



October 28, 2020

City of Los Angeles
Mike Feuer, City Attorney
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Via Electronic Mail

Re: Declarations of Local Emergencies, Curfews, and Discriminatory Policing

To Whom It May Concern:

The 2020 presidential election campaign has been extremely contentious. With ongoing concerns of voter suppression and intimidation as well as President Trump’s repeated statements preemptively calling into question the validity of any election that he does not win, it is highly likely that there will be a protests and counter-protests in your jurisdiction and throughout Southern California on election day and thereafter. As local governments, you have a constitutional obligation to protect and support free speech. 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). Government action that hinders speech should—and must—be taken with great caution. See *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 252 (6th Cir. 2015) (“In a balance between two important interests—free speech on one hand, and the state’s power to maintain the peace on the other—the scale is heavily weighted in favor of the First Amendment.”). This circumspection should be at its zenith when the matters under protest go to the heart of our own democracy, as in the case of protests relating to electoral politics.

Accordingly, we urge you to refrain from responding to possible protests by inappropriately declaring local emergencies and imposing curfews under Government Code § 8634, as well as from engaging in viewpoint or identity-based discrimination by allowing free protests from groups that espouse some views, but prohibiting or subjecting to selective enforcement groups that hold other beliefs.

The Power to Impose Curfew Orders Is Limited Under Govt. Code § 8634

The state and its subdivisions have limited authority to order a curfew to address a genuine “local emergency.” Govt. Code § 8634 (emphasis added). But curfews are a blunt tool that broadly inhibit both freedom of speech and freedom of movement. During the height of protests against police violence this summer, far too many jurisdictions imposed curfews where there was no local emergency. Instead, they imposed curfews only in response to notice that

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there would be demonstrations in their jurisdiction combined with some isolated incidents of destruction of property or other illegal activity in other jurisdictions miles away. Such situations do not rise to the level of true emergency. Indeed, the ACLU of Southern California had to resort to suing the cities of Los Angeles and San Bernardino and the County of Los Angeles to prevent such illegal curfews from impinging on residents' constitutional rights. Those localities rescinded their curfews shortly after we filed suit.

In any demonstrations that follow the elections, we hope Southern California jurisdictions will avoid such unconstitutional mistakes. We therefore urge you to refrain from imposing curfews in response to protests, and to use alternative, less restrictive means to address any possibility that some people will take advantage of peaceful protests to engage in destruction of property or other limited illegal activity.

Curfew Orders Frequently Violate the First Amendment

Curfew orders dramatically restrict free speech by entirely suppressing all demonstrations occurring after the time set by the curfew. 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 during the demonstration or because of a limited number of illegal acts that occurred during prior demonstrations. "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 may 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.

Just because a curfew order permits protest during daylight hours does not mean it is permissible. 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 First Amendment requires that law enforcement arrest individuals responsible for property damage, violence or other lawlessness during a protest whenever possible because it is a far more narrowly tailored approach than declaring an unlawful assembly or otherwise preventing a protest from continuing. *Collins v. Jordan*, 110 F.3d at 1371.

Curfew Orders Infringe on the Right of Freedom of Movement

Curfew orders often violate 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); see also *In re White*, 97 Cal. App. 3d 141, 148–49 (1979) (freedom of

movement “is simply elementary in a free society.”). 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 applied only to minors).

The curfews ordered during the summer imposed restrictions on movement that were not narrowly tailored to any government need. Many were geographically overbroad in applying in jurisdictions where no true local emergency existed or in every part of large jurisdictions where the problems the government relied on to justify the curfew had been limited to a few small areas. Moreover, the orders applied to all kinds of movement, including many that obviously could not be mistaken for activity causing property damage or violence. To give but a few examples, curfew orders imposed this summer banned 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. Other curfews began as early as 5 or 6 pm, making it very difficult for most working people to attend to basic necessities outside their homes. Given most of the orders allowed for only a few generally applicable travel exemptions, in practice they restricted nearly everyone in the jurisdiction to their residences for as much as 12 or 13 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.”).¹

Law Enforcement Must Treat Protesters and Counter Protesters Equally

The 2020 election and protests against police violence that emerged in the wake of the killing of George Floyd and continue, underscore significant fault lines in our society—both racial and ideological. Government officials, including law enforcement officers policing protest activities, must not treat those on opposing sides of these divides differently. Rather, they must treat protesters and counter protesters equally regardless of their viewpoint. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (holding that government cannot favor the views of one private speaker over those of another). Nor may government treat speakers differently based on their identity. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Prohibited, too, are restrictions distinguishing among different speakers. . . .”). Law enforcement may also not silence peaceful speakers because counter protesters or bystanders react violently to the peaceful protest. *Bible Believers*, 805 F.3d at 246.

Unfortunately, in protests in the state and across the country, there have been numerous instances of police subjecting Black activists and those who are critical of police differently from pro-police and white supremacist protesters. This unequal treatment includes subjecting Black activists to tactics and uses of force that dramatically differed from similarly situated white protesters as well as arresting Black Lives Matters protesters for actions that they ignored when engaged in by pro-police and white supremacist groups. Such blatant racial and viewpoint discrimination is clearly against the law, and jurisdictions across California should take

¹ In addition, curfews are often policed in a discriminatory manner, with law enforcement enforcing them aggressively in low income neighborhoods inhabited primarily by people of color while engaging in lax enforcement or no enforcement at all in wealthier neighborhoods primarily inhabited by white people. *See, e.g., Jennifer Wadsworth, San Jose Quietly Drops Curfew Citations Amid Claims of Selective Enforcement*, San Jose Inside (Sept. 3, 2020), <https://www.sanjoseinside.com/news/san-jose-quietly-drops-curfew-citations-amid-claims-of-selective-enforcement/>.

affirmative steps to ensure that law enforcement agencies treat protesters similarly regardless of viewpoint or identity, as the constitution requires.

Please feel free to contact us at peliasberg@aclusocal.org or pbibring@aclusocal.org if you have any questions or would like to discuss further the legal and constitutional issues we raise in this letter.

Sincerely,

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