



VIA ELECTRONIC MAIL

June 2, 2020

Kathryn Barger
Chair, Los Angeles County Board of Supervisors
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Los Angeles, CA 90012
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Re: Los Angeles County Curfew Order

Dear Supervisor Barger:

We respectfully request that you, in your capacity as Chair of the Board of Supervisors, rescind or substantially restrict the Curfew Order adopted on May 31 and re-issued on June 1 and June 2, 2020. The Order in its present form is neither authorized by state statutory law nor consistent with the United States Constitution, including the Constitution's prohibition on restrictions of speech and assembly, its protection for the freedom of movement, and its most basic notice requirements.

We recognize that in the last few days some individuals have damaged and stolen property in areas where many others have engaged in peaceful protests, but that unlawful conduct cannot justify a state of emergency in the entire county that effectively places over 10 million people under house arrest for twelve hours every evening and morning. The Constitution does not permit the County to order such a sweeping restriction on free speech and travel across a county of 10 million people to address a few localized attacks on property.

The Curfew Order Exceeds the State's Authority Under Govt. Code § 8634

The Order exceeds state statutory authority because it extends far beyond any emergency it seeks to address. The state and its subdivisions have authority to order a curfew to address a genuine "local emergency." Govt. Code § 8634. In its first clause, the Order states that it responds to threats to persons and property arising from "civil unrest in the County," *see* Curfew Order cl. 1, which presumably refers to the protests against police violence that have taken place in certain parts of the County over the last few days. However, so far as we are aware protesters in Southern California have threatened no person's life, and damage to property has occurred only in commercial districts in a few isolated regions. Nonetheless, the Order applies throughout the entirety of Los Angeles County's 4,751 square miles, and to nearly all of its *10 million* residents. *See* Curfew Order ¶ 4 (listing nine narrow exemptions). It therefore applies in numerous regions where no protests of any kind have occurred, let alone protests threatening life or property. While it is conceivable that a "local emergency" could encompass all of LA County – such as perhaps after a severe earthquake – protests or damage to property in a few isolated locales do not give rise to an emergency in the entire County.

The Curfew Order Violates the First Amendment

The Order also violates the First Amendment. The “principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (citation and quotation marks omitted). The Order dramatically restricts free speech by entirely suppressing all demonstrations occurring after 6pm.

The Order suggests this restriction is lawful because it has become “especially difficult” to protect public safety and property “during darkness and in the hours approaching darkness.” See Curfew Order cl. 4. However, a community’s right to protest day or night may not be infringed merely because some people have acted unlawfully in certain areas of the County. Moreover, even as to those areas, the First Amendment generally requires the state to punish those few who break the law rather than preventively suppressing everyone’s protected speech because of what a few people may do afterwards. “The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct.... The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence.... Banning or postponing legitimate expressive activity because other First Amendment activity regarding the same subject has resulted in violence deprives citizens of their right to demonstrate in a timely and effective fashion.” *Collins v. Jordan*, 110 F.3d 1363, 1371–72 (9th Cir. 1996). Because an unlawful assembly can be declared only for “assemblies which are violent or which pose a clear and present danger of imminent violence,” *In re Brown*, 9 Cal. 3d 612, 623 (1973), so too curfews are authorized, if at all, only when the state has no other means to prevent actual or imminent mass violence.

Perhaps the County believes the Order lawful because it preserves alternative means of protest during daylight hours. However, particularly during weekdays, the ability to protest during daylight hours cannot constitute an adequate substitute for the right to protest after work. Moreover, to satisfy First Amendment requirements a curfew must *both* be narrowly tailored *and* allow for ample alternative channels of communication. A “restriction that meets the ample alternative requirement can fail the narrow tailoring requirement.” *iMatter Utah v. Njord*, 774 F.3d 1258, 1267–68 (10th Cir. 2014) (citing *United States v. Grace*, 461 U.S. 171 (1983)). The Order fails the narrow tailoring test not only because of its extraordinary geographic scope, but also because the lock-down it orders restricts more speech than necessary to achieve its aim. The City may enforce “other laws at its disposal that would allow it to achieve its stated interests” by enforcing the criminal laws prohibiting damage to property and, if necessary as a last resort in narrowly defined circumstances, unlawful assembly. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011). Absent actual or imminent mass violence, “[o]bvious, less burdensome means for achieving the County’s aims are readily and currently available by employing traditional legal methods.” *Foti v. City of Menlo Park*, 146 F.3d 629, 642–43 (9th Cir. 1998). Because “there are a number of feasible, readily identifiable, and less-restrictive means of addressing” the County’s interests, the Order “is not narrowly tailored” to serve those interests. *Comite de Jornaleros*, 657 F.3d at 950.¹

¹ *In re Juan C.*, 28 Cal. App. 4th 1093 (1994), does not support the Order. Among other differences, in that case the respondent did “not dispute that a state of emergency existed when

The Curfew Order Violates the Freedom of Movement

The Order also violates the Constitution’s protection for the freedom of movement. “Citizens have a fundamental right of free movement, ‘historically part of the amenities of life as we have known them.’” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citations omitted). “In all the [s]tates from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective [s]tates, to move at will from place to place therein, and to have free ingress thereto and egress therefrom....” *United States v. Wheeler*, 254 U.S. 281, 293 (1920). While the state may impose restrictions on this right, any restrictions must both serve a compelling state interest and be narrowly tailored to accomplish that objective. *Nunez*, 114 F.3d at 946 (applying strict scrutiny to curfew order even though it only applied to minors).

The Order’s restrictions on movement are not narrowly tailored. Apart from the geographic breadth noted above, the Order applies to all kinds of movement, including many that obviously could not be mistaken for activity causing property damage. To give but a few examples, the Order bans people from walking with their children or dogs, jogging or riding bicycles for exercise, going to the grocery store, traveling for family caregiving obligations, and various other forms of entirely innocuous movement. Moreover, although the Order claims to target the hours “approaching darkness,” it starts at 6 PM, a full two hours before sunset (as of today), making it very difficult for most working people to attend to basic necessities outside their homes. Indeed, given that the Order’s only generally applicable travel exemptions permit travel to work and for medical treatments, in practice the Order essentially places nearly everyone in LA County under house arrest for twelve hours a day. The Constitution does not permit such a draconian deprivation of liberty under these circumstances. *Cf. Nunez*, 114 F.3d at 948 (striking down curfew order because “it does not provide exceptions for many legitimate activities.”).

The Curfew Order Contains Insufficient Notice

Finally, even if narrowed to deal with the various problems described above, the Order would remain unconstitutional because it provides for insufficient notice in two respects: it contains no provision requiring authorities to notify individuals prior to enforcing the Order, and it has been imposed without sufficient advance notice for all those subject to its restrictions.

Both the Fifth and Fourteenth Amendments prohibit deprivations of liberty without “due process.” The most essential element of due process is, of course, notice. Due process requires that notice “be of such nature as reasonably to convey the required information.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Given the breadth of the Order’s prohibition, due process requires that officers seeking to enforce it first provide notice to the general population of their intent to do so. The few cases upholding curfews comparable (albeit lesser in scope) than this one have contained such a

the curfew went into effect.” *Id.* at 1098. The court’s holding was thus premised on the existence of a “bona fide emergency” presenting a serious threat of “imminent destruction of life and property.” *Id.* at 1100–01. As explained above, no such emergency exists here, and certainly not throughout the entirety of Los Angeles County.

requirement. *E.g., In re Juan C.*, 28 Cal. App. 4th 1093, 1097 (1994) (order permitted arrest only of “such persons as do not obey this curfew *after due notice, oral or written, has been given to said persons*”) (emphasis added).

For similar reasons, even if acceptably narrowed, due process requires the County provide more notice before imposing the curfew. The County imposed the first day’s curfew *ninety minutes* before it went into effect. Notice for the second day’s curfew was only a few hours in advance. Common sense, as well as the Constitution’s most basic commands, require that County residents receive more time before they are effectively imprisoned in their own homes for the entire evening and night.

Thank you for considering this request.

Sincerely,

s/Ahilan Arulanantham

Ahilan Arulanantham
Senior Counsel