



March 29, 2021

TO: The Honorable Brian P. Kemp, Governor
FROM: The American Civil Liberties Union (ACLU) of Georgia
SUBJECT: Letter in Opposition to House Bill 289

Governor Kemp,

The ACLU of Georgia writes in strong opposition to HB 289, which, if passed, would violate Georgians' freedoms of speech and assembly as guaranteed by Section I, paragraphs V and IX of the Georgia Constitution and by the First Amendment of the United States Constitution.

The ACLU of Georgia has a long history of defending Georgians' rights to protest regardless of the views being expressed. HB 289 attempts to punish Georgians for exercising their rights by:

- redefining and dramatically expanding the crime of "unlawful assembly" to include activities like heckling a stand-up comic in a bar [lines 37-59; 75-76];
- exposing counties and municipalities to liability for personal injury or property damage resulting from any assembly of two or more persons [lines 82-85];
- punishing misdemeanor-level offenses as felonies if they are committed during an unlawful assembly [lines 99-105, 201-208];
- providing legal protections (i.e., an affirmative defense) for people who kill or injure protestors who are obstructing a roadway [lines 106-110];
- exposing protestors and protest organizers to potential liability under Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, a law intended to target organized crime [lines 114-117];
- denying state employment and employment benefits to anyone convicted of unlawful assembly, including for civil disobedience [lines 86-88, 186-189];
- blocking counties and municipalities from adjusting their own police budgets [lines 123-125]; and
- requiring counties and municipalities to implement a universal permit requirement for any assembly held on public property, regardless of size or anticipated needs [126-136].

Aside from being bad policy, many of these provisions raise serious constitutional concerns. We discuss some of HB 289's many constitutional infirmities below.

I. HB 289 adds an unconstitutionally vague and overbroad definition of unlawful assembly to Georgia’s Criminal Code

HB 289 adds an unconstitutionally vague and overbroad definition of unlawful assembly to Georgia’s Criminal Code. HB 289 makes it a crime to “knowingly participate in... [t]he assembly of two or more persons who harass or intimidate another person within any public accommodation.” But HB 289 fails to give Georgians fair notice of what qualifies as “harass[ing] or intimidate[ing]” speech. Instead, it gives broad discretion to law enforcement officers to decide what kinds of speech ought to be criminalized. Under this vague and overbroad standard, Georgians could end up arrested and jailed for engaging in speech simply because other people find it offensive.

Furthermore, protestors might not even need to participate in, or even be aware of, so-called “harassment” or “intimidation” in order to be liable under the expanded definition of unlawful assembly. Every member of an otherwise peaceful march or protest could be guilty of “unlawful assembly” if a single participant crosses the (undefined) line into harassment or intimidation. And the consequences of conviction are severe—in addition to fines and possible jail time, anyone convicted of unlawful assembly is ineligible for state employment and state employment benefits.

II. HB 289’s universal permit requirement is an unconstitutional prior restraint on speech.

HB 289’s universal permit requirement is an unconstitutional prior restraint on speech. A prior restraint “exists when the government can deny access to a forum for expression before the expression occurs.” HB 289 requires counties and municipalities to implement a permit system for all assemblies on public property, regardless of size or whether they will require noise or traffic-related accommodations. Permit applications must be reviewed “by an attorney representing the governing authority and by all heads of law enforcement agencies of such county or municipal corporation.” Even two or three protestors gathering together would need a permit under this bill.

In practice, it will be all but impossible for counties and municipalities to enact this mandate without violating the rights of Georgians to peaceably assemble. Courts apply a strong presumption against the constitutionality of prior restraints on speech, particularly when it applies to assemblies held in quintessential public forums like streets and parks. HB 289’s universal permit requirement is unconstitutional because it

1. fails to set any standards for review by local officials;
2. applies to all assemblies regardless of the assembly’s anticipated size, whether it will affect traffic patterns, or whether it will exceed noise limits; and
3. eliminates spontaneous protests on public property.

Counties and municipalities should not be asked to implement such a system, and Georgians should not and cannot be required to submit to it.

III. HB 289 incentivizes counties and municipalities to encourage aggressive police action against protestors and to violate protestors' First Amendment rights.

Should HB 289 become law, counties and municipalities will face staggering potential liability whenever harm to persons or property occurs during an assembly of two or more persons. HB 289 waives sovereign immunity to permit anyone claiming to have been injured or had their property damaged to sue counties and municipalities for being “grossly negligent by allowing the commission of violence against persons and property during an assembly of two or more persons.” Counties and municipalities may also be sued for “intentionally obstruct[ing] or interfer[ing] with... reasonable law enforcement protection during a riot or unlawful assembly[.]”

Thus, HB 289 incentivizes counties and municipalities to crack down--potentially violently--on peaceful marches or protests simply because of fear of liability, thereby infringing on the protestors' rights to speech and assembly. But HB 289 does not and cannot immunize counties and municipalities from liability under 42 U.S.C. § 1983 for violations of protestors' First Amendment rights. HB 289 puts counties and municipalities between a rock and hard place, and Georgians lose out.

HB 289 is an unconstitutional and unnecessary infringement on Georgians' constitutional rights of speech and assembly. Should it pass, we urge you not to sign it into law.

For Justice,



Christopher Bruce
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ACLU of Georgia