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M E M O R A N D U M

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RE: Protesting/picketing and the First Amendment

QUESTIONS PRESENTED

You have asked us to prepare a memo outlining the First Amendment right to protest and picket, the ways in which protesting and picketing can be constitutionally regulated in order to preserve the rights of others, and factors that might be helpful in deciding if and how to regulate these activities. This memo also focuses more in-depth on some key areas—notably, polling locations, private residences, educational institutions, medical facilities, funeral sites, and the State Capitol—where questions about protesting and picketing often arise. First Amendment questions are fact-intensive, and this memo cannot address every scenario that might arise. The goal of this memo is to offer useful guidance to both lawmakers and law enforcement officers, who must carefully balance the constitutionally protected rights of protesters and picketers with the rights of those who are impacted by such activities.

SHORT ANSWERS

Protesting and picketing are generally protected speech under the First Amendment. Nevertheless, States may need to regulate these activities to protect the public interest, including by applying ordinances that address noise, traffic safety, trespassing, disorderly conduct, resisting and obstructing, and destruction of property. But these ordinances should be applied reasonably and judiciously. Laws and ordinances that are prior restraints on speech deserve particularly close

scrutiny and must, among other things, contain sufficient standards for a decisionmaker to issue or deny a permit for speech activities.

Protesting and picketing that occur too close to polling locations may infringe on citizens' rights to freely cast their ballot. The U.S. Supreme Court has upheld a State's 100-foot non-electioneering zone, and consistent with that, Michigan law prohibits electioneering within 100 feet of a polling location. *See* Mich. Comp. Laws § 168.744.

Protesting and picketing at a residence —namely picketing focusing on one particular home (sometimes referred to as focused picketing)—may infringe on private residents' rights and conflict with local ordinances or state statutes. Local ordinances that prohibit or limit residential picketing must be analyzed individually to ensure that the First Amendment rights of protestors or picketers are preserved. Michigan has a statute that prohibits residential picketing, Mich. Comp. Laws § 423.9f(4), but it is most likely limited to the labor context and if challenged may be found to be facially unconstitutional because it is content-based and arguably does not meet the test for strict scrutiny.

School property is not off-limits for expressive activity by students, teachers, or members of the public. Nevertheless, **protesting and picketing at educational institutions** may be constitutionally regulated where they infringe on the rights of others, such as by materially disrupting classwork or creating substantial disorder. College campuses consist of various types of fora, and each area must be analyzed to determine the type of forum and the test applicable to that type of forum.

Protesting and picketing that impacts medical facilities are evaluated based on concerns for patient health and well-being, including noise, interference with access to a facility, or a person's right to be left alone.

Protesting and picketing that impacts a funeral may infringe on the rights of others if they physically or aurally disrupt funerals or create traffic disruption or noise pollution. Speech that has little expressive value, such as fighting words, incitement, or threats, may also be regulated. But laws must be crafted to overcome vagueness or overbreadth challenges. Laws banning *peaceful* protests based on the privacy of grieving families will be closely scrutinized and are not likely to survive constitutional scrutiny. Buffer zones will be evaluated based on their size in relation to the governmental interest; the larger the buffer zone, the more likely it is to be found unconstitutional.

Protesting at courthouses, jails, prisons, and police stations may be restricted, as these locations are typically considered nonpublic fora, especially the interiors of the facilities. The outside area surrounding the facilities, such as

sidewalks, may be considered public fora to the extent that they resemble and function as traditional public fora. And even if they are deemed public, protesting cannot interfere with or block work conducted at the facility or unduly harass or endanger the workers.

Protesting and picketing at the State Capitol may be restricted as long as the restrictions are reasonable and content-neutral and leave open ample alternative channels of communication. The Capitol is a public forum, so regulations must be content-neutral and serve a significant governmental interest. Caselaw has upheld the application of the Capitol Committee's procedures in certain circumstances.

ANALYSIS

I. Although peaceful protesting and picketing are protected speech under the First Amendment, States may nevertheless apply reasonable local criminal ordinances that protect the public interest.

A. Protesting and picketing are protected speech.

There is no doubt that, as a general matter, "peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace,* 461 U.S. 171, 176–77 (1983) (internal citations omitted). The starting point for analysis of protesting and picketing is that when these activities occur on public streets and sidewalks in residential neighborhoods, they are within the First Amendment's preserve. *See Gregory v. Chicago*, 394 U.S. 111, 125 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969).

Indeed, use of the streets for assembly and communication is a right held by U.S. citizens pursuant to the First Amendment. *Dean v. Byerley*, 354 F.3d 540, 549–50 (6th Cir. 2004) (citing *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 515–16 (1939)); *see also Grace,* 461 U.S. at 177 (explaining that streets and sidewalks are public fora for purposes of First Amendment scrutiny); *Hague*, 307 U.S. at 515 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

The Michigan Court of Appeals has explained that "[t]he rights to free speech under the Michigan and federal constitutions are coterminous." *City of Owosso v. Pouillon*, 657 N.W.2d 538, 541–42 (Mich. Ct. App. 2002), and thus, that "federal authority construing the First Amendment may be used in construing Michigan's constitutional free speech rights." *Id.* at 542.

In short, the right to use a public place for expressive activity may be restricted only for "weighty" reasons. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Too, although the government may restrict the right to use streets for assembly and communication through appropriate regulations, "that right remains unfettered unless and until the government passes such regulations." *Dean*, 354 F.3d at 551 (holding that in the absence of a narrowly tailored time, place, and manner restriction, there is a constitutional right even to focused residential picketing that otherwise would be disallowed).

B. Despite First Amendment protection of protesting and picketing, States and local governmental units are not powerless to ensure public safety and order.

Despite the fact that picketing enjoys First Amendment protections,

> [t]he rights of free speech and assembly … do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Cox v. Louisiana, 379 U.S. 536, 554 (1965).

The U.S. Supreme Court in *Cox v. Louisiana* explained that restrictions that "promote the public convenience in the interest of all" "cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." *Id.* For example, a demonstrator would not be justified in ignoring a red light, blocking traffic during rush hour, or blocking an entrance to a public or private building as a form of freedom of speech or assembly. *Id.* To the contrary, governmental authorities have the "duty and responsibility to keep their streets open and available for movement." *Id.* at 554–55. Even where religious rights are at issue, reasonable restrictions can prevail. In *Cox v. New Hampshire* for example, the U.S. Supreme Court held that a parade permit ordinance did not interfere "with religious worship or the practice of religion in any proper sense ... [and] only [constituted] the exercise of local control over the use of streets…." 312 U.S. 569, 578 (1941).

Particularly pertinent to protesting and picketing, which combine speech with conduct, the U.S. Supreme Court has "emphatically reject[ed]" the notion that the First Amendment is "the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." 379 U.S. at 555. Indeed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the

conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (internal citations omitted). The Supreme Court has cautioned that "[s]uch an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." *Id.*

That is why the Supreme Court said in *Grayned v. City of Rockford* that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." 408 U.S. at 116. That is also why, in *Gregory*, the Court was careful to qualify that a march, "*if peaceful and orderly*, falls well within the sphere of conduct protected by the First Amendment." 394 U.S. at 112 (emphasis added, citations omitted).[1] And that is why, in *Cantwell v. State of Connecticut*, the Court said that "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." 310 U.S. 296, 308 (1940) (internal quotation omitted). In rare circumstances, protesting that is in itself peaceful, can nevertheless be enjoined if it is enmeshed in violent conduct. *See, e.g., Milk Wagon Drivers Union of Chicago, Loc. 753 v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941) (explaining that a state can enjoin even peaceful picketing where "violence had given to the picketing [that in isolation is peaceful] a coercive effect whereby it would operate destructively as force and intimidation").

Our state courts, too,[2] have recognized that speech combined with conduct is different in kind than pure speech. The Michigan Supreme Court in *Way Baking Co. v. Teamsters & Truck Drivers Local No. 164, A.F. of L*, explained that picketing is "more than speech" and thus establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey. 56 N.W.2d 357, 364 (Mich. 1953). And our highest state court noted that the U.S. Supreme Court "has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity." *Id.* (internal citations and quotations omitted). Applying those

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[1] But the U.S. Supreme Court has cautioned that if protesters are not acting in a disorderly fashion, law enforcement cannot try to disperse them and then arrest them for disorderly conduct when they refuse. *See Gregory*, 394 U.S. at 112 (internal citation omitted).

[2] Where federal questions are involved, Michigan courts are bound to follow the prevailing opinions of the U.S. Supreme Court. *See Harper v. Brennan*, 311 Mich. 489, 493 (1945).

principles, the Michigan Supreme Court concluded that picketing undertaken with the goal of injuring a bakery business so as to compel the business to insist that its employees join the union, was not undertaken to accomplish a lawful labor objective. *Id*. at 361.

In the context of protesting, the Michigan Court of Appeals has recognized that the First Amendment does not prevent government from maintaining law and order. In *People v. Weinberg*, for example, fifteen defendants and others assembled outside the main office of a bank in Detroit for the purpose of protesting the bank's alleged discriminatory employment and loan practices. 149 N.W.2d 248, 250 (Mich. Ct. App. 1967). During the course of the day, various members of the group stood in line, and when they reached the teller's windows they would sit on the floor immediately beneath the windows, blocking access to the windows, and eventually refusing to leave when requested to do so. *Id*. They were charged with making a disturbance in a business place and with failure to leave a business place when ordered by a duly authorized agent. *Id.* The Court of Appeals held that their conduct was a disturbance. *Id.* at 252. And it addressed First Amendment issues, quoting this reasoning from *Cox*:

> " 'Nothing we have said here … is to be interpreted as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, *which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, Safeguard* [sic] *legitimate interests in private and public property,* or protect the administration of justice and other essential governmental functions.' "

Id. (quoting *Cox*, 379 U.S. at 574) (emphasis added).

But caution is advised in applying local ordinances to those engaged in protesting and picketing. Facts matter greatly in First Amendment analysis. The "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116. In assessing the reasonableness of a regulation, one must weigh heavily the fact that communication is involved, and the regulation must be narrowly tailored to further the State's legitimate interest. *Id*. at 116–17. "[T]he nature of a place, [and] the pattern of its normal activities, dictate the kinds of regulations … that are reasonable." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 772 (1994) (internal quotation and citation omitted). Accordingly, local noise, trespassing, and disorderly conduct ordinances must be applied carefully and only after evaluating the location, time, and circumstances.

The following cases demonstrate that fact-intensive, nuanced inquiry:

Disorderly conduct: *Cox*, 379 U.S. at 547 (holding that clapping and singing in a demonstration outside the Capitol building were not disorderly); *Edwards v. South Carolina*, 372 U.S. 229, 233 (1963) (holding that loud singing while stomping feet and clapping hands was not disorderly on the State House grounds); *but see Feiner v. New York*, 340 U.S. 315, 320 (1951) (where there was clear and present danger of disorder during an open-air meeting on city streets, recognizing "the interest of the community in maintaining peace and order on its streets").

Noise: *Madsen,* 512 U.S. at 772–73 (where protesters were protesting abortions and there were "high noise levels outside the clinic," explaining that "noise control is particularly important around hospitals and medical facilities" and that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests"); *Grayned,* 408 U.S. at 116 (in the context of a demonstration in front of a high school, upholding a school-specific anti-picketing statute noise regulation as to vagueness and overbreadth challenges, and stating that "[i]f overamplified loudspeakers assault the citizenry, government may turn them down."); *Stokes v. City of Madison*, 930 F.2d 1163, 1166 (7th Cir. 1991) (upholding as a reasonable time, place, and manner restriction sound amplification ordinance that required a prior permit to use such equipment); *Medlin v. Palmer,* 874 F.2d 1085, 1091–92 (5th Cir. 1989) (upholding as a reasonable time, place and manner regulation a noise ordinance prohibiting the use of any hand-held amplifier within 150 feet of any abortion clinic or other medical facility).

C. Laws that are prior restraints on speech must be carefully scrutinized.

Whether a criminal ordinance or a law that prohibits or limits residential picketing, if it is a prior restraint on the exercise of First Amendment rights, it bears "a heavy presumption against its constitutional validity." *Vance v. Universal Amusement Co.,* 445 U.S. 308, 317 (1980) (internal citation omitted). A prior restraint can survive constitutional challenge, as long as it is a content-neutral time, place, and manner regulation that satisfies certain constitutional requirements. *Forsyth Cnty. v. Nationalist Movement,* 505 U.S. 123, 130 (1992). But prior restraints must not "delegate overly broad licensing discretion to a government official." *Id.* (internal citation omitted). And they must contain narrow, objective, and definite standards to guide licensing authorities. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–51 (1969). A content-neutral permit requirement controlling the time, place, and manner of speech must also be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

The main inquiry with a prior restraint is whether it contains insufficient standards and therefore places too much discretion in the hands of the decisionmaker, which would allow that individual or entity to apply the ordinance in a content-based fashion. As to permits for events such as picketing and protesting, the U.S. Supreme Court has said that "[local governments] may impose a permit requirement on those wishing to hold a march, parade, or rally." *Forsyth Cnty.,* 505 U.S. at 130. But such control "[must be] exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Cox,* 312 U.S. at 574 (internal citations omitted). *See, e.g.*, *Am–Arab Anti–Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 606–08 (6th Cir. 2005) (striking down a City of Dearborn ordinance requiring a permit for all special events, regardless of size, noting that the City's interests in crowd and traffic control and property maintenance were not advanced by the application of the ordinance to small groups, especially those that are peaceably using a public right of way for a common purpose.) Compare *Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 96, 99 (W.D. Tenn. 1970) (upholding an ordinance that required a permit only when picketing such as organized groups carrying signs or banners would likely interfere with the normal use of streets and sidewalks). U.S. Supreme Court decisions have made clear that a person faced with an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. *See Shuttlesworth,* 394 U.S. at 151.

Our state-law prior restraint cases in the picketing/protest context have noted that free speech under the Michigan and federal constitutions are coterminous and have relied on federal cases. *See, e.g.*, *Mich. Up & Out of Poverty Now Coal. v. State*, 533 N.W.2d 339, 343–44 (Mich. Ct. App. 1995) (upholding Michigan Capitol Committee procedures in the context of tent-city protests and picketing).

In sum, caselaw supports the reasonable application of local criminal ordinances to protesting and demonstrating. *See Carey v. Brown,* 447 U.S. 455, 470–71 (1980) (citing *Gregory*, 394 U.S. at 118 (Black, J., concurring) ("[N]o mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.").

Again, First Amendment questions are fact-intensive, and each set of facts must be analyzed carefully.

II. Michigan has numerous statutes and local ordinances that may be utilized to regulate protesting and picketing.

Though the First Amendment "affords protection to symbolic or expressive conduct as well as to actual speech," those protections "are not absolute, and [the U.S. Supreme Court has] long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). The government may impose reasonable "time, place, and manner" restrictions. *Grayned*, 408 U.S. at 115. These include prohibitions on the number of simultaneous demonstrations, those that "might put an intolerable burden on the essential flow of traffic," or overloud noises that "assault the citizenry ... ." *Id.* at 115–16. And, "[o]f course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Id.* at 116.

Law enforcement must therefore strike a careful balance between respecting protesters' First Amendment rights of expression, assembly, and association, and maintaining public order. As noted in Section I, the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116. If it is not, or the protest gets out of hand, various state statutes and local ordinances may be used to maintain or regain order, and to deter and punish criminal wrongdoing. It is also important to apply these laws even-handedly; that is, they should be applied to protesters only to the extent they would be applied to anyone else engaged in the same criminal conduct in a non-protesting setting.

In addition to at-large State laws applicable in any jurisdiction, local ordinances may be utilized. Article VII, § 22 of the Michigan Constitution authorizes cities and villages to enact ordinances. In addition, townships are empowered to "enact ordinances that regulate the public health, safety, and general welfare." *Howell Twp v. Rooto Corp*, 670 N.W.2d 713, 716 (Mich. Ct. App. 2003). Under Mich. Comp. Laws § 41.181(1), the "township shall enforce the ordinances and may employ and establish a police department with full power to enforce township ordinances and state laws," and "[t]he sheriff, department of state police, or other local law enforcement agency shall, if called upon, provide special police protection for the township and enforce local township ordinances to the extent that township funds are appropriated for the enforcement." Law enforcement is expected to know the local laws and ordinances specific to their jurisdiction.

When addressing concerns at a protest, every attempt at de-escalation and deterrence should be utilized first, with arrest as the last available option. Law enforcement officers are provided great discretion in their interactions with citizens.

In some cases, a brief conversation will be enough to ensure compliance with State and local laws. In other cases, removing someone from the property will suffice. The hope is that no one will behave in such a manner that warrants an arrest. However, if an arrest becomes necessary, a warrant is not required when a crime is committed in the officer's presence or if there is reasonable cause to believe that a felony or misdemeanor punishable by more than 92 days in jail was committed. Mich. Comp. Laws § 764.15.

Also know that various groups such as the American Civil Liberties Union (ACLU) publish protest guides, often under the moniker "Know Your Rights." *See*, e.g., https://www.aclumich.org/en/know-your-rights/know-your-rights-when-you-protest (last accessed on Dec. 12, 2024). These inform protesters that their rights are strongest in public places so long as they do not block access or interfere with operations, that they may protest on private property with the owner's consent, and that police must treat counter-protesters equally. *Id.* They also tell protesters that they may photograph or video-record anything in public view. *Id.*

But protesters may *not* do any of the following and risk criminal prosecution for:

Disturbing the Peace

Michigan Compiled Laws § 750.170 makes it a misdemeanor to "make or excite any disturbance or contention" in virtually any location, including private businesses and public places, buildings, roads, etc., and election sites, "where citizens are peaceably and lawfully assembled … ." "A disturbance, which is something less than threats of violence, is an interruption of peace and quiet; a violation of public order and decorum; or an interference with or hindrance of one in pursuit of his lawful right or occupation." *People v. Weinberg*, 149 N.W.2d 248, 252 (Mich. Ct. App. 1967). Importantly, however, the "contention" aspect of the statute has been held unconstitutionally overbroad and is therefore unenforceable. *People v. Vandenberg*, 859 N.W.2d 229, 236 (Mich. Ct. App. 2014).

Also, any given locality has ordinances against excessive noise and other nuisances such as bright or strobing lights or fumes/odors.

Disorderly conduct

Michigan Compiled Laws § 750.167 prohibits disorderly conduct, including:

- "A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance;"

- "A person who is engaged in indecent or obscene conduct in a public place;" or

- "A person who is found jostling or roughly crowding people unnecessarily in a public place."

Most cities and other localities also have their own ordinances regulating the possession of open alcoholic containers, public intoxication, and other modes of disorderly conduct.

Unlawful Assembly

Michigan Compiled Laws § 752.543 renders it unlawful "for a person to assemble or act in concert with 4 or more persons for the purpose of engaging in conduct constituting the crime of riot, or to be present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose." This is a 5-year felony. Mich. Comp. Laws § 752.544(2).

Loitering ordinances may also apply, but they run the risk of being unconstitutionally vague. " 'Loitering' is generally defined as being dilatory, standing idly, lingering or delaying." *People v. Smith*, 254 N.W.2d 654, 656 (Mich. Ct. App. 1977). "[L]oitering is not a crime in itself and cannot be punished constitutionally." *Id.* "Rather, some conduct deleterious to the public good must be connected to the loitering." *Id.* (cleaned up).

Further, most municipalities and townships have curfew laws for minors. There is a broader state curfew as well. Mich. Comp. Laws § 722.752 (setting a curfew for unaccompanied minors under 16 years old from midnight to 6 a.m.).

Impeding or Blocking Traffic

Michigan Compiled Laws § 257.676b provides that "a person, without authority, shall not block, obstruct, impede, or otherwise interfere with the normal flow of vehicular, streetcar, or pedestrian traffic upon a public street or highway in this state, by means of a barricade, object, or device, or with his or her person."

Under Michigan Compiled Laws § 750.421b, it is also a 90-day misdemeanor for any person to "by force, stop or hinder the operation of any vehicle transporting farm or commercial products within this state, or the loading or unloading of such vehicle, with the intent to prevent, hinder or delay transportation, loading or unloading of such products … ."

Localities also have their own traffic ordinances, including those regulating ingress and egress, manner and speed of vehicular movement, parking, blocking lanes or driveways, etc.[3]

Trespassing on, Injuring, or Destroying Property

Michigan Compiled Laws § 750.552 makes it a 30-day misdemeanor to enter or remain on the land or premises of another after being forbidden to do so or told to leave by the owner, occupant, or an agent thereof.

There are numerous state statutes prohibiting the malicious destruction of or damage ("injury") to property, including personal property (Mich. Comp. Laws § 750.377a), homes (Mich. Comp. Laws § 750.380), fences and curtilage (Mich. Comp. Laws §§ 750.381 and 750.382), traffic devices (Mich. Comp. Laws § 750.377d), and bridges (Mich. Comp. Laws § 750.379).

Arson is another possible occurrence at a protest. Michigan has varying degrees of arson, from first to fifth (Mich. Comp. Laws §§ 750.72, 750.73, 750.74, 750.75, 750.77). There is also a specific statute for possession of a Molotov cocktail or similar device. Mich. Comp. Laws § 750.211a.

On the local level, most localities have ordinances governing property offenses, including trespassing and littering. They may also have specific laws regulating operational hours for certain locations, such as public parks.

Threatening or Committing Violence

Michigan Compiled Laws § 750.81 makes it a 93-day misdemeanor to assault or assault-and-batter someone. Assault is defined as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v. Starks*, 701 N.W.2d 136, 140 (Mich. 2005). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (cleaned up). It is a 4-year felony if the assault is committed with a weapon. Mich.

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[3] There is a state statute against "masspicketing" under Michigan Compiled Laws Laws § 423.9f, which prohibits picketers from hindering or preventing people from working or obstructing entries to or exits from workplaces or streets or private residences. But the Sixth Circuit Court of Appeals has limited that statute's application to "labor picketing," as the Act in which it is contained "regulates the behavior of employees and employers engaged in labor disputes." *Dean v. Byerley*, 354 F.3d 540, 547 (6th Cir. 2004).

Comp. Laws § 750.82. The charges and penalties increase if and to what extent the victim is injured, up to and including the victim's death.

Rioting and incitement to riot are possible as well. Michigan Compiled Laws § 752.541 provides that "[i]t is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm." Michigan Compiled Laws § 752.542 also states that inciting a riot consists of "intending to cause or to aid or abet the institution or maintenance of a riot, to do an act or engage in conduct that urges other persons to commit acts of unlawful force or violence, or the unlawful burning or destroying of property," or unlawfully interfering with first responders or the national guard. Riot and incitement to riot are 10-year felonies. § 752.544(1).

Further, Michigan Compiled Laws § 750.234e prohibits brandishing a firearm in public as a 90-day misdemeanor. The Michigan criminal jury instructions define "brandish" as pointing, waving, or displaying the firearm in a threatening manner. M. Crim. J.I. 11.25a.

Resisting or Obstructing Law Enforcement

Michigan Compiled Laws § 750.81d makes it a 2-year felony to assault, batter, wound, resist, obstruct, oppose, or endanger "a person who the individual knows or has reason to know is performing his or her duties," including law-enforcement officers, firefighters, and emergency medical personnel. The penalties increase if and to what extent the official is injured. "Obstruct" means "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." § 750.81d(7)(a). "Resist is defined as to withstand, strive against, or oppose." *People v. Morris*, 886 N.W.2d 910, 916 (Mich. Ct. App. 2016) (cleaned up). "Oppose is defined as to act against or furnish resistance to; combat." *Id.* (cleaned up). The resisting-or-obstructing statute protects those "who are lawfully engaged in conducting the duties of their occupation, from physical interference or the threat of physical interference." *Id.* at 917.

Also bear in mind that conspiracy to commit any of the above offenses, or others, would constitute an independent offense. A conspiracy is an agreement with "1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner … ." Mich. Comp. Laws § 750.157a. "The gist of a conspiracy is the unlawful agreement," and "the purpose of the conspiracy need not be accomplished." *People v. Mass*, 628 N.W.2d 540, 550 (Mich. 2001). "[C]onspiracy is separate and distinct from the substantive crime that is its object." *Id.* Conspiracy is penalized equally with the crime conspired. § 750.157a(a).

This is not intended to constitute an exhaustive list of possible offenses that protesters or picketers may commit. These are only the offenses that law enforcement are most likely to encounter in such situations. And, as outlined throughout this guidance, law enforcement must maintain awareness of First Amendment protections.

III. Protesting and picketing at particular places.

A. Polling locations.

Electioneering restrictions arise at the intersection of two fundamental rights—the First Amendment right to freedom of speech and the right to vote in an election free from interference and intimidation. The interior of a polling place, at least on election day, is government-controlled property that is set aside for the sole purpose of voting and thus is a nonpublic forum. *See Minnesota Voters All. v. Mansky*, 585 U.S. 1, 12 (2018). (U.S. Supreme Court Justices have not agreed on whether the public sidewalks and streets *surrounding* a polling place qualify as a nonpublic fora. *Id.* at 12–13.) The government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy. *Id*. at 12.

In *Burson v. Freeman*, the U.S. Supreme Court upheld a Tennessee law imposing a 100–foot zone around polling place entrances in which no person could solicit votes, distribute campaign materials, or "display ... campaign posters, signs or other campaign materials." 504 U.S. 191, 193–94 (1992) (plurality opinion). Strict scrutiny applied because the law was content-based, but even so, the *Burson* plurality—whose analysis was endorsed by Justice Scalia's opinion concurring in the judgment—emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past and found that the 100-foot zone was necessary to secure the advantages of the secret ballot and protect the right to vote. *Mansky*, 585 U.S. at 2 (discussing *Burson*). *Burson* noted that its decision was "the rare case in which we have held that a law survives strict scrutiny." 504 U.S. at 211.

Consistent with *Burson*, Michigan law prohibits "electioneering" within 100 feet of a polling place. Mich. Comp. Laws § 168.744.

B. Private residences.

The U.S. Supreme Court has held that "the protection of residential privacy" is a "significant government interest." *Frisby v. Shultz*, 487 U.S. 474, 484 (1988). " 'The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society,' " *Id*. (quoting

Carey, 447 U.S. at 471), and the home is unique in the sense it is " 'the last citadel of the tired, the weary, and the sick,' "*Phelps-Roper v. Strickland*, 539 F.3d 356, 363 (6th Cir. 2008) (citing *Frisby,* 487 U.S. at 484) (quoting *Gregory,* 394 U.S. at 125 (Black, J., concurring)). "It is," the Court recognized, " 'the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits.' " *Id.* at 363 (citing *Frisby,* 487 U.S. at 484) (quoting *Carey,* 447 U.S. at 471).

In *Frisby,* the town board, in response to residential picketing, passed an ordinance banning picketing in *all* residential neighborhoods. *Id.* at 476. The picketing at issue there, however, focused on and took place in front of a *particular* house. *Id*. The Court first ascertained the "place" (the forum) of the speech, noting that public streets and sidewalks are quintessential public fora and that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." *Id*. at 479–80. The Court then turned a discussion of the nature of the home. Such focused picketing, the Court said "is, by its very nature, destructive of residential privacy and therefore can be prohibited completely." 487 U.S. at 483. But the Court noted that "*only* focused picketing *taking place solely in front of a particular residence* is prohibited." *Id*. (emphasis added).[4] The Court read narrowly the language of the ordinance as intending "to prohibit only picketing focused on, and taking place in front of, a particular residence," in part because of representations by counsel at oral argument as to the reach of the statute applying only to single-residence picketing. *Id*. at 474. The Court noted that focused picketing was "fundamentally different from the more generally directed means of communication [such as handbilling, soliciting, and marching] that may not be completely banned in residential areas" because focused picketing "is narrowly directed at the household, not the public," and the picketers "do not seek to disseminate a message to the general public, but to intrude upon the targeted resident …in an especially offensive way." *Id.* at 486. Focused picketing is offensive, in part, because the residents are a "captive" audience, imprisoned within

[4] Notably, as detailed in the lower court opinion, the protesters in *Frisby* did commit some outrageous acts, including entering onto the residence to tie ribbons to the bushes and the door of the house. And they shouted slogans such as "Baby killer," and "you're a killer." A five-year-old boy in the neighborhood became frightened after one of the picketers told him that a man who lived on the street killed babies and that he should not go there. Finally, the picketers occasionally blocked the entrance to the Victoria residence and shouted at family members. *See Schultz v. Frisby*, 807 F.2d 1339, 1340–41 (7th Cir. 1986). But the Supreme Court did not discuss this behavior because it had already reached the conclusion that the restriction on focused picketing was constitutional.

their own homes with no means of avoiding the unwanted intrusive speech. *Id*. at 487.

> Along those same lines, the Court has also explained that
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> "[o]ne important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often captives outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."

Frisby, 487 U.S. at 484–85 (cleaned up). The "evil" of targeted residential picketing is "the very presence of an unwelcome visitor at the home." *Id.* at 478 (internal citation omitted). The Court concluded that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id*. at 485. Indeed, "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey*, 447 U.S. at 471.

Federal courts of appeals have varied slightly in how they read *Frisby*. The Sixth Circuit in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1104–07 (6th Cir. 1995), read the case as supporting a ban on picketing only in front of a single house, while the Eighth Circuit in *Douglas v. Brownell*, 88 F.3d 1511, 1520 (8th Cir. 1996), read *Frisby*'s holding more broadly to support the constitutionality of a prohibition on picketing of houses on either side of the targeted house.

The statute the Sixth Circuit examined in *Vittitow* was nearly identical to the one in *Frisby*. *Vittitow*, 43 F.3d at 1106. The Court noted both the reasoning and holding in *Frisb*y, but also noted that the ordinance construed by the U.S. Supreme Court in *Frisby* was unconstitutionally overbroad as written and was saved by the extraordinary measure of accepting counsel's representation at oral argument before the Supreme Court as to how the ordinance would be enforced. *Id*. The Sixth Circuit interpreted the statute at issue to result in a "complete ban on residential picketing" and struck it down. *Id.* at 1107. The Court explained that, after *Frisby*, the City should have been aware of the pitfalls in attempting to enforce a broadly worded ordinance and could have accomplished the desired result with "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone." *Id*. at 1105 (internal citation omitted). The Court also cautioned

that "any linear extension beyond the area solely in front of a particular residence is at best suspect, if not prohibited outright." *Id.* (cleaned up).[5]

The Eighth Circuit reached a different conclusion as to linear extension beyond the targeted residence. In *Douglas*, the Eighth Circuit analyzed a challenge to the constitutionality of a residential picketing ordinance enacted by the City of Clive, Iowa. 88 F.3d at 1513. The ordinance made it unlawful "for any person to engage in picketing before, about, or immediately adjacent to, the residence or dwelling of any individual in the City." *Id.* The City enacted the ordinance in response to complaints about weekly protests held in front of the home of a physician who performs abortions. *Id.* The district court had issued a preliminary injunction, enjoining the City from enforcing the residential picketing ordinance outside the "zone of privacy," which the district court defined as "the area in front of the targeted resident's home, as well as the areas in front of the homes immediately adjacent to the target resident's home." *Id.* at 1514 (cleaned up). And the court clarified that the injunction did "not prohibit picketing on the sidewalk across the street from those three residences." *Id.* The City subsequently amended its picketing ordinance to conform with the district court's orders. *Id.*

The protesters argued that the amended ordinance was not narrowly tailored because (1) it prohibited picketing on both sides of the targeted residence and prevented protesters from even passing by the targeted residence or the houses on each side; (2) it prohibited all expressive activity, including prayer, within the three-house zone; and (3) applied to the picketing of commercial establishments, if the commercial establishment happens to be next door to a residence. *Id.* at 1518. They also argued that, under *Frisby*, any prohibition that goes beyond the area solely in front of the targeted residence is not narrowly tailored. *Id.* at 1519.

In reviewing the ordinance, the Eighth Circuit considered the Sixth Circuit's holding in *Vittitow*, even though it was not bound by it. It noted that *Vittitow,* like *Madsen,* involved the constitutionality of an injunction, not an ordinance, and that a more precise standard applies to an injunction (again, an injunction must "burden no more speech than necessary," while an ordinance must only be "narrowly

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[5] Additionally, at issue in *Vittitow* was an injunction. Courts have noted that injunctions are subject to a more rigorous standard than an ordinance because "[i]njunctions … carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen,* 512 U.S. at 764. Therefore, an injunction must "burden no more speech than necessary to serve a significant government interest," *id.* at 767, while an ordinance need only be narrowly tailored, *Frisby*, 487 U.S. at 482.

tailored." *Douglas*, 88 F.3d at 1520 (cleaned up). So, it believed its holding was not entirely inconsistent with *Vittitow*.

But unlike the Sixth Circuit, the Eighth Circuit did not read *Frisby* as establishing a bright-line rule authorizing a limit on picketing only in the area directly in front of a targeted residence. *Id*. at 1519. As the Eighth Circuit explained, the Court's concern in *Frisby* was not so much the size of the prohibited zone, but rather the impact the ban had on protected activity. *Id.* The Court picked up a number of themes from *Frisby* and *Madsen*—the main one being that residential picketing is different from other forms of communicative activities, such as door-to-door solicitation and the distribution of handbills, because the targeted resident cannot avoid the picketers, and that the residents of the home are unwilling listeners. *Id.* at 1519–20. The Court did not come to the conclusion that there is a direct relationship between the size of the prohibited zone and the impact on protected speech, but concluded:

> [W]e do not read *Frisby* as requiring us to strike down the ordinance as not narrowly tailored simply because the ordinance extends beyond the area solely in front of the targeted residence. Rather, the question is whether the ordinance is specifically aimed at protecting the residents of [the City] from unwanted and unavoidable speech and does not sweep within its ambit other activities that constitute an exercise of First Amendment rights.

Id. at 1519–20. The Court was satisfied that the three-house zone was narrowly tailored because, unlike the injunctions in other cases, the city picketing ordinance allowed picketing through the neighborhood and on the sidewalk directly across from the targeted residence. *Id*. at 1520.

As to the alternate means of communication prong of the test, although the ordinance prohibited protesters from standing directly in front of the targeted residence and the residences on each side, it did not prohibit the picketers from picketing on the sidewalk directly across the street from those three houses. *Id.* at 1521. And the court specifically noted that the protesters could "picket, march, preach, or pray directly across the street from the targeted house and the house on each side of the targeted house" and therefore afforded ample channels of communication. *Id.*

Despite the Eighth Circuit's noting of the injunction at issue in *Vittitow*, it is nonetheless difficult to reconcile the difference in the way the Sixth and Eighth Circuits read the scope of *Frisby*. We, of course, are bound by the Sixth Circuit's reading.

It is also important to understand both the power and the limitations of *Frisby, Madsen,* and their progeny. These cases are powerful tools to restrict picketing that is directed solely to one particular house. But they do not support the proposition that the right to residential privacy automatically trumps the right to engage in targeted residential picketing. The Sixth Circuit has read *Frisby* as applying only focused picketing of one single residence, and we are bound by that more narrow reading and cannot follow the broader reading of the Eighth Circuit. And under any reading of *Frisby*, the key cases essentially permit picketers to simply expand the path of their picketing from just outside the target's home to the entire street or residential block. *See Residential Picketing*, 102 Harv. L. Rev. 261, 269 (1988).

Too, a key component of the Court's holding in *Frisby* was that the ordinance still gave protesters wide opportunity to disseminate their views, even in the neighborhood of their target, through handbilling, telephone solicitation, and the posting of signs. 487 U.S. at 484. On an as-applied challenge, there could be facts showing that there are no alternative channels of communication.

Finally, it bears mention that Michigan has a statewide picketing law, which provides:

> It shall be unlawful (1) for any person or persons to hinder or prevent by mass picketing, unlawful threats or force the pursuit of any lawful work or employment, (2) to obstruct or interfere with entrance to or egress from any place of employment, (3) to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance, or (4) *to engage in picketing a private residence by any means or methods whatever:* Provided, That picketing, to the extent that the same is authorized under constitutional provisions, shall in no manner be prohibited. Violation of this section shall be a misdemeanor and punishable as such.

Mich. Comp. Laws § 423.9f (emphasis added).

At first blush, this seems like a broad law that bans all targeted residential picketing. Our State courts have not yet interpreted this statute, but the Sixth Circuit has interpreted the statute as applying it only in the labor context. *See Dean*, 354 F.3d at 546–47.[6] This statutory section appears in a chapter of the

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[6] *But see Amalgamated Transit Union v. Interurban Transit P'ship,* No. 1:15-CV-855, 2015 WL 8491493, at *4 (W.D. Mich. Dec. 10, 2015). In that case, which addressed a demonstration outside the residence of The Rapid's Board chair in the

Michigan Code regulating labor and employment as part of the Employment Relations Commission Act 176 of 1939 ("Act"). *Id.* at 547. And the court noted that the chapter preamble states that its purpose is to regulate the conduct of parties. *Id.* at 540 (holding that the challenged statute did not apply to actions by a picketer in picketing the outside residence of the director of the State Bar of Michigan based on a delay regarding the picketer's application for bar membership).

The statewide picketing statute would likely be deemed content-based because it discriminates between lawful and unlawful picketing based on the subject of the picketing—labor—and because one has to reference the content of the regulated speech to determine whether it falls within § 423.9f(4). If so, it probably would not survive the applicable strict-scrutiny standard on a facial challenge. Regulations affecting public forum property that are content-based must serve a compelling state interest and be narrowly drawn to achieve that end. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). In the balancing of the right to protest and the right to privacy in one's home, it is not clear from *Frisby* that the right to privacy is a compelling (as opposed to a significant) interest. Nor is it clear that a court would find the protection of the home in the labor context to be narrowly drawn as compared to other contexts.

C. Educational institutions including college campuses.

The consideration in evaluating statutes that regulate protesting and picketing on or near educational institutions is generally the reason for the regulation. Courts have upheld laws that prohibit the disturbance of a school session.

In *Grayned v. City of Rockford*, for example, the Court upheld an anti-noise ordinance that prohibited anyone adjacent to a school where classes were in session from "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturb[ed] or tend[ed] to disturb the peace or good order" of school sessions. 408 U.S. at 108. The Court explained that the statute was not vague (because with fair warning it prohibited only actual or imminent, and willful interference with normal school activity) or overbroad (because it was not a broad invitation to discriminatory

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suburbs of Grand Rapids, the defendants argued that the plaintiffs' First Amendment claim should fail because targeting residential picketing was prohibited by Mich. Comp. Laws § 423.9f(4). Without mentioning the Sixth Circuit's decision in *Dean,* the federal district court for the Western District of Michigan noted that "the law is not yet established on the applicability and/or proper construction of the state statute." *Amalgamated Transit Union*, 2015 WL 8491493, at *4.

enforcement and prohibited expressive activity only if it materially disrupted classwork). *Id.* at 108–118. The Court recognized that the ordinance prohibited some picketing that was neither violent nor physically obstructive, but even so held that "[n]oisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach." *Id.* at 120. The Court noted that such expressive conduct "may be constitutionally protected at other places or other times," but "next to a school, while classes are in session, it may be prohibited." *Id.* The anti-noise ordinance did not impose restrictions on expressive activity before or after the school session. *Id.*

Police Dep't of City of Chicago v. Mosley, 408 U.S. 92 (1972), similarly dealt with picketing around a school. In that case, the High Court evaluated a city ordinance that prohibited all picketing within 150 feet of a school, but excepted peaceful picketing of any school involved in a labor dispute. *Id.* at 93. The plaintiff argued that this exception violated his equal protection rights, and the Court agreed, holding that the central problem with Chicago's ordinance was that it "describe[d] permissible picketing in terms of its subject matter." *Id.* at 95. As the Court explained, "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96. The Court noted that there might be sufficient regulatory interests that justify selectively excluding certain picketing, and that a State may have a legitimate interest in prohibiting some picketing in order to preserve public order, but that those distinctions have to be carefully scrutinized because picketing involves expressive conduct within the protection of the First Amendment. *Id.* at 98–99.

Protesting and picketing at colleges and universities gives rise to some additional considerations. As the U.S. Supreme Court has recognized, "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James,* 408 U.S. 169, 180 (1972). Even so, however, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry,* 460 U.S. at 46 (internal quotations omitted).

Courts that have evaluated challenges based on protesting and picketing on public college campuses have generally employed the same forum analysis that it uses to evaluate restrictions of speech on other types of governmental property. Forum analysis initially requires a court to determine whether a property is a traditional public forum, a designated public forum, or a nonpublic forum, and then applies the appropriate standard of scrutiny to decide whether a restriction on speech passes constitutional muster. *See Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677–683 (1998). In other words, the extent to which access to, and the

character of speech upon, government property may be limited depends upon the nature of the forum in which the speech takes place.

"[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " *Grace,* 461 U.S. at 177 (cleaned up). A content-based restriction on speech within a traditional public forum must be necessary to serve a compelling government interest and be narrowly drawn to achieve that interest. *Perry,* 460 U.S. at 45. A non-content-based restriction on speech that restricts the time, place or manner in which speech may be communicated is subjected to a different, less restrictive standard. *Id.* The government may enforce a reasonable, content-neutral time, place and manner restriction in a traditional public forum if the restriction is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. *Id.*

A designated public forum is a nonpublic forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects. *Perry,* 460 U.S. at 46. The government does not create this type of forum "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse." *Forbes,* 523 U.S. at 677 (internal quotations omitted).

A modern university contains a variety of fora, from private offices to academic medical centers, to concert halls, sports arenas, and open spaces. Even a campus's open spaces can vary widely in configuration. Accordingly, a college campus cannot be labeled as a single type of forum. *See Justice for All v. Faulkner,* 410 F.3d 760, 766 (5th Cir. 2005) (stating that "the Supreme Court's forum analysis jurisprudence does not require us to choose between the polar extremes of treating an entire university campus as a forum designated for *all* types of speech by *all* speakers, or, alternatively, as a limited forum where any reasonable restriction on speech must be upheld"); *see also Ala. Student Party v. Student Gov't Ass'n,* 867 F.2d 1344, 1354 n. 6 (11th Cir. 1989) (Tjoflat, J., dissenting) (stating that not all of a University campus is a public forum, but rather that a campus contains a variety of fora). Administration buildings or classrooms are not generally opened for widespread use by students or anyone else and are likely nonpublic fora. Auditoriums and stadiums are likely designated public fora, while streets and sidewalks that surround the campus are likely traditional public fora.

Another consideration is the central purpose of colleges. College campuses traditionally and historically serve as places specifically designated for the free exchange of ideas. *Healy,* 408 U.S. at 180 (stating that universities represent a "marketplace of ideas"). The U.S. Supreme Court has said that "[t]hat danger [of chilling speech] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center

of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 835–36 (1995) (citations omitted). Nevertheless, protesting and picketing can be regulated or prohibited on college campuses where appropriate. Safety, for example, is a competing concern to First Amendment concerns. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 650 (1981) (internal citations and quotations omitted) ("As a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective.").

Caselaw demonstrates that institutions of higher education must carefully craft regulations on expressive speech. In *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001), the Ninth Circuit upheld a community college's conditions for granting a permit for demonstration that prohibited disturbance or interference with campus activities, but struck down the conditions that prohibited the demonstrator from religious worship or instruction. In *Sword v. Fox*, 446 F.2d 1091, 1097 (4th Cir. 1971), the Court upheld a university regulation that banned demonstrations in college buildings but not otherwise, explaining that "students do not have an unlimited right to demonstrate on university property. As in the case of other public facilities, a university may place reasonable restrictions on demonstrations to protect safety and property, maintain normal operations, facilitate campus traffic, and the like." *Id.* at 1097. *See also Am. C.L. Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (upholding a university policy that required outsiders to reserve in advance a spot for speaking or leafletting, noting that universities have limited resources, which they have an interest in reserving for members of the university community). But in *People v. Rapp*, 821 N.W.2d 452, 453 (Mich. 2012), the Michigan Supreme Court struck down as facially overbroad a Michigan State University Ordinance that made it an offense to "disrupt the normal activity" of a protected person because it did not specify the types of disruption that were prohibited, thus criminalizing a substantial amount of unconstitutionally protected speech.

Michigan currently has a law on the books that provides that, as a part of the sentence for a conviction for any offense that the court determines was directly related to a riot, incitement to riot, unlawful assembly or civil disorder on or within 2,500 feet of a public community college, public college, or public university campus in this State, the court may order the individual not to enter onto the campus. *See* Mich. Comp. Laws § 769.1g.

D. Medical facilities.

No form of speech is entitled to greater constitutional protection than political speech. *McCullen v. Coakley*, 573 U.S. 464, 489 (2014). But some concerns are in tension with free-speech rights.

One of those concerns is the health and wellbeing of patients. In *Madsen v. Women's Health Ctr., Inc.,* for example, the U.S. Supreme Court upheld noise restrictions and a 36-foot buffer zone around abortion clinic entrances and driveway based on concerns about ensuring the health and well-being of the clinic's patients. 512 U.S. at 755, 776. "Noise control," the Court said, "is particularly important around medical facilities during surgery and recovery periods." *Id.* at 772. "The First Amendment does not demand that patients at such a facility undertake Herculean efforts to escape the cacophony of political protests." *Id.* But the Court struck down a blanket ban on "images observable," explaining that it swept "more broadly than necessary to accomplish the goals of limiting threats to clinic patients and their families." *Id.* at 755.

An additional concern with respect to medical facilities is adequate access to the facility for patients and family members. In *New York ex rel. Spitzer v. Operation Rescue National,* the Second Circuit evaluated a preliminary injunction that, among other things, imposed no-protest "buffer zones" at a broad range of health care facilities that offered reproductive health services, provided for expanded zones at two particular clinics. 273 F.3d 184, 190 (2d Cir. 2001). The Court struck down the provision of the injunction that expanded the buffer zones beyond fifteen feet at two clinics, but otherwise uphold the buffer zone provisions. *Id.* The Court then separately analyzed each protester to determine the validity of charges under state laws prohibiting trespass and public nuisance. *Id.* at 194. The Court noted, for example, that the record showed that at least one of the protesters impeded the operation of the facilities by physically obstructing clinic entrances. *Id.* But the Court also cautioned that, "[a]s much as we might idealize the antiseptic, rational exchange of views, expressions of anger, outrage or indignation nonetheless play an indispensable role in the dynamic public exchange safeguarded by the First Amendment. The fact that such protests make approaching health facilities unpleasant and even emotionally difficult does not automatically mean that such protest activities may be curtailed." *Id.* at 195–96.

Yet another concern is the constitutional "right to be let alone" and to avoid unwanted communication. *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (affirming a criminal statute that prohibited any person from knowingly approaching within eight feet of another person near a health care facility without that person's consent). The "right to be let alone" has been characterized by the United States Supreme Court as "the most comprehensive of rights and the right most valued by civilized men." *Id.* (citation and quotation marks omitted). While individuals do have the contrary "right to persuade," " 'no one has a right to press even good ideas on an unwilling recipient.' " *Id.* at 717–18 (cleaned up). Thus, the right to be left alone must be balanced with the right of others to communicate. *Id.* at 718 (citation and quotation marks omitted).

This balance often comes into play in protesting and picketing around abortion clinics. Although the Michigan Court of Appeals has said that public protests regarding abortion, whether in support or opposition, serve legitimate political purposes, protesting and picketing outside abortion clinics can nevertheless be restricted under certain conditions. In *PLT v. JBP*, No. 346948, 2019 WL 7206134, at *3 (Mich. Ct. App. Dec. 26, 2019), an unpublished case, the Michigan Court of Appeals held that an abortion clinic protester's behavior exceeded the permissible scope. The protester began interfacing with an abortion clinic worker, who believed that the individual was "starting to go beyond his political message and instead targeting her personally." *Id.* at *4. The worker repeatedly told the protester that he was scaring her and to get away from her, but the protester ignored these requests. As the Court of Appeals described it, the protester was "no longer simply seeking to share his political viewpoint with someone who might be receptive to his beliefs" but was instead antagonizing an individual who knew his views, did not share them, did not wish to hear them, and had repeatedly asked him to stop. Because the protestor repeatedly pressed his ideas on an unwilling participant, his conduct violated her right to be let alone. *Id.*, citing *Hill*, 530 U.S. at 717–18. The Court held that the protester had "harassed and stalked" the abortion worker and that the trial court had not erred by issuing a PPO. *Id.* at *7.

Although prior restraints against expressive speech are carefully scrutinized, the jurisprudence on prior restraint does not apply to a restraining order designed to protect a specific person from unwanted harassing or intimidating conduct.

E. Funerals and funeral processions.

The activities of individuals or groups protesting or picketing at funerals have generated significant caselaw, and in most states has led to legislation restricting when and where picketers may demonstrate at funerals.

The key case is *Snyder v. Phelps*, 562 U.S. 443 (2011), in which the father of a deceased solider sued a fundamentalist church and its members after they demonstrated at his son's funeral. The Court began by reiterating the general principle that the choice of where and when to conduct picketing "is not beyond the Government's regulatory reach" but rather is "subject to reasonable time, place, or manner restrictions." *Id.* at 456 (internal citation omitted). But the Court then proceeded to distinguish the facts from the limited situations where the Court had concluded that the local of targeted picketing could be regulated—focused, targeted protesting at residences and protesting at medical facilities. *Id.* at 457. In upholding the picketing on First Amendment grounds, the Court explained that "the church members had the right to be where they were," that the church had alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged, and that "the protest was not

unruly." *Id.* The Court also noted that the speech, however upsetting, was "at a public place on a matter of public concern" and was therefore entitled to "special protection" under the First Amendment. *Id.* at 458.

Funeral statutes often designate "buffer zones" around funeral and burial locations. Michigan's funeral statute does so, prohibiting certain behaviors, including intent to disrupt, within 500 feet of a building or other location where a funeral, memorial service, or viewing of a deceased person is being conducted or within 500 feet of a funeral procession or burial. *See* Mich. Comp. Laws § 750.167d. In 2010 that statute was challenged on overbreadth and vagueness grounds. *See Lowden v. Cnty. of Clare*, 709 F. Supp. 2d 569, 583 (E.D. Mich. 2010). The federal district court for the Eastern District of Michigan held that the statute was vague and overbroad insofar as it prohibited conduct that would "adversely affect" a funeral or funeral-related event; that language was severed from the statute. *Lowden v. Clare Cnty.*, No. 1:09-CV-11209, 2011 WL 3958488, at *14 (E.D. Mich. Sept. 8, 2011). The plaintiffs had also asked the Court to declare the 500-foot floating buffer zone around all funerals and funeral processions to be unconstitutional because it placed unreasonable restrictions on the time, place, and manner in which constitutionally protected activity may occur. *Id.* at *15. But the Court refused to issue a declaratory judgment on the floating buffer zone's constitutionality, recognizing that the buffer zone was not implicated by the facts before the Court. *Id.*

F. Courthouses, jails, prisons, and police stations.

The interiors of courthouses, security institutions, and law-enforcement buildings or complexes have traditionally been considered nonpublic fora. The Seventh Circuit has noted that the Constitution does not create "a right of access to the inside of governmental buildings … ." *First Defense Legal Aid v. City of Chicago*, 319 F.3d 967, 968 (7th Cir. 2003); *see also Greer v. Spock*, 424 U.S. 828, 835–37 (1976) (declaring military bases, despite their civilian access, to be nonpublic fora). A courtroom, for example, "is a nonpublic forum, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir." *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (cleaned up). Further, in *Adderley v. State of Florida*, 385 U.S. 39, 41 (1966), the Supreme Court held that while places like "state capitol grounds are open to the public," "[j]ails, built for security purposes, are not." Similarly, the interior of a prison is "most emphatically not" a public forum. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977). Nor is a police station. *First Defense Legal Aid*, 319 F.3d at 968.

These principles may apply *outside* of such facilities as well. For instance, the Supreme Court has been clear that not every sidewalk open to the public is necessarily a public forum. *United States v. Kokinda*, 497 U.S. 720, 728 (1990).

Rather, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 728–29. Indeed, the sidewalk outside of even a U.S. Post Office may not be a public forum if it is used primarily for ingress and egress from the post office and certain expressive activities, such as solicitation, would be disruptive of the postal work. *Id.* at 730–33. If, however, the sidewalk outside of a government building is "indistinguishable from any other sidewalks" in the area, then there is "no reason why they should be treated any differently" than traditional public fora. *Grace*, 461 U.S. at 179.

As with many of the locales discussed herein, the analysis largely turns on the idiosyncrasies of the location and the particular activity of the protesters there.

G. Our State Capitol

In a challenge to the Capitol Committee's regulation of expressive activity on the Capitol grounds, specifically its prohibition of the extended placement of tents on the grounds, the Michigan Court of Appeals employed forum analysis (*see infra* subsection III.C) to conclude that the Capitol Committee's procedures did not violate the First Amendment. *Michigan Up & Out of Poverty Now Coal. v. State*, 533 N.W.2d 339, 345–348 (Mich. Ct. App. 1995). The Court concluded that the Capitol was a public forum but that the Committee's procedures did not destroy the public-forum status of the Capitol grounds because they were valid time, place, and manner restrictions on protected free speech. *Id*. at 345. They were content-neutral because they applied equally to all citizens, and served the State's significant interest in providing the building occupants and the general public access to and from the Capitol. *Id*.

The Court addressed the Committee's discretion to designate certain areas for picketing or distributing leaflets, but noted that it was limited to furthering the purpose of allowing safe ingress and egress to and from the Capitol building, leaving all other areas of the Capitol grounds available for picketing and distribution of literature. *Id*. at 346. As to the Committee's procedures that limited the duration of a protest that could be held on the Capitol lawn, the Court held the restrictions were content-neutral because they applied to all individuals or groups desiring to hold an event or exhibit, regardless of the message to be conveyed, that they furthered the state's interest in protecting the Capitol grounds and the safety of those using the grounds, and that the 15-hour period during which events and exhibits could be held provided ample alternative channels of communication. *Id*.

Addressing the challenge to the number and size of structures that may be erected on the Capitol grounds, the Court rejected the plaintiff's argument that the restriction was enacted specifically to prevent his tent city and was therefore

viewpoint discrimination. The Court disagreed, holding that it was a reasonable time, place, and manner restriction because it applied equally to all organizations, restricted the size and number of structures without regard to the content of the expressive activity, and served the significant governmental interest in aesthetics and safety on the Capitol grounds. *Id.* at 347.