress and egress to buildings;
- Restricting the time in which the protest can occur (e.g., banning protest activity late at night);
- Restricting the size or placement of signs.¹⁰

The main idea behind Time, Place, and Manner Restrictions is that they impose neutral rules on use of public property that apply to everyone, regardless of the message or subject matter of the speech. To be constitutional in a traditional or designated public forum, Time, Place, and Manner Restrictions must pass a three-pronged test: (1) the regulation must not target speech based on its content, (2) the regulation must serve a significant government interest and be narrowly tailored (i.e., not overly broad) to achieving that interest, and (3) the regulation must allow speakers plenty of alternative means for communicating their message.¹¹ For example, a regulation prohibiting demonstrations in a residential area after 10 P.M. would likely be

¹⁰ Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY (July 30, 2023), <https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions/> (last updated July 9, 2024).

¹¹ *Id.*

permissible as it applies to all demonstrations regardless of content while avoiding excessive censorship and leaving would-be demonstrators with other ways to communicate, such as demonstrating at an earlier time or in a non-residential area.

To be constitutional in a limited public forum or nonpublic forum, Time, Place, and Manner Restrictions need only be: (1) reasonable in light of the purpose of the forum (i.e., they do not have to serve a significant government interest, or be narrowly tailored, or leave open alternative channels for expression), and (2) not viewpoint-based.

Time, Place, and Manner Restrictions limiting protest activity have been upheld in Mississippi federal courts. In *Siders v. City of Brandon*, the federal district court for the Southern District of Mississippi evaluated a city ordinance that restricted protests to a designated protest area.¹² The ordinance not only limited the location where protests could occur, but also strictly limited noise, lights, and prohibited “obscenities.”¹³ While the Court recognized that there were issues of fact that had to be decided by a jury, the ordinance did not obviously violate the First Amendment and the Court refused to grant an order preventing the enforcement of the regulation prior to trial.¹⁴

When planning a protest, organizers should research the local (city/town or county) code provisions and ordinances regulating public gatherings and the use of public places.

¹² *Siders v. City of Brandon*, NO. 3:21-CV-614-DPJ-FKB, 2023 WL 4053414, at *1 (S.D. Miss. 2023).

¹³ *Id.* at *2.

¹⁴ *Id.* at *12.

C. Challenging Time, Place, and Manner Restrictions

Protesters who have their speech or demonstration shut down or restricted based on what appears to be a reasonable Time, Place, and Manner Restriction may not be entirely without recourse. Many seemingly acceptable regulations in traditional or designated public forums have been found to fail the three-pronged test upon closer scrutiny. For example, in *Police Department of Chicago v. Mosley*, the U.S. Supreme Court reviewed a city ordinance that prohibited picketing/demonstrating within 150 feet of schools while they were in session.¹⁵ While this rule would typically be acceptable as a reasonable restriction on time, place, or manner, the ordinance specifically exempted picketing related to school labor disputes.¹⁶ In other words, the permissibility of the picketing depended entirely on its content – whether it related to a school labor dispute or not. The Supreme Court found that the ordinance was therefore not a proper Time, Place and Manner Restriction. The bottom line is that protesters should examine seemingly neutral regulations to determine whether they apply different rules to different kinds of speech, because if they do, the government may be overstepping its constitutional ability to regulate public speech.

Protest organizers should also check whether the government is fulfilling its obligation of providing adequate alternative channels for speech. For example, where the government denies protesters a permit for their desired demonstration location, and suggests an alternative location, it may be that the alternative location does not allow the protesters to reach their intended audience. This can be grounds for a constitutional challenge. For example, one notable case from New York, *Million Youth March, Inc. v. Safir*, involved a planned march through the streets of

¹⁵ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

¹⁶ *Id.*

Harlem to highlight issues affecting the Black community.¹⁷ The City of New York forced protesters to hold their march in the remote location of Randall's Island rather than its intended route through the streets of Harlem.¹⁸ The federal district court found that the alternative location was inadequate both because it hindered the marchers' ability to reach their intended audience of Black New Yorkers and because the change in location away from Harlem (with its significance to African American history) undermined the meaning of the march.¹⁹ Another case in Virginia found that a university's rule requiring student protesters to demonstrate at a campus location that was far removed from where their target audience of university board members was expected to meet was an inadequate alternative.²⁰

In sum, protesters' rights to protest on public property will depend on the kind of government property at issue, with different rules applying depending on the kind of government forum being used. While protest organizers must comply with reasonable Time, Place, and Manner Restrictions, the government must also comply with its constitutional obligations not to regulate speech based on content and to leave open alternative channels (in traditional or designated public forums) and not to regulate based on viewpoint (in all forums). Protesters are entitled to have their speech heard by their intended audience, and the government may not hide behind seemingly neutral regulations to censor speakers based on their viewpoint.

D. Permit Requirements and Prior Restraint

Governments will sometimes require that people seeking to hold public demonstrations or protests, or to distribute literature, get a permit or other approval prior to doing so. Permit

¹⁷ *Million Youth March, Inc. v. Safir*, 18 F.Supp. 2d 334, 336 (S.D.N.Y. 1998).

¹⁸ *Id.* at 348.

¹⁹ *Id.*

²⁰ *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339-340 (W.D.VA 1987).

requirements can be a valid Time, Place, and Manner Restriction, but permit requirements can also raise the issue of so-called “prior restraints” on protected speech. Prior restraints involve speech being subjected to government review or government suppression before the speech has even occurred.

Laws, codes, or ordinances requiring that speakers obtain a permit from the government before gathering or demonstrating in a public place must be related to a “legitimate government interest in protecting health, safety, and welfare”²¹ Additionally, permit laws, codes, or ordinances are unconstitutional if they allow public officials discretion to arbitrarily approve or deny a permit without any clearly defined criteria for the making their decision.²² Permit requirements that allow for “discretionary decision-making” can be challenged on constitutional grounds.²³ Permit criteria must also be content and viewpoint neutral to avoid public officials discriminating against the message the permit applicant wants to express.²⁴ Permit laws, codes, or ordinances should also specify a reasonably prompt timeframe (i.e., within a certain number of days) for public officials to decide whether to grant or deny a permit application.²⁵

Permit requirements have also been criticized by courts for inhibiting “spontaneous speech,” functioning to prevent or deter people from taking to the streets in reaction to breaking news.²⁶ Additionally, the First Amendment protects the right to speak anonymously. Where a permit requirement would make it impossible to speak and remain anonymous (such as by

²¹ *Beckerman v. City of Tulepo, Miss.*, 664 F.2d 502, 509 (5th Cir. 1981)

²² *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280 (5th Cir. 2003).

²³ *Beckerman*, 664 F.2d at 509.

²⁴ *Freedom from Religion Found., Inc. v. Abbot*, 955 F.3d 417, 427 (5th Cir. 2020) (citing *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 760 (1988)).

²⁵ *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

²⁶ *See Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002); *see also Cuiello v. City of Vallejo*, 944 F.3d 816, 832 (9th Cir. 2019).

requiring that participants in a protest be identified beforehand), it may violate the First Amendment.²⁷

Organizers faced with requirements that they seek permits or other government approval prior to demonstrating or distributing literature should carefully examine the relevant rules to ensure that they comply with the constitutional requirements described above.

E. Protests at the Mississippi State Capitol

Recent Mississippi legislation raises concerns related to all of the above constitutional doctrines. In the 2023 legislative session, Mississippi passed Senate Bill 2343, which was set to become law in July 2023.²⁸ The bill requires prior written approval from the Chief of Capitol Police or the Commissioner of the Department of Public Safety prior to hosting any event on “any street or sidewalk immediately adjacent to any building or property owned or occupied by any official, agency, board, commission, office or other entity of the State of Mississippi, or which can reasonably be expected to block, impede or otherwise hinder [incoming and outgoing traffic].”²⁹ This provision effectively gives the Chief of Capitol Police and the Commissioner “veto authority over what protests can and cannot take place near any property owned or occupied by any state official or entity.”³⁰

This is a controversial bill that has been challenged on First Amendment grounds. Several nonprofits successfully argued that the bill created an invalid prior restraint on speech and protest

²⁷ *Watchtower Bible*, 536 U.S. at 166-167.

²⁸ Mina Corpuz, *Does Mississippi’s New State Law Restrict Citizen’s Right to Protest?*, MISSISSIPPI TODAY (Aug. 19, 2024), <https://mississippitoday.org/2024/08/19/does-mississippis-new-state-law-restrict-citizens-right-to-protest/>.

²⁹ Senate Bill No. 2343(6)(c)

³⁰ Press Release, Mississippi Center for Justice, Federal Court Blocks Enforcement of Protest Restriction in Senate Bill 2343 (June 30, 2023).

and that it is a content-based restriction, which is unconstitutional in traditional public forums like city streets and sidewalks (see “Forum Analysis” above). These efforts led to a federal court ruling in June 2023 that the “prior written approval” part of the bill could not be enforced.³¹ At the time of this writing, the case is currently on appeal in the federal Fifth Circuit Court of Appeals. The outcome of the litigation will likely depend on whether the court finds that the bill is a valid Time, Place, or Manner Restriction or an unconstitutional prior restraint on speech.

³¹ *Id.*

Checklist: Protesting on Government Property *Forum Analysis*:

- ☐ Understand that one's right to protest on government property depends on the type of government property.
- ☐ The extent of a citizen's right to speak or protest on government property depends on which category of forum the property falls into:
 - ☐ Traditional public forums are public properties – such as streets, sidewalks, or parks – which “have immemorially been . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Speech and protest activity are most protected in traditional and designated (see below) public forums, but can still be subject to time, place, and manner restrictions (see below).
 - ☐ Designated public forums are government spaces (either physical or digital) that have not traditionally served as places for public speech and expression, but which have been designated or used by the government for the purpose of allowing public speech.
 - ☐ Limited public forums are government spaces (either physical or digital) that the government has opened up for speech only by particular groups or on particular topics. Speech in a limited public forum can be restricted so long as the restriction is reasonable in light of the purpose of the forum, and is viewpoint-neutral.
 - ☐ Nonpublic forums are government spaces that are not intended to be used by the public for speech and where speech may be restricted so long as it is not done in a viewpoint-based manner.

Time, Place, and Manner Restrictions:

- ☐ While the government cannot ban protests in traditional or designated public forums based on the protesters' viewpoint or the underlying subject matter of their messages, the government can lawfully regulate the manner in which a protest can occur.
- ☐ Time, place, and manner restrictions are often contained in local (city/town or county) code provisions and ordinances regulating public gatherings and the use of public places. You should research these local laws in the location where you are considering organizing or participating in a protest.
- ☐ Understand that sit-ins on public property can be limited by reasonable time, place, and manner restrictions.
- ☐ Understand that criminal penalties are a possibility even when a sit-in takes place on government property.

Challenging Time, Place, and Manner Restrictions:

- ☐ To be constitutional in a traditional or designated public forum, Time, Place, and Manner Restrictions must pass a three-pronged test:
 - ☐ (1) the regulation must not target speech based on its content;
 - ☐ (2) the regulation must serve a significant government interest and be narrowly tailored (i.e., not overly broad) to achieving that interest; and
 - ☐ (3) the regulation must allow speakers plenty of alternative means for communicating their message.

☐ To be constitutional in a limited public forum or nonpublic forum, Time, Place, and Manner Restrictions need only be:

☐ (1) reasonable in light of the purpose of the forum (i.e., they do not have to serve a significant government interest, or be narrowly tailored, or leave open alternative channels for expression); and

☐ (2) not viewpoint-based.

☐ Protesters should examine seemingly neutral regulations to determine whether they apply different rules to different kinds of speech, because if they do, they are likely not content and viewpoint neutral.

☐ Protest organizers should also check whether the government is fulfilling its obligation of providing adequate alternative channels for speech.

Permit Regulations and Prior Restraint:

☐ Permit requirements can be a valid Time, Place, and Manner Restrictions, but permit requirements can also raise the issue of so-called “prior restraints” on protected speech.

☐ Organizers faced with requirements that they seek permits or other government approval prior to demonstrating or distributing literature should carefully examine the relevant rules to ensure that they comply with the constitutional requirements.

☐ Permit requirements must:

☐ Not allow for discretionary decision-making by public officials.

☐ Be content-neutral and viewpoint-neutral.

- ☐ Specify a reasonably prompt timeframe (i.e., within a certain number of days) for public officials to decide whether to grant or deny a permit application.
- ☐ Allow for people to participate in the permitted event while remaining anonymous (although the person or group applying for the permit will have to identify themselves).

Protests at Mississippi Capitol:

- ☐ Senate Bill 2343 requires prior written approval from the Chief of Capitol Police or the Commissioner of the Department of Public Safety before hosting any event on “any street or sidewalk immediately adjacent to any building or property owned or occupied by any official, agency, board, commission, office or other entity of the State of Mississippi, or which can reasonably be expected to block, impede or otherwise hinder [incoming and outgoing traffic].”
- ☐ A federal court ruled that the “prior written approval” part of the bill could not be enforced.

Protests on Private Property

The First Amendment generally does not apply to protests on private property. The Supreme Court has rejected the idea that the First Amendment requires private property owners to allow others to speak on their property.³² The First Amendment only binds “state actors” (i.e., government entities and employees) rather than purely private citizens.³³ This means that, most of the time, private enterprises (e.g., businesses, companies, private schools) are not subject to First Amendment restrictions on their ability to censor speakers. However, as discussed below, there are some very limited situations where private entities qualify as “state actors” and are subject to the First Amendment.

A. Limited Situations Where a Private Entity is Subject to the First Amendment

Determining whether a private entity is a “state actor” for First Amendment purposes will involve complex legal analysis outside of the scope of this guide. Some examples of specific cases where private entities have been found to be state actors include:

- Where the entity performs a “public function,” meaning that the entity performs functions that are traditionally exclusively performed by governments:
 - For example, in *Marsh v. Alabama*, a “company town” owned by a private business was held to be a state actor because it performed traditional governmental functions like providing law enforcement and other civic services.³⁴

³² Gregory C. Sisk, *Private Property, Expression On*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/private-property-expression-on/> (last updated July 9, 2024).

³³ *Id.*

³⁴ *Id.*

- Where the government and a private business have an “interdependent” relationship:
 - In *Burton v. Wilmington Parking Authority*, a private restaurant was deemed to be a state actor because of its very close, mutually beneficial relationship with a municipal parking service.³⁵
- Where there has been “pervasive entwinement” between government and private actors:
 - In *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*, a statewide athletic association consisting of both public and private schools was deemed a state actor due to the heavy involvement of state officials in the organization.³⁶

While the examples above are not an exhaustive list, it is rare for private entities, such as businesses and individuals, to be deemed state actors. Where there is no state actor involved, the First Amendment will not apply, and protesters will not be able to assert that their protest speech or assembly is constitutionally protected.

B. Protesting at Private Businesses

Generally, there are few protections for protesting on the premises of private businesses. In the recent case of *Hat v. Landry*, a federal court in Louisiana addressed protests on the property of a pipeline company. Protesters raised a First Amendment challenge to a statute that forbids the unauthorized entry of a critical infrastructure, arguing that it unconstitutionally infringes on the right to peacefully protest and that the statute is too vague to comply with Due Process requirements.³⁷ The court rejected these arguments and stated that there is no

³⁵ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-725 (1961)

³⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 290 (2001).

³⁷ *Hat v. Landry*, No. 6:20-CV-00983, 2024 WL 1496889, at *2 (W.D. La. Apr. 5, 2024) (citing La. Stat. Ann. § 14:61).

constitutional right to protest on private property.³⁸ In *Geddie v. Seaton*, a federal court in Texas rejected a First Amendment claim from a plaintiff who was charged with criminal trespass after protesting at a private flea market.³⁹

Thus, it is unlikely that protests at private businesses will receive any protections under the First Amendment as such rights do not apply to private actors.

C. **Protesting at Private Residences**

There are broad First Amendment rights for protesting on public streets and sidewalks,⁴⁰ and these rights extend even to public streets and sidewalks in residential areas.⁴¹ However, governments can prohibit the targeting of particular homes.

In *Frisby v. Schultz*, the Supreme Court held that a local ordinance preventing the targeted picketing of homes did not violate the First Amendment.⁴² The Court emphasized the special concerns of protecting residential privacy and “captive audiences” (those who are forced to hear a speaker’s speech, such as those living in a home subject to targeted protest).⁴³ The Court in *Frisby* left open the possibility that there could be some instances where applying a ban on

³⁸ *Id.* at *13.

³⁹ *Geddie v. Seaton*, 3:06-CV-0895-R, 2006 WL 2263335 at *3 (N.D. Tex. Aug. 8, 2006). Some states, but not Mississippi, take a broader view of speech rights in privately owned shopping centers. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding California Supreme Court’s ruling that the state’s constitution gave high school students a free expression right to distribute literature and solicit signatures for a petition at a shopping center that was open to the public); Craig L. Finger, *Rights of Shopping Center Owners to Regulate Free Speech and Public Discourse*, IN THE ZONE, Fox Rothschild LLP (Oct. 2011), <https://www.foxrothschild.com/publications/rights-of-shopping-center-owners-to-regulate-free-speech-and-public-discourse> (last visited Dec. 4, 2024).

⁴⁰ For more information, see the section of this guide that addresses Protesting on Public Property.

⁴¹ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“[A] public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood.”).

⁴² *Id.* at 487-488.

⁴³ *Frisby*, 487 U.S. at 484-486.

residential picketing could be inappropriate – such as where a home is used as a place of public business or for public meetings – but did not address these possible exceptions in detail.⁴⁴ The Fifth Circuit, which is the controlling federal appellate court in Mississippi and several other states, has also held that targeted residential picketing is unprotected under the First Amendment.⁴⁵

Laws or ordinances that prevent the targeting of specific private residences will likely be upheld as valid “Time, Place, and Manner Restrictions.” Such restrictions do not violate the First Amendment provided that they meet certain criteria. For a more detailed explanation of Time, Place, and Manner Restrictions and the constitutional limits on such restrictions, please see the section of this guide addressing *Protesting on Public Property*.

Protesting outside of the homes of judges and Supreme Court Justices has become popular in recent years, particularly following recent controversial decisions.⁴⁶ Despite the popularity of this form of protest, it is arguably in violation of federal law. 18 U.S.C. § 1507 states that “[W]hoever, with the intent of . . . influencing any judge . . . pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge. . . shall be fined under this title or imprisoned not more than one year, or both.”⁴⁷ Some attorneys have interpreted this as prohibiting targeted protests outside of

⁴⁴ *Id.* at 487.

⁴⁵ *Tompkins v. Cyr*, 202 F.3d 770, 780, (5th Cir. 2000).

⁴⁶ Sara Swann, *Fact-Check: Is it Legal to Protest Outside Justices’ Homes? The Law Suggests No*, AUSTIN-AMERICAN STATESMAN (May 23, 2022), <https://www.statesman.com/story/news/politics/politifact/2022/05/23/fact-check-legal-protest-outside-justices-homes-abortion-protests-roe-v-wade/9862085002/>.

⁴⁷ 18 U.S.C. § 1507.

any judge or justice's home where the intent of doing so is to pressure a judge to vote in a certain way.⁴⁸

Protest organizers should consider these risks when planning a protest outside a judge's home. However, while picketing a particular person's house may be unprotected, protesters can generally still take to neighborhood streets and sidewalks to spread their message.⁴⁹

D. Doxing

Doxing involves publicly releasing personally identifying information about an individual for purposes of punishment, typically without their consent.⁵⁰ Doxing is a controversial practice, and laws have been passed across the nation prohibiting the practice.⁵¹

The line between constitutionally protected speech and doxing is difficult to draw. Under federal law, greater protection will apply where the doxing speech relates to matters of public concern, and does not involve "true threats" of physical harm. For example, in *United States v. Cook*, the federal district court for the Northern District of Mississippi addressed a cyberstalking case where a man (Cook) who had been accused and acquitted of a crime later posted on Facebook sensitive information about law enforcement officers involved in his case, along with aggressive comments.⁵² The court found that the Facebook posts were protected speech that did

⁴⁸ Swann, *supra* note 46.

⁴⁹ *Frisby*, 487 U.S. at 479-481 (holding that residential neighborhoods are public forums with broad protections for speech rights).

⁵⁰ David L. Hudson, Jr., *Is Doxxing Illegal?* Foundation for Individual Rights and Expression, <https://www.thefire.org/research-learn/doxxing-free-speech-and-first-amendment> (last updated Feb. 28, 2024).

⁵¹ *Id.* For a critique of the constitutionality of anti-doxing laws see Frank Lomonte and Paola Fiku, *Thinking Outside the Dox: The First Amendment and the Right to Disclose Personal Information*, 91 UMKC L. Rev. 1 (2022).

⁵² *United States v. Cook*, 472 F. Supp. 3d 326, (N.D. Miss. 2020).

not rise to the level of illegal threats because they did not communicate a specific intent to do harm towards a specific person.⁵³ Thus, the *Cook* case suggests that, under federal law in Mississippi, merely posting sensitive information about public officials will be protected under the First Amendment in the absence of any true threat.

Mississippi has no state law directly addressing doxing,⁵⁴ but Mississippi Code § 97-45-15 criminalizes “cyberstalking” and outlaws threatening or harassing people electronically. These laws may be implicated if personally identifying information is published electronically about someone without consent and in a manner intended to threaten or harass.

In sum, whether doxing is protected speech under the First Amendment will involve a case-by-case determination and will depend on whether the published information was lawfully obtained, whether it relates to a matter of public concern, whether it involves true threats of physical harm, and whether or not the information was used in furtherance of harassment or threats.

⁵³ *Id.* at 335.

⁵⁴ Laura Martisiute, *Is Doxing Illegal in Mississippi?* DELETEmE (May 7, 2024), <https://joindeleteme.com/doxxing/is-doxxing-illegal/is-doxxing-illegal-in-mississippi/>.

Checklist: Protesting on Private Property

General Considerations:

- ☐ Understand that the First Amendment generally does not apply to protests on private property.
- ☐ Understand that only state actors are bound by the First Amendment, not private actors.
- ☐ Understand in limited circumstances private entities can qualify as state actors, such as:
 - ☐ When the entity performs a “public function” traditionally exclusively performed by the government.
 - ☐ When the government and private business have an “interdependent” relationship.
 - ☐ Where there has been “pervasive entwinement” between government and private actors.

Protesting at Private Businesses & Private Residences (including Judges’ Homes):

- ☐ Know that there is no constitutional right to protest on private property, regardless of whether the property is commercial or residential.
- ☐ There are broad First Amendment rights for protesting on public streets and sidewalks, including in residential areas.
- ☐ In Mississippi, targeted residential picketing is unprotected under the First Amendment.
- ☐ Protesting outside of the home of a judge or Supreme Court Justice is arguably in violation of federal law.

Doxing:

- ☐ Doxing involves publicly releasing personally identifying information about an individual for purposes of punishment, typically without their consent.
- ☐ In Mississippi, electronically publishing personally identifying information without consent in a manner intended to threaten or harass may violate state law.

Protest in Schools

This section focuses on First Amendment rights in public schools. Private schools, by virtue of being non-government entities, are not subject to the First Amendment. However, some private schools have adopted handbooks or policies that promise protections similar to those available under the First Amendment. This will vary depending on the private school, but such protections, if any, are policy-based and are not a constitutional right.

A. Student Protest in Public Schools

Tinker v. Des Moines is the most important Supreme Court case affirming the right of public school students to peacefully protest in school. In *Tinker*, a group of high school students were disciplined for wearing black armbands to school to protest the Vietnam War.⁵⁵ In overturning this disciplinary decision, the Supreme Court famously stated that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁶ In other words, student speech at school receives First Amendment protection, but this must be balanced with schools’ need to control student conduct and ensure an orderly learning environment.⁵⁷ Thus, the Court in *Tinker* held that speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others” can be regulated, or even punished, by schools without violating the First Amendment.⁵⁸ For example, wearing armbands or buttons to show a support for a cause – even a controversial one –

⁵⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504-505 (1969).

⁵⁶ *Id.* at 506.

⁵⁷ *Id.* at 507.

⁵⁸ *Id.* at 513.

will be protected under the *Tinker* doctrine, but a loud demonstration in school hallways during class time likely will not.

That being said, schools cannot rely solely on the fear of possible disruption to justify banning speech and protest in schools.⁵⁹ Indeed, the *Tinker* court observed that speech often raises the risk of controversy or even disturbance, “[b]ut our Constitution says we must take this risk. . . .”⁶⁰ Still, students seeking to protest in school should be aware that the First Amendment does not protect them from being punished for speech that is materially disruptive, or reasonably likely to be materially disruptive, to school operations.

There are also several exceptions to the *Tinker* standard where schools can prohibit or punish in-school student speech without needing to show that the speech caused, or was reasonably likely to cause, disruption. These exceptions include on-campus student speech that promotes illegal drug use,⁶¹ or that is lewd, vulgar, or indecent.⁶² Additionally, students who chose to protest in school-sponsored forums – like school theatre productions, school newspapers or broadcast media, and school ceremonies – have very little First Amendment protection if their speech is censored. This is because under the U.S. Supreme Court’s decision in *Hazelwood v. Kuhlmeier*, school officials are allowed broad discretion to prohibit or punish student speech in school-sponsored forums without having to show any disruption, so long as officials can articulate a “legitimate pedagogical purpose” for censoring.⁶³ Avoiding controversy or preventing speech on topics deemed to be not-age-appropriate are just some examples of the

⁵⁹ *Id.* at 508 (“[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”).

⁶⁰ *Bd. Of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (plurality opinion).

⁶¹ *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

⁶² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

⁶³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

types of rationales that courts have deemed to be a “legitimate pedagogical purpose.”⁶⁴ Thus, under *Hazelwood*, school officials have extremely broad discretion to punish or censor student speech in school-sponsored forums.

Schools have less authority under the First Amendment to regulate or punish students for their off-campus speech.⁶⁵ The proliferation of social media and online speech can make it difficult to draw clear lines between on and off-campus.⁶⁶ But a school’s discipline of a student’s off-campus speech has to at least satisfy the *Tinker* standard requiring a showing of actual or reasonably likely disruption to school functions.⁶⁷ Moreover, the Supreme Court has emphasized that schools will be hard-pressed to justify intervening in students’ off-campus political or religious speech (protest on matters of public concern generally qualifies as political speech) and that schools have an interest in protecting students’ unpopular expression, especially when it occurs off campus.⁶⁸ This guidance from the Supreme Court strongly signals that students’ off-campus protest speech should be protected against school discipline.⁶⁹

Consistent with *Tinker*, the Fifth Circuit (the controlling federal court for all of Mississippi) maintains that peaceful acts of protest (such as wearing an armband) are protected

⁶⁴ *Id.* at 272.

⁶⁵ *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 189-90 (2021).

⁶⁶ *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996, 1006 (5th Cir. 2023) (“The ubiquity of social media has blurred the lines between off-and on-campus speech, causing increased difficulty for schools and parents alike.”).

⁶⁷ *See Mahanoy*, 594 U.S. at 193 (finding school violated student’s First Amendment rights when it disciplined her for off-campus, profanity-laced social media post because there was no evidence of likely substantial disruption).

⁶⁸ *Id.* at 190.

⁶⁹ *See, e.g., Cl. G v. Siegfried*, 38 F.4th 1270, 1274-75 (10th Cir. 2022) (invalidating a student’s suspension for using antisemitic language – which is both political and viewpoint-based – while off campus and not directed at anyone in particular where there was no showing of substantial disruption).

despite a risk that such acts can invite controversy.⁷⁰ Also consistent with *Tinker*, the Fifth Circuit has repeatedly held that a student’s speech is not protected by the First Amendment where the school either shows that a disruption has actually occurred because of the speech or where there are “demonstrable factors that would give rise to any reasonable forecast by the school administration of ‘substantial and material’ disruption.”⁷¹ The Fifth Circuit applies this *Tinker* standard to off-campus student speech, disseminated without use of school resources.⁷²

B. School Walkouts

Walkouts, where students leave classes and/or school grounds in an act of protest, is a common form of protests in schools. Unlike the silent act of wearing an armband in protest that was at issue in *Tinker*, walkouts are potentially very disruptive and may therefore be entitled to less First Amendment protection.⁷³ As a general rule, student protesters must accept that the law requires them to be in school and they can therefore be punished for missing class, even for protest reasons.⁷⁴

⁷⁰ See generally *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728 (5th Cir. 1971) (holding that a *Tinker*-like protest was protected despite the threat of disruptive counter-protests).

⁷¹ *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 390 (5th Cir. 2015) (quoting *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.*, 462 F.2d 960, 974 (5th Cir. 1972)); see also *A.M. v. Cash*, 585 F.3d 214, 221-222 (5th Cir. 2009).

⁷² *Bell*, 799 F.3d at 396; see *id.* at 400 (holding that school administrators reasonably forecast disruption where student posted an off-campus rap song that included references to shooting two coaches at the school).

⁷³ *Your First Amendment Guide to School Walkouts*, ACLU NEW HAMPSHIRE, <https://www.aclu-nh.org/en/your-first-amendment-guide-school-walkouts-0>, (last visited Oct. 2, 2024) (noting that due to their potentially disruptive nature, walkouts may receive less First Amendment protection).

⁷⁴ *Students’ Rights: Speech, Walkout, and Other Protests*, ACLU, <https://www.aclu.org/issues/free-speech/students-rights-speech-walkouts-and-other-protests> (last visited Oct. 2, 2024).

Schools may discipline students for walking out of class as part of their right to ensure an orderly school environment and enforce attendance standards. The Fifth Circuit addressed a school walkout in the case of *Dunn v. Tyler Independent School Dist.*, finding that school officials were within their rights to discipline students who had engaged in a mass walkout and rejecting several constitutional challenges to the school's conduct.⁷⁵ The court stressed the inherent requirement that students attend classes and that "the school was authorized to act with regard to a mass refusal to attend classes."⁷⁶ A federal court in Texas noted that under the *Tinker* framework, a walkout of over 100 students substantially interfered with the work of the school and that a school was within its rights to take measures to prevent further walkout disruption.⁷⁷ The bottom line is that schools may constitutionally crack down on disruptive walkouts in order to ensure proper school functioning.

C. Protesting as a K-12 Public School Teacher

Tinker stated that teachers in public schools retain First Amendment rights to some degree.⁷⁸ But court decisions that came after *Tinker* hold that, as public employees, school teachers have few First Amendment protections when speaking in the workplace. In the 2006 case of *Garcetti v. Ceballos*, the Supreme Court stated that public employee speech made pursuant to "official duties" is wholly without First Amendment protection.⁷⁹ This means that if a

⁷⁵ *Dunn v. Tyler Indep. Sch. Dist.*, 460 F.2d 137, 142 (5th Cir. 1972).

⁷⁶ *Id.*

⁷⁷ *Madrid v. Anthony*, 510 F. Supp. 2d 425, 434-435 (S.D. Tex 2007).

⁷⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

⁷⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

teacher incorporates acts of protest into her teaching duties, she will be unprotected from being disciplined for her speech.

Public school teachers enjoy more First Amendment protections when speaking outside of school and in their capacity as a private citizen rather than as a government employee. The classic case in this context is *Pickering v. Bd. of Educ.*, which involved a public school teacher who was fired for writing a letter to a local newspaper criticizing the school board for how it was allocating funds.⁸⁰ In *Pickering*, the Court recognized that the rights of public employees to speak as private citizens on matters of public concern must be balanced against the needs of the government as an employer to promote workplace efficiency.⁸¹ The Court concluded that in *Pickering*'s case, where he was speaking outside of work on a "matter of public concern" and had not knowingly or recklessly made false statements, his speech was protected and could not serve as the basis for his termination.⁸² But keep in mind that this is a balancing test, and in some cases, the scales will tip in favor of allowing the public employer to punish the employee for speech made outside of work on a matter of public concern. Examples of this are discussed below.

Subsequent holdings have added further nuance to the simple holding of the *Pickering* balancing test. The case of *Connick v. Myers* adds that public employee speech related solely to internal workplace matters like employee disputes and personal grievances will not receive the same protection as speech on public matters, such that public employers may be able to discipline employees for their speech on such internal workplace issues.⁸³ *Connick* further adds

⁸⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

⁸¹ *Id.* at 568.

⁸² *Id.* at 574.

⁸³ *Connick v. Myers*, 461 U.S. 138, 146-147 (1983).

that determining whether an employee’s speech is related to matters of public concern versus internal workplace issues is not always a simple inquiry but must instead be determined by “the content, form, and context of a given statement”⁸⁴

Connick highlights that protests related to matters of public concern will generally have more First Amendment protection than protests geared towards internal office disputes or grievances. *Connick* also reaffirms that the government can still constitutionally discipline employees for their protected speech on matters of public concern where it can demonstrate that the speech at issue “substantially interfered” with official duties.⁸⁵ For instance, a teacher protesting on school grounds during school hours would run a high risk of being found to have interfered with official duties, even if she was protesting during her lunch hour on a matter of public concern.

The content of a teacher’s off-duty speech may also risk interfering with official duties in some circumstances. One federal circuit court outside of Mississippi found that teacher speech which led to widespread backlash from the community was not protected despite being on a matter of public concern, specifically noting the unique role of public school teachers and the need to avoid speech that undermines trust in the teacher or the school.⁸⁶ The case involved a teacher making disparaging comments about students and their allegedly subpar abilities made on a private blog.⁸⁷ Courts have also found in some instances that schools are within their rights to terminate employment where out-of-work remarks would have detrimental effects on the

⁸⁴ *Id.* at 147-148.

⁸⁵ *Id.* at 149.

⁸⁶ *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 473-476, (3d. Cir. 2015).

⁸⁷ *Id.* at 457-462.

school or its community.⁸⁸ Because of the special responsibilities of the educator, teacher protest that is likely to provoke serious parent or student backlash can present risks despite the general First Amendment rule against the “heckler’s veto” (where speech is shut down due to the disruptive or violent behavior of a hostile audience). Teachers should consider whether their speech will undermine community trust, though this fortunately appears to primarily concern extreme cases involving racist speech or the denigration of students.

D. Striking as a Public School Teacher

Teachers in Mississippi must also be aware that, in addition to the above considerations, there are statutory restrictions on their ability to strike. MS Code § 37-9-75 defines a strike as “a concerted failure to report for duty, a willful absence from one's position, the stoppage of work, a deliberate slowing down of work, or the withholding, in whole or in part, of the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment”⁸⁹ Teachers and teacher organizations are barred from promoting, encouraging, or participating in any such strike activity.⁹⁰ Failure to comply with this statute can lead to legal liability and professional discipline. If a court finds that the statute has been violated, the teacher will be not only terminated from their job, but they will be barred from working as a public-

⁸⁸ See *Anderson v. Evans*, 660 F.2d 153, 159 (6th Cir. 1981) (finding that defendant school did not violate the First Amendment when it fired an elementary school teacher for making racially insensitive remarks. Note though that this case involved interpersonal speech rather than public comments and this impacted the *Pickering* balancing test).

⁸⁹ MS Code § 37-9-75(1)(a).

⁹⁰ MS Code § 37-9-75(3).

school teacher in Mississippi.⁹¹ The statute does allow for teachers to speak out on employment conditions in nondisruptive ways however.⁹²

The above statutory restrictions must be kept in mind for teachers interested in protesting employment conditions in Mississippi. While such issues are of public concern, teachers may not protest in ways that fall within the statute's definition of a strike without risking serious legal and professional liability.

E. Protesting as a Public University Professor

Public university professors are public employees and therefore technically subject to the same free-speech rules as are K-12 public school teachers when it comes to their protest rights.⁹³ As a general matter, the Fifth Circuit has applied cases like *Pickering* and *Connick* to the speech of college-level instructors. It has also applied the *Tinker* rule to the college environment and held that disruptive speech is not protected.⁹⁴ While the general analysis for university professors will therefore be similar to the above analysis for K-12 teachers, university professors have the additional protections of tenure and academic freedom.

⁹¹ MS Code § 37-9-75(8).

⁹² MS Code § 37-9-75(1)(a) (“[N]othing herein shall limit or impair the right of any certified teacher to express or communicate a complaint or opinion on any matter related to the conditions of public employment so long as the same is not designed and does not interfere with the full, faithful and proper performance of the duties of employment.”).

⁹³ See *Xingzhong Shi v. Ala. A&M Univ.*, 5:13-cv-00327-JHE, 2015 U.S. Dist. LEXIS 130012, at *38-*39 (N.D. Al. Sept. 28, 2015) (applying the *Pickering* balancing test to a non-tenured professor allegedly fired for protected speech).

⁹⁴ *Martin v. Parish*, 805 F.2d 583, 585 (5th Cir. 1986) (holding that the profanity-laden speech of an economics instructor was proper grounds for termination despite First Amendment challenges); *but see id.* at 587 (Hill, J. concurring) (arguing that cases such as *Tinker* and its progeny apply to high school settings rather than college classrooms).

Tenure protects professors' right to speak, research, and publish on controversial or unpopular topics without fear of losing their livelihood.⁹⁵ Further, the Supreme Court has repeatedly held that professors' mere membership in organizations dedicated to controversial political or social causes (such as the Communist Party) is not, by itself, grounds for discipline.⁹⁶

Tenure also gives a professor a property interest in, or "right" to, their job that does not necessarily exist for K-12 public school teachers. This means tenured professors cannot be summarily terminated without due process of law.⁹⁷ Due process includes "oral or written notice of the charges against [them], an explanation of the employer's evidence, and an opportunity to present [their] side of the story."⁹⁸ Tenured professors are thus far more secure in their jobs and do not face the same risks when engaging in protest that K-12 public school teachers do, even if professors' rights are less than absolute under the *Pickering-Connick* line of cases.

Even for professors without tenure, general academic freedom principles may help protect their protest rights. Academic freedom is "a special concern of the First Amendment," and academics may not be punished merely for adhering to controversial political or social beliefs.⁹⁹ Professors are free to hold controversial views, to embrace unorthodox political positions, to publish controversial scholarship, and to speak in favor of controversial positions.¹⁰⁰

⁹⁵ *Tenure*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, <https://www.aaup.org/issues/tenure> (last visited Oct. 3, 2024).

⁹⁶ *Keyishan v. Bd. of Regents*, 385 U.S. 589, 606 (1967) ("Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by [professors in the case]."); *see also* *Sweezy v. New Hampshire*, 354 U.S. 234, 249-250 (1957) (holding that association with controversial political groups is a protected freedom under the Constitution).

⁹⁷ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

⁹⁸ *Id.*

⁹⁹ *Keyishan v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁰⁰ *Id.*

Laws or policies that would punish academics for their speech risk deterring free expression and are viewed with suspicion under the First Amendment.¹⁰¹ While academic freedom is primarily concerned with professors' work as scholars and teachers rather than extracurricular protest activities, the concept is still relevant when considering a professor's right to engage in protest.

In conclusion, as a general rule, the *Pickering-Connick* line of cases governing school-teacher protests will also apply to university professors when protesting outside of their academic roles (although tenure may help protect from termination). However, because of strong protections for academic freedom and the wide leeway afforded to professors in teaching and publishing, professors can freely speak out on public issues if doing so is tied to their scholarship. This perhaps gives professors an alternative to traditional protest tactics, allowing them to spread public awareness of an issue or cause through publishing, presenting, and lecturing rather than through conventional picketing. In this way, professors have options for public speech that may not be available to teachers generally.

¹⁰¹ *Id.*

Checklist: Protest in Schools

Protesting as a Student:

- ☐ Student protest speech in school is protected by the First Amendment except that it can be limited or punished by schools if student activity “materially disrupts” or is reasonably predicted to disrupt school functions, or invades the rights of others.
- ☐ Schools can punish in-school student protest speech that promotes illegal drug use, or that is lewd or indecent without having to show the speech was disruptive.
- ☐ School officials have broad discretion to prohibit or punish student protest speech in school-sponsored forums (e.g. school newspapers, school plays, graduation ceremonies) without having to show disruption, so long as officials can articulate a legitimate pedagogical purpose for doing so.
- ☐ Off-campus student protest speech on matters of public concern will likely be protected, even if it involves an unpopular viewpoint, so long as the speech does not involve harassment or threats of violence targeted at specific members of the school community.
- ☐ Students can be punished for participating in walkouts that disrupt school functions.

Protesting as a K-12 Public School Teacher:

- ☐ Understand that public school teachers, because they are government employees, have no First Amendment protections when speaking pursuant to carrying out their official duties as a teacher.
- ☐ Know that teachers have greater First Amendment protections when speaking outside of school in their capacity as a private citizen.
- ☐ When a teacher speaks as a private citizen, focusing on matters of public concern rather

than internal workplace grievances will maximize First Amendment protections.

☐ Know that off-campus teacher speech that undermines community trust in the teacher or the school may not be protected by the First Amendment, even if it touches on matters of public concern.

☐ Teachers in Mississippi are statutorily barred from striking.

Protesting as a Public University Professor:

☐ Know that with respect to protesting, professors at public universities and colleges have largely the same First Amendment rights (or lack thereof) as K-12 public school teachers, except that professors receive additional protections due to academic freedom and tenure.

☐ Academic freedom and tenure protect professors' right to speak, research, and publish on controversial or unpopular topics without fear of losing their livelihood.

☐ Academic freedom allows professors to freely speak on public issues if doing so is tied to their scholarship.

Protesting as a Law Student or Lawyer

While law students and lawyers retain their First Amendment rights and are entitled to speak out on matters of public concern, they face additional considerations that other citizens do not. These considerations primarily revolve around gaining and maintaining admission to the state bar and the possibility that protest activities may lead to an adverse character and fitness determination.¹⁰² Fortunately, most protest activities are unlikely to present character and fitness issues, unless they involve arrest or violence.

A. Lawyers and Law Students Have the Right to Protest

As a general rule, the First Amendment protects the right of bar applicants to speak and assemble without fear of adverse character and fitness determinations. In *Konigsberg v. State Bar of Cali.*, the Supreme Court addressed the case of a California bar applicant (Konigsberg) who was denied admission on the grounds that he was suspected of being a communist insurgent who advocated the overthrow of the United States government.¹⁰³ Konigsberg argued that his denial was based on his political speech and associations and therefore was invalid under the First and Fourteenth Amendments.¹⁰⁴ Specifically, the California bar appeared to base its determination that Konigsberg was unfit on three grounds: that an ex-Communist Party member testified that Konigsberg attended party meetings, that Konigsberg criticized public officials and their policies, and that he refused to answer questions about his political beliefs and associations.¹⁰⁵

¹⁰² Julia Morgan-Trostle, *A Guide to Law Students Considering Nonviolent Civil Disobedience*, 42 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 21 (2017).

¹⁰³ *Konigsberg v. State Bar of Cali.*, 353 U.S. 252, 253-254 (1957).

¹⁰⁴ *Id.* at 255.

¹⁰⁵ *Id.* at 266.

The U.S. Supreme Court noted that mere membership in an organization like the Communist Party is not sufficient to show that one lacks good moral character.¹⁰⁶ Further, the Court held that Konigsberg's harsh public criticisms of the United States government and its officials were protected speech that the government cannot censor under the pretext of determining moral fitness for the legal profession.¹⁰⁷ The Court went on to state that it is important that state bar organizations do not exercise their powers "in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."¹⁰⁸ *Konigsberg* thus stands for the idea that lawyers are not prohibited from criticizing the government or engaging in lawful political associations (including controversial ones such as the Communist Party).

One famous case out of California, *Hallinan v. Committee of Bar Examiners, State Bar*, dealt with the bar admission of a law student (Hallinan) who had participated in nonviolent acts of civil disobedience in support of the Civil Rights Movement.¹⁰⁹ Despite having been arrested six times for peaceful acts of civil disobedience and having an unrelated history of violent altercations, Hallinan was ultimately determined by the California Supreme Court to be fit to practice law and an initial decision denying his admission was overturned.¹¹⁰ Key to the court's reasoning in *Hallinan* was that the acts of civil disobedience were nonviolent. While each state has its own standards, there are at least some states where nonviolent acts of civil disobedience

¹⁰⁶ *Id.* at 267.

¹⁰⁷ *Id.* at 269.

¹⁰⁸ *Id.* at 273.

¹⁰⁹ David Houston, *Law Students' Protest Activities Could Become Troublesome for Bar Admittance*, DAILY JOURNAL (May 3, 2024), <https://www.dailyjournal.com/articles/378617-law-students-protest-activities-could-become-troublesome-for-bar-admittance>.

¹¹⁰ *Id.*

will not result in an adverse character and fitness determination even where the applicant has been arrested.

It is not possible to determine how each individual state bar will view law student participation in protests and civil disobedience given that each state can determine its own standards. However, merely exercising one's right to speak on matters of public concern and to lawfully and peacefully assemble will not, alone, be grounds for denying bar admission. Some states, such as California in the *Hallinan* case described above, have even be willing to admit applicants who have been arrested as a result of their protest activities. This cannot be assumed to be the case for every state though, and being arrested at a protest should generally be viewed as a potential cause for concern for most bar applicants.

B. Potential Consequences of Being Arrested at a Protest

Law students and lawyers seeking to be admitted who are arrest due to their protest activity or civil disobedience will potentially face an obstacle to bar admission. The nature and severity of the charges and whether the protester is ultimately convicted are important factors. Common charges against arrested protesters include disorderly conduct, disturbing the peace, and criminal trespass. These charges are misdemeanors in Mississippi.¹¹¹ While such charges must still be disclosed to the state bar and can lead to additional inquiries during the bar admission process, they may not automatically foreclose bar admission depending on the applicant's overall history.

¹¹¹ MS Code § 97-35-7 (disorderly conduct); MS Code § 97-35-15 (disturbing the peace); MS Code § 97-17-87 (criminal trespass)

Being convicted of a felony is a far more serious matter. In Mississippi, anyone convicted of a felony in any court is automatically prohibited from being admitted to the bar in the state.¹¹² Kansas and Texas have similar rules.¹¹³ While other states may not have this absolute rule, a felony conviction will undoubtedly be viewed as a very serious concern by any state bar. There may be instances where a protester is charged with a felony depending on the aggravating circumstances of their arrest.¹¹⁴ For instance, a protester who is accused of assaulting a police officer or who uses a weapon may be charged with the felony of aggravated assault or a similar charge. This is all the more reason why law students and lawyers wishing to protest or engage in civil disobedience must be sure to remain peaceful and non-violent at all times.

Being arrested at a protest as a law student or lawyer can have impacts beyond one's admission to the bar. For example, many lawyers seeking to work for the federal government will need to acquire a security clearance. An arrest can prevent an applicant from obtaining a required security clearance or cause a current federal employee to lose their clearance.¹¹⁵ Being arrested may also impact one's employment even for private employers.

Immigration status can also be an important factor to consider. For law students and lawyers who are not U.S. citizens or lawful permanent residents (green card holders), even a misdemeanor arrest can have negative consequences for immigration status.¹¹⁶ If arrested, you

¹¹² MS Code § 73-3-41

¹¹³ Jonathan R. Tung, *Can a Felon Become a Lawyer?* FINDLAW, at <https://www.findlaw.com/legalblogs/greedy-associates/can-a-felon-become-a-lawyer/> (last updated Mar. 21, 2019).

¹¹⁴ Morgan-Trostle, *supra* note 102, at 22.

¹¹⁵ Jamison Koehler, *Criminal Charges and Security Clearance*, KOEHLER LAW, <https://koehlerlaw.net/other-offenses/criminal-charges-and-a-security-clearance/> (last updated Jan. 14, 2024).

¹¹⁶ Morgan-Trostle, *supra* note 102, at 25.

do not have to answer questions about your immigration status (you can say you are exercising your right to remain silent), but you may be required to provide identification.¹¹⁷ It is best to carry with you a copy (not the original) of your immigration documentation, so long as it is not expired.¹¹⁸ This includes carrying a copy of your green card, if you have one. But avoid carrying documents issued by another country, as this can be used to prove you are not a citizen.¹¹⁹

C. Bar Admission After Being Arrested at a Protest

When a law student or lawyer has engaged in civil disobedience or has been arrested as a result of their protesting, they are advised to seek legal counsel to help them navigate the bar admission process. Ideally, those planning on engaging in civil disobedience will obtain legal representation in advance to help them understand potential risks.¹²⁰ There are organizations such as the National Lawyers Guild (NLG) that provide mass defense committees to assist those engaged in civil rights protests.¹²¹ The NLG maintains a chapter at the Mississippi College School of Law.¹²² Those concerned about their own bar application are also encouraged to seek out a character and fitness lawyer who can help them better understand their unique situation.

¹¹⁷ *Know Your Rights: Immigrants' Participation in Protests*, NATIONAL IMMIGRATION LAW CENTER, <https://www.nilc.org/resources/immigrant-participation-in-protests-rights/> (last visited Nov. 28, 2024).

¹¹⁸ *Mass Defense Program*, NATIONAL LAWYERS GUILD, <https://www.nlg.org/wp-content/uploads/2022/06/Know-Your-Rights-Booklet-2022.pdf> at 48-49 (last visited Nov. 28, 2024).

¹¹⁹ *Know Your Rights: Immigrants' Participation in Protests*, NATIONAL IMMIGRATION LAW CENTER, <https://www.nilc.org/resources/immigrant-participation-in-protests-rights/> (last visited Nov. 28, 2024).

¹²⁰ *Id.* at 23.

¹²¹ *Mass Defense Program*, NATIONAL LAWYERS GUILD, <https://www.nlg.org/wp-content/uploads/2022/06/Know-Your-Rights-Booklet-2022.pdf> at 52 (last visited Nov. 28, 2024).

¹²² *NLG Students*, NATIONAL LAWYERS GUILD, <https://www.nlg.org/students/> (last visited Oct. 30, 2024).

Those applying to the bar must be candid about any arrests or charges they have faced due to protesting (or any other reason). If an applicant has already submitted a character and fitness application and is subsequently arrested, the applicant should update their application immediately.¹²³

D. Protesting as a Judicial Clerk

Those working as judicial law clerks, particularly at the federal level, face stringent limitations on their abilities to protest. These flow from the need to maintain the image of an impartial judiciary. Canon 5 of the Code of Conduct for federal law clerks prohibits engaging in both partisan and nonpartisan political activity.¹²⁴ In addition to barring activities like running for office or donating to political causes, this prohibition extends to passive activities such as displaying political signs or bumper stickers.¹²⁵ Federal clerks are urged to not weigh in on hotly contested political issues during their time as a clerk.¹²⁶ Consequently, current federal law clerks risk losing their clerkship if they engage in protest activities.

For state clerks in Mississippi, there is no canon of conduct analogous to the federal canon. However, the Mississippi Code of Judicial Conduct also places a strong emphasis on promoting the impartiality of the judiciary.¹²⁷ Because of this, those clerking in Mississippi state courts should strive to avoid engaging in activities that raise questions about potential biases of

¹²³ Morgan-Trostle, *supra* note 102, at 24.

¹²⁴ FEDERAL JUDICIAL CENTER, MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 14 (4th ed. 2013)

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Miss. Code. Jud. Cond. Canon 2(A)

their judge. If a state clerk has questions about what activities would be inappropriate, they should speak with their judge.

Checklist: Protesting as a Law Student or Lawyer

Lawyers and Law Students Have the Right to Protest:

- ☐ As a general rule, the First Amendment protects the right of bar applicants to speak and assemble without fear of adverse character and fitness determinations.
- ☐ Most protest activities are unlikely to present character and fitness issues unless they involve arrest or violence.
- ☐ It is not possible to determine how each individual state bar will view law student participation in protests and civil disobedience given that each state can determine its own standards.

Bar Admission After Being Arrested at a Protest:

- ☐ Law students and lawyers wishing to protest or engage in civil disobedience should remain peaceful and non-violent at all times.
- ☐ If arrested during a protest, this should be disclosed when applying to the bar and, depending on the circumstances, the applicant may want to consult with a character and fitness attorney. The nature and severity of the charges and the outcome (i.e., charges dismissed, conviction, guilty plea, etc.) will determine if the arrest poses an obstacle to bar admission.
- ☐ Common protest charges (e.g., disorderly conduct, blocking traffic) typically do not automatically foreclose bar admission, depending on the applicant's overall history.
- ☐ In Mississippi, anyone convicted of a felony in any court is automatically prohibited from being admitted to the bar in the state.
- ☐ An arrest while protesting or engaging in civil disobedience can have negative

consequences for lawyers and law students who are not U.S. citizens or lawful permanent residents (green card holders). You do not have to disclose your immigration status if asked (you have the right to remain silent) but may be required to provide identification. Carry a copy of your unexpired immigration documentation or green card, if you have one. Avoid carrying documentation issued by another country.

Protesting as a Judicial Clerk:

- ☐ Those working as judicial law clerks, particularly at the federal level, face stringent limitations on their abilities to protest:
 - ☐ No display of political signs or bumper stickers;
 - ☐ No donating to political causes;
 - ☐ No weighing in on political issues;
 - ☐ No engaging in protest activities.
- ☐ If you have questions about what activities would be inappropriate, you should speak with your judge.

Civil Disobedience

Although the First Amendment protects many forms of protest and ensures a right to peacefully assemble, it does not extend to acts of civil disobedience.¹²⁸ Civil disobedience means intentionally breaking the law in order to further some social or political end. In a case relating to a Black Lives Matter group obstructing a highway, a federal judge for the Fifth Circuit (the controlling federal court for Mississippi) summarized the issue as follows:

Civil disobedience enjoys a rich tradition in our nation’s history. But there is a difference between civil disobedience—and civil disobedience without consequence. Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to violate traffic rules or other laws that the rest of us are required to follow. The First Amendment protects protest, not trespass.¹²⁹

Thus, acts of civil disobedience (i.e., intentionally breaking the law to make a point) entail risk of arrest and criminal prosecution, and the attendant consequences for employment, housing, education, professional licensure and more.¹³⁰ It is ultimately up to each individual protester to consider how much they are willing to risk to promote a cause they care about.

¹²⁸ *Five Ways the First Amendment Protects Your Speech – and Three Ways it Does Not*, ACLU DISTRICT OF COLUMBIA (Aug. 15, 2025, 10:45 am), <https://www.acludc.org/en/news/five-ways-first-amendment-protects-your-speech-and-three-ways-it-does-not>.

¹²⁹ *Doe v. McKesson*, 947 F.3d 874, 878 (5th Cir. 2020) (Ho, J, concurring).

¹³⁰ See *Recording Police and Other Government Officials* in this guide which outlines considerations regarding consequences of an arrest.

A. Sit-Ins

Sit-ins are a form of protest and potentially a form of civil disobedience where a person peacefully occupies an area despite potential resistance or orders to disperse. Sit-ins have a long history related to the Civil Rights Movement in Mississippi and elsewhere.¹³¹ For example, in 1966, the Supreme Court held that a group of Black teenagers who protested Jim Crow segregation by peacefully sitting in a public library were protected under the First Amendment.¹³² But in the same year the Court held school segregation to be unlawful in *Brown v. Louisiana*, it also held that students who blocked the entrance to a prison could be prosecuted for trespass despite their First Amendment claims.¹³³ Thus, Civil Rights protesters who utilize sit-ins may face criminal penalties for trespass and breaching the peace.¹³⁴

Sit-ins are not per-se illegal, but the location where the sit-in occurs is important. Protests on private property, including sit-ins, are generally not protected by the First Amendment.¹³⁵ Anyone who occupies a private establishment or business against the

¹³¹ *Sit-Ins*, Mississippi Encyclopedia, <https://mississippiencyclopedia.org/entries/sit-ins/> (last visited Oct. 17, 2024).

¹³² *Brown v. Louisiana*, 383 U.S. 131, 146-147, (1966).

¹³³ *Adderley v. Florida*, 385 U.S. 39, (1966).

¹³⁴ *Sitting Down to Take a Stand*, United States Civil Rights Trail, <https://civilrightstrail.com/experience/student-led-sit-ins-across-the-south-lead-to-desegregated-businesses/> (last visited Oct. 17, 2024) (describing various sit-ins across the country during the Civil Rights era and legal penalties incurred by protesters); Prem Thakker, *Amid Gaza Protests, Universities Are Cracking Down on a Celebrated Protest Tactic: Sit-ins*, *The Intercept* (Jan. 21, 2024, 6 am), <https://theintercept.com/2024/01/21/university-student-sit-ins-palestine/>.

¹³⁴ *Protester's Rights*, ACLU MISSISSIPPI, <https://www.aclu-ms.org/en/know-your-rights/protesters-rights> (last visited Oct. 17, 2024).

¹³⁵ *Id.*

owner's consent can likely be lawfully prosecuted for trespass without the ability to rely on the First Amendment as a defense.

Sit-ins on government property are more nuanced. There are protections for protests on public property such as public streets, parks, or plazas, but these protections are not absolute and can be subject to reasonable time, place, and manner regulation, which a sit-in may violate. For instance, a sit-in may violate valid time, place, or manner regulations that prohibit blocking entrances or exits to buildings, or interfering with government employees carrying out their official duties, or assembling after a certain hour of the evening. Thus, trespass and disorderly conduct charges, or other criminal penalties, are a possibility even where a sit-in takes place on government property. For more information about protesting on public versus private property, please see the earlier sections of this guide that address *Protests on Government Property* and *Protests on Private Property*.

B. Blocking Traffic

Any protest that blocks traffic is illegal, unless organizers have obtained advance permission and cooperation from local authorities to do so.¹³⁶ Miss. Code § 97-1-11 states that it is unlawful for anyone to intentionally obstruct or interfere with the normal flow of vehicle traffic on public streets and highways or with the flow of pedestrian traffic on public sidewalks. Violations of this statute can lead to fines of up to \$400, imprisonment in county jail for up to four months, or both.¹³⁷ This law is almost certainly

¹³⁶ *Id.*

¹³⁷ Miss. Code § 97-35-23(1).

constitutional as a content-neutral time, place, and manner restriction, despite the broad First Amendment protections for protests on public streets.

For more information, please see the section of this guide that addresses *Protesting on Government Property*.

C. School Walkouts

School walkouts are a popular way for students to protest, but doing so can invite disciplinary consequences. This is because students may not protest in ways that disrupt the functioning of the school or interferes with the rights of others.¹³⁸

For more in-depth coverage of walkouts and other forms of protest in school, please see the section of this guide that addresses *Protesting in Schools*.

D. Can Police Arrest Law-Abiding Protesters Because of Others' Activities?

Just because one or more people participating in a protest break the law or engage in acts of civil disobedience does not mean that the police may arrest other people who are lawfully protesting.¹³⁹ Under the Fourth Amendment, the police may only arrest someone when they have probable cause to believe that person has violated the law. Probable cause must be particularized to the individual person being arrested and cannot be established by showing that a person was near unlawful activity.¹⁴⁰ In other words, the fact that a lawful protester was in the vicinity of an unlawful protester does not give the

¹³⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969).

¹³⁹ *See Jones v. Parmley*, 465 F.3d 46, 60 (2d Cir. 2006) (“[P]laintiffs had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed the law.”).

¹⁴⁰ *Ybarra v. Ill.*, 444 U.S. 85, 91 (1979).

police probable cause to arrest the lawful protester. Courts in Mississippi have affirmed this constitutional principle.¹⁴¹

In situations where the police determine that unlawful activity during a protest requires them to manage the entire protest gathering “as a unit,” police must first attempt to clear the area and provide an opportunity for lawful protesters to disperse.¹⁴² Only after being given reasonable notice to disperse and an opportunity to leave the area can otherwise lawful protesters be arrested if they fail to comply.¹⁴³

Notwithstanding the foregoing legal principles, the reality is that law enforcement does not always comply with these standards. For instance, during the 2020 Black Lives Matter protests, many law-abiding citizens were swept up in waves of mass arrests simply as a result of being at “the wrong place at the wrong time.”¹⁴⁴ During the Occupy Wall Street protests, more than 700 people were arrested after the police led a large crowd of protesters onto the Brooklyn Bridge in a manner that some of the arrested described as a trap.¹⁴⁵ Thus, while the First and Fourth Amendments can provide a means of challenging a mass arrest after the fact, they are not a guarantee against the possibility of arrest in the first place.

¹⁴¹ Haynes v. Jones City, 633 F. Supp. 3d 806, 815 (S.D. Miss. 2022) (quoting *Ybarra*, 444 U.S. at 91) (stating that probable cause must depend on facts that are particularized to the arrestee).

¹⁴² Barham v. Ramsey, 434 U.S. 565, 576 (D.C. Cir. 2006); Dellums v. Powell, 566 F.2d 167, 181 n. 31 (D.C. Cir. 1977).

¹⁴³ *Feiner v. New York*, 340 U.S. 315, 321 (1951) (rejecting First Amendment challenge to arrests where police gave dispersal orders in exercising their duty to preserve the peace and plaintiffs refused to comply); see also *Parmley*, 465 F.3d at 60.

¹⁴⁴ Anita Snow, *AP Tally: Arrests at Widespread US Protests hit 10,000*, AP NEWS (June 4, 2020), <https://perma.cc/5JV8-75TS>.

¹⁴⁵ Matt Wells, *Occupy Wall Street – the Story of the Brooklyn Bridge ‘Trap’*, THE GUARDIAN (Oct. 3, 2011), <https://www.theguardian.com/world/blog/2011/oct/03/occupy-wall-street-brooklyn-bridge-arrests>.

E. Liability Considerations for Protest Organizers

The liability of protest organizers may be different that of protest participants. The Fifth Circuit case of *McKesson v. Doe* addressed a claim against a prominent Black Lives Matter protest organizer (DeRay McKesson) for injuries sustained by a Louisiana police officer after an unidentified party participating in the protest threw a rock at the officer.¹⁴⁶ While the court recognized that Louisiana law does not impose responsibility on people for the criminal acts of others, it does recognize a legal duty not to negligently cause others to commit crimes that are foreseeable.¹⁴⁷ The Fifth Circuit held that because McKesson had allegedly led protesters in engaging in unlawful acts (blocking a public highway), and because violent confrontations with police are foreseeable consequences of unlawful protests, McKesson could potentially suffer legal consequences for the injuries of the police officer. However, the Supreme Court vacated the Fifth Circuit's decision, directing that the issues of state law involved should be decided by Louisiana's state supreme court.¹⁴⁸ After several more years of litigation, a federal district court in Louisiana dismissed the case on the grounds that the officer could not sufficiently prove that McKesson was actually a leader of the protest, organized the unlawful events, or caused the officer's injuries.¹⁴⁹

While McKesson was ultimately able to avoid liability on the facts of his case, it is an unfortunate cautionary tale that a protest organizer may face liability for organizing

¹⁴⁶ *Doe v. McKesson*, 945 F.3d 818, 822 (5th Cir. 2019).

¹⁴⁷ *Id.* at 827 (citations omitted).

¹⁴⁸ *McKesson v. Doe*, 592 U.S. 1 (2020).

¹⁴⁹ *Ford v. McKesson*, CV No. 16-00742-BAJ-RLB, 2024 WL 3367216, at *4-*5 (M.D. La. July 10, 2024).

an unlawful protest or encouraging or allowing others participating in the protest to engage in unlawful activity. See also the section of this guide discussing *RICO* for information about potential conspiracy charges related to protests.

Organizers of demonstrations should therefore be proactive to:

- Facilitate a lawful event - e.g., obtain any required permit; plan a location or route that will not block vehicular or pedestrian traffic (or else work with local authorities to get permission ahead of time to do so); comply with any local time, place, or manner regulations; etc.
- Be explicit when communicating about the event (both verbally and in writing) that all activity is intended to be lawful and that the organizer(s) do not want participants to engage in any unlawful or violent activity.

Checklist: Civil Disobedience

General Considerations:

- ☐ Know that the First Amendment does not extend to acts of civil disobedience.
- ☐ Understand potential arrest and prosecution risks before engaging in an act of civil disobedience.
- ☐ Consider consequences for employment, housing, and education before engaging in an act of civil disobedience.

Sit-Ins:

- ☐ Check if sit-in location is on public or private property.
- ☐ Understand that sit-ins on private property can result in prosecution for trespass.
- ☐ Understand that sit-ins on public property can be limited by reasonable time, place, and manner restrictions.
- ☐ Understand that criminal penalties are a possibility even when a sit-in takes place on government property.

Blocking Traffic:

- ☐ Understand that any protest that blocks traffic is illegal, unless permission has been obtained in advance from local authorities to do so.
- ☐ In Mississippi, unlawfully blocking traffic can lead to fines of up to \$400, imprisonment in county jail for up to 4 months, or both.

Arrest of Law-Abiding Protesters:

- ☐ Know that unlawful activity by some protest participants does not make the entire protest

unlawful; that police must have individualized probable cause to believe someone is breaking the law before arresting them; and that if police determine it is necessary to shut down a protest, they must first give clear dispersal orders and an opportunity for protesters to leave the area before making arrests.

- ☐ Understand the reality that law enforcement does not always follow the foregoing legal standards. This can be grounds for lawful protesters to challenge their arrest after the fact.

Liability Considerations for Protest Organizers:

- ☐ Understand that leading or organizing an unlawful protest, or encouraging others to engage in unlawful activity, can result in criminal charges and/or civil liability.
- ☐ Be proactive when organizing a demonstration or protest to facilitate a lawful event, and be explicit that participants should not engage in unlawful activity or violence.

Protesting While on Paper

A. Protesting While on Parole

Parolees must comply with the conditions imposed on them by their Parole Board, and failure to comply can result in parole revocation and re-incarceration.¹⁵⁰ Parole conditions usually do not prohibit participating in lawful protest activities or speaking on matters of public concern, but may include curfew requirements and limitations on the ability to travel outside the state without written permission by a parole officer.¹⁵¹ Such conditions can indirectly limit a parolee's ability to engage in protest. For instance, in *Sobell v. Reed*, a New York federal court was presented with a First Amendment challenge by a parolee who wished to travel to attend anti-war demonstrations and to speak about prison conditions, but his travel requests were frequently denied by his parole officer.¹⁵² The court held that the denials violated the plaintiff's First Amendment rights because they were not necessary to safeguard against specific, concretely described and highly likely dangers of misconduct by plaintiff.¹⁵³ Thus, travel restrictions cannot be used indiscriminately to prevent a parolee from engaging in First Amendment-protected activity. A federal court in New Mexico has also noted that being on parole does not void one's Constitutional right to attend protests.¹⁵⁴

However, there are some limited circumstances where a parolee's First Amendment rights are required to yield to the directives of the parole commission. In *Walrath v. Getty*, the plaintiff,

¹⁵⁰ 29 Miss. Code. R. 201-3.5

¹⁵¹ *Id.*

¹⁵² *Sobell v. Reed*, 327 F. Supp. 1294, 1295 (S.D.N.Y. 1971).

¹⁵³ *Id.* at 1304.

¹⁵⁴ *White v. Stone*, No. 21-CV-1207-SCY-JFR, 2023 WL 7165190, at *12 n.22 (D.N.M. Oct. 31, 2023) ("The Court disagrees that Plaintiff's participation in a BLM protest is not constitutionally protected activity merely because he was on parole.").

who had been convicted for abducting, sexually molesting, and attempting to drown a young boy, had his parole revoked after he refused to consent to a plethysmograph test, which measures the changes in volume in different parts of the body (in this case, the enlargement of the plaintiff's penis in response to certain stimuli).¹⁵⁵ The parole commission posited that the test was necessary to evaluate the plaintiff's potential for recidivism, but he refused to consent to the test and protested its administration.¹⁵⁶ He argued that the revocation of his parole based on his objection to the test violated his First Amendment right to protest.¹⁵⁷ A federal court of appeals found that the denial of parole was nonetheless proper under the circumstances.¹⁵⁸

In sum, parolees have the right to lawfully assemble, speak, and protest, just as other citizens do. However, conditions of parole that serve a legitimate penological purpose must still be complied with, even when they limit a parolee's First Amendment rights. A parolee should review whether participating in a given protest would violate any parole condition, such as curfew or travel restrictions. Additionally, parolees must be careful about being arrested while protesting. Being arrested while on parole in Mississippi will require the parolee to have a Parole Board hearing and may result in the revocation of their parole.

B. Protesting While on Probation or on Bail

Individuals on probation face many of the same considerations as those on parole when deciding whether to protest. Probation does not extinguish one's basic Constitutional rights, but it will impose conditions that must be followed to avoid jail time or other consequences.¹⁵⁹ The

¹⁵⁵ Walrath v. Getty, 71 F.3d 679, 680-82 (7th Cir. 1995).

¹⁵⁶ *Id.* at 681-682.

¹⁵⁷ *Id.* at 682.

¹⁵⁸ *Id.* at 684.

¹⁵⁹ *Probation Violations*, RUFUS ALLDREDGE, <https://www.arrestedms.com/probation-violations.html> (last visited Oct. 24, 2024).

conditions associated with probation in Mississippi are very similar to those associated with parole and include the same restrictions on travel.¹⁶⁰ Similar restrictions can also apply to individuals released from law enforcement custody on bail.¹⁶¹

Generally, probation conditions that affect First Amendment freedoms will be upheld on review if they are “narrowly tailored and [are] directly related to deterring [criminals] and protecting the public.”¹⁶² For example, some courts have upheld probation conditions forbidding those convicted of tax evasion from associating with groups that advocate for non-compliance with tax law.¹⁶³ Similarly, the Mississippi Court of Appeals has held that probation conditions that restrict free speech rights can be legitimate when they relate to one’s criminal conduct.¹⁶⁴

Those interested in protesting while on probation or on bail should review the specific conditions imposed on them to see whether any would be implicated because violating one’s probationary terms can lead to arrest and possible jail time. If uncertain, speak to a lawyer or consult with your probation officer.

¹⁶⁰ *Id.*

¹⁶¹ Ryan Nielsen, *What You Can and Can’t Do While Out on Bail*, D&D BAIL BONDS (Mar. 28, 2024), <https://ddbail.com/what-you-can-and-cant-do-while-out-on-bail/>.

¹⁶² *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999).

¹⁶³ *United States v. Schiff*, 876 F.2d 272, 276-277 (2d Cir. 1989); *see also* *United States v. Lawson*, 670 F.2d 923, 929-30 (10th Cir. 1982).

¹⁶⁴ *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037, 1042 (Miss. Ct. App. 2001); *see also* *Cobb v. State*, 437 So. 2d 1218, 1221 (Miss. 1983) (noting that courts are unanimous in holding that constitutional rights may be limited by probation conditions where there is “some reasonable relationship to the Appellant’s past or future criminality or to the rehabilitative purpose of probation.”).

Checklist: Protesting While on Paper

Protesting While on Parole:

- ☐ Review all parole conditions, including curfew and travel restrictions, to ensure participating in a given protest would not violate a parole condition since violations can result in parole revocation.
- ☐ If any parole conditions are implicated, speak with parole officer to request permission.

Protesting while on Probation or on Bail:

- ☐ Review all probation and bail conditions to ensure participating in a given protest would not violate them since violations can result in revocation of probation and re-arrest.
- ☐ If any probation or bail conditions are implicated, speak with probation officer or criminal defense attorney about requesting permission.

Anti-Boycott, Divest, and Sanctions (BDS) Laws

In recent years, numerous states have passed so-called anti-BDS laws directed towards the Boycott, Divestment, and Sanctions (BDS) Movement. The BDS Movement is a movement that advocates for Palestinian rights by opposing Israel's policies towards Palestinians through boycotts of Israeli business and businesses that do business in Israel, pressuring of institutions to divest from the state of Israel, and calling on governments to sanction Israel.¹⁶⁵ The ultimate goal of the BDS movement is to pressure Israel to change its treatment of Palestinians and its policies towards Palestine.¹⁶⁶ Numerous states have enacted anti-BDS statutes, including Mississippi.¹⁶⁷ Anti-BDS laws typically bar state agencies from working with and investing in companies involved with the BDS movement.¹⁶⁸ In Mississippi, companies that are deemed to be engaged in unlawful boycotts of Israel will be publicly listed on the website of the state Department of Finance and Administration.¹⁶⁹ Listed companies are ineligible for investment by Mississippi or its Public Employee Retirement System.¹⁷⁰ Companies will be given 90-days' notice of their pending inclusion on the list of companies and the consequences of listing, with companies being able to avoid listing if they cease all boycotting activity or state in writing that they are not engaged in BDS activity.¹⁷¹ This means that if you are a business wishing to do business with the

¹⁶⁵ *What is BDS?* B.D.S., <https://bdsmovement.net/what-is-bds> (last visited Sept. 11, 2024).

¹⁶⁶ *Id.*

¹⁶⁷ *Mississippi*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/location/mississippi/> (last updated Oct. 26, 2020) (describing Mississippi's HB 761, which has been signed into law and effective since July 2019); *see also* Matthew Impelli, *Map Shows Where Boycotting Israel is Illegal*, NEWSWEEK (April 29, 2024), <https://www.newsweek.com/pro-palestinian-protest-states-colleges-illegal-bds-1895292>.

¹⁶⁸ Impelli, *supra* note 167.

¹⁶⁹ Miss. Code § 27-117-5(1).

¹⁷⁰ Miss. Code § 27-117-5(3)(a).

¹⁷¹ Miss. Code § 27-117-5(3)(a)-(b).

state of Mississippi, you must either refrain from engaging in BDS activity or cease such activity upon notice from the state.

The constitutionality of anti-BDS statutes remains hotly contested and a subject of frequent litigation across the country. Commentators have argued that anti-BDS laws are entirely constitutional on the grounds that the laws merely affect “government speech” rather than private individuals’ speech and that BDS activity is not protected speech under the First Amendment.¹⁷² Many courts, however, have disagreed and held that the statutes raise serious First Amendment concerns.

The Supreme Court held in *NAACP v. Claiborne* that boycotts can constitute speech protected under the First Amendment.¹⁷³ Boycotts can be used to disseminate ideas and challenge an existing social order – expressive behaviors that fall within the scope of the First Amendment. The government can regulate boycotting in a way that affects speech rights, but only in very limited circumstances.¹⁷⁴ *Claiborne* has often been held to render anti-BDS laws unconstitutional.¹⁷⁵

Unfortunately, the Court of Appeals for the 5th Circuit (whose decisions federal courts in Mississippi must follow) has not examined anti-BDS laws, and no court has squarely addressed the constitutionality of Mississippi’s anti-BDS law. However, other courts outside the 5th Circuit have addressed the constitutionality of anti-BDS statutes similar to the one found in Mississippi.

¹⁷² Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes are Fully Constitutional*, 50 TEX. TECH. L. REV. 207, 218 (2018).

¹⁷³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911.

¹⁷⁴ *Id.* at 912.

¹⁷⁵ *Ali v. Hogan*, No. CCB-19-0078, 2019 WL 4861198, at *1 (D. Maryland 2019).

In *Koontz v. Watson*, the plaintiff sought to stop the enforcement of a Kansas anti-BDS statute which prevented the state from contracting with anyone who engages in a boycott of Israel not based upon a “valid business reason. . . .”¹⁷⁶ The Kansas court cited the *Claiborne* case mentioned above and found that the plaintiff’s BDS activities were protected under the First Amendment.¹⁷⁷ Because protected First Amendment freedoms were at issue, the court subjected the Kansas statute to a rigorous legal review called “strict scrutiny,” which looks to whether the state could show a legitimate interest furthered by the statute and whether the statute was narrowly tailored to furthering that interest. The Kansas court ruled that the anti-BDS statute did not satisfy this strict test and ruled the statute unconstitutional.¹⁷⁸

Georgia’s anti-BDS law was challenged in federal court in *Martin v. Wrigley*. The defendants argued that the law regulates *conduct* rather than speech and is thus constitutional. The court rejected this argument, noting that the state’s anti-BDS law was clearly a regulation of the content of speech rather than a pure regulation of conduct that only happened to incidentally infringe upon protected speech rights. Because the anti-BDS statute at issue contained an explicit carve out to allow businesses to boycott Israel on “legitimate business grounds,” the court ruled that the law was aimed at regulating the content of the boycotters’ speech,¹⁷⁹ and therefore implicated First Amendment rights. The court ruled that the plaintiff’s First Amendment challenge was plausible, but ultimately found that the defendants were protected from any liability because of qualified immunity.¹⁸⁰ Using the same reasoning, a federal court in Texas

¹⁷⁶ *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1012 (D. Kan. 2018) (quoting Kan. Stat. Ann. § 75-3740f(a)).

¹⁷⁷ *Id.* at 1022.

¹⁷⁸ *Id.* at 1023.

¹⁷⁹ *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1227 (N.D.GA 2021).

¹⁸⁰ *Id.* at 1234.

also found that a Texas anti-BDS statute was an attempt at regulating the content of speech protected under the First Amendment,¹⁸¹ although the case was later tossed out as moot.¹⁸²

In summary, courts have generally found that anti-BDS statutes raise First Amendment issues, and the general trend appears to be holding that such statutes impinge upon protected speech. While there are arguments to be had over the extent to which BDS activities are within the scope of the First Amendment and whether the statutes merely consist of government speech, the case law cited above indicates that courts have been suspicious of such arguments.

Despite powerful constitutional objections, anti-BDS laws remain prevalent across the United States. Challenging these laws can involve expensive litigation with no guarantee of success. Mississippi's anti-BDS law has yet to be successfully challenged in court, and as such it remains the law applicable to everyone in the state. While cases from other jurisdictions can provide guidance, there is no way of knowing how a court in Mississippi or the 5th Circuit Court of Appeals (decisions from this court are binding on Mississippi federal courts) would rule on constitutional challenges to the Mississippi law. Those seeking to protest Israel through boycott in Mississippi must thus be aware of the state's law and how it may impact them if they intend to do business with the state.

¹⁸¹ *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 743-745 (W.D. Tex. 2019)

¹⁸² *See Amawi v. Paxton*, 956 F.3d 816, (5th Cir. 2020).

Checklist: Anti-BDS Laws

Business Considerations:

- ☐ Understand that Mississippi has an active anti-BDS law.
- ☐ Be aware that companies will be given 90-days' notice of their pending inclusion on the Mississippi Department of Finance and Administration's list of violators of the state's anti-BDS law.

Options if Your Company is Pending Inclusion on List:

- ☐ Cease boycott activities.
- ☐ Provide written statement denying BDS involvement.
- ☐ Cease business engagements with state of Mississippi and continue boycott efforts.

Recording at Protests

A. Legal Rights and Limitations

When you are lawfully present in any outdoor, public space, you have the right to photograph, audio record, and video record anything in plain view, including protesters and counter protesters.¹⁸³ On private property, the owner may set rules about recording, including prohibiting it.¹⁸⁴ If you are stopped or detained for recording in an outdoor public space, such as during a lawful protest, remind the officer that taking photographs is your right under the First Amendment and does not constitute reasonable suspicion of criminal activity. However, police officers may order citizens to cease activities that are truly interfering with legitimate law enforcement operations.¹⁸⁵ Examples of activities that could potentially interfere with law enforcement operations include physically blocking an officer who is trying to respond to an emergency call, using bright flash that impairs an officer's vision, or standing too close to officers while they're conducting an arrest, especially if repeatedly asked to step back.

B. Hidden Camera Laws

Mississippi has only outlawed uses of hidden cameras in private places involving attempts to record nudity or other indecent content. Specifically, Mississippi prohibits secretly photographing, filming, or reproducing images of another person with lewd or indecent intent without that person's consent while in an area where a person would tend to be in a state of

¹⁸³ *Know Your Rights: Protester's Rights*, ACLU, <https://www.aclu.org/know-your-rights/protesters-rights> (last visited Nov. 15, 2024); *see also* Nat'l Press Photographers Ass'n v. McCraw, 90 F.4th 770, 793 (5th Cir. 2024)

¹⁸⁴ ACLU, *supra* note 183.

¹⁸⁵ *Id.*

undress and have reasonable expectations of privacy.¹⁸⁶ Examples of these areas include but are not limited to: bathrooms, restrooms, shower rooms, tanning booths, locker rooms, fitting rooms, dressing rooms, and bedrooms.¹⁸⁷ Hidden cameras are allowed in outdoor, public spaces.

C. Ethical Considerations and Protester Privacy

Taking photos and videos at a protest can help spread your movement's message and capture any violations of your rights. However, it is important to consider the privacy of fellow protesters. Although it is not illegal to post photos or videos of public protests and the people involved, it is a general rule of thumb within the protest community to refrain from posting photos or videos in which others can be identified without permission. Although it is not illegal to post photos or videos of public protests and the people involved, you may want to consider the risk to protest participants of posting photos or videos in which they can be identified. Law enforcement and intelligence agencies can use facial recognition technology to scan protest photos and identify participants, potentially enabling surveillance, tracking, or targeting of individuals involved in demonstrations. This technology can map facial features from photographs and match them against existing databases.¹⁸⁸ If you need to record peaceful protesters for publication reasons, a general tip is to film crowds from behind and only record the backs of people's heads or their feet or blur the faces of identifiable protesters prior to posting or sharing.¹⁸⁹

¹⁸⁶ Miss. Code Ann. § 97-29-63.

¹⁸⁷ *Id.*

¹⁸⁸ Thomas Germain, *How to Record Video During a Protest*, CONSUMER REPORTS (June 5, 2020), <https://www.consumerreports.org/audio-video/how-to-record-video-during-a-protest/>.

¹⁸⁹ *10 Tips for Filming Protests, Demonstrations, & Police Conduct*, WITNESS, https://s3-us-west2.amazonaws.com/librarywebfiles/Training+Materials/Training+PDFs/WITNESS+Tip+Sheets/English/FilmingProtests_PoliceConduct_v1_0.pdf (last visited Nov. 15, 2024); *see also*

D. Safety Measures for Recording

There are important safety measures to take when recording at a protest. Use a camera strap or tie a camera to your wrist to prevent loss if the protest becomes chaotic or you need to move quickly.¹⁹⁰ If you cannot run with your camera, do not bring it.¹⁹¹ Speak into the camera to document that you are the one filming. If you need to be anonymous for security reasons, use a code name when identifying who is speaking.¹⁹²

E. Best Practices for Documentation

Your recordings are easier to verify if you capture the date, time, and location of the recording. If possible, turn on automatic date, time, and GPS capturing features on your camera.¹⁹³ Alternatively, you can state the date and time when you start filming and video record street signs, and landmarks to establish the location.¹⁹⁴ If you think it is safe to do so, document the details of any violence occurring by filming the people involved, the surrounding crowd, injuries, bullet holes, and license plates or other identifying features of vehicles present that are associated with the incident.¹⁹⁵ When filming, keep each camera shot steady for at least 10 seconds before moving to a new angle or subject. This allows for more clear documentation and makes the footage more useful after the fact. Avoid quick movements.¹⁹⁶ It is a best practice to

Sommer Ingram Dean, *Can we Publish Photos Showing Protesters' Faces?* STUDENT PRESS LAW CENTER (June 11, 2020).

¹⁹⁰ WITNESS, *supra* note 189.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ WITNESS, *supra* note 189.

have a partner or buddy with you when recording to help keep you safe and to help identify noteworthy situations to document.¹⁹⁷ A partner/buddy can also act as a lookout, monitoring the surroundings while you focus on filming and alerting you to potential dangers or important events happening outside of your immediate field of view. If you are at risk of arrest, you can give your recording device and/or memory cards to your partner/buddy to ensure they are properly preserved. Finally, in the event of any legal charges arising from your recording activity, your partner can potentially serve as a witness on your behalf.

¹⁹⁷ *Id.*

Checklist: Recording Protesters

Before Recording:

- ☐ Ensure you are in a public outdoor space or have property owner's permission if on private property.
- ☐ Make sure that you are not interfering with police operations.

If using a Hidden Camera to record:

- ☐ Ensure that you are in an outdoor, public space.

Ethical Considerations and Protester Privacy:

- ☐ It is not illegal to post photos or videos of public protests and the people involved.
- ☐ Consider the risk to protest participants of posting photos or videos in which they can be identified.
- ☐ Consider recording crowds from behind and only record the backs of people's heads.
- ☐ Consider blurring the faces of identifiable protesters prior to posting or sharing.

Safety Measures While Recording:

- ☐ Use a camera strap or tie a camera to your wrist to prevent loss.
- ☐ If you cannot run with your camera, do not bring it.
- ☐ Speak into the camera to document that you are the one filming.
- ☐ If you would like to be anonymous, use a code name when identifying who is speaking.

Best Practices for Documentation:

- ☐ If possible, turn on automatic date, time, and GPS capturing features on your camera.
 - ☐ Alternatively, you can state the date and time when you start filming and video record street signs, and landmarks to establish the location.
- ☐ If it is safe to do so, document the details of any violence occurring by filming:
 - ☐ the people involved;
 - ☐ the surrounding crowd;
 - ☐ injuries;
 - ☐ bullet holes;
 - ☐ license plates;
 - ☐ other identifying features of vehicles present that are associated with the incident.
- ☐ Avoid quick movements and keep each camera shot steady for at least 10 seconds before moving to a new angle or subject.
- ☐ Have a partner or buddy with you to help keep you safe, identify noteworthy situations to document, and act as a lookout monitor.
 - ☐ If you are at risk of arrest, you can give your recording device and/or memory cards to your partner/buddy to ensure they are properly preserved.
 - ☐ In the event of any legal charges arising from your recording activity, you partner can potentially serve as a witness on your behalf.

Recording Police and Other Government Officials

You have a right to record, photograph, and video the police and government officials engaged in their job duties in an outdoor, public place.¹⁹⁸ Examples of government officials carrying out their job duties in an outdoor, public place can include a police officer performing an arrest at a public protest or videotaping a government official giving a speech from a public sidewalk. This right is subject to reasonable time, place, and manner restrictions so long as these restrictions serve a significant government interest.¹⁹⁹ For example, you are not allowed to block vehicular or pedestrian traffic, or block entrances to buildings, in order to record. As a further example, a police officer may lawfully ask you to step away from a crime scene in order to prevent damage to a crime scene, even if you are exercising your right to record. In short, the right to photograph, video, or record the police does not give you the right to break any other law.

Additionally, Mississippi is a one-party consent state, meaning you can record your interactions with police officers or other government officials who are carrying out their job duties without having to ask for permission, regardless of whether the encounter is occurring in a public or private place.²⁰⁰ For example, if you are on the phone with a police officer discussing protest permits, you are allowed to record the conversation without asking for their permission.

¹⁹⁸ *Police Encounters*, ACLU MISSISSIPPI, <https://www.aclu-ms.org/en/know-your-rights/police-encounters> (last visited Nov. 13, 2024); *see also* *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017).

¹⁹⁹ *Turner*, 848 F.3d at 690.

²⁰⁰ It is illegal to record in-person or phone conversations under Mississippi law without the consent of at least one party, or with the intent of committing a criminal or tortious act. Violations can result in fines, imprisonment, and/or civil damages. Miss. Code Ann. § 41-29-531(e).

However, when you are on private property, the property owner may set rules about photographs, filming, or recording – including prohibiting it – that you are obligated to follow, even if the people you wish to record are police or other government officials.²⁰¹

Do not try to hide the fact that you are recording. Government officials, including police officers, do not have a reasonable expectation of privacy when performing their jobs.²⁰² Police officers may not confiscate or demand to view your cell phone, digital photographs, digital audio recordings, or digital video recordings without a warrant or a subpoena.²⁰³ Although if you are arrested, your phone may be taken away and vouchered along with the rest of your property that will be returned to you upon release. Police officers may not delete or destroy your photographs, videos, or recordings under any circumstances.²⁰⁴ Police officers may, however, order citizens to cease activity that truly interferes with legitimate law enforcement operations and failure to comply with such an order can be a valid basis for arrest.²⁰⁵ Examples of activities that could potentially interfere with law enforcement operations include physically blocking an officer who is trying to respond to an emergency call, using bright flash that impairs an officer's vision, or standing too close to officers while they are conducting an arrest, especially if repeatedly asked to step back.²⁰⁶

²⁰¹ *Right to Record*, ACLU MISSISSIPPI, <https://www.aclu-ms.org/en/know-your-rights/right-record> (last visited Nov. 13, 2024).

²⁰² MS Code § 97-29-63.

²⁰³ *Wrongful or Unlawful Search and Seizure Cases in Mississippi*, STROUD FLECHAS & DALTON, <https://stroudlawyers.com/civil-rights/wrongful-or-unlawful-search-and-seizure-cases-in-mississippi/> (last visited Nov. 13, 2024).

²⁰⁴ *Police Encounters*, ACLU MISSISSIPPI, <https://www.aclu-ms.org/en/know-your-rights/police-encounters> (last visited Nov. 13, 2024).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

If you are in an outdoor, public place and a police officer orders you to stop recording or to hand over your recording device, you should politely tell them that you do not consent to do so and that taking photographs or videos is your right under the First Amendment.²⁰⁷ If the officer continues to insist, ask if the officer is requiring you to stop recording or to hand over your device. If the answer is yes, be aware that the officer may arrest you for refusing to comply, even if the order being given is illegal.²⁰⁸ If you do comply, continue to state that you are obeying the officer's order but do not consent to the infringement of your right to record, or the seizure and search of your property.

When facing a choice between complying with an unlawful police order or being arrested for failing to comply (which would be an unlawful arrest), you will need to weigh the personal risks of arrest against the value of continuing to record.²⁰⁹ Personal risks include: officers will almost certainly search you upon arrest; you may have to spend one or more nights in jail before being released; there can be health risks associated with being in jail, especially for those with pre-existing medical conditions; defending against arrest charges often entails legal fees and expenses; missing work due to detention following arrest or later court appearances can negatively impact your employment; the experience of being arrested, detained, and defending against criminal charges can be traumatic and emotionally stressful; arrest records, including arrest booking photographs, are public records, so there can be reputational harm from being arrested; arrest has potential immigration consequences for non-citizens; and you may have to report your arrest on future school, job, housing, and licensure applications.²¹⁰

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

Checklist: Recording Police and Government Officials

Before Recording:

- ☐ Ensure you are in a public outdoor space or have property owner's permission if on private property.
- ☐ Check that you are not blocking traffic or building entrances/exits.
- ☐ Keep recording device visible and accessible.

While Recording:

- ☐ Record openly – you do not have to attempt to hide that you are recording.
- ☐ Stay out of the way of police operations.

If Ordered to Stop Recording:

- ☐ Politely state that you do not consent to stopping and that recording is your First Amendment right.
- ☐ If the officer continues to insist, ask if the officer is requiring you to stop recording or hand over your device.
- ☐ If the answer is yes, be aware that the officer may arrest you for refusing to comply, even if the order being given is illegal.
- ☐ If complying, clearly state that you are following orders but do not consent.

If Refusing to Comply with Order to Stop Recording:

- ☐ Consider your personal risks before deciding to continue recording:
 - ☐ Potential Arrest and Search
 - ☐ Jail time
 - ☐ Legal fees

- ☐ Work disruption
- ☐ Health concerns
- ☐ Immigration status implications
- ☐ Future background checks
- ☐ Politely state that you do not consent to stopping.

Know Your Rights:

- ☐ One-party consent applies in Mississippi.
- ☐ Police cannot view/search content without a warrant.
- ☐ Police cannot destroy your recordings.
- ☐ The First Amendment protects the right to record public officials performing their duties in public.
- ☐ Property owners can restrict recording on private property.

Cell Phones at Protests: Password Protection & Biometrics

A. General Advice

Protecting your electronic devices and digital property when protesting can be crucial to keeping yourself and your information safe, as well as getting your message out to the public through the use of your device.²¹¹ Theft, damage, confiscation, or forced deletion of media can disrupt your ability to publish your experiences online.²¹²

Encryption capabilities are built into many electronic devices, including Apple iOS devices, such as iPhones and iPads, and most Android devices.²¹³ One of these capabilities is to protect these devices with a password. To protect your cell phone with a password or passcode, you can adjust the security preferences in the “Settings” application on your phone. If your device is not protected by a password, it may be easier for law enforcement to access the contents of your cell phone, or for aggressors to illegally access your phone.²¹⁴

Another way to protect your device is through biometric authentication.²¹⁵ Biometric authentication uses unique physical or behavioral characteristics to verify a person’s identity through measures such as fingerprint scanning, facial recognition, and iris scanning.²¹⁶ Because biometric data is unique to every individual, it can be harder for an unauthorized user to access a

²¹¹ *Attending a Protest*, SURVEILLANCE SELF-DEFENSE, <https://ssd.eff.org/module/attending-protest> (last updated Nov. 12 2024).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Smartphone Biometrics: Top 10 Questions and Reasons Why Biometric Data is Important for Digital Forensic Investigations, CELLEBRITE (June 14, 2023), <https://cellebrite.com/en/smartphone-biometrics-top-10-questions-and-reasons-why-biometric-data-is-important-for-digital-forensic-investigations/>.

²¹⁶ *Id.*

device protected by biometric authentication, if you are not present with them.²¹⁷ However, if you are present, biometric data is less secure than locking your device with a password or code, because an unauthorized user – including law enforcement – can hold your device up to your face or forcibly press your thumb onto the screen to unlock the device. Additionally, it’s important to keep in mind that even without your biometric data or passcode, the government can find ways to access your phone if they have a proper search warrant.²¹⁸

B. When would I be required to give my cell phone password to the police?

During protests, participants may face search or arrest, potentially leading to officials requesting access to their electronic devices. This could involve demands to unlock the device by providing a password (verbally, in writing, or through action) or using biometric features.²¹⁹

Under the Fourth Amendment, law enforcement officers may confiscate an item, such as a cell phone, if they believe it contains evidence of a crime, even if a warrant has not yet been obtained.²²⁰ However, they may not conduct a search of the item until a warrant is issued for them to do so.²²¹ Police officers need a proper search warrant to access your password-protected device. Even if they've confiscated your cell phone, you are not obligated to provide your password unless they present a valid search warrant.

²¹⁷ *Id.*

²¹⁸ Riana Pfefferkorn, *The FBI is Mad Because it Keeps Getting Into Locked iPhones Without Apple’s Help*, TECHCRUNCH (May 22, 2020, 2:33 PM), <https://techcrunch.com/2020/05/22/the-fbi-is-mad-because-it-keeps-getting-into-locked-iphones-without-apples-help/> [<https://perma.cc/EBD6-JX7Z>].

²¹⁹ SURVEILLANCE SELF-DEFENSE, *supra* note 211.

²²⁰ *See Riley v. California*, 573 U.S. 373, 401-03 (2014).

²²¹ *Id.*

When police seize a cell phone, obtain a warrant to search the item, and the owner refuses to unlock the phone or provide its passcode, complications arise in terms of legal process.²²² In this scenario, the government would have to obtain a court order to compel the owner to disclose their cell phone password. If the owner continues to refuse, a judge could hold you in contempt of court, meaning that you could go to jail until you disclose your phone password.²²³

On the issue of privilege against self-incrimination, federal courts are split about whether a person's act of producing their password to police qualifies for Fifth Amendment protection against self-incrimination.²²⁴ The Fifth Circuit, which controls Mississippi, has held that as long as the police have "clear and convincing evidence" that a person knows the password to their phone, the police have the right to compel the person to produce their password for their unencrypted device after police have obtained the proper warrant.²²⁵ Evidence that meets the "clear and convincing standard" includes: proof that the seized device belongs to you or the seized device being in your possession.²²⁶ So, if a police officer seized your phone while you were recording, they would have the ability to compel you to provide your password after obtaining a search warrant.²²⁷

C. When would I be required to provide biometrics to the police?

Regarding biometric data like Face ID or fingerprints, courts around the country have generally ruled that law enforcement can compel individuals to provide such data without

²²² Michael Seager, *Your Secret Cell Phone Passcode May Not Be a Secret for Long: The Uncertainty of Compelled Password Production*, 52 SW. L. REV. 161 (2022).

²²³ *Id.* at 163.

²²⁴ 167 Am. Jur. Proof of Facts 3d 431 (Originally published in 2018).

²²⁵ *United States v. Cheng*, No. 4:20-CR-455, 2022 WL 112025, at *9 (S.D. Tex. Jan. 12, 2022).

²²⁶ *Id.*

²²⁷ *Id.*

violating the Fifth Amendment's protection against self-incrimination,²²⁸ although neither the Fifth Circuit nor any Mississippi court has directly addressed this issue.²²⁹ Courts elsewhere have generally distinguished between providing a password and using biometric data like fingerprints or facial recognition. Biometric data is typically viewed as a nontestimonial act—a physical action that doesn't reveal potentially self-incriminating personal knowledge. In contrast, providing a password is usually considered a testimonial act, meaning it requires revealing personal knowledge that could be self-incriminating. Therefore, erring on the side of caution, be aware that a police officer could compel you to unlock your device using biometric methods after obtaining a proper search warrant.

²²⁸ Anthony Riccio, *The Landmark Case: Face ID and Law Enforcement*, RICCIO LAW (June 18, 2022), <https://anthonyricciolaw.com/criminal-law/police-biometric-device-unlock-rights/>.

²²⁹ *Id.*

Checklist: Cell Phones at Protests: Password Protection & Biometrics

Device Protection:

- ☐ Protect your cell phone with a password or passcode, or with biometric authentication.
- ☐ A password or passcode is more secure than biometric authentication when you are physically present with your phone (i.e., when attending a protest).

When is a warrant required to provide password or biometrics to law enforcement to unlock a cell phone?

- ☐ Know that law enforcement may confiscate your cell phone, if they believe it contains evidence of a crime, even if a warrant has not yet been obtained. But law enforcement needs a warrant to search your phone.
- ☐ Know that police need a proper search warrant to access your password-protected device. Even if they have confiscated your device, you are not obligated to provide your password unless they present a valid search warrant.
- ☐ Understand that you can be compelled by a court order to disclose your cell phone password.
- ☐ Understand that a police officer could compel you to unlock your device using biometric methods only after obtaining a proper search warrant.

Encrypted Messages and Using Encryption for Virtual Planning and Debriefing

A. General Information about Encrypted Messaging

Encryption is used to protect the contents of a message from unauthorized access.²³⁰ The information in an original message will undergo encryption by having its contents encoded or altered in some way. To then receive the original message, the encoded information has to be decrypted, which is the process of undoing the initial encoding.²³¹ The two main forms of encrypting online communication are end-to-end encryption and ordinary encryption. “End-to-end” refers to the two endpoints in the communication chain, the sender and the recipient.²³² End-to-end encryption (E2EE) offers a different level of privacy and security for your online communications, such as texts, posts, calls, and emails, than ordinary encryption.²³³ E2EE ensures that only you and the intended recipients of your message can view the content, and no one else.²³⁴ If you do not have end-to-end encryption, other parties could potentially read your messages.²³⁵

²³⁰ Katlyn Glover et al., *Encrypted Messaging Applications and Political Messaging: How They Work and Why Understanding Them is Important for Combating Global Disinformation*, THE UNIVERSITY OF TEXAS AT AUSTIN: CENTER FOR MEDIA ENGAGEMENT (June 19, 2023), <https://mediaengagement.org/research/encrypted-messaging-applications-and-political-messaging/>.

²³¹ *Id.*

²³² Namrata Maheshwari, *Encryption FAQ: Encrypted Messaging, AI, Content Moderation, and More*, ACCESSNOW (Sept. 11, 2024), <https://www.accessnow.org/encryption-faq/>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Amelia Nierenberg, *Signal Downloads are Way Up Since the Protests Began*, N.Y. Times (June 11, 2020), <https://www.nytimes.com/2020/06/11/style/signal-messaging-app-encryption-protests.html> (last updated June 12, 2020).

When online communications are encrypted end-to-end, no one can intercept the communications in transit — not even service providers/messaging platform providers.²³⁶ A service provider will only see the contents of electronic communications if either the sender or the recipient intentionally shares it (such as through an app’s reporting mechanism), or if either person decides to back-up the communications to a source that does not have E2EE.²³⁷ Encrypted messaging apps (EMAs) provide fast, mobile, and private E2EE encryption, which ensures that only the sender and receiver can access the contents of the messages.²³⁸ Examples of EMAs include Signal, Meta’s WhatsApp, Apple’s iMessage (as long as both sender and recipient have disabled iCloud backup and Messages in iCloud²³⁹), Telegram’s “Secret Chats,” and Silent Circle’s Silence Phone.²⁴⁰

Ordinary encryption does not prevent access from end-to-end.²⁴¹ With ordinary encryption, your data is encrypted in transit between your device and your service provider’s servers.²⁴² This means that the service provider is able to access the content of your electronic communications.²⁴³ Examples of services with ordinary encryption include Google’s Gmail and Microsoft Outlook.²⁴⁴ Systems protected by ordinary encryption are more susceptible to

²³⁶ Maheshwari, *supra* note 232.

²³⁷ *Id.*

²³⁸ Glover, *supra* note 230.

²³⁹ To turn off both iCloud Backup and Messages in iCloud: On your iOS, iPadOS, or visionOS device, go to Settings > [your name] > iCloud. On Mac, go to Messages > Settings > iMessage, and deselect Enable Messages in iCloud; *Messages & Privacy*, APPLE, <https://www.apple.com/legal/privacy/data/en/messages/> (last visited Nov. 15, 2024).

²⁴⁰ Maheshwari, *supra* note 232; *4.5 Protests: Communicate Often and Safely*, Holistic Security: Tactical Tech, <https://holistic-security.tacticaltech.org/chapters/act/4-1-5-protests-communicate-often-and-safely.html> (last visited Nov. 14, 2024).

²⁴¹ Maheshwari, *supra* note 232.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

inference. This can include hackers exploiting these platforms for criminal purposes, law enforcement compelling service providers to disclose their private data (which would include your communications using the server), and service providers accessing your communications themselves and using the data for their own purposes, such as to serve targeted ads or train AI systems.²⁴⁵

B. Government or Law Enforcement Access to Encrypted Messages

When law enforcement seeks access to the content of messages on EMAs such as Signal, WhatsApp, or iMessage (as long as both sender and recipient have disabled iCloud backup and Messages in iCloud), these platforms do not have the ability to provide the information.²⁴⁶ They do not have access to the information due to end-to-end encryption. The only possible providers of the content of these messages would be either the sender or the recipient. Because of this, the EMA will not be able to give law enforcement access to the requested contents.

Platforms protected solely by ordinary encryption do not offer users this same level of protection. With ordinary encryption, platforms have access to the content exchanged between its users such as text messages, emails, photos, and videos. When law enforcement seeks access to the content of messages on these platforms, the platform can choose whether or not to grant law enforcement this access.²⁴⁷ However, the platforms are not obligated to provide access unless

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Maheshwari, *supra* note 232.

law enforcement obtains a proper search warrant.²⁴⁸ Platforms cannot voluntarily hand over your information without a subpoena, court order, or warrant requesting it.²⁴⁹

C. Geofence Warrants

Geofence warrants are a type of search warrant that instructs companies like Google and Apple to search every single user's entire location history to detect who was present in a certain area at a certain time.²⁵⁰ For example, using a geofence warrant, police can force a company to hand over data on people who were in the vicinity of a protest where property damage occurred.²⁵¹ This can result in someone who goes to a protest and happens to be nearby when a crime occurs to get caught up in a police investigation, despite being completely innocent. Geofence warrants also take away anonymity that people may rely on in order to protest.²⁵² In 2024, the United States Court of Appeals for the Fifth Circuit, which includes Mississippi, found geofence warrants to be unconstitutional.²⁵³ The use of geofence warrants by law enforcement is illegal in Mississippi, however other states have allowed their use.²⁵⁴

²⁴⁸ 18 U.S.C. § 2516.

²⁴⁹ Sara Morrison, *Here's How Police Can Get Your Data – Even if You Aren't Suspected of a Crime*, VOX (Jul. 31, 2021, 9 am), <https://www.vox.com/recode/22565926/police-law-enforcement-data-warrant#>; 18 U.S.C. § 2702.

²⁵⁰ *Fifth Circuit Rules that Geofence Warrants Are Inherently Unconstitutional*, ELECTRONIC PRIVACY INFORMATION CENTER (Aug. 13, 2024), <https://epic.org/fifth-circuit-rules-that-geofence-warrants-are-inherently-unconstitutional/>.

²⁵¹ Matthew Guariglia, *Geofence Warrants Threaten Civil Liberties and Free Speech Rights in Kenosha and Nationwide*, ELECTRONIC FRONTIER FOUNDATION (Sept. 10, 2021), <https://www.eff.org/deeplinks/2021/09/geofence-warrants-threaten-civil-liberties-and-free-speech-rights-kenosha-and>.

²⁵² *Id.*

²⁵³ *United States v. Smith*, 110 F.4th 817 (5th Cir. 2024).

²⁵⁴ *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022), 107 F.4th 319 (4th Cir. 2024) (holding that geofence warrants were allowed as long as the Government established particularized probable cause to receive the warrant).

D. Use of Encryption for Virtual Planning and Debriefing

End-to-end encryption services can also be utilized when virtually planning a protest. Meeting in person is the most secure way to share sensitive information about a protest.²⁵⁵ But if in-person meetings are not an option, consider using secure channels such as EMAs or other E2EE service providers to share sensitive information contained in e-mails, texts, video calls, and audio calls.²⁵⁶ Most importantly, verify the identity of the protesters you are communicating with through a different communications channel – such as messaging them on another platform, or over an encrypted email, or making video or voice call.²⁵⁷ This ensures you’re in contact with your intended recipients.

²⁵⁵*How the Police can Access Your Digital Communications at a Protest*, PRIVACY INTERNATIONAL (May 5, 2021), <https://privacyinternational.org/explainer/4505/how-police-can-access-your-digital-communications-protest>.

²⁵⁶*Id.* (E2EE platforms like Thunderbird and K-9 Mail provide services to send E2EE emails. Platforms like Atlassian’s Jitsi, Signal, and Meta’s WhatsApp provide E2EE for voice and video calls).

²⁵⁷ *Id.*

Checklist: Encrypted Messages and Using Encryption for Virtual Planning and Debriefing

Understanding Encrypted Methods:

- ☐ Verify if the communication service you are utilizing uses end-to-end encryption (E2EE) versus ordinary encryption.
- ☐ Confirm iMessage settings (disable iCloud backup and messages in iCloud).

Government or Law Enforcement Access to Encrypted Messages:

- ☐ When law enforcement seeks access to the content of messages on EMAs such as Signal, WhatsApp, or iMessage, these platforms do not have the ability to provide the information (as long as both sender and recipient have disabled iCloud backup and Messages in iCloud).
- ☐ When law enforcement seeks access to the content of messages on platforms with ordinary encryption, the platform can choose whether or not to grant law enforcement this access. However, the platforms are not obligated to provide access unless law enforcement obtains a search warrant.

Use of Encryption for Virtual Planning and Debriefing:

- ☐ Verify identities of participants through different communication channels.
- ☐ Use secure EMA channels or other E2EE service providers to share sensitive information about a protest.
- ☐ Consider in-person meetings when possible.

RICO Laws

A. General Overview of State and Federal RICO Laws

The Racketeer Influenced and Corrupt Organizations (RICO) Act is a federal law that provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization.²⁵⁸ Under federal law, you can be held both criminally and civilly liable for violating the federal RICO Act.²⁵⁹ Mississippi has adopted a state RICO act that provides for similar criminal and civil penalties.²⁶⁰ In Mississippi, you can be held both criminally and civilly liable for violating the State's RICO Act.²⁶¹ Federal and state RICO laws were originally designed to combat organized crime but have been applied more broadly to criminalize securities firms, large corporations, and protesters.²⁶² The use of RICO laws against protesters has been widely criticized as a direct attack on the First Amendment right to

²⁵⁸ *Racketeer Influenced and Corrupt Organizations Act*, WIKIPEDIA, https://en.wikipedia.org/wiki/Racketeer_Influenced_and_Corrupt_Organizations_Act (last visited Nov. 14, 2024).

²⁵⁹ 18 U.S.C §1983; 18 U.S.C §1964.

²⁶⁰ MS Code § 97-43, Racketeer Influenced and Corrupt Organization Act (RICO).

²⁶¹ MS Code § 97-43-9(6).

²⁶² Legislative History of RICO, *See* S. REP. NO. 91-617, at 76-77 (1969); <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1917&context=lawreview> (Congress enacted RICO as part of ... a comprehensive plan designed to combat organized crime in the United States); *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 252 (1994) (holding that RICO requires no economic motive and that anti-abortion protesters could be charged under RICO); *see generally* *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (holding that because the predicate offense does not require economic motive, RICO requires no additional economic motive); *Carr: 61 Indicted in Fulton County in Atlanta*, OFF. OF THE ATT'Y GEN. (Sept. 5, 2023), <https://law.georgia.gov/press-releases/2023-09-05/carr-61-indicted-fulton-county-atlanta-public-safety-training-center>; *State of Georgia v. Beamon*, 49-51 (Ga. Superior Ct. 2023), <https://law.georgia.gov/document/document/23sc189192-criminal-indictmentpdf/download>

peacefully protest. Despite this, the Supreme Court has found that protesters can be labeled as racketeers and therefore potentially be charged with violating federal RICO laws.²⁶³

B. The Federal RICO Act:

In broad terms, a federal RICO charge requires (1) an “enterprise” made up of a group of people and (2) crimes committed (called predicate offenses) to further the interests of the group, which constitutes a “pattern of racketeering activity.”²⁶⁴ The Federal RICO statute allows for two types of legal action: criminal charges brought by prosecutors on behalf of states and civil lawsuits, brought by people or organizations harmed by racketeering.²⁶⁵

C. What is an “Enterprise”?

The federal RICO statute divides the concept of “enterprise” into two groups. The first group includes formal organizations. These are legally recognized entities like corporations, partnerships, nonprofits, and associations. The second group involves informal groups. This can include any group working together, even without any formal structure.²⁶⁶ This can include loose networks of people, and no official recognition of the group or paperwork memorializing the existence of the group is required. An enterprise can be either legal or illegal. For example, it could be a legitimate business that is also used for crime, an illegal operation disguised as a legitimate group, or a completely underground criminal network.²⁶⁷ An enterprise is proven by

²⁶³ Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); James Swinehart, *Protecting the First Amendment in Stopping Cop City: Overbreadth of Georgia’s RICO Laws*, 4 PRIN. L.J.F. 28, 29 (2024).

²⁶⁴ 18 U.S.C.A. § 1961; 18 U.S.C.A. § 1962; *Understanding the RICO Indictments Against Stop Cop City Activists* at https://www.youtube.com/watch?v=uLo5xfObD_Q.

²⁶⁵ 18 U.S.C. § 1963; 18 U.S.C. § 1964.

²⁶⁶ 18 U.S.C. § 1961.

²⁶⁷ *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164–65 (2001). *See also Primer on RICO Offenses* (2022), UNITED STATES SENTENCING COMMISSION, available at

evidence of an ongoing organization, where the people involved work together as a continuing unit. Even informal protest networks could potentially be considered “enterprises” under this broad definition if there is evidence of ongoing coordination between participants.²⁶⁸

D. What is a “Pattern of Racketeering Activity”?

The federal RICO statute provides a list of actions considered to be “predicate offenses.”²⁶⁹ A predicate offense is a specific crime that can be used as a building block for a RICO case.²⁷⁰ Predicate offenses consist of two categories: State Crimes and Federal Crimes. State crimes include murder, kidnapping, gambling, arson, bribery, extortion, and drug dealing.²⁷¹ Federal crimes include violence and property crimes, financial fraud, drug trafficking, immigration fraud, human trafficking, and terrorism-related offenses.²⁷²

A violation of RICO requires a pattern of racketeering activity. To prove a pattern exists, there must be evidence that at least two predicate offenses were committed within a 10-year period.²⁷³ There must also be proof that the racketeering activity relates to continued criminal activity.²⁷⁴

https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_RICO.pdf (last visited Nov. 14, 2024).

²⁶⁸ OFF. OF THE ATT’Y GEN., *supra* note 262; *Beamon*, *supra* note 262 at 23-24 (charging the Atlanta Forest Defenders, an informal group of protesters, as an enterprise under RICO).

²⁶⁹ 18 U.S.C. § 1961.

²⁷⁰ *Racketeer Influenced and Corrupt Organizations (RICO) Law*, JUSTIA, available at <https://www.justia.com/criminal/docs/rico/> (last visited Nov. 14, 2024).

²⁷¹ 18 U.S.C. § 1961 (1)(A).

²⁷² 18 U.S.C. § 1961 (1)(B)-(G).

²⁷³ 18 U.S.C. § 1961(5).

²⁷⁴ *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1989) (“RICO’s legislative history tells that the relatedness of racketeering activities is not alone enough to satisfy § 1962’s pattern element. To establish a RICO pattern, it must also be shown that the predicate themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.”); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (“[W]hile two acts are necessary, they

E. What constitutes a Federal RICO Case?

To violate the federal RICO statute, a person must engage in a pattern of racketeering activity connected to an enterprise.²⁷⁵ Different members of the enterprise can commit the different predicate offenses – they don't all have to be committed by the same person.

RICO creates four main types of violations. The first three types of violations deal with different ways people might engage in criminal enterprises and the fourth type of violation involves agreeing to help with any of those activities – even if no crime was actually committed:

1. Investment of Criminal Money (§ 1962(a))

The first type of violation is the investment of criminal money. This means using or investing income derived from a pattern of racketeering activity to fund or operate a business.²⁷⁶ An example of this would be using money from drug sales to open a legitimate bakery.²⁷⁷

2. Taking Over Business Through Crime (§ 1962(b))

The second type of violation is taking over a business through a pattern of racketeering activity. Essentially, this section prohibits gaining control of a business through criminal activity.²⁷⁸ An example of this would be using threats and violence to force a business owner to sell their shop to you.²⁷⁹

may not be sufficient . . . [T]wo isolated acts of racketeering activity do not constitute a pattern.”).

²⁷⁵ 18 U.S.C. § 1961(5).

²⁷⁶ 18 U.S.C. § 1962(a).

²⁷⁷ *See* United States v. Robertson, 514 U.S. 669, 671-672 (1995) (per curiam) (holding that defendant violated section 1962(a) by investing the proceeds of narcotic offenses into a gold mine).

²⁷⁸ 18 U.S.C. § 1962(b).

²⁷⁹ *See* United States v. Jacobson, 691 F.2d 110, 112 (2d Cir. 1982) (discussing acquisition of bakery's lease as security for extortionate loan).

3. Running Business Through Crime (§ 1962(c))

The third type of violation is using a business to engage in racketeering activity. This section prohibits the use of a business or organization to commit crimes.²⁸⁰ For example, this would include Department of Motor Vehicle (DMV) employees using their positions to sell fake licenses.²⁸¹

4. Conspiracy to Violate RICO (§ 1962(d))

This is the broadest and potentially most concerning type of RICO violation for political and protest organizers.²⁸² A RICO conspiracy charge is unique and more expansive than regular conspiracy charges in several important ways. For a RICO conspiracy charge, you can be charged even if no crime was actually committed.²⁸³ You do not need to personally commit or agree to commit any specific crime. There does not need to be proof that any racketeering activity actually occurred.²⁸⁴

To prove a federal RICO conspiracy, it must be shown that you: (1) knew about a plan that would violate RICO and (2) agreed to help or support the plan in some way. For example, if organizers discuss plans that would be predicate offenses under RICO (like using intimidation to take control of property), anyone who agrees to help--even in a small way, such as providing

²⁸⁰ 18 U.S.C. § 1962(c).

²⁸¹ *United States v. Alkins*, 925 F.2d 541, 551-53 (2d Cir. 1991).

²⁸² OFF. OF THE ATT'Y GEN., *supra* note 262; *Beamon*, *supra* note 262 at 24 (charging 61 people who were engaging in political protest activities under conspiracy to violate RICO).

²⁸³ 18 U.S.C. § 1962 (d); *see also* *Salinas v. United States*, 522 U.S. 52, 63 (1997) (“There is no requirement of some overt act or specific act in [RICO], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an act to effect the object of conspiracy.”).

²⁸⁴ *United States v. Delgado*, 972 F.3d 73, 79 (2d Cir. 2020) (“Nor must [the government] establish that a pattern of racketeering activity actually took place.”); *United States v. Williams*, 974 F.3d 320, 268 (3d Cir. 2020) (“Nor even must the conspiracy actually achieve any or all of its criminal ends.”).

information or small amounts of money--could potentially face conspiracy charges, even if the plan is never carried out.²⁸⁵ This makes RICO conspiracy charges particularly dangerous for organizers because simply being part of discussions about potential illegal activities could create risk of prosecution, even if you were not intending to participate in the activity. Furthermore, you can be charged even if the planned illegal activities never happened.

F. What constitutes a RICO case under Mississippi state law?

Mississippi's RICO statute largely mirrors the federal RICO, but it has some key differences. Mississippi requires two predicate acts within a five-year period to establish a pattern of racketeering.²⁸⁶ The state law lists similar predicate offenses as the federal RICO law. In total, there are sixteen categories of chargeable offenses under Mississippi RICO law, including multiple offenses "affecting administration of justice," that can be predicate offenses.²⁸⁷

A person convicted under RICO in Mississippi is guilty of a felony. If convicted, you could be fined up to \$25,000, face up to 20 years of jail time, or both. Additionally, instead of a fine, you could be forced to pay up to three times the amount of money gained, or three times the amount of monetary loss you caused, whichever is greater, plus court costs, investigation costs, and prosecution costs.²⁸⁸

Like federal law, under Mississippi law, any person who has been harmed by racketeering can sue under RICO as well.²⁸⁹ For example, if a business loses money due to criminal activities,

²⁸⁵ OFF. OF THE ATT'Y GEN., *supra* note 262; *Beamon*, *supra* note 262, at 49-51.

²⁸⁶ Miss. Code Ann. § 97-43-3.

²⁸⁷ *Id.*

²⁸⁸ Miss. Code Ann. § 97-43-7.

²⁸⁹ Miss. Code Ann. § 97-43-9 (5)

they can file a civil RICO lawsuit against those responsible, even if no one has been actually criminally charged.

G. RICO concerns as a protester or protest organizer?

The application of RICO to protest activities has been increasingly scrutinized, particularly when First Amendment rights are involved.²⁹⁰ However, prosecutors continue to use RICO charges when there are allegations that protest activities involve criminal activity. In Georgia, the State charged 61 protesters in 2023 for allegedly participating in a conspiracy to prevent a police training center's construction. Examples of charges that connected individuals to the conspiracy include, but are not limited to: throwing objects at Georgia State Patrol Headquarters; giving a protester money for camp fuel; giving protester \$11 for glue; possessing a mask, goggle, wig, and change of clothes; publishing posts online sharing the dates for weeks of planned protest action; publishing blog posts advocating for the protest movement; using a burner phone; publishing a police officer's home address; driving other protesters to a protest site; and discussing a call to action on Instagram.²⁹¹

It is important to remember that Mississippi RICO law and federal RICO law require evidence of organized criminal activity, not just coordinated protest.²⁹² However, remember that having a legitimate protest purpose doesn't automatically protect against state or federal RICO charges if criminal activity is also present.

RICO charges against protesters are so far relatively rare but can be extremely serious when they occur. Federal courts have allowed RICO claims against protest movements primarily

²⁹⁰ David Schultz, *RICO Laws*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/rico-laws/>.

²⁹¹ *Beamon*, *supra* note 262, at 49-100.

²⁹² 18 U.S.C. § 1962.

in cases involving allegations of physical violence or threats of violence.²⁹³ State courts' treatment of RICO cases against protesters varies significantly by jurisdiction. In Mississippi, the authors of this guide are not aware of any cases where the state has used its RICO law against protesters. However, it is important to keep in mind that there is potential for the state to charge protesters and protest organizers under the state's RICO statute.²⁹⁴ If charged under RICO (even if not ultimately convicted), you could face negative consequence such as, without limitation: loss of employment or housing, damage to reputation due to the public nature of arrest records and criminal charges, isolation from your activism community, mandated ankle monitoring under house arrest, financial stress, and mental stress.²⁹⁵ If found guilty, you could face a large fine, prison time, loss of voting rights, and negative effects on future employment.²⁹⁶

H. Best practices to prevent RICO suits

Taking practical steps to protect your organization(s) or protest event(s) from potential RICO liability is crucial. Since RICO requires an enterprise, which can be an association of individuals, legal entities, or businesses, challenging the prosecution's characterization of the

²⁹³ Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (holding that abortion clinics had standing to bring RICO action against antiabortion groups alleging that groups conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere); Ne. Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir. 1989) (finding that antiabortion activists were not shielded from RICO liability for their actions on the ground that actions were motivated by political beliefs.); OFF. OF THE ATT'Y GEN., *supra* note 262; *Beamon*, *supra* note 262 (indictment of protesters for allegedly throwing Molotov cocktails and rocks through windows of state buildings, throwing glass bottles at police officers, throwing fireworks at EMTs and damaging state vehicles, and intimidating contractors and construction workers).

²⁹⁴ *Scheidler*, 510 U.S. at 262 (holding that RICO contains no economic motive requirement).

²⁹⁵ Oliver Haug, *The Copy City Defendants Are Done Being Silent*, THE NATION (April 18, 2024), <https://www.thenation.com/article/activism/cop-city-defendants-rico-indictment>.

²⁹⁶ Caleb Bedillion, *Who Can and Can't Vote in Mississippi: A Guide to the State's Lifetime Voting Ban*, THE MARSHALL PROJECT (July 24, 2024), <https://www.themarshallproject.org/2024/03/25/mississippi-voting-rights-ban-felony-conviction#list>.

alleged enterprise can be a key defense strategy. Maintain clear documentation that shows your organization operates as a law-abiding advocacy group engaging in constitutionally protected protest activities.²⁹⁷ Your organization should keep detailed records of its peaceful mission statement, bylaws, and/or constitution. Maintaining files of all permits obtained for events, along with written policies that explicitly prohibit violence and property damage can be helpful as well. It could also be helpful to develop training materials that center on peaceful protest methods. Developing and implementing a clear document retention policy with respect to organizing a protest or event can also be helpful in the event of after-the-fact legal action against you or your organization.²⁹⁸

Communication practices within your organization require careful attention to avoid potential RICO liability. Be mindful that written materials – including zines, blog posts, social media posts, and internal communications – have been used as evidence of criminal activity against protesters in RICO cases. It is advisable to avoid jokes, hostile language, or hyperbole (e.g., intentionally exaggerated statements) about illegal activities, as these statements could be misinterpreted as evidence of criminal intent.²⁹⁹ It can also be helpful to consistently emphasize and document peaceful intentions and methods throughout your communications.

²⁹⁷ *Has Anyone Ever Beat A Rico Charge? Insider Secrets Revealed*, JUZKIW LAW FIRM (Sept. 11, 2024) <https://www.keylawyer.com/has-anyone-ever-beat-a-rico-charge-insider-secrets-revealed/>.

²⁹⁸ Lauren Regan, *Take Yourselves Seriously: Document Retention and Destruction Policies*, CIVIL LIBERTIES DEFENSE CENTER (May 26, 2017), <https://cldc.org/take-yourselves-seriously-document-retention-and-destruction-policies/>.

²⁹⁹ *Beamon*, *supra* note 262, at 45-48.

Checklist: RICO

Understanding RICO Risks:

- ☐ Know the elements required to charge under both state and federal RICO laws.
- ☐ Know that RICO charges are possible without crimes being actually committed.
- ☐ Know that having a legitimate protest purpose does not automatically protect against state or federal RICO charges if criminal activity is also present.
- ☐ Know the risks you could face if charged under RICO, even if not ultimately convicted:
 - ☐ Loss of employment;
 - ☐ Loss of housing;
 - ☐ Damage to reputation due to the public nature of arrest records and criminal charges;
 - ☐ Financial stress;
 - ☐ Mental stress;
 - ☐ Mandated ankle monitoring under house arrest;
 - ☐ Isolation from your activism community.

Best practices to prevent RICO suits

- ☐ Documentation and record-keeping that can help prove non-violence/non-conspiracy:
- ☐ Develop and memorialize a clear, peaceful mission statement;
- ☐ Document organizing communications that discourage and disavow violence;
- ☐ Create training materials on peaceful protest methods;

☐ Retain (do not discard or destroy) planning documents and permit applications;

☐ Be mindful about communication

☐ Avoid jokes or hyperbole about engaging in violence or illegal conduct when communicating (either verbally or in writing) about participating in or organizing a protest event;

☐ Emphasize peaceful intentions and encourage peaceful, lawful conduct in communications about participating in or organizing a protest event.

Maintaining 501(c)(3) Status

A 501(c)(3) organization is exempt from federal income tax under section 501(c)(3) of the United States Code. 501(c)(3) organizations must follow certain rules to obtain and maintain tax-exempt status. For instance, they are subject to the requirement that no substantial part of the organization's activities influence legislation. Additionally, they are limited in participation in political campaigns.³⁰⁰

A. Protesting as a 501(c)(3) organization

A 501(c)(3) organization cannot lose tax-exempt status based on the ideological viewpoint of its mission or activities.³⁰¹ 501(c)(3) organizations may engage in protest activities, but these activities must be focused on issues rather than specific candidates or parties. 501(c)(3) organizations may criticize and praise legislators and political parties as long as their statements are issue-focused. For example, a statement such as “despite public outcry, the Senate Majority Leader refuses to bring sensible gun control legislation to the floor” would be permissible. Another example of a generally acceptable statement would be, “please thank the Senator Majority Leader for her recent vote on legislation to maintain funding for affordable housing.”³⁰² However, talking about a candidate's qualifications or endorsing a candidate should be avoided, as 501(c)(3) organizations are prohibited from engaging in this sort of conduct.³⁰³

³⁰⁰ 26 U.S.C. § 501(c)(3).

³⁰¹ *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *see also* *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995); *Z St. v. Koskinen*, 791 F.3d 24, 30 (D.C. Cir. 2015).

³⁰² *Commenting on Candidates and Campaigns: How 501(c)(3)s Can Respond During an Election Year*, BOLDER ADVOCACY, <https://afj.org/wp-content/uploads/2022/08/Commenting-on-Candidates-and-Campaigns-1-2.pdf> (last visited Nov. 15, 2024).

³⁰³ 26 U.S.C. § 501(c)(3).

All 501(c)(3) organizations are subject to the requirement that their purposes must not be illegal or contrary to public policy. While the “contrary to public policy” doctrine is rarely used to deny tax-exempt status, a notable example is the denial of 501(c)(3) status to organizations with racially discriminatory admissions policies.³⁰⁴ Additionally, 501(c)(3) organizations jeopardize their tax-exempt status if their protest activities involve violence or illegal activity. For example, if a 501(c)(3) organization founded to promote environmental conservation engages in vandalism of government bulldozers as a form of protest, they will lose tax-exempt status and potentially be subject to criminal charges.³⁰⁵

B. Political Campaigning

501(c)(3) organizations are prohibited from supporting (or opposing) political candidates.³⁰⁶ Political candidates include any person running for elected public office at the local, state, or national level.³⁰⁷ Examples of prohibited activities include endorsing a political candidate, rating candidates (even on a nonpartisan basis), establishing political action committees, and making statements on behalf of, or against, a political candidate.³⁰⁸

However, organizations are allowed to make comments on political campaigns as long as they are issue-focused. For example, a 501(c)(3) organization is allowed to correct factual errors

³⁰⁴ Congressional Research Service, *The Public Policy Doctrine and 501(c)(3) Organizations* <https://crsreports.congress.gov/product/pdf/IF/IF12788> (last visited Nov. 17, 2024).

³⁰⁵ Rev. Rul. 75-384, 1975-2 C.B. 204.

³⁰⁶ 26 U.S.C. § 501(c)(3); *Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/charitable-organizations/restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> (last visited Nov. 15, 2024).

³⁰⁷ 26 CFR § 53.4945-3(a)(2).

³⁰⁸ *Ass’n of the Bar of the City of New York v. Comm’r*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); *see also* Judith E. Kindell & John Francis Reilly, *Election Year Issues* 34, <https://www.irs.gov/pub/irs-tege/eotopici02.pdf> (last visited Nov. 15, 2024).

stated by candidates. It is important that the organization not criticize the speaker of the erroneous fact, but instead focus on the underlying issue.³⁰⁹ Additionally, 501(c)(3) organizations are permitted to hold public forums for candidates as long as all legally qualified candidates running for the position are invited, the questions are prepared and presented by a nonpartisan panel, the topics discussed cover a broad range of issues of interest to the public, each candidate has equal opportunity to present their views, and the moderator makes no comment implying approval or disapproval of candidates.³¹⁰

C. Lobbying

A 501(c)(3) organization may want to advocate for or against legislation at the local, state, or national level by lobbying. The IRS defines lobbying as “attempting to influence legislation.” A 501(c)(3) may engage in some lobbying, but too much lobbying activity risks loss of task-exempt status.³¹¹ The IRS requires that lobbying cannot be a “substantial part” of an 501(c)(3) organization’s activities.³¹² To determine what level of activity rises to a “substantial part,” the IRS considers a variety of factors, including the time and resources devoted by the organization to the activity.³¹³ An organization found to be conducting excessive lobbying under the substantial-parts test may lose its tax-exempt status, resulting in all of its income being subject to tax.³¹⁴ Organizations are also prohibited from exceeding their annual ceiling amounts

³⁰⁹ BOLDER ADVOCACY, *supra* note 302.

³¹⁰ Rev. Rul. 86-95, 1986-2 C.B. 73

³¹¹ Lobbying, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/lobbying> (“In general, no organization may qualify for section 501(c)(3) status if a substantial part of its activities is attempting to influence legislation”) (last visited Nov. 15, 2024).

³¹² 26 U.S.C. § 501(c)(3).

³¹³ INTERNAL REVENUE SERVICE, *supra* note 311.

³¹⁴ Lobbying, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/lobbying> (last visited Nov. 15, 2024).

for either lobbying or grassroots expenditures.³¹⁵ Examples of lobbying activities include contacting, or urging the public to contact, members of Congress or advocating for the adoption of legislation.

D. Educational Activities

501(c)(3) organizations may involve themselves in issues of public policy for educational purposes. “Educational” is defined as including instruction of the public on subjects useful to the individual and beneficial to the community. While an educational organization may advocate a particular viewpoint, it is not educational if its principal function is the mere presentation of an unsupported opinion. Examples of protected 501(c)(3) educational activities include public discussions about local issues, trainings on constitutional rights, and distributing educational materials about environmental issues in your community.³¹⁶

E. Voter Registration and Get-Out the Vote Drives

501(c)(3) organizations may conduct voter registration and get-out-the-vote drives if they are carried out in a neutral, non-partisan manner. To maintain neutrality, organizations should avoid referring to a candidate or political party during voter drives. Voter registration conducted in a biased manner is prohibited.³¹⁷ All voter registration and get-out-the-vote communication is

³¹⁵ 26 U.S.C. § 501(h)(1); 26 U.S.C. § 501(h)(2) (defining lobby expenditures, lobbying ceiling amount, grass roots expenditures, and grassroots ceiling amount, which can be used to determine an organization’s annual ceiling amounts).

³¹⁶ JUDITH E. KINDELL AND JOHN FRANCIS REILLY, ELECTION YEAR ISSUES 349-50, <https://www.irs.gov/pub/irs-tege/eotopici02.pdf> (last visited Nov. 17, 2024).

³¹⁷ *Frequently Asked Questions About the Ban on Political Campaign Intervention by 501(c)(3) Organizations: Get-out-the-Vote Activities*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-get-out-the-vote-activities> (last visited Nov. 15, 2024).

limited to urging acts such as registering and voting and describing places and times of registration and voting.³¹⁸ For example, it would be impermissible for a 501(c)(3) to hold a voter registration drive for Democrats specifically.

³¹⁸ KINDELL & REILLY, *supra* note 316, at 377.

Checklist: Maintaining 501(c)(3) Organization Status

Protest Activities:

☐ Focus on issues, not candidates or parties, when making statements related to political events.

☐ Do not praise or encourage violence or illegal activities.

Political Campaign Rules:

☐ No candidate endorsements.

☐ No candidate ratings.

☐ No political action committees.

☐ No statements for/against candidates.

☐ Candidate forums are allowed, subject to these requirements:

☐ Invite all legally qualified candidates running for the position;

☐ Questions must be prepared and presented by a nonpartisan panel;

☐ Topics discussed must cover a broad range of issues of interest to the public;

☐ Each candidate must have an equal opportunity to present their views;

☐ The moderator makes no comment implying approval or disapproval of candidates.

Lobbying:

- ☐ Monitor the time and resources spent on lobbying to ensure that lobbying is kept below “substantial part” threshold.
- ☐ Stay within annual expenditure limits for lobbying activities.

Educational Activities:

- ☐ Maintain an educational purpose by focusing on public instruction on subjects useful to your organization’s constituency.
- ☐ You may advocate for a particular viewpoint in an educational presentation, provided you provide facts to support your position.

Voter Registration and Get-Out the Vote Drives:

- ☐ Maintain neutral, non-partisan approach during voter drives.
- ☐ Avoid referencing candidates/parties during voter drives.
- ☐ Focus only on the registration process and polling locations and times.

Open Carry and Concealed Carry at Protests

A. Overview

Since January 2020, the U.S. has witnessed over 600-armed protest demonstrations. Armed demonstrations are 6.5 times more likely to turn violent or destructive than demonstrations where no firearms are present.³¹⁹ There have been instances of firearms at protest demonstrations in Mississippi,³²⁰ which has comparatively weak gun laws.³²¹ You do not have to obtain a state permit to purchase a gun in Mississippi, although you may choose to do so. You do not have to register your firearm. There is no licensing requirement to obtain a gun unless you wish to engage in concealed carry in some contexts. There are no state bans on assault weapons or state restrictions on magazine capacity.³²² Mississippi limits gun ownership and licensing for people who: have felony convictions (unless pardoned or expunged), suffer from physical infirmities preventing safe handling, chronically abuse controlled substances or alcohol, have been committed to mental health facilities (within the last 5 years without psychiatric clearance),

³¹⁹ Sam Jones, *Fact Sheet: Updated Armed Demonstration Data Released A Year After the 6 January Insurrection Show New Trends*, ARMED CONFLICT LOCATION AND EVENT DATA https://acleddata.com/acleddatanew/wp-content/uploads/2022/01/ACLED_ET_Armed-Demonstration-Factsheet_1.2022.pdf (last visited Nov. 17, 2024).

³²⁰ News2Share, *Armed, Black Self-Defense Groups Rally Through Brookhaven, Mississippi for D'Monterrio Gibson*, YOUTUBE (Jun. 18, 2022), <https://www.youtube.com/watch?v=K1XSMcETd5A>; Roudabeh Kishi et al., *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, ARMED CONFLICT LOCATION AND EVENT DATA, <https://acleddata.com/2021/08/23/armed-assembly-guns-demonstrations-and-political-violence-in-america/> pdf (last visited Nov. 17, 2024).

³²¹ *Gun Laws in Mississippi*, EVERYTOWN RESEARCH, <https://everytownresearch.org/rankings/state/mississippi/> (last visited Nov. 13, 2024) (noting that Mississippi has no foundational gun laws in place).

³²² *Mississippi Gun Laws*, NATIONAL RIFLERY ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, <https://www.nrila.org/gun-laws/state-gun-laws/mississippi/> (last visited Nov. 13, 2024); EVERYTOWN RESEARCH, *supra* note 321.

are mentally incompetent (without court restoration), are fugitives from justice, or are disqualified under federal law.³²³

B. Open Carrying at a Protest

Open carrying of a weapon is permitted in Mississippi. Anyone who is at least 18 years old and legally entitled to a firearm can open carry.³²⁴ In Mississippi, open carrying of firearms is allowed at demonstrations, but municipalities can enforce local restrictions.³²⁵ Look at local ordinances to determine if your community restricts firearms at demonstrations.

C. Concealed Carrying at a Protest

You are allowed to carry a hidden firearm on your person in a sheath, belt holster or shoulder holster, or bag without a license, although you may choose to obtain a license if you wish.³²⁶ However, Mississippi law prohibits concealed carry of firearms in specific locations including: places of nuisances (defined by Mississippi law as places where prostitution or illegal drug activity occur); police stations; detention facilities; courthouses; polling places; government meeting places (including any meeting of the legislature); any school, college, or professional athletic event; schools; airports; churches; places where firearms are prohibited under federal law; private property where a person has posted a sign prohibiting carrying of a firearm; and any parade or demonstration for which a permit is required by local ordinance to carry a firearm.³²⁷ If

³²³ Miss. Code Ann. § 45-9-101(2)(c)-(l).

³²⁴ Miss. Code Ann. §45-9-101(24); Miss Code Ann § 97-37-1(14).

³²⁵ Alex Yablon, *The 35 States Where Local Officials Can't Ban Guns at Protests*, THE TRACE (Sept. 11, 2017), <https://www.thetrace.org/2017/09/35-states-local-officials-cant-ban-guns-protests/>.

³²⁶ Miss. Code Ann. § 45-9-101(24).

³²⁷ Miss. Code Ann. § 45-9-101(13).

your protest demonstration occurs at one of these places, concealed carry will generally not be allowed.

However, Mississippi law allows citizens to obtain an enhanced concealed carry permit upon taking an additional gun safety course.³²⁸ Active duty military members, veterans, and retired law enforcement officers may obtain the enhanced concealed carry permit without taking an additional gun safety course.³²⁹ With an enhanced concealed carry license, you may conceal carry in most spaces, except not in law enforcement stations, detention facilities, courtrooms during a judicial proceeding, or any place of nuisance.³³⁰ Additionally, enhanced concealed carry permits do not authorize citizens to concealed carry on private property in which there is a physical sign prohibiting firearms.³³¹ Mississippi generally allows concealed carry at protests, regardless of permit status. While local municipalities retain the authority to restrict concealed carry at the certain events, any permit holding carrier who is affected by such restrictions can appeal through state court.³³² Mississippi does not allow public access to concealed carry registry information.³³³

³²⁸ Miss. Code. § 97-37-7(2).

³²⁹ The Mississippi Department of Public Safety Firearm Permit Application, available at <https://www.driverservicebureau.dps.ms.gov/sites/default/files/Documents/INDIVIDUAL-COMBINED-APP.pdf>

³³⁰ *Location Restrictions in Mississippi*, GIFFORDS LAW CENTER, available at <https://giffords.org/lawcenter/state-laws/location-restrictions-in-mississippi/> (last updated Dec. 31, 2023); *Summary of Mississippi Gun Laws*, CLOSE QUARTER COMBAT <https://www.cqcselfdefense.com/ms-gun-laws> (last visited Nov. 17, 2024).

³³¹ Miss. Code Ann. § 45-9-101(13).

³³² Miss. Code Ann. § 45-9-53(5).

³³³ CLOSE QUARTER COMBAT, *supra* note 330.

Checklist: Open and Concealed Carry at Protest

General Requirements to Obtain a Firearm:

- ☐ Must be 18+
- ☐ Limitations on gun ownership and licensing for people who:
 - ☐ have a felony conviction (unless pardoned or expunged);
 - ☐ suffer from physical infirmities preventing safe handling;
 - ☐ chronically abuse controlled substances or alcohol;
 - ☐ have been committed to mental health facilities (within the last 5 years without psychiatric clearance);
 - ☐ have a felony conviction (unless pardoned or expunged);
 - ☐ are mentally incompetent (without court restoration);
 - ☐ are fugitives from justice;
 - ☐ are disqualified under federal law.

Open Carrying at a Protest:

- ☐ Generally allowed if you have the legal right to possess a firearm.
- ☐ Check local ordinances to determine if your community restricts firearms at demonstrations.

Concealed Carrying at a Protest:

- ☐ Mississippi generally allows concealed carry at protests.
- ☐ Hidden firearm is allowed on your person in a sheath, belt holster or shoulder holster, or a bag without a license.
- ☐ Concealed carry of firearms prohibited in:
 - ☐ Police stations;
 - ☐ Detention facilities;
 - ☐ Courthouses;
 - ☐ Polling places;
 - ☐ Government meeting places;
 - ☐ Any school, college, or professional athletic event;
 - ☐ Schools;
 - ☐ Airports;
 - ☐ Churches;
 - ☐ Places where firearms are prohibited under federal law;
 - ☐ Private property where a person has posted a sign prohibiting carrying of a firearm;
 - ☐ Any parade or demonstration for which a permit is required by local ordinance to carry a firearm.

- ☐ Local municipalities retain the authority to restrict concealed carry at the certain events; however, any permit holding carrier who is affected by such restrictions can appeal through state court.

Enhanced Concealed Carry Permit:

- ☐ Citizens can obtain an enhanced concealed carry permit upon taking an additional gun safety course.
- ☐ Active-duty military members, veterans, and retired law enforcement officers may obtain the enhanced concealed carry permit without taking an additional gun safety course.
- ☐ With an enhanced concealed carry license, you still cannot conceal carry in:
- ☐ Law enforcement stations;
 - ☐ Detention facilities;
 - ☐ Courtrooms during a judicial proceeding;
 - ☐ Any place of nuisance.



RIGHTS AND RISKS TO CONSIDER WHEN PROTESTING IN MISSISSIPPI